



DEFENDING DISSENT

TOWARDS STATE PRACTICES THAT PROTECT
AND PROMOTE THE RIGHTS TO PROTEST

A JOINT REPORT BY THE INTERNATIONAL NETWORK
OF CIVIL LIBERTIES ORGANIZATIONS (INCLO) AND
THE INTERNATIONAL HUMAN RIGHTS CLINIC (IHRC)
OF THE UNIVERSITY OF CHICAGO LAW SCHOOL



ABOUT INCLO

The International Network of Civil Liberties Organizations (INCLO) is a network of thirteen independent national human rights organisations from different countries in the Global North and South. They work together to promote fundamental rights and freedoms by supporting and mutually reinforcing the work of member organisations in their respective countries and by collaborating on a bilateral and multilateral basis. Each organisation is multi issue, multi-constituency, domestic in focus, independent of government, and each advocates on behalf of all persons in its country through a mix of litigation, legislative campaigning, public education, and grassroots advocacy.

The members of INCLO are: the Agora International Human Rights Group (Agora, Russia); the American Civil Liberties Union (ACLU, United States); the Association for Civil Rights in Israel (ACRI, Israel); the Canadian Civil Liberties Association (CCLA, Canada); the Centro de Estudios Legales y Sociales (CELS, Argentina); Dejusticia (Colombia); the Egyptian Initiative for Personal Rights (EIPR, Egypt); the Human Rights Law Network (HRLN, India); the Hungarian Civil Liberties Union (HCLU, Hungary); the Irish Council for Civil Liberties (ICCL, Ireland); the Kenya Human Rights Commission (KHRC, Kenya); the Legal Resources Centre (LRC, South Africa); and Liberty (United Kingdom).

INCLO advocates against government and police repression, and criminalisation of social protests and human rights activism. In fulfilling its mandate, INCLO has published two reports compiling standards and practices from INCLO jurisdictions. In 2013 INCLO published its first report, *[Take Back the Streets: Repression and Criminalization of Protest around the World](#)*, which documents case studies of police responses to protests from INCLO jurisdictions globally, drawing out the common trends and underlying problems. The cases highlight instances of excessive, abusive, and unlawful uses of force resulting in injury and death, and discriminatory treatment and criminalisation of social leaders. The second report, *[Lethal in Disguise: The Health Consequences of Crowd-Control Weapons](#)*, was released in 2016 in collaboration with Physicians for Human Rights and documents the misuse and abuse of crowd-control weapons, their detrimental health effects, and the impact of their use on the meaningful enjoyment of the rights to freedom of assembly and expression. The report highlighted the proliferation of crowd-control weapons and the widespread misuse of these weapons resulting in injury, disability and death.

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



ABOUT THE IHRC

The International Human Rights Clinic (IHRC) is a practice-based educational program on international human rights law and advocacy for juris doctor (JD) students at the Law School of the University of Chicago. The IHRC uses international human rights laws and norms as well as other substantive law and strategies to draw attention to human rights violations, develop practical solutions to those problems using interdisciplinary methodologies, and promote accountability on the part of state and non-state actors. The Clinic works closely with governmental, non-governmental, and international organisations to design, collaborate, and implement projects which include litigation in domestic, foreign, and international tribunals as well as non-litigation projects such as documenting violations, legislative reform, drafting reports, and conducting consultations and training.

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EXECUTIVE SUMMARY

INTRODUCTION

Dissent and the ability to publicly express beliefs and opinions is essential to democracy. Protests and public gatherings are a central tool of public expression and engagement, often serving as the only avenue for advocacy seeking political, social, or economic reform. Despite the importance of protest to a free society, many states have failed to adequately protect protest and public speech. In fact, policing institutions overwhelmingly treat protests, assemblies, and other gatherings as security threats that should be discouraged. This approach to public assembly can lead policing institutions to resort to excessive, arbitrary, and discriminatory force during protests. Repressive practices that interfere with and undermine the freedom to speak, assemble, and protest burden democracy and impermissibly hinder public dialogue.

International law principles and standards, as well as most constitutions and domestic laws, have long protected the rights to protest and assembly. The International Covenant on Civil and Political Rights (ICCPR) details a broad range of underlying and interdependent human rights necessary to realise the rights to protest and assembly.ⁱ These include the rights to life; liberty and security of the person; humane treatment and respect for the inherent dignity of the person; privacy; freedom of expression; of assembly; the freedom to associate with others; non-discrimination in the enjoyment of each of these rights; and the right to an effective remedy for the violation of human rights. Collectively, these rights comprise “the rights to protest”, the core rights a state must protect and promote to enable the exercise of protest and public assembly.

To actualise the protection and promotion of the rights to protest, international law has identified six legal principles that should guide and inform state engagement with protest and public assembly: legality, precaution, necessity, proportionality, accountability, and non-discrimination. However, there is little direction on how states and their policing and security institutions can operationalise these principles.

Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest aims to fill this gap by bridging the divide between principle and practice and provide guidance on how states can protect and promote protest and public assembly. It builds upon previous efforts undertaken by INCLIO and the UN Special Rapporteur on Freedom of Peaceful Assembly and of Association to identify general principles and good practices of protest policing. **The report relies on information gathered from comparative desk research on policies and practices on policing protests, interviews with policing experts in eight countriesⁱⁱ, as well as consultations with and the expertise of INCLIO organisationsⁱⁱⁱ engaged in advocacy on human rights and policing.** It is organised around three themes: (1) Preventive measures and institutional design; (2) Tactics and the use of force; and (3) Accountability and oversight. Within these themes, **the report describes good and bad practices and provides recommendations on how international standards and principles can be implemented through national laws and regulations.**

SECTION 2: PREVENTIVE MEASURES AND INSTITUTIONAL DESIGN

LEGISLATION, LEADERSHIP AND CULTURE (2A):^{iv} Effective protection and promotion of the rights to protest and assembly necessitate a foundational legal and institutional framework that prepares and equips policing institutions (and other government services) to engage appropriately with protests and public assemblies. **States must adopt strong, clear, and stable legislation, regulations, and policies that commit the state and its security institutions to safeguard the rights to protest.** States should also avoid legislative language that qualifies or curtails the rights to protest (e.g. by granting broad discretion to use emergency powers).

Policing institutions should also develop internal mechanisms and policies that embed human rights principles in departmental culture, ensuring officers at all levels understand protection and promotion of the rights to protest as a primary goal of engaging with protests and assemblies. These mechanisms should create 'pause points' that evaluate consequences for rights protection at each step of planning and executing protest engagement. These internal mechanisms should be bolstered by a clear and transparent chain of command that guards against excessive, arbitrary, and discriminatory escalations of force. Ongoing training for all officers in human-rights compliant and professionalised policing practices should support these other efforts.

NORTHERN IRELAND: The experience of Northern Ireland provides a good example of an effective and robust legislative framework that promotes and protects the rights to protest. Following the Good Friday Agreement, Northern Ireland engaged in legislative reform that prioritised human rights and accountability that has had a lasting impact. To ensure accountability of state and police actors, Northern Ireland passed legislation that mandated that all government authorities comply with the rights guaranteed in the European

Convention of Human Rights. The statute placed the police duty to protect human rights on an equal level with other traditional police duties. Policing experts credit these statutory innovations with helping shift police mentality around protests from an approach of "control and stop" to one of facilitation. As former senior commander Stephen White described, these Acts are "helpful for police" by "giv[ing] clear guidance on what they should be working for" and describing "what constitutes good planning and good justifications for adopted strategies." Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

NON-DISCRIMINATION AND EQUALITY

(2B): As with all policing duties, police engagement with protests and public assemblies should involve consideration of the rights and needs of community members, including marginalised groups. Police should serve and address these needs in the design and implementation of relevant protest and public assembly-related operations. For example, **policing institutions should take affirmative steps to recruit police officers representative of the communities that they serve and ensure diversity in leadership.** Policing institutions must also ensure equality and non-discrimination among its officers and staff in assignments, duties, and departments. Non-discrimination and equality principles should be incorporated into officer training and supervision, and **officers should receive comprehensive and ongoing instruction and training on structural inequality and implicit bias.**

NOTIFICATION SYSTEMS (2C): Prior notification systems can interfere with and impair the rights to protest. **If a notification system is in place, it should only be used to enable facilitation of public gatherings.** Notification processes should be simple, quick, widely accessible, and free. Notification systems should not be used by the state to prohibit spontaneous protests or disperse events due to a lack of notification. If there are restrictions placed on an event, the restrictions must be reasonable and not overly burdensome, they must not prevent protesters from effectively exercising their rights to protest, and they must not be selectively enforced or otherwise applied in a discriminatory manner. Urgent internal and external appeal processes must be in place to guarantee independent review of the legality of any restrictions imposed.



OREN ZIV / ACTIVE STILLS

ISRAEL: Experiences in Israel illustrate problematic uses of notification mechanisms as the government has used these systems to create barriers to exercising the rights to protest. In a recent protest against the Israeli government's intention to deport thousands of African refugees to Rwanda, the protest organisers – a group of students and social activists – were compelled to pay 100 thousand NIS (equivalent to USD25 thousand) for security expenses to exercise their rights to protest. These types of fees discourage speech and limit the exercise of the rights to protest.

POLICE TRAINING (2D): Training should prepare officers to exercise good judgment and to engage in balanced decision-making aimed at protecting and promoting the rights to protest. In many states, training tends to emphasise the proper use of crowd-control equipment and preparation for the worst-case scenario. While these are both important, training limited to these elements primes officers to react to and expect violence. Such training must be balanced with training that prioritises communication, dialogue, de-escalation,

and graduated use of force. Special emphasis should be placed on training operational-level commanders on human rights standards. Policing institutions must implement training and instruction in a manner that develops skills early in an officer's career. To reinforce this training, performance evaluations should be based on skills taught during training and reflect human rights principles.

SECTION 3: TACTICS AND THE USE OF FORCE

To effectively protect protest and public assembly, tactics on the appropriate use of force and other interventions should be reviewed, guidance should be provided on appropriate tactics, and accountability mechanisms put in place to ensure compliance. Tactics for engagement with protests and public assemblies should include de-escalation and non-escalation techniques; genuine engagement with protesters and the use of specially-trained dialogue officials; reasonable and graduated use of force; data tracking and reporting; and the protection of the privacy rights of protesters.

DE-ESCALATION AND NON-ESCALATION (3A): Policing institutions should adopt de-escalation and non-escalation techniques, which require designing operations with an understanding of crowd dynamics and anticipation of the likely impact of police behavior on protesters and bystanders. For example, regular uniforms, as opposed to "riot gear", can reflect police intent not to escalate force in their engagement with an assembly. Police officers should wear regular uniforms when possible, only relying on crowd-control equipment when necessary. Premature use of crowd-control weapons (CCWs) is not only disproportionate but can also have the effect of escalating tensions and disorder. Overall, protest spaces should be planned and organised with the goal of facilitating the exercise of rights. For example, protest spaces should have adequate entrances and exits. Tactics and strategies that fail to differentiate between individuals in a protest should be prohibited. Engagement with individuals in protests and assemblies should always comply with the principles of necessity and proportionality and promote public trust and police legitimacy.

CANADA: Canada has instituted some protest engagement procedures that promote non-escalation tactics as well as the safety of police and protesters. During the 2010 Winter Olympic Games, the Vancouver Police Department kept officers out of crowd-control equipment and gave clear instructions not to engage with force, even if provoked by a small number of individuals. At one of the first events during the Olympics, when some individuals behaved provocatively, throwing

rocks and sticks and spitting at officers who were in regular uniforms, officers obeyed the command not to respond. Police did not use force, and no protesters were arrested or injured. The police were seen to be reasonable, restrained, and after that night, in the words of Deputy Chief LePard, "the crowds were totally with us." Interview with Doug LePard, Chief Officer, Metro Vancouver Transit Police (February 26, 2018).

GENUINE ENGAGEMENT, DIALOGUE, AND THE PROMOTION OF JOURNALISTIC ACTIVITY

(3B): Specialised dialogue officials can enable productive engagement and effective communication between police and assembly participants. **Dialogue officials should facilitate transparency in police tactics and plans; communicate key information to protesters; and communicate any needs or demands from protesters to the relevant state actor.** Dialogue officials should not be charged with additional policing functions such as carrying out arrests or using force.

Journalistic activity, including recording or documenting policing operations in a protest, is protected expression. Moreover, facilitating and protecting this activity increases transparency, promotes genuine communication, and enables trust in accountability mechanisms. **Journalistic activity should not require special or traditional journalistic credentials, and police should not confiscate or interfere with use of journalistic or photographic tools such as smartphones, microphones, and cameras.**

SOUTH AFRICA: Standing Order 156 of the South African Police Service is an example of a pro-engagement policy that fails to fully protect journalistic activity by leaving out key actors. The order directs officers to engage the media with dignity and respect, and to ensure that their rights to report and record are not interfered with. However, the definition of media officials in the order does not include citizen journalists.

Further, the order is not always adequately implemented by police officials. Journalists are often prevented or manhandled by police officials when covering protests. In 2015, during the #FeesMustFall protest outside the South African Union buildings, journalists were intimidated and harassed by the police as well as some protestors when covering the student protests.

RESTRICTIONS ON THE USE OF FORCE (3C): Command decisions and tactics resulting in the use of force must be evaluated for their consequences and compliance with the principles of legality, precaution, necessity, proportionality, accountability, and non-discrimination. Policing institutions should have extensive precautionary measures in place and sufficient tools to ensure appropriate and graduated responses to serious security concerns. Minor legal infractions or acts of disrespect should not trigger the use of force. Policing institutions should promote restraint and dialogue to avoid the indiscriminate use of force. **CCWs should only be used when thoroughly tested, compliant with human rights, and situationally appropriate. Their use should be limited to the defense of life and bodily integrity.** Training on the use of crowd-control equipment and weapons should include: the impact and harm caused by each weapon or piece of equipment; the likely perceptions of and reaction to the use of each weapon, including the possible escalation in tensions; and whether less harmful means are available to achieve the particular aim.

DATA TRACKING AND REPORTING (3D):

Good practices require policing institutions to engage in data tracking and reporting. Legislation should mandate collection and reporting of data on the use of force, including: numbers and types of weapons deployed; arrests; stops and searches conducted; and the training that officers have received on the use of CCWs and equipment. **There should be a centralised system for reporting each instance a CCW or a firearm is used or drawn, whether it resulted in injury or death, and the demographic information of the individuals against whom force was used.** An unjustified failure to report or keep adequate records should constitute grounds for disciplinary action.

SURVEILLANCE AND NON-STATE ACTORS (3E):

Surveillance practices can have a chilling effect on protest, infringe privacy rights, and violate associated human rights of protesters and bystanders. The state and its security institutions should not conduct indiscriminate surveillance such as the collection, retention, and use of

personal information absent individualised suspicion that a crime has been (or is reasonably expected to be) committed, and in compliance with the principles of legality, necessity, and proportionality. A general belief that someone present in a crowd may commit some offence in the future does not justify the use of indiscriminate surveillance technologies and the retention of personal information on protesters (e.g. facial recognition and IMSI-catchers). Any recording of a protest by policing institutions should be open, transparent, and publicised. Search and seizure of mobile phones should be prohibited in the absence of probable cause. **The state should not keep any database of activists, organisers, and individuals involved in social movements.** Finally, the state may only deploy non-state actors as its agents in the context of protests subject to express enabling legislation and policies that subject them to the same principles as those governing security services, in line with standards of human rights and state responsibility.

UNITED STATES: In the United States, law enforcement are now drawing information from social media and creating searchable databases for police to determine where activists are meeting and how they are communicating. Another increasingly used technology to surveil protesters and activists are IMSI-catchers, also known as “Stingrays” or “cell site simulators”, invasive cell phone surveillance devices that mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information. An IMSI-catcher can capture call activity from thousands

of uninvolved bystanders while searching for an individual or group. This kind of indiscriminate collection and, potentially, retention of personal information treats everyone in a protest, or in the vicinity of one, as a suspect and is, by definition, not justified by any individualised determination. Such broad surveillance can also be used for purposes unrelated to public speech, making participation in speech a greater risk to the individual.

SECTION 4: ACCOUNTABILITY AND OVERSIGHT

Meaningful accountability mechanisms are a critical component of protecting the rights to protest. **Those who have the power to enforce the law should be subject to it.** Mechanisms that effectively investigate and address claims of misconduct and violence ensure all other mechanisms and policies are complied with. Transparent and accessible mechanisms can markedly improve interaction between crowds and policing institutions, deter wrongdoing, and help provide legal remedy to victims of police violence. At the same time, multiple levels of oversight increase the likelihood of detecting misconduct or criminality. Transparency also helps ensure professionalised policing that complies with human rights standards.

INDEPENDENT OVERSIGHT MECHANISMS (4A): Well-resourced and staffed independent oversight mechanisms are central to effective accountability. Such bodies should investigate all uses of force during protests and assemblies as well as allegations of police misconduct or criminality. Such bodies should also conduct systemic reviews of police policies and practices to ensure compliance. These bodies should have sufficient authority to effectively investigate complaints, including funding, resources, the power of subpoena, and the ability to impose disciplinary measures and initiate prosecutions for violations. Policing institutions should be required by law to report uses of force to these bodies, and to cooperate with investigations.

Policing institutions should foster a culture of compliance and support of independent oversight and accountability mechanisms, and the oversight process must be independent and insulated from the influence of policing institutions. The findings of investigations should be made public and should be easily accessible. There should be an open, accessible, and safe complaints mechanism, and **support structures for sexual violence complainants should be established.** The complaint and accountability process should protect and promote the best interests of the complainant.

ARGENTINA: Efforts in Argentina at creating accountability mechanisms provide an example of how oversight and transparency processes can be undermined through ineffective implementation. An independent oversight body, Office of Transparency and External Control, was created by the 2016 City of Buenos Aires Security Law. This Office was charged with publishing complete files of relevant investigations of police misconduct and criminality. So far, the Office has failed to fulfil this obligation. At the national level, civil society organisations have faced a series of obstacles when submitting access to information requests on operational policies and practices in the context of protests. Although access to public information is guaranteed by law, the response from the relevant institutions to these requests has been perfunctory, incomplete, or altogether absent.

INTERNAL INVESTIGATIONS AND

POLICIES (4B): Policing institutions should establish policies and procedures for effective internal investigations. Internal investigations should be carried out by a high-ranking officer, team, or department with no involvement in the incident under review. Processes which frustrate or delay internal investigations should be identified and eliminated. Officers suspected or accused of misconduct should not have greater procedural protections than those provided to other government employees, and officers should not be held to a lower standard than citizens. Departments should implement post-event debriefing to review decisions and identify successes,

failures, and areas for improvement. In ordinary performance reviews, police should be evaluated in light of human rights-based standards.

CHILE: Chile illustrates insufficient and inauthentic mechanisms for accountability that fail to adequately protect the rights to protest. Following the death of a bystander at a protest in 2011 when two police officers fired Uzi submachine guns at the crowd, there was a wave of resignations from the policing institution. However, these “resignations” were ultimately mere reassignments to different posts. This sort of false accountability fails to address the systemic issues that lead to the use of force and impede trust between the public and police officials.

TRANSPARENCY (4C): Transparency is essential. Policies for training, use of force manuals, and reports and statistics on police practices should be made publicly available and easily accessible. The state should similarly have an open and documented process for determining which crowd-control weapons and equipment to acquire, develop, or trade. Reporting on the deployment and use of crowd-control weapons, equipment, and all uses of force should be mandated and describe the circumstances justifying the use of the weapon, equipment, or force. Without releasing personal identifying information, policing institutions should inform the public about the number of people arrested and hospitalised during a protest, and the places and reasons for detention.

CONCLUSION

This report explores how policing and security institutions can engage with protests and public assemblies in a manner that protects and promotes this important form of public engagement and speech and respects the rights of protesters. The report identifies good practices and tactics as well as counter-productive and harmful ones with the aim of promoting a dialogue between the state, its policing institutions, members of civil society, and other stakeholders on how to protect and promote this critical form of public participation and expression in a human rights-compliant manner.

ⁱ International Covenant on Civil and Political Rights and Optional Protocol, G.A. Res No. 2200, UN Doc A/6316 (1966) (entered into force Mar. 23, 1976).

ⁱⁱ South Africa, Hungary, United Kingdom, United States, Canada, Ireland, Russia, and the Netherlands.

ⁱⁱⁱ The members of INCLO are: the Agora International Human Rights Group (Agora, Russia); the American Civil Liberties Union (ACLU, United States); the Association for Civil Rights in Israel (ACRI, Israel); the Canadian Civil Liberties Association (CCLA, Canada); the Centro de Estudios Legales y Sociales (CELS, Argentina); Dejusticia (Colombia); the Egyptian Initiative for Personal Rights (EIPR, Egypt); the Human Rights Law Network (HRLN, India); the Hungarian Civil Liberties Union (HCLU, Hungary); the Irish Council for Civil Liberties (ICCL, Ireland); the Kenya Human Rights Commission (KHRC, Kenya); the Legal Resources Centre (LRC, South Africa); and Liberty (United Kingdom).

^{iv} The section headings here are labeled to correspond to the sections in the Defending Dissent Report. In other words, Section 2 of the Report, on Institutional Design and Preventive Measures, has four sub-sections (labeled A-D).

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GLOSSARY OF ACRONYMS AND TERMS

ASSEMBLY SPACES	“Any public or common area open to the public (i.e. streets, sidewalks, parks, plazas, state buildings etc.) including privately owned spaces [which] are open to the general public and serve similar functions as public spaces,” ¹ and may include other urban or rural private spaces which may be used for the vindication of rights.
ACHPR	African Commission on Human and Peoples’ Rights
DIALOGUE OFFICIALS / REPRESENTATIVES	Officials trained in communication and public engagement who act as liaisons with organisers and protesters and serve as the point of contact for the public.
CROWD-CONTROL EQUIPMENT	Protective wear which covers the entire body of a law enforcement officer and often includes a helmet, face visor, body armour (vests, neck protectors, knee pads), a shield, and sometimes a gas mask. It also includes equipment such as barricades and speaker systems.
CROWD-CONTROL WEAPONS (CCWS)	Weapons used by policing and security institutions in protests and assemblies, typically excluding live ammunition. CCWs may include kinetic impact projectiles, chemical irritants, water cannons, disorientation devices, acoustic weapons, and directed energy weapons.
IACHR	Inter-American Commission on Human Rights
JOINT REPORT	Maina Kiai (former Special Rapporteur on the rights to freedom of peaceful assembly and of association) & Christof Heyns (former Special Rapporteur on extrajudicial, summary or arbitrary executions), <i>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</i> , 5, U.N. Doc. A/HRC/ 31/66 (Feb. 4, 2016).
JOURNALISTIC ACTIVITY	Refers to any individual or organisation involved in taking pictures, recording, reporting or documenting a protest, protesters and/or police action, and includes traditional news and print media, as well as social media and citizen journalism.
NON-STATE ACTORS	Entities such as private military and security contractors ² which are contracted by, or work in association with, states or state-sanctioned agencies in the context of protests.
OSCE	Organization for Security and Co-operation in Europe

POLICING AND SECURITY INSTITUTIONS	State agencies, excluding non-state actors, responsible for safety and security and the protection and promotion of the rights to protest, including policing institutions and law enforcement agencies.
RIGHTS TO PROTEST	The proper protection and promotion of the right to assemble and to protest requires the protection of a broad range of rights, including the following rights under the International Covenant on Civil and Political Rights: life (Art 6); liberty and security of person (Art 9); humane treatment and respect for the inherent dignity of the person (Art 10); the right to privacy (Art 17); the right to hold opinions and freedom of expression (Art 19); the right of peaceful assembly (Art 20); the freedom to associate with others (Art 22); the right to non-discrimination in the enjoyment of each of these rights (Art 2 and 26); and the right to an effective remedy for the violation of human rights. ³ Collectively, these rights are referred to as the “rights to protest.”
SOCIAL PROTESTS, ASSEMBLIES AND OTHER GATHERINGS	“[A]n intentional and temporary gathering in a private or public space for a specific purpose, and can take the form of demonstrations, meetings, strikes, processions, rallies or sit-ins with the purpose of voicing grievances and aspirations or facilitating celebrations.” ⁴
UN	United Nations

¹ 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, ¶ 10, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016) [hereinafter Joint Report] (“Even sporting events, music concerts and other such gatherings can potentially be included. While an assembly is defined as a temporary gathering, this may include long term demonstrations, including extended sit-ins and ‘occupy’-style manifestations. Although an assembly has generally been understood as a physical gathering of people, it has been recognized that human rights protections, including for freedom of assembly, may apply to analogous interactions taking place online.”).

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 44, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017).

³ International Covenant on Civil and Political Rights and Optional Protocol, G.A. Res No. 2200, UN Doc A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Numerous other conventions, declarations and covenants protect the right to protest including: G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 20 (Dec. 10, 1948) [hereinafter UDHR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(ix), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Rights of the Child art. 15, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Rights of Persons with Disabilities art. 29, Dec. 13, 2006, 2515 U.N.T.S.3 [hereinafter CRPD]; and G.A. Res. 53/144, 1999 Declaration on Human Rights Defenders art. 5 (Mar. 8, 1999) [hereinafter DHRD].

⁴ Joint Report, supra note 1, at ¶ 10.

1. INTRODUCTION:

BRIDGING THE GAP BETWEEN PRINCIPLE AND PRACTICE

States and policing institutions often fail in their obligations to protect and promote the rights to protest; instead identifying protests, assemblies, and other gatherings as security threats; imposing unnecessary and arbitrary legal restrictions; engaging in discriminatory practices; criminalising leaders of protests and social movements; and resorting to force when there is no real threat to life or physical integrity.

Public demonstrations are a fundamental tool of democratic engagement. Public speech and protests allow individuals and communities to advocate for political reform and recognition of individual and group rights. Historically, public speech has driven progress on labour rights and migrants' rights, prompted an end to corruption and discriminatory practices, opened the door to enhanced political freedoms and equality in political representation, mobilised access to land, resisted exploitation of natural resources, and demanded solutions to housing shortages and the absence of basic social services.

Yet, too often, citizen expression has been met with repressive, arbitrary and, at times, deadly responses from the state. States and policing institutions often fail in their obligations to protect and promote the rights to protest; instead identifying protests, assemblies, and other gatherings as security threats; imposing unnecessary and arbitrary legal restrictions; engaging in discriminatory practices; criminalising leaders of protests and social movements; and resorting to force when there is no real threat to life or physical integrity. These reactionary practices have significantly undermined the freedom to speak, assemble and protest – key rights to democratic expression and participation, the rule of law, and rights which are often the only path to the vindication of other fundamental rights.

People assemble and gather in different ways, from an organised march, to a spontaneous protest, to a sit in or festival, and for different aims: to express dissent or approval or to celebrate and commemorate. How lawmakers, state agencies, and policing institutions respond to these gatherings can depend on the identity of the group protesting, the cause, political context, where and when the protest takes place, and the nature of the group or institution being challenged (whether governmental, religious, corporate, educational, or cultural). Whatever the context – whether the protest takes place in an urban or in a rural area, whether the space is public or private, or whether the event is a show of pride or a demand to be heard – the repression and/or criminalisation of a protest is a threat to an essential component of democracy and public dialogue and engagement.

International human rights law and international and regional standards, as well as most constitutions and national laws, establish principles and standards for protecting protest and assembly – including the duties, obligations, and responsibilities of the state. Guidance on protecting and promoting the rights to protest is also provided by regional and international human rights bodies, international experts, regional courts, and domestic courts.⁵

However, there is little direction on how these various principles and standards should be operationalised by the state and its policing and security institutions. This report aims to fill that void by addressing how international standards and principles, and their national counterparts, are and can be implemented. This report builds upon previous efforts undertaken by INCLIO and the UN Rapporteur on Freedom of Peaceful Assemblies and Association to close the gap between principle and practice. This report relies on extensive desk research, interviews with twenty-six policing experts in eight countries, as well as consultations with and the expertise from thirteen INCLIO member organisations engaged in advocacy on human rights and policing. It provides guidance to states, security and policing institutions, academics, protest and social movement leaders, and civil society on how the rights to protest can be protected and promoted in reality.

⁵ *Joint Report, supra* note 1.

This report identifies twelve principles and thirty-three practices for protecting and promoting the rights to protest. The principles and good practices are organised around three themes: (1) Preventive measures and institutional design; (2) Tactics and the use of force; and (3) Accountability and oversight. Alongside each principle, the report identifies a set of good practices drawn from deployment designs, documented models, and strategies used by policing and security institutions, operational commanders, law enforcement officials, and independent policing experts. Specific case studies further illustrate good and bad practices through concrete and contextual examples of implementation. Each section concludes with a set of principle-specific recommendations.

A. METHODOLOGY

This report was conceived by INCLO following the release in 2016 of the *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* ("Joint Report"). The goal of this report is to develop and expand on the principles identified in the Joint Report and identify and gather specific strategies and models through which states and security institutions approach protests in a human rights-oriented manner. The primary desk research and interviewing for this report was conducted by IHRC, in collaboration with INCLO, during the 2017-2018 academic year. IHRC began the first phase of the research by collecting scholarship on practices and strategies around "crowd" and "assembly" management as well as protests and other forms of public speech. Scholarship collected was authored by academics, human rights groups, United Nations (UN) actors, think tanks, policing experts, and policing institutions. IHRC and INCLO then compiled a list of existing experts and operational commanders (from the initial literature review and from the collective experience and knowledge of INCLO members) to identify potential individuals for further engagement.

In the second phase of the research, IHRC and INCLO devised questionnaires tailored to government officials or representatives, members of policing institutions, academics, and civil society organisations. The questionnaires focused on identifying existing laws, policies, and institutional structures; the community context; the specific tactics and strategies employed by policing and security institutions before, during, and after an event; and the good and bad practices observed or used. Finally, interviews were conducted with international policing experts, operational commanders and members of policing institutions, government officials, academics, activists, and human rights advocates from countries in the Global North and South. The information gathered through these interviews was then evaluated according to the international human rights framework and supplemented by case studies and domestic expertise from INCLO member organisations. The report was drafted collaboratively by INCLO and IHRC.

It should be noted that the literature collected and reviewed for this report was mainly from English-speaking authors and countries. Similarly, most interviews conducted were held in the United Kingdom, the United States, and Canada. However, interviews were also conducted with policing experts in Russia, South Africa, Ireland, the Netherlands, and Hungary. As a result, many of the law enforcement perspectives shared in this report reflect the situation in certain countries, which may differ, sometimes significantly, from the circumstances experienced in others. We have compensated for this imbalance by providing case studies and examples from different countries from the Global North and

South, including: Argentina, Brazil, the United States, Canada, Chile, Peru, Ireland, Colombia, Hungary, the United Kingdom, Russia, Israel, Egypt, South Africa, Kenya and India.

In presenting this report, deliberate decisions have been made on language and common narratives around protests and protesters, policing, and marginalisation. The authors have identified select key terms and associated narratives and provided definitions in the glossary. The nomenclature selected for this report is a reflection of the aim of this report: *to document international principles and practices that protect and promote the rights to protest, driving normative developments in the translation from principle to reality.*

B. THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

Under the International Covenant on Civil and Political Rights (ICCPR), the realisation of the right to assemble and to protest requires the protection of a broad range of fundamental human rights, including the rights to: life; liberty and security of person; humane treatment and respect for the inherent dignity of the person; the right to privacy; the right to hold opinions, and freedom of expression; the freedom to associate with others; the right to non-discrimination in the enjoyment of each of these rights; and the right to an effective remedy in the case of the violation of human rights.⁶ It is this bundle of rights this report refers to as “the rights to protest”.

Each one of these rights, or any combination of them, may – depending on context – protect attendees, bystanders, monitors, journalists and people engaged in journalistic activity, and members of policing and security institutions. In circumstances when a restraint of one of these rights can be justified by the proper human rights analysis, the other rights remain applicable and protect the people involved. In the words of the Special Rapporteurs, “[n]o assembly should . . . be considered unprotected.”⁷

There are six legal principles that inform the application of the bundle of human rights governing state and policing institutions in the protection and promotion of the rights to protest: legality, precaution, necessity, proportionality, accountability, and non discrimination.⁸ These core legal standards determine the lawfulness of each policy, tactic, deployment, and institutional process identified in this report.

