



DOMESTIC ADHERENCE TO CONTINENTAL AND INTERNATIONAL NORMS IN THE PRACTICE OF POLICING ASSEMBLIES IN AFRICA

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THE DANISH
INSTITUTE FOR
HUMAN RIGHTS

Domestic Adherence to Continental and International Norms in the Practice of Policing Assemblies in Africa

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Project funded by the European Union

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The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research; providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

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Foreword

The right to gather in public and demonstrate peacefully is a cornerstone of democracy. It is a key aspect of the freedoms of expression and of assembly.

On several occasions, the African Commission on Human and Peoples' Rights (ACHPR) has confirmed the important role of the police in ensuring the peaceful conduct of public assemblies, with the most recent such confirmation being its Resolution on the Need to Develop Guidelines on Policing and Assemblies in Africa (ACHPR/Res. 363(LIX) 2016).

Even though an important role of the police with respect to public assemblies is to protect the right to gather peacefully, Africa has seen many instances of the police violating the rights of persons assembling peacefully by way of, for example, excessive use of force, arbitrary and mass arrests, torture and other ill-treatment, and sexual violence against mainly women protesters, instances of violations that have been encapsulated in the Resolution on the Right to Peaceful Demonstrations (ACHPR/Res. 281(LV) 2014).

The African Policing Civilian Oversight Forum (APCOF) and the Danish Institute for Human Rights (DIHR) are providing the ACHPR with technical support with a view to developing guidelines and other tools for facilitating a rights-based approach to policing assemblies. As emphasised in the ACHPR's Resolution 363, human rights defenders are particularly vulnerable to abuse in connection with public assemblies. Resolution 363 also highlights freedom of expression and the importance of communication and the right of access to information relating to assemblies.

Funding from the European Union was obtained and the project commenced in early 2016 in the form of a partnership comprising the ACHPR, the APCOF and the DIHR. A highly inclusive process was envisaged, and, ultimately, also realised, in order to ensure maximum buy-in from all stakeholders in developing the proposed guidelines. This study thus forms part of that methodology by providing information on how assemblies are policed in a representative group of African states, and the extent to which this is done in a way that conforms to international and continental norms on the policing of assemblies.

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November 2016

Executive summary

The increasing number of public assemblies in Africa in recent years has resulted in growing concern being expressed by the African Commission on Human and Peoples' Rights (the African Commission) as regards the violation of human rights. In 2014, at its 55th Ordinary Session held from 28 April to 12 May in Banjul, the Gambia, the African Commission adopted Resolution 281 on the Right to Peaceful Demonstrations, urging states parties to the African Charter on Human and Peoples' Rights ('the African Charter') to refrain from engaging in arbitrary arrests and detentions of peaceful demonstrators, as well as from using disproportionate force against such demonstrators. More recently, in April and May 2016, the African Commission issued public statements on the manner in which the police had responded to demonstrations in The Gambia and Kenya. In both cases, the African Commission urged the respective governments to investigate reports of excessive use of force by the police during demonstrations relating to electoral reforms.¹

The present study examines African domestic adherence to regional and international norms and standards on freedom of assembly in Africa in order to establish a baseline concerning the extent to which national law and practice meet these norms and standards.

Despite the fact that the constitutions of many African countries recognise the right to freedom of assembly,² the practical exercise of the right is often rendered difficult, and sometimes even impossible, by obstructive legislation and practices. The 'war on terrorism' has sped up the enactment of anti-terrorism laws that restrict the exercise of freedoms of assembly, expression and association. In this regard, the continent is witnessing a growing number of new 'copycat' laws aimed at restricting the ability of individuals to freely assemble. The African Commission has identified 'numerous examples of legal restrictions on freedom of association and assembly that appear to be "borrowed" from one country by another'.³

The study concludes that, although a number of African states have taken measures to protect the right to freedom of assembly, including by enshrining the right in their respective national constitutions, many legal and practical challenges still persist. These include:

- Legal frameworks that restrict the right to freedom of assembly; and
- Practices that exacerbate the risks associated with poor management of assemblies,

¹ See 'Press statement of the African Commission on Human and Peoples' Rights on the events of 14 and 16 April 2016, in the Islamic Republic of the Gambia' available at www.achpr.org/press/2016/04/d298 (accessed on 4 June 2016); 'Joint press-release on the need to carry out prompt and effective investigations into the violence that occurred during demonstrations in Kenya' available at www.achpr.org/press/2016/05/d301/ (accessed on 4 June 2016).

² Countries which recognise the right to freedom of assembly in their constitutions include Burkina Faso, Cameroon, Chad, Egypt, Ethiopia, Ghana, Kenya, Mozambique, South Africa, Tunisia and Zimbabwe.

³ African Commission on Human and Peoples' Rights (2014) 12.

including: the absence of mechanisms to foster communication among all the relevant stakeholders involved during public assemblies; poor planning, lack of coordination and ambiguous lines of command and control; excessive use of force, including lethal force, in the dispersal of public assemblies; and inadequate mechanisms of oversight and accountability.

Methodology

This present study is a desk review of relevant domestic laws and policies as well as internal police-service documents, such as standard operating procedures. Secondary material consulted comprised academic literature, reports by human rights organisations, and credible news articles. The report also draws on research by the African Commission,⁴ the United Nations (UN) Special Rapporteurs,⁵ and other organisations working in the sphere of freedom of assembly.⁶ The study builds on the 2014 Report of the African Commission's Study Group on Freedom of Association and Assembly in Africa.⁷ Concluding observations adopted by the African Commission after consideration of the reports of states parties were also consulted.

The study uses international and continental human rights law as the benchmark for examining the extent to which domestic laws and practices on policing and assemblies are human rights-compliant.

The study focuses on six selected African countries: Burkina Faso, Cameroon, Egypt, Kenya, Nigeria and South Africa. These countries were selected in order to represent all five geopolitical regions of the continent and on the basis of different legal traditions and experiences relating to policing of assemblies in recent history. Seen together, these countries provide a rich portrait of the laws and practices relating to the policing of assemblies in Africa.

For consistency, the structure of the country evaluations coincides with the chronology of actions taken before, during and after the holding of public assemblies. To the extent possible, emphasis has been specifically put on the following: planning for public assemblies (notice period and restrictions, and communication and negotiation); management of public assemblies (training and equipment, deployment, and command and control); dispersal of public assemblies (use of force, arrests and detentions, and medical response); and accountability.⁸

Specific attention is paid to the experiences of women, journalists, human rights defenders, lesbian, gay, bisexual and transgender (LGBT) people, and other vulnerable or targeted groups in exercising the right to assembly.

⁴ For example: African Commission on Human and Peoples' Rights (2015); African Commission on Human and Peoples' Rights (2014).

⁵ There was specific reliance on the individual and joint reports of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

⁶ The objectives and format of this study are in many respects similar to the twin studies conducted by the Euro-Mediterranean Human Rights Network on the right to freedom of assembly in the Euro-Mediterranean region. See Euro-Mediterranean Human Rights Network (2013); Euro-Mediterranean Human Rights Network (2014).

⁷ African Commission on Human and Peoples' Rights (2014).

⁸ Due to lack of information, some country evaluations do not include all the listed elements.

There has been significant progress made by human rights defenders in gaining recognition for their important work. However, the African Commission is well aware, thanks to its investigative methods and information it receives – including from victims of human rights violations – that the situation of women human rights defenders can be particularly precarious because of stereotypes. Women human rights defenders are generally targeted because of their gender and because of their human rights activities. In addition to the types of violations and abuses they may suffer in line with those experienced by their male colleagues, women human rights defenders are also subjected to specific attacks due to their gender, including gender-based violence.

[Report of the Study on the Situation of Women Human Rights Defenders in Africa (2015) 15–16]

The right to freedom of assembly

Normative content and rights-based policing

The definition of the term ‘assembly’ as used in this study is borrowed from the first thematic report of the UN Special Rapporteur on the Rights to Freedom of Assembly and of Association. In this regard, an assembly is defined as ‘an intentional and temporary gathering in a private or public space for a specific purpose’.⁹ As observed by the Special Rapporteur, an assembly may take various forms, including demonstrations, meetings, processions, rallies or sit-ins.¹⁰ In terms of the ordinary meaning of the word, an assembly denotes the physical or face-to-face gathering of people.

The right to freedom of assembly is widely considered one of the cornerstones of a democratic society. The right allows for celebration of achievements and commemoration of past or historical events. It also allows individuals and groups to publicly express grievances, to petition authorities, to demand change, and to hold governments to account.¹¹ In this context, public protests are viewed as ‘natural channels’ for conveying complaints.¹² In certain contexts, such as in societies experiencing economic hardship or political repression, protests are deemed to be unavoidable.¹³

The right to freedom of assembly has inherent linkages with other human rights, but mainly with the freedoms of expression and of association. In the case of *International Pen and Others (on behalf of Saro-Wiwa) vs Nigeria*,¹⁴ the African Commission observed that the three freedoms of assembly, expression and association share a ‘close relationship’. The right to freedom of assembly allows individuals to invoke a wide range of other issues. The UN Special Rapporteur on the Right to Food has, for instance, observed that, ‘if the right to food is to be realized, the rights which allow people to invoke it, such as freedom of expression and of peaceful assembly and the right of access to an independent and impartial justice system, must also be guaranteed’.¹⁵

Protection in international human rights law

States have a duty to respect, protect and fulfil the right to freedom of assembly. This duty is enshrined in a number of regional and international human rights treaties. Article 11 of the African Charter guarantees the right to freedom of assembly, although it subjects the exercise of the right

⁹ A/HRC/20/27, 12 May 2012, para 24.

¹⁰ *Ibid.*

¹¹ Through public protests, citizens in Burkina Faso, Egypt and Tunisia brought to an end decades of authoritarian rule. In Burundi and the Democratic Republic of the Congo, citizens recently resorted to public protests to challenge the extension of presidential-term limits, albeit without success. In Kenya, a public protest by children stopped the grabbing by a private developer of a school playground. In South Africa, the ‘Fees Must Fall’ protests in forced the government to backtrack on a proposal to increase university fees.

¹² Geneva Academy of International Humanitarian and Human Rights (2014) 3.

¹³ *Ibid.*

¹⁴ (2000) AHRLR 212 (ACHPR 1998), para 110.

¹⁵ A/HRC/22/50/Add. 2, para 23.

to 'necessary restrictions provided for by law'. The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides in Article 8 for 'freedom of peaceful assembly' together with the 'right to free association'. The African Youth Charter similarly provides for the right.¹⁶ Notably, the right is not enshrined in the Protocol to the African Charter on the Rights of Women in Africa.

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law[,] in particular those enacted in the interest of national security, [and of] the safety, health, ethics and rights and freedoms of others.

