



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Parades and Protests in Northern Ireland





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Temple Court, 39 North Street, Belfast BT1 1NA
Tel: (028) 9024 3987 ■ Fax: (028) 9024 7844
Email: information@nihrc.org ■ Online: www.nihrc.org ■ twitter.com/nihrc
facebook.com/nihrc ■ youtube.com/nihrc

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Introduction

1

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The present paper is a general advice on the human rights framework governing the right to peaceful assembly.
- 1.2 The rights of peaceful assembly and association are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions and engage in literary and artistic pursuits¹. The right of peaceful assembly is recognised at article 21 of the International Covenant of Civil and Political Rights (ICCPR)² and article 11 of the European Convention on Human Rights (ECHR).³ The right of peaceful assembly is not absolute, restrictions may be imposed to protect the broader interests of the community and society.
- 1.3 The Special Rapporteur on the rights to freedom of peaceful assembly and of association, following a visit to the UK in January 2013, stated:

the right to freedom of peaceful assembly is not an absolute right, as provided by article 21⁴ of the ICCPR. Limitations imposed in accordance with these legitimate interests ... are justifiable and may relate to the time, place and manner of parading. Conversely, a proportionate approach to weighing the rights of all parties involved in a parade may necessitate facilitating marchers to process through contested routes. The Special Rapporteur emphasizes that decisions ... should be fully rooted in the human rights framework as this constitutes an objective and justifiable means of balancing the competing interests inherent in the process. Concerns that certain parades interfere with the rights and freedoms of others can thus be balanced by understanding that on the one hand pluralism, tolerance and broadmindedness are the hallmarks of a democratic society, but on the other hand article 20⁵ of the ICCPR shall apply.⁶
- 1.4 The visit by the Special Rapporteur took place at a time at which protests regarding the flying of the Union Flag from Belfast City Hall were on-going. These protests were a reflection of the Northern Ireland context in which many issues, including the regulation of parades and protests are controversial.
- 1.5 The body with principal responsibility for making decisions regarding parades and related counter protests in Northern Ireland is the Parades Commission for Northern Ireland (Parades Commission). The Parades Commission may make "*determinations in respect of particular proposed public processions and protest meetings*".⁷ In the financial year 2012/13 the Parades Commission received notifications

¹ HRC A/HRC/RES/15/21 The rights to freedom of peaceful assembly and of association 06/10/2010

² ICCPR, Article 21: '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.'

³ ECHR, Article 11 Freedom of assembly and association: 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

⁴ See footnote 2

⁵ Article 20 ICCPR: 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc A/HRC/23/39/Add.1, 29 May 2013, para 65

⁷ s.2(2)(a) Public Processions (Northern Ireland) Act 1998

of 4,449 parades and protests. Of these, only 225 were described as 'sensitive'⁸ or 'contentious', which is defined by the Parades Commission as *"having the potential of raising concerns and community tensions, and which consequently are considered in more detail by the Parades Commission"*.⁹ Whilst proportionately the number of 'contentious' parades and protests is low the level of disturbance which has arisen as a result of dissatisfaction with rulings of the Parades Commission, by both those wishing to engage in a parade and those opposed to a parade, has been significant.

- 1.6 On a number of occasions the legislative framework governing parades and protests in Northern Ireland has been subject to review.
- 1.7 In September 2002 Sir George Quigley was appointed by HM Government to review the Parades Commission and its governing legislation. The Quigley review recommended that the criteria on which determinations regarding parades are made should be modelled precisely on the right to peaceful assembly.¹⁰ Furthermore the Review recommended the separation of procedures for facilitation and determination. The recommendations of the report were not implemented by HM Government.
- 1.8 In 2007 a further strategic review of parading was chaired by Lord Ashdown. The Review Group published an interim review document, which identified that the adoption of a rights based approach will *"provide a framework for the just resolution of disputes, and the means of ensuring consistent decision-making in the regulation of public assemblies"*.¹¹ The Review recommended that a revised framework recognise a right to freedom from sectarian harassment.¹²
- 1.9 The Hillsborough Agreement 2010 made provision for the establishment of a working group to develop proposals for a new and improved framework for parading.¹³ Following receipt of the working group's report the Office of First and deputy First Minister published the draft Public Assemblies, Parades and Protests Bill 2010. The draft Bill sought to extend the machinery regulating parades to a broad range of other public assemblies.¹⁴ Whilst a consultation process took place the Bill was not subsequently introduced to the Assembly.
- 1.10 On 9 July 2013, the First Minister Rt. Hon Peter D. Robinson MLA and deputy First Minister Martin McGuinness MLA appointed Dr Richard Haass, to act as independent chair of an all-party group charged with bringing forward recommendations on the specific issues of parades and protests; flags, symbols and emblems, and matters related to the past.¹⁵ The work of this group is ongoing.
- 1.11 Parades and protests engage a broad range of human rights and state obligations. International human rights law, in particular the jurisprudence of the European Court of Human Rights (ECtHR), is a valuable resource for parades related adjudicative processes. Furthermore it is sufficiently flexible to accommodate alternative mechanisms for resolution which seek to develop innovative compromise agreements.

⁸ Statistics provided by the Parades Commission upon request.

⁹ See further, Annual Report and Financial Statements Parades Commission for Northern Ireland for the year ended 31st March 2012

¹⁰ Quigley Review of the Parades Commission and the Public Processions (NI) Act 1998 (2003), pgs 295-7

¹¹ SRPB (2008) Strategic Review of Parading in Northern Ireland: Interim Consultative Report, para 2.3

¹² *Ibid*, pg 50

¹³ Hillsborough Agreement (2010) pg 11

¹⁴ OFMdfM Consultation on 'The Public Assemblies, Parades and Protests Bill (Northern Ireland)' 20th April – 14th July

¹⁵ NI Executive Press Release 'Dr Richard Haass to chair all-party talks' 9th July 2013

- 1.12 The Commission has developed this paper to set out the international human rights framework relating to parades and protests. The paper is intended to act as a resource for those considering the development of domestic decision making mechanisms regarding parades and protests. Those considering this matter may also benefit from reviewing the Commission's paper on flags, symbols and emblems.¹⁶
- 1.13 The Commission bases its position on internationally accepted human rights standards, including the ECHR, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties include;

European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];

European Social Charter, 1961 (ESC) [UK Ratification 1962];

United Nations Convention on the Elimination of all forms of Racial Discrimination, 1966 (CERD) [UK ratification 1969];

International Covenant on Civil and Political Rights, 1966 (ICCPR) [UK ratification 1976];

International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];

United Nations Convention on the Rights of the Child, 1989 (UNCRC) [UK ratification 1991];

United Nations Convention against Torture, 1987 (CAT) [UK ratification 1988];

Framework Convention for the Protection of National Minorities, 1993 (FCNM) [UK ratification 1998];

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 [UK ratification 2007];

United Nations Convention on the Rights of Persons with Disabilities, 2006 (CRPD) [UK ratification 2009].

- 1.14 In addition to these treaty standards there exists a body of 'soft law' developed by the United Nations and regional human rights bodies. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include;

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992;

United Nations General Assembly, Global Agenda for Dialogue by the General Assembly 2001;¹⁷

UN Human Rights Council: Elimination of all forms of intolerance and of discrimination based on religion or belief 2006;¹⁸

¹⁶ NIHRC 'Flags, Symbols and Emblems' (Belfast 2013) This paper only concerns flags, symbols or emblems carried at processions, parades or protests; it does not consider the legality or legitimacy of events at which such objects may be displayed

¹⁷ UN Doc. A/RES/56/6, 21 November 2001

¹⁸ Resolution 6/37

ECRI General Policy Recommendation no.1 on combating racism, xenophobia, anti-Semitism and intolerance, 1996;¹⁹

Committee of Ministers Recommendation on Hate Speech, 1997;²⁰

United Nations Declaration on a Culture of Peace, 1999;²¹

UNESCO Universal Declaration on Cultural Diversity, 2001;

Durban Declaration and Programme of Action, 2001;²²

ECRI General Policy Recommendation No.7 on National Legislation to combat racism and racial discrimination, 2002;²³

Faro Declaration on the Council of Europe's Strategy for Developing Intercultural Dialogue, 2005;²⁴

Council of Europe, White Paper on Intercultural Dialogue, 2008;²⁵

Organisation for Security and Cooperation in Europe, Guidelines on Freedom of Peaceful Assembly, 2010.

¹⁹ ECRI (96)43 rev

²⁰ R (97) 20

²¹ A/RES/53/243A

²² A/CONF.189/12

²³ CRI(2003)8

²⁴ DGIV/DC-FARO

²⁵ CM(2008)30

Domestic Legislation

- 2.1 The principal legislative instruments governing parades and protests in Northern Ireland are the Public Processions (Northern Ireland) Act 1998 (Public Processions Act) and the Public Order (Northern Ireland) Order 1987 (Public Order Order). Other criminal and civil legislation may be invoked in particular circumstances to deal with certain behaviours.
- 2.2 Under the Public Processions Act, section 6(2), advance notice of a parade must be provided to the Police Service of Northern Ireland at least 28 days prior to the event. The written notification must specify the date and time, route, number of participants and supporters, the names of the bands taking part, the name and address of the organiser and their arrangements for control of the parade.²⁶ Any person organising or participating in a parade which has not met these notification requirements or where the parade differs from the notice will be guilty of an offence triable summarily.²⁷ Similar notification requirements exist for related protest meetings, notice for which must be provided at least 14 days prior to the event.²⁸ Any person who organises or takes part in a protest which does not comply, or which differs from notification requirements will be guilty of an offence.²⁹
- 2.3 The Parades Commission was established under section 1(1) of the Public Processions Act and holds the functions of promoting a greater understanding of the issues concerning public processions and also promoting and facilitating mediation to resolve disputes.³⁰ The Parades Commission may issue determinations in respect of a proposed parade or related protest, imposing such conditions upon the organisers, participants and supporters as it considers necessary.³¹ In making determinations, it must have regard to:³²
 - (a) any public disorder or damage to property which may result from the procession;
 - (b) any disruption to the life of the community which the procession may cause;
 - (c) any impact which the procession may have on relationships within the community;
 - (d) any failure of a person of a description specified in the guidelines to comply with the Code of Conduct (whether in relation to the procession in question or any related protest meeting or in relation to any previous procession or protest meeting); and,
 - (e) the desirability of allowing a procession customarily held along a particular route to be held along that route.
- 2.4 With respect to protest meetings related to parades, the Public Processions Act contains similar provisions regarding the Parades Commission's determinations.³³

²⁶ Public Processions (Northern Ireland) Act 1998, s.6(4).