- **Legality** requires that states develop and enact a legal framework that is compliant with international standards, protecting the rights to protest in their constitutional, statutory, or administrative law.
- **Precaution** requires that “all feasible steps be taken in planning, preparing, and conducting an operation related to an assembly to avoid the use of force or, where force

⁶ ICCPR, *supra* note 3. Numerous other conventions, declarations and covenants protect the right to protest including: UDHR, *supra* note 3, at art. 20; CERD, *supra* note 3, at art. 5(ix); CRC *supra* note 3, at art. 15; CRPD, *supra* note 3, at art. 29; DHRD, *supra* note 3, at art. 5.

⁷ *Joint Report*, *supra* note 1, ¶ 9.

⁸ See *Joint Report*, *supra* note 1, ¶ 36, 50; Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169 of 17 (Dec. 17, 1979) [hereinafter UN Code of Conduct]; Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 112-13, U.N. Doc. A/CONF.144/28/Rev.1 (1991) [hereinafter UN Basic Principles]; *Special Rapporteur on Extrajudicial Summary or Arbitrary Executions*, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) (by Christof Heyns) [hereinafter 2014 UNSR Report].

is unavoidable, to minimize its harmful consequences.”⁹ The principle of precaution may involve ensuring effective institutional design, proper training, use of force policies, command structures, and tactical decisions in the field. The principle obligates the state to take precautionary measures before and during an event to make sure that interventions by law enforcement officers protect and promote assemblies and the assembled.

- **Necessity and proportionality** determine the legality of certain actions taken by policing and security institutions. Each action must seek to achieve a legitimate goal and employ the least intrusive and restrictive means necessary and appropriate to achieve that goal.¹⁰
- **Accountability** requires that the state establish a clear and transparent command structure to minimise the use of force and to facilitate effective reporting of misconduct. Accountability also requires the establishment of effective review processes for assessment and investigation of abuses and violations of the law in the management of assemblies. Accountability would counsel that any violations of the rights to protest are recorded, reported, credibly investigated, effectively remedied, and sanctioned.
- **Non-discrimination** requires the equal protection of the law and the enjoyment of one’s rights without discrimination on “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹¹

The normative framework outlined requires an understanding on the part of the state and its policing and security institutions about their role and the role of protests in a democratic society. Specifically, it requires an understanding that groups or crowds – however small or large, critical of the establishment, or disorderly – are exercising essential democratic rights that are protected in international law and standards. A look at the policing models dominant over the last century reveal a different understanding – one of hostility towards protests with a focus on the dispersal of crowds and stifling of dissent. While there have been effective strategies and practices deployed by policing and security institutions in different countries at different times, the practices presented in this report aim to further develop an emerging model of policing aimed at the facilitation of fundamental rights. This model directly confronts these negative assumptions about crowds and conceives of the proper role of the state and its policing and security institutions in relation to protests in order to establish a protective, service-oriented, professionalised, and enabling approach to policing.

C. HISTORY OF STRATEGIES OF POLICING ASSEMBLIES

Since the end of World War II, policing and security institutions in democracies have generally utilised three strategies in policing protests, assemblies, and other gatherings: escalated force, negotiated management, and strategic incapacitation. The history described below primarily follows the development of these approaches in the United States,¹² but versions

⁹ *Joint Report, supra* note 1, ¶ 52.

¹⁰ *Id.*

¹¹ ICCPR, *supra* note 3, at art. 26.

¹² See PATRICK F. GILLHAM, *SECURITIZING AMERICA: STRATEGIC INCAPACITATION AND THE POLICING OF PROTEST SINCE THE 11 SEPTEMBER 2001 TERRORIST ATTACKS*, 5 *SOCIOLOGY COMPASS* 636, 637 (2011).

of these models were applied in other countries at various times and some are still being used today.

- **1940s–1960s: Escalated force.** The police view crowds as “homogenous and dangerous”¹³ and seek to maintain “control” of the crowd at all times.¹⁴ As a result, “[p]olice increase the level of force they use in response to perceived changes in protesters’ behaviour.”¹⁵ This escalation of force “can be rapid and extreme”¹⁶ and involves significant indiscriminate police violence, up to and including the use of live ammunition.¹⁷ While this strategy has fallen out of favour in some countries, the ideology and its remnants remain in practice in some jurisdictions.

SOUTH AFRICA: ESCALATED FORCE AT MARIKANA.

In Marikana, South Africa, the South African Police Service shot and killed thirty-four protesting mineworkers on 16 August 2012. In days prior to the massacre, four miners, two police officers and two security guards were killed. Approximately 400 police officers – heavily armed with live ammunition and wearing full combat gear – as well as military vehicles were deployed to Marikana. The miners had set up camp on a hill called Wonderkop near the Lonmin mine and, even though police occasionally engaged with them, they were committed to their strike. However, the aggressive behaviour and heavy armour of the police caused concern among them. On the day in question, the police rapidly escalated force – despite the absence of a legitimate threat to life from the protesters. Many of the miners were found with gunshot wounds in their backs, indicating that they were running away and posed no immediate threat to the police.



MUJAHID SAFODIEN/AFP/GETTY IMAGES

¹³ DAVID R. MANSLEY, COLLECTIVE VIOLENCE, DEMOCRACY AND PROTEST POLICING 11 (2014); see also VERN NEUFELD REDEKOP & SHIRLEY PARE, BEYOND CONTROL: A MUTUAL RESPECT APPROACH TO PROTEST CROWD-POLICE RELATIONS 141 (2010).

¹⁴ See REDEKOP & PARÉ, *id.* at 141.

¹⁵ MICHELLE D. BONNER, POLICING PROTEST IN ARGENTINA AND CHILE 2 (2014).

¹⁶ *Id.*

¹⁷ *Id.*

INDIA: THE USE OF THE ARMED FORCES. The Armed Forces Special Powers Act of 1958 has conferred special powers upon the Armed Forces in “disturbed areas” in the North Eastern state of Manipur and Kashmir. The Act gives legal immunity to the Armed Forces, allowing for unrestricted use of escalated force. There can be no prosecution, suit or any other legal proceeding against anyone acting under the Act. This Act has been used by the state as a tool for abuse, oppression, and discrimination since its inception.

- **1970s–1990s: Negotiated management.** Flowing from escalated force, negotiated management seeks to “control” protests through less violent means. This strategy emphasises negotiation between protesters and police to ensure that the assembly results in minimal “trouble”.¹⁸ Despite stressing communication, the degree to which protesters are actually listened to and respected can be minimal – police continue to direct crowds and seek “to make certain they do things in line with what the police would desire.”¹⁹ Should these methods fail, police still have access to more forceful methods of crowd-control.²⁰ A variant of this approach was applied in this century to some Latin American countries in an effort to limit violent and even lethal police practices following highly repressive episodes.
- **2000s–present: Strategic incapacitation.** In the strategic incapacitation approach, police seek to “minimiz[e] risk by identifying and neutralizing possible threats.”²¹ This strategy “rel[ies] on an assortment of surveillance and information sharing tactics to identify and label potentially disruptive protesters.”²² Once identified, police seek to “neutralize” the threat by using “preemptive arrests, crowd-control weapons and equipment, and control of space tactics,”²³ as well as mass arrests, which contradict the targeting aim of the strategy.²⁴

Over time, and with some regional variation, these three models have been – and in some cases continue to be – applied in varying degrees. In Europe and North America, for example, cross national differences in protest policing have diminished over time,²⁵ and scholars have identified common trends in the evolution of police strategy. Escalated force predominated until the 1960s but fell out of favour following the violent repression of social movements in that decade. The more “benign” negotiated management replaced

¹⁸ See REDEKOP & PARÉ, *supra* note 13, at 142.

¹⁹ *Id.*; see also DAVID P. WADDINGTON, POLICING PUBLIC DISORDER: THEORY AND PRACTICE 14 (2007) (“preventative strategies are less concerned with achieving a genuine process of ‘give and take’ than with ensuring that the police achieve their objectives via the least confrontational means at their disposal”).

²⁰ See REDEKOP & PARÉ, *supra* note 13 at 142-43 (displaying visual depicting how the Royal Canadian Mounted Police consider risk and use of force); Waddington, *supra* note 15 at 191.

²¹ GILLHAM, *supra* note 12, at 647 (emphasis in original).

²² *Id.*

²³ *Id.*; see also LESLEY J. WOOD, CRISIS AND CONTROL: THE MILITARIZATION OF PROTEST POLICING 26 (2014) (“The strategic incapacitation approach to protest policing recognizes the ways that police combine the intelligence gathering and analysis of intelligence-led policing in order to pre-empt protest through control or dissuasion of protesters. If police are unable to stop the protest, and protesters continue to appear ‘threatening’ or ‘unpredictable,’ police shift their approach to one that uses mass arrest, supported by the use of less-lethal weapons and riot control units.”).

²⁴ *Id.* at 26.

²⁵ See WADDINGTON, *supra* note 19, at 10 (“There is widespread agreement among American and European scholars that the last three decades have seen a major transformation in the dominant style of public order policing”); Donatella della Porta & Herbert Reiter, *The Policing of Protest in Western Democracies*, POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES 1-32, 6 (Donatella della Porta & Herbert Reiter, eds., 1998) (“Over time, cross national differences between the European countries seem to have diminished. . . . A general trend emerges regarding protest policing styles”).

Since the end of World War II, policing and security institutions in democracies have generally utilised three strategies in policing protests, assemblies, and other gatherings: escalated force, negotiated management, and strategic incapacitation.

it as the dominant paradigm from the 1970s-1990s. New fears of terrorism and concerns that negotiated management failed to adequately constrain “transgressive” protest groups led strategic incapacitation to emerge in the 2000s and to remain commonplace today.²⁶

In other regions, such as Latin America, the variation in the use of these strategies was responsive to local developments. For example, a period of less repressive strategies of policing often followed periods of violence. In Argentina, “the government has had many different strategies combining repression, negotiation and control of police violence in different ways depending on the context [...]. The recent history of Argentina reveals that it is the central executive that determines police behaviour, with the judiciary exercising significant power and influence.... As a result, the government’s approach has alternated between open aggression and repression and strategies of negotiation with explicit limits placed on the use of force.”²⁷

²⁶ See MANSLEY, *supra* note 13, at 11-12; WOOD, *supra* note 23, at 26-28; GILLHAM, *supra* note 12, at 637-39; DELLA PORTA & REITER, *id.*, at 6-8.

²⁷ CELS, *El derecho a la protesta social en la Argentina*, Buenos Aires, 2017, available at: <http://www.cels.org.ar/protestasocial/>.

THE FIELD TODAY

Trends in policing strategies in the context of protests have not been consistent globally. For example, escalated force remains the dominant strategy in Latin America.²⁸ Furthermore, police often continue to apply these strategies in a discriminatory manner such that racially, ethnically, or politically marginalised communities face the most violence and the greatest burdens on the exercise of their rights to protest.²⁹ Moreover, all three strategies explicitly contemplate police use of force and utilise state coercion to “pacify . . . dissent.”³⁰ Finally, not all existing policing institutions reveal a clear strategy or a singular approach in their practices. As a result, these strategies fail to prioritise the protection and promotion of the rights to protest.

CO-OPERATIVE FACILITATION: AN EMERGING MODEL FOR HUMAN RIGHTS-COMPLIANT PROTECTION AND PROMOTION OF THE RIGHTS TO PROTEST

In response to these deficiencies, a variety of academics and members of civil society have recently proposed a new model for policing protests best termed “co-operative facilitation.” This model aims to re-orient state and, specifically, police behaviour around defending and protecting human rights rather than controlling expression and dissent in public spaces. Relying on empirical crowd psychology research, this approach begins with the premise that “crowds should not be seen as an inherent threat,” and that “violence derives from interactions—notably between crowd and police.”³¹ From this starting point, the strategy emphasises four key themes: education, facilitation, communication, and differentiation.³²

These themes require police to understand the social dynamics of crowds, protect and promote the rights to protest, and avoid indiscriminate tactics.³³ Although not yet fully implemented in any jurisdiction, aspects of this strategy (such as dialogue officials, emphasis on facilitation, or avoidance of indiscriminate tactics) represent a more progressive approach to protest policing. The co-operative facilitation strategy thus seeks to disrupt a status quo in which violent and repressive police tactics remain all too common, and move these practices towards a human rights approach to policing of protests.

²⁸ See BONNER, *supra* note 15, at 2 (“When police are called upon to manage protests in Latin America, most use a reactive approach known as ‘escalated force.’”).

²⁹ See WOOD, *supra* note 23, at 41-42.

³⁰ Donatella della Porta & Kivanç Atak, *The Police*, BREAKING DOWN THE STATE: PROTESTORS ENGAGED 113, 122 (Jan Willem Duyvendak & James M. Jasper, eds., 2015).

³¹ Stephen Reicher et al., *Knowledge-Based Public Order Policing: Principles and Practice*, 1 POLICING: A J. OF POLY AND PRAC. 403, 414 (2007).

³² See Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67, 98-106 (2015).

³³ See Reicher et al., *supra* note 31, at 409-410.

PREVENTIVE MEASURES AND INSTITUTIONAL DESIGN

To effectively protect the rights to protest, the state must orient the relevant state actors towards an approach of protection and promotion of protest.

OVERVIEW

Preventive measures provide a critical foundation for a human rights-based and professionalised approach to policing in protests. This section reviews and assesses measures that prevent and anticipate infringement on the rights to protest as consistent with the principle of precaution.

Preventive measures can include conditions that impact police culture and practice: regulatory frameworks, chains of command, training on the proportional use of force, and appropriate education on required skills and measures that avoid discriminatory practices. Such measures may involve the use of notification systems that facilitate the organisation of public and private space.

A. LEGISLATION, LEADERSHIP AND CULTURE

PRINCIPLES AND STANDARDS

- States must have a legal and institutional framework in place that protects and facilitates the rights to protest. International law requires that “[s]tates shall respect and ensure all rights of persons participating in assemblies.”³⁴ Regionally, the Inter-American Commission on Human Rights (IACHR) states that “social and political participation through the right of freedom of assembly is an essential element to the consolidation of the democratic life of societies.”³⁵ This “implies that a presumption exists in favour of the exercise of the right”³⁶ and that states must “act on the assumption that [protests] do not constitute a threat to public order.”³⁷
- States must also provide the support, infrastructure and services necessary to implement the relevant legal and institutional framework. This means “[s]tates should provide the necessary support to, and sufficient oversight of, the authorities involved in the management of assemblies, at all levels of government. This includes sufficient training and necessary financial and human resources.”³⁸ This also includes the provision of basic government services necessary for individuals to exercise the rights to protest – such as traffic regulation, medical assistance and cleaning services.³⁹

³⁴ *Joint Report*, *supra* note 1.

³⁵ CIDH, Segundo informe sobre la Situación de las Defensoras y los Defensores de Derechos Humanos en las Américas, 31 de diciembre de 2011, OEA/Ser.L/V/II. Doc. 66, párr. 129.

³⁶ CIDH, Informe Anual 2015, capítulo 4A, párrafos 65. See also African Commission on Human and Peoples’ Rights (ACHPR). Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa [hereafter referred to as the ACHPR Guidelines], para 2.1.1, which states that the enactment, interpretation, implementation and enforcement of national laws and regulations governing the right to assemble freely with others must require law enforcement responses that favour the presumption of the exercise of the right to assemble freely. Further, see Organization for Security and Co-operation in Europe (OSCE), Guidelines on Freedom of Peaceful Assembly [hereafter referred to as the OSCE Guidelines], para 2.1, which states: “As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation. Anything not expressly forbidden by law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so. A presumption in favour of this freedom should be clearly and explicitly established in law.”

³⁷ CIDH, Informe Anual 2015, capítulo 4A, párrafos 64.

³⁸ *Id.* at ¶ 17(d). The Inter-American Commission on Human Rights (IACHR) has stated that: “The general principles on use of force, applied to the context of protests and demonstrations, require that the administration of security operations be carefully and thoroughly planned by people with experience and specifically trained for this type of situation and under clear acting protocols”. See Inter-American Commission on Human Rights, Annual Report 2015, chapter IV A, para. 79.

³⁹ *Joint Report*, *supra* note 1. The ACHPR Guidelines state, at para 17.3, that the provision of first aid and other essential services during an assembly must be provided free of charge to assembly participants. Further, the OSCE Guidelines state, at para 2.2, that “[i]t is the primary responsibility of the state to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed and not subject to undue bureaucratic regulation.”

- Legislation, procedures, and codes of conduct should be publicly accessible, including regulatory instruments and information about law enforcement procedures relating to assemblies.⁴⁰ Law enforcement agencies should establish, and make publicly available, enforceable protocols and standards of conduct for law enforcement officials that are consistent with regional and international human rights standards.⁴¹ Such protocols and standards of conduct, according to the IACHR, must guarantee that members of police institutions act “with certainty in their duty to protect participants of a public gathering, demonstration or assembly.”⁴²
- Effective reporting and accountability mechanisms must be put in place to ensure security interventions protect and facilitate the rights to protest. According to the African Commission on Human and Peoples’ Rights (ACHPR) Guidelines, law enforcement agencies must establish a clear, transparent, and single command structure for the policing of assemblies. Additionally, the operational roles and responsibilities of law enforcement officials within the chain of command should be clearly established, articulated, and publicly known to ensure a single chain of accountability.⁴³ Additionally, “[states] should publicly recognize that there is room for differences of opinion and promote a[n] [overall] culture of tolerance.”⁴⁴

GOOD PRACTICES

To effectively protect the rights to protest, the state must orient the relevant state actors towards an approach of protection and promotion of protest. All state actors, including the policing and security institutions, should understand that the rights to protest are fundamental and central to the proper functioning of a democratic state and the effective safeguarding of other core human rights.⁴⁵ Policing and security institutions should cultivate a culture of defending dissent. While many practices in this report focus on the behaviour and culture of security institutions, these practices cannot be properly understood without reference to the wider political and governmental framework in which these institutions operate.

Key political commitments that inform the practice of policing and security institutions are necessary to effectively protect and promote the rights to protest. To ensure effective facilitation, the commitment to safeguarding the rights to protest must be reflected in legislation, in the mindset of political and police leadership, policing protocols, and in the

⁴⁰ ACHPR Guidelines, para 4.1.

⁴¹ *Id.* at para 4.2. Further, at para 6.1, the ACHPR Guidelines reiterate that law enforcement agencies have an obligation to promote access to information and should make available, in the public domain, information relevant to the policing of assemblies. This should include all regulations, standing orders and instructions, codes of conduct, information about chain of command and operational decision-making. In addition, information should also be provided on the type of equipment generally available to law enforcement officials and policing assemblies, the circumstances in which such equipment will be deployed, the procedures and reasons for imposing limitations on the right to assembly by public authorities, and information on how to access internal and external complaints mechanisms. In a similar vein, the OSCE Guidelines state, at para 2.6, that relevant regulatory authorities must ensure that the general public has adequate access to reliable information about its procedures and operations, and the regulatory process should enable the fair and objective assessment of all available information.

⁴² CIDH, Informe de Seguridad Ciudadana y Derechos Humanos, 2009, par. 193; CIDH, Informe Anual 2015, capítulo IV A, párr. 79.

⁴³ ACHPR Guidelines, para 5.1.

⁴⁴ *Id.* at ¶ 17(e). The OSCE has stated, in the context of content-based restrictions, that: “Assemblies are held for a common expressive purpose and, thus, aim to convey a message. Restrictions on the visual or audible content of any message should face a high threshold and should only be imposed if there is an imminent threat of violence.” See OSCE Guidelines, para 3.3.

⁴⁵ See CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *Latin American State Responses to Social Protest* 36-43 (2017); INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANIZATIONS (INCLIO), *LETHAL IN DISGUISE: THE HEALTH CONSEQUENCES OF CROWD CONTROL WEAPONS* (2016); INCLIO, *TAKE BACK THE STREETS: REPRESSION AND CRIMINALIZATION OF PROTESTS AROUND THE WORLD* (2013).

training of operational commanders and members of policing institutions. As the United Nations Office on Drugs and Crime notes in the Handbook on police accountability, oversight and integrity, “guidance for the police on what to do and how to do it” is an essential component of effective accountability and police integrity.⁴⁶

Protecting and promoting the rights to protest requires political actors to create, fund, and support the institutional mechanisms necessary for protecting human rights. Policing institutions, in particular, must be provided with legal, political, institutional, and cultural support from the state to effectively implement human rights-compliant and professionalised strategies in interacting with protests.

NORTHERN IRELAND: THE POLICE ACT OF 2000. The experience of police reform in Northern Ireland following the Good Friday Agreement provides a useful example of the importance and impact of strong human rights legislation and policies. During the period of sectarian violence known as “the Troubles” between Northern Ireland’s Protestant majority (who favoured remaining part of the United Kingdom) and its Catholic minority (who favoured joining the independent Republic of Ireland), the Catholic community viewed the overwhelmingly Protestant policing institution as regularly using disproportionate and excessive force against them.⁴⁷ As a result, the peace process emphasised the protection of human rights in policing.⁴⁸

This emphasis produced the Police (Northern Ireland) Act of 2000,⁴⁹ which gave special force in Northern Ireland to the United Kingdom’s Human Rights Act.⁵⁰ The Human Rights Act “requires all public authorities, including the police, to act in a way which is compatible with the rights set out in Schedule 1 to the Act, which are taken from the European Convention on Human Rights.”⁵¹ The Police (Northern Ireland) Act of 2000 made this command even more explicit: in addition to the traditional police duties “to protect life and property; to preserve order; to prevent the commission of offences; [and,] where an offence has been committed, to take measures to bring the offender to justice,”⁵² the Act also obligates police to “protect human rights and secure the support of the whole community.”⁵³ The Police (Northern Ireland) Act thus strengthens the Human Rights Act in a subtle

⁴⁶ U.N. OFF. ON DRUGS AND CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT AND INTEGRITY, at 10, U.N. Sales No. E.11.IV.5 (2011) (HANDBOOK).

⁴⁷ Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017); see also THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND ¶¶ 1.3-1.4 (1999).

⁴⁸ *Id.* (“It is a central proposition of this report that the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the human rights of all. Our consultations showed clear agreement across the communities in Northern Ireland that people want the police to protect their human rights from infringement by others, and to respect their human rights in the exercise of that duty.”).

⁴⁹ Police (Northern Ireland) Act 2000, c. 32.

⁵⁰ Human Rights Act 1998, c. 42 (UK), <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

⁵¹ HER MAJESTY’S CHIEF INSPECTOR OF CONSTABULARY, ADAPTING TO PROTEST 4 (2009); see also *id.* at sched. 1 pt. 11 (listing protected rights, including: right to life; prohibition of torture; prohibition of slavery and forced labour; right to liberty and security; right to a fair trial; no punishment without law; right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; right to marry; prohibition of discrimination; and, prohibition of abuse of rights).

⁵² Police (Northern Ireland) Act 2000, *supra* note 49, § 32(1).

⁵³ Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); accord *id.* at §§ 32(4)-(5), 52.

but powerful way: it places the police duty to protect human rights on an equal level with other traditional police duties.

Experts credit these statutory innovations with helping shift police mentality when working in the context of protests from “control and stop” to facilitation.⁵⁴ Furthermore, although this legislation places significant positive obligations on police, commanders in Belfast do not view it as a burden. To the contrary, as former Senior Commander Stephen White described, these Acts are “helpful for police” by “giv[ing] clear guidance on what they should be working for” and describing “what constitutes good planning and good justifications for adopted strategies.”⁵⁵ As a result, this statutory language has helped the Police Service of Northern Ireland build a strong culture of human rights protection in its approach to protests.⁵⁶

Practice 1: Mandate police protection and promotion of the rights to protest in domestic law and enforce these rights with a strong normative framework

An effective legal framework that mandates respect for social protests is central to the protection and promotion of the rights to protest. International standards and guidelines, constitutional principles, legislation, operational standards and standing orders, and procedures must define what is appropriate – while also guiding the behaviour of policing institutions. As policing institutions are specifically tasked with enforcing the law, a legal mandate that directs them to protect and promote the legal rights to protest is crucial for their efficacy. Constitutional provisions and statutory law should require police protection of citizens’ human rights in any response to a public assembly, while lower-level regulations and police policies should provide more developed and contextual guidance to the police in responding to protests. Laws that specifically regulate police action in the protest and public demonstration context can ensure a democratic approach to protests by creating mandates for all relevant branches of the government to promote and protect the rights to protest.

The absence of a strong, clear, and stable regulatory framework can lead to unpredictable, uneven, and arbitrary interventions by policing institutions and other state actors. The legal framework should be clear, comprehensive, and binding. Clear laws not only guide the behaviour and culture of policing institutions, but also provide clear guidance in judicial interventions.

When formulating such legal protections, states should take care to avoid legislative language that weakens or qualifies the rights to protest.⁵⁷ Legislation that differentiates

⁵⁴ Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 12, 2017); *see also* Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

⁵⁵ Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

⁵⁶ *Id.*; Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

⁵⁷ *See* LATIN AMERICAN STATE RESPONSES TO SOCIAL PROTESTS, *supra* note 45, at 36-43.

between (for example) “legitimate” and “illegitimate” protests, scheduled and spontaneous protests, or protesters who have complied with a notification system and those who have not, could leave some protests without explicit legal protection – and give police justification for violating the human rights of participants.

Legal loopholes in the protection of the rights to protest should also be addressed. Such loopholes can be used to weaken these rights, especially by states and government actors lacking political commitment to protect the rights to protest. Imprecise constitutional or statutory authority granting broad emergency or public order powers, criminalisation for minor offences committed in the context of protests, or the undermining of accountability mechanisms are all legal loopholes that undermine the protection of these fundamental rights.

PERU: EXCESSIVE AND EXTENDED USE OF “EMERGENCY POWERS”. The Peruvian government has used its constitutionally protected emergency powers to declare states of emergency for months at a time, prohibiting protests and using the military to enforce “public order”.⁵⁸ These imprecise standards (e.g. “public order”) have translated into unchecked discretion. Peru’s use of apparently constitutional or legal mechanisms are contrary to international law insofar as they disproportionately violate human rights, including the rights to protest.

The use of the armed forces or any militarised security institution (whether it is weaponry, tactics, the designation of protesters as “internal enemies”, or relying on the military justice system) has emerged as part of a wider trend of using anti-terrorism powers against communities organising for basic housing, land, economic and other fundamental rights. The discretion to use these emergency powers to manage demonstrations reflects a lack of political commitment to protecting the rights to protest and a general hostility towards any type of dissent. This lack of political commitment to safeguarding these fundamental democratic rights then trickles down to impact the culture and behaviour of policing and security institutions.

The involvement of armed forces in public security – including protest – should be prohibited in all circumstances. To the extent that armed forces are deployed in context of protest, their conduct must be subjected to the same standards as policing institutions.

Legislation that grants policing institutions excessive discretion can also compromise the protection of the various rights to protest by giving its members broad authority to arrest or disperse.⁵⁹ Providing such wide latitude for legally acceptable interventions muddles the standard for appropriate behaviour and makes it difficult to provide effective oversight.⁶⁰ Furthermore, expansive authority and wide discretion enable policing institutions to engage in “overly punitive response[s] to relatively minor incidents.”⁶¹ This permits and promotes an antagonistic model of policing which often results in human rights violations.

⁵⁸ *Id.*, at 20.

⁵⁹ Skype interview with Michelle Bonner, Associate Professor of Political Science, University of Victoria (Jan. 25, 2018).

⁶⁰ Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017).

⁶¹ Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017); *see also* Skype interview with Doug LePard, Chief Officer, Metro Vancouver Transit Police (February 26, 2018).

Practice 2: Ensure that the protection and promotion of the rights to protest is incorporated into police culture, including an appreciation of the importance of dissenting views in a democratic society

Laws, policies and protocols provide a necessary foundation but must be accompanied by a culture in police and security institutions oriented towards protecting and promoting the rights to protest. As former law enforcement officer and Russian policing expert Igor Burmistrov put it, sometimes “on paper everything looks good here, everything is correct.” However, further enquiry into how members of policing institutions train, behave in the field, and are or are not held accountable for their actions, reveals an inconsistency between norms, policy, and practice.⁶²

Policing institutions should view protecting and promoting the rights to protest, including dissent, as central to their function and should expect to be held accountable for failure to do so. As many interviewed experts emphasised, the task of building a culture of rights protection and accountability falls primarily on leadership.⁶³ If the political and policing leadership demonstrate a commitment to human rights standards, the institutional hierarchy amplifies their leadership to create a departmental culture that takes the protection and promotion of human rights seriously.

Internal practices and policies aimed towards this end are key to altering culture and operational norms within policing institutions. Policies may fall into two categories:

- **Proactive policies** create “pause points” where relevant officials pause and consider whether a decision they are about to make is consistent with human rights and if it will effectively protect and promote the rights to protest before they act. These policies allow policing institutions to identify and prevent human rights violations.
- **Reactive policies** seek to develop systematic review processes of violations after they occur to avoid repeating them. They use accountability, discipline, and legal sanctions to deter future misconduct.

Policing institutions committed to human rights and professionalised services should employ both proactive and reactive policies and engage in a continuing, self-reflective process aimed at improving strategies to protect and promote human rights in the communities they serve –including a genuine display of willingness to receive and learn from criticism. Through this process, policies and practices may evolve and increase in efficacy.

Practice 3: Establish a clear chain of command that incorporates multiple points of review and assessment, and fosters a culture of accountability

A clear chain of command determines how authority and power are exercised and delegated from management and supervision to officers in the field responsible for varying functions.

⁶² Interview with Igor Nikolayevich Burmistrov, former Senior Instructor at the Training Centre of Sankt Petersburg Directorate of Interior.

⁶³ Interview with Sir Denis O'Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

It allows instructions and priorities to flow downward along the chain of command and accountability to flow upward. A clear chain of command for police and security institutions in the context of protests facilitates good decision-making and effective implementation of decisions. However, the unique nature of protecting and promoting the rights to protest in a particular context may require political authorities and policing institutions to develop specialised command procedures specifically suited to those circumstances. The chain of command should clearly articulate the distinction in duties between political authorities, civil servants, and policing institutions to help clarify where responsibility lies for planning and decision-making and specify who is responsible for authorising key tactics during an event – especially any action that involves the use of force. The chain of command should reinforce assessing strategies and options through human rights standards and charge each commander with the duty of articulating how the selected operational plan or decision complies with the aim of facilitation and the principles of legality, precaution, necessity, proportionality, accountability, and non-discrimination.

CANADA AND THE UNITED KINGDOM: Gold-Silver-Bronze Commanders.

Some jurisdictions, such as Canada and the UK, utilise a gold-silver-bronze system to apportion responsibility during a protest. Under this approach, the gold commander decides overall strategy, the silver commander makes decisions about tactics, and the bronze commanders lead officers on the ground.⁶⁴ Formal rank does not determine who takes on which role; instead, roles are assigned by considering the particular needs of the event combined with the skills and experiences of available commanders.⁶⁵ For a given event, there may be multiple bronze commanders each tasked with different responsibilities and each working with the silver commander. The silver commander assesses the consequences of each bronze commander’s operational plan to determine whether a selected strategy advances the goals of protecting and promoting the rights to protest and if it can be implemented as planned.⁶⁶ The command structure thus ensures multiple points of review and assessment where commanders evaluate if each tactic in the adopted strategy complies with the law (is it legal, proportionate, and necessary?) and what the likely consequences of police action are. The chain of command can facilitate systematic, principle-driven, and evidence-based decision-making, by considering questions like “what if the police encounter resistance to these tactics?”, and “what are the health and safety implications for [members of the policing institutions] and members of the public who may be affected by police action?”⁶⁷ This structure also increases accountability by directly attributing the decisions made during the operation to the individual responsible.

⁶⁴ See Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017).; see also, e.g., Office of the Independent Review Director (Ontario, Canada), POLICING THE RIGHT TO PROTEST: G20 SYSTEMIC REVIEW REPORT 31-32 (2012), http://www.oiprd.on.ca/EN/PDFs/G20-Systemic-Review-2012_E.pdf (last visited Apr 23, 2018) (noting how the abandonment of the UK-inspired Gold-Silver-Bronze model for the policing of the 2010 G20 Summit in Toronto, Canada, in favour of the US-inspired Incident Command Model, led to confusion in the command structure).

⁶⁵ Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017).

⁶⁶ COLLEGE OF POLICING, AUTHORIZED PROFESSIONAL PRACTICE, ‘OPERATIONS: COMMAND STRUCTURES’, 2013 available at <https://www.app.college.police.uk/app-content/operations/command-and-control/command-structures/>.