[African Charter, Article 11]

The African Commission has considered at least two communications relevant to understanding the content of the right to freedom of assembly.¹⁷ The Commission has also adopted several resolutions and other forms of interpretative guidelines touching on freedom of assembly and/or aspects related to the enjoyment of the right in practice. These include:

- Resolution 281 on the Right to Peaceful Demonstrations;
- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa;
- Resolutions 69, 119 and 196 on the Situation and Protection of Human Rights Defenders in Africa;
- Resolution 230 on the Need for a Study on the Situation of Women Human Rights Defenders in Africa;
- Resolution 61 on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); and
- General Comment No. 3 on the Right to Life.

The right to freedom of assembly is also recognised in numerous international human rights treaties adopted at the global level. In particular, the right is enshrined in the following treaties: the International Covenant on Civil and Political Rights,¹⁸ the Convention on the Rights of the Child,¹⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination.²⁰

In addition to the global treaties listed above, the right to freedom of assembly is enshrined in a number of soft-law instruments, including the Universal Declaration of Human Rights,²¹ the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,²² and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.²³ UN human rights mechanisms have also adopted various normative documents elaborating on different aspects of the right to freedom of assembly and on the policing of assemblies.²⁴

Normative content and rights-based policing

Freedom of assembly is about the ability to freely plan, organise, promote, advertise and hold an assembly, as well as to participate in such assembly. It is a right that accrues to everyone, and, as such, no individual should be prohibited from exercising the right on the basis of race, ethnicity, colour, sex, language, religion, or any other prohibited ground of discrimination.²⁵ Indeed, the

¹⁶ Article 5.

¹⁷ (2000) AHRLR 212 (ACHPR 1998); (2011) AHRLR 90 (ACHPR 2011).

¹⁸ Article 21.

¹⁹ Article 15(1).

²⁰ Article 5(d)(ix).

²¹ Article 20(1).

²² Article 5(a).

²³ Article 2(5).

²⁴ Examples include: Human Rights Council Resolution 22/10 on The Promotion and Protection of Human Rights in the Context of Peaceful Protests, 21 March 2013; Basic Principles on the Use of Force and Firearms by Law Enforcement, UN Doc. A/CONF.144/28/Rev.1 (1990).

²⁵ See African Charter, Article 1.

right is all the more relevant for groups most at risk of discrimination or those that have historically suffered discrimination. These groups include women, persons with disabilities, indigenous peoples, and persons belonging to minority groups. It is also a right that accrues to associations (including unregistered associations), legal entities and corporate bodies.²⁶

International human rights law protects peaceful assemblies only. This means that assemblies risk losing some of the protection of international human rights law should they turn violent. Other rights, such as that of freedom from arbitrary arrest, remain in force and sporadic violence should not be used as a justification to suspend the rights of an assembly per se. Citing with approval the Organization for Security and Co-operation in Europe's (OSCE) Guidelines on Freedom of Peaceful Assembly ('the OSCE Guidelines'),²⁷ the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly recommended that there should be a general presumption in favour of peaceful assemblies.²⁸ A broad interpretation of the term 'peaceful' should be adopted.²⁹ In this respect, the OSCE Guidelines provide that the term 'peaceful' includes conduct that may be deemed annoying or that which may temporarily hinder, impede or obstruct the activities of third parties.³⁰

Obligation to respect: Restrictions and use of force

States should not impose restrictions on the enjoyment of the right to freedom of assembly that are impermissible in international human rights law. Permissible restrictions are those that are necessary in a democratic society, lawful, and proportionate to the aims pursued.³¹ As the African Commission has observed in a number of cases,³² restrictions or limitations that erode the very essence of the right are impermissible. The UN Human Rights Committee has held that the overall objective of imposing restrictions should be to facilitate the exercise of a right rather than to disproportionately or unnecessarily limit it.³³ In other words, states should operate from the premise that the enjoyment of a right is the rule and its restriction the exception.

Common restrictions imposed on the enjoyment of the right to freedom of assembly include those relating to the time and place of a protest, as well as the manner in which it may be held. Another common restriction is the requirement to notify authorities prior to holding a public protest. This requirement should not be used as an excuse to prevent the enjoyment of the right, nor should its practical application amount to a requirement for permission. The purpose of prior notification should be to afford authorities the opportunity to facilitate the exercise of the right as well as to take measures to protect public safety and the rights of others.³⁴ A notification procedure should be subject to a proportionality assessment, free of charge, and widely accessible.³⁵ It should not be overly bureaucratic.³⁶ The notice period should not be unreasonably long.³⁷

The right to assemble and to demonstrate is integral to democracy and human rights. Even if acts of violence occur during such events[,] participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality. Firearms may never be used simply to disperse an assembly.

Freedom of peaceful assembly is a right and not a privilege and as such its exercise should not be subject to prior authorization by the authorities. State authorities may put in place a system of prior notification, where the objective is to allow State authorities an opportunity to facilitate the exercise of

²⁶ OSCE Office for Democratic Institutions and Human Rights (2010), para 2.5.

²⁷ *Ibid.*, 33.

²⁸ A/HRC/20/27, 12 May 2012, para 26.

²⁹ Manfred Nowak (2005) 487.

³⁰ OSCE Office for Democratic Institutions and Human Rights (2010), 33.

³¹ A/HRC/31/66, 4 February 2016, para 29.

³² (2000) AHRLR 262 (ACHPR 2000), para 70; (2000) AHRLR 200 (ACHPR 1998), para 65.

³³ Human Rights Committee, Comm. No. 1948/2010, UN doc. CCPR/C/108/D/1948/2010, 10 September 2013, para 7.4.

³⁴ A/HRC/31/66, 4 February 2016, para 21.

³⁵ *Ibid.*, para 22.

³⁶ *Ibid.*

³⁷ *Ibid.*

the right, to take measures to protect public safety and/or public order and to protect the rights and freedoms of others. Any notification procedure should not function as a de facto request for authorization or as a basis for content-based regulation. Notification should not be expected for assemblies that do not require prior preparation by State authorities, such as those where only a small number of participants is expected, or where the impact on the public is expected to be minimal.

[*Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, A/HRC/31/66, 4 February 2016, para 21]

The core recognition behind the need for notifications regimes is that the right to assembly is a right adhering in the people. As such, notification is positive, but should not be required in all circumstances. In the case of small public gatherings or gatherings leading to no disruption to others, no notification should be necessary In addition, it is not possible to submit notification in the case of spontaneous assemblies, in reaction for instance to particular political decisions, and states should clearly carve out an exception to the notification requirement that applies in such cases. The authorities must still protect and facilitate such demonstrations when they occur.

[*Report of the African Commission on Human and Peoples' Rights Study Group on Freedom of Association and Assembly in Africa* (2015) 61]

States should also refrain from the use of force in the management or policing of assemblies. Use of force may include mass arrests and detentions and the use of both non-lethal and lethal force. The use of force should be restricted to exceptional instances and be strictly carried out in accordance with international human rights law. In particular, the use of force should satisfy the principles of necessity and proportionality. As discussed earlier, the African Commission, in Resolution 281, urged states to refrain from arbitrarily arresting and detaining demonstrators as well as from the disproportionate use of force against demonstrators. In this context, it has been observed that arbitrary arrest and detention of protestors has 'particular import for the criminalisation of assemblies and dissent'.³⁸ In instances where protestors are nevertheless arrested and detained, this should be done in compliance with the African Commission's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention (the Luanda Guidelines) and other relevant regional or international norms and standards.

On the question of the use of force, paragraph 28 of the African Commission's General Comment No. 3 on the Right to Life is instructive. It provides:

The right to assemble and to demonstrate is integral to democracy and human rights. Even if acts of violence occur during such events[,] participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality. Firearms may never be used simply to disperse an assembly.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials further provide that, 'in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary'.³⁹ As regards dispersal of violent assemblies, Principle 14 provides that 'law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary'.

Following the use of force, law enforcement officials are required to render first aid and medical assistance to any injured persons 'at the earliest possible moment'.⁴⁰ The relatives and close friends of the injured should also be notified. In order to fulfil this requirement, states must provide first-aid training for law enforcement officials.

³⁸ Ibid., para 45.

³⁹ Principle 13.

⁴⁰ Principle 5(c).

Obligation to protect

Protecting the right to freedom of assembly means shielding individuals and groups that are exercising this right from abuses by, or interference from, non-state actors. In Resolution 281, the African Commission recommended to states that they should 'protect peaceful protesters regardless of their political affiliation, and/or sex'.^{41, 42} Journalists and human rights defenders may face particular risks because of their monitoring work. They should be afforded special measures of protection together with those who are particularly at risk of discrimination or other forms of violations, such as women.

It is the opinion of the [African] Commission that in the present communication [*Egyptian Initiative for Personal Rights and Interights vs Egypt II*], the respondent state had a responsibility to provide a police force to protect the victims against violations of their rights during the protest, and to put in place normative systems and institutions to maintain a system of justice that provides remedies for violations and imposes sanctions on violators. It is also the duty of the respondent state to investigate when violations have occurred and ensure thorough investigations.

[African Commission on Human and Peoples' Rights, *Egyptian Initiative for Personal Rights and Interights vs Egypt II* (2011) AHRLR 90 (ACHPR 2011), para 274]

Obligation to fulfil: Facilitation of assemblies

Fulfilling the right to freedom of assembly entails taking positive or facilitative steps to ensure that those wishing to exercise the right can effectively and freely do so. As pointed out by the African Commission Study Group on Freedom of Association and Assembly in Africa, 'a state's duty is facilitate the conduct of peaceful assembly, and any legal framework implemented should be aimed at this purpose'.⁴³ The European Court of Human Rights and the Inter-American Commission on Human Rights support this position.⁴⁴

The UN Special Rapporteur on the Rights of Freedom of Assembly and of Association and the Special Rapporteur on Extrajudicial Killings have identified at least five elements of effective or proper facilitation of assemblies by states:⁴⁵

- Proper planning for assemblies;
- Effective communication and collaboration among all relevant parties;
- Provision of basic services, including traffic management, medical assistance and clean-up services;
- Protection of the safety and rights of protesters, monitors and bystanders; and
- Adequate training of law enforcement officials in facilitating assemblies.

Facilitation of assemblies is at the core of a human rights approach to policing assemblies. A 'human rights approach to policing assemblies first requires that the authorities consider their duty to facilitate the enjoyment of the right to freedom of peaceful assembly'.⁴⁶ In essence, states should not view assemblies as threats to be controlled or quashed but as social and political processes to be facilitated.

⁴¹ In the case of the, a case involving the assault and sexual abuse of two female journalists during a protest in Cairo, the African Commission held that states have an obligation to protect protesters from third parties ((2011) AHRLR 90 (ACHPR 2011), para 274).

⁴² See also , European Court of Human Rights, Judgment, 21 June 1988, para 33.

⁴³ African Commission on Human and Peoples' Rights (2015) 60.

⁴⁴ , European Court of Human Rights, Judgment, 5 December 2006, paras 35–36; Inter-American Commission on Human Rights OEA/Ser.L/V/II.116 Doc 5, rev. 1 cor., 22 October 2002, para 359.