²⁷ *Ibid.*, s.6(7)

²⁸ *Ibid.*, s.7(2)

²⁹ *Ibid.*, s.7(9)

³⁰ *Ibid.*, s.2(1)

³¹ *Ibid.*, s.8(1)

³² *Ibid.*, s.8(6)

³³ *Ibid.*, s.9A

- 2.5 The Secretary of State for Northern Ireland may review a determination of the Parades Commission, in respect of a public procession³⁴ or a protest meeting,³⁵ on application by the Chief Constable. Upon review, the Secretary of State may revoke, amend or confirm the determination.
- 2.6 Only the Secretary of State holds the power to prohibit a procession or related protest meeting. Section 11 empowers the Secretary of State to prohibit an individual parade or protest;³⁶ all parades of a particular class or description in an area³⁷ or all parades and protests in an area for a period of up to 28 days.³⁸ Any person who knowingly organises or takes part in a parade or protest which has been prohibited is guilty of an offence and may be prosecuted summarily.³⁹
- 2.7 Under the Public Processions Act, sections 11 and 11A, decisions by the Secretary of State will have regard to; any serious public disorder or damage to property, serious disruption to the life of the community; serious impact on relationships within the community and any undue demands on the police or military.
- 2.8 A number of legislative provisions create offences which may be relevant to the conduct of individuals at parades or protests. Section 14(1) of the Public Processions Act prohibits a person from preventing or hindering a lawful parade or protest. It further prohibits a person from hindering, molesting, obstructing or acting in a disorderly manner towards or behaving offensively and abusively towards those taking part in a lawful public procession.
- 2.9 Articles 9-11 of the Public Order Order prohibit acts which are intended or likely to stir up hatred or arouse fear. This includes the use of threatening, abusive or insulting words, behaviour or written material;⁴⁰ the (publishing or) distribution of threatening, abusive or insulting material;⁴¹ or the distribution, showing or playing of a recording or visual images or sounds which are threatening, abusive or insulting.⁴² Each of these offences may be prosecuted summarily or on indictment.⁴³
- 2.10 Article 19(1) prohibits the use of threatening, abusive or insulting words or behaviour; any display or action; or permits such on their land or premises with intent to provoke a breach of the peace in any public place or in relation to a public procession. Article 18(1) prohibits disorderly behaviour in a public place and, although not specific to behaviour occurring in the context of a parade or protest, may be utilised by police in certain situations.

³⁴ *Ibid*, s.9(1)

³⁵ *Ibid*, s.9B(1)

³⁶ *Ibid*, s.11(1) and s.11A(1)

³⁷ *Ibid*, s.11(2)

³⁸ *Ibid*, s.11(3) and s.11A(2)

³⁹ *Ibid*, s.11(8) and s.11A(7)

⁴⁰ *Public Order (Northern Ireland) Order 1987*, Art.9(1)

⁴¹ *Ibid*, Art.10(1)

⁴² *Ibid*, Art.11(1)

⁴³ *Ibid*, Art.16(1)

- 2.11 It is an offence to wilfully obstruct, or seek to obstruct, traffic or hinder any lawful activity under article 20(1) of the Public Order Order. The Motorways Traffic Regulations prohibit a pedestrian to be on the motorways, except in an emergency.⁴⁴ The Road Traffic (NI) Order 1995 also creates the offence of intentionally causing danger to road users by causing anything to be on or over the road; interfering with vehicles or interfering with traffic equipment.⁴⁵ An individual endangering himself or the safety of others through negligence on a road is also an offence.⁴⁶
- 2.12 The Terrorism Act 2000 creates the offences of inviting support for a proscribed organisation⁴⁷ or wearing an item of clothing, or wearing, carrying or displaying an article which arouses reasonable suspicion of being a supporter of a proscribed organisation.⁴⁸
- 2.13 The Protection from Harassment (Northern Ireland) Order 1997 criminalises harassment⁴⁹ and provides civil injunctive relief where a person pursues a course of conduct which amounts to harassment.⁵⁰ The legislation does not provide a definition of harassment other than confirming that it includes “alarming the person or causing the person distress”⁵¹ and that it must occur on at least two occasions.⁵²
- 2.14 The Northern Ireland Act 1998 places a number of duties upon public authorities. Section 75(1) requires a public authority to “have due regard to the need to promote equality of opportunity”; between persons of different religious beliefs, political opinion, racial group, age, marital status, sexual orientation; between men and women; between persons with a disability and those without; and between persons with dependents and persons without.
- 2.15 The duty under s.75(2) requires public authorities, in carrying out their duties, to have “regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group”.
- 2.16 Finally, s.76(1) makes it unlawful for a public authority to discriminate, or to aid or incite another person to discriminate against a person or class of person on the ground of religious belief or political opinion.

⁴⁴ Motorways Traffic Regulations (Northern Ireland) 2008, reg.13(1)(b)

⁴⁵ Road Traffic (NI) Order 1995, Art.33

⁴⁶ *Ibid*, Art.38

⁴⁷ Terrorism Act, 2000 s.12(1)

⁴⁸ *Ibid*, s.13(1)

⁴⁹ Protection from Harassment (Northern Ireland) Order 1997, Art.4

⁵⁰ *Ibid*, Art.3

⁵¹ *Ibid*, Art.2(2)

⁵² *Ibid*, Art.2(3)

Human rights of individuals engaging in or affected by a parade or protest

- 3.1 International human rights law requires states to refrain from violating the human rights of individuals. There is also a positive obligation to take measures to protect individuals from harm caused by private persons or entities.⁵³ A failure to take appropriate measures or to exercise due diligence to prevent such harm being caused by third parties, may amount to a violation of the rights of the individual.⁵⁴
- 3.2 When a parade or protest is to take place, the state must consider all the human rights engaged and take such measures to ensure adequate respect for all rights engaged. The state's considerations should include the rights of those individuals parading or protesting and the rights of those not wishing to partake but who may be affected, as well as the rights of law enforcement officials.
- 3.3 In this section the paper sets out the key human rights likely to be engaged in the context of a parade or protest. The rights engaged by those participating in a parade may be the same as those engaged for the persons affected by a parade or protest. For instance, this may be the case where individuals affected by a parade or protest organise a counter protest (including in the form of a parade), in which case those participating in the original parade or protest and those in the counter protest are seeking to exercise the right to peaceful assembly.
- 3.4 Those participating in a parade or protest may also be exercising their rights to: culture, freedom of expression, freedom of religion, and freedom of association. In addition, where certain actions are taken by the authorities, the rights to: life, freedom from inhuman and degrading treatment, movement, and liberty and security of the person may be engaged. With respect to those affected by a parade or protest, rights engaged may include the rights to: life, freedom from inhuman and degrading treatment, culture, freedom of religion, liberty and security of the person, freedom of movement, private and family life, access to health services and peaceful enjoyment of one's property.
- 3.5 Whilst human rights are afforded to an individual they are often exercised collectively. Parades or protests are commonly undertaken by associations or groups of individuals who may perhaps be bound together by shared beliefs and objectives. An individual's ability to exercise his or her rights in community with others may thus be integral to enjoyment of human rights.⁵⁵

Right to freedom of assembly and association

The right to freedom of assembly is protected by the ICCPR, article 21, which states:

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.

⁵³ ICCPR, Article 2

⁵⁴ UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, para 8

⁵⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment 21: Right of everyone to take part in cultural life* (2009) E/C.12/GC/21, para 13

The right to freedom of association is protected by the ICCPR, article 22, which states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by 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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

The right to freedom of assembly, along with the right to freedom of association, is also protected by the ECHR, article 11 of which states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

- 3.6 The ECtHR understands 'assembly' to include both formal and informal meetings and gatherings, the latter covering protests occurring without prior notification.⁵⁶ The right to freedom of assembly protects assemblies, parades or protests that take place in private and those on public thoroughfares⁵⁷ and it may be claimed by both organisers and participants.⁵⁸ There is no requirement to have a certain number of participants before it can be categorised as an assembly for the purposes of the international human rights standards.⁵⁹
- 3.7 It is important to note that the scope of this right extends only to peaceful assemblies; the ECtHR has emphasised that the right "*does not cover a demonstration where the organisers and participants have violent intentions*".⁶⁰ Decision makers may look to the intentions of those wishing to exercise the right to peaceful assembly; looking beyond the written or stated objectives and intentions of a group and considering the actions and positions it defends, in assessing the nature of the organisation.⁶¹ Where an organisation has previously exercised the right to peaceful assembly and violence has arisen, this will be a relevant consideration.⁶²

⁵⁶ *Oya Ataman v. Turkey* (5 December 2006) Application No. 74552/01, paras 40 – 43

⁵⁷ *Rassemblement Jurassien et Unite Jurassienne v. Switzerland* App 8191/78 (1980) 17 DR 93, para 119

⁵⁸ *Christians Against Racism and Fascism v. the United Kingdom* Application No. 8440/78 (1980) 21 DR 138, para 148

⁵⁹ *CS v. Germany* (6 March 1989) Application No. 13858/88, ECtHR inadmissibility decision

⁶⁰ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 77

⁶¹ *Ibid*, para 90

⁶² *Christian Democratic People's Party v. Moldova* (14 February 2006) Application No. 28793/02, para 28

- 3.8 In this regard, where the organisers do not themselves have violent intentions but the demonstration may provoke disorder, this in and of itself does not justify restricting the right to peaceful assembly of the organisers.⁶³ The European Commission on Human Rights (E.Comm HR) has stated that the right must be secured to:

everyone who has the intention of organising a peaceful demonstration. In the Commission's opinion the possibility of a violent counter-demonstration, or the possibility of extremists with violent intentions, not members of the organising organisation, joining the demonstration cannot as such take away that right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of article 11(1) of the Convention.⁶⁴

- 3.9 The OSCE Guidelines on Freedom of Peaceful Assembly state that:

Assemblies can change from being non-violent to being violent. Should there be, at any stage during a peaceful assembly, a declaration of unlawful intent, it may change from being peaceful to non-peaceful ... and/or from being lawful to being unlawful (and may thus be terminated in a proportionate manner). However, the making of unlawful statements by participants in an assembly (whether verbal or written) does not of itself turn an otherwise peaceful assembly into a non-peaceful assembly, and any intervention should again arrest the particular individuals involved rather than dispersing the entire event.⁶⁵

- 3.10 The ECtHR has found that the failure to comply with domestic legal provisions cannot, in and of itself, result in a conclusion that a demonstration is not peaceful.⁶⁶ In the case of *Cisse v. France* the fact that the protesters had breached immigration rules did not result in the protest not being peaceful.⁶⁷ Where a parade or protest is intended to disrupt an activity, the practice of the ECtHR has been to address the matter as an exercise of the right to freedom of expression not as an exercise of the right to freedom of assembly.⁶⁸
- 3.11 Both the ICCPR and the ECHR provide a general limitation on the scope of protections afforded in the treaties.