⁶⁷ *Id.*

When policing institutions have structures that incorporate multiple points of review, commanders must be familiar with the responsibilities given to each role. They should understand the scope (and limits) of their discretion and know the situations for which they must seek approval for their decisions.⁶⁸ Additionally, commanders who act beyond the scope of their authority should have their actions reviewed through both internal and external accountability mechanisms.⁶⁹ Having clear lines of decision-making allows policing institutions to minimise human rights violations that result as a consequence of arbitrary intervention, confusion, or insufficient planning.

Practice 4: Provide policing institutional leadership with specialised and ongoing training

Emphasis on adequate and ongoing training is a key component in giving meaningful effect to human rights protections. Training should, at a minimum, help commanders operationalise and internalise the principles of legality, precaution, necessity, proportionality, accountability and non-discrimination. Training should also emphasise an understanding of and relationship with the communities served. Commanders should be provided with advanced, ongoing human rights-compliant training. Properly trained leadership is key for operational decision-making consistent with the aim of protecting and promoting the rights to protest.⁷⁰ Leadership should, therefore, exemplify professionalism.⁷¹

This requires the persons in charge of the operations – either members of policing institutions or other representatives from the State – to fully understand the law and the requirements of human rights compliant policing.⁷² Put simply by Sir Denis O’Connor, an independent director of the Board of the College of Policing in the United Kingdom and former Chief Constable, leadership training should emphasise: “we’re for the law, and the law enables protest.”⁷³

Ideally, leadership should learn from experts in both the fields of policing protest and human rights.⁷⁴ Thus, policing institutions should involve human rights experts in their training process.⁷⁵ It is crucial that commanders on the ground have a thorough understanding of human rights requirements so that they may communicate those requirements to the individual officers under their command.⁷⁶ Commander training should be ongoing and include the use of scenarios designed to flesh out existing problems and identify specific tactics and approaches that lead to violence and other human rights violations.

In summary, the legal framework, institutional culture, training, and practice should consistently set the goal of protecting human rights. In this manner, the commitment to

⁶⁸ Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in West Yorkshire, Eng. (Dec. 14, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

⁷² Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London, Eng. (Dec. 15, 2017); Interview with Sir Denis O’Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

⁷³ Interview with Sir Denis O’Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

protecting the rights of all those involved in or affected by a protest will “flow from national policy to operationalization.”⁷⁷

RECOMMENDATIONS

- » States should enact, adopt, and implement legislation, administrative regulations, protocols, and policies for the protection and promotion of the rights to protest.
- » Laws, regulations, policies, and decision-making processes should make clear that protests are protected even if they are not fully compliant with any extant “formal” requirements such as notification. The legal framework should also indicate that actions of individual protesters or a sub-group participating in a protest do not render the protest itself or other individual or sub-group participants “illegal” – even where such actions may be violent.
- » The legal framework protecting the rights to protest and relevant police and security sector policies should expressly indicate that violation of the right to property by some protest participants does not justify punitive or repressive actions (such as the use of force) against other individuals or groups participating in a protest.
- » Each step of a policing institution’s decision-making process should incorporate the principles of legality, necessity, proportionality, precaution, accountability, and non discrimination.
- » Political authorities and policing institutions should establish a clear chain of command which incorporates multiple points of review and assessment and creates effective accountability mechanisms.
- » Political authorities should provide policing and security institutions with the resources and training necessary to ensure a rights-protective approach. Effective training should be ongoing; include nuanced scenarios highlighting the principles of legality, precaution, necessity, proportionality, accountability, and non-discrimination; and include case study scenarios and strategies for resolving documented challenges.
- » The involvement of armed forces in public security – including protest – should be prohibited in all circumstances. To the extent that armed forces are deployed in context of protest, their conduct must be subjected to the same standards as policing institutions.

⁷⁷ Interview with Sir Denis O’Connor, *id.*

B. NON-DISCRIMINATION AND EQUALITY

PRINCIPLES AND STANDARDS

- All people have an inalienable right to assemble.⁷⁸ The state must protect and promote all forms of assembly by any individual “without discrimination on the basis of any prohibited ground.”⁷⁹ For groups, communities, sectors, and individuals “who have historically experienced discrimination” or experience current marginalisation or other disadvantage, police and security institutions must take affirmative actions to ensure equal protection and rectify any past discriminatory dynamics.⁸⁰
- The Organization for Security and Cooperation in Europe (OSCE) has affirmed that the freedom to organise and participate in public assemblies must be guaranteed to: individuals, groups, unregistered associations, legal entities, and corporate bodies; members of minority ethnic, national, sexual, and religious groups; nationals and non-nationals (including stateless persons, refugees, foreign nationals, asylum seekers, migrants, and tourists); children, women, and men; law-enforcement personnel; and persons without full legal capacity, including persons with mental illnesses.⁸¹
- Policing institutions should be representative of the communities they serve.⁸² Thus, “[s]tates should promote diversity in law enforcement, so that communities see themselves in police. This requires a sufficiently representative body with the inclusion of women and minority [sic] groups.”⁸³ While not a guarantee in itself, policing and security institutions representative of the communities served are likely to be more successful in building relationships of trust with protest participants, allowing them to better facilitate and promote rights to protest.

GOOD PRACTICES

In many societies, certain communities and groups have been subjected to historical discrimination on the basis of various characteristics including ethnic, racial, and religious identities. In such contexts, the relationship between policing and security officials and these communities is often strained, tense, or overtly antagonistic. Discriminatory policies and practices of the state and its policing and security institutions have led to community distrust. In some countries, the strained or otherwise negative relationship between policing officials and communities is widespread, painful, and entrenched. As has been widely reported in countries such as the United States, disproportionate use of force and lethal force by policing institutions against certain communities has garnered intense public criticism.

Other groups and individuals have also been discriminated against in various contexts by policing and security institutions based on gender, sexual orientation, national identity, and political opinion. Vulnerable individuals such as children, older people, disabled people,

⁷⁸ *Joint Report*, *supra* note 1, ¶ 18.

⁷⁹ *Id.* at ¶ 15 (“including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”).

⁸⁰ *Id.* at ¶ 16.

⁸¹ OSCE Guidelines, *supra* note 36, ¶ 2.5.

⁸² *Id.* at ¶ 39.

⁸³ *Id.* at ¶ 49(a).

pregnant people, and transgender people have also been subjected to discrimination by the state. Some individuals may also become susceptible to discriminatory state action because of vulnerabilities caused by transitions (for example, in gender expression or place of residence), homelessness or unemployment, engagement in certain kinds of work such as informal labour or sex work, or use of drugs or struggles with addiction. These individuals are treated differently by states, often with particular animosity and even violence. Marginalisation, discrimination, and other violations of human rights often go hand in hand.⁸⁴

The lack of trust between police departments and communities is often a symptom of broader systematic discrimination and violence by the state and society, which fuels a lack of engagement between police and communities and encourages suspicion and antagonism.⁸⁵ As part of this dynamic, policing institutions are often perceived by communities to be another problematic arm of the state involved in discrimination that harms or ignores the needs of certain communities.⁸⁶ Policing officials sometimes initiate and perpetuate this environment of distrust through disrespectful and aggressive engagement with the communities they serve, abusing their authority through uneven enforcement and biased policing. Trust requires regular, consistent, reasonable, and respectful behaviour. To build trust in the context of protest, policing institutions must show common decency and respect while demonstrating their compliance with the law and with agreements and promises made to protesters.

ISRAEL: OR COMMISSION. In October 2000, mass demonstrations and riots took place in towns and villages in northern Israel. Palestinian citizens of those towns were protesting in solidarity with Palestinians in the occupied territories. The police used rubber-coated bullets and live ammunition to disperse the protesters, causing the death of twelve Palestinians and injury to hundreds more. Following these events, a state commission of enquiry was established. The commission presented its conclusions in 2003 and determined, among other things, that the events and their fatal consequences were the product of long-term discrimination against the Palestinian citizens of Israel. The report describes the negative and hostile attitude of the police towards Palestinian citizens of Israel and how police often perceive them as the enemy. One of the recommendations made by the commission was that the police take steps to change this attitude towards this minority group.



⁸⁴ See e.g. TERRITORIOS DE CONTROL POLICIAL: GESTION DE ILEGALISMOS EN LA CIUDAD DE BUENOS AIRES 16 (Maria Victoria Pita & Maria Ines Pacea eds., 2017), available at <http://publicaciones.filo.uba.ar/sites/publicaciones.filo.uba.ar/files/Territorios%20de%20control%20policial%20%28interactivo%29.pdf> ("La policía maneja y cotiza diferencialmente el uso de la ciudad para aquellos que cambiaron su identidad de género, su país de residencia, para los que ejercen la prostitución, viven en la calle, consumen determinadas drogas, venden ciertos productos, ofertan en lugares, formas o en cantidades específicas o tienen antecedentes penales").

⁸⁵ RICH MORIN & RENEE STEPLER, THE RACIAL CONFIDENCE GAP IN POLICE PERFORMANCE, PEW RES. CTR. (Sept. 29, 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/>.

⁸⁶ *Id.*

The distrust and, in some cases, animosity engendered between some communities and policing officials can lead to an escalation in tactics and violations of the rights to protest – including the right to life and the right to personal liberty and security. In such a context, the conditions are pre-set for distrust, escalation, overreaction, and the use of force.

To avoid this, policing institutions must develop skills for engaging with communities in a productive manner that recognises the duty to serve and the complex power dynamics between police and different groups. Dialogue and community programming, when implemented effectively, can assist in these efforts but are rarely sufficient. A serious reflection on institutional reform is needed to ensure that discriminatory practices and attitudes are prioritised, addressed, and remedied.

Practice 5: Ensure that policing institutions are representative of the communities they serve

Police institutions tend to be better able to serve communities when they recruit and retain officers who are representative of the community. Security and policing directors are generally in agreement that better recruitment is essential to improving police-community relations.⁸⁷

However, a representative policing institution is not a sufficient solution to establishing community relations. Members of the Black Lives Matter movement in the United States have indicated that while African-American police officers are, on occasion, deployed in protest contexts, this often does not prevent violence and discrimination.⁸⁸ Similar sentiments are expressed by relatives of young black people killed by the police in Brazil.⁸⁹ However, such deployment can favour an understanding of the community context if coupled with training and a culture of non-discrimination and engagement. The less representative a police department is of the community, the more trust tends to erode; this, in turn, makes it harder for police departments to recruit from the sections of the community that are not represented.⁹⁰

Policing institutions continue to be overwhelmingly male.⁹¹ In the United States in 2016, for example, 87.9 per cent of law enforcement officers were men.⁹² Clearly, such a composition is not representative of society and so recruitment of female policing officials should be

⁸⁷ Paul Bass, *The Promise and Challenges of a Representative Police Force*, NY TIMES (Aug. 17, 2016, 3:20 AM), <https://www.nytimes.com/roomfordebate/2016/08/17/how-can-police-do-a-better-job-of-recruiting-officers/the-promise-and-challenges-of-a-representative-police-force> (last visited Mar 2, 2018); see also HOUSE OF COMMONS, HOME AFFAIRS COMMITTEE, *POLICE DIVERSITY*, FIRST REPORT OF SESSION 2016-17 (UK), <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/27/27.pdf> ("In 1999, 2% of police officers in England and Wales were from a Black or Minority Ethnic (BME) background, compared to 6.5% of the population...In 2015, 5.5% of police officers were from a BME background, compared to 14% of the population").

⁸⁸ ALEX VITALE, *THE END OF POLICING* (2017) ch 1.

⁸⁹ *Nossas vidas importam: ativismos, violência institucional e direitos humanos. Diálogos Brasil - Argentina*, organized by Grupo de Pesquisas em Antropologia do Direito e Moralidades – GEPADIM/NUFEP/UFF, in alliance with the Comissão de Direitos Humanos da Associação Brasileira de Antropologia. Their testimonies are available at <https://www.youtube.com/watch?v=IpcWvorg7IQ&feature=youtu.be>.

⁹⁰ Mike Maciag, *Where Police Don't Mirror Communities and Why It Matters*, GOVERNING, (Aug. 28, 2015), <http://www.governing.com/topics/public-justice-safety/gov-police-department-diversity.html>.

⁹¹ Megan Bastick, *Integrating Gender into Internal Police Oversight*, OSCE (2014), <https://www.osce.org/odihr/118326?download=true>; Tim Prenzler and Georgina Sinclair, *The Status of Women Police Officers: An International Review*, 41(2) International Journal of Law, Crime and Justice 115 (2017), <https://pdfs.semanticscholar.org/7074/bea3789e2fae84614a8f6841f9fadd9bba03.pdf>; Tanja Van Der Lippe, et al, *Gender Policies and the Position of Women in the Police Force in European Countries*, 14 Journal of European Social Policies 391 (2004).

⁹² *Gender Distribution of Full-time Law Enforcement Employees in the United States in 2016*, Statista (last visited 1 June 2018), <https://www.statista.com/statistics/195324/gender-distribution-of-full-time-law-enforcement-employees-in-the-us/>.

a priority.⁹³ This is especially important in the context of protests where body searches should be conducted by an officer of the same gender as the protester.

Achieving a representative policing institution requires taking significant intentional steps to change established patterns that rely on fixed pipelines for recruitment and result in an insufficiently diverse applicant pool.

NORTHERN IRELAND: REPRESENTATIVE POLICING. In Northern Ireland, a long history of ethnic violence between Protestants and Catholics fuelled tensions between the Catholic community and the almost exclusively Protestant police officers.⁹⁴ More representative policing and concrete steps in recruitment were key parts of the peace process.⁹⁵ In 2001, the Royal Ulster Constabulary (the predecessor of the current police force, the PSNI) was comprised of 8.3 per cent Catholic officers but by 2010 this figure had grown to 29.38 per cent.⁹⁶ Police Superintendent of the Police Services of Northern Ireland, Nigel Goddard, explains that having “Catholic officers policing Catholic neighbourhoods matters a lot for how the police are seen.”⁹⁷ One of the key strategies used to increase the number of Catholic officers in the PSNI was to combine all applicants for a given number of openings into a single pool from which “an equal number of Protestants and Catholics were then drawn for appointment.”⁹⁸

Providing clear and real routes of advancement through mentorship and opportunities to pursue advanced degrees can make positions appealing to individuals from populations with no established pipelines to policing institutions.⁹⁹ Once young women and men see members of their community as officials, and in leadership positions, recruitment becomes easier and community engagement improves. In the words of Former Atlanta Police Chief Turner: “The best recruiters are our officers. Their friends, their family members. They think the way they think, and they look the way they look. ... It becomes easier because you have a history.”¹⁰⁰

Practice 6: Incorporate non-discrimination and equality principles into departmental culture and officer training

Comprehensive, effective and ongoing non-discrimination and equality training is vital for the protection and promotion of the rights to protest. Often training tends to emphasise security skills and tactics, failing to sufficiently incorporate critical human rights strategies relevant in the protest context. While some states have taken significant steps to incorporate

⁹³ *Recruiting and Retaining Women: A Self-Assessment Guide for Law Enforcement*, National Center for Women and Policing (2001), <https://www.ncjrs.gov/pdffiles1/bja/185235.pdf>.

⁹⁴ Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017) p. 2.

⁹⁵ Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

⁹⁶ HOUSE OF COMMONS, HOME AFFAIRS COMMITTEE, *supra* note 87.

⁹⁷ *Id.*

⁹⁸ *Id.* It is worth noting that the UK had to seek a derogation from the Council of Europe to pursue the positive discrimination (affirmative action) policies in Northern Ireland without violating the European Convention on Human Rights.

⁹⁹ Beth Schwartzapfel, *Lessons for Bratton on How to Recruit Black Officers*, THE MARSHALL PROJECT, (June 11, 2015, 2:54 PM), <https://www.themarshallproject.org/2015/06/11/lessons-for-bratton-on-how-to-recruit-black-officers>.

¹⁰⁰ *Id.*

general human rights training into police training curriculum, emphasising proportionality and necessity in decision-making and practice, there has been less explicit and systematic attention to training policing units and leadership on how to ensure non-discrimination and respect for equality in policing public events.

The typical “neutral” approach to training and tactics can fail to recognise relevant historical dynamics and current realities of social inequality and how those dynamics inevitably impact policing. As has been repeatedly demonstrated, “neutral” interventions may have discriminatory impacts. Too few policies and practices contemplate affirmative measures aimed at addressing discrimination. A good practice would incorporate effective training on (and strategies for addressing) implicit bias and dynamics of distrust born of historical and institutional patterns of inequality.

SOUTH AFRICA: COMMUNITY ENGAGEMENT IN POLICING GATHERINGS.

The South African Police Services (SAPS) has issued a national instruction requiring the police services to engage with community stakeholders in gatherings in order to promote public safety.¹⁰¹ The police services are required to play a proactive role in “identifying and diffusing any possible conflict before it escalates to violence”.¹⁰² As a result, the police services have a duty to communicate and engage with the community, the organisers, and participants of protests. In practice, however, the police services often fail to comply with this instruction and to adequately engage with protesters at gatherings while dispersing them. Additionally, pre-event engagement is often used to intimidate rather than communicate with protesters.

UNITED KINGDOM: COMMUNITY IMPACT ASSESSMENTS: One practice promoted by the College of Policing in the United Kingdom calls for Community Impact Assessments (CIA) to inform the assessment of risk and decisions on strategies. CIAs require an assessment of the “history which may be relevant to the operation or community”, and takes account of the “unique and current nature of the communities being assessed”.¹⁰³ In addition to considering the existing dynamics and vulnerabilities of certain communities, the CIA asks the police to identify the impact on “future issues, including how or when the incident may evolve and what the community impacts and perceptions may be.”¹⁰⁴

Practice 7: Acknowledge and address the power imbalance in the coercive relationship between policing institutions and communities to promote meaningful co-operation

Attempts to repair or build community relationships through engagement or dialogue have not always been successful. Imani Robinson, a London-based activist and organiser,

¹⁰¹ National Instruction 4 of 2014 Public Order Policing: Crowd Management during Public Gatherings and Demonstrations (hereinafter referred to as “National Instruction 4”).

¹⁰² Section 1(9) of National Instruction 4.

¹⁰³ COLLEGE OF POLICING, *supra* note 66.

¹⁰⁴ *Id.*

explains the perspective that “policing by consent is a false narrative because policing is a coercive interaction.”¹⁰⁵ According to this view, policing by consent is not a realistic description of the relationship between police officials and certain communities or groups. Robinson points to everyday interactions with police as providing evidence to the community of their vulnerability to policing institutions. For Robinson, failing to recognise this reality further harms relations between communities and policing institutions.

In stop and search procedures, for example, officers often approach persons of colour making demands and interrogating the individual. Only when the person questions the officer’s tactics will the officer respond that he or she had merely asked a question.¹⁰⁶ In general, stop and search procedures are a common tactic used to harass different marginalised groups, usually without any grounds for carrying out such a procedure.¹⁰⁷ Recently, in Argentina, police have started stopping buses transporting protesters in order to search all passengers, which has the additional effect of delaying their arrival at a protest.

This is an example of a common abuse of power which contributes to a lack of trust and a sense that police interactions are inherently coercive.¹⁰⁸ Thus, efforts to build community relationships are likely to be successful only when this dynamic is acknowledged and addressed by the purveyors of power: the policing institutions.

The ways in which majority white assemblies are viewed by policing institutions as opposed to assemblies comprised of people of colour is part of this history of police discrimination.¹⁰⁹ For example, in the UK, academic Dr Adam Elliott-Cooper observed that officer presence at a student protest comprised of mainly white students was “so low that [the group of protesters] were able to walk into the offices of the conservative party and occupy it with ease. This can be compared to the Notting Hill Carnival, which is the second-largest carnival in the world and is African Caribbean. This event takes place every year and it has a very heavy police presence.”¹¹⁰ Throughout Latin America, workers and marginalised groups also suffer unequal and discriminatory responses in the context of protests.¹¹¹ This inequality in responses by security services reinforces the lack of trust that these communities have towards members of the security services.

By receiving and reflecting on social feedback regarding past and current situations, policing institutions can better work towards increasing legitimacy and public trust.¹¹²

¹⁰⁵ Interview with Imani Robinson, Activists and Organizer, in London, Eng. (Dec. 15, 2017).

¹⁰⁶ How policing officials respond in these circumstances varies and there are instances of escalation in coercive and even violent tactics once an interaction is initiated. See e.g. Ronald G. Fryer, Jr, *AN Empirical Analysis of Racial Differences in Police Use of Force*, National Bureau of Economic Research Paper No. 22399 (July 2016), <http://www.nber.org/papers/w22399>;

¹⁰⁷ For more information about this practice in Argentina, see CELS, “*Hostigados. Violencia y arbitrariedad policial en los barrios populares*”, <http://cels.org.ar/hostigados.pdf>. See also <https://www.irishtimes.com/life-and-style/people/stop-and-search-garda-harassment-or-crime-fighting-1.3161508>.

¹⁰⁸ *Id.*

¹⁰⁹ Morin & Stepler, *supra* note 85.

¹¹⁰ Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017).

¹¹¹ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45.

¹¹² This idea is reflective of the academic theory of cooperative facilitation known as Corporate Social Responsibility. Following a corporate social responsibility approach would require the police to consider moral obligations, policing by consent, sustainability in their relationship with the community, and reputation in the community; James Gravelle & Colin Rogers, *Engaging Protestors: A Smarter Way for Policing Demonstrations*, 84 POLICE J. 5 (2011).

ARGENTINA: TRAINING POLICE IN HUMAN RIGHTS – ADVANCES AND SETBACKS. In 2011, the new National Ministry of Security established a democratic security system that understood protests as part of socio-political dynamics and not as an obstacle to democracy or public order. Towards that end, Administrative resolution 199 of 2011¹¹³ reformed the police educational system. It established guidelines for a new training and professional intervention model that incorporated a human rights and conflict management perspective in initial training, continuous training, and higher education. The resolution establishes that all training programs at all levels must be approved by the Ministry of Security as a political authority. The training includes modules with a humanistic profile taught by non-security professionals intended to counteract the traditional training provided to police officers.

However, since 2016, there have been a number of setbacks. In the officers' school "Juan Angel Pirker", the training program was revised: the module on "Constitutional Aspects and Human Rights" was shortened from a four-month course to a one or two month seminar. There were also ten non-security sector teachers who were dismissed without justification, raising the concern that the institution was reverting to the more traditional and security-focused training approach that fails to recognise the coercive dynamics inherent in policing.

¹¹³ Resolution 199/2011 of the Ministry of National Security of Argentina on reforms of the police education system, available at: <http://www.minseg.gob.ar/sites/default/files/Res.MS-199-2011.pdf>.

RECOMMENDATIONS

- » Police deployment should consider the rights and different needs of members of the communities they serve, including marginalised groups, and address them in the design and implementation of policing operations.
- » In the case of a lawful body search, the law enforcement officer in charge should be of the same gender as the self-identified gender of the person being searched.
- » States and policing institutions must take affirmative steps to recruit police officers who are representative of the different social sectors and groups in the communities that they serve. They should prioritise members of marginalised groups and those subject to historical discrimination. Policing institutions should also aim to be more broadly representative of community attributes such as race, gender, ethnic or social origin, colour, age, disability, religion, belief, culture, language, education, geographic location, economic and social status, and other relevant characteristics. This may include enacting legislation or adopting policies allowing for the affirmative measures needed to overcome established patterns of discrimination.
- » Policing institutions must ensure equality and non-discrimination among their officers and staff in assignments, duties, promotions and other benefits regardless of any of the attributes listed above.
- » Recruitment, hiring, and promotion criteria should be periodically reviewed to ensure that barriers to entry and advancement for members of different social sectors and marginalised groups are removed. Departments should take affirmative steps to ensure diversity in leadership.
- » Training on structural inequality and implicit bias should be comprehensive, ongoing, and delivered by experts in the field.
- » Policing and security institutions should approach community engagement with an understanding of the coercive nature of policing and the social context of police and community engagement. Communities should not be obligated or compelled to engage with policing and security institutions in dialogue-building programs, and an unwillingness to engage should never be a justification for non-service, escalation, or violence by policing institutions.

C. NOTIFICATION SYSTEMS

PRINCIPLES AND STANDARDS

- International law establishes that “[e]very person has the inalienable right to take part in peaceful assemblies.”¹¹⁴
- Regimes that require authorisation from the state before assemblies or protests are in violation of international law and the rights to protest. The right to assemble and speak cannot be dependent on the permission of the state. As the OSCE has explained, “[i]n an open society, many types of assembly do not warrant any form of official regulation. Where notification systems are in place, prior notification may only be requested where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety, and the rights and freedoms of others. Any such legal provision should require the organizer of an assembly to submit a notice of intent rather than a request for permission.”¹¹⁵
- Similarly, the ACHPR has stated that, “[r]ecognising the important expressive role that spontaneous assembly can play in a democracy, law enforcement agencies must have in place processes and procedures to ensure the facilitation of spontaneous assemblies, including in relation to known or scheduled political or social events, commemorative days, and in anticipation of decisions made by courts, parliaments and other state authorities. Lack of prior notification of an assembly does not render an assembly unlawful and should not form the sole basis of a decision by law enforcement officials to disperse an assembly.”¹¹⁶

GOOD PRACTICES

The right to assembly and speech imposes limits on the kinds of burdens and requirements the government (including policing institutions) are permitted to place on those wishing to exercise their fundamental rights. In fact, public protests “should be regarded as equally legitimate uses of public space as the more routine purposes for which public space is used (such as commercial activity or for pedestrian and vehicular traffic.)”¹¹⁷ International law prohibits systems that require official authorisation and limit the ways in which notification systems can operate.

While failure to notify authorities of a protest does not render a protest illegal or authorise its dispersion, many states still choose to have prior notification systems. Importantly, “the purpose of prior notification should be to afford authorities the opportunity to facilitate the exercise of the right as well as to take measures to protect public safety and the rights of others . . . [and] a notification procedure should be subject to a proportionality assessment,

¹¹⁴ *Joint Report*, *supra* note 1, at 5.

¹¹⁵ OSCE Guidelines, *supra* note 36, at ¶ 4.1.

¹¹⁶ ACHPR Guidelines, *supra* note 36, at ¶ 9.1. This coheres with the OSCE Guidelines, which state, at para 4.2, that: “Where legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable. Such an exception would only apply in circumstances where the legally established deadline cannot be met. The authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature.”

¹¹⁷ OSCE Guidelines, *supra* note 36.

free of charge, and widely accessible.”¹¹⁸ Nevertheless, contrary to international standards, notification is used, in some circumstances, to place excessive restrictions on the exercise of the rights to protest.

Practice 8: Protect and promote the rights of protesters in the absence of notification

Prior notification systems must reflect a “presumption in favour of assemblies” and must not be used as an authorisation system.¹¹⁹ There are assemblies that are inherently unable to participate in notification systems due to their nature. These assemblies include spontaneous assemblies or “flash mobs” and those that are organised as a way to resist an action by the state, or even address the police itself. Regardless of the nature of the protest, protesters who have notified authorities and those who have not should be equally protected and the rights to protest should be equally promoted.¹²⁰

There are a number of legitimate reasons why assembly organisers may not want to participate in a notification system or otherwise engage with state representatives prior to a protest. This might especially be the case when protests are targeting the police or other state agencies. Organisers have expressed concerns that permission requirements and pre-event communications have been used by authorities in their jurisdictions as a way to impose unjustifiable limitations on the rights to protest. In addition, it is important to note that notification systems work best in cultures, or in those circumstances where a high level of organisation on part of protest movements is the norm. In political cultures or circumstances where protest is predominantly spontaneous or reactive, notification systems may not be very useful.

The lack of notification or co-operation with pre-event discussions cannot be used as an excuse to label an assembly “illegitimate” or “unlawful”. Failure to submit prior notification does not justify limiting the rights to protest or legitimise the use of force. For example, Colombia has a National Police Code (which has recently been declared unconstitutional but remains in effect until 19 June 2019) which requires that prior notification is submitted and signed by at least three people. This is an example of an overly restrictive regime, not only because it compels notification but because of the requirement that three individuals sign and provide their personal information to the state in order to exercise their rights to protest. The Colombian Congress is set to pass a new law to regulate the right to protest and the Constitutional Court has affirmed that the State cannot deny or prevent a meeting, demonstration or protest for failure to meet the regulations, but must take alternative measures to ensure compliance.¹²¹

¹¹⁸ THE AFRICAN POLICING CIVILIAN OVERSIGHT FORUM & THE DANISH CENTER FOR HUMAN RIGHTS, DOMESTIC ADHERENCE TO CONTINENTAL AND INTERNATIONAL NORMS IN THE PRACTICE OF POLICING ASSEMBLIES IN AFRICA 8, (2017).

¹¹⁹ *Joint Report*, *supra* note 1, at ¶ 28.

¹²⁰ AMNESTY INTERNATIONAL DUTCH SECTION, POLICING ASSEMBLIES 15 (2014).

¹²¹ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45, at 12.

COLOMBIA: THE NEW PROTEST LAW AND THE CRIMINALISATION OF SPONTANEOUS PROTEST.

Following the Constitutional Court's ruling on the unconstitutionality of the National Police Code, the Court established parameters for the Congress in regulating the right to protest. One parameter was related to the duty of notification and its consequences. In general, the Court stated that there can be no consequences for failure to comply with notification requirements. However, where protesters block a road or street without notification they may be subject to criminal conviction, fines, and terms of imprisonment pursuant to Colombia's Criminal Code. Such punitive sanctions violate the rights to protest, particularly the ability to hold spontaneous assemblies.

In addition, requiring prior notification in order for an assembly to be considered as "legitimate" further disenfranchises already marginalised groups. For example, Corey Stoughton of Liberty observed that protests by members of marginalised and under-resourced communities may be more spontaneous and less likely to engage in prior notification or permit systems.¹²² As she explained, certain communities "don't have information about those processes and even if they do they don't have the level of trust that's required to believe that those processes will work for them and be worth the investment of time it takes to engage in [them]."¹²³ Clear information on whether notification systems are in place and, if so, how they work may assist in facilitating relationships of trust between policing institutions and communities.

Requiring prior notification for assemblies can also contribute to an escalating policing presence based on the assumption that a protest is "unauthorized".¹²⁴ For example, in Chile, the notification system functions as an authorisation system that also imposes many stipulations, including approved routes and speakers. Any deviation from these stipulations is seen as a reason for police to respond to the entire protest with whatever force they deem necessary.¹²⁵ Once the policing institution intervenes to compel compliance with the technical terms of the agreement or authorisation, the stage is set for escalation in tensions and tactics.

Mass and arbitrary arrests during an event violate fundamental rights and are likely to escalate tensions and undermine public trust in police.

¹²² Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017).

¹²³ *Id.*

¹²⁴ GENEVA ACAD. OF INT'L. LAW AND HUM. RTS., *Facilitating Peaceful Protests*, Academy Briefing No. 5, 13 (Jan. 2014).

¹²⁵ Skype interview with Michelle Bonner, Associate Professor of Political Science, University of Victoria (Jan. 25, 2018).

KENYA: BANNING PROTESTS IN THE LEAD UP TO PRESIDENTIAL ELECTIONS. The Minister for Interior purported to ban protests in the cities of Nairobi, Mombasa, and Kisumu in the lead-up to Kenya’s Presidential elections of 26 October 2017. The Supreme Court had annulled the results of the election that took place on 8 August 2017 and three weeks of protests followed leading up to the imposition of the ban.

The ban was an attempt by the Cabinet Secretary to translate the notification requirement under Section 5 of the Public Order Act into a requirement of authorisation. Section 5(4) only permits the police to prohibit a public meeting or procession if there is already an existent notice for a rival meeting at the same time and venue. In the alternative, it was an over-reach in the interpretation of Section 5(8)(b) of “clear, present or imminent danger of a breach of the peace or public order” in a manner that displayed political bias, particularly because supporters of the President who mounted protests against the Judiciary for annulling the August election did not face a similar ban.

The cabinet secretary suggested that the protection of public property was paramount to the decision to ban the protests and even proposed that the Chief Operating Officer of the National Super Alliance (NASA, the Opposition Coalition) be charged with destruction of property for the damage caused in past protests.