⁴⁵ A/HRC/31/66, 4 February 2016, paras 37–42.

⁴⁶ OSCE Office for Democratic Institutions and Human Rights (2010) 75.

Country analysis

The laws and practices in the six selected countries are examined with regard to the extent to which they comply with the regional and international norms and standards set out above. As shown in Table 1, the six countries under review have ratified or acceded to all the relevant treaties save for the African Youth Charter (which has not been ratified by Burkina Faso, Egypt and Nigeria). They are consequently bound by most of the regional and international human rights treaties providing for the right to freedom of assembly.

Table 1: Ratification of relevant treaties

	Regional treaties			Global treaties		
	ACHPR	ACRWC	AYC	ICCPR	CRC	CERD
Burkina Faso			X			
Cameroon						
Egypt			X			
Kenya						
Nigeria			X			
South Africa						

Burkina Faso

Legal framework

The Constitution of Burkina Faso protects the right to freedom of assembly, demonstration, and procession.⁴⁷ The enjoyment of the right is subject to respect for 'the law, public order, morality and the human person'. The administrative requirements for holding public assemblies are contained in Law No. 022-97/AN of 21 October 1997 on freedom of assembly and demonstration. Law No. 026-2008/AN of 8 May 2008 provides for the repression of acts of vandalism committed during demonstrations in a public place.

Planning for public assemblies

Notice period and restrictions

Law No. 022-97/AN establishes a compulsory, prior-notification regime for public assemblies. Private meetings are expressly exempted from the notification regime. Organisers of a public

⁴⁷ Constitution of Burkina Faso, Article 7.

assembly are required to give 72 hours' notice to the competent authorities. Failure to give such notice renders the public assembly illegal, and both conveners of, and participants in, such an assembly are criminally liable. Spontaneous public assemblies are illegal, irrespective of the manner in which they are conducted.

The law gives authorities wide and discretionary powers to determine the fate of public assemblies. They may prohibit, cancel, stop or disband a public assembly if the circumstances or maintenance of public order so demand. In practice, therefore, authorities have at their disposal the backing of the law to prevent or stop the holding of a public assembly that they consider to be against their political or other interests.

Communication and negotiation

Law No. 022-97/AN does not provide for a legally sanctioned framework in terms of which negotiations between relevant stakeholders may take place. However, there have been attempts to foster such negotiations. For instance, in what has been described as a good practice, the Ministry of Justice and the Promotion of Human Rights has at least once organised a seminar, Public Demonstration and Human Rights: What Strategy for a Better Collaboration between the Different Actors, with the participants consisting of security forces and non-governmental organisations (NGOs).⁴⁸

Management of public assemblies

Deployment

The police, composed of ranks at the national and municipal levels, are primarily responsible for managing public assemblies as part of their law enforcement role. However, it is not unusual for the gendarmerie (military police) and the national army (including the Presidential Guard when it was still in existence) to be involved in law enforcement functions, including responding to public assemblies. This practice is not in keeping with Decree No. 2005-025/PRES/PM/SECU/MATD/DEF/MJ regarding the organisation of security forces in Burkina Faso. According to the Decree, the gendarmerie and the national army may be deployed to discharge law enforcement functions in exceptional circumstances only. The intervention of the army must be sought in writing by the relevant administrative authority, such as the Prime Minister.

Dispersal of public assemblies

Use of force

Burkinabe law provides that the police may use a variety of means, other than the use of firearms, to disperse public assemblies.⁴⁹ Should these methods fail, the competent civilian authority may seek reinforcements from the gendarmerie and the national army. Reinforcements from the army should only be sought as a last resort and only in instances of a siege or for purposes of setting free any captives held by demonstrators.⁵⁰ The order by a civilian authority requesting the intervention of the army must be clear that lethal force should not be used unless certain conditions are met.

Law No. 032-2003/AN relating to internal security allows the use of firearms during law enforcement operations if at least one of the following conditions is met.⁵¹

⁴⁸ A/HRC/20/27, para. 46.

⁴⁹ Decree No. 2005-025/PRES/PM/SECU/MATD/DEF/MJ, Article 20.

⁵⁰ Decree No. 2005-025/PRES/PM/SECU/MATD/DEF/MJ, Article 12(2).

⁵¹ Law No. 032-2003/AN, Article 13.

- Attacks or assaults are directed against law enforcement officers;
- Law enforcement officers are faced by armed individuals;
- Only the use of firearm will enable law enforcement officers to defend the area, installation or people under their protection; or
- Law enforcement officers are facing resistance that cannot be overcome without the use of firearms.

Excessive use of force is an issue that Burkina Faso has long been called upon to address. In its concluding observations on the report submitted by Burkina Faso in May 2011, the African Commission recommended that the country should 'refrain from the excessive and disproportionate use of force during popular demonstrations'. In October 2016, the UN Human Rights Committee expressed its concern about 'allegations of a number of human rights violations committed by the army, notably the presidential security guard, gendarmes and prison guards during the social and political unrest of the last few years'.⁵² The issue of excessive use of force in Burkina Faso came under sharp scrutiny following the October/November 2014 Balai Citoyen protests. The protests took place at several locations in Ouagadougou, including around the National Assembly, on roads leading to the Presidential Palace, and outside the residential home of the President's brother, François Compaoré. The protest at the National Assembly was violent at some point; protestors set the Parliament building on fire and engaged in acts of vandalism. Protests in other parts of the city, however, were largely peaceful. The police, gendarmerie and the national army were all deployed in response to the protests. Lethal force was used in an attempt to quell the protests, resulting in the death of at least 16 people.⁵³ An estimated 500 people suffered injuries during the protests, including wounds caused by live ammunition and burns caused by fire.

Lethal force was similarly used during the September 2015 demonstrations when citizens took to the streets to protest against the attempted military coup. As a result, 14 protestors were killed by gunfire. Six of them were shot in the back as they ran away from security forces.⁵⁴ Government estimates show that 271 people were injured during the protests, including a pregnant woman who was shot in the stomach as she stood on her doorstep.⁵⁵ The bullet also injured her unborn baby. The lives of both the mother and the child were saved by doctors.

Human rights organisations have described the use of force during the 2014 and 2015 protests as excessive, disproportionate, and a violation of domestic Burkinabe law as well as of international and regional standards and norms. For instance, it has been claimed that, during the Balai Citoyen protests, 'batons and cords were used as a means to punish and indiscriminately beat protestors, including children, often for merely exercising their right to peacefully demonstrate'.⁵⁶ Journalists and human rights defenders were also beaten during the protests.

The use of lethal force to disperse public assemblies features mostly in instances where the gendarmerie and/or the army are involved. During the Balai Citoyen protests, the police are said to have used tear gas and water in an attempt to disperse the protestors. They neither carried firearms nor shot at protestors. In contrast, the gendarmerie and the army carried and used firearms during such protests. The Presidential Guard was responsible for most of the deaths caused by gunshot wounds. According to research conducted by Amnesty International, 'it was mainly members of the RSP, a security unit directly under the control of Blaise Compaoré, [which] shot at protestors on the roads leading to the Presidential Palace and in front of the residence of François Compaoré'.⁵⁷ The Presidential Guard was also responsible for the deaths of protestors during the September 2015 protests. The Presidential Guard was disbanded shortly after the failed coup.

⁵² UN Human Rights Committee, CCPR/C/BFA/CO/1, 17 October 2016, para 25.

⁵³ This is the figure given by a government ad hoc committee that was mandated to investigate the events surrounding the protests. A coalition of Burkinabe human rights organisations claims that 33 people were killed during the protests.

⁵⁴ 'Burkina Faso: No amnesty for soldiers who killed unarmed civilians' available at <https://www.amnesty.org/en/press-releases/2015/10/burkinafasonoamnestyforsoldiers/> (accessed on 13 April 2016).

⁵⁵ Ibid.

⁵⁶ Amnesty International 'Just where they thinking when they shot at people: Crackdown on anti-government protests in Burkina Faso (2015) 15. <https://www.amnesty.org/en/documents/AFR60/001/2015/en/>

⁵⁷ Ibid.

Oversight and accountability

Burkina Faso does not have an independent and effective civilian police oversight mechanism. As a result, oversight of police responses to public assemblies is neither systematic nor consistent. In the aftermath of the Balai Citoyen protests, the interim government established an ad hoc committee to investigate what happened during the protests. However, the mandate of this committee did not include investigations of who were responsible for human rights violations during the protests. The Prosecutor occasionally opens investigations into the use of lethal force by law enforcement officials during demonstrations.

Cameroon

Legal framework

The Preamble to the Constitution of Cameroon provides for the right to freedom of assembly. Pursuant to Law No. 96 of 18 January 1996 introducing a number of constitutional amendments, the Preamble is an integral part of the Constitution. Like Burkina Faso, Cameroon has specific legislation governing public assemblies. Law No. 90/55 of 1990 outlines the procedural or administrative requirements for holding public assemblies. Other laws relevant to public assemblies include:

- Law No. 90/054 of 19 December 1990 relating to maintenance of law and order;
- Law No. 90-46 of 19 December 1990 relating to a state of emergency; and
- Law No. 91/120 of 16 December 1991 relating to elections.

Law No. 90-46 provides for derogation of the right to freedom of assembly during a declared state of emergency. Law No. 91/120 regulates the holding of public meetings during election campaigns.

Planning for public assemblies

Notice period and restrictions

Law No. 90/55 draws a distinction between public meetings, on the one hand, and public processions and demonstrations, on the other. This distinction has significant implications. Meetings are considered to be public if they take place in a public place or a place open to the public. Organisers of public meetings planned to take place other than on a public highway are required to issue a three-day notice to the competent administrative authorities (*sous-préfets*). Public highways may be used for public meetings only if a special authorisation is sought and obtained.

Organisers of public processions and demonstrations are under an obligation to give seven days' notice thereof. Religious processions and those relating to local traditions and practices are exempted from the notification regime. Notices or declarations in respect of public meetings or processions must contain the name, contact details and signature of the organiser. They must also indicate the purpose, date, time and venue of the meeting or procession. *Sous-préfets* are mandated to issue a receipt upon receiving notice of a public meeting or procession. They reserve the power to recommend another date, time and venue for a meeting or a different route in the case of a procession. They may also issue an order prohibiting a public meeting or procession altogether.

Law No. 90/55 provides that it is a punishable offence to convene a public assembly or procession without prior notification being given to the relevant authorities, to provide misleading information in a notice, or to participate in a public meeting for which prior notice was not issued.

