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Eleni Polymenopoulou

EXPRESSING DISSENT: GAG LAWS, HUMAN RIGHTS ACTIVISM AND THE RIGHT TO PROTEST

Eleni Polymenopoulou[*]

Abstract

Over the last decade, gag laws have been increasingly used in the context of the right to protest in both liberal and illiberal States. Alarming restrictions include not only laws directly suppressing protests—as in the case of authorization requirements and other prior restraints—but also laws suppressing protests indirectly, in the name of public order, freedom of movement, and other public interests. Drawing on the jurisprudence of human rights bodies, this Article explores whether there is any way to assess the legitimacy of such restrictions vis-à-vis human rights activism and the imperative of political and democratic participation. This Article argues that the only possible criterion by which to distinguish 'gag laws' from legitimate restrictions is effectively a functional one, based on the 'chilling effect' on the freedom to protest. This author takes the view that gag laws encompass not only legislation imposing prior restraints to freedom of speech or assembly but also all those laws applied in a way that attempts to eliminate dissent and political opposition.

* Assistant Professor, Hamad Bin Khalifa University, College of Law, Qatar Foundation; Adjunct Assistant Professor, Georgetown University, Edmund A Walsh School of Foreign Service; epolymenopoulou@hbku.edu.qa.

INTRODUCTION

In December 2020, the highest court of Hong Kong upheld the detention of "media tycoon and pro-democracy" activist Jimmy Lai on charges of fraud and "collusion with a foreign country."[1] This is a ruling that a few years earlier no one would anticipate. In July 2020, after considerable international backlash and concern,[2] the Republic of China enacted a new security law which would be applicable in the SAR and extraterritorially.[3] The new law, which has already led to hundreds of arrests[4] and drawn international concern,[5] stipulates, among other things, life imprisonment for "secession, subversion, terrorism and collusion with foreign forces."[6] It further specified that offenses could be considered terrorist activity, punished by life imprisonment.[7]

This is sadly not an isolated incident. Protests around the world have been accompanied by excessive police violence, procedural abuses and prosecution of leading human rights activists. In many of these cases, governments have responded not only by extreme repression, but also, by enacting measures indirectly targeting the right to free speech and freedom of peaceful assembly. This has been especially evident not only in Asia, but also, in the Americas. The introduction of broad laws against

1. Anon, *Hong Kong tycoon Jimmy Lai ordered back to jail pending trial* ALJAZEERA NEWS, https://www.aljazeera.com/news/2020/12/31/hong-kong-tycoon-jimmy-lai-ordered-back-to-jail-pending-trial [https://perma.cc/NJX2-7MTN]; *see also* Theodora Yu, Shibani Mahtani and Eva Dou, *Hong Kong media publisher Jimmy Lai is charged under national security law*, WASH. POST (Dec. 11, 2020), https://www.washingtonpost.com/world/asia_pacific/hong-kong-national-security-law-jimmy-lai/2020/12/11/58e7cc5c-3b69-11eb-aad9-8959227280c4_ story.html [https://perma.cc/XUM9-T87S].

2. *See, e.g.*, *China/Hong Kong: U.N. experts urge China to respect protesters' rights*, U.N. OFF. HIGH COMM'R (Sept. 12, 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24979&LangID=E [https://perma.cc/XUS6-ESXU].

3. *See* Grace Tsoi & Lam Cho Wai, *Hong Kong security law: What is it and is it worrying?*, BBC NEWS (June 30, 2020), https://www.bbc.com/news/world-asia-china-52765838; Vivian Wang & Alexandra Stevenson, *In Hong Kong, Arrests and Fear Mark First Day of New Security Law*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/world/asia/hong-kong-security-law-china.html [https://perma.cc/D6B2-Y5QN].

4. Zen Soo, *Hong Kong Police Make First Arrests Under New Security Law*, ASSOCIATED PRESS (June 30, 2020), https://apnews.com/article/481e4051462954f6ddc3bb3079f14ad4 [https://perma.cc/4RRP-Z2GF].

5. *See U.N. experts call for decisive measures to protect fundamental freedoms in China*, UN NEWS (June 16, 2020), https://news.un.org/en/story/2020/06/1067312 [https://perma.cc/R2Z8-VYC9].

6. Tsoi & Wai, *supra* note 3; *see also* Wang & Stevenson, *supra* note 3 (noting arrests were made the first day of the law's enactment).

7. Wang & Stevenson, *supra* note 3.

terrorism in the aftermath of the uprisings in Nicaragua,[8] Venezuela,[9] Colombia,[10] Mexico,[11] Guatemala,[12] and Chile,[13] as well as in the post-Covid era,[14] has had a severe impact upon the right to peaceful assembly, eventually leading to self-censorship and the gradual minimization of dissent.[15]During the protests in Nicaragua, for instance, the Government

8. *See* IACHR Press release No 108/ 2019, *Amid Ongoing Restrictions on Public Protest, IACHR Urges Nicaragua to Comply with Implementation of Agreements* (Apr. 30, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/108.asp [https://perma.cc/5PPL-3XY3].

9. *See* IACHR Press release No 48/17, *IACHR Urges Venezuela to Guarantee the Right to Protest and to Demilitarize Streets* (Apr. 19, 2017), https://www.oas.org/en/iachr/media_center/PReleases/2017/048.asp [https://perma.cc/7VY4-69XY] (in fact, during 2017–2018, the government in Venezuela responded with extreme militarization—about "500,000 civilian militias on the streets to defend peace, sovereignty and independence of the country"). IACHR Press release No 15/19, *IACHR Condemns Deaths in Protests and Calls on State Institutions to Protect the Human Rights of the Venezuelan People*, 25 Jan. 2019, https://www.oas.org/en/iachr/media_center/PReleases/2019/015.asp [https://perma.cc/LC48-D9RW]; IACHR Press release, *IACHR Alarmed by Arrests in the Context of Protests in Venezuela* (Feb. 1, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/022.asp [https://perma.cc/8E3N-WZUD] (stressing that "[t]he IACHR stresses that an arrest is arbitrary and illegal whenever it is conducted beyond the reasons and formalities established by law, when it is executed without observing the standards required by law, and when it is done without the authority to conduct such a detention").

10. United Nations High Commissioner for Human Rights, Situation of human rights in Colombia, A/HRC/43/3/Add.3, 26 February 2020, ¶ 86–91.

11. David Agren, *Mexico president accused of hypocrisy for backing tough anti-protest laws*, THE GUARDIAN (July 30, 2019).

12. HRW, *Guatemala: Investigate Excessive Use of Force by Police*, HUMAN RIGHTS WATCH (Nov. 24, 2020), https://www.hrw.org/news/2020/11/24/guatemala-investigate-excessive-use-force-police [https://perma.cc/DJ39-6U4M].

13. *Cf.* with respect to Chile alone, *see*, IACHR, *IACHR Condemns the Excessive Use of Force during Social Protests in Chile, Expresses Its Grave Concern at the High Number of Reported Human Rights Violations, and Rejects All Forms of Violence* (Dec. 6, 2019), available at https://www.oas.org/en/iachr/media_center/Preleases/2019/317.asp [https://perma.cc/WD6J-HLJ2] (noting that "[...] while according to information from the Ministry of Health, the country's emergency medical services treated 12,652 people who were injured in connection with the demonstrations, while there have been 26 fatal victims since the start of the social protests on October 18").

14. *See, e.g.*, the set of indicators developed by the OHCHR during the pandemic, https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/Covid19freedomAssembly.aspx [https://perma.cc/8BHY-S98L]; *see also* UN Press Release, *States responses to Covid 19 threat should not halt freedoms of assembly and association*, UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E [https://perma.cc/M5LK-LTWZ]. The present Article, however, does not explore the specific circumstances governing the COVID-19 pandemic, nor standards applicable to states of emergency and the regime of derogations from human rights treaty obligations. The rationale of gag laws, even those adopted in the name of public health, remain the same and could in theory also become applicable in assessing restrictions due to pandemics.

15. Grenfieth de Jesus Sierra Cadena, 'La liberté de manifestation dans l'espace public

adopted various criminal laws (or, "gag laws") on security and public peace.[16] This prompted the Inter-American Commission on Human Rights (IACHR) to observe a continuous "shutdown of democratic spaces" in Nicaragua.[17] In its view, such measures "indicate a pattern of State action aimed at silencing, intimidating, and criminalizing all voices that oppose the government's position."[18] Furthermore, the Commission noted, "while seemingly legal and strictly formal [such legislative action has] illegitimately restricted the rights to freedom of expression, association and assembly, all of which are essential for any democratic society to function effectively."[19]

This Article explores whether there is any way to assess the legitimacy of such "seemingly legal and strictly formal" restrictions drawing on the jurisprudence of human rights bodies. To do so, in Part I, this Article discusses the crystallization of freedom to protest as part of the right to peaceful assembly, as well as its relationship with freedom of expression. In Part II, this Article examines the impact and function of gag laws on the right to protest, drawing parallels from the prohibition of prior restraints on publications. Lastly, this Article focuses on borderline cases, where the fine line between legitimate and illegitimate limitations to freedom of protest is particularly elusive, as in the case of anti-vandalism laws and laws banning illicit graffiti. As this Article suggests, in illiberal societies where freedom of speech standards are extremely low and ways to express democratic participation are lacking, a presumption in favour of the legality of protests should exist.

Interestingly, however, State responses to protests and social unrest are no longer the privilege of illiberal States nor those that directly and expressly ban protests by means of prior restraints. A growing number of governments, including liberal ones, are now responding to protests and

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latino-américain (Argentine, Colombie, Venezuela et Cour interaméricaine des droits de l'Homme)' 75, 75–76 in : *La liberté de manifester* et ses limites : perspective de droit comparé (Aurélie Duffy-Meuner et Thomas Perroud eds, Presses Universitaires de Marseille 2017) (referring to recent anti-terrorist laws passed in Colombia and Venezuela).

16. *Crackdown in Nicaragua*, HUM. RTS. WATCH (June 19, 2019), https://www.hrw.org/report/2019/06/19/crackdown-nicaragua/torture-ill-treatment-and-prosecutions-protesters-and [https://perma.cc/TTU4-SWSK]; *see also* Ortega's "Gag Law" Takes Effect in Nicaragua (Feb. 26, 2021), https://www.loc.gov/law/foreign-news/article/nicaragua-constitution-amended-to-establish-life-imprisonment-for-hate-crimes/ [https://perma.cc/TZP6-6VU2] (referring to the "Special Cybercrimes Law" that passed in November 2020, which "punishes with jail the propagation of false and/or distorted news that causes alarm, fear, and anxiety in the population, or a group or sector of it, or a family").

17. Press Release, Inter-Am. Comm'n on H.R., IACHR Concerned about Ongoing Repression in Nicaragua (July 11, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/172.asp [https://perma.cc/AM2K-U5JS].

18. *Id.*

19. *Id.*

dissent by passing laws that are excessively vague, overbroad and easily subject to abuse. The function of these speech and protest suppression laws is to minimize dissent, especially human rights activism and political opposition. While in principle such laws are imposed to protect a legitimate public interest (for instance, the elimination of vandalism, looting and other violent behaviour that occurs in the context of protests, or even, further economic objectives and the protection of investors' rights), they have a detrimental chilling effect on the right to free speech, peaceful assembly, and, ultimately, democratic participation.