ARGENTINA: PREVENTIVE DIALOGUE IN “NI UNA MENOS”. A pre-event dialogue between organisers and officials in advance of a march on Women’s Day helped to promote and facilitate the event. After several episodes of repression and criminalisation following a demonstration for women rights in the city of Buenos Aires on 3 June 2017, the organisers (movement “Ni una Menos”) arranged a series of meetings with political authorities in order to establish an agreement on the presence and duties of policing institutions during the march planned for 8 March, Women’s Day. Other state agencies were involved in the meetings and were present during the march to oversee police activity. The protest proceeded peacefully without the active intervention of the police.

Practice 9: Ensure that where notification systems are in place, they are simple, quick, widely accessible, free, and do not have a chilling effect on the rights to protest

Where notification systems are used, they should be quick, efficient, and easy to access and use.¹²⁶ This helps ensure that notification systems do not become a barrier to the free exercise of the right to assemble.¹²⁷ Notification should be allowed in multiple urban and rural locations, have concise forms in multiple languages, and allow multiple options for submissions.¹²⁸ Some jurisdictions, for example, take submissions through the internet and social media. While the feasibility of such a system will depend on the wider infrastructure

¹²⁶ *Joint Report, supra* note 1, at ¶ 28.

¹²⁷ GENEVA ACAD. OF INT’L. LAW AND HUM. RTS., *supra* note 124.

¹²⁸ *Id.*

and resources available to the population, any mechanism that makes the process more accessible is a welcome development. Furthermore, the process must be free as individuals cannot be required to pay to engage in the exercise of their rights. Many complaints regarding the permitting systems in England pertain to police asking organisers to pay fees or insurance charges, creating a chilling effect for people seeking to exercise their rights.¹²⁹ This is impermissible under both international and English law.¹³⁰

It is not necessary for the police to administer a notification system; the system should ideally be managed by civil authorities. The state may need to provide additional services, free of charge, including traffic officers and emergency assistance not under the authority of policing institutions (such as paramedics or fire assistance), and entrust a separate civilian authority to facilitate their provision. If the notification system is administered by a policing institution, then the police bear the duty to inform emergency services and ask them to be present.

A notification should only need to include the date, estimated time, and location of the assembly. Where appropriate, the organiser's contact information may be required (though not mandatory) to facilitate engagement and communication prior to and during the event. A response from authorities should not be required for the assembly to proceed as planned. If restrictions are placed on an event with respect to location, route, time, place, or target, there must be an urgent appeal process in place for independent review and oversight. For example, in Hungary, in case of a ban imposed by the police upon notification, the organiser may challenge that restriction before the court within three calendar days. The court's decision, with no appeal, is required in three calendar days.

INDIA: "PERMITTING, NOT NOTIFYING". On paper, a no-objection certificate from the relevant state police institution is required to organise a protest. However, these certificates are often denied. As a result, in practice, the notification system operates as an authorisation system. Further, the system is primarily used for surveilling, tracking, and targeting protesters and groups such as unions.

EGYPT: PERMISSION DISGUISED AS NOTIFICATION: In Egypt, under the protest and assemblies law passed in 2013, organisers are required to submit a paper notification to their nearest police precinct. In the vast majority of the cases, the protest permission is "denied" by the police citing national security concerns. Despite the wording of the law only referring to a notification requirement, the police regularly use the language of authorisation and permission – even in media statements.

ISRAEL: PAYING USD25 THOUSAND TO PROTEST: In a recent protest against the Israeli government's intention to deport thousands of African refugees to Rwanda, the protest organisers – a group of students and social activists – were compelled to pay 100 thousand NIS (equivalent to USD25 thousand) for security expenses to exercise their rights to protest.

¹²⁹ Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017).

¹³⁰ *Id.*



ALEJANDRO PAGNI /GETTY IMAGES

ARGENTINA: “LACK OF PERMISSION” AS AN EXCUSE TO SUPPRESS AN “ITINERANT SCHOOL”. Following aggressive political rhetoric towards teachers’ unions, teachers decided to erect an “itinerant school” in front of Argentina’s National Congress: an installation that would not block entrance or egress nor transit, and which would be used for various educational and artistic activities.

During the night of 9 April 2017, while a group of teachers were preparing to set up the structure for the school, both the Federal and City of Buenos Aires police deployed law enforcement officials. Using pepper spray and batons, the law enforcement officials injured at least two people. Two others were arrested and charged with assault and resisting arrest.

Officials justified the operation by alleging that the protesters had failed to get permission. In this case, an administrative procedure was used to limit the exercise of a constitutional right, resulting in the violation of the right to protest and the repression and persecution of these teachers.

UNITED KINGDOM: PAYING TO PROTEST. Some policing institutions in the United Kingdom have sought to treat organised protests in the same way they would other privately organised events, such as festivals or sporting events. This places the responsibility on the protest organisers to apply and pay for traffic management orders and to provide for security at their event, creating a chilling effect on the rights to protest. This security can either be privately arranged or provided by the police at a cost to the organisers.

Under the Public Order Act 1986, protest organisers are required to notify the police in advance of marches, and the police can impose conditions which, if not complied with, can result in criminal charges. Police have used notification by protesters as an opportunity to make marches unavoidably unlawful if traffic management plans and security are not put in place by protesters, at their own cost.

In 2015, Liberty assisted a campaign pressure group working on climate change. The Metropolitan Police demanded that they organise their own traffic management and policing for a march through London. After publicity and the threat of litigation, the police backed down, but other policing institutions have continued to argue that they have no obligation to facilitate protest. This approach

is contrary to international law and standards in that it requires payment for the exercise of a fundamental right.

RECOMMENDATIONS

- » Notification systems should not serve as a precondition to protest and assembly and should not be used as authorisation systems.
- » If a notification system is in place, it should be used to facilitate dialogue and to help plan for better policing.
- » The authorities in charge of receiving notifications should ideally not be policing institutions.
- » If there is a notification system in place, the process should not be onerous or bureaucratic,¹³¹ and the mechanisms should be simple, quick, widely accessible, and free.¹³² Mechanisms should be easily accessible either online or in person at multiple urban and rural locations.
- » Organisers should not be required to notify authorities for extended periods in advance before an event, and the state cannot prohibit spontaneous protests or disperse them due to a lack of notification. The lack of notification or co-operation in pre-event meetings cannot be used as an excuse to label an assembly as “illegal” or “illegitimate” and is not a valid argument to disperse or criminalise protesters.
- » The failure to notify does not enable the dispersion of a protest or the criminalisation of protesters, which may result in fines or imprisonment.¹³³ In the case of spontaneous protests, a decision to disband the protest because of the absence of prior notification amounts to a disproportionate restriction on freedom of assembly.¹³⁴
- » If there are restrictions placed on an event, the restrictions must be reasonable and not overly burdensome, they must not prevent protesters from effectively exercising their rights to protest, and they must not be selectively enforced or otherwise applied in a discriminatory manner. Urgent internal and external appeal processes must be in place to guarantee independent review of the legality of any restrictions imposed.
- » The names and private, identifying information of organisers should not be required by notification systems. Information gathered through the notification process must only be aimed at helping policing institutions prepare and organise the public space to facilitate and protect the event.

¹³¹ *Joint Report, supra* note 1.

¹³² *Id.* at ¶ 28. See, also, *Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, U.N. Doc. A/HRC/20/27 (May 21, 2012) (by Maina Kiai) [hereafter 2012 UNSR Report], ¶ 28, which states that such a notification should be subject to a proportionality assessment and not unduly bureaucratic.

¹³³ *Id.* at ¶ 29.

¹³⁴ *OSCE Guidelines, supra* note 26, at p.18. As stated by the OSCE: “Where legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable. Such an exception would only apply in circumstances where the legally established deadline cannot be met. The authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature.”

D. POLICE TRAINING

PRINCIPLES AND STANDARDS

- International legal standards require that states ensure members of policing institutions have the “training and instructions necessary to engage in the context of assemblies wherever possible without recourse to any use of force.”¹³⁵ Law enforcement training “should include pre- and in-service instruction in both classroom and scenario-based settings.”¹³⁶
- Members of policing institutions must have the professional skills for handling assemblies. This applies to both those in charge of planning (how best to engage in the context of an assembly, establish a dialogue with organisers, prevent problems from occurring, anticipate risks and avoid or prepare for them, etc.), and officials policing the event (how to communicate with participants to reduce tension, negotiate, peacefully settle conflicts, and assist people in need, etc.).¹³⁷
- All law enforcement officials must receive ongoing and continuous training on policing assemblies, with advanced training being made available to any unit specifically tasked with policing assemblies.¹³⁸
- The IACHR has stated that members of security institutions must have clearly defined rules governing conduct; training; the use of equipment, communication devices, and vehicles; and personal defence and non-lethal deterrence to better equip them to perform their tasks without infringing upon other human rights.¹³⁹
- Law enforcement officials should be trained to differentiate between individual and group behaviour, and to identify and remove specific persons acting in an unlawful or violent manner while continuing to facilitate the enjoyment of the right to assemble freely with others for all other persons.¹⁴⁰

GOOD PRACTICES

Comprehensive, ongoing, and effective training is a key part of responsible protection and promotion of the rights to protest. Policing institutions have a duty to ensure that officers who are acting in the community as agents are supplied not only with adequate equipment and knowledge of security tactics but with the proper skills to protect and promote the rights of the members of the community in which they serve.

Officers must receive instruction and training on how to implement their duties in an appropriate and proportional manner. Training should prioritise de-escalation and conflict

¹³⁵ *Joint Report*, *supra* note 1, at ¶ 67(a).

¹³⁶ *Id.*, at ¶ 67(a-d).

¹³⁷ Amnesty International, *Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by law enforcement officials* at page 151. The ACHPR Guidelines state, at para 21.3.4, that law enforcement officials must receive training on the lawful, proportionate, and necessary use of force and on alternatives to the use of force, such as understanding crowd behaviour and techniques in crowd facilitation and management, de escalation, a graduated response to tension or violence, and on first aid.

¹³⁸ ACHPR Guidelines, *supra* note 36, at ¶ 7.2.

¹³⁹ IACHR, *Report on Citizen Security and Human Rights*, 31 December 2009, OEA/Ser.L/V/II. Doc. 57, para. 193.

¹⁴⁰ ACHPR Guidelines, *supra* note 36, at ¶ 20.3.

resolution. Scenario and skill-based training will better prepare officers and commanders and reduce the likelihood that they are taken by surprise and misjudge a situation.

Practice 10: Ensure that all personnel involved in protests receive comprehensive, effective, and ongoing training on human rights-compliant principles and practices

A common theme that emerged during interviews with experts and police officials in multiple jurisdictions across the globe was that officers at all levels need more effective and targeted training in order to effectively facilitate assemblies. Commanders, experts, academics, and civil society members all agreed that providing more comprehensive training would vastly improve human rights-compliant policing.¹⁴¹ Training must be thorough, effective, and ongoing to ensure officers emerge from programs with the necessary skills.

Oftentimes the only training officers receive, if any, is worst-case scenario training – and even this is frequently inadequate for handling the events these tactics anticipate.¹⁴² As Igor Burmistrov, a police officer and Russian policing expert, explained in relation to Russian policing institutions: “all training is reduced to the use of force, firing and pounding.”¹⁴³ When officers are only trained for a worst-case scenario, instead of on how to best protect and promote an assembly, this can lead to a defensive-aggressive approach to assemblies.¹⁴⁴ This training predisposes officers to regularly intervene and increases the chance that disproportionate and excessive force will be used during assemblies.¹⁴⁵

Training also tends to be infrequent, limited to a once a year course of a few hours, involving a few drills on how to put on crowd-control equipment or how to extract someone from a crowd. These sessions tend to take place only during basic training or sporadically throughout an officer’s career. In the end, officers are left with a limited skill set; not trained on how to accurately evaluate a situation and unprepared to de-escalate tense and difficult situations.

Good practice dictates that officers are effectively instructed and trained on the effective protection and promotion of an assembly. In fact, police directors generally agree training is paramount. In the words of Igor Burmistrov, “at the heart of everything is training. It is all about learning, learning and learning.”¹⁴⁶ Effective training in the overall facilitation of a protest includes the use of: appropriate tactics to ensure protection of human rights, equipment that protects protesters in the least invasive manner, restrained and proportional engagement, and a non-discriminatory approach towards individuals and marginalised communities.

¹⁴¹ See Interview with Sir Denis O’Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017); Interview with Clifford Stott, Professor of Social Psychology, Keele University, in West Kirby, Eng. (Dec. 15, 2017); Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017); Skype interview with Dr. Anja Biernert, Senior Programme Officer, Amnesty International Dutch Section (Jan. 18, 2018).

¹⁴² Skype interview with Anja Biernert, Amnesty Dutch Section (Jan. 18, 2018).

¹⁴³ Interview with Igor Nikolayevich Burmistrov, former Senior Instructor at the Training Centre of Sankt Petersburg Directorate of Interior.

¹⁴⁴ THE AFRICAN POLICING CIVILIAN OVERSIGHT FORUM & THE DANISH CENTER FOR HUMAN RIGHTS, *supra* note 118.

¹⁴⁵ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45, at 27; see also Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 *Eur. J. Soc. Psychol.* 1102-1117 (2007).

¹⁴⁶ Interview with Igor Nikolayevich Burmistrov, former Senior Instructor at the Training Centre of Sankt Petersburg Directorate of Interior.

One challenge noted by proponents is that training requires significant investments of both time and money. Some jurisdictions, confronted with limited resources, have tackled this issue by creating specialised “public order squads”, although the limitation of resources is not the only motivation for the creation of specialised teams. In South Africa and England, these squads are highly trained and have the ability to be sent to different departments around the country as the need arises. While many commanders and policing experts view the creation of these squads as a positive development, their ability to promote and protect the rights to protest depends on what their training emphasises and how much training is focused on engagement, and de-escalation and non-escalation tactics. Specialised public order squads can develop into militarised units if their training is a more specialised form of “worst-case scenario” training. If the specialised units resemble dialogue police (discussed more in Practice 16 below), with an emphasis on communication and de-escalation, then focusing training on specialised units can better protect and promote the rights to protest.

Practice 11: Mandate that training focuses on protecting and promoting the rights to protest

The initial training of members of policing institutions contributes to the foundation for officers’ subsequent practice, and conditions the skills new recruits carry with them from the academy to practice. To acculturate officers to their critical role in protecting and promoting the rights to protest, training should emphasise human rights principles and provide practical real-world examples of human rights-compliant strategies. Training should veer away from themes of crowd-control, restraint and punishment, and “military swagger.”¹⁴⁷ To the extent possible, training materials should be made publicly available.

Chief Superintendent Owen West of the West Yorkshire Police Department in the United Kingdom observed the impact that “public order” training can have on officers. He noted that trainers often over-emphasise weapons, tasers, and pepper spray, which then impacts the mentality officers adopt in the context of a protest.¹⁴⁸ In other words, what is taught in training and what is emphasised matters in how officers then approach the event. Consequently, new recruits should be taught non-violent forms of intervention that include non-escalation and effective de-escalation techniques – only using force as a last resort in exceptional situations – with the goal of protecting and promoting the rights to protest and the physical integrity of participants and bystanders.¹⁴⁹ Different experts raised the need to incorporate expertise from sources beyond the security sector to ensure training methods are informed by the best available information and expertise (e.g. evidence-based social science in the field of “protest policing” and studies on the dynamics of protest from the field of crowd psychology).¹⁵⁰

Some policing institutions have made human rights case law part of their training as a way of bringing real-world scenarios into the classroom. The Police Service of Northern Ireland explicitly incorporated human rights law and principles. Officers are taught the principles of necessity and proportionality through discussion and case studies, which are often pulled from European Court of Human Rights case law. Emphasis is placed on changing

¹⁴⁷ Interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in West Yorkshire, Eng. (Dec. 14, 2017).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; Interview with Sir Denis O’Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London (Dec. 14, 2017); Interview with Clifford Stott, Professor of Social Psychology, Keele University, in West Kirby, Eng. (Dec. 15, 2017).

the scenarios regularly so the exercise does not become rote, and the scenarios are used to translate principles into operational standards.¹⁵¹

According to Sir Denis O'Connor, former Chief Inspector of Constabulary and former police commander, who oversaw police reform during a period of austerity,¹⁵² implementing training of this kind requires an initial investment. It requires investing in a new paradigm in which emphasis is placed on prevention, precaution and more dynamic skills of engagement and facilitation. In the end, the resulting culture of human rights protection and promotion will produce long-term benefits.

ARGENTINA: PROGRAM ON THE REASONABLE USE OF FORCE AND FIREARMS. In 2012, the National Ministry of Security created the Program on the Reasonable Use of Force and Firearms,¹⁵³ as part of the professionalisation and modernisation of policing policies.

One of the key aims of the programme was to promote the welfare of police officers by providing better training on reducing the use of force. To this end, officers were evaluated on their performance in the use of force and firearms. New policies and practices in compliance with international standards, as well as new training courses, were implemented to create a system of supervision and oversight to ensure effective implementation.

In 2018, following an executive decree and an Administrative Decision, the Program was discontinued. While some of its functions are retained in other programmes, this repeal is a setback for protection of the rights to protest. The Ministry has lost an important mechanism for monitoring police performance.

Practice 12: Require that training emphasises non-violent forms of intervention, including non-escalation and effective de-escalation techniques

Good practice requires that training emphasises non-violent forms of intervention and “de-escalation tactics based on communication, negotiation and engagement.”¹⁵⁴ Numerous jurisdictions have prioritised de-escalation through the training of specialised dialogue officials – police or not – who are deployed during assemblies, the first level of engagement with a crowd (discussed in more detail in **Practice 16**). The skills taught to and used by dialogue officials can be seen by some as at odds with traditional police practices. For example, police commanders in England (where policing institutions use dialogue officials to promote communication) reported hostility between policing units and dialogue officials. Policing units – trained in the use of crowd-control weapons and equipment and focused on the use of force – referred to dialogue officials as ‘not real police’ because they were

¹⁵¹ NORTHERN IRELAND POLICING BOARD, MONITORING THE COMPLIANCE OF THE POLICE SERVICE OF NORTHERN IRELAND WITH THE HUMAN RIGHTS ACT 1998, HUMAN RIGHTS ANNUAL REPORT 18 (2008).

¹⁵² Interview with Sir Denis O'Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017).

¹⁵³ Creation of the Program on the Use of Force and the Use of Firearms in Argentina, Resolution 933/2012, available at: <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do%3bjsessionid=71EA927F426C9C106F64B30F6D26C4F4?id=204821>

¹⁵⁴ *Joint Report*, *supra* note 1, at ¶ 67.

there to talk with protesters and not empowered to use force or to make arrests. This mentality begins in training and might be addressed through institution-wide training that emphasises the facilitative role that officers should play during an assembly.

Finally, some police monitoring groups in the UK have raised concerns that dialogue officials fulfil a dual or secondary function of intelligence gathering. Deploying dialogue officers to carry out intelligence-gathering undermines the primary purpose of their deployment as it weakens the trust between protesters and dialogue officers, and influences public perceptions of their legitimacy.¹⁵⁵

Some policing institutions have made human rights case law part of their training as a way of bringing real-world scenarios into the classroom.

UNITED KINGDOM: HUMAN RIGHTS TRAINING. After a number of high-profile and poorly managed protests in 2009, the United Kingdom decided to change its police training to address some of the deficiencies that led to mismanagement.¹⁵⁶ Over the next two years, trainers (including a human rights lawyer and experts in assembly policing) travelled around the country to conduct comprehensive training at different departments. The philosophy taught became “policing by consent” with the goal of facilitating the right of free speech. Special focus was placed on the legal requirements of facilitation. Given the fact that the primary role of policing institutions and officers is to enforce the law, emphasising the obligation to facilitate as a legal obligation proved most effective. Highlighting that every assembly must be considered lawful was key.

The training focused on silver commanders, the mid-level supervisors, who were the ones controlling the action on the ground. This way the decision-making officers were the ones who best understood the role of police in assembly management. When the commanders on the ground give orders that comply with human rights standards, compliance trickles down to the officers carrying out those orders. Overall, this change in training was seen to have a positive impact on the approach taken by police managing assemblies, resulting in a facilitative approach.

¹⁵⁵ See <https://netpol.org/2014/06/17/police-liaison-intelligence-balcombe/>.

¹⁵⁶ Interview with Sir Denis O'Connor, Affiliated Lecturer, Cambridge University Institute of Criminology, in London, Eng. (Dec. 14, 2017).

RECOMMENDATIONS

- » Training should prepare officers to exercise good judgment and engage in balanced decision-making aimed at protecting and promoting the rights to protest.
- » The protection and promotion of the rights to protest must be part of basic training and academy training and should include real-life scenarios and exercises that rely on past cases to identify both poor decision-making and unlawful conduct.
- » Training programmes should be periodically reviewed by teams comprised of independent persons from different disciplines, including human rights, law, sociology, and psychology.
- » Training and instruction need to be implemented in a manner that develops skills early in an officer's career and continues regularly to ensure their maintenance and development. Skills should include an approach towards human rights protection and facilitation.
- » Non-discrimination and equality principles should be incorporated into officer training and supervision, and officers should receive comprehensive and ongoing instruction and training on structural inequality and implicit bias.
- » Policing units trained specially for deployment in protest contexts must be trained on communication, dialogue and engagement, the principles that guide the graduated use of force, and the protection of life and bodily integrity.
- » Special emphasis should be placed on training operational-level commanders on human rights standards and the reasonable use of force.
- » For a full set of recommendations on training on the use of crowd-control weapons/equipment in the context of protests, see pages 92-93 of *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons (2016)*.
- » Performance evaluations of police officials should be based on skills and principles taught during assembly policing training and reflect human rights principles.

3

TACTICS AND THE USE OF FORCE

Policing institutions must be cognisant of the effect that their presence, presentation, and tactics have on the dynamics of a protest and crowd behaviour.

OVERVIEW

This section analyses tactics used by states and their policing institutions in the context of protests, including: non-violent forms of intervention, de-escalation and non-escalation techniques, genuine engagement and recourse to specially-trained dialogue officials, the reasonable and graduated use of force, data tracking and monitoring, and the protection of the privacy rights of protesters.

A. DE-ESCALATION AND NON-ESCALATION

PRINCIPLES AND STANDARDS

- States and policing institutions are obligated by international law to “facilitate the exercise of the right to peaceful assembly.”¹⁵⁷ To that end, tactics used by police should emphasise non-violent intervention, non-escalation and de-escalation, and promote communication and engagement.¹⁵⁸ Communication involves genuine dialogue and also nonverbal presentation. This includes the appearance of officers, “the presence or use of certain [crowd-control] equipment and the body language of officials”,¹⁵⁹ and other elements that “may be perceived by organizers and participants as intimidation.”¹⁶⁰
- The physical appearance of the police during the assembly should not contribute to creating or increasing existing tensions.¹⁶¹ The IACHR has stated that it is imperative for law enforcement officials to identify themselves as such and carry visible badges that show their name or identification number, with the goal of avoiding confusion and insecurity.¹⁶² At the same time, the ACHPR has stated that in the deployment of officials to an assembly, law enforcement agencies must take into account the potential adverse influence that the visible appearance of law enforcement officials, deployment tactics, and equipping of officials at an assembly can have on the way in which an assembly develops.¹⁶³
- Operational commanders must give priority to de-escalation tactics that favour the presumption of the right to assemble freely with others – such as open communication, negotiation and dialogue with assembly organisers and participants.¹⁶⁴
- The ACHPR has stated that the dispersal of assemblies should be a measure of last resort and law enforcement officials must act on the presumption that, although they have the power to intervene in an assembly, they should only do so in circumstances in

¹⁵⁷ See ICCPR, *supra* note 3 at art. 21 and art. 19; *Joint Report*, *supra* note 1, at ¶ 49(b).

¹⁵⁸ *Id.*, at ¶ 67(b).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, at ¶ 38.

¹⁶¹ Amnesty International, *supra* note 137, at page 151.

¹⁶² Inter-American Commission on Human Rights, Annual Report 2015, chapter. 4A, para. 225-226. The appropriate identification of law enforcement officers is a key piece of control and oversight that facilitates the identification of the different intervening actors, particularly in an incident where force was used, to elucidate the facts and determine responsibilities.

¹⁶³ ACHPR Guidelines, *supra* note 36, at ¶ 14.2. The ACHPR Guidelines state further, at para 14.3, that: “Law enforcement agencies generally should deploy only the minimum number of officials commensurate to the size of the assembly, necessary to ensure the protection and safety of officials, participants, observers and bystanders, and take a graduated approach to any increase of visible policing numbers during the course of an assembly.”

¹⁶⁴ *Id.*, at ¶ 20.2. The OSCE Guidelines state, at para 5.4: “If a stand-off or other dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution. Such dialogue – although not always successful – can serve as a preventive tool to help avoid the escalation of conflict, the imposition of arbitrary or unnecessary restrictions, or recourse to the use of force.”

which it is legal, necessary, proportionate, and non-discriminatory to do so.¹⁶⁵

- States must also take measures to create a protest environment which is the least likely to lead to escalation. The IACHR has stated that the competent institutions of the state have a duty to design operating plans and procedures to facilitate the exercise of the right of assembly. This includes everything required for the activities in the assembly to take place, such as rerouting pedestrian and vehicular traffic in a certain area and escorting those participating in the gathering or demonstration to guarantee their safety.¹⁶⁶

GOOD PRACTICES

Assemblies are fundamentally about group interactions. How these groups, the assembled and police officials, interact shapes the outcome of the event. In order to protect and promote the rights to protest, policing in the context of protests does not merely mean observing and reacting to protesters. Policing institutions must be cognisant of the effect that their presence, presentation, and tactics have on the dynamics of a protest and crowd behaviour.¹⁶⁷ When police are seen to be threatening, aggressive, or indiscriminate in their tactics, their very presence may be intimidating and can become a trigger for increased tensions. On the other hand, good facilitation tactics, gear, police presence, presentation, and conduct can support building public trust and promoting non-escalation or de-escalation. Effective communication is key as it minimises unexpected situations and allows protesters to scrutinise and understand police reasoning and use of tactics. The use of dialogue officials, regulating the visibility of police and crowd-control equipment and weapons,¹⁶⁸ and avoiding the unnecessary use of force are all practices that have been successfully used around the world. However, the need to regulate police visibility in the context of protests is not a green-light for indiscriminate undercover policing – this would further undermine trust between policing institutions and protesters and raise concerns about privacy and freedom of expression.

Practice 13: Regulate police presence and visibility in the context of protests, subject to the obligation to protect the rights of protesters

The very presence of police at an event has an impact on protesters. This impact depends on a variety of factors that shape how police presence is understood – including presentation, approach, numbers, and past events involving the police. Organisers and activists interviewed for this report, especially those representing traditionally discriminated against communities or groups, spoke about the unsettling and intimidating experience that an

¹⁶⁵ ACHPR Guidelines, *supra* note 36, at ¶ 22.1. Further, at para 22.5, it states: “The authority to issue an order for dispersal should be limited to operational commanders who are present at the operation or to well-informed officers on the ground. Such orders should only be given in situations where there is a serious, widespread and imminent threat to the safety of persons, of substantial damage to property, or to the rights and freedoms of others, providing that all reasonable attempts have been made to minimise the harm.”

¹⁶⁶ IACHR, *supra* note 139: the planning of operations must consider, especially, the State’s duty of protecting, during a protest, the physical integrity of protesters and by-standers that are close by, even in relation to acts committed by private or non-state actors. See, in this regard, Access to justice and social inclusion: the road towards strengthening democracy in Bolivia, OEA/Ser.L/V/II.Doc. 34, 28 June 2007, para. 43; CIDH, Inter-American Commission on Human Rights, Report on the Situation of Human Rights Defenders in the Americas, 2006, para. 63.

¹⁶⁷ GODIAC – GOOD PRACTICE FOR DIALOGUE AND COMMUNICATION AS STRATEGIC PRINCIPLES FOR POLICING POLITICAL MANIFESTATIONS IN EUROPE, RECOMMENDATIONS FOR POLICING POLITICAL MANIFESTATIONS IN EUROPE 5 (2013).

¹⁶⁸ Regulating the visibility of police does not imply the use of undercover policing in protests.

overwhelming police presence has on festivals or demonstrations (even when organisers indicated there were no real threats to life or property).¹⁶⁹

When there is no threat of violence, visibly disproportionate police presence is likely to have an escalating or provocative effect, or a chilling effect on expressing opinions and participating freely. Police planning for such events should take into account how police presence is understood, and whether the same aims of protecting and promoting the rights to protest could be achieved through greater reliance on dialogue officials and emergency services (e.g. paramedics or fire services).¹⁷⁰ Additionally, when police are present in large groups, regulating their presence around protesters might help avoid direct contact and intimidation that may have an escalating effect. This regulation should also take into account that in certain circumstances a visible police presence is necessary to protect the rights of protesters, particularly in instances where there are aggressive or antagonistic counter-protesters.

Practice 14: Direct that members of policing institutions attend events in regular police uniforms, limiting the visibility of weapons and equipment

The appearance of members of policing institutions impacts how a crowd perceives the police and therefore the way crowds might react to police behaviour and presence.¹⁷¹ An unjustifiably threatening or intimidating presentation, especially the display of crowd-control equipment and weapons, is likely to escalate tensions. Open and unthreatening appearances may ease tensions and assist with facilitation and engagement.¹⁷²

According to the research of Professor Clifford Stott, a leading expert in the field of crowd psychology, collective actions within crowds can be characterised as reactions to the perceived illegitimacy of law enforcement actions.¹⁷³ The display of crowd-control equipment and weapons merely as a deterrence can be viewed by crowd participants as an act of unjustified and indiscriminate provocation on the part of the police. This creates a situation where the crowd unites in opposition to the police and amplifies distrust and tension. This idea is reinforced by the fact that across the spectrum of stakeholders in the protection and promotion of the rights to protest, most of the interviewees for this report agreed that officer presence in crowd-control equipment should be used sparingly – if at all. One common solution to address this dilemma is to lead with officers skilled in dialogue and have the outfitted officers, or just the equipment, nearby (but out of sight) so that they are easily deployable but not perceived as a threatening presence. This tactic was used successfully in the 2004 European Football Championships in Portugal and the approach underpins crowd policing in the UK, Sweden and Denmark.¹⁷⁴

Beyond crowd-control equipment, police behaviour – particularly how they approach and talk to protesters – carries a message to the community. Former Vancouver Deputy Police Chief LePard made a conscious effort to use a “‘meet and greet’ strategy”. “Instead of using

¹⁶⁹ Interview with Imani Robinson, Activist and Organizer, Black Lives Matter, in London Eng. (Dec. 15, 2017); Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017).

¹⁷⁰ Interview with Imani Robinson, Activist and Organizer, Black Lives Matter, in London, Eng. (Dec. 15, 2017).

¹⁷¹ Interview with Clifford Stott, Professor of Social Psychology, Keele University, in London, Eng. (Dec. 15, 2017).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

[crowd-control] officers in Darth Vader outfits, we aim to be totally engaged with the crowd. We were out there high-fiving, shaking hands, asking people how they're doing, and telling the crowd that 'We are here to keep you safe'."¹⁷⁵

Communicating the intent to promote and protect a protesters rights to protest through words and body language is part of effective presentation with the goal of de-escalation. During the 2010 Winter Olympics the Vancouver police department kept officers out of crowd-control equipment and gave clear instructions not to engage with force, even if provoked by a small number of individuals. At one of the first events during the Olympic Games, when some individuals behaved provocatively by throwing rocks and sticks and spitting at officers who were in regular uniforms, officers obeyed the command not to respond. Police did not use force and no protesters were arrested or injured. The police were seen to be reasonable, restrained, and after that night, in the words of Deputy Chief LePard: "the crowds were totally with us."¹⁷⁶

Practice 15: Prohibit the use of indiscriminate tactics and strategies

Certain tactics and strategies that policing institutions regularly rely upon to establish or regain control do not allow officers to differentiate between individuals who present a real threat to others. This is, in itself, contrary to individual and collective rights as it involves treating a protest as one homogenous group – often enabling its dispersion.

In addition to being contrary to international standards on the use of force, research into police conduct and crowd behaviour has proven indiscriminate tactics to be ineffective and shown that "undifferentiated police intervention can instigate unification of crowd members against them."¹⁷⁷ When police contain entire groups of protesters, carry out mass arrests, discharge water cannons or tear gas, mobilise mounted police, or release dogs, then all participants become a target. These actions do not consider the rights of children, older people, or others with specific needs. By relying on indiscriminate tactics policing institutions act irrationally and disproportionately, losing legitimacy and public trust.