Sous-préfets have a long history of applying the law to restrict or prevent, rather than facilitate, public assemblies. A 2001 study of the practical application of Law No. 90/55 concluded:

The requirement for the organisers of public gatherings to obtain a 'receipt' is a euphemism for a requirement for public gatherings to obtain permits. Therefore, although the law says that persons wishing to hold public meetings have to make a 'declaration', in reality the law requires them to make an application for authorisation to do so.⁵⁸

The study also concluded that security officers were 'generally unaware of the law on public meetings and sometimes [asked] to see an "authorisation notice" for the meeting'.⁵⁹ Today, the state of affairs largely remains as it was in 2001. *Sous-préfets* often refuse to issue receipts for meetings that they perceive to be contrary to the political interests of the ruling party, citing public-order concerns as the reason for their refusal. It is commonplace for *sous-préfets* to issue a receipt for a meeting or procession and then cancel or suspend it on the eve of the meeting or on the very day that the meeting or procession is to take place. These practices violate Cameroon's obligations in terms of regional and international norms and standards on public assemblies. A key principle of the proper management of public assemblies is the following requirement:

When a State invokes national security and protection of public order to restrict an assembly, it must prove the precise nature of the threat and the specific risks posed. It is not sufficient for the State to refer generally to the security situation. National, political or government interest is not synonymous with national security or public order.⁶⁰

Political opposition and civil society groups working on human rights and democracy issues have been prevented from holding public assemblies on numerous occasions. For instance, in April 2011, acting on the basis of instructions issued by the Yaoundé prefecture, the police interrupted and stopped the Yaoundé International Human Rights Festival. In April 2015, the Yaoundé *sous-préfet* cancelled a receipt he had issued for a meeting to discuss the role of students in promoting good governance in public universities.⁶¹ In September 2015, a seminar on electoral governance and democratic change, organised by the civil society group calling itself Dynamique Citoyenne, was stopped and five of its organisers arrested.⁶² They were held in custody for seven days without charge.

According to the National Human Rights Commission of Cameroon, the recurrent violations of the right to freedom of assembly in Cameroon are largely due to misinterpretation of the law on the part of the *sous-préfets*. Another concern cited by the Commission is the failure or delay by *sous-préfets* to issue receipts for public meetings or processions upon receiving notification.

[Commission Nationale des Droits et des Libertés, *Rapport sur l'état des droits de L'homme* (2014) 37]

Lesbian, gay, bisexual and transgender (LGBT) people are also routinely prevented from exercising their right to freedom of assembly. On the one hand, demonstrations expressing disapproval of LGBT people are usually allowed to take place without interference. On the other, it is common for meetings organised by LGBT people or groups to be prohibited or disrupted. In March 2012, authorities stopped a workshop convened in Yaoundé to discuss the rights of LGBT people.⁶³ This action discriminated on the basis of sexual orientation against the right of LGBT people to freely assemble. Other minority groups also face discrimination in the enjoyment of the right to freedom of assembly. In his report on the mission to Cameroon, the UN Independent Expert on minority issues noted that he had been apprised of serious allegations regarding violations of the civil and political

⁵⁸ ARTICLE 19 'Freedom of association and assembly: Unions, NGOs and political freedom in sub-Saharan Africa' (2001) 22.

⁵⁹ Ibid.

⁶⁰ 4 February 2016, A/HRC/31/66, para. 31.

⁶¹ See www.journalducameroun.com/article.php?aid=19964 (Accessed on 18 March 2016).

⁶² Amnesty International (2016) 108.

⁶³ 'Cameroon: LGBT rights workshop shut down' available at <https://www.hrw.org/news/2012/04/05/cameroon-lgbt-rights-workshop-shut-down> (accessed 18 March 2016).

rights, including the right to freedom of assembly, of individuals advocating for greater political autonomy for anglophone regions or for their secession from Cameroon.⁶⁴ The Independent Expert recommended the immediate revocation of actions restricting the rights of these individuals or groups.⁶⁵

Communication and negotiation

Law 90/55 does not provide for a negotiation framework involving the organisers, the police and local authorities. Meetings between these stakeholders before public assemblies are rare. Indeed, *sous-préfets* sometimes fail to communicate whether or not they will issue a receipt for a meeting respect of which they have received notification, thus leaving the organisers in limbo.

Management of public assemblies

Training and equipment

Police officers in Cameroon generally have little knowledge of human rights. This is partly attributed to the limited training in human rights offered to police officers. In its concluding observations following the review of Cameroon's third periodic report, the African Commission indicated that it was concerned by 'the limited number of hours devoted to human rights education in training institutions for judicial officers'.⁶⁶ The Commission recommended that the number of hours devoted to human rights training should be increased. In recent times, the Cameroon National Commission on Human Rights and Freedoms has been involved in the training of police officers regarding human rights.⁶⁷

Deployment

The police are charged with maintaining law and order during public assemblies and processions. A paramilitary force, Bataillon d'Intervention Rapide, and the army (including its elite forces) are also sometimes deployed.

Dispersal of public assemblies

Use of force

Under Law No. 90/054 of 19 December 1990, the police are forbidden from using firearms in routine law-and-order operations such as policing of assemblies.⁶⁸ The police may use firearms, however, if they are confronted by armed individuals or they cannot defend themselves using less lethal means.

Contrary to international and regional norms and standards, the police sometimes use excessive force to suppress public meetings or demonstrations in Cameroon. Tear-gassing and brutal beating of protestors, including women protestors, are common when security forces disperse public assemblies or demonstrations.⁶⁹ The demonstrations from 25 to 29 February 2008 were violently suppressed by the army, which shot indiscriminately at protestors. The actual number of people who died in the protest is disputed. The government puts the death toll at 24, but human rights activists claim that more than 100 people died.⁷⁰

⁶⁴ para 74, 97.

⁶⁵ *Ibid.*, 97.

⁶⁶ African Commission on Human and Peoples' Rights para 60.

⁶⁷ See 'Training workshop of some judicial police officers on human rights' available at <http://www.achpr.org/sessions/19th-ec/resolutions/332/> (accessed on 15 September 2016).

⁶⁸ Law No. 90/054, section 3(1).

⁶⁹ See 'Protestors teargassed as Cameroon's Biya marks 30 years in power' available at <http://www.reuters.com/article/ozatp-cameroon-protest-idAFJ0E8A600B20121107> (accessed on 18 March 2016).

⁷⁰ Mindi Schneider 'We are hungry: A summary report of food riots, government responses, and state of democracy in 2008' available at http://www.academia.edu/238430/_We_are_Hungry_A_Summary_Report_of_Food_Riots_Government_Responses_and_State_of_Democracy_in_2008 (accessed on 18 March 2016).

The Massacre of the Wouri Bridge

During the protest, a majority of the casualties were youths. Of the many instances in which they bore the brunt of the attacks, the most notable was perhaps what is now known as the Massacre of the Wouri Bridge. On 27 February, thousands of youths involved in a peaceful march in Bonaberi were ambushed. The protest was against high food prices, unemployment, and the proposed constitutional amendment. At the River Wouri Bridge, security forces opened fire and threw tear gas at the marchers. Rather than face the bullets, many jumped into the river, hoping to swim to safety. Others rushed to escape, and many were injured in the process. Some of those who jumped into the river drowned, and the following day many corpses were retrieved from the river.

[Account extracted from Julius Amin 'Understanding the protest of February 2008 in Cameroon' (2012) 58 *Africa Today* 21, 25–26]

Arrests and detentions

Thousands of demonstrators were arrested during, or in the aftermath of, the demonstrations from 25 to 29 February 2008. The National Human Rights Observer of Cameroon estimates that close to 3 000 people were arrested, including children.⁷¹ The majority of those arrested were peaceful demonstrators. In certain instances, individuals were arrested at their homes. Cases of torture and ill-treatment were also reported: 'While in detention, they [the demonstrators] were subjected to beatings and some either died in the process or were somehow maimed'.⁷² Those arrested were tried in special hearings which lacked the minimum fair-trial guarantees.⁷³ Most recently (March 2016), about 60 opposition leaders and supporters were arrested as they gathered to participate in a protest relating to the presidential-term limit.⁷⁴

Medical response

According to the report compiled by National Human Rights Observer of Cameroon, the police did not render medical assistance to the injured during the February 2008 demonstrations. The report noted:

Many people who were hit by bullets should normally have received immediate medical attention. However, the police did not fulfil their obligation to provide medical assistance to those injured as well as [to inform] members of their families.⁷⁵

The National Human Rights Observer concluded that, 'because of the government's failure to take charge of the wounded, several people died from their injuries'.⁷⁶

Oversight and accountability

Cameroon is yet to establish an independent civilian policing oversight mechanism or authority. The bulk of cases of police misconduct is handled internally. A few are handled by the judiciary. In particular, the DGSN is mandated to investigate cases of police misconduct. He or she has the option of triggering an internal disciplinary process or forwarding a case to the court. Regrettably, public perception of the police internal control mechanism is poor because it operates as a 'subset of a system that is generally very corrupt, ineffective and unaccountable'.⁷⁷

⁷¹ National Human Rights Observer of Cameroon (2008) 23.

⁷² *Ibid.*, 24.

⁷³ 'Concerns on the part of FIACAT and ACAT Cameroon about torture and abuse in Cameroon' presented to the Human Rights Committee prior to consideration of Cameroon's 4th periodic review, 97th session, 12–30 October 2010, available at https://www.fiacat.org/IMG/pdf/CDH_Cameroon_EN-3.pdf (accessed on 15 September 2016).

⁷⁴ 'Cameroon police detain 69 regime opponents' available at <http://www.timeslive.co.za/africa/2016/03/30/Cameroon-police-detain-60-regime-opponents> (accessed on 15 September 2016).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ E Eban 'Police internal control system in Cameroon' in E Alemika & I Chukwuma (eds) (2011) 112, 126.

Accountability for police violations committed in the course of managing public assemblies is yet to become an established practice. For instance, it is reported that no police officer was sanctioned for the killings and other violations committed during the February 2008 demonstrations.⁷⁸ As such, impunity is deeply rooted in the police force. It is often the case that police officers are held accountable only in high-profile cases or in the context of a huge public outcry. According to a 2011 review of the police internal control system in Cameroon:

The internal disciplinary system of the Cameroon police is usually put into effective action only when the police are being vilified by the masses, the press and international community for egregious violations of human rights, such as extra-judicial killing, involvement in armed robbery, extorting money from foreign diplomats, or when the victim is a prominent person The practice of instituting police internal disciplinary action in only cases of police abuse involving prominent individuals or those which are shockingly outrageous has greatly hindered the Cameroon people from complaining of human rights abuse by the police, as there is no hope that erring officials will be brought to account for their misdeeds.⁷⁹

Similarly, the judiciary does not offer any better prospects for police accountability because of a general lack of independence and owing to corruption.⁸⁰ Moreover, the police are often reluctant to prosecute their own: 'The police find it difficult to treat a fellow member as a suspect criminal, particularly when the alleged offence was committed for the purpose of maintaining public order.'⁸¹

In the absence of an independent civilian policing oversight authority, the role that Cameroon's National Commission for Human Rights and Freedoms could play in ensuring police accountability cannot be overemphasised. The Commission is charged with the promotion and protection of human rights in the country, a mandate which includes investigating and addressing complaints of human rights violations.