I. IS THERE A RIGHT TO PROTEST?

While most Constitutions around the world grant a right to peaceful assembly,[20] they do not generally grant a 'right to protest' as such. In vindicating the right to free speech, however, jurisdictions around the world have repeatedly recognized underlying elements of the right to protest.[21] The U.S. Supreme Court in particular has been clearly pioneering in this respect[22] by recognizing the constitutionality of expressive conduct, and by consistently rejecting content-based restrictions. The views of the Court in relation to desecration of the U.S. flag as an exercise of First Amendment rights are indicative in this respect. In the view of the U.S. Supreme Court, laws banning the desecration of symbols are unconstitutional in light of the U.S. Constitution's First Amendment, because this type of conduct does not reach the requisite threshold of "fighting words,"[23] and does not "threaten to disturb the peace," nor constitute a "breach of the peace."[24]

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20. *See* Hum. Rts. Comm., General Comment No. 37 on the Right of Peaceful Assembly (Art. 21), U.N. Doc. CCPR/C/GC/37, p.2, ¶3 (2020), https://undocs.org/CCPR/C/GC/37 [hereafter General Comment No. 37] (referring to www.rightofassembly.info [https://perma.cc/UM8L-SZ9X] and noting that a total of 184 of the 193 States Members of the United Nations recognize the right to peaceful assembly in their constitutions).

21. Few States however, expressly recognize a distinct "right to protest." *See* Sierra Cadena, *supra* note 15, at 77, nn.290–93 and 78ff (referring to the Constitutions of Colombia, Venezuela, and Argentina that expressly guarantee a "right to protest" as well as the "great gap" between the Constitutional rhetoric and local courts' practice).

22. This may also be due to the acceptance of free speech as a central American value in relation to protests and demonstrations, especially after labour protections passed in the 1930s and the new deal. *See* Geoffrey Berman, *New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s* (1994), 80 VA. L. REV. 291, 295 (1994). On the historic elements, see also Hina Jilani, *Report of the Special Rapporteur on the situation of human rights defenders* A/62/225 § 4 (Aug. 13, 2007).

23. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

24. Texas v. Johnson, 491 U.S. 397, 420 (1989) ("The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten

A right to protest is not expressly guaranteed under human rights instruments either. As emphasized by the United Nations Human Rights Council[25] and the European Parliament,[26] this is generally presumed on the basis of the freedom to peaceful assembly. Along with freedom of expression and freedom of association, the freedom of peaceful assembly is an essential component of democracy, citizenship, and participatory form of governance.[27] The former United Nations Special Rapporteur on the situation of human rights defenders in her report on the right to protest (in the context of freedom of assembly), likewise observes that "the protection of the right to protest lies in the recognition and protection of a set of rights that includes freedom of expression and opinion, freedom of association, freedom of peaceful assembly and trade union rights, including the right to strike."[28]

In addition, the right to protest overlaps with the right to freedom of expression, at least to some extent.[29] However, contrary to the freedom of expression, the right to protest comprises two additional characteristic features. First, the element of expression is in a *public space* or in a way that enhances public debate,[30] typically for the purpose of opposing government policies. Akin to freedom of expression, the right to protest

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to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression"). Amidst the extremely vast literature, *see generally* Ivan Hare, *Method and Objectivity in Free Speech Adjudication: Lessons from America*, 54 INT'L & COMP. L. Q. 49, 76 (2005); J. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 (1975). On equivalent notions of "breach of the peace" under UK law, see Helen Fenwick, *The Right to Protest, the Human Rights Act and the Margin of Appreciation*, 62 MOD. L. REV. 491, 503 (1999).

25. G.A. Res. 15/21, at 1–2 (Oct. 6, 2010).

26. European Parliament Resolution 2569 on the Right to Peaceful Protest and the Proportionate Use of Force, Dec. 23, 2019, 2019 O.J. (C 449) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019IP0127 [https://perma.cc/FAS9-74TS] [hereinafter Resolution 2569].

27. G.A. Res. 15/21, at 1 (Oct. 6, 2010); Resolution 2569, *supra* note 26, ¶¶ C, H, I, and 1.

28. Jilani, *supra* note 22, ¶ 22.

29. General Comment No. 37, *supra* note 20 (noting that "the full protection of the right of peaceful assembly is possible only when other, often overlapping, rights are also protected, notably freedom of expression, freedom of association and political participation"); *see also* Edison Lanza (Special Rapporteur for Freedom of Expression), *Protest And Human Rights: Standards On The Rights Involved In Social Protest And The Obligations To Guide The Response Of The State*, ¶ 18, U.N. Doc. OEA/SER.L/V/II CIDH/RELE/INF.22/19 (2019), http://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf [https://perma.cc/K8TT-NE6Q] [hereinafter IACHR Report] ("In this regard, the right to protest is protected by the right to freedom of expression.").

30. Which is why the form or physical location of the assembly should not matter. *See* General Comment No. 37, *supra* note 20, ¶ 6: "Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof."

is also a "democratic right,"[31] in the sense of a right enabling participation and democratic debate. Second, the right to peaceful assembly typically contains an element of inherent *disruption*, caused by the physical gathering of persons in the public space. Even in its lighter form, therefore, any protest may contain at least fragments of "unlawful" behavior. It is also precisely for this reason that this right is often considered in light of police violence, arbitrary arrests and unregulated action by State agents, especially in mass demonstrations.[32]

In July 2020, the Human Rights Committee, issued a long-awaited General Comment (No. 37) on Article 21 of the International Covenant of Civil and Political Rights (ICCPR) and the fundamental right to freedom of assembly.[33] The Committee elaborates on the relation between the right to peaceful assembly and protest, by emphasizing that protests, demonstrations, rallies and flash mobs all constitute different forms of assembly; that "peaceful assemblies can sometimes be used to pursue contentious ideas or goals"; and that regardless of form, scale or nature, and whether they actually "cause disruption," all should enjoy protection under human rights law.[34] Further, in elaborating on the scope of peaceful assembly, the Committee establishes a two-stage test, under which, first, it must be established whether the person falls within the protective scope of Article 21 of the ICCPR and secondly, whether restrictions are legitimate in the particular context.[35] Accordingly, protests and other forms of demonstrations containing disruptive elements are protected under Article 21, in the view of the Committee, insofar as they are not tantamount to physical violence.

II. A TREND TO MINIMIZE DISSENT THROUGH "GAG LAWS"

The main challenge for the international community in cases of excessive repression is to ensure State compliance with obligations related to the right to life, liberty, and security of people.[36] Due to the large-scale, systematic, endemic human rights issues related to democratic participation in the Americas and the explosive context of the last couple of years, the Inter-American Commission has been particularly proactive in emphasizing positive obligations in relation to

31. Daniel McGlone, *The Right to Protest*, 30 ALTERN. L. J. 274, 275 (2005).

32. On State positive obligations in mass demonstrations, *see* IACHR Report, *supra* note 29, ¶ 251; General Comment No. 37, *supra* note 20, ¶ 21; *see also* Giuliani & Gaggio v. Italy, App. No. 23458/02, ¶¶ 208–18, 251 (Mar. 24, 2011), http://hudoc.echr.coe.int/eng?i=001-104098 [https://perma.cc/7C4G-UFLA] (concerning the death of a young protester at a demonstration of the 'No global movement' and other communities during the G8 protest in Italy).

33. General Comment No. 37, *supra* note 20.

34. *Id.* ¶¶ 6, 7.

35. *Id.* ¶11.

36. *Compare* IACHR Report, *supra* note 29, ¶ 251 *with* Giuliani & Gaggio v. Italy, *supra* note 32, ¶¶ 298–306.

both freedom of assembly and the right to life. These include the obligation to undertake a prompt, effective and impartial investigation in cases involving human rights violations. A poignant example of such obligations is the precautionary measures granted to students, journalists and photo-reporters who have been intimidated, attacked, imprisoned or even assassinated during the 2018 Nicaraguan protests against President Ortega.[37] These cases include the *Leaders of the 19 de Abril Carazo Movement* of Nicaragua, whereby the Commission granted precautionary measures in favor of more than one hundred student-protesters active both on social media and the streets;[38] that of journalist Ángel Eduardo Gahona,[39] who was shot and killed while streaming on Facebook live from his smartphone amidst the protests in Bluefields Bay";[40] that of Barbarena, the director of a major news outlet in Nicaragua;[41] that of Chamorro Barrios, a well-known independent investigative journalist and founder of the magazine Confidential;[42] and that of Emilio Álvarez

37. Inter-Am. Comm'n on H.R., Press release, IACHR Adopts Precautionary Measures in Favor of More Than a Hundred People at Serious Risk in Nicaragua (Sept. 18, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/205.asp [https://perma.cc/G9BA-86X8] (noting that "in total, the IACHR has issued 23 resolutions to directly protect 114 people who are at serious and urgent risk of irreparable harm to their human rights, and in many of them the IACHR has also requested that their families be protected"). For a list of those who were intimidated, attacked or assassinated, see Inter-Am. Comm'n on H.R., *Gross Human Rights Violations in the Context of Protests in Nicaragua* (June 2018), ¶¶ 33–35.

38. Inter-Am. Comm'n on H.R., *Leaders of the 19 de Abril Carazo Movement and others, Nicaragua*, Resolution No. 52/18, Precautionary Measures: 840/18, 841/18 and 779/18 (Sept. 17, 2018), http://www.oas.org/en/iachr/jsform/?File=/en/iachr/MESENI/mc.asp&Year=2018 [https://perma.cc/NN4T-GKSE]. *See also* Inter-Am. Comm'n on H.R., *Yerling Marina Aguilera Espinoza and 17 other human rights defenders, Nicaragua,* Resolution No. 70/18, Precautionary Measures: 939/18 and 1067/18 (Sept. 17, 2018), http://www.oas.org/en/iachr/jsform/?File=/en/iachr/MESENI/mc.asp&Year=2018 [https://perma.cc/MEG3-AFEZ].

39. *Migueliuth Sandoval Cruz and the family of journalist Ángel Eduardo Gahona, Nicaragua*, Resolution No. 41/18, Precautionary Measure: 669/18 (June 12, 2018), ¶ 22, http://www.oas.org/en/iachr/jsform/?File=/en/iachr/MESENI/mc.asp&Year=2018 [https://perma.cc/W5KR-PKQQ] (granting precautionary measures to Gahona's widow).

40. Carl David Goette-Luciak, *How A Journalist's Death Live On Air Became A Symbol Of Nicaragua's Crisis*, GUARDIAN (May 29, 2018, 2:30 EDT), https://www.theguardian.com/world/2018/may/29/nicaragua-journalist-killed-live-on-air-angel-gahona [https://perma.cc/E98M-QUUA] (noting that it is believed by many that he was murdered by the police who were looking to "dispose of a journalist they considered an irritant").