EGYPT: THE "PILOT" GAME AND THE BARBED-WIRE TUNNEL. On 8 February 2015, on the occasion of the first football game since 2013 where fans were allowed back into stadia after a two-year suspension, restrictive interim regulations were placed on the number of supporters allowed to attend the "pilot" game. The game was scheduled to take place in a small stadium with only 10,000 tickets for sale.

The policing institution introduced a highly problematic "technique": a barb-wire tunnel that was used as the entrance between the outside gates of the stadium and the grounds, to ensure that only ticketed fans entered. The barb-wired tunnel, or cage as some witnesses called it, was demeaning and suffocating and people started climbing out of the overcrowded tunnel. The police officials fired tear gas canisters into the tunnel, resulting in a stampede and the death of 20 football fans.

¹⁷⁵ POLICE EXECUTIVE RESEARCH FORUM, MANAGING MAJOR EVENTS: BEST PRACTICES FROM THE FIELD 7 (2011).

¹⁷⁶ *Id.* at 8.

¹⁷⁷ GODIAC, *supra* note 167 at 9.

INDIA: USE OF PELLET GUNS IN KASHMIR. The indiscriminate nature of pellet guns (or bird shot) has and continues to result in serious injuries to participants and bystanders, including children and teenagers. The use of this weapon has blinded more than a 1000 people in protest contexts in India. Pellet guns were first introduced after the “summer unrest of 2010” where protests erupted due to human rights abuses by the Indian Army in Kashmir and in which 117 unarmed people, mostly youths, were killed by members of policing and security institutions. The Union Home Ministry then established a high-level committee that recommended the use of pellet guns as a mode of crowd-control in Kashmir. On 12 July 2016, 15-year-old Insha Mushtaq was hit by a hail of over 100 pellets while observing a protest from her family’s balcony. She permanently lost her vision. This is not an isolated incident as many other boys and girls have been victim to the indiscriminate use of this crowd-control weapon. Insha has become a symbol of the misuse of crowd-control weapons in Kashmir by Indian policing and security institutions.

Containment, in its various guises, is a particularly problematic tactic. The tactic involves a cordon of police officers, often in crowd-control equipment, surrounding a group of protesters to restrict or prevent their movement. If it is used, it should be limited to circumstances where separating crowds is necessary for preventing an imminent risk of harm to others – and there must always be a route open for participants to exit.¹⁷⁸ However, when the tactic is used inappropriately it infringes peoples’ right to liberty and security of person. Many of the criticisms of containment stem from the excessive use of the tactic against protesters; the practice of holding protesters for extended periods of time without access to restrooms, food, or medication; and the common practice of arresting contained protesters en masse.¹⁷⁹

RUSSIA: BOLOTNAYA SQUARE.

In 2012 during a mass protest of over fifty thousand people in Bolotnaya Square, Moscow, 12,759 police officers were deployed. Police carried out mass arrests and used violent tactics during the event. Several protesters were criminally charged and more than thirty people were convicted – many of whom were imprisoned. The criminal cases are still ongoing.



ALEXANDER ZEMLIANICHENKO JR / AP IMAGES

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017); Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London (Dec. 15, 2017). See also ADAPTING TO PROTEST, *supra* note 51.



JOSE LUIS MAGANA / AP IMAGES

UNITED STATES: THE INAUGURATION DAY PROTESTS.

During the 20 January 2017 Inauguration Day protests police indiscriminately arrested 230 protesters, including bystanders. Officers contained more than 200 protesters, many of whom had broken no laws, trapping them without giving an order to disperse and detaining them for several hours before formally arresting them. Police officers also deployed tear gas, pellet guns, concussion grenades, flash-bang grenades, and smoke flares, and they indiscriminately fired pepper spray in thirty-foot plumes. The ACLU of the District of Columbia sued the Metropolitan Police Department, alleging that officers used excessive force; arrested innocent people; detained them for up to sixteen hours without access to food, water, and bathroom facilities; and subjected some detainees to body cavity searches.

Mass and arbitrary arrests during an event violate fundamental rights and are likely to escalate tensions and undermine public trust in police. When entire groups are arrested, there rarely is a legitimate justification. Mass arrests send a message that everyone is suspect because of their group membership or their presence at an event. This can have a chilling effect on people exercising their rights. Predictably, this message sets the stage for escalation in tensions and tactics and may quickly lead to violence.

Research into police conduct and crowd behaviour has proven indiscriminate tactics to be ineffective and shown that “undifferentiated police intervention can instigate unification of crowd members against them.”

ARGENTINA: ARRESTS ON WOMEN'S DAY. On 8 March 2017 during the Women's Day march, police beat protesters indiscriminately and deployed hydrant trucks and pepper spray. The police claimed the tactics were justified to bring an end to a small fire that had been set by a number of individuals in front of the cathedral in the City of Buenos Aires. Police arrested twenty demonstrators, mainly women, who (according to subsequent criminal investigations) were not involved in the incidents. The detainees were mistreated under police control; prohibited from communicating with friends, family or attorneys; and subjected to degrading body cavity searches.

A pre-event plan on graduated use of tactics is key for effective decision-making. Planning for an event must include identifying the negative impact of indiscriminate strategies. Containment strategies should not be used before protesters are notified and given the opportunity to move or disperse (or before other targeted interventions are attempted). Numerous investigations of protests that resulted in serious injuries or deaths at the hands of police fault members of policing institutions for failing to take opportunities to de-escalate the situation. Examples of this can be seen in the Marikana Massacre in South Africa and in the Mark Duggan protests in England.¹⁸⁰ In both cases, investigators noted repeated missed opportunities for de-escalation that might have prevented the tragedies that followed.¹⁸¹ In the above-mentioned case in Buenos Aires the judicial investigation revealed that the police needed, but were not equipped with, megaphones to communicate with protesters before resorting to the use of force (water cannons, pepper spray, and mass arrests). The police also ran out of fire extinguishers to manage the small fires set up by a group of protesters.

Another factor that can influence the escalation of force is when the police officials are deployed without sufficient rest. This was discussed during the trial for a double homicide in the context of protest in Argentina in 2002, where police officers that had been on duty for over 36 hours were deployed.¹⁸²

¹⁸⁰ See MARIKANA COMMISSION OF INQUIRY, REPORT ON MATTERS OF PUBLIC, NATIONAL AND INTERNATIONAL CONCERN ARISING OUT OF THE TRAGIC INCIDENTS AT THE LONMIN MINE IN MARIKANA, IN THE NORTHWEST PROVINCE (2015); ADAPTING TO Protest, *supra* note 51.

¹⁸¹ *Id.*

¹⁸² Evidence from the trial for the murder of Maximiliano Kosteki and Darío Santillán, occurred 26 June 2002 in the province of Buenos Aires, Argentina.

RECOMMENDATIONS

- » The manner in which policing institutions act in the context of protests impacts the dynamics of protest and must be taken into account and understood by commanders and officers. Police operations must be designed with this understanding, anticipating the likely impact of police behaviour on protesters and bystanders.
- » The presence and visibility of policing institutions at an event should be determined during the operational design stage prior to the protest and should be dependent on a thorough analysis of the conditions expected during deployment. Visibly overwhelming or disproportionate deployments may escalate tensions and should be subject to the principles of necessity, proportionality, and precaution. In other circumstances, shows of force may de-escalate tensions.
- » The presence of policing institutions at protests should not evidence discriminatory treatment. The assessment of risk must be evidence-based.
- » Public space; and private space used by the general public or used for a protest must be organised to facilitate the exercise of the rights of protesters and include entrance and exit or egress.
- » Police should be well-rested and their well-being must be promoted, including sufficient access to water, food, suitable clothing, and ablutions.
- » Policing officials under investigation for serious misconduct or criminality relating to the use of force should be prohibited from engaging in any operation in the context of protests, until such time as charges are dropped or the official in question is cleared of wrongdoing.
- » Police officials should dress in regular uniform with visible name tags on display and the visibility of crowd-control equipment and weapons should be determined during the operational design stage. Crowd-control equipment and weapons should only be deployed when it becomes necessary and only used to defend the life and bodily integrity of protesters, bystanders, or policing officials.
- » Any decision to escalate force should be traceable through a chain of command that is clear in advance, documented, and makes it possible to attribute specific decisions to use force to a designated commander.

B. GENUINE ENGAGEMENT, DIALOGUE, AND THE PROMOTION OF JOURNALISTIC ACTIVITY

PRINCIPLES AND STANDARDS

- International standards indicate that the “proper facilitation of assemblies also benefits from effective communication and collaboration among all relevant parties.” Dialogue and exchange of information between state institutions and “where identifiable, assembly organizers before, during and after an assembly enable a protective and facilitative approach to be taken, helping to diffuse tension and prevent escalation.”¹⁸³ Policing institutions or other state representatives should have “an accessible point of contact” available “before, during and after an assembly”. The point of contact officer must be “trained in communication and conflict management.”¹⁸⁴
- The ACHPR has stated that law enforcement officials must make every effort to communicate with assembly organisers and/or participants as soon as practicable after notification of intention to hold an assembly is given or knowledge is gained of an intended assembly. Officials must be able to evidence their attempts to engage in such communication.¹⁸⁵
- During an assembly, law enforcement agencies should attempt to engage in continuous dialogue and negotiation with assembly organisers and participants to proactively address any issues that may arise, and should maintain open communication with all relevant stakeholders.¹⁸⁶
- As stated by the OSCE, “[t]he role of the media as a public watchdog is to impart information and ideas on matters of public interest – information that the public also has a right to receive. Media reports can thus provide an otherwise absent element of public accountability for both organisers of assemblies and law-enforcement officials. Media professionals should, therefore, be guaranteed as much access as is possible to an assembly and to any related policing operation.”¹⁸⁷
- NGOs and civil society organisations also play a crucial watchdog role in any democracy and must, therefore, be permitted to freely observe public assemblies.¹⁸⁸
- If an assembly is dispersed, observers of an assembly (including journalists) must not be prevented from observing and recording the dispersal operation.¹⁸⁹

¹⁸³ *Joint report, supra* note 1, at ¶ 38. The IACHR recommends designating spaces for communication and dialogue ahead of the demonstration, and for state authorities to engage and liaise with protesters to coordinate protest activities and public security operations to avoid conflict situations. See IACHR, *supra* note 166, at ¶ 68(e). See, also, ACHPR Guidelines, *supra* note 36, at ¶ 6.3, which states that law enforcement agencies must allow for and facilitate the involvement of third parties – such as national human rights institutions and civil society organisations – in dialogue and mediation with assembly organisers prior, during and after assemblies, and provide prompt and relevant information to such third parties for this purpose.

¹⁸⁴ *Id.* at ¶ 49(d). In this regard, the ACHPR Guidelines state, at para 6.3: “To facilitate effective communication, law enforcement agencies should appoint specially trained officials to act as communication liaisons with stakeholders.” The ACHPR has also stated that law enforcement agencies should have and make known a communication mechanism to promote a collaborative and inclusive approach to the preparation, planning and policing of assemblies, which should be underpinned by principles of transparency, community partnership, and the proactive dissemination of all key information to stakeholders. ACHPR Guidelines, para 6.2.

¹⁸⁵ ACHPR Guidelines, *supra* note 36, at ¶ 11.2.

¹⁸⁶ *Id.* at ¶ 13.1-13.2.

¹⁸⁷ OSCE Guidelines, *supra* note 36, at ¶ 5.10.

¹⁸⁸ *Id.* at ¶ 5.9.

¹⁸⁹ ACHPR Guidelines, *supra* note 36, at ¶ 22.7.

- According to the ACHPR Guidelines, “[a]ll persons have the right to record an assembly, including the right to record the law enforcement presence and action. This right must be protected by law with disciplinary procedures in place for law enforcement officials who seize or damage any equipment, except where such seizure is authorised by an independent judicial authority. Disciplinary procedures refers to internal disciplinary sanctions effected through policing procedures, as well as external criminal procedures.”¹⁹⁰

GOOD PRACTICES

Genuine engagement and open communication are an essential component of the protection and promotion of the rights to protest. When state institutions and protesters are able to understand each other’s aims and reasoning they are less likely to resort to violence, act arbitrarily, or act out of confusion or fear.¹⁹¹ However, a lack of dialogue or a reluctance from protesters to engage in dialogue with police officials does not justify the use of more restrictive tactics.

Effective engagement requires having civil or police officers trained in communication, easily identifiable to the people (outfitted in recognisable clothing) and focused on sharing key information with protesters. To create a channel of effective dialogue, the exchange should not be limited to the formal aspects of the protest but also to any demands the protesters may have. The interlocutors of the state must be in a position to channel these demands to the offices that may be able to offer a political response.

Direct communication with organisers is not the only tool or practice for promoting openness and engagement with the public. Some policing institutions have systematised processes in place to facilitate and promote access by the media (traditional and citizen journalists), a practice that evinces trust in the public and confidence in their own internal policies and procedures. Transparency and engagement can be promoted through sharing of information via social media, traditional media, independent monitors, or designated point of contact officers. Importantly, this should not be limited to traditional media. Citizen journalism, or “independent reporting, often by amateurs on the scene of an event, which is disseminated globally through modern media, most often the Internet”, is legitimate and should be unobstructed by policing institutions.¹⁹² This includes the right to “record back”, a person’s right to record “an interaction in which he or she is being recorded by the state agent”.¹⁹³

Pre-, during, and post-event communication with assembly organisers is a good tactic to increase the protection and promotion of the rights to protest. However, engagement with the police should be optional and at the discretion of organisers. Some organisers have experienced misuse of this tactic, with law enforcement using the pre-event communication as a way to impose limitations and overly burdensome requirements on organisers and participants¹⁹⁴ – or even as an opportunity to initiate illegal surveillance actions against organisations or communities. If organisers do not wish to communicate beforehand or

¹⁹⁰ *Id.*, at ¶ 15.6.

¹⁹¹ ADAPTING TO PROTEST, *supra* note 51 at 9.

¹⁹² Frank la Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* ¶ 62, U.N. Doc. A/65/284 (Aug. 11, 2010).

¹⁹³ *Joint Report*, *supra* note 1, at ¶ 71; *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Use Of Information And Communications Technologies to Secure the Right to Life* ¶ 118, U.N. Doc. A/HRC/29/37 (Apr. 24, 2015).

¹⁹⁴ Skype Interview with Anja Biernert, Senior Program Officer, Amnesty International Dutch Section (Jan. 18, 2018).

during an event, as is at times the case when a protest is directed at policing institutions, that decision should be respected.

SOUTH AFRICA: MEDIA LIAISON BY POLICE OFFICIALS. Standing Order 156 in the South African Police Service provides guidance on how the police service should engage with the media when exercising their duties. The order provides that police officials have a duty to treat media officials with dignity and courtesy and the media may not be prohibited from taking photographs or making visual recordings. However, the definition of media officials in the order does not include citizen journalists. Further, the order is not always adequately implemented by police officials. Journalists are often prevented from covering protests or manhandled by police officials. For example, journalists were intimidated and harassed by the police as well as some protesters during #FeesMustFall movement's protest outside the South African Union buildings in 2015.

Practice 16: Designate dialogue officials or employ other mechanisms to ensure effective communication with protesters

When protesters and state interlocutors discuss what will occur before, during, and after the protest and are able to communicate prior to the assembly about their mutual expectations, policing institutions are better able to protect and promote rights. In West Yorkshire, England, Chief Superintendent West makes it a point to meet with organisers in the community when he is informed that an assembly will take place. He walks them through the selected route or area and outlines the police department's role and strategy during the event, and the logistics for the day.¹⁹⁵ For Chief Superintendent West, this meeting ideally results in a "Memorandum of Understanding" that all parties will sign so that organisers and participants are aware of how the department plans on managing the event.¹⁹⁶ This is often referred to as the "no surprises" approach, a strategy intended to ensure that all parties can reasonably anticipate how the other will act. Superintendent Nigel Goddard from Northern Ireland also recognises the importance of transparency and communication with assembly participants even without a pre-event exchange and agreement. When discussing working with large assemblies, he explains that "the key is communication. If you get the process across and let [the protesters] see you as being fair, then they will see your actions as legitimate."¹⁹⁷ Ultimately, people tend to feel more comfortable with a police presence when they are aware of their policies and tactics.

ISRAEL: THE SOCIAL JUSTICE DEMONSTRATIONS AND THE "POLICE MEDIATOR": During the Social Justice Demonstrations in 2012, thousands of protesters marched through Tel Aviv, blocking main traffic arteries for long periods of time. The police recruited a "police mediator" who facilitated communication between the organisers and the police. The police allowed the march to proceed and there were no arrests, little police violence, and no use of crowd-control measures.

¹⁹⁵ *Id.* at 3. Interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in London, Eng. (Dec. 14, 2017).

¹⁹⁶ *Id.*

¹⁹⁷ Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 2020, 2017).....



MARK WALLHEISER / STRINGER

UNITED STATES: THE ALTON STERLING PROTESTS IN BATON ROUGE. After the July 2016 police shooting of Alton Sterling in Louisiana, police used excessive force, physical and verbal abuse, and wrongful arrests to disperse protesters who were gathered peacefully in Baton Rouge to speak out against the police killing. Eyewitness accounts indicate that police in crowd-control equipment with assault rifles lunged and grabbed at peacefully assembled people and threw them to the ground. Police used mace, taser charges, and pepper spray on non-violent protesters and kept live automatic weapons trained on peaceful crowds. Police officers gave contradictory and confusing orders to protesters, then arrested them for non-compliance. Police arrested nearly 200 people including journalists and legal observers – some for failure to disperse, even though they were not given adequate notice or opportunity to leave. Police also forced protesters from public forum spaces including sidewalks, neutral ground, and public property. The ACLU of Louisiana filed a lawsuit against the Baton Rouge Police Department seeking an emergency order to ensure that the police in Baton Rouge obey the Constitution.

Communicating with organisers and protesters is a skill in which officials must be thoroughly trained. To ensure institutional capacity for effective communication, political authorities and policing institutions have begun to employ dialogue officials – police officials or civil servants – in the context of protests. Dialogue officials are specialised units of officers trained in communication and in de-escalation. The primary role of these officers is to engage with the public, identify potential risks to the exercise of rights, and avoid conflict through ongoing dialogue.¹⁹⁸ They do not have the power to arrest or to use force, making

¹⁹⁸ ADAPTING TO PROTEST, *supra* note 51.

them less threatening and more approachable. These officers wear special vests to indicate their function and also to be visibly distinct from other officers so that protesters can identify them. The use of dialogue officials began in Sweden and has since made its way to numerous other jurisdictions, including England, Germany, Portugal, Ukraine, Argentina and Canada.

Practice 17: Protect and promote journalistic activity to increase transparency, promote genuine communication, and ensure accountability

The work of journalists and photojournalists is fundamental to the exercise of rights by protesters. Media coverage and social networks can function as loudspeakers, amplifying and facilitating public expression. Attendance at events by journalists and photojournalists operates as a form of oversight and control of state action. Sometimes, the mere presence of cameras can discourage protesters from resorting to violence. When repressive practices do occur, the journalistic record provides an independent portrayal of events and promotes accountability and transparency.¹⁹⁹

Journalists also play an important role for policing institutions as a key influencer of public confidence in policing. Journalistic activity records and reports police activity to the public. Savvy policing institutions, aware of this reality, see the value of ensuring accurate and complete reporting – which in turn can also deter misleading or false allegations against the police.

In Northern Ireland, as part of an effort to increase trust, police commanders began to change the way in which they dealt with journalistic activity in protests in the early 2000s.²⁰⁰ Policing expert and former Commander Stephen White explains that police should “[b]e transparent. If you have made a sensible, reasonable plan then there is no downside to bringing the media in, so people know you are being sensible and reasonable in your approach.”²⁰¹ When police conduct is seen as fair, it is seen as legitimate; this builds trust and prevents misunderstanding and miscommunication that can lead to escalation of tensions and even violence.²⁰²

More open engagement with the media has become part of the British Model. In a report reviewing police practices and recommending changes for assembly management, Her Majesty’s Chief Inspector of the Constabulary called attention to the reality that (regardless of what the police may wish were the case) there is a “high volume of publicly sourced footage of the protests, [as a result], individual and collective police actions are under enormous public scrutiny.”²⁰³ To advance accurate reporting and allow the public to understand police behaviour and strategies, the following ideas were suggested: “an improved police event website; embedding journalists with frontline police; police briefing at the scene, to provide information that is contextualized by what is happening on the ground; and making frontline officers experience available after the event.”²⁰⁴

¹⁹⁹ “EL ROL DE PERIODISTAS Y REPORTEROS”, en El derecho a la protesta social en la Argentina: <http://www.cels.org.ar/protestasocial/#periodistas>

²⁰⁰ Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

²⁰¹ *Id.*

²⁰² See Interview with Clifford Stott, Professor of Social Psychology, Keele University, in London, Eng. (Dec. 15, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 2020, 2017).

²⁰³ ADAPTING TO PROTEST, *supra* note 51, at 14–25.

²⁰⁴ *Id.*, at 9.

Protecting and promoting journalistic activity, not just the traditional media, is an essential element of transparency and open engagement. This means that citizen journalism and “recording back” must not be obstructed or prevented. States have attempted to place limits on peoples’ right to record public events and police conduct by enacting legislation or retaliating through threats, arrests, and the use of force when people record public officials. For example, in 2015 Spain enacted Citizen Security Law which imposes serious fines (as much as €30 thousand) for the unauthorised publication or dissemination of damaging photos of the police.²⁰⁵

States around the world have shut off or slowed down internet access or cellular services (including shutting off texting functions and blocking communications applications like WhatsApp and Telegram) during events in an effort to frustrate access to and sharing of information.²⁰⁶ In extreme cases, states have shut down the internet. Policing institutions have also retaliated against individuals for exercising their right to record by conducting searches and seizures; pushing and striking protesters and bystanders; confiscating smartphones, tablets, cameras, or other recording devices, and deleting the recording; and arresting individuals.²⁰⁷

These practices undermine not only the freedom of expression and basic security of protesters and the public at large but impoverish public debate and frustrate democratic accountability. As one judge in a case involving the right to record and police retaliation in the United States put it: “officers are public officials carrying out public functions, and the First Amendment requires them to bear bystanders recording their actions. This is vital to promote access that fosters free discussion of governmental actions, especially when that discussion benefits not only citizens but the officers themselves.”²⁰⁸

ARGENTINA: THE CASE OF DANTE BARISONE. In December 2017, a large protest was held in Buenos Aires in opposition to changes in the pension and retirement system. Journalists and attendees recorded (through videos and photographs) police actions during the event. Federal Police agent Dante Barisone was recorded running over a pedestrian during the protest with his police motorcycle. A judicial investigation into his conduct is currently underway.

²⁰⁵ Raphael Minder, *Spain's New Public Safety Law Has its Challengers*, NY TIMES (Jun. 30, 2015), <https://www.nytimes.com/2015/07/01/world/europe/spains-new-public-safety-law-has-its-challengers.html>. See also Roxane Cassehgari and Daniel Simons, *Caught on Film: What the Law Says About Filming the Police in Europe* (Jun. 8, 2017), <https://www.opensocietyfoundations.org/voices/caught-film-what-law-says-about-filming-police-europe>.

²⁰⁶ See RONALD DEIBERT, ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (2008).

²⁰⁷ See *State v Russo*, 406 P.3d 137 (SC Hawai'i 2017); *Gilk v Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Turner v Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (“We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police.”); *Smith v City of Cumming*, 212 F.3d 1331, 1333 (11th Cir. 2000) (recognizing the right to “photograph or videotape police conduct [because it] protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v Seattle*, 55 F.3d 436 (9th Cir. 1995); *ACLU of Illinois v Alvarez*, 679 F.3d 583 (7th Cir. 2012). See *Pentikainen v Finland* (2017) 65 E.H.R.R. 21, 817 (“The ‘watch-dog’ role of the media assumes particular importance in such contexts since their presence is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny.”) See also Matt Ford, *A Major Victory for the Right to Record Police*, THE ATLANTIC (Jul. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/>; Roxane Cassehgari and Daniel Simons, *Caught on Film: What the Law Says About Filming the Police in Europe* (Jun. 8, 2017), <https://www.opensocietyfoundations.org/voices/caught-film-what-law-says-about-filming-police-europe>; Brian Stelter and Brad Stone, Web Pries Lid of Censorship by Iranian Government, StarNewsOnline (Jun. 23, 2009), <http://www.starnewsonline.com/article/NC/20090623/News/605058086/WMM/>.

²⁰⁸ *Fields v City of Philadelphia*, 862 F.3d 353, 362 (3rd Cir. 2017).

IRELAND: THE JOBSTOWN TRIAL. On 15 November 2014, a protest against water charges in Jobstown, Dublin involved a Government Minister and her assistant being blocked from leaving a public event for a number of hours. Subsequently six protesters, including a TD (member of parliament) were arrested and charged with the offence of false imprisonment. During their trial on these charges, which lasted for eight weeks, all the accused men were acquitted. The viewing of video footage from police sources and from protesters was seen as having a significant impact on the case.

RECOMMENDATIONS

- » State officials involved in promoting and protecting the rights to protest should undergo specialised, comprehensive, and ongoing training on communication and engagement strategies.
- » Where possible, the first step in planning for an event should be to establish clear lines of communication between protesters and the state.
- » Recourse to specialised dialogue officials in the context of protests can be an effective practice, especially when dialogue officials are exclusively focused on communication and do not carry out policing functions (i.e. making arrests or using force).
- » Dialogue officials should aim to establish agreements regarding the formal aspects of the protest (route, time, etc.). If the protest includes the relaying of demands, dialogue officials should open a line of communication to ensure that the demands are heard by relevant state institutions or private parties.
- » The right to journalistic activity and the right to record policing operations in the context of protests must be protected and promoted. No special or traditional journalistic credentials should be required to allow journalistic activity in the context of protests.
- » Journalistic or photographic tools and materials (including smartphones, tablets, microphones, and cameras) should not be confiscated or erased and their use should not be obstructed.
- » Internet access should not be blocked and mobile communications should not be monitored, intercepted, or limited. The use of mobile triangulation technologies such as Stingrays should be prohibited and specific applications, such as WhatsApp and Telegram, should not be blocked.
- » The rights of members of the media (including members of the independent media, citizen journalists, bloggers, photographers, and independent monitors) should be protected and promoted. These journalists should be informed of police strategies through pre-event briefings or during event communications.

C. RESTRICTIONS ON THE USE OF FORCE

PRINCIPLES AND STANDARDS

- The use of force during the management of assemblies is strictly constrained by international human rights law.²⁰⁹ Force may only be used when “strictly unavoidable” and, if used, it must comply with “the principles of legality, precaution, necessity, proportionality, accountability, [and non-discrimination].”²¹⁰
- The UN Human Rights Council has called upon states “as a matter of priority, to ensure that their domestic legislation and procedures are consistent with their international obligations in relation to the use of force, in particular the principles of necessity and proportionality.”²¹¹
- According to the ACHPR, the planning, preparation, and conduct of an assembly must take operational, tactical, and other measures to avoid the use of force. Where force is unavoidable, the harmful consequences of the use of force must be minimised.²¹² If the use of force is necessary and proportionate, but the need for force could reasonably have been prevented from arising in the first place by exercising all precautions in planning and preparation for an assembly operation, operational commanders must be held accountable.²¹³
- The use of any weapon requires extensive training and clear standards for the appropriate use of that weapon.²¹⁴ Firearms [armed with live ammunition] and autonomous weapons “should not be used in the policing of assemblies under any circumstances.”²¹⁵
- “There should be a focus on effective independent accountability mechanisms” and “[s]tates must make their laws on the use of force publicly available”²¹⁶ to assist the public in understanding the extent of the police powers and the conditions for accountability.²¹⁷
- The use of crowd-control weapons (CCWs) “must be subject to independent scientific testing and approval, and used responsibly by well-trained law enforcement officials, as such weapons may have lethal or injurious effects if not used correctly or in compliance

²⁰⁹ See *Joint Report*, *supra* note 1 at 12.

²¹⁰ *Id.* at ¶ 50. According to the ACHPR Guidelines, *supra* note 36, at ¶ 21.1.2: “The use of force is an exceptional measure. In carrying out their duties, law enforcement officials shall, as far as possible, apply non-violent methods before resorting to the use of force and firearms. Force and firearms may only be used if other means of achieving a legitimate law enforcement objective are ineffective or unlikely to be successful. Law enforcement officials must, as far and for as long as possible, differentiate between peaceful assembly participants and those who engage in violent acts. An assembly should be deemed peaceful if its organisers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful. ‘Peaceful’ shall be interpreted to include conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties. Isolated acts of violence do not render an assembly as a whole non-peaceful.” The OSCE has stated that: “If the force used is not authorised by law, or more force was used than necessary in the circumstances, law enforcement personnel should face civil and/or criminal liability, as well as disciplinary action. Law-enforcement personnel should also be held liable for failing to intervene where such intervention might have prevented other officers from using excessive force.” OSCE Guidelines, *supra* note 36, at ¶ 5.6.

²¹¹ Human Rights Council, Resolution A/HRC/25/L.20, The promotion and protection of human rights in the context of peaceful protests 24 March 2014, para. 10.

²¹² ACHPR Guidelines, *supra* note 26, at ¶ 21.1.1.

²¹³ *Id.*

²¹⁴ *Id.* at ¶ 67(d).

²¹⁵ *Id.* at ¶ 67(e)–(f). As stated in the ACHPR Guidelines, at para 21.2.4: “Firearms are not an appropriate tactical tool for the policing of assemblies. Firearms must never be used to disperse an assembly. The indiscriminate discharge of firearms into a crowd is a violation of the right to life.”

²¹⁶ 2014 UNSR Report, *supra* note 8, at ¶ 123-124.

²¹⁷ *Id.* at ¶ 29.

with international law and human rights standards. States should work to establish and implement international protocols for the training on and use of less-lethal weapons.”²¹⁸ “In particular, equipment should be assessed for accuracy, reliability and its ability to minimize physical and psychological harm. Equipment should be procured only where there is sufficient capacity to train officers effectively on its proper use”.²¹⁹ Additionally, the IACHR considers it advisable to implement systems of recording and control of ammunitions.²²⁰

- The UN Human Rights Council has urged states to pay particular attention to the safety and protection of women and women human rights defenders from acts of intimidation and harassment as well as gender-based violence, including sexual assault, in the context of peaceful protests.²²¹
- The requirement to protect life means that lethal force may not be used intentionally merely to protect law and order or to serve other similar interests. For example, it may not be used only to disperse protests, to arrest a suspected criminal, or to safeguard other interests such as property. The primary aim must be to save life. In practice, this means that only the protection of life can meet the proportionality requirement where lethal force is used intentionally.²²²

CURRENT PRACTICES

The lawful exercise of the use of force by policing institutions is a key component in protecting and promoting the rights to protest. However, more often than not, cases studies across different jurisdictions evidence abuses and misuses of force, including the misuse of CCWs, by policing institutions. The use of force by policing institutions in the context of protests remains of utmost concern due to the number of deaths and injuries sustained by protesters at the hands of police officers.

The disproportionate use of force is a complex problem and is due to several factors, including: limited and insufficient training; inadequate and outdated norms and protocols for intervention; deficiencies in the preparation and design of operational plans; problems in institutional design; the absence of functioning internal and external oversight mechanisms; and, in some occasions, deficiencies in the crowd-control equipment and weapons used.

Force in the context of protests should only be used to protect the right to life and the physical integrity of protesters, bystanders, and police officers, and it must always comply

²¹⁸ *Joint Report, supra* note 1, at ¶ 55.

²¹⁹ *Joint Report, supra* note 1, at ¶ 67(c). A dividing line cannot be drawn between lethal and non-lethal weapons; as stated by the former UNSR on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns: “[I]t must be remembered that almost any use of force against the human person can under certain circumstances lead to loss of life or serious injury”. See United Nations, General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Note by the Secretary-General, A/69/265, 6 August 2014, at ¶ 69.

²²⁰ IACHR, *supra* note 166, at ¶ 68(b).

²²¹ Human Rights Council, Resolution, *supra* note 211.