Egypt

Legal framework

The 2014 Constitution of Egypt protects the right to freedom of assembly, subject to two conditions. Firstly, 'weapons of any type' should not be carried during public assemblies. Secondly, the right can only be exercised 'upon providing notification as provided by law'. The Constitution expressly exempts private meetings from the notification regime. Article 92 provides that 'no law that regulates the exercise of rights and freedoms may restrict them in such a way as [to] infringe upon their essence and foundation'.

Citizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protest, while not carrying weapons of any type, upon providing notification as regulated by law. The right to peaceful, private meetings is guaranteed, without the need for prior notification. Security forces may not attend, monitor or eavesdrop on such gatherings.

[Constitution of Egypt, 2014, Article 73]

Egypt has one of the newest laws on public assemblies in Africa: Law 107 on the Right to Public Meetings, Processions and Peaceful Demonstrations enacted on 24 November 2013. Other laws that impact the enjoyment of the right to freedom of assembly include the following:

⁷⁸ 'Concerns on the part of FIACAT and ACAT Cameroon about torture and abuse in Cameroon' presented to the Human Rights Committee prior to consideration of Cameroon's 4th periodic review, 97th session, 12–30 October 2010, available at https://www.fiacat.org/IMG/pdf/CDH_Cameroon_EN-3.pdf (accessed on 15 September 2016).

⁷⁹ E Eban 'Police internal control system in Cameroon' in E Alemika & I Chukwuma (eds) (2011) 128.

⁸⁰ African Policing Civilian Oversight Forum (2008) 14.

⁸¹ E Eban 'Criminal liability of the police in Cameroon: Prospects and challenges' (2011) 5 127, 132.

- Law No. 85 of 1949 on Maintaining Order in Educational Institutions;
- Law No. 162 of 1958 relating to a state of emergency; and
- Law No. 34 of 2011 on Criminalization of Assaults on the Freedom to Work and Vandalism against Facilities.

Planning for public assemblies

Notice period and restrictions

As stated above, one of the conditions for the enjoyment of the right to freedom of assembly under the Constitution of Egypt is the requirement to give the requisite notice as provided for by law. The procedure on notification is enshrined in Law 107 of 2013. Section 8 requires organisers of public meetings, processions or protests to give at least three days' notice to the police, with the period of notice not to exceed 15 days. The notice period for electoral meetings is shorter. The notice should state the name and contact details of the organisers, the venue, the start and end times, and the purpose of the meeting. In a manner that exceeds the bounds of a human rights-compliant notification regime, section 8 also requires organisers to indicate 'the demands requested by the participants' and the motto to be used during the public assembly.⁸²

Section 10 empowers the Minister of the Interior or the Specialized Director of Security to prohibit, relocate or alter the route of a public assembly if information showing serious threats to peace and security is found. The Minister of the Interior is also given wide discretionary powers to designate certain areas as 'specified safe areas', the surroundings of which are out of bounds for public assemblies. The list of possible areas which may be designated as 'specified safe areas' is long and includes the offices of international organisations, foreign diplomatic missions, the premises of government auditing agencies, prosecutorial offices, educational institutions, museums, monuments and their surrounds, and 'other public facilities'. In essence, almost all public places or facilities may be designated as safe areas.

Under Law No. 85 of 1949, students are required to seek permission from the relevant authorities of the school, college or university before they can hold a meeting within the precincts of the institution.

Management of public assemblies

Deployment and training

Established in 1969, the Central Security Forces (CSF) is the unit charged with policing assemblies in Egypt. Although the CSF is engaged in law enforcement, it has nearly all the features of a military force. It operates under the Ministry of the Interior, which is considered a 'military entity' pursuant to a ministerial decree issued in 1981. Indeed, police officers and soldiers have both been part of the CSF since the establishment of the unit. According to Seifeldine, the CSF is the 'the flagrant symbol of a militarized police, due to their paramilitary-like structure and the military conscripts that they enrol'.⁸³ The military is also routinely deployed to police demonstrations.

Although the training of police officers includes a course on human rights, the military nature of the CSF has meant that human rights principles are rarely adhered to in the course of policing assemblies in Egypt. For this reason, the Egyptian National Council for Human Rights has highlighted the need for training and continuing education for police officers in the policing of assemblies.⁸⁴

⁸² See A/HRC/23/39, para 54.

⁸³ R Seifeldine 'Prospects of police reform in Egypt's changing political environment 2011–2015', Master of Arts/Science thesis, The American University in Cairo (2015) 62.

⁸⁴ See 'Summary of the National Council for Human Rights fact-finding mission about the disperse of Raba'a Al-Adaweya sit-in' available at <http://www.nchregypt.org/media/ftp/rabaa%20report%20translation.pdf> (accessed on 5 June 2016).

Protection of demonstrators

Two particular issues have been found to be of serious concern in the response of security forces to recent demonstrations in Egypt. The first issue is the deliberate failure on the part of security forces to protect protestors from counter-protestors. Indeed, in many cases, security forces have allowed pro-government protestors to join them in dispersing and violently beating anti-government protestors. Security forces have deliberately left different groups of protestors to clash and fight each other. During a clash between two groups of protestors on 5 December 2012 in Cairo, security forces allegedly failed to intervene for over five hours.⁸⁵ In June and July 2013, the police and the military failed to intervene in several deadly clashes between groups of protestors, which resulted in the death of 78 people.⁸⁶

The second issue of serious concern is sexual violence against women protestors, perpetrated both by security officers and individual male protestors. In a joint urgent appeal to Egyptian authorities dated 19 January 2012, several UN special rapporteurs observed that acts of sexual violence against women during demonstrations 'do not constitute isolated events, but represent an ongoing pattern of violence against women peacefully taking part in protests by Egyptian security forces'.⁸⁷ Women journalists and human rights defenders have been particularly targeted for sexual violence.⁸⁸ Between 30 June and 2 July 2013, at least 90 cases of sexual violence against women were reported in Tahrir Square in Cairo.⁸⁹ Women detained as part of the crackdown on demonstrations have been subjected to virginity tests and/or have been sexually violated in other ways.⁹⁰

In the case of the *Egyptian Initiative for Personal Rights and Interights vs Egypt II*,⁹¹ the African Commission found that Egypt had violated the African Charter by failing to provide protection for two women who were sexually violated during protests in Cairo.

Dispersal of public assemblies

Use of force

Law 107 of 2013 permits the use of force for purposes of dispersing public assemblies. It provides for the use of different and graduated levels of force culminating in the use of lethal force if the circumstances warrant.⁹² In particular, it provides that, if protestors fail to disperse despite being given repeated verbal instructions to do so, the police may in the first instance use water cannons, tear gas, and batons to disperse the assembly.⁹³ If this kind of force fails to disperse the protestors or if the assembly turns violent, the force may be enhanced to include warning shots, sound or gas bombs, rubber cartouche bullets, and non-rubber cartouche bullets in that order.⁹⁴ Finally, the police may use 'tools proportionate to the danger posed against life, money, or property if it is determined that the protestors possess firearms'.⁹⁵ The specific 'tools' that may be used in this regard are not stipulated.

Excessive and disproportionate use of force has been a defining feature of police and military responses to the series of demonstrations staged in Egypt since January 2011. Although the demonstrations have always turned violent, security forces have consistently failed in their duty to distinguish between peaceful and non-peaceful protestors. The number of people killed since the protests began is difficult to tell, but it is certainly in the range of thousands. In March 2014, a

⁸⁵ Joint Urgent Appeal, 11/01/2013, Case No. EGY 1/2013, available at [https://spdb.ohchr.org/hrdb/23rd/public_-_UA_Egypt_11.01.13_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/23rd/public_-_UA_Egypt_11.01.13_(1.2013).pdf) (accessed on 22 April 2013).

⁸⁶ Joint Urgent Appeal, 09/07/2013, Case No. EGY 10/2013, available at [https://spdb.ohchr.org/hrdb/24th/public_-_UA_Egypt_09.07.13_\(10.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_UA_Egypt_09.07.13_(10.2013).pdf) (accessed on 22 April 2016).

⁸⁷ Joint Allegation Letter, 19/01/2011, Case No. EGY 2/2012, available at <http://freeassembly.net/reports/egypt-communications/> (accessed on 22 April 2016).

⁸⁸ *Ibid.*

⁸⁹ Joint Urgent Appeal, 09/07/2013, Case No. EGY 10/2013, available at [https://spdb.ohchr.org/hrdb/24th/public_-_UA_Egypt_09.07.13_\(10.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_UA_Egypt_09.07.13_(10.2013).pdf) (accessed on 22 April 2016).

⁹⁰ 'The fight to freedom of assembly in Egypt: UPR CSO joint submission' available at <http://afteegypt.org/wp-content/uploads/2014/11/UPR-Joint-report-on-freedom-of-Assembly-AFTE-EIPR-CIHRSEN.pdf> (accessed on 22 April 2015).

⁹¹ (2011) AHR/LR 90 (ACHPR 2011), para 274.

⁹² The provisions on the use of force in Law 107 of 2013 complement similar provisions in laws and policy documents that existed prior to its enactment. These include the relevant provisions in Law 109 of 1971 on Police Authority and Decision No. 156 of 1964 on the Use of Firearms.

⁹³ Law 107 of 2013, Article 12.

⁹⁴ Law 107 of 2013, Article 13.

⁹⁵ *Ibid.*

group of Egyptian NGOs estimated that 'more than 2 000 people' have died in the protests, 'the overwhelming majority of them killed through the use of excessive force'.⁹⁶ A fact-finding committee established in the aftermath of the January 25 Revolution found that 846 people were killed in public squares and in the vicinity of public buildings between 25 January and 3 February 2011.

In some instances, tens or hundreds of people have died in a single day when security forces opened fire on demonstrators. On 14 August 2013, demonstrators who had staged 45-day-long sit-ins at the Raba'a and al-Nahda squares in support of Mohammed Morsi were violently dispersed by security forces. On that day alone, more than 726 people were killed by lethal force in what has come to be known as the Raba'a massacre.⁹⁷ On another occasion, military forces killed 27 Coptic demonstrators when they ran them over with armoured personnel carriers.⁹⁸

Arrests and detentions

Thousands of people participating in public assemblies have been arrested and detained since 25 January 2011. On 9 January 2014, the Minister of the Interior reportedly declared:

Every Friday no less than 500 to 600 get arrested [...] at the beginning, we used to wait for the demonstration to turn violent, but now we confront them once they congregate. When we confront them, there are some who run, but, whoever we can grab, we detain.⁹⁹

In March 2014, the estimate of detained protestors stood at 16 000. By April 2015, the number had risen to 41 000.¹⁰⁰ Those arrested included children. In this regard, the UN Special Rapporteur on the rights to freedom of assembly and of association in October 2014 expressed concern that, between 20 September 2013 and 30 May 2014, Egyptian authorities had detained '52 young men between the ages of 15 and 18' during peaceful demonstrations.

The charges levelled against detainees if and when they are presented to court usually include 'demonstrating without authorization', 'assaults on police officers', and 'affiliation to a prohibited party'. In March and April 2014, a criminal court provisionally sentenced 1 212 people to death on charges related to their participation in demonstrations during which police stations were attacked. The charges against these individuals included 'threatening public order', 'burning a police station', 'belonging to a banned group' and 'murder'.