The ICCPR, article 5(1) states:

Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

⁶³ *Christians against Racism and Fascism v. the United Kingdom* (16 July 1980) Application No. 8440/78, DR 21, para 138

⁶⁴ *Ibid*

⁶⁵ OSCE, Guidelines on Freedom of Peaceful Assembly, 2nd edition (2010) para 164

⁶⁶ *Cisse v. France* (16 January 2001) Application No. 51346/99 ECtHR admissibility decision

⁶⁷ *Ibid*

⁶⁸ *Steel and Others v. the United Kingdom* (1998) 28 EHRR 603

The ECHR, article 17 states:

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

3.12 The ECtHR has observed that:

the purpose of article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms.⁶⁹

3.13 The ECtHR has in particular emphasised that the purpose of article 17 is to prevent those with totalitarian aims from exploiting, in their own interests, the principles enunciated in the ECHR.⁷⁰

3.14 In the case of *Kasymakhunov v. Russia*, the ECtHR ruled:

political organisations may promote a change in the law or the legal and constitutional structures of the state on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political organisation whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.⁷¹

3.15 In this case the ECtHR held that two individuals belonging to a group which made racist statements and statements in support of violence could not rely on the freedoms of religion, expression and association to justify their actions. Article 17 has also been used to prohibit reliance on the right to freedom of expression to justify hate speech.⁷²

Right to freedom of expression

The right to freedom of expression is protected by the ICCPR, article 19, which states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁶⁹ *Paksas v. Lithuania* [GC] (6 January 2011) Application No. 34932/04, paras 87 – 88

⁷⁰ *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII, para 2

⁷¹ *Kasymakhunov and Saybatalov v. Russia* (14 March 2013) Application Nos. 26261/05 and 26377/06, para 105

⁷² *Ibid.*, paras 106-113

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of expression is also protected by the ECHR; article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3.16 The right to freedom of peaceful assembly is interlinked with the right to freedom of expression.⁷³ The right to freedom of expression is viewed as integral to enabling the enjoyment of other rights, such as the right to freedom of assembly and association.⁷⁴ The interdependence of expression and peaceful assembly in the context of a parade or protest is such that the rights may be engaged simultaneously, with the ECtHR recognising that a collection of individuals may assemble together to “*secure a forum for public debate and ... open expression of protest*”.⁷⁵

3.17 The ECtHR and UN Human Rights Committee have a practice of taking either freedom of expression or freedom of assembly as the ‘lead’ in their deliberations. The ECtHR has commented that:

Article 10 is to be regarded as a *lex generalis* [general law] in relation to article 11, a *lex specialis* [specific law]. It is therefore unnecessary to take the complaints under article 10 into consideration separately... On the other hand, notwithstanding its autonomous role and particular sphere of application, article 11 must, in the present case, also be considered in the light of article 10. The protection of personal opinions, secured by article 10, is one of the objectives of freedom of peaceful assembly as enshrined in article 11.⁷⁶

⁷³ *Vogt v. Germany* (1995) 21 EHRR 205

⁷⁴ UN Human Rights Committee, *General Comment 34: Freedom of Expression* (2011) CCPR/C/GC/34, para 4

⁷⁵ *Eva Molnar v. Hungary* (17 October 2008) Application No. 10346/05, para 42

⁷⁶ *Ashughyan v. Armenia* (17 July 2008) Application No. 33268/03, paras 71-72

- 3.18 The ECtHR has stressed that the linking of those rights in this way is particularly relevant when the “intervention against an assembly or an association” is related to the messages articulated by participants.⁷⁷
- 3.19 The right to freedom of expression protects “*all means of expression and the means of their dissemination*”.⁷⁸ This includes inter alia, political or religious discourse, as well as cultural expression.⁷⁹ The UN Human Rights Committee notes that expression, which may be considered to be deeply offensive, is also protected by the right although this may be restricted in accordance with article 19(3) and article 20 (prohibition of hate speech).⁸⁰ Restrictions may be permissible to protect the rights of others, which refers both to other individuals or members of a community defined, for example, by religious faith or ethnicity.⁸¹
- 3.20 The ECHR equally protects individuals receiving and imparting information and ideas. Expressions protected may include those that “offend, shock or disturb”.⁸² Nevertheless, expressions which are “gratuitously offensive to others” may be legitimately restricted, in particular where the rights of others are infringed by the expression and it does not “*contribute to any form of public debate capable of furthering progress in human affairs*”.⁸³ Instances in which the expression incites disrespect or hatred the ECtHR would regard as hate speech.⁸⁴

Advocacy of national, racial or religious hatred (hate speech)

ICCPR, article 20(2) states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

CERD, article 4(a) requires States to:

... declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

CERD, article 4(b) requires States to:

...declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.⁸⁵

⁷⁷ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 85

⁷⁸ UN Human Rights Committee, *General Comment 34: Freedom of Expression* (2011) UN Doc. CCPR/C/GC/34, para 34

⁷⁹ *Ibid*, para 11

⁸⁰ *Ibid*

⁸¹ *Ibid*, para 28

⁸² *Handyside v the United Kingdom* (7 December 1976) Application No. 5493/72, para 49

⁸³ *Giniewski v France* (31 January 2006) Application No. 64016/00, para 43

⁸⁴ *Ibid*, para 52

⁸⁵ The UK has entered a reservation in respect of Article 4; “[the United Kingdom] interprets Article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that Article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of Article 4.”

- 3.21 Hate speech is not limited to oral expression but also includes written and pictorial manifestations.⁸⁶ One definition of hate speech may be found within the Council of Europe, Recommendation No. R(97) 20:

all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.⁸⁷

- 3.22 In its General Comment No. 34, the UN Human Rights Committee has elaborated on the relationship between articles 19 and 20 of the ICCPR:

articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the state: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.⁸⁸

- 3.23 The ECtHR has considered forms of expression which are potentially hate speech primarily under the admissible restrictions under right to freedom of expression, although in certain instances the freedom of assembly and association has also been engaged.⁸⁹ In light of tolerance and respect for the equal dignity of all constituting the foundations of a democratic, pluralistic society, the ECtHR has stated:

it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.⁹⁰

- 3.24 In *Norwood v. the United Kingdom*, the ECtHR ruled that a public expression which amounted to an attack on a religious group within a jurisdiction was not protected by the right to freedom of expression.⁹¹

⁸⁶ UN Human Rights Council, Resolution 16/18, para 3; EU Framework Decision 2008, Article 1(1)(b); ECRI General Policy Recommendation 7, para 18(f)

⁸⁷ Council of Europe, Recommendation No. R(97) 20 of the Committee of Ministers to Member States on "Hate Speech" (30 October 1997), Scope. This Recommendation advocates for a sound legal framework to be implemented around hate speech but does not require a specific prohibition.

⁸⁸ UN Human Rights Committee, General Comment 34: Article 19: *Freedoms of opinion and expression* (12 September 2011) CCPR/C/GC/34, paras 50-1

⁸⁹ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 85

⁹⁰ *Gündüz v. Turkey*, (4 December 2003) Application No. 35071/97, para 40

⁹¹ *Norwood v. the United Kingdom* (16 November 2004) Application No. 23131/03, ECtHR admissibility decision

Right to culture

ICESCR, article 15(1)(a) states:

1. The state Parties to the present Covenant recognise the right of everyone:
(a) to take part in cultural life;

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, article 2(2) recalls that;

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.

Right of everyone to take part in cultural life

- 3.25 Cultural rights are an “integral part of human rights”, their promotion is essential *“for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.”*⁹²
- 3.26 The UN Committee on Economic, Social and Cultural Rights (CESCR) has commented that the concept of ‘culture’ encompasses:

ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.⁹³
- 3.27 As with other economic, social and cultural rights provisions, article 15 confers specific legal obligations to respect, protect and fulfil the right in question with a focus on availability, accessibility, acceptability, adaptability and appropriateness. This requires non-interference with the exercise of cultural practices and access to cultural goods and services and steps to prevent third parties from interfering with the right. It also requires appropriate measures (whether legislative, administrative, judicial, budgetary, promotional or other) to ensure full realisation of the right, including *“preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.”*⁹⁴
- 3.28 The CESCR has highlighted that all persons have the right to choose their own cultural identity and whether or not to belong to a community. This ensures that those wishing to take part in all forms of culture are free to express their identity and exercise their cultural practices without discrimination.⁹⁵ Similarly, those who choose not to express their culture outwardly will be protected.

⁹² UN Committee on Economic, Social and Cultural Rights, *General Comment 21: Article 15(1)(a) The Right of Everyone to Take Part in Cultural Life* (21 Dec. 2009) E/C.12/GC/21, para 11

⁹³ *Ibid*, para 13

⁹⁴ *Ibid*, para 6

⁹⁵ *Ibid*, para 49

- 3.29 The CESCR recognises the close association that the right to take part in cultural life has with the enjoyment of other rights.⁹⁶ It recalls that although national and religious peculiarities and historical, cultural and religious backgrounds must be considered, State Parties are under an obligation not to interfere with, but also to protect and promote this right. Cultural diversity cannot be invoked to infringe upon or limit the scope of other rights and freedoms.⁹⁷
- 3.30 When exercising the right to peaceful assembly (such as in a parade or protest) an individual may be expressing his or her cultural identity and exercising his or her cultural rights. Where the right to peaceful assembly is exercised to express a cultural identity, the manner, time and place of the assembly may take on a new significance.⁹⁸ In particular, the location or the calendar date may be of significant importance to those engaged in a parade or protest.⁹⁹

Protection of minorities and their cultures

ICCPR, article 27:

Those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The UNCRC makes specific provision for the protection of the rights of children from a minority culture. Article 30 states:

Those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

UNESCO Convention on the Protection and promotion of the Diversity of Cultural Expressions, article 2(3) states:

The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

The Framework Convention for the Protection of National Minorities (FCNM), article 5(1) states that:

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

⁹⁶ *Ibid*, para 17

⁹⁷ *Ibid*, para 18

⁹⁸ *Öllinger (Karl) v. Austria* [2006] ECHR 665, para 41

⁹⁹ *Pendragon v. the United Kingdom* (1998) 27 EHRR CD 179

FCNM , article 15 of the requires that state Parties:

Create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

- 3.31 The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 1(1) emphasises:

States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

- 3.32 The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 4(2) encourages States to:

take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs.¹⁰⁰

- 3.33 As to what constitutes a 'minority', the Office of the UN High Commissioner for Human Rights has noted that the status of 'minority' under international law is not to be construed in a narrow sense, explaining that:

In most instances a minority group will be a numerical minority, but in other a numerical majority may also find itself in a minority-like or non-dominant position ... In some situations, a group which constitutes a majority in a state as a whole may be in a non-dominant position within a particular region of the state in question.¹⁰¹

- 3.34 Referring to the necessity of achieving an adequate balance between competing interests, the ECtHR has also noted that:

Although individual interest must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.¹⁰²

- 3.35 The CESCR Committee regards ICESCR, article 15(1)(a) to equally protect the *"right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture"*.¹⁰³ This right requires states to *"recognize, respect and protect minority cultures"*, including their:

¹⁰⁰ Article 4(2), UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

¹⁰¹ UN Office of the High Commission for Human Rights, *Minority Rights: International Standards and Guidance for Implementation* (2010) pgs 2-3

¹⁰² *Barenkevich v. Russia* (2008) 47 EHRR 266, para 30

¹⁰³ UN Committee on Economic, Social and Cultural Rights, *General Comment 21: Right of everyone to take part in cultural life* (2009) E/C.12/GC/21, para 32

cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership.¹⁰⁴

- 3.36 The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions also extends its protection to minorities, noting that *“the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities.”*¹⁰⁵