²²² 2014 UNSR Report, *supra* note 8, at ¶ 72. In this regard, the ACHPR Guidelines state, at para 21.1.4: “The intentional use of lethal force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life, thus making it proportionate, and all other means are insufficient to achieve that objective, thus making it necessary. Assessment of legality, necessity and proportionality should be based on the relevant facts with a requirement for reasonable grounds, rather than mere suspicion or presumption, of risk or harm.”

with the principles of: legality, necessity, proportionality, precaution, non-discrimination and accountability.²²³

Proper training, tactics, and equipment are all needed to ensure that unlawful and disproportionate force is not used. Precautionary measures should be taken during preparation for an event to ensure the use of force does not become necessary. This includes training officers to exercise good judgment and improve their communication and de-escalation skills.

With the growing use of crowd-control weapons, there is a need for human rights-compliant regulation surrounding the procurement, development, testing, and use of CCWs. The principle of precaution is undermined when there is no comprehensive and effective regulatory framework in place. Any decision to use force must be made with full consideration of the likely and possible consequences. Whether a particular command or action complies with the principles of necessity, proportionality, and non-discrimination depends on a full assessment of likely and possible consequences.

Practice 18: Ensure that extensive precautionary measures are in place when planning for engagements in the context of protests

Whether the use of force is necessary, proportionate, and legal will often depend on institutional design, community engagement, decisions made, and actions taken well before the moment that force is used.²²⁴ There is no exhaustive list of required precautionary measures but certain kinds are clearly relevant and useful. For example, engaging protest organisers and protesters before or at the start of an event can often be an invaluable precautionary measure. By both establishing clear lines of communication between security institutions and organisers and establishing a mutual understanding of the goals of the protest and how the protest will be managed, the dangers of miscommunication and escalation can be mitigated. In the words of Chief Superintendent West, “if you have talked yourself to death in a room with partners, then you have done as much as you can.”²²⁵ In Latin America, “in most cases force is used without having attempted dialogue with protesters.”²²⁶ When the use of force is greater than the minimum strictly necessary to achieve a pressing and legitimate end, the use of force cannot be justified and falls foul of the precaution principle.

Another related key precautionary measure is accurate and effective risk assessment and goal articulation by policing institutions. The more clearly the police leadership can articulate their aims for an event and how particular plans and tactics are suited to those defined aims, the less likely that circumstances will escalate to the use of force. Gary White, a former police commander in Northern Ireland with extensive experience managing protests and parades, spoke about the need to make sure a risk assessment takes place before the event and before any decisions are made on what equipment should be used.²²⁷

²²³ UN Basic Principles, *supra* note 8.

²²⁴ See, e.g. *Frumkin v Russia*, App. No. 74568/12, Eur. Ct. H.R. (2016) (finding that police use of force could have been prevented had the department taken measures earlier on to engage with the protesters).

²²⁵ Interview with Owen West, Chief Superintendent, West Yorkshire Police Force, in West Yorkshire, Eng. (Dec. 14, 2017).

²²⁶ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45 at 24–26 (“There is nearly no experience in the region of political negotiations as a way to mediate conflicts”).

²²⁷ Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017).

Superintendent Nigel Goddard, who manages the tactical support groups for the Police Services of Northern Ireland and decides what special equipment should be used for any given event, made a similar point.²²⁸ Superintendent Goddard typically co-ordinates with the operational planning commander of the department tasked with managing the event. The operational commander will set out the plan for the event, identify possible risks and how to respond to them. Superintendent Goddard will then evaluate the risk assessment and whether the particular piece of equipment is truly necessary or if the specifically identified objective can be accomplished by other means.²²⁹ In short, explicitly defining anticipated challenges allows for assessment at the command level. Such systematised review is crucial for evaluating the necessity and proportionality of the means identified for accomplishing the aims.

Practice 19: Consider likely or possible consequences of each command decision or tactic used to determine compliance with necessity, proportionality and non discrimination principles

Unnecessary and disproportionate use of force is often the result of improper training and a lack of understanding on the part of police or public authorities. Protesting, occupying public places, and creating some amount of disorder is part of the exercise of fundamental rights that policing institutions are obliged to protect and promote. Decisions may be made to “restore order” without a previous assessment of what will be required to accomplish that aim or what consequences will result. The College of Policing manual in the United Kingdom, for example, instructs leadership to have “clarity of command decisions, including the foreseeable levels of force that officers may use, e.g., officers directed to disperse a crowd may individually use force to do so. Although those officers would have to justify their use of force, the commander should also consider whether they foresaw the use of force, whether use of force was necessary and whether any further clarity was required regarding the level of force to be used.”²³⁰ Proportionality of a measure must be weighed in the light of these likely consequences, as must preventive measures.

Similarly, the likely consequences of using certain CCWs must be evaluated to determine whether the use of such weapons complies with necessity, proportionality, and non discrimination principles. Weighing non-discrimination from a gender perspective, the use of some CCWs against protesters who are pregnant might be particularly life-threatening to the pregnant person and foetus. The use of chemical agents is particularly dangerous as various chemical agents, including tear gas and pepper spray, may cause miscarriages.²³¹ Chemical agents used as crowd-control weapons have been linked to miscarriages since the late 1980s, and Physicians for Human Rights has called for more studies to be conducted on the subject.²³² More recently, a spike of miscarriages has been reported in Bahrain after the government engaged in large-scale use of CCWs against its citizens.²³³ The

²²⁸ Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

²²⁹ *Id.*; see also POLICE EXECUTIVE RESEARCH FORUM, *supra* note 175 at 56 (“The theory of graduated use-of-force in response to escalating disorder is based on what is both reasonable and proportionate to the threat. An appropriate response must be stressed at all times, especially given the amount of media attention that focuses on police when disorder erupts during mass demonstrations, and how this attention affects the public perception of the department.”).

²³⁰ COLLEGE OF POLICING, PUBLIC ORDER: POLICE USE OF FORCE, <https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/police-use-of-force/> (last modified Oct. 23, 2013).

²³¹ Craig Rothenberg et al., *Tear Gas: An Epidemiological and Mechanistic Reassessment*, 1378 ANN. N.Y. ACAD. SCI. 96, 99 (2016).

²³² PHYSICIANS FOR HUMAN RIGHTS, WEAPONIZING TEAR GAS: BAHRAIN’S UNPRECEDENTED USE OF TOXIC CHEMICAL AGENTS AGAINST CIVILIANS 28-29 (2012), <https://www.thenation.com/wp-content/uploads/2015/04/Bahrain-TearGas-Aug2012-small.pdf>.

²³³ *Id.* at 4.

government of Chile briefly banned the use of chemical agents by police departments and law enforcement agencies after a report linked the use of the weapon to miscarriages.²³⁴

Alongside the detrimental health effects of CCWs, remotely piloted aircraft or drones are increasingly deployed in the context of protests to discharge CCWs, such as tear gas. These armed or weaponised drones often discharge CCWs from the air which predispose their discharges, in the form of projectiles or canisters, to striking protesters in the upper portions of their bodies or their heads, which can lead to death or serious injury. Accordingly, the discharge of CCWs from armed drones may fall foul of the legality, necessity, and proportionately principles governing the use of force. In the absence of legal certainty from the international community on the interpretation of the principles of the use of force relating to armed drones, their use should be prohibited in the context of protests.²³⁵

Practice 20: Promote dialogue and the graduated use of force

Dispersal of assemblies collides with the exercise of the rights to protest and is often performed through the use of force, usually in an indiscriminate manner. Making the decision to disperse a crowd needs to be assessed in light of foreseeable consequences and made with the utmost care.²³⁶ Superintendent Nigel Goddard of the PSNI spoke about a particular event in Northern Ireland in 2012, when protesters decided to shut down traffic by sitting in intersections. These sit-ins happened across the city, with different commanders handling the various locations. One commander decided to end the sit-in. In order to accomplish that aim, he used dogs and a marching shield line. As the dogs pushed people back, one dog chased down and bit an elderly man. This is an example of how a decision to end a sit-in escalated quickly, especially when the members of the security service decided to use tools which indiscriminately harmed people present. A commander in charge of another intersection decided not to disperse the crowd and instead decided to speak with the leaders of the group. He negotiated to let the protesters occupy the intersection for an hour, after which they would end the sit-in. The organisers agreed and after the hour, the protesters dispersed peacefully and without incident.²³⁷

Rushing to a decision to disperse a crowd is something that happens repeatedly in response to protests around the world and regularly leads to excessive force and violence by police officers. For example, during a demonstration in Nochixtlan, Mexico in June 2016, teachers and their supporters blocked a road while protesting education reform. Police decided to remove them and deployed 800 troops, never having attempted dialogue. This decision and the commitment to carry it out led to the use of firearms and tear gas and cost ten people their lives – all to clear a road.²³⁸ According to Louise Edwards, a human rights lawyer working with the African Policing Civilian Oversight Forum in South Africa, in order to avoid escalations in violence it is “important for the officers on the ground to understand the dynamic role a [protest] plays in a healthy democracy. Police officers should be willing

²³⁴ Mari Hayman, *Chile Suspends Use of Tear Gas Amid Concerns Over Miscarriages*, LATIN AMERICA NEWS DISPATCH (May 19, 2011) <http://latindispatch.com/2011/05/19/chile-suspends-use-of-tear-gas-amid-concerns-over-miscarriages/>.

²³⁵ 2014 UNSR Report, *supra* note 8, at ¶ 135-141.

²³⁶ Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017).

²³⁷ Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

²³⁸ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45, at ¶ 24-26.

to continue rolling negotiations and offer options – demonstrating flexibility – before considering dispersal.”²³⁹

Chief Doug LePard, former Deputy Chief of the Vancouver Police Department, emphasises the need to understand the bigger picture in terms of tactics and force. Responding to every minor violation of the law or act of disrespect can escalate tensions quickly. “Be patient”, he says and consider whether, for example, removing people from a space will lead to more violence than waiting them out. This type of analysis is central to the principle of precaution and needs to be part of the ongoing training for officers involved in the context of protests, and needs to be directly understood in relation to decision-making and use of tactics.

ISRAEL: THE ETHIOPIAN COMMUNITY PROTEST. In 2015, a mass demonstration against police violence and racism towards the Ethiopian community was held in Tel Aviv. The protest lasted a few hours and proceeded without much intervention by the police. As the protest neared its conclusion, thousands of protesters gathered in the city’s main square. A large contingent of heavily armed police officers were present in the square. Police were equipped with water cannons, stun grenades, tear gas, and sponge bullets and had horses. As the protesters came close to the municipality building the police began using the tools and weapons at their disposal. Tensions and violence quickly escalated. The use of stun grenades intensified the panic. Dozens of people were injured and many of the protesters were arrested.



²³⁹ Interview with Louise Edwards, human rights lawyer at the African Policing Civilian Oversight Forum, in Johannesburg, South Africa (Mar. 12, 2018).



CANADA: BLACK LIVES MATTER - TORONTO, 2016. The policing of two Black Lives Matter - Toronto (BLM-Toronto) protests illustrates the need for patience and dialogue prior to deciding to disperse a protest. In the summer of 2016, BLM-Toronto brought Canada's largest annual Pride Parade – whose participants included Canadian Prime Minister Justin Trudeau and numerous police officers in uniform – to a standstill with a sit-in and demands that uniformed police officers as well as police floats and vehicles be barred from the Parade. BLM-Toronto asserted that the police presence made members of marginalised communities feel unsafe due to the troubled history between the force and Toronto's black community.²⁴⁰ Despite the substantial police presence at the event, and a strong police desire to remain involved in the parade,²⁴¹ police rightly did not disperse the counter-protest. BLM-Toronto's brief delay of the Pride parade eventually resulted in a vote by Pride Toronto to ban police uniforms, weapons and vehicles from future parades. This also prompted a national discussion on the meaning of pride events, the principle of equality, and the state of policing in Canada.

By contrast, a series of 2016 protests prior to Pride wherein BLM-Toronto protested police violence by creating a tent city outside police headquarters resulted in police forcibly removed tents from the surrounding public square out of "safety concerns."²⁴² Group organisers were also surveilled and alleged that they were attacked by police, including some organisers who were "punched, hit and physically assaulted."²⁴³ The result was to exacerbate distrust of the police in a community attempting to voice concerns regarding its experiences, particularly around the policing of its protests.

²⁴⁰ See, e.g., Andrea Janus & Muriel Draaisma, "Pride Toronto Asks Police to Withdraw Application to March in Pride Parade", CBC News (2 April 2018), online: CBC News <<http://www.cbc.ca/news/canada/toronto/pride-toronto-asks-police-to-withdraw-application-to-march-in-pride-parade-1.4602545>>.

²⁴¹ See, e.g., Malone Mullin, "Pride Month Wraps Up Amid Police Ban Controversy", CBC News (25 June 2017), online: CBC News <<http://www.cbc.ca/news/canada/toronto/pride-month-wraps-up-amid-police-ban-controversy-1.4177467>>.

²⁴² Makda Ghebreslassie, "Black Lives Matter Protesters Demand Answers as Group Moves to Toronto Police HQ", CBC News (21 March 2016), online: CBC News: <<http://www.cbc.ca/news/canada/toronto/black-lives-matter-toronto-police-headquarters-1.3501347>>.

²⁴³ *Id.*; Stephen Davis, "Police monitored Black Lives Matter Toronto protesters in 2016, documents show", CBC News (3 May 2018), online: CBC News: <<http://www.cbc.ca/news/canada/toronto/police-monitored-black-lives-matter-toronto-protesters-in-2016-documents-show-1.4645628>>.

INDIA: ALIGARH MUSLIM UNIVERSITY. On 2 May 2018, Aligarh Muslim University hosting ex Vice President of India, Mr. Hamid Ansari, witnessed a gathering outside the campus of right-wing Hindutva groups shouting slogans and threatening the students and faculty of the university with extreme violence. These groups had a police escort. After these groups left, some students came forward to file a complaint. The same police officers that provided an escort to the Hindutva groups then charged at these students with batons and tear gas.

RECOMMENDATIONS

- The use of firearms and live ammunition in the context of protests, particularly automatic firearms, should be prohibited.
- The use of CCWs which are indiscriminate in their nature, such as stun grenades and tear gas, should not be used for dispersion or generally in the context of protests.
- The use of force is subject to the principles of legality, necessity, proportionality, precaution, non-discrimination, and accountability, and should only be used in self defence or in defence of others facing an imminent threat to life or serious injury.
- Wherever possible, the use of dialogue and communication should always precede the use of force. Police commanders must be trained in dialogue and engagement and should use these tactics before any decisions are made to resort to the use of force.
- To ensure a graduated, necessary, and proportionate deployment of force, policing institutions may be provided with a range of tools that allow for such a response. This may include CCWs but only when they have been independently and thoroughly tested, are human rights compliant, and where they are situationally appropriate.
- CCWs must not be misused or used as tools of intimidation.
- The use of armed or weaponised drones equipped to discharge CCWs must be prohibited pending further investigations into their compliance with international human rights law.
- Training on the use of crowd-control equipment and weapons should include: the impact and harm caused by each weapon or piece of equipment; the likely perceptions of and reaction to the use of each weapon, including the possible escalation in tensions; whether less harmful means are available to achieve the particular aim, and if not, whether the overall objective of the use of force is better achieved by not using the provided equipment.
- Any arrests or detentions which occur in the context of protests should be performed by police officials wearing appropriate uniforms and visible name tags. Prompt information on the place of detention should be provided to interested persons and access to legal services for the detainee must be ensured.
- Mass arrests are inherently indiscriminate and should be prohibited as they do not comply with the principles of necessity, proportionality, and legality.

- Dogs and horses can be indiscriminate tools and their use should be prohibited in the context of protests.
- In the event that people are injured or killed – or in any circumstance that requires investigation – a clear chain of custody of evidence must be established, commands issued, including dispersal orders, must be documented, and all weapons used must be seized for the purposes of investigation.

D. DATA TRACKING AND REPORTING

PRINCIPLES AND STANDARDS

- As part of states' responsibility to ensure accountability "[s]tates must establish effective reporting and review procedures to address any incident in relation to an assembly during which a potentially unlawful use of force occurs."²⁴⁴ Satisfying this requirement includes gathering and reporting "relevant information, including statistics on when and against whom force is used . . ."²⁴⁵
- The ACHPR has specified that state parties should establish processes for the systematic collection and public dissemination of disaggregated data and other information about the policing of assemblies on an annual basis. This may include the number of assemblies, the number of assemblies prohibited, the number of assemblies during which law enforcement officials resorted to the use of force, the number of assemblies dispersed, and information about persons injured or killed due to police action during assemblies.²⁴⁶

GOOD PRACTICES

No complete assessment of the practices of policing institutions is possible without key information. What kind of force do police use? How often? Against whom? Such basic questions can only be answered when policing institutions are obligated to record, track, and report protest data. Even as state officials and leaders of policing institutions accept the value of evidence-based policing and intelligence-driven strategy, key information remains uncollected and unreported. Without accurate and comprehensive data, the ability to develop better practices or hold officials accountable for violations of existing standards is limited.

Policing institutions should be required by law to keep records of key use of force and protest data. For example: the use of force during protests, the kinds of crowd-control weapons and tactics used, the quantities of each type of weapon deployed, when the use of a particular tactic and weapon results in injury or death to an individual, key demographic information of the targeted or injured individuals, and investigations of misconduct and

²⁴⁴ *Joint Report*, *supra* note 1, at ¶ 50.

²⁴⁵ *Id.* at ¶ 49(h).

²⁴⁶ ACHPR Guidelines, *supra* note 36, at ¶ 8.5. The ACHPR Guidelines state further, at para 8.6: "The right to monitor the observance of human rights in a given society includes the right to engage in active observation of an assembly and to collect, verify, and use information related to the assembly. All persons have the right to seek and receive information and to freedom of expression, and enjoy the right to observe and independently monitor public assemblies without fear of reprisal. This includes civil society organisations, human rights defenders, monitors, journalists and other media workers."

outcomes of those investigations. This information should be regularly compiled and made available to the public in a timely manner.

Practice 21: Require that effective systems for reporting and monitoring the use of force are established and the results are publicly available

An effective system of reporting requires that every use of force, including stop and search procedures, regardless of whether it results in injury or death be reported and collated as part of a centralised dataset. As the case study detailed below demonstrates, effective reporting includes disaggregating the information to facilitate better understanding of police practices. Policing institutions should track different categories of tools and crowd-control equipment, report on each instance of use, and indicate whether or not it resulted in an injury or death.²⁴⁷ Related to the numbers on the use of force, reporting on internal investigations should be part of use of force data reporting. The public should have access to the number of complaints made against officers, the investigations into misconduct, the outcomes of those investigations, whether internal disciplinary measures were pursued, what kind of disciplinary measures were imposed, and whether external review or prosecution followed. In order to assess the nature of police use of force, its effectiveness, and compliance with human rights standards of existing policies and practices, the public needs access to a nuanced set of statistics and specific data. Existing reporting requirements should be regularly reviewed in order to identify failures or new avenues for improving information gathering, allowing for genuine assessment and accountability.

An effective system of reporting requires that every use of force, including stop and search procedures, regardless of whether it results in injury or death be reported and collated as part of a centralised dataset.

²⁴⁷ See, e.g., POLICE SERVICE OF NORTHERN IRELAND, STATISTICS, <https://www.psni.police.uk/inside-psni/Statistics/> (last visited Mar. 12, 2018).

NORTHERN IRELAND: RECORD KEEPING AND REPORTING. Following the peace process in Northern Ireland and the establishment of the Police Services of Northern Ireland, systemic and concerted steps were taken to ensure the incorporation of human rights into every aspect of policing. The Policing Board of Northern Ireland, an independent public body, was tasked with carrying out this annual assessment and making public its findings and recommendations for better compliance. In its annual report, the Board recommended that the PSNI require reporting on use of force and the exercise of stop and search powers. The Board's reasoning was that only by having actual numbers on how discretionary powers of the police are used can the department, the state, and society evaluate the lawfulness of existing practices.

In compliance with the Policing Board's recommendations, the PSNI provides a whole set of statistics and information on police use of force, use of stop and search powers, and set of complaints and disciplinary measures. Every six months, the PSNI provides information on:

- A. "Summary details of all cases that resulted in formal disciplinary hearings;
- B. Details of all conduct leading to a Superintendent written warning;
- C. Details of cases where disciplinary proceedings are not commenced or not concluded because the officer in question retires, resigns, or otherwise leaves the PSNI;
- D. Details of PSNI Professional Standards' current misconduct investigations and disciplinary action taken as a result of completed investigations;
- E. Details of any action taken by District Commanders under the PSNI tracking and trending policy;
- F. Details of all civil actions taken against the police;
- G. Details of judicial review cases brought against the PSNI and any action taken in response to adverse decisions."²⁴⁸

This information is then analysed and reported to the public through the Annual Human Rights Report. Additionally, the PSNI provides regular reports on statistics on its webpage, providing numbers on stop and search and police use of force.²⁴⁹ As the PSNI explains on its website, Recommendation 21 of the Policing Board Human Rights Annual Report (2008) requires reporting of "statistics on all categories of uses of force." The chart from one such report (provided below) demonstrates the detailed information collected and disclosed. The data includes not only the use of specific tools, but also the number of times these weapons are drawn.²⁵⁰

²⁴⁸ NORTHERN IRELAND POLICING BOARD, *supra* note 151, at 77.

²⁴⁹ STATISTICS, *supra* note 148.

²⁵⁰ POLICE SERVICE OF NORTHERN IRELAND, USE OF FORCE STATISTICS 1ST APRIL 2017 TO 30TH SEPTEMBER 2017 (Dec. 15, 2017), <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/statistics-on-police-use-of-force/2017/september/use-of-force-1-apr-2017---30-sept-2017-official-public.pdf>.

Summary table police use of force between 1st April 2017 and 30th September 2017 compared to the same period last year.

Use of Force	1 Apr 2016 – 30 Sept 2016	1 Apr 2017 – 30 Sept 2017	% change ^(c)
AEP Pointed	22	22	-
AEP Discharged	0	0	-
AEP Total	22	22	-
Baton Drawn Only	192	183	-5%
Baton Drawn & Used	74	85	+15%
Baton Total	266	268	+1%
CS Drawn (not sprayed)	77	84	+9%
CS Sprayed	106	105	-1%
CS Total	183	189	+3%
PAVA Drawn (not sprayed)	0	1	-
PAVA Sprayed	2	2	-
PAVA Total	2	3	+50%
Firearm Drawn or Pointed	225	256	+14%
Firearm Discharged	1	1	-
Firearm Total	226	257	+14%
Police Dog Used	30	115	+283%
CED Drawn ^(a)	119	167	+40%
CED Fired ^(b)	5	19	+280%
CED Total	124	186	+50%
Handcuffs / Limb Restraints	N/A	2,738	-
Unarmed Physical Tactics	N/A	2,991	-
Water Cannon Deployment	14	0	-100%
Water Cannon Used	0	0	-
Water Cannon Total	14	0	-100%

^(a) Includes drawn/aimed and red-dot. ^(b) Includes Stun Drive. ^(c) % change figures rounded to nearest integer.

While the extent of reporting and publication on use of force and stop and seizure powers by the PSNI is in many ways impressive and exceptional, some problems do remain. For example, although the Policing Board recommended the inclusion of certain demographic information about the individuals stopped and searched, the recommendation has not been implemented. "No justification has been advanced as to why the PSNI should continue to operate such a limited classification system for ethnicity of persons stopped and searched. The length of time which the PSNI has taken to take steps to align its classification system is disappointing."²⁵¹ A review of the statistics provided on the PSNI website on stop and search powers reveals that background and ethnicity of the individuals stopped is still not part of the information reported to the public.²⁵² Data on injuries resulting from the use of each type of crowd-control weapon or tool is also lacking, making it difficult to evaluate the kind of harm caused by each tool.

²⁵¹ NORTHERN IRELAND POLICING BOARD, *supra* note 151, at 54.

²⁵² POLICE SERVICE OF NORTHERN IRELAND, STOP AND SEARCH STATISTICS, <https://www.psn.police.uk/inside-psni/Statistics/stop-and-search-statistics/> (last visited Mar. 12, 2018).

No complete assessment of the practices of policing institutions is possible without key information. What kind of force do police use? How often? Against whom?

RECOMMENDATIONS

- » Policing institutions should be required by law to keep records on the use of force; numbers and types of weapons deployed; arrests, stops and searches conducted; and the training that officers have received on the use of CCWs and equipment.
- » A centralised system should be put in place to report on and register each instance a CCW or a firearm is deployed, used, or drawn; whether it resulted in injury or death; and the demographic information of the individuals against whom force was used. Such a system enables determinations of individual responsibility and assists with assessing the outcomes of policing operations, which fosters oversight and accountability.
- » Comprehensive data and statistics should be provided to the public and data content should be regularly evaluated and reviewed by an independent oversight body to improve reporting, collection, and publication.
- » Failure to report or keep adequate records, without justification, should constitute a ground for service review, dismissal, or a disciplinary or criminal sanction.

E. SURVEILLANCE AND NON-STATE ACTORS

PRINCIPLES AND STANDARDS

- The ACHPR states that any “documenting of assembly operations by law enforcement officials must be regulated by national law in compliance with regional and international human rights standards.”²⁵³ Recording and surveillance cannot be used “as a means to harass or intimidate assembly participants, or to discourage persons or groups from exercising their right to assemble freely with others.”²⁵⁴
- International law and standards require that “[t]he collection of personal information in relation to an assembly must not interfere impermissibly with privacy or other right”²⁵⁵ and must be regulated by national law that complies with human rights. The ACHPR Guidelines state that any “retention and use [of information] should be limited to circumstances where the use of force by law enforcement officials or their exercise of the powers of arrest and detention is recorded; where a complaint about the conduct of law enforcement officials is made; where recordings provide evidence of misconduct by law enforcement officials; or where recordings provide evidence of a crime committed by law enforcement officials or others. Recordings should be retained only for so long as is necessary for the relevant purpose.”²⁵⁶
- Regarding the infiltration of security agents dressed as civilians in protests, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed his deep concern “about the use of embedded undercover police officers in groups that are non-violent and take peaceful direct action by exercising their right to freedom of peaceful assembly.”²⁵⁷

CURRENT PRACTICES

Surveillance of protests and protesters is an all too common practice. Surveillance in the context of protests involves recording, collecting, retaining and using personal information on protesters, organisers, social movement leaders, and bystanders. Surveillance implicates not only the rights to protest but also individual’s right to privacy.²⁵⁸

Although surveillance and intelligence collection may serve legitimate purposes, in certain circumstances, they can also have a chilling effect over the right to protest, infringe privacy rights, and violate associated human rights. It is important for policing institutions to understand and acknowledge the history of misuse of these powers. Intelligence gathering and surveillance tactics have been used by policing institutions as tools of political and ideological persecution with the goal of silencing dissent, disrupting peoples’ ability to

²⁵³ ACHPR Guidelines, *supra* note 36, at ¶ 15.2 and 15.3.

²⁵⁴ *Id.*, at ¶ 15.2 and 15.3.

²⁵⁵ *Joint Report*, *supra* note 1.

²⁵⁶ *Id.*, at ¶ 15.5.

²⁵⁷ http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-39-Add1_en.pdf. The IACHR stresses that the absence of identification by police institutions opens the way to infiltration for intelligence purposes. Police officers should always carry visible badges that show their name or identification number. Accountability for violations in the context of protests is compromised if individual officers cannot be identified. IACHR Annual Report 2015, chapter IV A paras 225-226.

²⁵⁸ See e.g. UDHR, *supra* note 3, at Art 12; ICCPR, *supra* note 3 at Art 17; American Declaration on the Rights and Duties of Man, Article V; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 8; American Convention on Human Rights, Art 11.

organise, cracking down on social movements, and delegitimising their leaders and their social demands.²⁵⁹

Indiscriminate surveillance, which involves the indiscriminate collection and retention of personal information, should be prohibited. The creation and retention of activist or organisational databases has the effect of criminalising groups and individuals based on their group membership. Any retention and use of personal information obtained through surveillance must be strictly regulated by a clear national law that is in compliance with human rights principles.

Practice 22: Prohibit the indiscriminate use of surveillance technologies

The use of indiscriminate surveillance technologies that facilitate the mass capture and retention of personal information in the context of protests should be prohibited in accordance with privacy and other individual and collective rights. These powerful new technologies tend to be deployed in secret – without public notice or discussion, nor proper safeguards or proper judicial authorisation. This not only intrudes on peoples' privacy but also undermines policing based on openness, transparency and trust. In this way, these technologies can also have a chilling effect over the right to protest and expression and deteriorate the relationship between the police and the public. Indiscriminate collection and retention of personal information treats everyone in, or in the vicinity of, a protest or a protest group as a suspect. It is by definition not justified by any individualised determination and it violates the principles of legality, necessity, and proportionality.

In the United States, for example, law enforcement are using “sophisticated surveillance products that draw information from social media and then create easy-to-search databases for police to look at, [to monitor] where activists are meeting, what they're saying and when they're saying it.”²⁶⁰ Another increasingly used technology to surveil protesters and activists are IMSI-catchers, also known as “Stingrays” or “cell site simulators”, invasive cell phone surveillance devices that mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information.²⁶¹ “An IMSI catcher can potentially capture the call activity of thousands of innocent bystanders while looking for a single suspect or small group of suspects.”²⁶²

Facial recognition technologies are also increasingly used by policing institutions and their use during protests is highly problematic and intrusive. As of 2016, only five states in the United States had passed laws limiting some discrete aspect of facial recognition technology use by policing institutions.²⁶³ These laws are all very limited in scope.²⁶⁴ The vast majority of states leave policies governing the use of these technologies up to individual

²⁵⁹ See e.g. Eveline Lubbers, *Secret Manoeuvres in the Dark: Corporate and Police Spying on Activists* (2012); Nelson Blackstock, *Cointelpro: the FBI's Secret War on Political Freedom* (1975). See also Dante Avaro, *Citizen Traceability: Surveillance à la Argentina*, 2 *Journal of Power, Politics & Governance*, 93-113 (2014); Veronica Smink, *Fear and Loathing: Argentina's Infamous Spy Agency*, BBC News (28 Jan 2015), <http://www.bbc.com/news/world-latin-america-31013336>; Rob Evans and Paul Lewis, *Undercover Police had Children with Activists*, *The Guardian* (20 Jan 2012), <https://www.theguardian.com/uk/2012/jan/20/undercover-police-children-activists>; George Joseph, 'NYPD officers accessed Black Lives Matter activists' texts, documents show' *The Guardian* Apr. 4, 2017, available at <https://www.theguardian.com/us-news/2017/apr/04/nypd-police-black-lives-matter-surveillance-undercover>; Rob Evans, 'Files detailing police spying operations against protesters published online' *The Guardian*, Jan. 14, 2016, available at <https://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2016/jan/14/files-detailing-police-spying-operations-against-protesters-published-online>.

²⁶⁰ <https://www.opendemocracy.net/protest/matt-cagle-interview>.

²⁶¹ <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them>.

²⁶² <https://ccla.org/rcmp-admit-using-imsi-catchers/>.

²⁶³ CLARE GARVIE ET AL., *THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA* 35 (2016).

²⁶⁴ *Id.*

security institutions.²⁶⁵ Disturbingly, most institutions provide little (if any) guidance on the proper use of facial recognition software.²⁶⁶ Out of the fifty-two institutions identified by the Georgetown Center on Privacy & Technology in the United States as maintaining facial recognition programs, twenty-four of them did not disclose a policy and were not clearly covered by another service's policy. Five of these institutions explicitly said that they had no use policy at all.²⁶⁷ Of the security services that did provide policies, only a few required probable cause prior to use of facial recognition technology, more required reasonable suspicion, and most required a vague "criminal justice purpose" or didn't suggest any legal standard at all.²⁶⁸ This is particularly problematic because of the high risk of misuse of facial recognition. Any technology that captures and facilitates the retention of personal identifying information of masses of people, protesters and bystanders, seriously interferes with the peoples' right to privacy and to protest.