Medical response

The rendering of medical assistance to participants of sit-ins has sometimes proved to be a big challenge because of heavy gunfire. At the sit-in in Raba'a, the Egyptian National Council for Human Rights found that, although 300 ambulances were allocated to the sit-in on the day the dispersal occurred, the injured were deprived of first aid because of heavy gunfire.¹⁰¹

Oversight and accountability

The Egyptian Ministry of the Interior has a special internal complaints department called *Altaftish*. It is mandated to investigate complaints against police officers, including complaints of police

⁹⁶ 'The right to freedom of assembly in Egypt: UPR CSO joint submission' available at http://afteegypt.org/wp-content/uploads/2014/11/UPR-Joint-report-on-freedom-of-Assembly-AFTE-EIPR-CIHRs.EN_.pdf (accessed on 22 April 2015).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Quoted in EMHRN (2014) 20.

¹⁰⁰ Amnesty International 'Egypt must take immediate measures to address the systemic violations of human rights and end impunity, 10 April 2015, AI Index: MDE 12/1262/2015.

¹⁰¹ See 'Summary of the National Council for Human Rights fact-finding mission about the disperse of Raba'a Al-Adaweya sit-in' available at <http://www.nchregypt.org/media/ftp/rabaa%20report%20translation.pdf> (accessed on 5 June 2016).

brutality. In practice, it appears that matters of police brutality are not given priority in the work of the internal complaints department.¹⁰² Indeed, there is a 'general perception that the MOI [Ministry of the Interior] tolerates the systematic brutality that leads to cases being solved, and some functional brutality to intimidate political opponents'.¹⁰³

In its report documenting human rights violations committed in the course of dispersing demonstrators in the Raba'a and Nahda sit-ins, the Egyptian National Council for Human Rights recommended that an independent judicial inquiry be established to determine responsibility for the violations.¹⁰⁴ This recommendation is yet to be taken up. The judiciary also serves as an oversight mechanism, but the independence and impartiality of the institution is frequently questioned. In the context of the January 25 Revolution and subsequent demonstrations, the courts have almost always acquitted law enforcement officials charged with killing protestors.¹⁰⁵

Kenya

Legal framework

The Constitution of Kenya protects the right to freedom of assembly. Article 37 provides that 'every person has the right, peaceably and unarmed to assemble, to demonstrate, to picket and to present petitions to public authorities'. The state may limit the right, subject to the condition that the limitation is enshrined in law and is reasonable and justifiable in an open and democratic society.¹⁰⁶ Members of the police service, defence forces and the intelligence service can exercise the right to freedom of assembly but only for the narrow purpose of raising issues relating to the maintenance of good order and/or discipline within their respective institutions.¹⁰⁷

Like many common law African countries, Kenya does not have specific legislation for the regulation of public assemblies. Instead, the law on public assemblies is enshrined in public-order legislation. The substantive legislation governing the conduct of public assemblies in the country is the Public Order Act (Cap 56 of 1950). The Penal Code (Cap 63) stipulates the sanctions for violations of the provisions of the Public Order Act relating to public assemblies.

Planning for public assemblies

Notice period and restrictions

The Public Order Act requires any person intending to convene a public assembly to give the police between three and 14 days' notice.¹⁰⁸ The notice should be in the form prescribed by the police. Details required to be filled in on the form include the name and contact details of the organiser, and the date and time of the assembly. The police may prevent the holding of a public assembly if the date, time and venue proposed by the organiser are already taken up by another person or group. Contrary to international norms and standards, it seems that the law does not contemplate the holding of either simultaneous or counter-demonstrations.¹⁰⁹

Although the law creates a notification rather than a permission regime, there is a general tendency on the part of the police to presume that permission should be sought before a public assembly is

¹⁰² R Seifeldine 'Prospects of police reform in Egypt's changing political environment 2011–2015', Master of Arts/Science thesis, The American University in Cairo (2015) 79.

¹⁰³ *Ibid.*

¹⁰⁴ See 'Summary of the National Council for Human Rights fact-finding mission about the disperse of Raba'a Al-Adaweya sit-in' available at <http://www.nchregypt.org/media/ftp/rabaa%20report%20translation.pdf> (accessed on 5 June 2016).

¹⁰⁵ R Seifeldine 'Prospects of police reform in Egypt's changing political environment 2011–2015', Master of Arts/Science thesis, The American University in Cairo (2015) 79.

¹⁰⁶ Constitution of Kenya, Article 24.

¹⁰⁷ Constitution of Kenya, Article 24(5); National Police Service Act 11A of 2011, section 47(3)(f); National Intelligence Service Act 28 of 2012, section 39; Kenya Defence Forces Act of 2012, section 51.

¹⁰⁸ Public Order Act, section 5(2).

¹⁰⁹ On state obligations regarding simultaneous and/or counter-demonstrations, see A/HRC/20/27, para. 30; A/HRC/31/66, para. 24.

convened. Indeed, it is not uncommon for the police to purport to prohibit the holding of a public assembly or to issue a blanket ban on all or certain forms of public assemblies. In early March 2013, ahead of the Supreme Court decision on the results of the presidential election, the Inspector General Of Police issued a countrywide directive banning all forms of public assemblies. The police reiterated the contents of the directive a day before the decision of the court was handed down.¹¹⁰ About two months later, in May 2013, when plans were underway for an opposition coalition party to hold a political rally in Nairobi, the Inspector General issued yet another blanket ban on all political rallies and processions. The Inspector General purportedly lifted the ban following a huge public outcry and after holding a meeting with the organisers of the rally.¹¹¹

Blanket bans on public assemblies are considered incompatible with state obligations to respect the right to freedom of assembly:

Blanket bans, including bans on the exercise of the right entirely or on any exercise of the right in specific places or at particular times, are intrinsically disproportionate, because they preclude consideration of the specific circumstances of each proposed assembly.¹¹²

For this reason, several UN special rapporteurs raised concerns about the blanket ban on public assemblies imposed in Kenya in March 2013.¹¹³

Communication and negotiation

Communication and negotiation between relevant stakeholders involved in the planning and management of public assemblies in Kenya are not well entrenched and generally take place on an ad hoc basis and in an inconsistent manner. In other words, negotiations do not happen as a matter of course or routine. In certain instances, negotiations have happened only after a bitter and public stand-off between the organisers and the police.¹¹⁴

As stated above, the police may prevent the holding of a public assembly if the venue proposed by the organisers is already taken up by another person or group. For the police to prevent the holding of a public assembly for this reason, they must liaise with and be in effective communication with county governments, which are responsible for allocating venues for public assemblies. However, the lack of effective communication has in at least one particular instance led to a situation where the police and the relevant county government gave conflicting information about the availability of a venue.¹¹⁵

Management of public assemblies

Training and equipment

The Kenya National Police Service is composed of the Kenya Police Service and the Administration Police Service. The Constitution of Kenya provides that one of the objects and functions of the National Police Service is to 'train staff to the highest possible standards of competence and integrity and *to respect human rights and fundamental freedoms and dignity*'.¹¹⁶ The entry-level training for both the Kenya Police Service and the Administration Police Service takes a period of nine months.

¹¹⁰ 'Police ban demos ahead of court's ruling' available at <http://www.nation.co.ke/News/politics/Police-ban-demos-ahead-of-courts-ruling/-/1064/1733860/-/ptnermv/-/index.html> (accessed on 10 April 2016).

¹¹¹ See 'Kenians online react to Kimaiyo's ban on rallies' available at www.nation.co.ke/news/Kenians-online-react-to-Kimaiyo-ban-on-rallies/-/1056/2329282/-/ye3n3iz/-/index.html (accessed on 10 April 2016); 'Cord says now allowed to hold Uhuru Park rally' available at www.nation.co.ke/news/politics/-/1064/2329044/-/y2eldp/-/index.html (accessed on 10 April 2016).

¹¹² A/HRC/31/66, para 30. See also A/HRC/23/39, para. 63.

¹¹³ Joint Allegation Letter, KEN 1/2013, available at [https://spdb.ohchr.org/hrdb/24th/public_-_AL_Kenya_28.03.13_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Kenya_28.03.13_(1.2013).pdf) (accessed on 18 April 2016).

¹¹⁴ 'Cord says now allowed to hold Uhuru Park rally' available at www.nation.co.ke/news/politics/-/1064/2329044/-/y2eldp/-/index.html (accessed on 10 April 2016).

¹¹⁵ See 'Uhuru Park unavailable for CORD Madaraka celebration – police' available at <http://www.capitalfm.co.ke/news/2016/05/uhuru-park-unavailable-for-cord-madaraka-celebration-police/> (accessed on 6 June 2016); 'CORD cleared to hold Madaraka Day rally at Uhuru Park' available at <http://www.nation.co.ke/counties/nairobi/Uhuru-Park/-/1954174/3225104/-/121sxxa/-/index.html> (accessed on 6 June 2016).

¹¹⁶ Constitution of Kenya, Article 244(d), our emphasis.

The 2009 National Task Force on Police Reforms (Ransley Task Force) reviewed the training and found that a significant part of the training was dedicated to paramilitary field drills and parades whereas 'limited time [was] allocated to "intelligent" police training'.¹¹⁷ This kind of training has a direct correlation with the police's attitude and approach to policing in general and to crowd management in particular. In this context, the Ransley Task Force observed that 'emphasis on paramilitary training and drills inculcates in the recruits [a] psyche that policing is combative and confrontational'.¹¹⁸

Perhaps more importantly, the stipulated procedures governing the police's response to demonstrations in Kenya are old and outdated. The 2008 Commission of Inquiry into the Post-election Violence recommended a complete overhaul of the Police Standing Order regulating responses to demonstrations.¹¹⁹ In February 2014, the National Police Service published draft 'service standing orders' and invited comments from the public.¹²⁰ There has been no further concrete action since then.

Deployment, and command and control

The General Service Unit (GSU), a paramilitary unit of the Kenya Police Service, is almost always deployed to respond to large protests and demonstrations. It is not unusual for the GSU to be joined by the Administration Police Service. In exceptional circumstances, and particularly in rural areas, prison wardens and members of the Kenya Wildlife Services may be deployed to manage public assemblies.

As a result of historical tensions,¹²¹ issues of coordination and lack of clear lines of command and control have traditionally arisen whenever several units of the National Police Service, especially the Kenya Police Service and the Administration Police Service, are jointly deployed in an operation.