41. Inter-Am. Comm'n on H.R., *Miguel Mora Barberena, Leticia Gaitán Hernández and their families, Nicaragua,* Resolution No. 90/18, Precautionary Measure: 873/18 (Dec. 13, 2018), ¶ 19, http://www.oas.org/en/iachr/jsform/?File=/en/iachr/MESENI/mc.asp&Year=2018 [https://perma.cc/EF4G-M8QW].

42. Inter-Am. Comm'n on H.R., Carlos Fernando Chamorro Barrios et al., *Nicaragua* Resolution No. 91/18, Precautionary Measure: 1606–18, ¶ 33. *See also*, Javier Iván Olivares, Resolution No. 31/21(EXTENSION), Nicaragua Resolution No. 91/18, Precautionary Measure: 1606–18 (Apr. 5, 2021), ¶ 6.

Montalván, considered to be Nicaragua's pro-democracy "Sage."[43] Human Rights violations against the rights of journalists and photo-reporters, in particular, and more broadly human rights defenders, should be considered aggravated infringements of State obligations to provide protection to human integrity. As the Commission has stated repeatedly the role of journalists in covering protests is significant in "documenting the acts of serious violence against the civilian population as a result of both the excessive use of force by the police force and the actions of armed third parties."[44]

Similar findings have been those of the Special Rapporteur for Freedom of Expression of the Inter-American Commission in his report on "Protest and Human Rights" in 2019,[45] as well as the United Nations Human Rights Committee in General Comment No. 37 on the right of peaceful assembly, which notes,

> [T]he role of journalists, human rights defenders, election monitors and others involved in monitoring or reporting on assemblies is of particular importance for the full enjoyment of the right of peaceful assembly. . . . They may not be prohibited from, or unduly limited in, exercising these functions, including with respect to monitoring the actions of law enforcement officials.[46]

and

> States have an obligation to investigate effectively, impartially and in a timely manner any allegation or reasonable suspicion of unlawful use of force or other violations by law enforcement officials, including sexual or gender-based violence, in the context of assemblies.[47]

There are, in addition, significant obligations for States to be particularly diligent in the way that their law enforcement agents attempt to quell protests, especially by seeking to "de-escalate situations that

43. Inter-Am. Comm'n on H.R., *Álvaro Lucio Montalván y su núcleo familiar respecto de Nicaragua* Resolution No. 96/18, Precautionary Measures: 698/18 (Dec. 18, 2018), ¶ 8; see also "Emilio Álvarez Montalván, Nicaragua's Pro-Democracy Sage, Dies at 94" https://www.nytimes.com/2014/07/05/world/americas/emilio-alvarez-montalvan-nicaraguas-pro-democracy-sage-dies-at-94.html [https://perma.cc/9SEC-VUMS].

44. *Álvaro Lucio Montalván*, *supra* note 43, ¶ 29; Chamorro Barrios et al., *supra* note 42, ¶ 32; Olivares, *supra* note 42, ¶ 6.

45. IACHR Report, *supra* note 29, ¶ 256.

46. Hum. Rts. Comm., General Comment No. 37, *supra* note 20, ¶ 30 (referring to *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014)).

47. *Id.*, ¶ 90.

might result in violence."[48] Standards applicable in relation to the right to life and integrity of the person apply in this respect, including the strictly exceptional use of lethal force.[49] There are, however, additional obligations stemming from freedom of peaceful assembly that are related specifically to demonstrations in the public space. These include, for example, the impermissibility of deployment of armed forces or the military to disperse protests without distinguishing between peaceful and non-peaceful participants;[50] or "strategies of crowd control that rely on containment, often for long periods of time" (the so-called practice of "kettling").[51]

Laws indirectly targeting expression of dissent however are equally harmful, disproportionally affecting the rights of peaceful protesters. A poignant example is offered by the Spanish *Citizen's Safety Law* passed in 2015, popularly known as "Ley Mordaza" (which translates to "gag law").[52] The supposed aim of the law is to protect demonstrators from "violent elements" thus making them "freer" to protest. However, the oppressive nature of the law, such as its prohibition to demonstrate near Congress and the Senate, or of taking photos or recordings of police officers, and disallowing the peaceful refusal to disburse from a demonstration, along with the steep fines that can be imposed for a violation of the law, as much as €600,000 in some instances, makes the law repressive.[53] Yet, one of its many problems, is not the actual banning of protests per se, but rather the heavy fines imposed on anyone who disseminates information, therefore "violating journalists' right to do

48. *Id.*, ¶ 78.

49. ¶¶ 79–82. See also the *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement* (2020); the Human Rights Committee, General Comment No. 36 (2018) on the right to life.

50. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE) & OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (ODIHR), GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 159 (second ed., 2010), https://www.osce.org/files/f/documents/4/0/73405.pdf [https://perma.cc/A6JJ-5K5U] [hereinafter OSCE Guidelines]; cf. Hum. Rts. Comm., General Comment No. 37, *supra* note 20, ¶ 82 (on the prohibition of indiscriminate mass arrest prior to, during or following an assembly).

51. *Id.* at 160; Hum. Rts. Comm., General Comment No. 37, *supra* note 20, ¶ 84; *see also* Maina Kiai (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 On His Follow-Up Mission To The United Kingdom Of Great Britain And Northern Ireland*, U.N. Doc. A/HRC/35/28 (June 8, 2017).

52. Yolanda Quintada, *Spain's 'Gag Laws,'* RESOURCE CENTRE ON MEDIA FREEDOM IN EUROPE (May 9, 2016), https://www.rcmediafreedom.eu/Tools/Legal-Resources/Spain-s-gag-laws [https://perma.cc/82KW-B2YL].

53. J. Jiménez Gálvez, *Five Things Spain's 'Gag Law' Will Stop You Doing From Today*, EL PAÍSEL PAÍS (July 1, 2015, 8:42 AM), https://english.elpais.com/elpais/2015/06/30/inenglish/1435681072_581012.html [https://perma.cc/BN3M-J3S5].

their jobs."[54] According to Reporters without Frontiers (RSF), penalties imposed on journalists and reporters amounted to nearly 4 million euros from 2015 to 2020, "often just because they took or published photos of police officers."[55] These restrictions are unlawful not in and by themselves, but rather because they employ the term "public order" as a vague justification for the actions taken. As the Human Rights Committee notes in General Comment 37, "States parties should not rely on a vague definition of 'public order' to justify overbroad restrictions on the right of peaceful assembly."[56]

A. *The Dual Function of Gag Laws*

1. Gag Laws as Prior Restraints

The term gag law is not an official legal term that can be found in statutes or case-law. In the United States, it is used primarily in the context of pro-environmental activism: the term "ag-gag laws" for example, refers to domestic laws that protect farmers and agricultural enterprises against activists who denounce animal abuse.[57] In media law, too, the term "gag order" is associated with common law injunctions aimed at preventing the media from publishing particular stories.[58] This occurs especially in the context of privacy actions, with a view to safeguarding the right to a fair trial, in an attempt to reduce the prejudicial effect of pre-trial publicity.[59] Over the last year, however, the use of the

54. Quintada, *supra* note 52.

55. *Spain urged to repeal gag law, complete state TV and radio reform, and stop obstructing reporters*, REPORTERS SANS FRONTIERS (RSF) (Feb. 27, 2020), https://rsf.org/en/news/spain-urged-repeal-gag-law-complete-state-tv-and-radio-reform-and-stop-obstructing-reporters [https://perma.cc/BH24-KPYD]; *see also* Fernando Garea, *Ruling party rams controversial security legislation through Congress*, EL PAÍSEL PAÍS (Dec. 12, 2014), https://english.elpais.com/elpais/2014/12/12/inenglish/1418379884_767333.html [https://perma.cc/55LP-YHAT] (criticizing *Ley Mordaza* as *carte blanche* for the police, an attack on civil liberties" and "a legal aberration).

56. General Comment No. 37, *supra* note 20, ¶ 44.

57. Utah has enacted ag-gag statutes that bans the collection of evidence and other undercover investigations, such as unauthorized recordings and pictures. *See* Daniel Sternberg, *Why Can't I Know How the Sausage is Made - How Ag-Gag Statutes Threaten Animal Welfare Groups and the First Amendment*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 625, 632–33 (2015); *see also* Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to Ag-Gag Laws*, 23 DUKE ENV'T. L. & POL'Y F. 377, 379 (2013); *see also Ag-Gag Laws*, ANIMAL LEGAL DEFENSE FUND, https://aldf.org/issue/ag-gag/ [https://perma.cc/R73K-ZTSF] (last visited Apr. 18, 2021) (listing a summary of legal cases at a local level).

58. ROY MOORE ET AL., MEDIA LAW AND ETHICS 164 (2017) (discussing for example, the "Minnesota gag law" in *Near v. Minnesota*, 283 U.S. 697, 718 (1931)).

59. *See, e.g.*, URSULA SMART, MEDIA AND ENTERTAINMENT LAW 79–80 (4th ed. 2020). For a U.S. perspective, *see* Cynthia M. Nakao, *Constitutional Law: Gag Me with a Prior Restraint: A*

term "gag laws" is increasingly used in the context of free speech and the right to protest, to denote any possible restriction to free speech and freedom of assembly.

Laws "gagging" protesters are easily recognizable when imposed as prior restraints. This is the case with several States located in Northern Africa and the Middle East that grant vague powers to public authorities to prohibit public gatherings. For example, the 2002 Moroccan law limits the right to organize a street demonstration for political parties, trade unions, professional groups, and registered associations only, and bans entirely any type of gatherings in public.[60] The situation appears to have deteriorated following the Arab uprisings. Following the protests in Tahrir square for example, that led to the dismantling of the former regime in Egypt, the Egyptian government passed an anti protest law in 2013, which subjected all assemblies of over ten persons to prior police authorization.[61] Similar laws were adopted in Tunisia,[62] and Morocco.[63] Such laws are grave and utterly eliminate any dissent, yet they are typically only complementing other unlawful practices. As the Committee against Torture reports,

> [T]orture is carried out by Egyptian military, police and prison officials for the purposes of punishing protesters and,

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Chilling Effect that Sends Shivers down the Spines of Attorneys and the Media, 7 LOY. ENT. L. J. 353, 365 (1987).

60. *See, e.g.*, George Sadek, "Morroco" 38, 44-5 in : *Civic Space Legal Framework (Brazil • Finland • Morocco • Tunisia October 2020)* LL File No. 2020-019355 (The Law Library of Congress) available at https://www.loc.gov/law/help/civic-space/civic-space.pdf [https://perma.cc/UC7Q-YMBA]; *see generally* Dylan O'Driscoll, Amal Bourhrous, Meray Maddah and Shivan Fazi, *Protest and state*, Society relations in the middle east and north Africa (Stockholm international peace research institute Oct. 2020).

61. David Kirckpatrick, *New Law in Egypt effectively bans protests*, N.Y. TIMES (Nov. 25, 2013), https://www.nytimes.com/2013/11/26/world/middleeast/egypt-law-street-protests.html [https://perma.cc/S36S-KVPR]; https://carnegieendowment.org/2016/11/24/egypt-s-anti-protest-law-legalising-authoritarianism-pub-66274 [https://perma.cc/DW48-JR6V].