Practice 23: Institute a legal framework that regulates and limits the retention and use of personal information as well as complies with the principles of necessity, proportionality and non-discrimination

The wide discretion granted to security institutions to engage in surveillance practices in the context of protests can give way to the development of intrusive practices. Such practices are often rationalised by invoking generalised risks of potential disruptive or criminal behaviour. That discretion must be limited. The collection, retention, or use of personal information in the context of protest must be regulated by law and comply with the principles of necessity and proportionality. Surveillance may be conducted as part of an existing criminal investigation, or subject to an individualised determination of probable cause, or reasonable grounds to believe, that a crime has been or will be committed. As noted in the Joint Report, "[l]egislation and policies regulating the collection and processing of information relating to assemblies or their organizers and participants must incorporate legality, necessity and proportionality tests. Given the intrusiveness of such methods, the threshold for these tests is especially high."²⁶⁹

Several police commanders interviewed for this report said that recording events may allow law enforcement to forgo making arrests for low-level offences during a protest.²⁷⁰ They reasoned that by not intervening during the event, they are able to minimise conflict. However, surveilling an entire event, identifying individual protesters, and compiling that information cannot be justified by the aim of pursuing low-level offences after the event.

Generalised claims of possible criminality tend to be used to justify surveillance against certain politically and socially disfavoured groups, political dissidents, or marginalised

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 37.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Joint Report, supra* note 1, at ¶ 74.

²⁷⁰ Interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in London, Eng. (Dec. 14, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017).

groups, among others.²⁷¹ When individuals of a certain community or political viewpoint are identified as posing a “threat” based on nothing more than membership in a group, there is no individualised or evidence-based justification. Not only does such targeted use of surveillance violate the principle of non-discrimination, it cannot satisfy the standards of necessity and proportionality.

The surveillance of Black Lives Matter (BLM) activists by law enforcement in the United States provides a powerful example of how disfavoured groups have been targeted by policing institutions. A former NYPD detective speaking about police surveillance of BLM protesters in 2014–2015 explained the standard operating procedure of identifying the leaders of protests groups. “If you take out the biggest mouth, everybody just withers away”, he said, explaining, “[once] you identify that person, you can run computer checks on them to see if they have a warrant out or any summons failures, then you can drag them in before they go out to speak or rile up the crowd.”²⁷² Serving as a speaker at a protest or leading a group in protest does not provide a legitimate basis for conducting surveillance operations. Nor is the aim of shutting down an event, ensuring that the crowd “withers away”, a legitimate aim of surveillance or any other tactic.

This type of surveillance and the accompanying practice of seeking to establish reasons to arrest and remove protesters is even more problematic when it is used against communities of colour and groups protesting against the government or police institutions. In the case of NYPD surveillance of BLM activists, there was no evidence of unlawful or criminal conduct, and nothing that could reasonably merit undercover operations lasting months and involving surveillance of individuals before and during events.²⁷³ This was also the case during the 2014 Football World Cup in Brazil where security institutions tracked social media, tapped phones, and surveilled organizers, carrying out pre-event arrests for organizing a protest. These measures were explained as necessary because “it is difficult to obtain satisfactory proof as to the criminal responsibility of those who commit crimes during protests.”²⁷⁴ Such justifications are clear violations of the above-mentioned principles.

Imani Robinson, an organiser and an activist from England and former organiser in BLM in England, spoke about the heavy surveillance experienced by minority activists in London.²⁷⁵ Police confiscating phones and searching for personal information and contact details (all without a search warrant)²⁷⁶ is a common enough practice during BLM events that Ms Robinson advises protesters to bring burner phones instead of their personal phones.

²⁷¹ See, e.g., *Chilean Police Clash with Mapuche Protesters in Santiago*, SANTIAGO TIMES ((Sept. 27, 2017)), <http://santiagotimes.cl/2017/09/27/chilean-police-clash-with-mapuche-protesters-in-santiago/>; Joseph, *supra* note 260; Joshua Hammer, *How Egypt's Activists Became 'Generation Jail*, N.Y. TIMES MAGAZINE ((Mar. 14, 2017)), <https://www.nytimes.com/2017/03/14/magazine/how-egypts-activists-became-generation-jail.html>; AGORA INTERNATIONAL HUMAN RIGHTS GROUP, RUSSIA UNDER SURVEILLANCE 2017: HOW THE RUSSIAN STATE IS SETTING UP A SYSTEM OF TOTAL CONTROL OVER ITS CITIZENS (2017), <https://www.opendemocracy.net/files/Agora-Russiaundersurveillance2017.pdf>; *1 Million Russians to Be Put Under Surveillance in 2016—Activists*, THE MOSCOW TIMES (Oct. 10, 2016)), <https://themoscowtimes.com/news/1-million-russians-to-be-put-under-surveillance-in-2016-activists-55667>; RIGHT 2 KNOW, BIG BROTHER EXPOSED: STORIES OF SOUTH AFRICA'S INTELLIGENCE STRUCTURES MONITORING AND HARASSING ACTIVISTS MOVEMENTS (2015), <http://bigbrother.r2k.org.za/wp-content/uploads/Big-Brother-Exposed-R2K-handbook-on-surveillance-web.pdf>; *COINTELPRO and the History of Domestic Spying*, NATIONAL PUBLIC RADIO: NEWS AND NOTES (Jan. 18, 2006), <https://www.npr.org/templates/story/story.php?storyId=5161811>.

²⁷² Joseph, *supra* note 260.

²⁷³ See also documents showing police monitoring of hashtags such as #BlackLivesMatter, #ImUnarmed, #PoliceBrutality as a means of identifying threats. See Nicole Ozer *Police Use of Social Media Surveillance Software Is Escalating, and Activists are in the Digital Cross-hairs*, ACLU Blog (Sept. 22, 2016), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/police-use-social-media-surveillance-software>.

²⁷⁴ CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 45.

²⁷⁵ Interview with Imani Robinson, Activist and Organizer, Black Lives Matter, in London, Eng. (Dec. 15, 2017).

²⁷⁶ *Riley v. California*, 134 S. Ct. 2473, 2493 (2014).

ARGENTINA: ILLEGAL ESPIONAGE AND COLLECTION OF INFORMATION OF SOCIAL MOVEMENTS.

Two cases from 2011 and 2015 in Argentina illustrate how surveillance and intelligence activities are used to surveil social movements and political and social leaders. In 2011, a group of union leaders and workers were in a labour dispute with the multinational food company, Kraft. During a workers' assembly, officers from Argentina's Gendarmerie (a national security institution) infiltrated the assembly as undercover agents. The agents were in possession of judicial warrants that only enabled them to identify workers that were allegedly committing the crime of blocking a highway.

The workers, who realised that they had been infiltrated, filed a judicial complaint. This complaint revealed that the Gendarmerie had collected information about the workers' political and ideological affiliation, which was being stored in databases, and which was beyond the scope of the judicial warrants. These databases dated back to the 1990s and included information about different political and social actors, gathered through undercover policing and illegal surveillance.

In 2015, a public defendant from the City of Esquel, Chubut, Argentina accused the judiciary of retaining intelligence information on journalists from the area, and on environmental and indigenous activists from the Mapuche people. The defendant found this information in a judicial criminal file, which related to allegations of land seizure against the Mapuche Lof Cushamen community, in the possession of the Chubut's Attorney's Office.

It was revealed that the information had been collected through illegal surveillance and through diverse sources and analysis practices for classifying the activists. The information included photos taken from social media platforms and during protests, and had notes scribbled on them with phrases such as "permanently holds value judgements over the activity of government officials and the forces"; "in the events he/she always remains in the back watching and rarely gives statements or participates in press conferences"; and "it has been revealed that in the last months he/she travelled across the country to meet with assemblies".

An investigation revealed that the information had been provided to the judicial officer by an agent from Argentina's Federal Intelligence Agency, without justification or a lawful request to provide the information.

Practice 24: Mandate that non-state actors are only deployed in the context of protests where there is express enabling legislation and policies that subject them to the same, if not more restrictive, principles than those governing policing and security institutions

The use of non-state actors in context of protests, particularly in rural areas where they are reportedly often deployed, should be strictly prohibited unless expressly authorised by enabling legislation which subjects non-state actors to the same (if not higher) standards than those binding policing institutions. Importantly, non-state actors cannot be used to circumvent human rights standards that apply to security institutions belonging to the state and states "cannot lawfully engage in any activity, or conclude any agreement with . . . non-state actors, the foreseeable consequences of which would undermine or defeat

the very object and purpose of [a] right, or of any of the ancillary rights designed to give it effect in practice".²⁷⁷

By way of an example, tactics and surveillance employed by private security contractor TigerSwan against protesters in the indigenous-led movement seeking to stop the Dakota Access Pipeline in the United States provides an example of a non-state actor carrying out extensive and sophisticated surveillance operations in informal collaboration with security services and federal agencies with little to no oversight.²⁷⁸

As these private actors surveil, infiltrate, agitate, harass, and even attack protesters and activists, they do so without being subjected to the same stringent standards as state actors. TigerSwan, in engaging the Dakota Access Pipeline protests, described the movement as "an ideologically driven insurgency with a strong religious component" which "generally followed the jihadist insurgency model."²⁷⁹ In doing so, it conducted extensive electronic surveillance, as well as aerial surveillance, and infiltrated the protest camps and activist groups involved. TigerSwan then strategised ways to use their intelligence and infiltration: "Exploitation of ongoing native versus non-native rifts, and tribal rifts between peaceful and violent elements is critical in our effort to delegitimize the anti-DAPL movement."²⁸⁰ This non-state actor, with a particular mission to undermine and delegitimise a protest movement, provided "daily intelligence updates" to security institutions and pushed for the arrest and prosecution of activists – at times complaining that some police institutions were not doing enough with the intelligence provided.

These actors, when acting as agents of the state, should be subject to the same, if not more restrictive, principles than those that govern policing and security institutions. Under international law, the conduct of persons or entities that exercise elements of governmental authority shall be considered actors of the state.²⁸¹ Therefore, the state employing non-state actors is responsible for any human rights violations committed by these actors, and must ensure that there is oversight and accountability for their actions.²⁸²

The use of indiscriminate surveillance technologies that facilitate the mass capture and retention of personal information in the context of protests should be prohibited in accordance with privacy and other individual and collective rights.

²⁷⁷ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 15, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018).

²⁷⁸ Alleen Brown, Will Parrish, and Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, THE INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Responsibility of States for Internationally Wrongful Acts. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I) / Corr.4. http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

²⁸² *Joint Report*, *supra* note 1, at ¶ 87.

SOUTH AFRICA: PRIVATE SECURITY CONTRACTORS AND THE #FEESMUSTFALL MOVEMENT: During the #FeesMustFall movement from 2015-2017 in which South Africa students protested for fee-free higher education, many South African universities increased the number of private security guards on their campuses. The presence of private security guards has become the norm on university campuses during student protests, regardless of the fact that they have no official role in terms of South African protest legislation.

The role of private security during the protests was to protect university property and protect the universities' interests. In September 2017, the students of Cape Peninsula University of Technology (CPUT) embarked on a protest. CPUT appointed the same security company that has been used since the 2015 #FeesMustFall protest, despite allegations of fraudulent dealings between the university and the company. This security company also had a history of portraying excessively aggressive and militarised behaviour. During the 2017 protests, university staff wrote an open letter to the acting Vice Chancellor making an urgent call for the removal of the private security company and the "militarisation" of the university. The security guards of the company were heavily armed with the presence of "nyalas" (armoured personnel carriers) on the campus. There were allegations of the private security guards racially profiling students and harassing female students. The private security was further given a master key to the student residences which allowed them to access the residences at any given time and search any student that they suspected of being part of the protests, creating an atmosphere of fear and terror among the students.

In response, students at the university arranged a mass meeting to discuss the removal of the private security company. The private security company surrounded the students at their meeting which took place in an open area in the university campus. After several hours, the university management refused to engage with the students and as a result the students became disgruntled and proceeded to express this through chanting and continuing their protest on the campus. Shortly after this, the security guards began firing shots. Students attempted to flee but several were injured. The university continued to operate in this para-military fashion over the course of several weeks.

Private security companies have no greater authority than any ordinary citizen in the management of protests in South Africa. However, the use of private security in protests has increased and private security has de facto assumed the role of South African protest policing. South African domestic legislation includes a code of conduct that private security needs to adhere to. However, it is difficult for protesters to ensure that private security adheres to these standards as they are often not clearly identified by name tags which is one of the requirements in reporting complaints against them.

RECOMMENDATIONS

- » The use of indiscriminate surveillance technologies (e.g. facial recognition and IMSI catchers) during protests should be prohibited.
- » The collection, retention, and use of the personal information of individual protesters, organisers, or bystanders by policing and security institutions in the context of protests should be prohibited in the absence of an individualised suspicion that a crime has been committed, or is reasonably expected to be committed, and such collection, retention, or use of personal information must comply with human rights standards, including the principles of necessity, proportionality, and non-discrimination.
- » A generalised and undefined belief that someone taking part in a protest may commit some offence in the future does not justify surveilling, taking or retaining a photograph, or recording video footage of protesters.
- » Any recording of a protest by police institutions should be open, transparent, publicised, and for the purpose of protecting the protest and the protesters with the goal of using the material for review and evaluation of the police intervention in a protest. A clear protocol about how to save, store, preserve, access, and delete the material should be in place as well as mechanisms and processes to promote public access to the recordings, particularly in instances of the use of force.
- » During an event, protesters cannot be stopped and compelled to submit to searches or photographed without evidence that unlawful conduct has taken place or is reasonably suspected to take place and they are suspected of being responsible for that conduct. A decision by police officials to institute these procedures must be subject to the principles of proportionality and necessity.
- » The state should not keep any permanent records or databases of activists, organisers, and individuals involved in social movements.
- » Seizure of mobile phones and devices and the search of contact details should only be permitted if there is probable cause or reasonable grounds to believe, based on credible evidence, that a crime has been, is, or will be committed by the individual whose device is searched or seized.
- » Non-state actors should not conduct surveillance or security activities in the context of protests. To the extent that they engage in these activities, there must be express enabling legislation and policies that subject them to the same, if not more restrictive, principles than those governing security services – in line with standards concerning human rights and state responsibility.

ACCOUNTABILITY AND OVERSIGHT

Effective oversight also requires an independent body empowered to investigate misconduct allegations and recommend disciplinary sanctions, as well as rigorous internal supervision and investigation.

OVERVIEW

Ensuring that those who have the power to enforce the law are also subject to it is critical to ensuring compliance with law and policy but it also often presents a challenge. Accountability mechanisms are critical. Public trust is severely undermined if police abuse and criminality goes unchecked.

This section proposes good practices for democratic police accountability and details how these external and internal oversight mechanisms, in addition to the judicial system, can build public trust in policing institutions, address patterns of violence and misconduct, and even vindicate members of policing institutions who engage in good practices. It also documents the importance of transparency to ensure professionalised policing that complies with human rights standards.

A. INDEPENDENT OVERSIGHT MECHANISMS

PRINCIPLES AND STANDARDS

- International law requires that “[t]he state and its organs shall be held accountable for their actions in relation to assemblies.”²⁸³ This forms part of the state’s “obligation to provide to those whose rights have been violated in the context of an assembly an adequate, effective, and prompt remedy determined by a competent authority having the power to enforce remedies.”²⁸⁴
- To fulfil this obligation, “[s]tates should establish and fund . . . non-judicial oversight including . . . a statutory independent oversight body.”²⁸⁵ This statutory independent oversight body must possess all competence and powers for effective protection of rights in the context of assemblies.” The independent body should be empowered to “investigate complaints from the public, to accept referrals from [policing institutions] and to initiate investigations itself where it is in the public interest to do so. The body should investigate all cases of use of force by security services.”²⁸⁶
- The ability to file complaints with monitoring and oversight mechanisms must be guaranteed to all persons without fear of reprisals or punishment.²⁸⁷
- As expressed by the IACHR, impunity produces a strong chilling effect on the exercise of freedom of expression and the consequences for democracy – which depend on a free, open and dynamic exchange of ideas and information – can be particularly severe.²⁸⁸

²⁸³ *Joint report, supra* note 1 at 20.

²⁸⁴ *Id.* at ¶ 89. Similarly, the ACHPR Guidelines state, at para 8.1, that the responsibility of state parties and law enforcement agencies to respect, protect, promote, and fulfil the right to assemble freely with others extends to establishing effective procedures for reporting and reviewing any unlawful use of force, and to providing an adequate, effective and prompt remedy to persons who experience human rights violations due to the policing of assemblies.

²⁸⁵ *Id.* at ¶ 96(b).

²⁸⁶ *Id.* at ¶ 96(d).

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²⁸⁸ IACHR, Office of the Special Rapporteur for Freedom of Expression, Violence against journalists and media workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators. OEA/Ser.L/V/II., CIDH/RELE/INF. 12/13, 31 December 2013, para. 2.

GOOD PRACTICES

The importance of developing an effective independent oversight mechanism for accountability cannot be overstated.²⁸⁹ Having judicial and other institutional mechanisms that fairly investigate claims of misconduct and violence can help ease tensions between crowds and policing institutions. When people believe that officers who violate human rights will face consequences, they are less likely to escalate tensions when they see misbehaviour. Furthermore, public trust in an independent oversight mechanism provides a powerful tool for vindicating security institutions when public safety requires intervention. Effective oversight therefore contributes to a legitimacy-enhancing cycle that improves trust and makes the facilitation of protests less risky for both protesters and policing institutions.²⁹⁰

While this section focuses on independent oversight mechanisms, judicial oversight is an essential component of external oversight and accountability. An effective judicial system enforces sanctions against offending officers, compensates victims for harms suffered, provides vindication for rights that are violated, and seeks to deter future misconduct. Court supervision is particularly valuable if other accountability mechanisms are lacking or untrustworthy.²⁹¹

Effective oversight also requires an independent body empowered to investigate misconduct allegations and recommend disciplinary sanctions, as well as rigorous internal supervision and investigation. Such oversight mechanisms provide a necessary supplement to judicial remedies by focusing on identifying wrongdoing and criminality. Multiple levels of oversight thus make it more likely that acts of misconduct or criminality in policing institutions are detected and dealt with. When officers are allowed to circumvent consequences, it sends a message that policing institutions are above the law²⁹² or are held to a different standard than ordinary citizens – and not to more rigorous codes of conduct as should be the case with law enforcement agents.

Practice 25: Establish, maintain, and capacitate an independent oversight body with sufficient authority to effectively investigate complaints

International legal standards explicitly require states to establish an independent police oversight body with a strong mandate.²⁹³ An effective accountability mechanism must have sufficient access to carry out an investigation and be empowered and capacitated to prosecute individual officers for violations of the law or internal regulations. To do this, the independent oversight body must: accept and investigate complaints from the public; take referrals from members of policing institutions, including through a protected disclosure mechanism; have the authority to unilaterally initiate investigations; investigate all instances of the use of force; have full investigatory powers; and be financially viable

²⁸⁹ This Report focuses on practices most relevant for accountability in the context of policing protests. Much work has been done elsewhere extensively identifying good practices in the field of police accountability writ large. See generally, e.g., HANDBOOK, *supra* note 46; Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125 (2016).

²⁹⁰ See HANDBOOK, *supra* note 46 at 8–9 (“enhancing accountability can improve police legitimacy and increase public confidence, which in turn will reinforce the integrity of the system.”); cf. JAPHET BIEGON, ABDULLAHI BORU & DELLY MAWAZO, DOMESTIC ADHERENCE TO CONTINENTAL AND INTERNATIONAL NORMS IN THE PRACTICE OF POLICING ASSEMBLIES IN AFRICA 12--13 (2017).

²⁹¹ See Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London, Eng. (Dec. 15, 2017).

²⁹² See, e.g., U.S. DEPT OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 7--9, 46--70 (2017). (“The failure to review and investigate officer use of force has helped create a culture in which officers expect to use force and not be questioned about the need for or propriety of that use. In this way, CPD’s failure to adequately review officer use of force on a regular basis has combined with CPD’s failure to properly train and supervise officers to perpetuate a pattern of unlawful use of force within CPD.”).

²⁹³ See *supra* notes 257–260 and accompanying text.

or have the financial resources to operate.²⁹⁴ Policing institutions and other state agents should be statutorily obligated to facilitate and co operate with oversight investigations. The obstruction of, or interference with, an oversight investigation should be an offence.

Beyond this baseline, the independent bodies should also “have oversight over the entire police complaints system”,²⁹⁵ including the power to conduct systemic reviews of the practices of policing institutions to identify underlying problems and causes and make systemic recommendations.²⁹⁶ Such practices and policies should focus on both urban and rural areas and delineate procedures for reporting every incident in which the police use force (whether it results in injury or not) and for accepting complaints. The findings of investigations, including reasons for any dismissals of complaints, should be made public and easily accessible subject to limitations on disclosure intended to respect the privacy rights of complainants.

ARGENTINA: FRUITLESS ATTEMPTS AT ACCOUNTABILITY. The 2016 City of Buenos Aires Security Law created the Office of Transparency and External Control. The Office is charged with the duty to publish the complete files of all relevant investigations on offences committed by police officers. So far, the government has not fulfilled that obligation.

At the national level, Centro de Estudios Legales y Sociales (CELS) has faced a series of obstacles when submitting requests for access to public information on operational matters in the context of protests and national intelligence. Despite the existence of the law on access to public information (Law 27.275), the responses to these requests have been perfunctory, incomplete, or altogether absent.

On 27 November 2017, CELS presented a request for information addressed to the National Security Minister, Patricia Bullrich, regarding an operation carried out two days prior by federal forces in the Río Negro province. During this operation, a member of the Mapuche community of Villa Mascardi, Rafael Nahuel, was murdered. The operation was in response to a protest by the Mapuche community over land rights. The Ministry responded with a generic statement that the operation had been carried out in accordance with the law. There was no administrative investigation.

Public access is compromised here by the failure of public authorities to comply with existing legal requirements of transparency. Additionally, the government has been claiming national security exemptions on intelligence activities with no real oversight – further frustrating accountability and transparency provided for in the law.

Practice 26: Empower independent oversight mechanisms to impose disciplinary measures, subpoena witnesses, and initiate prosecutions for violations

Accountability and legitimacy are compromised when the mandate of independent oversight bodies does not include the power to impose disciplinary measures or to

²⁹⁴ See *Joint Report*, *supra* note 1, at ¶ 96(d).

²⁹⁵ HANDBOOK, *supra* note 46 at 71.

²⁹⁶ *Id.*, at 55 (“Independent oversight bodies that investigate complaints need to be empowered to do so properly and allowed to identify underlying problems and causes . . . and recommend systemic changes.”).

prompt or initiate criminal prosecutions, and when policing institutions and prosecutors fail to follow the recommendations or take into account the findings of the independent oversight body.

Even if disciplinary decisions ultimately remain in the hands of these other actors, implementing the recommendations should be expected to follow. The adoption of disciplinary decisions should not rely on calculations of alleged political costs and benefits of complying with the recommendation.²⁹⁷ Commanders and prosecutors may have incentives to “go easy” on the front line officers whom they lead or rely on for cases and evidence.²⁹⁸ Vesting the independent oversight body with disciplinary and enforcement powers, or creating an independent and standalone tribunal to adjudicate and enforce oversight body recommendations, can overcome this problem. For instance, in Northern Ireland, the Police Ombudsman has independent authority to investigate suspected violations and to issue recommendations for discipline or prosecution – recommendations that are regularly followed.²⁹⁹

Moreover, when the oversight bodies decide not to pursue criminal charges or pursue disciplinary proceedings, they must adequately disclose to the public their reasons for doing so. The rate at which the oversight body sustains complaints can provide a good indicator as to whether investigators take their duties seriously.³⁰⁰ For example, an academic in England described a situation in which “there have been thousands of complaints of racism in policing but none have been upheld.”³⁰¹ Low sustained rates often result from “numerous entrenched, systemic policies and practices that undermine . . . accountability [in policing institutions].”³⁰² Even in the best case, low rates of sustained complaints indicate an alarming disconnect between the experiences of the communities doing the reporting and the experiences of investigators. Transparency by independent oversight bodies thus holds the investigators themselves accountable to the public and reinforces confidence in the complaints system.

Practice 27: Mandate that the oversight process is independent and insulated from the influence of policing institutions

An effective oversight process requires that the oversight body be independent of politics or ties to the policing institutions.³⁰³ Ensuring sufficient independence in turn requires a legally protected commitment to unbiased and professional fact-finding. The staff of the independent oversight body should display “rigor and professionalism” in carrying out their duties.³⁰⁴ To achieve this goal, the oversight body should have a statutory underpinning,

²⁹⁷ Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017); *see also* Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017).

²⁹⁸ *Cf.* U.S. DEPT OF JUSTICE, *supra* note 293.) (“In the rare instances when complaints of misconduct are sustained, we found that discipline is haphazard and unpredictable, and is meted out in a way that does little to deter misconduct.”).

²⁹⁹ Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017); *see also* discussion *infra* Case Study: Northern Ireland.

³⁰⁰ Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017); Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017).

³⁰¹ Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017).

³⁰² U.S. DEPT OF JUSTICE, *supra* note 293.

³⁰³ *See* HANDBOOK, *supra* note 46, at 55.

³⁰⁴ Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London, Eng. (Dec. 15, 2017).

funding separate from the budget of policing institutions, and “complete discretion in the performance or exercise of its functions.”³⁰⁵ Additionally, “there must be a fair and transparent appointment process for the body’s commissioners or councillors”, with an opportunity for public participation. The selection of staff “should be based on merit rather than on political or any other affiliation.”³⁰⁶

Policing institutions should foster a culture of compliance and support of independent oversight and accountability mechanisms. In the modern context of public scrutiny via smartphones and instant media, an effective accountability regime can make police interactions with the public easier,³⁰⁷ and it can help clarify whether or not a police official is responsible for alleged misconduct or criminality. Conversely, members of policing institutions should not exploit public opinion to impede or push back against independent oversight. For example, the engagement of policing institutions in the context of protests was one of the first issues addressed by Chile’s National Institute for Human Rights after the government established it in 2010.³⁰⁸ This oversight body was initially very critical of police practices, but political pushback was so severe that the Institute shifted its focus to other human rights issues out of concern for institutional survival.³⁰⁹ This kind of political or bureaucratic influence over oversight mechanisms undermines the aims of oversight bodies and ultimately makes the policing of protests harder, not easier, by deteriorating trust between police and protesters.

The oversight body should also be representative of the communities that are policed and should engage, where possible, with communities in understanding community concerns. For instance, the oversight body and policing institutions should be representative with respect to gender and gender identity. They should ensure that gender-specific issues, such as sexualised searches and other claims of sexual violence or intimidation, are not unwittingly ignored.³¹⁰ An independent and representative oversight body must also avoid indirect affiliations with policing institutions. One of the most frequent complaints voiced by members of civil society in England is that staffing oversight bodies with former police officers can create undue institutional sympathy in favour of the policing institutions.³¹¹

Practice 28: Enable an open, accessible, and safe complaints mechanism, with a particular emphasis on facilitating complaints relating to gender-based violence

Finally, the oversight body should be open and accessible to the public. For instance, in disciplinary proceedings against an officer, complainants should be allowed party status. Allowing complainants to participate in adjudicative hearings facilitates the oversight and

³⁰⁵ HANDBOOK, *supra* note 46, at 49.

³⁰⁶ *Id.*

³⁰⁷ *Cf.* Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

³⁰⁸ Skype Interview with Michelle Bonner, Associate Professor of Political Science, University of Victoria (Jan. 25, 2018).

³⁰⁹ *Id.*

³¹⁰ See HANDBOOK, *supra* note 46, at 15 (recommending men and women have equal representation in police institutions and accountability structures, and that police adopt “gender mainstreaming” strategies that “mak[e] the concerns and experiences of women as well as men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that women and men benefit equally and inequality is not perpetuated”); Jasmine Sankofa, *Mapping the Blank: Centering Black Women’s Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L. J. 651, 666 (2016); cf. PAUL BUTLER, CHOKEHOLD 98–103 (2017).

³¹¹ See Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London, Eng. (Dec. 15, 2017); Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017); Interview with Dr. Adam Elliott-Cooper, King’s College London, in London, Eng. (Dec. 12, 2017).

accountability process by ensuring that the interests of victims are safeguarded and by bolstering the independence and transparency of oversight institutions.³¹²

To be open and accessible, the oversight body and police departments must use support structures and protocols that facilitate public complaints.³¹³ This is particularly true when dealing with complaints of gender-based intimidation, coercion, manipulation, and violence by officers.³¹⁴ Such complaints are often overlooked in the popular discourse surrounding police accountability.³¹⁵ Nevertheless, police sexual violence is a widespread and systemic problem³¹⁶ that often has a disparate impact on women, particularly women of colour.³¹⁷ In the United States, for example, the only police behaviour more frequently complained about than gender-based violence is excessive force.³¹⁸ Furthermore, such sexual misconduct and violence is likely underreported. Victims are generally chosen because of their perceived vulnerability and often fear retribution from police if they come forward. The general reticence of sexual assault survivors to report the crime is also well-documented.³¹⁹ To combat this, oversight bodies and police departments should adopt “no tolerance” policies and conduct regular hiring, training, and supervision activities in ways that emphasise the unacceptability of police sexual misconduct and violence.³²⁰

Because police sexual violence shatters trust in a particularly acute and personal manner, investigators must protect complainants from retaliation, re-traumatisation, and criminalisation. For instance, in the case of complaints of sexual violence, any information that might disclose the identity of the complainant should not be disclosed without the consent of the complainant. Unfortunately, in practice the provision of systemic support to sexual violence complainants remains largely aspirational.³²¹ This status quo must change.

Because police sexual violence shatters trust in a particularly acute and personal manner, investigators must protect complainants from retaliation, re-traumatisation, and criminalisation.

³¹² See, e.g., COMMISSIONER FOR HUMAN RIGHTS, COUNCIL OF EUROPE, OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS CONCERNING INDEPENDENT AND EFFECTIVE DETERMINATION OF COMPLAINTS AGAINST THE POLICE ¶¶ 30, 77–79 (2009), <https://rm.coe.int/16806daa54>.

³¹³ See, e.g., Sankofa, *supra* note 312, at 689–93.

³¹⁴ Gender-based police “misconduct” can range from lewd or inappropriate remarks or comments to allegations of sexual assault or rape. See, e.g., Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 171–72 (2016). ROGER GOLDMAN ET AL., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 3 (2011).

³¹⁵ See Sankofa, *supra* note 312, at 668. See also https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html?utm_term=.6e3bffb6483612; Zoë Carpenter, *The Police Violence We Aren't Talking About*, THE NATION (Aug. 27, 2014), <https://www.thenation.com/article/police-violence-we-arent-talking-about/>. <https://www.thenation.com/article/police-violence-we-arent-talking-about/>.

³¹⁶ See Trombadore, *supra* note 316, at 160–64; Carpenter, *id.* See also <https://www.independent.co.uk/news/uk/home-news/police-officer-complaints-domestic-abuse-sexual-assault-cases-rise-watchdog-figures-a8214201.html#17>.

³¹⁷ See Trombadore, *supra* note 316, at 167–69.

³¹⁸ See Carpenter, *supra* note 317 (“According to the Cato Institute, more than 9 percent of reports of police misconduct in 2010 involved sexual abuse, making it the second-most reported form of misconduct, after the use of excessive force. Comparing that data to FBI crime statistics indicates that ‘sexual assault rates are significantly higher for police when compared to the general population’”).

³¹⁹ See Sankofa, *supra* note 312, at 667–72; Trombadore, *supra* note 216, at 166.

³²⁰ See generally GOLDMAN ET AL., *supra* note 278; INDEPENDENT POLICE COMPLAINTS COMMISSION, THE ABUSE OF POLICE POWERS TO PERPETRATE SEXUAL VIOLENCE (2012).

³²¹ See, e.g., Carpenter, *supra* note 317, at 279.