Dispersal of public assemblies

Use of force

The National Police Service Act provides that police officers should perform their functions through non-violent means. In circumstances in which they are compelled to use force, the force should be necessary and proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used. Both the National Police Service Act and the Public Order Act restrict the use of firearms to exceptional circumstances. In particular, firearms should be used for the limited purpose of saving or protecting life or in self-defence against imminent threat of life or serious injury.¹²²

In practice, the police frequently flout both domestic and international law on the use of force. The police's response to demonstrations came under sharp focus in the aftermath of the violence that rocked the country following the announcement of the results of the 2007 presidential election. Both peaceful and violent demonstrations were a key feature during the violence, which has now become popularly known as the 'Post-election Violence'. A Commission of Inquiry established to investigate the post-election violence found that police management of the demonstrations was 'inconsistent in its application, jeopardized the lives of citizens and was in many cases a grossly unjustified use of deadly force'.¹²³ A total of 405 people died of gunshot wounds, while 557 suffered gunshot injuries.¹²⁴ The Commission of Inquiry found that these deaths and injuries were mainly as a result of the police

¹¹⁷ Republic of Kenya (2009) 104.

¹¹⁸ *Ibid.*, 104.

¹¹⁹ Government of Kenya (2008), 421 (hereinafter "").

¹²⁰ See 'Public to participate in drafting of Police Service Standing Orders' available at <http://www.news24.co.ke/MyNews24/Public-to-participate-in-drafting-of-Police-Service-Standing-Orders-20140220> (accessed on 4 June 2016).

¹²¹ Republic of Kenya (2009) 40.

¹²² National Police Service Act, Sixth Schedule, section B(1); Public Order Act, section 14(1).

¹²³ 419.

¹²⁴ *Ibid.*, 386.

shooting live ammunition directly into groups of protesters, including those who were peaceful and posed no particular danger.¹²⁵ Children, women and bystanders were among those who died at the hands of the police. In Kisumu, 25 demonstrators were shot dead by the police in a single day.¹²⁶

Evidence from the pathologist Dr Odour revealed that of the 50 people shot by police in Kisumu 30 were shot from behind and a further 9 from the side. In addition 3 of the deceased were under the age of 14 years (one a 10 year old girl) and 3 were female. One of the children, a 12 year old boy, was shot twice in the back. Further a 45 year old woman was shot and killed whilst in her home just outside the CBD.

The Commission could find no legal or operational basis for justifying the shooting of civilians from behind at any time given the circumstances presented to it. These figures are complemented by other witnesses who told of circumstances indicating further indiscriminate use of firearms by the police in terms of people who were shot and injured.

[Waki Report, 387–388]

Although legal and institutional police reforms were initiated in the wake of the post-election violence,¹²⁷ the police's response to demonstrations has not significantly changed. Protests are still met with brutal force and violence. On 30 March 2013, the police shot dead and injured several demonstrators who were protesting the Supreme Court decision regarding the results of the presidential election.¹²⁸ In 2015, four people were killed in different parts of the country when the police used live ammunition to disperse demonstrators.¹²⁹

In instances where the police do not use lethal force to disperse demonstrators, the degree of force used has nevertheless remained disproportionate and excessive. In January 2015, police lobbed tear gas canisters at children who were protesting the grabbing of their school playground by a private developer. Five children were injured during the incident.¹³⁰ Most recently, in April 2016, the police were captured on video brutally beating students in the course of responding to protests at the University of Nairobi. According to the Independent Policing Oversight Authority and the Commission on Administrative Justice, many students sustained serious injuries, including bone fractures.¹³¹

Arrests and detentions

Arbitrary arrest and illegal detention of demonstrators allegedly for holding or participating in unlawful assemblies are not uncommon in Kenya. The Public Order Act provides that a public assembly held contrary to its provisions is an unlawful assembly. It makes it an offence, punishable by one year of imprisonment, to hold or participate in an unlawful assembly. For the larger part, the police seldom institute charges following arrests. When they institute charges, which almost always include the charge of 'taking part in unlawful assembly', 'inciting violence' or 'rioting', the cases are rarely prosecuted to their logical end. It follows that, in most of the cases, the purpose of the charge is simply to harass protestors and punish them for legitimately exercising their right to freedom of assembly.

The Fifth Schedule to the National Police Service Act contains arrest and detention rules. Section 2 of the Schedule provides that 'a police officer shall accord an arrested or detained person all the rights set out under Articles 49, 50 and 51 of the Constitution'. These sections of the Constitution deal with, respectively, rights of arrested persons, a fair hearing, and the rights of detained persons.

¹²⁵ Ibid., 420.

¹²⁶ Ibid., 388.

¹²⁷ See, for example, Amnesty International (2013).

¹²⁸ See International Network of Civil Liberties Organizations (2013) 38–43; Human Rights Watch 'Kenya: Witnesses describe Kisumu killings by police' available at <https://www.hrw.org/news/2013/05/23/kenya-witnesses-describe-kisumu-killings-police> (accessed on 11 April 2016).

¹²⁹ ARTICLE 19.

¹³⁰ Commission on Administrative Justice available at <http://www.ombudsman.go.ke/resources-downloads/> (accessed on 11 April 2016).

¹³¹ 'IPOA: There is evidence police assaulted UoN students during riots' available at <http://www.standardmedia.co.ke/article/2000198980/ipoa-there-is-evidence-police-assaulted-uon-students-during-riots> (accessed on 11 April 2016); Commission on Administrative Justice 'An investigations report on mishandling of the University of Nairobi students' elections and subsequent riots of April, 2016' available at <http://www.ombudsman.go.ke/wp-content/uploads/2016/11/Ombudsman-report-on-the-handling-of-April-2016-SONU-elections-and-subsequent-riots-pdf-1.pdf> (accessed on 10 November 2016).

Police treatment of arrested and detained protestors usually falls short of these provisions of domestic law. Compliance with the relevant international and regional norms and standards, such as the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, is thus generally lacking.

Police treatment of women protestors has particularly been found wanting. In one instance, reported to the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, a woman protestor who was eight months' pregnant was slapped in the face and pushed to the ground by a police officer.¹³² In another instance, a woman who was taking part in a peaceful demonstration against the tax regime was allegedly sexually assaulted by a police officer.¹³³

Medical response

A particularly progressive provision in Kenyan law is the obligation imposed on police officers to render medical assistance when the use of force results in injuries and to notify relatives or close friends of the injured about the incident. Indeed, it is an offence for a police officer to fail to provide such medical assistance. Section 3 of the Sixth Schedule to the National Police Service Act provides:

When the use of force results in injuries –

- a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and
- b) shall notify relatives or close friends of the injured or affected persons.

Despite the existence of this clear mandatory obligation, the police seldom administer first aid or offer any form of medical assistance to demonstrators who suffer injuries as a result of police action. This role ordinarily falls on fellow demonstrators or independent actors, such as the Red Cross Society of Kenya.

Oversight and accountability

The Independent Policing Oversight Authority (IPOA) is mandated to provide civilian oversight of police operations, including those relating to public assemblies. In the recent past, the IPOA has launched investigations into reported cases of excessive use of force by the police during assemblies.¹³⁴ The IPOA is also sometimes present during public assemblies to monitor the police's response and action.¹³⁵ The police are required to notify the IPOA whenever death or serious injury occurs during operations or in police custody. Police notifications are, however, inconsistent and mainly come from police stations located in the capital city of Nairobi.¹³⁶

An Internal Affairs Unit exists within the National Police Service. It is charged with conducting internal investigations into complaints against police officers. Public confidence in the Internal Affairs Unit remains relatively low. It is noteworthy that other independent agencies, such as the Kenya National Commission on Human Rights and the Commission on Administrative Justice, are also mandated to look into police misconduct and are often engaged in monitoring the police's response to public gatherings and assemblies.

¹³² See Joint Allegation Letter, 18/03/2014, Case No. KEN 3/2014, available at <http://freeassembly.net/reports/kenya-communications/> (accessed on 12 April 2016).

¹³³ *Ibid.*

¹³⁴ See 'IPOA: There is evidence police assaulted UoN students during riots' available at <http://www.standardmedia.co.ke/article/2000198980/ipoa-there-is-evidence-police-assaulted-uon-students-during-riots> (accessed on 11 April 2016); 'IPOA investigating the alleged teargassing and injury of Langata Road Primary School pupils' available at <http://www.ipoa.go.ke/images/press/IPOA-INVESTIGATING-THE-ALLEGED-TEARGASSING-AND-INJURY.pdf> (accessed on 11 April 2016); 'IPOA investigations into police operations during the demonstrations by Narok residents' available at <http://www.ipoa.go.ke/ipoa-media/press-releases/images/press/NAROK-PROTESTS.pdf> (accessed on 11 April 2016).

¹³⁵ IPOA (2014) 15.

¹³⁶ *Ibid.*, 11.

Nigeria

Legal framework

Section 40 of the Constitution of Nigeria provides in part that 'every person shall be entitled to assemble freely and associate with other persons'. The enjoyment of this right may, however, be limited by 'any law that is reasonably justifiable in a democratic society'.¹³⁷ Specific grounds for limiting the right include, on the one hand, interests related to defence, public safety, public morality and public health, and, on the other, protection of the rights of others.¹³⁸ Like Kenya, the primary law on public assemblies in Nigeria is public-order legislation, being the Public Order Act (Cap 382 of 1990). Other pieces of legislation that contain provisions on public assemblies include the Penal Code, the Electoral Act (2010), and the Same Sex Marriage Prohibition Act (2013).

Planning for public assemblies

Notice period and restrictions

Nigeria is a federal state. The function of regulating public assemblies rests with the governors of the 36 semi-autonomous states. The governors are the senior executive authorities within their respective states.

The Public Order Act establishes the legal regime for regulating public assemblies in Nigeria. Several restrictions enshrined in the Act are impermissible in terms of international and regional norms and standards. The Act requires anyone who intends to hold a public assembly to obtain a licence or permission from the governor in charge of the state where the assembly will be held. The application for a licence must be lodged no less than 48 hours prior to the intended day of the assembly. The governors are given wide powers in their consideration of applications. They may direct the police to issue a licence only if they (the governors) are satisfied that the public assembly is unlikely to cause a breach of the peace. The governors have the power to determine the route and time for holding a procession. In 2007, the Nigerian Court of Appeal held that a licence should not be required for the purpose of holding a public assembly. The police continue, however, to insist that a licence should be obtained.

The Public Order Act has for the larger part been used to deny Nigerian citizens the right to freedom of assembly. The history of its application has been summarised as follows:

The police in Nigeria have deployed the Public Order Act to unjustifiably deny people and groups the right to carry out processions or demonstrations, most often for the political aims of the ruling class.¹³⁹

Political considerations on the part of governors and the police have generally determined which public assemblies are allowed to take place and which ones are denied a licence or are prohibited outright.¹⁴⁰ In an attempt to address this subjective application of the Public Order Act, the 2013 Nigeria Police Code of Conduct enjoins the police, amongst other things, to 'maintain a neutral position with regard to the merits of any labour dispute, political protest, or other public demonstration while acting in an official capacity'.¹⁴¹

The Electoral Act and the Same Sex Marriage Prohibition Act contain further and context-specific restrictions on the exercise of the right to freedom of assembly. The Electoral Act prohibits the

¹³⁷ Constitution of Nigeria, section 45.

¹³⁸ Ibid.