62. *See also* Clément Nyaletsossi Voule (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, Visit To Tunisia*, ¶ 20, U.N. Doc. A/HRC/41/41/Add.3 (June 25, 2019).

63. *See, e.g.*, FIDH & Observatoire pour les defenseur des droits de l'Homme, *MAROC: Constantes offensives contre la liberté d'association (Morocco, Constant Offensive Against Freedom of Association)* (Jan. 2019), at 5 (noting that the new new Constitution adopted in 2011 allows substantial limitations to fundamental rights), https://www.fidh.org/IMG/pdf/note-maroc-num.pdf [https://perma.cc/G7KP-EZSM]; *Morocco: Protesters, activists and journalists detained over Rif protests must be released*, AMNESTY INT'L (Nov. 28, 2017, 11:05 UTC), https://www.amnesty.org/en/latest/news/2017/11/morocco-protesters-activists-and-journalists-detained-over-rif-protests-must-be-released/ [https://perma.cc/SJ9L-T6YV]; *see also* Maina Kiai (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*, at 563–69, U.N. Doc. A/HRC/29/25/Add.3 (June 10, 2015).

> since 2013, supporters and members of the Muslim Brotherhood . . . The practice of torture has allegedly been facilitated by a significant increase in arrests by the authorities since July 2013, as well as by the practice of detaining protesters at unofficial places of detention. The sources also reported the practice of sexual violence by State agents and excessive use of force in response to protests since 2011, resulting in thousands of deaths.[64]

Notification requirements that impose substantial and excessively bureaucratic procedures, however, may also amount to substantial prior restraints. Such requirements should be dismissed as illegitimate prior restraints, as emphasized by the guidelines *on Freedom of Peaceful Assembly* issued by the OSCE and the Venice Commission of the Council of Europe.[65] For example, the recent Greek law on "public outdoor gatherings" passed in July 2020, grants immense power to the authorities to heavily regulate public outdoor gatherings at the discretion of public authorities.[66] This law was adopted in the aftermath of anti-governmental protests following the COVID-19 outbreak—although neither pandemics nor public emergencies are explicitly mentioned in the text of the law—this has already caused a significant public outcry.[67]

A parallel should be drawn with freedom of expression and the principle of prohibition of prior restraints.[68] As a general rule, prior restraints should be wholly exceptional and when imposed, be subject to utmost judicial scrutiny. This principle arguably pre-dates modern human rights guarantees on freedom of speech—or peaceful protest. In *Near v. Minessota* (1931), the U.S. Supreme Court emphasised that "[t]he fact

64. *Rep. of the Comm. against Torture*, ¶ 66, U.N. Doc. A/72/44 (2016).

65. OSCE Guidelines, *supra* note 50, at 65 (noting "[a]ny legal provisions concerning advance notification should require the organizers to submit a notice of the intent to hold an assembly, but not a request for permission," since "[a] permit requirement is more prone to abuse than a notification requirement . . .").

66. Nomos (2020:4703) Δημόσιες υπαίθριες συναθροίσεις και άλλες διατάξεις [Public outdoor gatherings and other provisions], Ephemeris tes Kyverneseos tes Hellenikes Demokratias [E.K.E.D.] 2020, A:131 (Greece), https://www.kodiko.gr/nomothesia/document/631833/nomos-4703-2020 https://perma.cc/6JYQ-J6HK]. For example, one of the most controversial clauses states that "[r]estrictions may be imposed in connection with an impending public outdoor gathering if it is likely that their conduct will disproportionately disrupt the socio-economic life of the area in particular." *Id.* art. 8 (In Greek: επιτρέπεται η επιβολή περιορισμών σε σχέση με επικείμενη δημόσια υπαίθρια συνάθροιση, εάν πιθανολογείται ότι η διεξαγωγή της θα διαταράξει δυσανάλογα την κοινωνικοοικονομική ζωή της συγκεκριμένης περιοχής).

67. *See* Reuters Staff, *Greece passes law regulating demonstrations, thousands march in Athens*, REUTERS (July 9, 2020), https://www.reuters.com/article/us-greece-protests-idUSKBN24A2VQ [https://perma.cc/8L3B-ZP32].

68. *Compare with* General Comment No. 37, *supra* note 20, ¶ 13 ("While the notion of an assembly implies that there will be more than one participant in the gathering, a single protester enjoys comparable protections under the Covenant, for example under article 19.").

that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right[s]."[69] In *Near*, the U.S. Supreme Court quotes Blackstone to flag the difference between such restrictions and prior restraints, echoing that "[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[70] The U.S. Supreme Court reaffirmed this stance in 1971, though way more succinctly, in *the Pentagon papers* case, in which the *New York Times* and the *Washington Post* disclosed classified materials on controversial U.S. strategies in Vietnam.[71]

In cases dealing with prior restraints, U.S. jurisprudence dictates that the government should have the burden of proving why such disclosure was necessary, which the Court describes as carrying a "heavy burden of showing justification for the imposition of such a restraint."[72] Furthermore, there is a heavy presumption playing against the constitutional validity of any prior restraints.[73] Specifically, in the context of expressive conduct, such as the time, place, and manner of the expression or speech, the U.S. Supreme Court has been proactive in affirming that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[74]

In the rest of the world, the rejection of prior restraints has never been self-evident, as most civil law traditions explicitly *allow* limitations to

69. Near v. Minnesota, 283 U.S. 697, 718 (1931). *See generally* MOORE, *supra* note 58, at 164–65; Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. CIVIL LIBERTIES L. REV. 327, 329–32 (2005).

70. *Near*, 283 U.S. at 713.

71. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). The concurring opinion penned by Justice Black details that U.S. courts in New York had ordered temporary restraint of the *New York Times* that included publication of -vulgarized – versions of classified material on the War in Vietnam on the grounds of national security. *Id.* at 714–15, 718 (Black, J., concurring).

72. *Id.* at 714; *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (holding that "[a]ny system of prior restraints . . . comes to this Court bearing a heavy presumption against its constitutional validity.").

73. *New York Times Co.*, 403 U.S. at 714.

74. Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989). The Court was required to clarify the use of the least intrusive standard, and did so by noting, "The Court of Appeals erred in requiring the city to prove that the guideline was the least intrusive means of furthering these legitimate interests, since a "less-restrictive-alternative analysis" has never been—and is here, again, specifically rejected as—a part of the inquiry into the validity of a time, place, or manner regulation." *Id.* at 782.

media and the press even by virtue of their Constitution.[75] Yet, from the 1990s onward, the contribution of the European Court[76] and the Inter-American Commission for Human Rights[77] in interpreting these

75. By way of example, *see* German Constitution, Art. 5: "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures [...] There shall be no censorship (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour."' Italian Constitution, Art. 21: "Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorisation or censorship. Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences . . . .Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law." Spanish Constitution, Article 20: "(1) The following rights are recognized and protected: the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction. [...] (4) These freedoms are limited by respect for the rights recognized in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood. (5) The seizure of publications, recordings and other means of information may only be carried out by means of a court order." Greek Constitution, Article 14: "(1) Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State. (2) The press is free. Censorship and all other preventive measures are prohibited [...] (3) The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of: a) an offence against the Christian or any other known religion; b) an insult against the person of the President of the Republic, c) a publication which discloses information on the composition, equipment and set-up of the armed forces [...] d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law."

76. *See* Observer & Guardian v. U.K., App. No. 13585/88, ¶ 153 (Nov. 26, 1991), http://hudoc.echr.coe.int/eng?i=001-57705 [https://perma.cc/U7S9-Z3RE]. In this case, temporary injunctions that had been obtained by the U.K. government which prevented publication of the book, "Spycatcher" by Peter Wright, a former member of MI5 which is a branch of the British Security Service (BSS), which recounted illegal acts committed by BSS and MI5. *Id.* ¶¶ 11, 13. While proceedings were pending regarding the injunctions to stop publication of the book, extracts of the book which were not based on generally available information were simultaneously published in articles at a variety of media outlets, and soon after, the British government obtained a temporary injunction to stop publication. *Id.* ¶¶ 14–15, 22, 27. The case before the ECtHR concerns the proceedings of contempt of Court raised against the papers that had already published extracts of the book, such as Observer and Guardian. *Id.* ¶ 16. The Court found that "Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such," yet that their prohibition "is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision." *Id.* ¶ 60. It also found that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court." *Id.*

77. *See, e.g.*, Francisco Martorell v. Chile, Case 11.230, Inter-Am Comm'n H.R., Report No. 11/96., OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 234 (1997). This case concerned the claim of an author of a book published in Argentina, entitled "Impunidad Diplomatica" which was scheduled to be released and sold in Chile. *Id.* ¶ 1. The Santiago Court of Appeals had issued an interlocutory

limitations have also been crucial in establishing that prior restraints should be only exceptional and well-justified. Even in matters related to individuals engaging in public speech (protected under Article 19 therefore, rather than Article 21 of the ICCPR),[78] international human rights bodies are reluctant to accept prior restraints such as permit systems. For example in *Coleman*, Australia was found in breach of Article 19 of the ICCPR, because the local authorities prosecuted an individual who delivered a speech in a mall without a prior permit.[79] The Human Rights Committee found that "a permit system . . . must not operate in a way that is incompatible with article 19 of the Covenant" and that "in the present case, the author made a public address on issues of public interest" and his address "was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall."[80]

Conversely, when certain behaviour is "duly disruptive" regulation is by default required, whether in the public space or online. In other words, administrative authorities and the local police may prohibit protests based on a variety of considerations encompassing public interests—as in the case of sites of cultural or religious significance.[81] Some types of regulation are also almost by default illegitimate—as in the case of the

injunction ["orden de no innovar"—in other words a gag order] in order to protect a Chilean's businessman right to privacy, and ordered a temporary "stop to the book's entry, distribution and circulation in Chile pending a final ruling on the case." *Id.* ¶¶ 2, 4. The petitioners asserted that prior censorship is prohibited under the American Convention on Human Rights—and in fact, article 13(2) of the Convention is one of the few regional instruments to protect such explicit prohibition. *Id.* ¶¶ 56–58 (noting that this is because contrary to the European Convention on Human Rights, the American Convention contains a unique "prohibition of prior censorship").

78. General Comment No. 37, *supra* note 20, ¶ 15 (noting that 'While the notion of an assembly implies that there will be more than one participant in the gathering, a single protester enjoys comparable protections under the Covenant, for example under article 19'); *see* U.N. Human Rights Committee, *Coleman v. Australia* Communication No. 1157/2003 (2006), U.N. DOC. CCPR/C/87/D/1157/2003 ¶ 6.4 (noting that the author was convicted and fined $400, with 14 days imprisonment on default, for obstruction of police).

79. *Coleman*, ¶ 2.3 (noting that the author was convicted and fined $400, with 14 days imprisonment on default, for obstruction of police).

80. *Id.* ¶ 7.3.