- 3.37 Under the ECHR, the obligation to respect an individual’s cultural identity and heritage has emerged from the jurisprudence under the right to private and family life, article 8, ECHR. In light of the importance of cultural diversity, article 8 protects the right to maintain a minority identity and to lead one’s private and family life in accordance with that tradition. In *Chapman v the United Kingdom*, the ECtHR stated that:

there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe to recognize the special needs of minorities and an obligation to protect their security, identity and lifestyle..., not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.¹⁰⁶

- 3.38 The protection of cultural heritage to ensure a pluralistic society has been recognised as important, the ECtHR noting that:

pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.¹⁰⁷

- 3.39 The obligation to fulfil requires positive measures such as supporting the cultural infrastructure for the implementation of policies aimed at protecting and promoting cultural diversity, granting financial and other assistance to relevant actors as well as *“[t]aking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life’ and ‘to create conditions conducive to constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance”*.¹⁰⁸ It also requires measures from the state where individuals or communities are unable to realise the right for themselves¹⁰⁹ and to ensure appropriate education and public awareness concerning the right, particularly in relation to rural areas, areas of deprivation or in relation to the specific situation of minority groups.¹¹⁰

¹⁰⁴ *Ibid*, para 32

¹⁰⁵ UNESCO Convention on the Protection and promotion of the Diversity of Cultural Expressions, Article 2(3)

¹⁰⁶ *Chapman v. the United Kingdom* [2001] ECHR 43, at 93

¹⁰⁷ *Gorzelik v. Poland* [2004] ECHR 72, at 92

¹⁰⁸ *Ibid*, para 58

¹⁰⁹ *Ibid*, para 54

¹¹⁰ *Ibid*, para. 53

Freedom of thought, conscience and religion

The right freedom of thought, conscience and religion is protected under ICCPR, article 18, which states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

It is also protected under the ECHR, article 9 of which states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

- 3.40 Freedom of thought, conscience and religion may be simultaneously engaged with both freedom of expression and peaceful assembly.
- 3.41 The ICCPR and ECHR restrict the ability of a state to interfere with the right to freedom of religion, aside from in specific circumstances. It also includes positive obligations, with regard to individuals not participating in a parade or protest, requiring government to protect individuals and other groups from any disproportionate interference with their right to freedom of religion by private individuals.¹¹¹

¹¹¹ *Leyla Sahin v. Turkey* (10 November 2005) Application No. 44774/98, para 108

- 3.42 In balancing competing interests, the ECtHR has emphasised the state's role to ensure mutual tolerance between competing groups by acting as *"the neutral and impartial organiser of the exercise of various religions, faiths and beliefs"*.¹¹² The ECtHR has recognised that the co-existence of different religions may require such restrictions upon article 9 *"to reconcile the interests of the various groups and ensure that everyone's beliefs are respected"*.¹¹³ The regulation of the place and type of manifestation of religious symbols has been considered justifiable to obtain peaceful co-existence.¹¹⁴
- 3.43 The UN Human Rights Committee has stated that:

The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant.¹¹⁵

Equality and non-discrimination

ICCPR, article 26, states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The prohibition of discrimination under the ECHR only applies where another of the freedoms of the Convention are engaged. Article 14 states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- 3.44 The Council of Europe has noted that *"the rules of a - real or imagined - 'dominant culture' cannot be used to justify discrimination, hate speech or any form of discrimination on grounds of religion, race, ethnic origin or other identity."*¹¹⁶
- 3.45 Discrimination includes direct and indirect discrimination and is defined as:
- any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹¹⁷

¹¹² *Ibid*, para 107

¹¹³ *Kokkinakis v. Greece* [1993] ECHR 20, para 33; See also *Barankevich v. Russia* (2008) 47 EHRR 266, para 30

¹¹⁴ *Refah Partisi and Others v. Turkey* [2003] ECHR 97, para 95

¹¹⁵ UN Human Rights Committee, *General Comment 34: Freedom of Expression* (2011) UN Doc. CCPR/C/GC/34, para 48

¹¹⁶ Council of Europe, *White Paper on Intercultural Dialogue: Living Together as equals in dignity* (2008) pg 20

¹¹⁷ UN Human Rights Committee, *General Comment 18: Non-discrimination* HRI/GEN/1/Rev.1 at 26 (1994) , para 7

- 3.46 The UN Human Rights Committee has emphasised the importance of guaranteeing non-discrimination, stating that:

[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.¹¹⁸

- 3.47 Guaranteeing the enjoyment of rights and freedoms without discrimination “*does not mean identical treatment in every instance*”.¹¹⁹

Right to life

ICCPR, article 6:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

ECHR, article 2:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided for by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

- 3.48 In the context of parades and protests, there may be a threat to the lives of both those participating in the parade or protest and to the lives of non-participants. In such circumstances, there is a positive obligation upon the state to protect individuals. Failure to honour that obligation would result in a violation of the right to life.
- 3.49 Specifically, ECHR, article 2 contains a positive obligation where “*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party*”.¹²⁰ The failure “*to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*”, would amount to a violation of the ECHR, article 2.¹²¹

¹¹⁸ *Ibid*, para 1

¹¹⁹ *Ibid*, para 8

¹²⁰ *P. F. and E. F. v the United Kingdom* (23 November 2010) Application No. 28326/09, para 37

¹²¹ *Ibid*

- 3.50 In the context of policing, the ECtHR takes into account *“the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”*.¹²² It notes that its interpretation of *“all reasonable steps”* must *“not impose an impossible or disproportionate burden on the authorities”*, including financial and human resources.¹²³
- 3.51 The positive obligation to protect the right to life extends to all relevant officials in all relevant branches of government.¹²⁴ When making decisions regarding parades and protests, decision makers must take into account the risks posed to ‘other individuals’, but also to those engaged in the parade or protest, as well as the police and other public servants responsible for overseeing the parade or protest. Where there is a real risk of violence in the context of a parade or protest, in such a manner that the lives of individuals would be threatened, there is a positive duty to find the least restrictive and most appropriate way to prevent such harm occurring.

Right to freedom from torture, inhuman or degrading treatment

ICCPR, article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ECHR, article 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Convention against Torture, article 3:

the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

- 3.52 This is an absolute right which cannot be restricted. The right protects individuals from being subjected to torture, inhuman or degrading treatment, whereby each element requires a different threshold in severity to be met. Treatment amounting to ‘torture’ requires the highest level of severity. ‘Inhuman

¹²² *Ibid*, para 40

¹²³ *Ibid*

¹²⁴ UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (29 March 2004) CCPR/C/21/Rev.1/Add.13, paras 4, 7

treatment' occurs when it *"was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering"*.¹²⁵ Treatment is considered degrading when it creates *"feelings of fear, anguish and inferiority capable of humiliating and debasing [the victim]. ... it is sufficient if the victim is humiliated in his or her own eyes"*.¹²⁶ Further factors that are taken into account are the vulnerability of the victim (age, gender, status, etc.), the environment and the cumulative effect of other factors.¹²⁷

- 3.53 The right also contains positive obligations, requiring states to take all reasonable steps to prevent such acts committed by private actors, similar to those under the right to life.¹²⁸ In particular, the ECtHR has found this positive obligation to incorporate a duty to take *"all reasonable measures to prevent the recurrence of violent attacks"*.¹²⁹ It is thereby accepted that not in all circumstances, will operational measures be able to *"prevent that risk from materialising"*.¹³⁰
- 3.54 The ECtHR has held that the actions of protesters may reach the minimum level of severity required to fall within the scope of article 3, in the relevant case the ECtHR noted that the protest was *"premeditated, it continued for two months, it was designed to cause fear and distress to young children and their parents making their way to school, and it clearly resulted in considerable mental suffering"*.¹³¹ The ECtHR accepted that in the circumstances of the case the fore-knowledge of the police triggered their obligation to take preventive action.¹³²

Right to liberty and security of the person

ICCPR, article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

ECHR, article 5:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

¹²⁵ *Kudla v. Poland* (26 October 2000) Application No. 30210/96, para 92

¹²⁶ *Smith and Grady v. the United Kingdom* (27 September 1999) Application Nos. 33985/96 and 33986/96, para 120

¹²⁷ *Price v. the United Kingdom*, ECHR 2001-VII Application No. 33394/96, para 24

¹²⁸ *A v. the United Kingdom* (23 September 1998) Application No. 35373/97

¹²⁹ *Ibid*, para 162

¹³⁰ *P. F. and E. F. v. the United Kingdom* (23 November 2010) Application No. 28326/09, para 40

¹³¹ *Ibid*, para 38

¹³² *Ibid*, para 39

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

- 3.55 The right to liberty and security of the person protects individuals from arbitrary deprivation of liberty as well as from bodily injury. These are to be understood as two independent elements of the right; detention is therefore not a prerequisite for an infringement on the right to personal security.¹³³

The right to personal security

- 3.56 The right to security of person obliges states to protect individuals from “*known threats to life or bodily integrity proceeding from either governmental or private sources*”.¹³⁴ It also requires states to protect individuals from excessive use of force by the police.¹³⁵
- 3.57 The right to security of the person necessarily overlaps with other rights protected by the ICCPR, such as the right to life. The right to personal security is, however, broader than the right to life as it also covers injuries that are not life-threatening.¹³⁶ Similarly, the protection of bodily integrity is also protected by the right to freedom from torture, inhuman or degrading treatment.
- 3.58 Where there is a real risk to the security of persons in relation to a parade or protest the government’s positive duties under the right to security of person are engaged.¹³⁷

The right to liberty

- 3.59 States have a positive obligation to take appropriate measures to protect individuals against abduction or detention by criminal individuals or groups, as well as wrongful detention by lawful organisations.¹³⁸
- 3.60 The ECtHR has equally interpreted the right to liberty to be separate from the right to freedom of movement, which is protected by Protocol No. 4, article 2. The distinction is, however, “*one of degree or intensity, and not one of nature or substance*”.¹³⁹ The determination of whether an action falls within the scope of article 5(1) is based on the “*concrete situation and ... a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question*”.¹⁴⁰
- 3.61 A ‘deprivation of liberty’ is therefore comprised of an ‘objective element’ which refers to an individual’s detention “*in a particular restricted space for a not negligible length of time*”.¹⁴¹ Additionally, a ‘subjective element’ must be fulfilled, which reflects the absence of the individual’s consent to the confinement¹⁴². The ECtHR has noted that detention measures that do not involve the ‘classic’ form of imprisonment must be “*evaluated by reference to the nature and extent of the confinement, the manner of*

¹³³ UN Human Rights Committee, *Leehong v. Jamaica*, 613/1995, para 9.3

¹³⁴ *Ibid*, para 8

¹³⁵ *Ibid*, para 9.3; UN Human Rights Committee Concluding Observations Belgium (2011) CCPR/C/BEL/CO/5, para 14

¹³⁶ UN Human Rights Committee, Concluding Observations Czech Republic (2006) CCPR/C/CZE/CO/2, para 14; Georgia (2002) CCPR/CO/74/GEO, para 14; Hungary (2002) CCPR/CO/74/HUN, para 10

¹³⁷ UN Human Rights Committee, *General Comment 20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* (1992) HRI/GEN/1/Rev.1 at 30 (1994), para 2

¹³⁸ UN Human Rights Committee, Concluding Observations Uganda (2004) CCPR/CO/80/UGA, para 12; Yemen 2012, para 24

¹³⁹ *Austin and Others v. the United Kingdom* (15 March 2012) Application Nos. 39692/09, 40713/09, 41008/09, para 57

¹⁴⁰ *Ibid*

¹⁴¹ *Storck v. Germany* (16 June 2005) Application No. 61603/00, para 74

¹⁴² *Ibid*, para 74

its implementation, its duration and its effect upon the applicant".¹⁴³ Finally, the action must be imputable to the state.