NORTHERN IRELAND: THE POLICE OMBUDSMAN. The Police Ombudsman in Northern Ireland provides a good example of effective independent oversight. The peace process, which ended the ethnic violence between Northern Ireland's Protestant majority and its Catholic minority, brought substantial reforms to police oversight. Today, the Ombudsman's Office is empowered to recommend that an officer be disciplined, fired, or prosecuted for "police misconduct." It takes complaints from the public, is "well-resourced", and has "complete access to investigate."³²² In conducting investigations, the Ombudsman has "powers of constable" which give it authority to search and seize evidence from police and arrest officers when necessary.³²³ Additionally, as one former commander explained, "anytime a police officer draws a weapon, they are supposed to notify the Ombudsman's Office and offer a justification for why it was necessary."³²⁴ Experts interviewed for this report uniformly described the positive impact this powerful Ombudsman's Office has had on policing in Northern Ireland.³²⁵

An example of a policing of protests investigation by the Police Ombudsman's office shows the benefits of these broad powers. On July 12, 2011, violence broke out in Ardoyne area of Belfast "as Nationalist protesters demonstrated against a contentious Orange Order parade."³²⁶ Responding to "stones, heavy masonry, and roof slates" thrown at officers by the rioters, police authorised use of water cannons and rubber bullets.³²⁷ The Ombudsman's office relied upon several key processes to evaluate the legality of this use of force. All discharges of firearms, including rubber bullets, were automatically referred to the Ombudsman which collected all relevant paperwork and use of force reports completed by officers and their commanders.³²⁸ The Ombudsman placed a senior investigating officer at the event to observe police decision-making and practices. The investigators also reviewed records to establish exactly when permissions for use of force were granted and how events unfolded. Additionally, the investigators checked to make sure each officer who handled and discharged a weapon had been properly trained and authorised to use those weapons. The investigators then evaluated measures taken prior to use of force aimed at preventing the need to use force, and the proportionality of the measure given the gravity of the threat.

In finding the police use of force justified, the Ombudsman concluded that police properly "employed a series of tactics—including discussions with different parties, the deployment of officers on foot and in vehicles, the use of water cannon, and the issuing of verbal warnings—before resorting to the use of baton rounds when these proved ineffective."³²⁹

³²² Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017).

³²³ See POLICE OMBUDSMAN FOR NORTHERN IRELAND, "POWERS OF CONSTABLE", <https://policeombudsman.org/Information-for-Police-Officers/Power-of-Constable> (last visited Apr. 18, 2018).

³²⁴ *Id.*

³²⁵ See *id.*; Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

³²⁶ POLICE OMBUDSMAN FOR NORTHERN IRELAND, POLICE JUSTIFIED IN DISCHARGING 77 BATON ROUNDS DURING ARDOYNE DISTURBANCE, <https://policeombudsman.org/Investigation-Reports/Police-justified-in-discharging-77-baton-rounds-du> (last visited Mar. 13, 2018).

³²⁷ *Id.* (describing that police ultimately fired 77 rubber bullets).

³²⁸ *Id.* ("including command and control serials, journal entries, policy and decision logs completed by senior officers, and Use of Force forms completed by officers who discharged AEPs").

³²⁹ *Id.*

RECOMMENDATIONS

- » States should create independent bodies charged with investigating and adjudicating misconduct, the use of force, and alleged criminality by policing institutions as well as systemic reviews of policies and practices.
- » The independent oversight and accountability mechanisms must have sufficient funding, resources, audit powers, the power of subpoena, and independence to ensure effective investigation.
- » Reporting use of force by policing institutions to the independent mechanism should be required by law and mandated through internal processes.
- » Policing and state agents should be obligated, by statute, to facilitate and co-operate with oversight investigations. Obstruction of, or interference with, an oversight investigation should be an offence.
- » A culture of compliance and support of independent oversight and accountability mechanisms should be fostered.
- » The public should be able to bring complaints for investigation by the independent oversight mechanism.
- » Complainants should have full party status during adjudicative proceedings on the complaint.
- » The findings of investigations, including reasons for any dismissals of complaints, should be made public and easily accessible – subject to limitations on disclosure intended to respect the privacy rights of complainants.
- » In the case of complaints of sexual violence or misconduct, any information that might disclose the identity of the complainant (including the identity of the implicated officer,) should not be disclosed by the oversight institution without the consent of the complainant.
- » Support structures and protocols for sexual violence complainants should be established. The best interests of the complainant should be protected and promoted throughout the complaint and accountability process.
- » The independent oversight mechanisms must be empowered to impose disciplinary measures or trigger prosecution of individual officers for misconduct or criminality. Decisions not to pursue prosecutions should be made public (and, where possible, should be accompanied by certificates of non-prosecution) to enable complainants and private parties to pursue other remedies.

B. INTERNAL INVESTIGATIONS AND POLICIES

PRINCIPLES AND STANDARDS

- International law requires that “[t]he state and its organs shall be held accountable for their actions in relation to assemblies.”³³⁰ To fulfil this obligation, “[s]tates should establish and fund . . . non-judicial oversight, including an effective internal investigations process.”³³¹ As part of these internal procedures, “[a] law enforcement officer who is under investigation, external or internal, should not be redeployed into the field until the investigation is complete and the officer is cleared of wrongdoing.”³³²
- Governments and law enforcement agencies must ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms and they did not take all measures in their power to prevent, suppress, or report such use.³³³
- Law enforcement agencies must have post-assembly debriefing processes in place.³³⁴ These processes should promote monitoring, evaluation, and learning from the law enforcement operation on effective facilitation of the right to assemble. The process should identify both failings and good practices as well as the effectiveness of risk assessments and contingency plans for the event.³³⁵

GOOD PRACTICES

Policing institutions are obliged to develop internal processes and practices to promote transparency and accountability, including, but not limited to, establishing clear policies for effective internal investigations for use of force and suspected misconduct and criminality. Such internal practices can play a large role in the effectiveness of accountability mechanisms. If policing institutions choose not to co-operate with oversight mechanisms – such as by adopting a “code of silence” – they can significantly diminish the efficacy of the overall accountability scheme.³³⁶

The resistance of policing institutions to oversight shifts responsibility to administrative and judicial oversight bodies, while simultaneously making it more difficult for these bodies to gather the information needed to investigate and adjudicate complaints. And if there are little or no consequences for the abuse of power, a system of impunity for misconduct and criminality can develop. On the other hand, support for accountability mechanisms by policing institutions not only facilitates the identification and correction of practices that violate rights – it helps create a culture of protection and promotion of the rights to protest.

³³⁰ *Joint Report*, *supra* note 1 at 20.

³³¹ *Id.* at ¶ 96(b).

³³² *Id.* at ¶ 96(c).

³³³ UN Basic Principles, *supra* note 8.

³³⁴ ACHPR Guidelines, *supra* note 36, at ¶ 24.1.

³³⁵ *Id.* As stated further, at para 24.2, law enforcement agencies are encouraged to make reports of the debriefing available to any person, including but not limited to, assembly organisers, participants, oversight authorities and other relevant stakeholders.

³³⁶ HANDBOOK, *supra* note 46, at 87; *see also id.* at 75–76 (“Worldwide, the police culture is often characterized by what is referred to as the ‘blue wall of silence.’ Such a culture, valuing loyalty over integrity, facilitates misconduct by keeping it concealed.”).

Practice 29: Require that internal investigations and disciplinary processes for misconduct and criminality by members of policing institutions are instituted, effectively investigated, and completed

Regardless of what external mechanisms are put in place, policing institutions themselves should investigate alleged misconduct and criminality and impose disciplinary measures where appropriate. Such internal mechanisms not only provide another avenue of remedying misconduct and criminality, but also help officers internalise principles of human rights-compliant and professionalised policing. Investigations carried out internally should be meaningful and effective – the goal should be to improve the quality of policing, not to shield officers from the consequences of criminal conduct.

A key component of effective internal investigation is to mandate reporting of uses of force within the command structure³³⁷ and to the independent oversight body. Without data on the frequency, circumstances, and justifications underlying use of force incidents, evaluating the effectiveness of existing policies, training, or review processes is severely limited. For example, the Los Angeles Police Department requires internal and external reporting any time force is used by obligating the internal investigator to notify both the district attorney and the independent Inspector General’s office.³³⁸

These kinds of reporting and notice requirements should supplement a wider emphasis on de-escalation and non-escalation tactics. If police leadership is to take the need to provide meaningful accountability seriously,³³⁹ it must also recognise and commend officers who consistently have positive interactions with protesters or who consistently de-escalate or do not escalate difficult or trying situations. It must also provide officers with structural support services that facilitate good policing, including timely and adequate mental health and social services.

Relatedly, part of facilitating robust internal investigations is the protection of investigators or officers co-operating with an investigation from recrimination or backlash from fellow officers.³⁴⁰ Police officers conducting internal investigations should never face pressure or coercion to alter their findings.³⁴¹ A serious failure of accountability occurs if investigating officers engaged in good policing – who make genuine findings of misconduct or provide evidence and testimony – subsequently face more dangerous assignments, less ability to call for backup, negative performance reviews, or pressure to resign.³⁴²

Finally, officers found to have committed wrongdoing must face meaningful disciplinary measures. Discipline appeals processes, like adjudications of first instance, should be independent and impartial. Officers found to have committed an offence should not be allowed to avoid the consequences of their actions.³⁴³ In short, police commanders must always take meaningful action on findings of wrongdoing in order to uphold departmental policy and deter future misconduct or criminality. For example, in Chile a wave of public

³³⁷ Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017).

³³⁸ LOS ANGELES POLICE DEPARTMENT, USE OF FORCE POLICY (2014).

³³⁹ See Futterman et al. *supra* note 290 at 182–86.

³⁴⁰ See, e.g., Jamie Kalven, *Code of Silence*, THE INTERCEPT (Oct. 6, 2016), <https://theintercept.com/series/code-of-silence/>.

³⁴¹ See *id.*

³⁴² See *id.*

³⁴³ See, e.g., Jennifer Smith Richards & Jodi S. Cohen, *Secretive appeals process quietly reducing punishment for cops after findings of misconduct*, CHI. TRIBUNE (Dec. 13, 2017), <http://www.chicagotribune.com/news/watchdog/ct-chicago-police-grievance-cases-met-20171213-story.html>.

resignations followed the death of a bystander at a protest event in 2011 when two police officers fired Uzi submachine guns at the crowd.³⁴⁴ However, these resignations were mostly for show. The majority of officers who resigned were merely reassigned to different posts.³⁴⁵ This sort of false accountability fails to address the systemic issues that allowed police officers to use live ammunition at a protest in clear violation of international human rights standards.

Practice 30: Identify and eliminating processes which frustrate or delay internal investigations

Due process requires proper investigatory procedures to prevent arbitrary adverse outcomes. The risk of an officer under investigation, using their expertise to cover up violations or otherwise undermine investigations before they start, should be addressed. For instance, officers are well positioned to disrupt the chain of custody of a crucial piece of evidence against them, thereby making it significantly more difficult for the relevant fact-finder to determine whether misconduct or criminality occurred.

Effective accountability therefore requires the police to ensure that bad investigatory practices do not get built into either external or internal investigations. Such bad practices include: failing to interview witnesses; failing to collect physical evidence like spent ammunition; failing to consider, account for, or remedy “[t]he potential for inappropriate coordination of testimony, risk of collusion, and witness coaching during interviews”; asking cursory questions “aimed at eliciting favourable statements justifying the officer’s actions rather than seeking truth”; failing to challenge inconsistencies or illogical explanations during questioning; asking “leading questions favourable to the officer”; failing “to review and incorporate probative evidence from parallel civil and criminal proceedings based on the same police incident”; drafting reports “in a manner favourable to the officer by omitting conflicts in testimony or with physical evidence that undermine the officer’s justification or by exaggerating evidence favourable to the officer”; and failing to hold officers accountable for lying to investigators or making “affirmative efforts to conceal evidence.”³⁴⁶

In sum, effective oversight requires upholding the standards of good policing in the oversight context and avoiding investigatory practices that insulate officers or create opportunities for collusion, concealment of evidence, or lying. Police officers accused of misconduct or criminal conduct deserve the same due process protections as everyone else. Collective bargaining agreements or “Law Enforcement Bills of Rights” that enshrine into law or practice process requirements that grant special protections for police and inhibit the effective investigation of accused officers are plainly inappropriate.³⁴⁷

³⁴⁴ Skype Interview with Michelle Bonner, Associate Professor of Political Science, University of Victoria (Jan. 25, 2018). See also Police Abuse in Contemporary Democracies (Michelle D. Bonner et al eds., 2018) 113.

³⁴⁵ *Id.*

³⁴⁶ U.S. DEPT OF JUSTICE, *supra* note 293. See also Vikram Dodd, *Mark Duggan’s death: two shots fired and two conflicting stories*, THE GUARDIAN (Jan. 8, 2014), <https://www.theguardian.com/uk-news/2014/jan/08/mark-duggan-death-london-riots>, (“the armed officers were allowed to sit together in a room at Leaman Street station in east London for eight hours and write their full statements after conferring.”).

³⁴⁷ See Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 125-26 (2017); Keenan & Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 227 (2005); see also Paul Butler, Opinion, *The Police Officers’ Bill of Rights Creates a Double Standard*, N.Y. TIMES: ROOM FOR DEBATE (June 27, 2015 9:13 PM), <https://www.nytimes.com/roomfordebate/2015/04/29/balti-more-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard>.

Practice 31: Engage in reflective debriefing sessions after protests that identify successes, failures, and areas of improvement

In addition to internal investigations that focus on specific instances of misconduct, policing institutions should also evaluate their record of protecting and promoting human rights at a systemic level. Carrying out broader review of practices seeks not only to prevent individual officers from violating human rights, but also to improve department policy so that rights violations become less likely in the first place.³⁴⁸

One way to accomplish this goal is to engage in post-event debriefs that allow officers and commanders to learn from their experiences.³⁴⁹ Debriefs offer policing institutions the opportunity to consider rights vindications and rights violations from a broader perspective. Rather than focusing on individual cases of wrongdoing, debriefs allow police to step back and consider the ways in which the department as a unit succeeded or failed in protecting human rights, how events unfolded, and whether a different decision at a key point may have prevented escalation. The Honourable Frank Iacobucci, former Puisne Justice on the Supreme Court of Canada, has drawn attention to “the importance of conducting debriefs in a manner that respects officers’ mental health needs” as well as the utility of debrief self-analysis, including “whether the officer experienced fear, anxiety and other psychological and emotional effects during the encounter, and techniques for coping with those effects while trying to de-escalate a situation.”³⁵⁰ And as noted by Dr. Alok Mukherjee, former chair of the Toronto Police Services Board (Canada), debriefing “is not just a training tool, but an accountability tool that supervisors should use to reinforce the use of de-escalation tactics.”³⁵¹ Good practices should also include allowing policing institutions to consider issues of systemic discrimination in the protesting context, such as how deployment tactics, staffing assignments, and arrest decisions can adversely affect women, racial or ethnic communities, members of the LGBTQI+ community, and other marginalised groups.

Lessons learned in the debrief can then be applied in the next protesting event. Debriefs thus provide for an iterative process that builds institutional expertise in rights protection. Since debriefs can also provide essential information to police oversight bodies who are engaging in post-event reviews of police conduct, this iterative process ideally includes engaging with and incorporating systemic guidance from police oversight bodies.

³⁴⁸ See Interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in London, Eng. (Dec. 14, 2017); Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast, N. Ir. (Dec. 18, 2017).

³⁴⁹ RESOURCE CENTER FOR HUMAN RIGHTS, POLICY OPTIONS FOR IMPROVEMENT OF ASSEMBLY POLICING MANAGEMENT IN MOLDOVA 29 (2017).

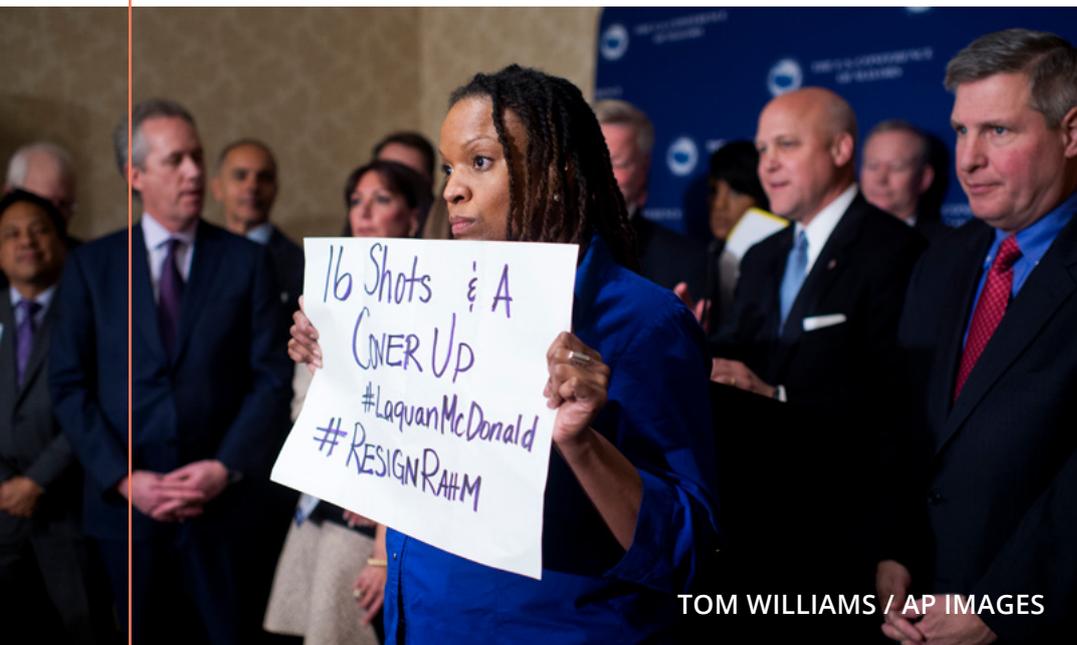
³⁵⁰ POLICE ENCOUNTERS WITH PEOPLE IN CRISIS: AN INDEPENDENT REVIEW CONDUCTED BY THE HONORABLE FRANK IACOBUCCI FOR CHIEF OF POLICE WILLIAM BLAIR, Toronto Police Service 174 (2014), https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf.

³⁵¹ Paul Dubé, Ontario Ombudsman, A MATTER OF LIFE AND DEATH 293 (2016), <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2016/a-matter-of-life-and-death>.

UNITED STATES: THE LAQUAN MCDONALD COVER-UP. The City of Chicago's response to the police shooting of Laquan McDonald provides a paradigmatic example of poor internal oversight. On 20 October 2014, white Chicago Police Department (CPD) officer Jason Van Dyke shot seventeen-year-old African American Laquan McDonald sixteen times, killing him.³⁵² Although video of the incident had been captured on dashcam, the City fought for a year to prevent its public release.³⁵³ During this time, Officer Van Dyke was placed on paid desk leave.³⁵⁴ Following a court order requiring the City to release the video, Van Dyke was charged with murder mere hours before the dashcam video became publicly available.³⁵⁵

The dashcam video powerfully demonstrated the inadequacy of police records and the internal investigation. The Chicago Tribune reported:

"In charging Van Dyke with first-degree murder, prosecutors said the officer opened fire six seconds after exiting his squad car, firing 16 rounds at McDonald in about 14 seconds as the teen was walking away, and was reloading when another officer told him to hold his fire. For 13 of those seconds, McDonald was already lying on the street, prosecutors said. The video did not show McDonald lunging toward officers as some of them claimed, although there appears to be a silver object in McDonald's right hand."



The reports state investigators viewed the video and found them consistent with officers' accounts. In the report that closed the investigation, filed in March [2015], a detective offered this terse assessment. "Criminal attacked officer," the report says, "that officer killed criminal."³⁵⁶

³⁵² See Nausheen Husain, *Laquan McDonald timeline: The shooting, the video and the fallout*, CHI. TRIBUNE (Oct. 20, 2017), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htlmlstory.html>.

³⁵³ See *id.*

³⁵⁴ Zach Stafford, *Chicago police officer who shot black teen 16 times charged with murder*, THE GUARDIAN (Nov. 24, 2015), <https://www.theguardian.com/us-news/2015/nov/24/chicago-police-shooting-laquan-mcdonald-16-times-murder-charge>.

³⁵⁵ See Husain, *supra* note 355.

³⁵⁶ Chi. Tribune staff, *Laquan McDonald police reports differ dramatically from video*, CHI. TRIBUNE (Dec. 5, 2015).

In the tragic case of Laquan McDonald, officers fabricated a story to cover-up the misconduct of another officer. An internal investigation not only failed to challenge or expose the cover-up but accepted it as true. High-level strategic decisions appear to have been made to suppress evidence and shield Officer Van Dyke from any accountability until a court order made that position practically and politically impossible. As a result, the City has suffered an ongoing crisis in public confidence in the police, and the already fraught relationship between the CPD and the city's communities of colour – frequently punctuated by conflicts between police and protesters denouncing the City's police department – has deteriorated further.³⁵⁷

RECOMMENDATIONS

- » Policing institutions should establish internal policies and procedures for effective investigation of complaints for misconduct, use of force, or alleged criminality, and they should ensure that all officers are aware of their existence and how they work.
- » Internal investigations must be carried out by high ranking officers or teams with no involvement in the incident of misconduct or criminality. Preference should be given to internal investigations carried out by a separate, independent police institution.
- » States should ensure that no legislation is adopted which frustrates effective investigations by providing greater procedural protections for officers accused or suspected of misconduct or alleged criminality than those provided for other government employees facing dismissal or targets of a criminal investigation (e.g. Law Enforcement Bills of Rights). In terms of the principles of legality and non-discrimination, officers should not be held to a lower standard to that of citizens.
- » An officer under investigation for an offence committed in the context of a protest should not engage in policing protests until the investigation is complete.
- » External oversight bodies should be notified why and when an internal investigation is initiated and completed. Oversight bodies and civil society organisations may be invited to witness proceedings and to participate as a “friend” or observer in proceedings.
- » Results of internal investigations should be reported to external oversight bodies and to the public. Reports on the dismissals of complaints must include written reasons for the dismissal. Private complainants should have access to the proceedings and have broad powers to offer evidence and call witnesses.
- » Departments should implement post event debriefs to review decisions made and the steps leading to the use of force, if force was used.
- » Law enforcement officials should have access to structural, mental health, and social support systems.
- » In ordinary performance reviews, police should be evaluated in light of human rights-based standards.

³⁵⁷ See, e.g. Ben Austen, *Chicago After Laquan McDonald*, THE N.Y. TIMES (April 20, 2016), <https://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html>; see also Monica Davey & Mitch Smith, *Video of Chicago Police Shooting a Teenager is Ordered Released*, THE N.Y. TIMES (Nov. 19, 2015), <https://www.nytimes.com/2015/11/20/us/laquan-mcdonald-chicago-police-shooting.html>.

C. TRANSPARENCY

PRINCIPLES AND STANDARDS

- International law provides that “[e]very person has the right to access information related to assemblies.”³⁵⁸ In meeting this requirement, “States should proactively disseminate key information relating to the management of assemblies.”³⁵⁹ The information considered key under international law includes: laws and regulations relating to the management of assemblies; information regarding the responsibilities and procedures of agencies and bodies that manage assemblies; standard operating procedures and policies, including codes of conduct, governing the policing of assemblies; the types of equipment routinely used in policing assemblies; information on the training of law enforcement officers; and information on how to access accountability processes.³⁶⁰
- Additionally, “States should enact comprehensive legislation, for example freedom of information acts, to facilitate public access to information, based upon the principle of maximum disclosure.”³⁶¹ Furthermore, “States should manage information so that it is comprehensive and easily retrieved, and should respond promptly and fully to all requests for information.”³⁶²
- Law enforcement agencies should publicly communicate the findings of any internal debriefings and/or investigations (whether internal and external) resulting from each assembly operation.³⁶³

GOOD PRACTICES

Transparency in decision-making is an essential component of effective accountability. Public access enables interested parties to judge for themselves whether state and police behaviour complies with human rights standards. This public viewing then enables democratic feedback that can help the state and police better respond to community needs. Furthermore, transparency should reduce incidences of misconduct by encouraging self-regulation. When police officers and state agents know that their behaviour is under public scrutiny, they are less likely to engage in activities that violate human rights standards.

Practice 32: Make policies, manuals, reports and statistics on police practices in the context of protests publicly available

Information about policing in the context of protests should be widely and easily accessible, in order to provide the maximum opportunity for public understanding and review of police behaviour. To advance this goal, state officials and the police should ensure: free access to public records and internal police regulations (including police policies and procedures),³⁶⁴

³⁵⁸ *Joint report, supra* note 1, at ¶ 18.

³⁵⁹ *Id.* at ¶ 82(a).

³⁶⁰ *Id.*

³⁶¹ *Id.* at ¶ 82(b).

³⁶² *Id.*

³⁶³ ACHPR Guidelines, *supra* note 36, at ¶ 24.7.

³⁶⁴ See Interview with Corey Stoughton, Advocacy Director, Liberty, in London, Eng. (Dec. 13, 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017).

ample opportunity for media observation of police decision-making and actions,³⁶⁵ and civil society observation and monitoring of police behaviour during protests.³⁶⁶ Such transparency gives protesters and communities insight into how police make decisions regarding assemblies, the rules and guidelines they are following, and the policies which dictate certain strategies and tactics. In turn, these insights inform expectations regarding police behaviour and help members of the public identify practices that violate the law or police policy.³⁶⁷ Access further allows the public to evaluate whether human rights-compliance is embedded in decision-making processes.³⁶⁸ Finally, transparency plays a crucial role in accountability by ensuring that the public is adequately informed regarding who to credit or hold responsible for policing actions.

As discussed above (see Practice 17 above), policing institutions should also have processes in place to provide briefings before or at the start of an event on how the event will be policed. Individuals engaged in journalistic activity should be provided with a contact person during the event who can respond to specific issues as events unfold. Some departments have accomplished this by employing a media liaison office and establishing command posts specifically for media use at protest events.³⁶⁹ As Chief Doug LePard of the Metro Vancouver Transit Police explained, “police should communicate well and often. They should, first, do the right thing and explain what they’re doing and why.”³⁷⁰

Practice 33: Procure crowd-control weapons and equipment in an open and transparent process

The procurement of equipment and technology, including CCWs, used by policing institutions in the context of protests often lacks transparency and accountability. The lack of a legal framework makes it difficult to know and evaluate the process through which decisions get made to procure these technologies, whether the human rights consequences are considered and what information is provided to states and policing institutions on how these weapons should be used.

To fix this gap in regulation and accountability, states and policing institutions should make public the criteria used to acquire these technologies. Information on testing, development, impact, and suggested use provided by companies to police should be provided to the public along with the use of force policies and more specific equipment policies. It should also be part of the written procurement proceedings and subjected to audits. Because “guidelines and standard operation procedures are often industry driven and the people designing (and profiting from) weapons are the ones determining how they should or should not be used”, public access to and review of these standards is crucial for democratic accountability.³⁷¹ Moreover, states and policing institutions should ensure that standards and regulations are created in consultation with, and awareness of, groups that may be disproportionately impacted by crowd-control weapons e.g. children, pregnant women. Finally, to improve public understanding of how these weapons are used and the

³⁶⁵ See Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, N. Ir. (Dec. 19, 2017); Interview with Gary White, MBE, Senior Police Advisor, Saferworld, in Belfast N. Ir. (Dec. 18, 2017).

³⁶⁶ See Interview with Neil Jarman, Director, The Institute for Conflict Research, in Belfast, N. Ir. (Dec. 18, 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017).

³⁶⁷ Interview with Nigel Goddard, Superintendent, Police Services of Northern Ireland, in Belfast, N. Ir. (Dec. 20, 2017).

³⁶⁸ Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, N. Ir. (Dec. 18, 2017).

³⁶⁹ Skype Interview with Doug LePard, Chief Officer, Metro Vancouver Transit Police (February 26, 2018).

³⁷⁰ *Id.*

³⁷¹ LETHAL IN DISGUISE, *supra* note 45 at 19.

impact they have, detailed reporting requirements should be developed to track the use of each weapon, the context in which it is used, the specific justification offered for its use, and a detailed accounting of the resulting injuries.

UNITED STATES: THE STANDING ROCK PROTESTS, 2017. In opposition to the construction of the Dakota Access pipeline in the midwestern United States, protesters and water protectors camped out for more than a year near North Dakota's Standing Rock Sioux Tribe reservation. Local law enforcement agencies, led by the Morton County Sheriff's Department, aggressively deployed militarised gear and weapons to intimidate peaceful protesters and violently crack down on a historic indigenous-led movement.³⁷²

Personnel and equipment pouring in from over seventy-five law enforcement agencies from around the country and National Guard troops created a battlefield-like atmosphere at Standing Rock.³⁷³

The deployment of CCWs at the Standing Rock protests and the injuries inflicted by these weapons demonstrate the need for regulation and accountability with respect to so-called "less lethal weapons." In addition to automatic rifles, law enforcement at Standing Rock used sound cannons, tear gas, mace, rubber bullets, and concussion grenades against water protectors. Police also used potentially fatal water cannons for hours in below-freezing weather to disperse protesters. An estimated 300 protesters were injured in November 2016, twenty-six of whom were hospitalised.³⁷⁴ According to eyewitness reports, numerous protesters suffered hypothermia as a result of being soaked with water from the water cannons while other demonstrators suffered seizures, multiple bone fractures from projectiles fired by police, internal bleeding from a rubber bullet injury, broken ligaments, loss of bowel control, and loss of consciousness, and one elder went into cardiac arrest.³⁷⁵



³⁷² See, e.g., Julia Carrie Wong & Sam Levin, *Standing Rock protesters hold out against extraordinary police violence*, THE GUARDIAN (Nov. 29, 2016), <https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation> (Nov. 29, 2016), Jamil Dakwar, *Police at Standing Rock Are Using Life-Threatening Crowd-Control Weapons to Crack Down on Water Protectors*, ACLU BLOG (Nov. 22, 2016), <https://www.aclu.org/blog/racial-justice/american-indian-rights/police-standing-rock-are-using-life-threatening-crowd>, see also Dallas Goldtooth, *11/20 Water Cannon used on #NoDAPL Protectors – Phone Interview with Angela Bibens*, SOUNDCLOUD: DALLAS GOLDTOOTH (Nov. 20, 2016), <https://soundcloud.com/dallas-goldtooth>.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

The deployment of CCWs at the Standing Rock protests and the injuries inflicted by these weapons demonstrate the need for regulation and accountability with respect to so-called “less lethal weapons.”

RECOMMENDATIONS

- » Policies for training, protecting, and promoting the rights to protest, use of force manuals, and basic outlines of decision-making and the chain of command should be made public and be easily accessible.
- » Policing institutions should extend access to decision-making processes to media, civil society, medical, and monitoring groups – prior to, during, and after protests.
- » Post-event review processes should be accessible to the public. States should inform the public of the number of people arrested and hospitalised, and the places and reasons for detention. No names or personal identifying information of people arrested, hospitalised or detained may be disclosed to the public at large without the consent of the person concerned.
- » The state should make public the decision-making processes and criteria used to determine what crowd-control weapons and equipment are acquired, developed, or traded. All steps within that decision-making process should be documented and traceable.
- » Reporting on the deployment and use of crowd-control weapons and equipment, as well as all uses of force should be mandated and comprehensive (including description of circumstances justifying the use of weapons, crowd-control equipment, and/or force).

CONCLUDING REMARKS

The practices documented in this report provide a roadmap on how states, and their policing and security institutions and individual commanders (and officers) can find ways to better serve the people, to protect their rights and to identify and address counter-productive/entrenched strategies and practices. This report aims to document successful, as well as problematic, attempts to improve security approaches to protest and to place them into a comprehensive framework for human rights-compliant and professionalised policing of protests and assemblies. Ultimately, the protection and promotion of the rights to protest requires a comprehensive rights-protective legal framework reinforced by institutional mechanisms and a political and police leadership committed to fostering a culture of engagement and protection. Moving away from repression and violence demands systemic, multi-dimensional reform.

Entrenching non-discrimination and equality of treatment in policing institutions depends not only on affirmative legal obligations but also requires a profound change in how officers are recruited, hired, trained, promoted and disciplined. Ensuring non-escalation and no use of force during protests – even and especially when protests are disorderly or challenge the political establishment – requires establishing systems and strategies all aimed at minimising violence. These include: training and use of dialogues officers, engagement with protesters and protection of journalistic activity, effective planning, and implementation of precautionary measures. It also requires training and equipping police officers for graduated use of force, and putting systems in place for effective reporting on use of force. Finally, entrenching these good practices depends on establishing effective internal and external accountability mechanisms so violations and failures are discovered and remedied. Without accountability, any reform and improvement can be quickly lost.

The good and problematic practices catalogued in this report aim to provide a toolkit for policing institutions everywhere to evaluate their existing policies, practices, and institutional mechanisms. They provide detailed discussion of how to implement legal principles and the kinds of challenges and complications that can arise. INCLO and IHRC hope this report can promote open, practical, and well-informed dialogue between activists, human rights defenders, and policing institutions on human rights-compliant policing and the ways in which good practices serve individuals engaged in public speech and assembly and the goals of security and policing institutions alike.