81. *See* https://www.loc.gov/law/help/peaceful-assembly/foreign.php#italy [https://perma.cc/C47A-KYZR] (providing an overview of European jurisdictions, e.g. France: "The authorities (the prefect or the mayor) may prohibit a demonstration if they believe that it would disturb public order." Italy: "Based on considerations of public order, morality, and public health, the superintendent may prohibit the meeting, or establish the time and place of the meeting." Portugal: "The authorities may stop meetings, rallies, demonstrations, or parades being held in public places, or in places open to the public, only when they are contrary to law or morality, or when they seriously disrupt order, public tranquillity, [or] the free exercise of individual rights, or violate the provisions of article 1(2) of Decree-Law No. 406 of August 29, 1974." Spain : "In the event of meetings and demonstrations in public places, however, prior notification must be given to the authorities, who may ban such meetings only when there are well-founded grounds to expect a breach of public order, involving danger to persons or property."

Italian mayor who sought to tax protesters to clean up the city of Rome.[82] The exact limits between regulation and censorship however generally require a certain balancing exercise to reconcile the conflicting interests at stake.[83] For example, in some States protests within a specified distance from public buildings, such as government buildings, Parliaments and embassies can be banned on the basis of laws protecting cultural or historic buildings and sites,[84] as well as laws concerning the well-functioning of the public space (e.g., police acts).[85] The same questions will appear in online assemblies, and the inherent limits of free speech through content regulation, vis-à-vis hate speech for example, or speech inciting to terrorism, genocide, and so on.[86] Ascertaining the fine line between legitimate and illegitimate regulations therefore is not an easy task, especially when the administration does not justify the relevant decisions.[87] This is precisely the point of conflation between legitimate prior restraints and (non-legitimate) prior censorship. Even the U.S. Supreme Court, although generally affording an extraordinary protection to the right to free speech in the public space,[88] accepts a variety of "reasonable restrictions" concerning the time, place and manner of a

82. Karine Roudier, *La liberté de manifestation aujourd'hui en Italie. Quels problèmes, quelles perspectives?*, 62–63 in LA LIBERTÉ DE MANIFESTER ET SES LIMITES (discussing the unconstitutionality of this type of regulation, that remained a draft).

83. *Cf.* dissenting opinions of Mr. Michael O'Flaherty and Mr. Walter Kälin in *Coleman*, noting that "in declining to seek a permit [the author] accordingly deprived the State party's authorities of the opportunity to reconcile the interests at issue in this particular case."

84 By way of example, the Greek law on the protection of antiquities and cultural heritage law no. 3028/2002 (Ch. 6, Access to and use of monuments and sites), art.38, provides that a special decision by the Ministry of Culture is required for any events in archaeological sites, historical places or immovable monuments. The decision is "issued upon a relevant opinion of the Board" and specifies "the cultural or other events that can take place at such sites, provided that such events are compatible with the character of the sites as monuments or protected sites." This however did not prevent about hundred public officials working for the Ministry of Culture from "barricading" themselves in the Acropolis monuments to protest against delays in salaries, see Nicholas Paphitis, "Riot police battle with culture ministry officials at the Acropolis" Independent (Oct. 23, 2011), https://www.independent.co.uk/news/world/europe/riot-police-battle-with-culture-ministry-officials-at-the-acropolis-2107149.html.

85. *Cf.* the former sections 132–38 of the British *Serious Organised Crime and Police Act 2005* (repealed in 2011 following the adoption of the *Police Reform and Social Responsibility Act 2011*) provided that protests within one kilometre from the Parliament required special permission by the Metropolitan Police.

86. On the problematic delineation between censorship and legitimate restrictions to free speech, *see also*, Eleni Polymenopoulou, Censorship in: Contribution to the Max Planck Encyclopedia of Comparative Constitutional Law (Oxford University Press 2019). On internet regulation, *see indicatively,* Jan Oster, *European and International Media Law* (Oxford University Press 2016) 201ff (discussing internet governance and regulation).

87. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Mission to Georgia: Comments By The State On The Report Of The Special Rapporteur*, ¶ 72–73, U.N. Doc. A/HRC/20/27/Add.2 (June 8, 2012).

88. *See* Snyder v. Phelps, 562 U.S. 443 (2011).

particular event (or, "narrowly tailored" rules, in the wording of the U.S. Supreme Court).[89] As a result, anti-government protesters "may be banished to distant designated protest zones," in accordance with the government's interests.[90] Requirements for licensing of protests however under US standards, must be "narrow, objective, and definite" in order to be constitutional.[91] Yet in the United States, even this type of regulation of protests in the public and private space has been put to question. The *Occupy movement* for example has also been a catalyst in this respect.[92] Following a round of legal proceedings in various places in the United States, the Supreme Court finally accepted that protesters who want to "tent and sleep in a park 24 hours a day" are protected by the First Amendment, and that their rights prevail over the peaceful enjoyment of a quiet public space.[93]

Protection of freedom of expression and the right to peaceful assembly under international human rights law has no equivalent to the U.S. Supreme Court "tests" (i.e., exceptions) to the First Amendment.[94] International human rights law generally subjects the rights to freedom of speech and freedom of assembly to careful balancing between conflicting interests. The right to freedom of peaceful assembly is

89. *Ward*, 491 U.S. at 791 ("Our cases make clear, however, that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); *see also* Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

90. RONALD KROTOSZYNSKI JR., SEDITIOUS LIBEL, "OFFENSIVE", PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 26, 39 (Yale University Press 2012).

91. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) ("This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

92. Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L. J. 1155, 1157 (2012) (noting that "one of the Hallmarks of the *Occupy Wall Street movement* has been the symbolic occupation of institutions and interests, by taking over public, and occasionally, private space").

93. Ofer, *supra* note 92, at 1165–66 (2012) (referring to legal proceedings against the Occupy movement in Boston, Fort Myers, Minneapolis, Columbia).

94. On a critique to the limits of the First Amendment, *see* generally Steven Shiffrin, *What's wrong with the first amendment* (Cambridge University Press 2016); also, Robert Cornevere, *Certainty and the Censor's Dilemma*, 45 (2) HASTINGS CONST. L. Q. 301–32 (2018) (referring to Steven Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014)).

protected under Article 21 of the ICCPR—yet this same article, similar to Article 19 on freedom of expression, is subject to a number of express qualifications.[95] These qualifications are as broad as "public safety," "public order," "protection of public . . . morals," and a general clause of "protection of the rights and freedoms of others."[96] Human rights instruments do not provide any *prima facie* indications as to the exact point of time at which a restriction that is normally legitimate amounts to a "gag law."

Peaceful assembly has been interpreted by human rights bodies as allowing only *minimal intervention.* This means that restrictions are allowed in order to regulate protests, in accordance with government interests, provided that these restrictions are exceptional[97]—as well as legal, strictly necessary and proportionate.[98] Freedom of assembly remains the rule (rather than the exception), yet the lawfulness of limitations ultimately remain a matter of balancing. The OSCE guidelines, in particular, note that the term "peaceful" encompasses disruption, in the sense of "conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties."[99]

In 2016, the two UN Special Rapporteurs on freedom of peaceful assembly and extrajudicial killings issued a joint statement containing a

95. International Covenant on Civil and Political Rights art. 21, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf [https://perma.cc/9SY4-LQNV] ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.").

96. *Id.*

97. General Comment No. 37, *supra* note 20, at 36–37 ("While the right of peaceful assembly may in certain cases be limited, the onus is on the authorities to justify any restrictions" and "The prohibition of a specific assembly can be considered only as a measure of last resort").

98. *Id.* ("Authorities must be able to show that any restrictions meet the requirement of legality, and are also both necessary for and proportionate to at least one of the permissible grounds for restrictions enumerated in article 21 [...]"); *see also* IACHR Report, *supra* note 29, ¶ 71; Maina Kiai (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*, ¶ 59, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013) [hereinafter Kiai 2013 Report].

99. OSCE Guidelines, *supra* note 50, at 15, ¶ 1 (3) ("Only peaceful assemblies are protected. An assembly should be deemed peaceful if its organizers have professed peaceful intentions and the conduct of the assembly is non-violent.").

checklist of sorts on the proper management of assemblies.[100] Drawing on the significant efforts of the international community to protect human rights defenders and the OSCE guidelines,[101] they emphasized that "[f]reedom of peaceful assembly is a right and not a privilege and as such its exercise should not be subject to prior authorization by the authorities."[102] According to General Comment 37 of the Human Rights Committee, a primary negative duty of States applicable in peaceful assemblies is the obligation not to interfere.[103] As the Committee states, a prohibition of a peaceful assembly should only be a measure of "last resort:

> 23. . . . States are obliged . . . not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.
>
> 37. The prohibition of a specific assembly can be considered only as a measure of last resort. Where the imposition of restrictions on an assembly is deemed necessary, the authorities should first seek to apply the least intrusive measures. States should also consider allowing an assembly to take place and deciding afterwards whether measures should be taken regarding possible transgressions during the event, rather than imposing prior restraints in an attempt to eliminate all risks.[104]

What is clearly of interest here is how one defines "peaceful." According to both the Inter-American bodies and the UN Human Rights Committee, there should be a presumption in favor of peacefulness and lawfulness of

100. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly) and Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Joint Report on the Proper Management of Assemblies*, Part II, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016) [hereinafter *Joint Report*].

101. OSCE Guidelines, *supra* note 50, at 27 (¶ 11); *see also generally* Inter-Am. Comm'n. H.R., *Second Report on the Situation of Human Right Defenders in the Americas*, ¶ 37, OEA/Ser.L/V/II. Doc. 66 (December 31, 2011), https://www.refworld.org/pdfid/51ff7a3b4.pdf [https://perma.cc/6YJR-RXHM] (noting the significant number of murders of labor union leaders in Venezuela).

102. *Joint Report*, *supra* note 100, at 21–22 (further noting that "[a]ny notification procedure(s) should not be overly bureaucratic, and should be subject to a proportionality assessment. The notice period should not be unreasonably long . . . free of charge . . . and widely accessible.").

103. General Comment No. 37, *supra* note 20, ¶¶ 8, 23.

104. General Comment No. 37, *supra* note 20, ¶¶ 23, 37. The Human Rights Committee makes reference to the OSCE and Venice Commission Guidelines. *Id.* at n.41.

assemblies.[105] In the Committee's view, this may go as far as accepting that ""[c]ollective civil disobedience or direct action campaigns can be covered by article 21, provided that they are non-violent[]" and, even, "[t]he carrying by participants of objects that are or could be viewed as weapons or of protective equipment such as gas masks or helmets" as this is not sufficient to consider the protest non-peaceful.[106] In addition, according to the Committee "mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to "violence."[107]

With regard to regulation, the Committee, akin to the U.S. Supreme Court, stipulates that "[t]he regulation of the time, place and manner of assemblies is generally content neutral," and that "while there is some scope for restrictions that regulate these elements, the onus remains on the authorities to justify any such restriction on a case-by-case basis."[108]

2. Gag Laws as Laws Imposing Liability

In seeking to ascertain the proper limits and limitations on the right to peaceful assembly, human rights bodies generally point to two types of obligations. The first is the minimum use of force to disperse protests. The Inter-American Commission, for example, in a case against Venezuela regarding detainee riots and subsequent unauthorized force used by the penitentiary personnel, noted that State authorities "should use minimum force necessary to dissolve protests."[109] Likewise, the Inter-American Commission and the Rapporteur for human rights protection emphasized that major violations by member States of the OAS is precisely the reason for "disproportionate responses to protests,

105. IACHR Report, *supra* note 29, ¶ 331 (concluding States "should establish by law, clearly and explicitly, the presumption in favor of the lawfulness of demonstrations and peaceful protest."); *see also* Kiai 2013 Report, *supra* note 98, ¶¶ 18, 78; Maina Kiai (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*, ¶ 45, U.N. Doc. A/HRC/26/29 (Apr. 14, 2014) [hereinafter Kiai 2014 Report].