- 3.62 A deprivation of liberty can be imputable to a state through a) the state's direct involvement in the detention of an individual, or b) its failure to protect an individual against interferences with his/her liberty by private persons.¹⁴⁴
- 3.63 In *Austin v. the United Kingdom*, the ECtHR examined the applicability of ECHR, article 5(1) with regard to 'kettling' or "*containment of a group of people carried out by the police on public order grounds*". The ECtHR first noted that "*[i]t cannot be excluded that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of article 5 § 1*".¹⁴⁵ The determination had to be made on a case by case basis, taking into account "*the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public*".¹⁴⁶ In particular, the measures had to be unavoidable, necessary to avert a real risk of serious injury or damage and the minimum required.¹⁴⁷
- 3.64 The ECtHR considered that the cordon's coercive nature, duration and effect on the applicants, in terms of physical discomfort and inability to leave, "*point[ed] towards a deprivation of liberty*".¹⁴⁸ When examining the type and manner in which the measure was implemented, the ECtHR took into account the "*real risk of serious injury and even death*" to the protesters, police and public, which the police had assessed prior to the protest. The ECtHR noted that, therefore, the cordon was "*the least intrusive and most effective means to be applied*" given the exceptional facts of the case.¹⁴⁹ The ECtHR concluded that article 5(1) was not applicable in this case, but emphasised that in cases where the need to prevent serious injury or damage could not be demonstrated, the coercive and restrictive nature of the cordon "*might have been sufficient to bring it within article 5*".¹⁵⁰ Indeed, in a subsequent case where there were no serious risks evident, the ECtHR did find the measures of the police to amount to a deprivation of liberty.¹⁵¹
- 3.65 Parades or protests may result in the confinement of individuals. In determining whether the rights have been violated, the duration, effect and type of measures and manner in which the particular confinement measures are implemented are key factors.¹⁵² In particular, it must be demonstrated that they relate to the risks posed and as such, were necessary and proportionate.

¹⁴³ *Austin and others v. the United Kingdom* (15 March 2012) Application Nos. 39692/09, 40713/09, 41008/09, para 45

¹⁴⁴ *Storck v. Germany* (16 June 2005) Application No. 61603/00, para 89

¹⁴⁵ *Austin and others v. the United Kingdom* (15 March 2012) Application Nos. 39692/09, 40713/09, 41008/09, para 60

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*, para 59

¹⁴⁸ *Ibid*, para 64

¹⁴⁹ *Ibid*, para 66

¹⁵⁰ *Ibid*, para 68

¹⁵¹ *MA v. Cyprus* (23 July 2013) Application No. 41872/10, paras 192, 195

¹⁵² *Austin and others v. the United Kingdom* (15 March 2012) Application Nos. 39692/09, 40713/09, 41008/09, para 57

Right to freedom of movement

ICCPR, article 12:

1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

- 3.66 The right to freedom of movement is contained in Protocol No. 4 of the ECHR, article 2. However, this Protocol has not been ratified by the UK.
- 3.67 Restrictions of the freedom of movement are permitted in accordance with article 12(3) but “*must not nullify the principle of liberty of movement*”.¹⁵³
- 3.68 In the case of *Luis Asdrúbal Jiménez Vaca v. Colombia* an individual argued that the failure of the Government to investigate death threats, harassment and other forms of intimidation by unknown individuals, resulting in the individual being prevented from living and continuing his job in the place of his choosing, amounted to a violation of ICCPR, article 12 since it constituted a form of forced exile.¹⁵⁴ In the circumstances, the UN Human Rights Committee found a violation of ICCPR article 12(1) and (4), alongside violations of the right to security of the person and the right to life.¹⁵⁵
- 3.69 Parades and protests have the ability to impact other individuals’ lives in a manner which might give rise to the state’s positive duties under ICCPR, article 12(1).

Right to private and family life

ICCPR, article 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

ECHR, article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

¹⁵³ UN Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (2 November 1999) CCPR/C/21/Rev.1/Add.9, para 2

¹⁵⁴ UN Human Rights Committee, *Luis Asdrúbal Jiménez Vaca v. Colombia*, CCPR/C/74/D/859/1999, 15 April 2002, para 3.5

¹⁵⁵ *Ibid*, paras 7.3-7.4

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- 3.70 The right to private and family life protects individuals against “arbitrary or unlawful interference” by the state with their privacy, family and home. It also protects the physical and psychological integrity of the person and “*can sometimes embrace aspects of an individual’s physical and social identity*”.¹⁵⁶ It contains positive obligations on states to ensure the human rights of individuals are not affected by the actions of third parties, such as private individuals.¹⁵⁷ The ECtHR has also found it to include:

... not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.¹⁵⁸

- 3.71 In *Moreno Gomez v. Spain*, the applicant complained of the personal impact of the local authorities’ failure to act in ending night-time disturbances. Although laws had been introduced to prevent such disturbances, the ECtHR found these not to be effective, holding that the nature and continuous duration of the interferences, coupled with the state’s failure to discharge its positive duties, amounted to a breach of article 8.¹⁵⁹
- 3.72 ECHR, article 8 therefore protects individuals from a range of actions that negatively impact private and family life. In cases where parades and protests or their negative side-effects impact an individual in a manner which affects their physical or psychological integrity,¹⁶⁰ or the disturbances are of a continuous nature,¹⁶¹ there are positive obligations upon government to intervene.

Right to peaceful enjoyment of one’s possessions

ECHR, article 1 of Protocol No. 1:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- 3.73 With respect to parades and protests the recognition of a positive obligation to protect the right to property is particularly relevant in the context where the exercise of commerce is interrupted. In this

¹⁵⁶ *Pretty v. the United Kingdom* (29 April 2002) Application No. 2346/02, para 61

¹⁵⁷ UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17), 08 April 1988, para 1; *X and Y v. The Netherlands* (26 March 1985) Application No. 8978/80, para 22

¹⁵⁸ *Moreno Gomez v. Spain* (16 November 2004) Application No. 4143/02, para 53

¹⁵⁹ *Ibid.*, paras 60-63

¹⁶⁰ *Ibid.*, para 53

¹⁶¹ *Ibid.*, paras 60-63

regard it is worth noting that the right to private and family life extends to activities of a professional or business nature.¹⁶²

- 3.74 The right to peaceful enjoyment of one's possession protects the individual's tangible property, home and possessions but also contractual rights. Restrictions of this right must strike *"a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"*.¹⁶³
- 3.75 A deprivation of possessions includes formal, but also de facto expropriations.¹⁶⁴ The ECtHR's practice is thereby to *"look behind the appearances and investigate the realities of the situation"*.¹⁶⁵
- 3.76 In *Torgny Gustafsson v Sweden*, an owner of a restaurant was blockaded and boycotted by the Hotel and Restaurant Workers Union (HRF) as he had refused to join the Union. He alleged violations of his freedom not to join a union but also his right to property under article 1 of Protocol 1, as deliveries could not be brought to the restaurant due to the blockade and he was forced to close his business.
- 3.77 Although the majority of judges of the Court found no violation of his right to property, a dissenting opinion pointed out that there was a positive obligation to ensure the action by the private party did not interfere with article 1 of Protocol 1 and that at the minimum, individuals should *"have the opportunity to have an independent and impartial tribunal review the proportionality issue"*.¹⁶⁶
- 3.78 The ECtHR has, in subsequent cases, confirmed positive obligations to represent an aspect of the right to property and the state's duty to ensure the effective exercise of the right. The ECtHR thereby noted that positive obligations under article 1 Protocol 1 *"may require the state to take the measures necessary to protect the right of property"*, including putting in place procedural guarantees.¹⁶⁷

Right of access to health services

ICESCR, article 12(1) and 12(2)(d):

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

¹⁶² *Niemietz v Germany* (1992) 16 EHRR 97 para 29.

¹⁶³ *James v the United Kingdom* (21 February 1986) Application No. 8793/79, para 50.

¹⁶⁴ *Hermannes Gerhardus Jozef LOHUIS and Others v the Netherlands* (30 April 2013), Application No. 37265/10, para 41.

¹⁶⁵ *Ibid*

¹⁶⁶ *Torgny Gustafsson v. Sweden* (25 April 1996) Application No. 15573/89, Dissenting opinion by Judge Martens joined by Judge Matscher, para 14.

¹⁶⁷ *Broniowski v Poland* (22 June 2004) Application No. 31443/96, para 143; *Sovtransavto Holding v Ukraine* (25 July 2002) Application No. 48553/99, para 96; *Torgny Gustafsson v. Sweden* (25 April 1996) Application No. 15573/89, Dissenting opinion by Judge Martens joined by Judge Matscher, para 14.

UNCRPD, article 25(1)(c):

1. States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

c. Provide these health services as close as possible to people's own communities, including in rural areas;

European Social Charter (1961), article 11:

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in cooperation with public or private organisations to take appropriate measures designed inter alia:

1. To remove as far as possible the causes of ill-health.

- 3.79 The right to health requires states, as a core minimum, *"to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups"*.¹⁶⁸ Access to health services forms one of the pillars of the right to health and means that *"health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS."*¹⁶⁹
- 3.80 ICESCR, article 12(2)(d) emphasises the importance of *"provision of equal and timely access"* to health care.¹⁷⁰ The right to health also contains positive obligations upon states to prevent third parties from interfering with individuals' enjoyment of the right to health.¹⁷¹ This requires states to take *"all necessary measures to safeguard persons ... from infringements of the right to health by third parties"*.¹⁷²
- 3.81 Similar obligations flow from the right to health as protected by the UNCRPD.¹⁷³

Rights of the child¹⁷⁴

UNCRC, article 3

In all actions concerning children, ... the best interests of the child shall be a primary consideration.

- 3.82 In the context of parades and protests, special consideration should be given to the manner by which UNCRC rights of the child may be affected.

¹⁶⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health* (2000) E/C.12/2000/4, para 43(a)

¹⁶⁹ *Ibid*, para 12(b)(ii)

¹⁷⁰ *Ibid*, para 17

¹⁷¹ *Ibid*, paras 33, 35

¹⁷² *Ibid*, para 51

¹⁷³ UNCRPD, Article 25(c)

¹⁷⁴ See also UNCRPD, Art. 7

- 3.83 The UNCRC enumerates the specific rights of children, of which article 3 forms a key pillar. In certain instances, the rights enunciated in the UNCRC mirror protections provided by the ICCPR or ECHR. Other rights, however, are more specific and merit separate highlighting.

