

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

DEFENDING DISSENT:

TOWARDS STATE PRACTICES
THAT PROTECT AND PROMOTE
THE RIGHTS TO PROTEST

EXECUTIVE SUMMARY



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

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

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

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

SECTION 2: PREVENTIVE MEASURES AND INSTITUTIONAL DESIGN

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

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

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

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

NON-DISCRIMINATION AND EQUALITY (2B):

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

NOTIFICATION SYSTEMS (2C):

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

POLICE TRAINING (2D): Training should prepare officers to exercise good judgment



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

and to engage in balanced decision-making aimed at protecting and promoting the rights to protest. In many states, training tends to emphasise the proper use of crowd-control equipment and preparation for the worst-case scenario. While these are both important, training limited to these elements primes officers to react to and expect violence. Such training must be balanced with training that prioritises communication, dialogue, de-escalation, and graduated use of force. Special emphasis should be placed on training operational-level commanders

on human rights standards. Policing institutions must implement training and instruction in a manner that develops skills early in an officer's career. To reinforce this training, performance evaluations should be based on skills taught during training and reflect human rights principles.

SECTION 3: TACTICS AND THE USE OF FORCE

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

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

CANADA: Canada has instituted some protest engagement procedures that promote non-escalation tactics as well as the safety of police and protesters. During the 2010 Winter Olympic Games, the Vancouver Police Department kept officers out of crowd-control equipment and gave clear instructions not to engage with force, even if provoked by a small number of individuals. At one of the first events during the Olympics, when some individuals behaved provocatively, throwing rocks and sticks and spitting at officers who were in regular uniforms, officers obeyed the command not to respond. Police did not use force, and no protesters were arrested or injured. The police were seen to be reasonable, restrained, and after that night, in the words of Deputy Chief LePard, "the crowds were totally with us." Interview with Doug LePard, Chief Officer, Metro Vancouver Transit Police (February 26, 2018).

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

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

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

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

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

DATA TRACKING AND REPORTING (3D):

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

SURVEILLANCE AND NON-STATE ACTORS (3E):

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

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



UNITED STATES: In the United States, law enforcement are now drawing information from social media and creating searchable databases for police to determine where activists are meeting and how they are communicating. Another increasingly used technology to surveil protesters and activists are IMSI-catchers, also known

as “Stingrays” or “cell site simulators”, invasive cell phone surveillance devices that mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information. An IMSI-catcher can capture call activity from thousands of uninvolved bystanders while searching for an individual or group. This kind of indiscriminate collection and, potentially, retention of personal information treats everyone in a protest, or in the vicinity of one, as a suspect and is, by definition, not justified by any individualised determination. Such broad surveillance can also be used for purposes unrelated to public speech, making participation in speech a greater risk to the individual.

SECTION 4: ACCOUNTABILITY AND OVERSIGHT

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

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

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

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



INTERNAL INVESTIGATIONS AND POLICIES

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

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

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

CONCLUSION

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

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

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

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

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

ABOUT INCLO

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

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

ABOUT THE IHRC

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

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