106. General Comment No. 37, *supra* note 20, ¶¶ 16, 20.

107. *Id.* ¶ 15; *Cf. e.g.*, Barraco v. France, Eur. Ct. H.R. no. 31684/05, § 41 (2009) ¶ 43 ("Any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic"). The European Court of Human Rights however has held differently in *Kudrevičius* and Others *v. Lithuania*, Application no. 37553/05, 15 October 2015 ¶ 114 (considering as a crucial element whether the applicants "could have foreseen, to a degree reasonable in the circumstances, that their actions [...] could have been deemed to amount to a "serious breach of public order").

108. *Id.* ¶ 53.

109. Inter-Am. Comm'n. H.R. *Víctor Jesús Montero Aranguren y otros* (Retén de Catia), Case no. 11.699, 24 Feb. 2005, ¶¶ 139 *in fine* (July 5, 2006) (noting however that the case at hand concerned the massacre of tenths of detainees by the penitentiary authorities at the Detention centre of Catia and the lack of subsequent investigation).

as if they were a threat to the stability of the government or to national security."[110]

In this respect, a parallelism with freedom of speech controversies would be useful, specifically the well-established jurisprudence emphasizing that interference is only permitted in limited circumstances. According to the U.N. Human Rights Committee, any restriction [to free speech] should not be "overbroad in nature," in line with the necessity and proportionality tests, and "the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought."[111] Likewise, the European Court of Human Rights in numerous judgements flags that "[f]reedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[112] The U.S. Supreme Court in turn uses the doctrine of "overbreadth" to invalidate statutes that go against the First Amendment. In a case regarding animal protection and "gag" laws, for example, this has resulted in invalidating local statutes banning the depiction of animal harm in a broad way.[113] The reason is that ag-gag activists who are depicting animal harm undercover would not be easily distinguished from, say, tourists taking pictures of a rural landscape where agricultural activities take place.

Secondly, both the Human Rights Committee and the European Court of Human Rights points to an obligation of "tolerance" and "facilitation" of protests "if the freedom of assembly . . . is not to be deprived of all substance," applicable when "demonstrators do not engage in acts of violence."[114] This obligation is reiterated also in the Human Rights

110. IACHR Report, *supra* note 29, ¶ 27.

111. Hum. Rts. Comm., Views Adopted by the Comm. under Article 5(4) of the Optional Protocol concerning Commc'n No. 2309/2013, ¶ 8.4 U.N. Doc. CCPR/C/125/D/2309/3013 (2019); Bakhytzhan Toregozhina v. Kazakhstan, U.N. Hum. Rts. Comm. Communication No. 2137/2012, ¶ 7.4, U.N. Doc. CCPR/C/112/D/2137/2012 (Nov. 20, 2014) (in relation to an activist who was convicted for organizing an art-mob event at the monument of Mahatma Ghandi).

112. Observer and Guardian v. United Kingdom, *supra* note 76, at ¶ 59; *see also* The Sunday Times v. U.K. (No. 2), App. No. 13166/87, ¶ 50 (Nov. 26, 1991), http://hudoc.echr.coe.int/eng?i=001-57708.

113. United States. v. Stevens, 559 U.S. 460, 467, 473 (2010); *see also* Landfried, *supra* note 58, at 380–83 (discussing *Stevens* in relation to ag-gag laws).

114. Balçık & Others v. Turkey, App. No. 25/02, ¶ 52 (Nov. 29, 2007), http://hudoc.echr.coe.int/eng?i=001-83580 [https://perma.cc/K2XC-GMUQ]; Oya Ataman v. Turkey, App. No. 74552/01, ¶¶ 5, 42 (Dec. 5, 2006), http://hudoc.echr.coe.int/eng?i=001-78330 [https://perma.cc/L8VF-UQ6T] (regarding the suppression of protests against F-type prisons in İstiklal Street, Istanbul and subsequent arrest and imprisonment of human rights activists); *see also* Ashughyan v. Armenia, App. No. 33268/03, ¶¶ 6, 7, 90 (July 17, 2008), http://hudoc.echr.coe.int/eng?i=001-87642 [https://perma.cc/7MRJ-9NDN] (regarding the suppression of

Committee's jurisprudence, which also emphasizes a presumption in favor of the lawful exercise of protests.[115] According to the Committee's General Comment No. 37, "States parties have certain positive duties to facilitate peaceful assemblies and to make it possible for participants to achieve their objectives."[116]

"Tolerance" and "facilitation," however, are obligations that are not easily susceptible to enforcement in practice as they clash almost by default with State interests. Is tolerance a specific State obligation guaranteeing free speech and freedom to protest, capable of circumventing national security measures and going as far as exempting protesters from liability from, say, light forms of vandalism such as graffiti on statues? Conversely, would tolerance go as far as implying also a legal right available to journalists and photo-reporters to report and display information and pictures of these protests, in order to facilitate and encourage more participation to protests, and would tolerance be of equal meaning in light of public health and social distancing, as in the post-COVID-19 world?

III. A FUNCTIONAL APPROACH TO GAG LAWS

A. *Exploring the "Chilling Effect" of Gag Laws*

The chilling effect is one of the elements considered when discussing limitations to both speech and assembly, both by the European Court and the UN Human Rights Committee. For example, as the UN Committee notes

> the imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it. Restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect.[117]

Likewise, the ECtHR accepts that "a prior ban can have a chilling effect on the persons who intend to participate in a rally and thus amount to an

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demonstrations at Yerevan on Mother's Day); Alekseyev v Russia, App. No. 4916/07, ¶¶ 6, 50 (Oct. 21, 2010), http://hudoc.echr.coe.int/eng?i=001-101257 [https://perma.cc/VCS5-JHBY] (regarding the suppression of the Russian gay pride). *See also Barraco v. France*, *supra* note 107.

115. *See* Alekseev v. Russia, U.N. Hum. Rts. Comm. Communication No. 1873/2009, ¶ 9.6, U.N. Doc. CCPR/C/109/D/1873/2009 (Dec. 2, 2013) (discussing protests organized by a pro-LGBT activist); *See also* General Comment No. 37, *supra* note 20, ¶ 44 ("Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration.").

116. General Comment No. 37, *supra* note 20, ¶ 24.

117. General Comment No. 37, *supra* note 20, ¶ 36.

interference, even if the rally subsequently proceeds without hindrance on the part of the authorities"[118]

The exact meaning of what constitutes a "chilling effect" however cannot but be a functional criterion, which depends on context and circumstances. Measures indirectly affecting the right to protest and the ability to express dissent are also those that disproportionality and severely criminalize specific public order offences related to protests. These laws are clearly not *per se* unlawful, as their purpose is specifically the prevention of crime and illicit behaviour during or at the occasion of protests. Yet, a functional approach to the right to protest necessitates a more careful examination of the effect of such laws taken in context: if the function of these laws is to create a chilling effect on protesters (both peaceful and violent) due to the imposition of disproportionate or harsh penalties, they are in essence gag laws that are in principle prohibited.

Political debate, human rights activism, and the associated freedom of speech challenges may sometimes go beyond the typical limits of "lawful" and "peaceful" forms of publication, expression, and protest. This is especially true in societies that rank low in freedom of speech standards, whereby freedom of expression platforms are limited. Human rights defenders are the ones who are most at risk, as they are typically "subject to laws and regulations that impinge on their rights, in particular their right to freedom of expression, association and movement."[119] Other marginalized or vulnerable groups may also be at increased risk—for instance, children,[120] LGBT individuals, indigenous peoples, or human rights defenders. A functional criterion therefore would suggest that any laws restricting their freedom of assembly for those vulnerable groups that are under increased risk and have no other way of meaningfully participating in democratic life will always have a chilling effect upon that particular group.

Some examples could shed light upon this argument. In Mexico, following protests against president Obrador, various States passed local "anti-demonstration laws" (*anti-marchas*), with penalties for those fully or partially blocking access to businesses, as high as twenty years.[121] This was complemented by local bylaws on the permissibility of the use of

118. *See, e.g.*, Kasparov and Others v. Russia, no. 21613/07, § 84, 3 October 2013 ¶ 84.

119. Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 26, U.N. Doc. A/HRC/31/55 (Feb. 1, 2016).

120. *See generally* Aoife Daly, *Demonstrating Positive Obligations: Children's Rights and Peaceful Protest in International Law*, 45 GEO. WASH. INT'L L. REV. 763 (2013).

121. David Agren, *Mexico president accused of hypocrisy for backing tough anti-protest laws*, GUARDIAN (July 30, 2019, 23:34 EDT), https://www.theguardian.com/world/2019/jul/30/mexico-president-andres-manuel-lopez-obrador-accused-of-hypocrisy-after-supporting-anti-protest-laws [https://perma.cc/B23S-EGJK].

force by enforcement authorities, which allowed them to employ force in the event of non-lawful protests.[122]

In Chile, a law was passed by the government which amended the State's criminal penal code in the aftermath of the 2019–2020 protests against President Piñera, with the design, in the words of President Piñera, "to strengthen public order and protect citizen security" ("fortalecer el orden público y para resguardar la seguridad ciudadana").[123] This new law criminalizes, among other things, the looting of shops, vandalism, and the creation of barriers, any behaviour that disrupts public traffic, as well as "any type of protest or action is punishable if the government interprets it as an act of violence or something that violates public order,"[124] and further demands university expulsion for those students participating in protests.[125]

Other such laws could be those concerning economic prosperity, as is the case with the recent Australian law that provides for the criminalization of protests when obstructing economic activity and Canada's Anti-Terrorism Act of 2015 which has broadly "expanded the definition of national security to include 'the economic or financial stability of Canada'" which now can allow for the labelling of certain peaceful protests to be threats to national security.[126] As the UN Special Rapporteur on peaceful assembly notes, "[e]conomic activity is certainly important, but States tread a dangerous path when they prioritize the freedom of the market over the freedom of human beings."[127]

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122. *See* Diana Sanchez, *Mexico: Five things that need to change in the new Law on the Use of Force*, AMNESTY INT'L (Oct. 10, 2019. 14:11 UTC), https://www.amnesty.org/en/latest/news/2019/10/mexico-ley-del-uso-fuerza-debe-cambiar/ [https://perma.cc/M2TM-73CH]; *see generally* Carlos Silva Forné, *The excessive use of force by Mexico city law enforcement agencies: corruption, normal abuse and other motives*, 9 MEXICAN L. REV. 3–21 (2016), https://revistas.juridicas.unam.mx/index.php/mexican-law-review/article/view/10428/12504 [https://perma.cc/SAJ8-E7Q7] (for a socio-legal perspective).