The right to freedom from violence

UNCRC, article 19:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

- 3.84 In the context of parades and protests, special consideration should be given to the manner by which UNCRC, article 19 rights of the child may be affected. In interpreting UNCRC, article 19, the Committee on the Rights of the Child (CRC Committee) has noted the following assumptions and observations:

No violence against children is justifiable; all violence against children is preventable.¹⁷⁵

The right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention.¹⁷⁶

- 3.85 Violence is understood to include the various forms of harm listed in UNCRC, article 19(1) and is not limited to intentional harm. Rather, violence can also mean “*non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment)*”.¹⁷⁷
- 3.86 The CRC Committee has defined mental violence as including “*scaring, terrorizing and threatening; exploiting and corrupting*”, as well as “[i]nsults, name-calling, humiliation, belittling, ridiculing and hurting a child’s feelings”.¹⁷⁸ Physical violence is defined as “*fatal and non-fatal physical violence*”, which includes bullying.¹⁷⁹

¹⁷⁵ UN Committee on the Rights of the Child, *General Comment 13: The right of the child to freedom from all forms of violence* (2011) CRC/C/GC/13, para 3(a)

¹⁷⁶ *Ibid*, para 3(f)

¹⁷⁷ *Ibid*, para 4

¹⁷⁸ *Ibid*, paras 21(b), (d)

¹⁷⁹ *Ibid*, para 22(b)

- 3.87 Recognising the impact of violent experiences on children, the prevention of all forms of violence is essential in order to guarantee “children’s rights to survival, dignity, well-being, health, development, participation and non-discrimination”.¹⁸⁰ UNCRC, article 19 requires the adoption of broad ranging measures “cutting across all sectors of Government, which must be used and be effective in order to prevent and respond to all forms of violence”.¹⁸¹ Effectiveness is thereby measured by the “enforcement, quality, relevance, accessibility, impact and efficiency” of the procedures.¹⁸² An example of a prevention measure is the “challenging [of] attitudes which perpetuate the tolerance and condoning of violence in all its forms, including race, religion, ethnic or social origin, disability and other power imbalances”.¹⁸³
- 3.88 The Secretary General of the United Nations in a General Study on Violence against Children has recognized that;

The existing standards in international law relevant to violence against children are comprehensive and detailed. The challenge is to ensure that all States implement their obligations. The systemic and widespread nature of violence against children in all its forms and all its settings must be recognised and acknowledged. Thereafter, appropriate and effective legislative, policy and programmatic responses must be put in place, implemented, monitored and consistently modified so as to respond effectively and urgently to this massive global issue.¹⁸⁴

The right to rest, leisure, play, recreational activities, cultural life and the arts

UNCRC, article 31:

state Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

- 3.89 The CRC recognises that there are environmental, physical and human factors which impact upon the enjoyment of these rights; for example violence or community unrest.¹⁸⁵ States are, therefore, required to protect children from potential harm caused by third parties, including other children, that would impede their enjoyment of the right to rest, leisure, play, recreational activities, cultural life and the arts.¹⁸⁶

¹⁸⁰ *Ibid*, paras 11(d), 13

¹⁸¹ *Ibid*, para 39

¹⁸² *Ibid*, para 57

¹⁸³ *Ibid*, para 47(a)(i)

¹⁸⁴ UN Secretary General’s Study ‘Violence against Children’ (UNICEF, 2006), pgs 41 – 42, available at <http://www.unicef.org/violencestudy/reports.html>

¹⁸⁵ UN Committee on the Rights of the Child, *General Comment 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts* (2013) CRC/C/GC/17, paras 34-36

¹⁸⁶ *Ibid*, para 57

Resolution by dialogue

- 4.1 The state is under a duty to promote tolerance, mutual respect and understanding. International human rights law has further recognised the value of dialogue and cultural exchanges through the Framework Convention on National Minorities.

FCNM, article 6(1) requires states to:

Encourage a spirit of tolerance and intercultural dialogue and take effective measure to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

CERD, article 7 provides that state parties will undertake to:

adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups.

- 4.2 In the context of contested parades and protests, adopting a human rights based approach to deliberations necessitates the state facilitating dialogue between rights holders. The purpose of such dialogue is to provide a resolution prior to the state having to engage in an adjudicative process. The ECtHR has recognised the place for non-adjudicative resolution, provided this is complimentary to, and not a substitution for an adjudicative procedure.¹⁸⁷ The rights engaged in a particular dispute will provide the framework for discussions, which will be the same regardless of whether the mechanism is adjudicative or non-adjudicative.
- 4.3 Dialogue can occur informally or through established mechanisms.¹⁸⁸ Where informal dialogue and other non-adjudicative mechanisms have failed to resolve the issue of dispute, or where they have been deemed inappropriate, adjudicative proceedings must be engaged. (see section 5)
- 4.4 The OSCE Guidelines on Peaceful Assembly acknowledge the potential for dialogue to resolve contested parades and protests. They state:

If a proposed assembly, or its time, place, or manner, is disputed and no resolution emerges between the organizer, the designated regulatory authority, law enforcement officials, or other parties whose rights might be affected, then negotiation or mediated dialogue may help reach a mutually agreeable accommodation. Genuine dialogue between relevant parties can often yield a more satisfactory outcome for everyone involved than formal recourse to the law.¹⁸⁹

¹⁸⁷ *Fedje v. Sweden*, (8 May 1990) Application No. 12631/87, paras 31-34

¹⁸⁸ OSCE, 'Handbook on Monitoring: Freedom of Peaceful Assembly' (2011) pg 78

¹⁸⁹ OSCE, 'Guidelines on Freedom of Peaceful Assembly', 2nd edition (2010) para 5.4

- 4.5 The UN Special Rapporteur on Peaceful Assembly has acknowledged that arrangements governing parades and protests may facilitate the potential for dialogue. In a mission report following a visit to the United Kingdom, the Special Rapporteur stated:

Section 6(2) [Public Processions (Northern Ireland) Act 1998] requires notification to the Commission of an intended procession at least 28 days before the event. The Special Rapporteur, who favours short notice, cautions that this is an exceptional measure aimed at allowing all parties concerned time to reach agreement on a contested issue in view of the historical divisions which should be reviewed regularly to ensure that the conditions warranting it still exist.

- 4.6 The ECtHR has similarly recognised that in certain circumstances dialogue among those exercising their right to freedom of assembly and those who are opposed to a parade or protest may result in a resolution which obviates the necessity of restricting human rights.¹⁹⁰
- 4.7 Dialogue is particularly important where individuals or groups have raised concerns regarding a parade or protest.¹⁹¹ The ECtHR has recognised that in circumstances where constructive dialogue and consultation with those impacted upon by the exercise of the right to peaceful assembly has taken place, the imposition of restrictions will be less permissible.¹⁹²
- 4.8 The UN General Assembly, through the adoption of the Global Agenda for Dialogue among Civilizations Resolution, has recognised that dialogue among rights holders enhances mutual understanding and respect and underpins the objective of promotion and protection of human rights and fundamental freedoms and enrichment of common understanding of human rights.¹⁹³ The Resolution requires States to ensure the “*participation by all individuals, peoples and nations in local, national and international decision-making processes*”.¹⁹⁴
- 4.9 The UNESCO Universal Declaration on Cultural Diversity has stressed that in our increasingly diverse societies:
- it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace.**¹⁹⁵
- 4.10 The Advisory Committee on the FCNM notes that article 15, which promotes the right to participation, is:

Intended to facilitate intercultural dialogue by making it possible for national minorities to be visible, have their voice heard and participate effectively in decision making.¹⁹⁶

¹⁹⁰ *Rassemblement Jurassien Unité v. Switzerland*, Application No. 8191/78, 10 October 1979, DR 17, p. 119

¹⁹¹ *Ibid*

¹⁹² *Ibid*

¹⁹³ UN General Assembly, Global Agenda for Dialogue by the General Assembly, A/RES/56/6, 21 November 2001, Article 3

¹⁹⁴ *Ibid*, Article 3

¹⁹⁵ Article 2, UNESCO Universal Declaration on Cultural Diversity

¹⁹⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities, ‘Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs’ (2008) ACFC/31DOC(2008)001, para 22

- 4.11 The Committee also notes that providing increased opportunities for national minorities (these are the minorities who engage the relevant provisions of FCNM) to participate in society allows the simultaneous opportunity for the majority population to *“become better acquainted with the culture, language and history of the national minorities, in a spirit of intercultural dialogue”*.¹⁹⁷
- 4.12 The Office of the UN High Commissioner for Human Rights has noted that the status of ‘minority’ under international law is not to be construed in a narrow sense, explaining that:
- In most instances a minority group will be a numerical minority, but in other a numerical majority may also find itself in a minority-like or non-dominant position ... In some situations, a group which constitutes a majority in a state as a whole may be in a non-dominant position within a particular region of the state in question.¹⁹⁸
- 4.13 Recalling the value of dialogue, the UN Human Rights Council adopted Resolution 6/37 on the Elimination of all forms of intolerance and of discrimination based on religion or belief.¹⁹⁹ The Resolution emphasises:
- that promoting tolerance and acceptance by the public of and its respect for diversity and combating all forms of intolerance and of discrimination based on religion and belief are substantial elements in creating an environment conducive to the full enjoyment by all of the right to freedom of thought, conscience and religion, as enshrined in article 18 of the International Covenant on Civil and Political Rights.²⁰⁰
- 4.14 The Resolution further recognises:
- the importance of a continued and strengthened dialogue among and within religions or beliefs, at all levels and with a broader participation including of women, to promote greater tolerance, respect and mutual understanding.²⁰¹
- 4.15 The Council of Europe’s commitment to intercultural dialogue is also evident under the Faro Declaration which encourages:
- intercultural dialogue on the basis of universal human rights, as a means of promoting awareness, understanding, reconciliation, tolerance and respect for the other, of preventing conflicts and of ensuring an integrated and cohesive society.²⁰²
- 4.16 The Council of Europe White Paper on intercultural dialogue also notes that racism, xenophobia, intolerance and all other forms of discrimination *“refute the very idea of dialogue and represent a standing affront to it”*.²⁰³

¹⁹⁷ *Ibid*

¹⁹⁸ UN Office of the High Commission for Human Rights, ‘Minority Rights: International Standards and Guidance for Implementation’ (2010) pp.2-3

¹⁹⁹ See also Commission on Human Rights Resolution 2003/54: Elimination of all forms of religious intolerance, 24 April 2003

²⁰⁰ UN Human Rights Council, Resolution 6/37: Elimination of all forms of intolerance and of discrimination based on religion or belief, 14 December 2007, para 8

²⁰¹ *Ibid*, para 12

²⁰² Faro Declaration on the council of Europe’s Strategy for Developing Intercultural Dialogue (2005) DGIV/DC-FARO

²⁰³ Council of Europe, White Paper on Intercultural Dialogue: Living together as equals in dignity (2008) p.21

- 4.17 The UN Declaration on a Culture of Peace recognises peace as being:
a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation.²⁰⁴
- 4.18 Creating a culture of peace, therefore, requires:
Adherence to the principles of freedom, justice, democracy, tolerance, solidarity, cooperation, pluralism, cultural diversity, dialogue and understanding at all levels of society and among nations.
- 4.19 The Council of Europe White paper recognises the role of intercultural dialogue in strengthening democratic society, including in post conflict situations.²⁰⁵

²⁰⁴ UN Declaration on a Culture of Peace, preamble

²⁰⁵ Council of Europe, *White Paper on Intercultural Dialogue Living together as equals in dignity* (2008) p.17 (Paper adopted by the Committee of Ministers)

Adjudicative decision making

- 5.1 Any adjudicative process with regard to parades and protests must comply with the applicable international human rights law standards.

The ECHR article 6(1) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

- 5.2 For article 6(1) to apply, there must be a genuine and serious dispute about a civil right or obligation.²⁰⁶ This refers not only to the existence of a right, but also its scope and the manner of its exercise.²⁰⁷ The outcome of any proceedings relating to the dispute must be decisive in their determination.²⁰⁸
- 5.3 The ECtHR has found that where a body, which makes determinations with respect to civil rights and duties, or its procedures are not in full accordance with article 6 (1) this may be compatible with article 6(1) if they are “*subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)*”.²⁰⁹
- 5.4 The role of the ECtHR is to assess the legality of restrictions upon the human rights that are engaged after the fact. In contrast adjudicative bodies will routinely be asked to review proposals for the exercise of the right to peaceful assembly and determine what restrictions are necessary and permissible. Article 6(1) applies both to decision making processes which permit parades and protests and to those which consider their permissibility after they have occurred.
- 5.5 The right to peaceful assembly protects the content, activities, time and place of a parade or protest.²¹⁰ A restriction upon one of these features, will amount to an interference with the right to freedom of assembly.²¹¹ In addition, punishing an organiser or participant after a parade or protest will amount to an interference.²¹²
- 5.6 **In circumstances where a decision making body proposes to restrict a peaceful parade or protest it must consider:**
- a) whether there is a legal basis for the restriction**
 - b) whether the proposed restriction serves a legitimate aim**
 - c) whether the proposed restrictions are necessary in a democratic society**
- 5.7 The Commission notes that many domestic arrangements regarding the exercise of the right to peaceful assembly require prior notification.²¹³ International human rights law recognises that such

²⁰⁶ *Sporrong and Lönnroth v. Sweden* [1984] ECHR 18, para 81

²⁰⁷ *Le Compte, Van Leuven and De Meyere v. Belgium* [1981] ECHR 3, para 49

²⁰⁸ *Ringeisen v. Austria* [1971] ECHR 2, para 94

²⁰⁹ *Albert and Le Compte v. Belgium* [1983] ECHR 21, para 29

²¹⁰ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, paras 79-80

²¹¹ *Ibid*

²¹² *Ezelin v. France* (1992) 14 EHRR 362, para 39

²¹³ OSCE, ‘Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States’ (May 2011 – June 2012) Warsaw 9 November 2012 pg 22; In the Northern Ireland context the Public Procession (NI) Act 1998 requires prior notification.

requirements are permissible and do not represent a restriction on the right to freedom of assembly.²¹⁴ Furthermore the ECtHR has found that:

the subjection of public assemblies to a prior-authorisation procedure does not normally encroach upon the essence of the right [to freedom of peaceful assembly].²¹⁵

- 5.8 The OSCE Guidelines state that such decision making frameworks;
- should fairly and objectively assess all available information to determine whether the organisers and participants in an assembly for which they have received notification are likely to conduct the event in a peaceful manner and to ascertain the probable impact of the event on the rights and freedom of non-participant stakeholders.²¹⁶**
- 5.9 The ECtHR has emphasised that despite the existence of a notification procedure;
- in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on the right to freedom of peaceful assembly.²¹⁷**
- 5.10 In circumstances where an organisation has wilfully ignored an authorisation process despite having sufficient time and opportunity to comply with the process, restrictions may be imposed.²¹⁸
- 5.11 It should be noted that the ECtHR has ruled that a formal registration arrangement, requiring groups to register prior to authorisation of a parade or protest, would amount to a disproportionate interference with the right to freedom of peaceful assembly.²¹⁹

Is there a lawful basis for a proposed restriction?

- 5.12 Where the state proposes to interfere with a parade or protest it must identify a lawful basis for the interference. An interference must be prescribed by law, the law must be adequately accessible and the consequences foreseeable, i.e formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct; and to meet these requirements a law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.²²⁰ Where the legal framework is elaborated upon through executive or administrative statements, this may be sufficient, provided they result in adequately precise guidance to individuals to regulate their conduct.²²¹

²¹⁴ UN Human Rights Committee, *Kivenmaa v Finland* (1994) 412/1990

²¹⁵ *Rassemblement Jurassien and Unite Jurassienne v. Switzerland* (1980) 17 DR 93; *Bukta and Others v. Hungary* (17 October 2007) Application No. 25691/04, para 34

²¹⁶ OSCE, 'Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States' (May 2011 – June 2012) Warsaw 9 November 2012

²¹⁷ *Bukta and Others v. Hungary* (17 October 2007) Application No. 25691/04, para 36

²¹⁸ *Rai and Evans v. the United Kingdom* (17 November 2009) Application Nos. 26258/07 and 26255/07, ECtHR inadmissibility decision, pg 11

²¹⁹ OSCE, 'Guidelines on Freedom of Peaceful Assembly', 2nd edition (2010) para 105

²²⁰ *Gorzeliak and Others v. Poland* [GC], 17 (February 2004) Application No. 44158/98, paras 64-65

²²¹ *Rai, Almond and "Negotiate Now" v. the United Kingdom*, (6 April 1994) Application No. 25522/94, ECommHR decision, para 1

- 5.13 The regulations governing parades and protests should be adequately accessible and the consequences foreseeable to ensure potential participants are clear as to whether or not their participation would be against the law.²²²

Does the proposed interference serve a legitimate aim?

- 5.14 The exercise of the right to freedom of peaceful assembly may be restricted in the pursuit of one of four legitimate aims, namely; the interests of national security or public safety; the prevention of disorder or crime; the protection of the rights and freedoms or other and; the protection of health or morals.
- 5.15 Discourse around measures to prevent public disorder and to protect the rights of others are often on similar terms.²²³ Here we focus on these two justifications. The ECtHR has recognised that the exercise of the right to peaceful assembly is likely to result in some degree of disorder and disruption to others. The ECtHR has stated:

It goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility.²²⁴

- 5.16 In its jurisprudence, the ECtHR has afforded states a wide discretion when identifying whether a potential for public disorder exists.²²⁵ Decision makers are required to make an assessment on the basis of available evidence of the circumstances of the specific parade or protest.²²⁶ They may also take into consideration the potential for the parade or protest to result in public disorder in other areas throughout the jurisdiction.²²⁷
- 5.17 Decision makers may take into consideration the potential impact on stability within a jurisdiction and upon social harmony generally.²²⁸ The ECtHR has noted the importance of pluralism, tolerance and broadmindedness as hallmarks of a 'democratic society'. It has stated:

In exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functioning of democracy, and the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.²²⁹

- 5.18 The jurisprudence of the ECtHR has made clear that the protections for the rights to freedom of expression and assembly extend to actions which may be perceived as offensive.²³⁰ However, limitations on these freedoms may be legitimate to ensure stability within the jurisdiction. In *Refah Partisi v. Turkey*, the ECtHR stated:

²²² *Ziliberberg v. Moldova* (4 May 2004) Application No. 61821/00, ECtHR inadmissibility decision

²²³ See *S v. Austria* (3 December 1990) Application No. 13812/88, ECommHR inadmissibility decision: The ECommHR decided that restrictions to avoid traffic disruption were justified on the basis of both protection of the rights of others and prevention of public disorder.

²²⁴ *Oya Ataman v. Turkey* (5 December 2006) Application No. 74552/01, para 38

²²⁵ *Gypsy Council v. the United Kingdom* (14 May 2002) Application No. 66336/01, ECtHR inadmissibility decision

²²⁶ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 93

²²⁷ *Christians against Racism and Fascism v. the United Kingdom* (16 July 1980) Application No. 8440/78, DR 21, pg 150

²²⁸ *Vona v. Hungary* [2013] ECHR 653, para 63

²²⁹ *Barenkevich v. Russia* (2008) 47 EHRR 266, para 30

²³⁰ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 86; *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, Series A no. 139, para 32

[p]luralism and democracy are based on compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole.²³¹

- 5.19 In the case of *Vona v. Hungary*, the ECtHR noted that demonstrations of power by an association established to address crime emanating from members of the Roma community created an:

anti Roma atmosphere... which amounted to an abuse of the relevant law on associations, ran counter to the human dignity and prejudiced the rights of others, that is, those Roma citizens.²³²

- 5.20 The demonstrations in question were of a threatening nature and indicated the ability and willingness of the organisers to establish a paramilitary force, the ECtHR ruled:

if the right to freedom of assembly is repeatedly exercised by way of intimidating marches involving large groups, the state is entitled to take measures restricting the related freedom of association in so far as it is necessary to avert the danger which such large-scale intimidation represents for the functioning of democracy Large-scale, co-ordinated intimidation – which is related to the advocacy of racially motivated policies, incompatible with the fundamental values of democracy – may justify state interference with freedom of association.²³³

- 5.21 In the circumstances of the case the ECtHR recognised that disbanding the organisation was a drastic measure but that “the threat to the rights of others represented by the rallies of the Movement could be effectively eliminated only by removing the organisational backup”.²³⁴

- 5.22 We see here the close correlation between the legitimate aims of preventing disorder and protecting the rights of others. The ECtHR has recognised that an exercise of the right to peaceful protest is likely to result in a certain level of disruption and inconvenience to others.²³⁵ However the level of disruption must be reasonable. In *Gypsy Council v. the United Kingdom*, the ECtHR accepted that the prevention of significant traffic disruption and the avoidance of excessive noise and disorder emanating from a festival may form part of the legitimate aim of protecting the rights of others.²³⁶

- 5.23 The ECtHR has stated that exercises of the right to freedom of assembly should not be restricted solely on the basis that they are capable of creating a feeling of uneasiness in groups of citizens or because some may perceive them as disrespectful.²³⁷

²³¹ *Refah Partisi and Others v. Turkey* [2003] ECHR 87, para 99 see further *Informationsverein Lentia and Others v. Austria* (24 November 1993) Series A No. 276, pg 16, para 38)

²³² *Vona v. Hungary* [2013] ECHR 653, para 61

²³³ *Vona v. Hungary* [2013] ECHR 653, para 69

²³⁴ *Ibid*, para 70

²³⁵ *Oya Atama v. Turkey* (Application no. 74552/01) 5 December 2006, para 38

²³⁶ *Gypsy Council v. the United Kingdom*, (14 May 1996) Application No. 66336/01 ECtHR inadmissibility decision

²³⁷ *Vajnai v. Hungary* [2008] ECHR 33629/06, para 57

5.24 With respect to the circumstances in the *Vona* case the ECtHR stated:

such a rally was capable of conveying the message to those present that its organisers had the intention and the ability to have recourse to a paramilitary organisation to achieve their aims, whatever they may be... the reliance of an association on paramilitary demonstrations which express racial division and implicitly call for race-based action must have an intimidating effect on members of a racial minority, especially when they are in their homes as a captive audience.²³⁸

5.25 The decision makers may take into account the particular vulnerabilities of any groups who consider that their rights are adversely affected by the exercise of the right to freedom of assembly.²³⁹ In such circumstances the international human rights provisions regarding the protection of minorities are particularly pertinent.