123. *Anti-Looting And Anti-Hooded Law: Piñera's Agenda To Face The Social Crisis*, CNN CHILE (July 11, 2019), https://www.cnnchile.com/pais/pinera-agenda-crisis-social-ley-anti-saqueo-anti-encapuchados_20191107/ [https://perma.cc/XHH7-TNW6]; *see also* Law No. 21208, Modifica El Código Penal Para Tipificar Acciones Que Atenten Contra La Libertad De Circulación De Las Personas En La Vía Pública A Través De Medios Violentos E Intimidatorios, Y Fija Las Penas Aplicables Al Saqueo En Las Circunstancias Que Indica, 30 de Enero de 2020, DIARIO OFICIAL [D.O.] (Chile), https://www.diariooficial.interior.gob.cl/publicaciones/2020/01/30/42566/01/1720321.pdf [https://perma.cc/DH94-WELX].

124. Bethany Francis, *What's In The Anti-Looting Law?*, CHILE TODAY (Jan. 20, 2020), https://chiletoday.cl/whats-in-the-anti-looting-law/#:~:text=What%20Does%20The%20Law%20Say,something%20that%20violates%20public%20order [https://perma.cc/C3CQ-JENG].

125. Kiai 2014 Report, *supra* note 107, ¶ 47.

126. Maina Kiai, Special Rapporteur on the Rts. to Freedom of Peaceful Assembly and of Ass'n, Statement At The 32nd Session Of The Human Rts. Council (June 17, 2016), at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21188&LangID=E [https://perma.cc/9DTY-T6RP].

127. *Id.*

Another, yet more controversial, example of disproportionate or harsh penalties that make these anti-demonstration laws, in essence, gag laws is the attempt to suppress the Black Lives Matter (BLM) movement, which has acquired momentum in the U.S. following the Charleston Church shootings in 2015 and the killing of a black man named George Floyd in 2020 by a police officer while in custody "by kneeling on his neck for more than eight minutes."[128] As a response to civil unrest and activism prior to 2017, various States around the U.S. passed local anti-protest bills,[129] while in July 2020, the U.S. government passed an executive order criminalizing vandalism of cultural monuments with punishment that reaches up to "ten years' imprisonment for the willful injury of Federal property."[130] This is a substantial aspect of BLM protests, which have demanded the removal of colonial statues, veteran monuments, and monuments of the confederacy which remind humanity of its racist and colonial past.[131]

128. Lauren Aratani, *George Floyd killing: what sparked the protests – and what has been the response?*, GUARDIAN (May 29, 2020), https://www.theguardian.com/us-news/2020/may/29/george-floyd-killing-protests-police-brutality [https://perma.cc/YS9B-HQZL] (last visited Mar. 18, 2021). The gruesome death of George Floyd, which was recorded by pedestrians in the public space, was widely publicized and became a national interest. *See, e.g.*, NBC News NOW, *New Security Video Shows Events Leading Up to George Floyd's Arrest*, YOUTUBE (June 1, 2020), https://www.youtube.com/watch?v=VDd5GlrgvsE [https://perma.cc/ZFK8-K6ES] (noting that as of March 30, 2021, just the security footage of the events leading up to George Floyd's death has over 21 million views); *see also* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html [https://perma.cc/E9JZ-YAL2] (viewing a reconstructed video of George Floyd's death using security footage, witness videos, and official documents; warning, canotians scenes of graphic violence.).

129. *Anti-Protest Bills Around the Country*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/free-speech/rights-protesters/anti-protest-bills-around-country [https://perma.cc/Y5V3-5WG8] (last visited Apr. 18, 2021); Vera Eidelman & Lee Rowland, *Where Protest Flourish, Anti-Protest Bills Follow*, AM. CIV. LIBERTIES UNION (Feb. 17, 2:00 PM), https://www.aclu.org/blog/free-speech/rights-protesters/where-protests-flourish-anti-protest-bills-follow [https://perma.cc/8VV2-CYK5] (last visited Mar. 18, 2021).

130. Exec. Order No. 13933, 85 Fed. Reg. 40,081, ¶ 2(a) (June 26, 2020), https://www.federalregister.gov/documents/2020/07/02/2020-14509/protecting-american-monuments-memorials-and-statues-and-combating-recent-criminal-violence [https://perma.cc/F6MZ-7FRN] (referring to 18 U.S.C. ¶ 1361, on Federal Property, and 18 U.S.C. ¶ 1369, on the Veterans' Memorial Preservation and Recognition Act of 2003).

131. *See generally* E. Perot Bissell V, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, 128 YALE L. J. 1130, 1152–53 (2019) (discussing the academic aspects of taking down Confederate monuments).

B. *Expressing Dissent in Illiberal Societies*

A further examination of illicit and violent behavior during protests requires a more careful consideration of States with no developed human rights system, transitional societies, and States with extremely low media freedom standards. In this situation, the obligation of "tolerance" and "facilitation" vis-à-vis the freedom to protest is arguably meaningless. In the context of extreme repression, States are acting in breach of human rights standards not only when repressing lawful and peaceful protests, but even those repressing illegal and unauthorized protests, as well as those involving minor disturbances and light forms of vandalism. This is because protesting in this case is the only possible alternative to free speech. In the context of severe repression, peaceful free speech is not an option—the criterion of lawfulness therefore should be read as a more flexible alternative. The Special Rapporteur on Peaceful Assembly of the Inter-American Commission makes a similar point, noting that "disproportionate restrictions to protest, in particular in cases of groups that have no other way to express themselves publicly, seriously jeopardize the right to freedom of expression."[132]

An example of extreme repression of free speech platforms is exemplified by the worn-torn Middle East. According to indicators developed by Reporters Sans Frontiers, Syria for example, ranks 173 out of 180; Iran 174 out of 180 and Iraq 163 out of 180.[133] Yet these countries are those that suffer the most from repression. In December 2019, for instance, pictures, videos, and news articles began circulating on the internet of Iranian security forces cracking down on protests regarding Iran's increase in fuel prices, by opening fire and lethally shooting unarmed demonstrators protesting throughout Iran.[134] It was reported that the worst violence occurred in the city of Mahshaha, which initially saw as many as 100 people killed, though that number was later corrected to 148 and labelled as the "Massarcre of Mahshahr."[135] The aftermath of the

132. Catalina Botero Marino (Special Rapporteur for Freedom of Expression), *Annual Report of the Inter-American Commission on Human Rights*, ¶ 70, U.N. Doc. OEA/Ser.L/V/II.134 (Feb. 25, 2009).

133. RSF, World Press Freedom Index (2021), https://rsf.org/en/ranking?# [https://perma.cc/TB6G-35PD]

134. Farnaz Fassihi & Rick Gladstone, *With Brutal Crackdown, Iran Is Convulsed by Worst Unrest in 40 Years*, N.Y. TIMES (Dec. 3, 2019), https://www.nytimes.com/2019/12/01/world/middleeast/iran-protests-deaths.html [https://perma.cc/A8KV-WW52].

135. See Fassihi & Gladstone, *supra* note 134; Michael R. Pompeo, U.S. Sec'y of State, Commemoration of the Massacre of Mahshahr and Designation of Iranian Officials Due to Involvement in Gross Violations of Human Rights (Nov. 18, 2020), https://ir.usembassy.gov/commemoration-of-the-massacre-of-mahshahr-and-designation-of-iranian-officials-due-to-involvement-in-gross-violations-of-human-rights/ [https://perma.cc/CAV6-7DPV]. It is worthwhile noting that, after some delay, the Iranian government admitted to the unarmed killings

crackdown on these widespread protests was a literal massacre, with hundreds of protesters reportedly killed by the Iranian security forces.[136] In addition, there has been a total absence of an effective and impartial investigation by the Iranian government into the wrongdoing of the Iranian security forces,[137] while Iranian courts have reportedly upheld death sentences against protesters involved in these protests on the grounds of "taking part in destruction and burning, aimed at countering the Islamic Republic of Iran."[138] Similarly, during the Iraqi protests of 2019, a number of reporters and human rights activists were shot,[139] and even in Syria, alleged killings and beatings of activists during protests have been reported.[140] There is no point in distinguishing between peaceful and non-peaceful protest in Syria, Iraq, or Iran: a presumption in favour of lawfulness of these protests prevails.

An interesting comparison on this point is the particular type of political, revolutionary art which has appeared in Middle Eastern States: the so called "revolution graffiti"—what some authors also call "conflict

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of the protesters (the government referred to them as "rioters"), however it did not provide an official death toll. Mirian Berger, *Iran finally admits it shot and killed 'rioters.' But it still won't say how many people died in last month's protests*, WASH. POST (Dec. 3, 2019, 12:28 PM), https://www.washingtonpost.com/world/2019/12/03/iran-finally-admits-it-shot-killed-rioters-it-still-wont-say-how-many-people-died-last-months-protests/ [https://perma.cc/HV9L-U763].

136. *Compare Iran: More than 100 protesters believed to be killed as top officials give green light to crush protests*, AMNESTY INT'L (Nov. 19, 2019), https://www.amnesty.org/en/latest/news/2019/11/iran-more-than-100-protesters-believed-to-be-killed-as-top-officials-give-green-light-to-crush-protests/ [https://perma.cc/6XLN-6A5D] (listing initial death numbers at 106), *with Iran: Death toll from bloody crackdown on protests rises to 208*, AMNESTY INT'L (Dec. 2, 2019), https://www.amnesty.org/en/latest/news/2019/12/iran-death-toll-from-bloody-crackdown-on-protests-rises-to-208/ [https://perma.cc/K5BG-EA6Z] (increasing the death toll to 208 a mere two weeks after the first report).

137. *Iran: No Justice for Bloody Crackdown, Unlawful Lethal Force, Families Threatened, Cover-Ups*, HUM. RTS. WATCH (Feb. 25, 2020), https://www.hrw.org/node/339072/printable/print [https://perma.cc/7PQ3-U9ZR]. *See also* Javaid Rehman, Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, ¶ 12, U.N. Doc. A/75/213 (July 21, 2020).

138. *Iran: Death Penalty for Protest-Related Charges*, HUM. RTS. WATCH (July 10, 2020), https://www.hrw.org/news/2020/07/10/iran-death-penalty-protest-related-charges [https://perma.cc/88MY-HYML].

139. United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Violations and Abuses in the Context of Demonstrations in Iraq* (2020; *see also* Security Council Resolution 2522 (2020), mandating UNAMI to 'promote accountability in Iraq'; *see also "Protests in Iraq are met with violence"*, THE ECONOMIST (Oct. 31, 2019), https://www.economist.com/middle-east-and-africa/2019/10/31/protests-in-iraq-are-met-with-violence [https://perma.cc/CKB4-6PRC].

140. HRW, Syria: Protesters Describe Beatings, Arrests (June 28, 2020) https://www.hrw.org/news/2020/06/28/syria-protesters-describe-beatings-arrests [https://perma.cc/Q6WB-G3V6].

graffiti."[141] This has been remarkably present in north Africa and the broader Middle East during the protests in 2011, especially Egypt,[142] but also Syria, where "[p]rotests in Syria were sparked in 2011 by the arrest and torture of young boys for spray-painting anti-regime graffiti,"[143] and where Abu Malik al-Shami, a street artist and rebel fighter, is "hailed as the Banksy of the Middle East."[144] In Cairo in particular, this graffiti has been a tool for women's rights empowerment and emancipation, as in the case of a network of women, visual artists named Women on the Walls (WOW).[145] In other Middle Eastern countries, graffiti is also spreading, as is the case in Yemen,[146] with a number of artists being women and political activists.[147] The dilemma is the following: on the one hand, it is a clearly illicit form of art and from the perspective of states it remains a "subversive activity"—probably breaching an array of domestic laws on vandalism, public order, and public morality. On the other hand, street art is a form of political speech. Given the loaded political environment in which it is created, it acquires even greater political significance. Surely it is illegal, yet a functional approach to free speech suggests that it should stand at least some chances against removal.

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141. JOHN LENNON, WRITING WITH A GLOBAL ACCENT: CAIRO AND THE ROOTS/ROUTES OF CONFLICT GRAFFITI 59, 62–72 (Left Coast Press, 2015); MARYAM JAMSHIDI, THE FUTURE OF THE ARAB SPRING: CIVIC ENTREPRENEURSHIP IN POLITICS, ART, AND TECHNOLOGY START UPS 82–86 (Butterworth-Heinemann, 1st ed. 2013); LARBI SADIKI, ROUTLEDGE HANDBOOK OF THE ARAB SPRING (Routledge, 1st ed. 2016).

142. *See* Mia Jankowitz, *Erase and I will draw again': the struggle behind Cairo's revolutionary graffiti wall*, GUARDIAN (Mar. 23, 2016), https://www.theguardian.com/cities/2016/mar/23/struggle-cairo-egypt-revolutionary-graffiti [https://perma.cc/5UJL-H37U]; Nohad Elhajj, *Graffiti creates positive human rights narratives in Lebanon*, OPEN GLOB. RTS. (Jan. 23, 2020), https://www.openglobalrights.org/graffiti-creates-positive-human-rights-narratives-in-lebanon/ [https://perma.cc/84VA-KXVY].

143. Daly, *supra* note 120, at 764 n. 9.

144. Ephrat Livni, *A rebel fighter is being hailed as "Syria's Banksy,"* QUARTZ (Oct. 26, 2016), https://qz.com/818755/street-artist-and-rebel-fighter-abu-malik-al-shami-is-being-hailed-as-syrias-banksy/ [https://perma.cc/Y8PM-8B9Z].

145. *About*, WOMEN ON WALLS, http://womenonwalls.org/about/ [https://perma.cc/P6U2-Z9P8] (last visited Apr. 18, 2021); *see* Johanna Kanes, Jolynn Shoemaker & Andrea Carlise, *Women, Cultural Rights, And Public Spaces: Analysis and Recommendations To Advance Women's Human Rights*, INT'L ACTION NETWORK GENDER EQUITY & L. 15, 32 (2019).

146. Joshua Levkowitz, *Street Art in Yemen: Artists Fight War through Graffiti*, (Dec. 15, 2017); *see generally*, The Arab Gulf States Institute of Washington (AGSIW), https://agsiw.org/street-art-yemen-artists-fight-war-graffiti/ [https://perma.cc/42NN-23TE].

147. Nisan Ahmado, Yemeni Artist's Murals Depict Costs of War, Apr. 17, 2019, https://www.voanews.com/extremism-watch/yemeni-artists-murals-depict-costs-war [https://perma.cc/4ZBB-PMYD].

C. *"Minor Disturbances" and Light Forms of Vandalism*

There are many legal arguments that could support the presumption of lawfulness of protests in repressed societies. The starting premise is arguably the declaration of human rights defenders, which proclaims that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."[148] A stronger argument, however, draws on the lenience applied by the ECtHR in cases concerning *conduct*, particularly when political speech is at stake.

First, according to the ECtHR there is no presumption in favour of State intervention in balancing the right to protest against public interests, since "an unlawful situation does not, in itself, justify an infringement of freedom of assembly."[149] In other words, the required threshold to restrict the freedom to protest is engaging in acts of violence only.[150] This, however, leaves outside the scope of State intervention conduct such as vandalism and "minor disturbances,"[151] which, albeit unlawful, fall short of engaging in acts of violence standard of the ECtHR.[152]

Second, as a general rule, symbolic speech has a better chance of being protected if it shows evidence of at least some degree of creativity, especially when conveying a political message. In cases such as *Eon v. France*, the Court found that waving a small placard reading "Casse toi pov'con" ("Get lost, you sad prick") as the French President's party was about to pass by is protected under Article 10 as "political speech" and "social commentary."[153]

Third, the Court has demonstrated concretely that political activism may possibly outweigh light forms of vandalism. An example is the case of the performance of the rock band *Pussy Riot*. Pussy Riot performed a punk prayer called *Virgin Mary, Drive Putin Away* in a Cathedral in Moscow and were subsequently prosecuted in Russia for extremism and hooliganism.[154] The Court found numerous violations, including of the right to fair trial under Article 6 and the right to be free from human and

148. G.A. Res. 53/144, at 3 (Mar. 8, 1999).

149. Protopapa v. Turkey, App. No. 16084/90, ¶ 109 (Feb. 24, 2009), http://hudoc.echr.coe.int/eng?i=001-91499 [https://perma.cc/Y6HX-L472].

150. *Id.*

151. Bukta & Others v. Hungary, App. No. 25691/04, ¶ 37 (July 17, 2007), http://hudoc.echr.coe.int/eng?i=001-81728 [https://perma.cc/7FKK-Z4P8].

152. *Id. Ataman*, *supra* note 114, at 42; *Protopapa* , *supra* note 149, ¶ 109.

153. Eon v. France, App. No. 26118/10, ¶¶ 53, 59–60 (Mar. 14, 2013), http://hudoc.echr.coe.int/eng?i=001-117742 [https://perma.cc/7AJT-ZX58].

154. Mariya Alekhina & Others, App. No. 38004/12, ¶¶ 11–13, 18, 20 (Sept. 11, 2018), http://hudoc.echr.coe.int/eng?i=001-184666 [https://perma.cc/XJP2-98HY].

degrading treatment under Article 3 of the European Convention.[155] It also found a violation of the applicants' freedom of expression, taking into account their "disapproval of the political situation in Russia" and their wish to contribute in this way to the public debate.[156]

In *Ibrahimov and Mammadov*, the applicants, members of an anti-government youth organisation, were caught vandalizing a statue during protests in Baku.[157] They were arrested, punched, and questioned about the graffiti statue, and subsequently prosecuted, taken to a detention facility, and allegedly ill-treated.[158] According to the applicants, the police planted drugs on them, and then brought against them drug charges.[159] What is interesting is that, instead of considering the case under Article 3 alone on freedom from torture and inhuman and degrading treatment, or Article 6 and the applicants' rights to fair trial, the Court considered the Article 10 claim relevant, and found an interference with the applicants' rights to freedom of expression that was "grossly arbitrary and incompatible with the rule of law."[160]

Finally, in a case against Moldova, the Court found that condemning an applicant who protested before the Moldovan parliament by displaying sculptures "represent[ing] an erect penis with a picture of the face of a high-ranking politician attached to its head [...]" and another "represent[ing] a large vulva with pictures of several high-ranking prosecutors between the labia"[161] was an unnecessary infringement of the right to freedom of expression under Article 10.[162]

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155. *Id.* ¶ 67.

156. *Id.* ¶ 212.

157. Ibrahimov & Mammadov v. Azerbaijan, App. No. 63571/16, ¶ 10 (Feb. 13, 2020), http://hudoc.echr.coe.int/eng?i=001-200819 [https://perma.cc/R9KC-EXMQ]. The incident had taken place at the occasion of the birthday of the former president of the Republic of Azerbaijan which is celebrated in the country as a national day – "flower day." *Id.* ¶¶ 8–9. The applicants had spayed the words "F**k the system" on the frontal side and "Happy slave day" on the lateral side of a statue. *Id.* ¶ 10.

158. *Id.* ¶ 10; *see also* Baldassi & Others v. France, App. No. 15271/16, ¶ 1 (June 11, 2020), http://hudoc.echr.coe.int/eng?i=001-203213 [https://perma.cc/5G6S-QN7H] (noting that France violated Article 10 by bringing criminal charges to punish the participants of a boycott of Israeli products in French supermarkets to protest in favor of Palestinians).

159. Ibrahimov and Mammadov v. Azerbaijan, *supra* note 158, ¶¶ 12, 14, 24, 50, 144.

160. *Id.* ¶¶ 173–74 (Noting that the authorities prosecuted the applicants "for drug-related crimes in retaliation for their actions" and not within the context of the law).

161. Mătăsaru v. the Republic of Moldova, App. No. 69714/16, ¶ 7 (Apr. 15, 2019), http://hudoc.echr.coe.int/eng?i=001-189169 [https://perma.cc/CFC9-LX4J] (noting also that the installation included also "inflated balloons in the form of male genitals attached to nearby trees").

162. *Id.* ¶ 36 (stating "the domestic courts went beyond what would have amounted to a 'necessary' restriction on the applicant's freedom of expression"). The applicant was convicted for hooliganism under Moldavian law and sentenced to two years of imprisonment. *Id.* ¶¶ 9–10. *See generally* Mandreigelya v. Russia, App. No. 34310/13 (June 23, 2020), http://hudoc.echr.coe.int/eng?i=001-203174 [https://perma.cc/8SPZ-Y2RY] (concerning a "static demonstration").

CONCLUSION

Gag laws are not only those that impose prior restraints or disproportionate punishments for freedom of speech offenses and those related to protests; they encompass any type of restriction to freedom of speech that inhibits pluralism and limits democratic participation, and any and all prior restraints attempting to eliminate dissent—even those imposed in the form of regulation. The current trend that sees gag laws mushrooming and massive prosecutions taking place is an alarming one. More often than not, the violent suppression of protests (for example, the deployment of military forces, unlawful arrests, and the excessive use of force) is complemented by laws targeting not only peaceful assembly *per se* but also media freedom, human rights activism, and the ability to express dissent.

States should abide by their human rights obligations to respect both media freedom and freedom of peaceful protest. This includes utmost scrutiny to prior restraints and the prohibition of authorization for peaceful assemblies, as well as other laws that are seemingly lawful. This includes State obligations to justify excessive notification requirements, as well as vague laws on the protection of public order, even when these are passed for a legitimate cause. In the context of politically oppressed societies, alternative means should be found for human rights defenders and political activists to be able to express themselves. Creativity may function as a response to an unduly restrictive laws, as in the case of illicit street art and virtual protests—also protected in same terms as physical protests.[163] This is also how the future of the right to protest might look like in the post COVID-19 world.

163. Hence an obligation for States to not "block or hinder Internet connectivity in relation to peaceful assemblies." *See* General Comment No. 37, *supra* note 20, ¶ 34.