What restrictions are necessary in a democratic society?

5.26 Where a pressing social need is identified, the next question which a state or decision maker must ask themselves is what restrictions are necessary in a democratic society to meet the identified need.

5.27 The ECtHR has stated that a prohibition is “the most radical measure”²⁴⁰ and that “*the unconditional prohibition of a counter demonstration is a very far-reaching measure which would require particular justification*”.²⁴¹ The most likely response will be the imposition of a legitimate restriction.

5.28 The test of ‘necessity in a democratic society’ requires the ECtHR to determine whether the interference corresponds to a “*pressing social need*” and whether it was “*proportionate to the legitimate aim pursued*”, in light of its scale and extent.²⁴²

5.29 In assessing if a restriction is necessary it is important that the evidence upon which the assessment is made is solidly grounded in facts and that a decision maker is objective in his/her approach.²⁴³ Decisions with respect to exercises of the right to freedom of association should be based on the specific circumstances of each case.²⁴⁴

5.30 Where a parade or protest is likely to encounter hostility the state has a positive obligation to take reasonable measures to ensure that a group are able to exercise the right to freedom of association.²⁴⁵ This is not a duty to ensure that a parade or protest actually takes place. Where the resources required or the likely public disturbance which would arise from an exercise of the right to freedom of assembly are too great restrictions may be imposed.²⁴⁶

5.31 There may be a risk that individuals, who are not associated with the organisers, could join the parade or protest and create disorder. The existence of such a risk does not justify the imposition of

²³⁸ *Vona v. Hungary* [2013] ECHR 653, paras 65 - 66

²³⁹ *Aksu v. Turkey* [GC] (15 March 2012) Application Nos. 4149/04 and 41029/04, para 75

²⁴⁰ *Barankevich v. Russia* (2008) 47 EHRR 266, para 33

²⁴¹ *Ollinger v. Austria* (2008) 48 EHRR 38, para 44

²⁴² *Wingrove v. the United Kingdom* [1996] ECHR 60, para 53; *Aydin and Ors. v. Turkey* (27 May 2013) Application Nos. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, paras 48-49; *Lehideux and Isorni v. France* (1998) 30 EHRR 665, para 51; *Mouvement Railien Suisse v Switzerland* [2012] ECHR 1598, para 48; *Vejdeland v. Sweden* [2012] ECHR 242, para 51

²⁴³ *Cisse v. France* (9 April 2002) Application No. 51346/99, paras 48 -50; *Hyde Park and Others v. Moldova (No. 1)* (7 April 2009) Application No. 18491/07, para 26

²⁴⁴ OSCE, ‘Guidelines on Freedom of Peaceful Assembly’, 2nd edition (2010) para 43

²⁴⁵ *Plattform “Artze fur das Leben”* (1991) 13 EHRR 204, para 34

²⁴⁶ *Ibid*

disproportionate restrictions on the rights of individuals with peaceful intentions.²⁴⁷ The ECtHR has held that:

The freedom to take part in a peaceful assembly ... is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act.²⁴⁸

- 5.32 It should be noted that where a parade or protest is ongoing and a determination is made that the parade or protest should cease, it is important that the actions of the authorities in bringing the parade or protest to an end are proportionate to the aim sought.²⁴⁹ Where practicable, a warning should be given to the participants prior to the commencement of any measures to bring the parade or protest to an end and state actors should act in an appropriate manner.²⁵⁰
- 5.33 Sanctions imposed upon those who have committed offences during a parade or protest should be proportionate.²⁵¹ Where wide spread disorder does emerge the state authorities may seek to bring action against the organisers of the parade or protest. The OSCE has emphasised that in such circumstances:
the organisers of and participants in assemblies should benefit from a "reasonable excuse" defence... Organisers of assemblies should not be held liable for the failure to perform their responsibilities if they made reasonable efforts to do so.²⁵²
- 5.34 However organisers should not be devoid of any responsibility and the ECtHR has emphasised that:
associations and others organising demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force.²⁵³
- 5.35 Organisers must make all reasonable efforts to ensure compliance and act responsibly.²⁵⁴
- 5.36 International human rights law in particular emphasises the responsibility of those exercising the right to parade or protest where concerns are raised regarding potential adverse implications on the rights of others.²⁵⁵
- 5.37 The willingness of organisers of parades or protests to engage in the sorts of mechanisms discussed in section four may be a relevant consideration. Where an individual or group of individuals have raised concerns regarding the impact of a parade or protest and the organisers have engaged in constructive dialogue with them, in an attempt to reach a resolution, this may influence the considerations of a decision maker.²⁵⁶ A broad range of restrictions may be imposed upon a parade or protest; in general restrictions relate to either the time, place or manner of a parade or protest.²⁵⁷ When determining

²⁴⁷ *Ezelin v. France* (1991) 14 EHRR 362, para 51 – 53

²⁴⁸ *Ibid*

²⁴⁹ *Cisse v. France* (9 April 2002) Application No. 51346/99, para 52

²⁵⁰ *Rai and Evans v. the United Kingdom* (17 November 2009) Application Nos. 26258/07 and 26255/07, ECtHR inadmissibility decision, pg 12

²⁵¹ OSCE, 'Guidelines on Freedom of Peaceful Assembly', 2nd edition (2010), para 88

²⁵² *Ibid*, para 110

²⁵³ *Rai and Evans v. the United Kingdom* (17 November 2009) Application Nos. 26258/07 and 26255/07, ECtHR inadmissibility decision, pg 11

²⁵⁴ OSCE, 'Guidelines on Freedom of Peaceful Assembly', 2nd edition (2010), para 112

²⁵⁵ *Vona v. Hungary* [2013] ECHR 653, para 63

²⁵⁶ *Rassemblement Jurassien et Unite Jurassienne v. Switzerland* Application No. 8191/78 (1980) 17 DR 93, paras 16, 11

²⁵⁷ OSCE, 'Guidelines on Freedom of Peaceful Assembly' (2010)

what restrictions are necessary decision makers should have regard to the purpose of an event and to the other rights which may be engaged. In general the proportionality of any restriction should be determined on the basis of the specific parade or protest under consideration and blanket approaches should be avoided.²⁵⁸

- 5.38 To the extent that a parade or protest is intended to express an opinion or message, engaging the right to freedom of expression, it is important that restrictions do not impact disproportionately on the ability of rights holders to communicate to the intended audience.²⁵⁹ This is a particular relevant consideration with respect to counter demonstrations.²⁶⁰
- 5.39 Where the purpose of a parade or protest is to commemorate an event occurring in a specific location, engaging the right to culture, the development of restrictions which continue to permit access to the relevant location will be important.²⁶¹
- 5.40 OSCE Guidelines emphasise the potential for organisers to take on the responsibility of addressing concerns regarding the potential adverse implications of a parade or protest. The OSCE Guidelines state that “*under some circumstances, it may be legitimate to impose on organizers a condition that they arrange a certain level of stewarding for their gathering*”.²⁶² The acceptance of greater responsibility by organisers may address concerns regarding disorder or potential implications for the rights of others and may obviate the necessity of restrictions.
- 5.41 International human rights law discourse increasingly emphasises the responsibility of rights holders and the importance of both rights holders and governments seeking a balance between competing interests.²⁶³ States are granted a wide discretion to take into account their particular circumstances and devise arrangements to suit their particular contexts. The ECtHR has recognised that historical and political factors may be relevant factors when the state is making decisions regarding the protection or limitation of rights.²⁶⁴

²⁵⁸ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 97

²⁵⁹ *Ollinger v Austria* (2008) 48 EHRR 38

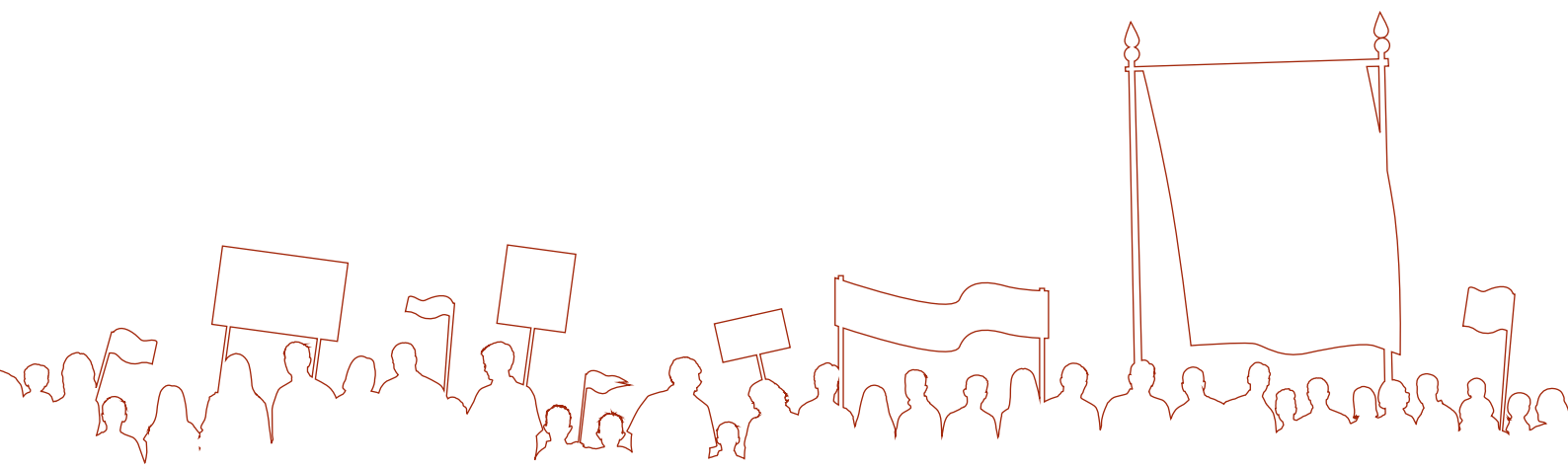
²⁶⁰ *Ibid*

²⁶¹ *Stankov and Ljinden v. Bulgaria* (2 October 2001) Application No. 29225/95, para 109

²⁶² OSCE, ‘Guidelines on Freedom of Peaceful Assembly’ (2010), para 195

²⁶³ *Vona v. Hungary* [2013] ECHR 653, para 63

²⁶⁴ *Ždanoka v. Latvia* [GC], Application No. 58278/00, ECHR 2006IV, para 33; *Sedjic and Finci v. Bosnia and Herzegovina* [GC] (22 December 2009) Application Nos. 27996/06 and 34836/06, paras 38-56; *Lautsi and Others v. Italy* [2011] ECHR 2412, para 68, *Aydin and Ors. v. Turkey* (27 May 2013) Application Nos. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, para 51



Contact us

If you would like to know more about the work of the Commission, or any of the services we provide, please contact us.

Northern Ireland Human Rights Commission
Temple Court
39 North Street
Belfast
Northern Ireland
BT1 1NA

Telephone: +44 (0) 28 9024 3987

Fax: +44 (0) 28 9024 7844

Email: info@nihrc.org

www.nihrc.org

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