¹³⁹ I Terwase 'The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria' (2010) 10 432, 447–448.

¹⁴⁰ Ibid., 432, 453.

¹⁴¹ Nigeria Police Code of Conduct, Principle 6.

holding of political rallies, campaigns and rallies in places of worship, police stations and public offices. Under the Same Sex Marriage Prohibition Act, processions and meetings by gays are expressly prohibited. The Act also makes it an offence to support a procession or meeting organised by gays. The punishment for the offence is severe: 10 years' imprisonment. The Act directly discriminates against gays on the basis of sexual orientation and gender identity, and, as such, it contravenes international and regional human rights standards and norms, including Article 2 of the African Charter on non-discrimination.¹⁴² Prior to the enactment of the law, regional and international human rights actors raised concerns about its discriminatory nature.¹⁴³ These concerns were ignored.

The [UN] Special Rapporteur [on the Rights to Freedom of Peaceful Assembly and of Association] deeply regrets the passing [in Nigeria] of the Same Sex Marriage Prohibition Act in January 2014. He is concerned that this Act – which bans gay marriage and makes it an offence to register, operate, participate in or support gay clubs, societies, organizations, processions or meetings, or to make a public display of a same-sex amorous relationship, directly or indirectly – [discriminates] against the right to peacefully assemble and associate on the basis of sexual orientation and gender identity.

[UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association; comments extracted from <http://freeassembly.net/reports/nigeria-communications/> (accessed on 12 April 2016)]

Management of public assemblies

Training and equipment

Members of the Mobile Police Force receive training in responding to public assemblies in specialised police training institutions. These specialised facilities, like the rest of police training facilities in the country, are poorly resourced. There have been efforts to integrate human rights in the training of police in the country,¹⁴⁴ although the results of these efforts are yet to be seen.

Deployment

The police have the general duty to ensure public order, including the management of public assemblies.¹⁴⁵ A paramilitary wing of the police called the Mobile Police Force serves as an anti-riot unit and frequently comes to the assistance of the regular police. The Nigerian military has historically responded to public assemblies, regardless of whether the country is under military or civilian political leadership.

Communication and negotiation

The Public Order Act does not provide for formal negotiations or consultations between organisers, police and local authorities. Where these are conducted or undertaken, they are informal and ad hoc in nature.

Dispersal of public assemblies

Use of force

The Public Order Act empowers the police to stop or disperse an unlawful assembly. An assembly is deemed unlawful if it takes place without a licence, violates the conditions of the issued licence,

¹⁴² See African Commission on Human and Peoples' Rights Resolution 275 on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity.

¹⁴³ See, for instance, Joint Allegation Letter, 13/06/2013, Case No. NGA 4/2013 and Joint Allegation Letter, 13/01/2014, NGA 1/2014, available at <http://freeassembly.net/reports/nigeria-communications/> (accessed on 12 April 2016).

¹⁴⁴ See A Iwar 'Police and human rights training in Nigeria' (2013) 2 2.

¹⁴⁵ Police Act, section 10.

or continues to take place after an order for dispersal has been given. The police routinely stop or disperse demonstrations in Nigeria. They have in some cases done so with disproportionate and excessive force, including lethal force. For this reason, it has long been said that crowd control is one of the two areas (the other being crime control) where 'one can see the disproportionate use of violence and deadly force by the police in its dealings with the public'.¹⁴⁶ For instance, it is alleged that, in its response to the Biafra protests, the police (and the military) killed dozens of people.

Military involvement in policing matters, and, in particular, in responding to demonstrations, has almost always resulted in the killing of demonstrators in Nigeria. The most recent incidents involving the military relate to demonstrations by members of the Islamic Movement in Nigeria (IMN), a Shi'ite Muslim minority group. On 25 July 2014, during that year's celebration of 'Jerusalem Day', the military opened fire and killed 30 protestors and bystanders.¹⁴⁷ Most recently, between 12 and 14 December 2015, a clash between the military and IMN protestors left hundreds of people dead. Those who died were killed either by military fire or when the military set fire to a building in which the wounded were receiving treatment.¹⁴⁸ Several institutions in the country, including the Nigerian Human Rights Commission, have launched investigations into the incident.

Arrests and detentions

Police officers in Nigeria are permitted to arrest without a warrant any person they reasonably suspect of committing an offence under the Public Order Act. This power is often used as a basis for the mass arrest and detention of demonstrators. For instance, up to 200 protestors were arrested and detained during the December 2015 protests in Zaria.¹⁴⁹ Some of them were charged with numerous offences, including unlawful assembly and disturbance of the peace. Many of those who were detained were beaten and subjected to ill-treatment.¹⁵⁰ Hundreds of protestors have also been arrested and detained in the context of the Biafra protests.¹⁵¹

Oversight and accountability

The Police Service Commission (PSC) has been assigned the functions of a civilian oversight mechanism. It is responsible both for the appointment and promotion of police officers and the investigation and punishment of police misconduct. There are other bodies, however, that exercise some oversight role in relation to the police force, such as the Police Council, the Public Complaints Commission, and the National Human Rights Commission. Due to capacity challenges, the PSC traditionally refers complaints of police misconduct back to the police.¹⁵² In recent years, the PSC has embarked on enhancing the capacity of its staff to conduct investigations into police misconduct.¹⁵³

South Africa

Legal framework

In what signifies a break from its apartheid past, the 1996 Constitution of South Africa recognises the right to freedom of assembly, while the Regulation of Gatherings Act (205 of 1993) provides the legislative framework for facilitating the exercise of the right. Section 17 of the Constitution provides

¹⁴⁶ Chukwuma Innocent 'The legal structure of the police and human rights in Nigeria' (1997) 14 41, 48.

¹⁴⁷ Amnesty International 'Nigeria: unearthing the truth: Unlawful killings and mass cover-up in Zaria' available at <https://www.amnesty.org/en/documents/afr01/3883/2016/en/%20in/>.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid., 12.

¹⁵⁰ Ibid., 30.

¹⁵¹ See 'Nigeria should respect protestors' rights' available at <https://www.hrw.org/news/2016/10/12/nigeria-should-respect-protesters-rights> (accessed on 10 November 2016).

¹⁵² CLEEN Foundation 'Civilian oversight of policing in Nigeria: Structure, functions and challenges' available at <http://www.cleen.org/Civilian%20oversight%20of%20Policing%20in%20Nigeria.pdf> (accessed on 17 September 2016).

¹⁵³ See IPOA & APCOF (2015) 48.

that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'. This right, like most rights in the South African Constitution, may be limited, but only to the extent that the limitation is permissible under the Constitution.¹⁵⁴ The Labour Relations Act of 1995 provides for the right of every employee to participate in 'protest action to promote or defend socioeconomic interests of workers'. Workers who provide 'essential' or 'maintenance' services are, however, prohibited from engaging in protest action.¹⁵⁵

The purpose of the Regulation of Gatherings Act is to set out how and where gatherings and demonstrations may be conducted. Unlike the relevant laws that precede it,¹⁵⁶ the Regulation of Gatherings Act was formulated with the aim of facilitating rather than impeding the exercise of the right to freedom of assembly. It is premised on the idea that 'every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so'.¹⁵⁷

Police response to and conduct during public protests is regulated by a number of policy and legal documents, namely:

- Police Service Standing Order (General) 262 on Crowd Management during Gatherings and Demonstrations;
- The National Instruction on Crowd Regulation and Management during Public Gatherings and Demonstrations, 2012 (2012 National Instruction);
- The Policy and Guidelines of the Ministry of Police on Policing of Public Protests, Gatherings and Major Events, 2011 (2011 Policy and Guidelines);
- Police Service Standing Order 251 on the Use of Firearms;
- The South African Police Service Act 68 of 1995; and
- The Criminal Procedure Amendment Act of 2012.

Public-order management procedures in South Africa are currently being reviewed.

Planning for assemblies

Notice period and restrictions

The Regulation of Gatherings Act requires that seven days' notice be given to local authorities and the police prior to the holding of any gathering or demonstration.¹⁵⁸ However, a shorter notice period is provided for if, for whatever reason, the organisers of a gathering are unable to comply with the seven-day notice period.¹⁵⁹ If less than 48 hours' notice is given, the local authorities have discretionary powers to prohibit such a gathering.¹⁶⁰ This restriction may easily serve as a blanket ban on spontaneous demonstrations.

The practical application of the notification requirement involves the filling in of a form by organisers of a public assembly. In terms of section 3 of the Regulation of Gatherings Act, the form requires details such as the name and contact details of the organiser and his or her deputy, the time, duration and date of the assembly, its purpose, and the names of the marshals. According to a study conducted by Freedom House, organisers of public assemblies in South Africa seem not to find the notification procedure to be burdensome.¹⁶¹ Some reports have, however, identified what they have described as a:

¹⁵⁴ Constitution of South Africa, section 36.

¹⁵⁵ Labour Relations Act, section 77(1).

¹⁵⁶ Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973 (as amended in 1992); Demonstrations in or near Court Buildings Prohibition Act 71 of 1982; Gatherings and Demonstrations at or near the Union Buildings Act 103 of 1992. All these laws (and several others) were repealed by the Regulation of Gatherings Act 205 of 1993.

¹⁵⁷ Regulation of Gatherings Act, Preamble, para 1.

¹⁵⁸ *Ibid.*, section 3(2).

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Freedom House (2015) 56.

disturbing pattern where social movements and organisations stridently opposed to government policies were isolated and targeted by local authorities through an overtly technical interpretation of the [Regulation of Public] Gatherings Act, imposition of unreasonable conditions on protest marches and outright prohibitions of gatherings based [on] flimsy and unsupported reasons.¹⁶²

Certain aspects of the procedure still fall short of international norms and standards. In particular, the requirements to indicate the purpose of the meeting and the names of the marshals are listed by the UN Special Rapporteur on the Rights to Freedom of Association and of Assembly as examples of unduly bureaucratic notification procedures.¹⁶³

Assemblies in the vicinity or immediate surrounding of court premises, Parliament buildings and the buildings hosting the President's office (the Union Buildings) are excluded from the notification procedure and are generally prohibited.¹⁶⁴ For gatherings in these places, permission must be sought from the magistrate of the district concerned, the Chief Magistrate of Cape Town or the Director-General of the Office of the President, as the case may be.¹⁶⁵ In November 2009, the Office of the President issued a letter suspending until further notice 'all marches to the Union Buildings and the Presidency'.¹⁶⁶ The stated purpose of the direction was to allow the Office of the President time to 'review guidelines relating to the granting of permission to those organizations wishing to march and submit memoranda to the Presidency'.¹⁶⁷ The directive was retracted after a non-governmental organisation challenged it in court.¹⁶⁸

Another restriction imposed on public assemblies relates to liability of organisers. Section 11 of the Regulation of Gatherings Act provides for the possibility of organisers to be held liable for any injury or loss of life or any damage to property caused during a demonstration or gathering. They may escape such liability, however, if they show that the injury, loss of life or damage to property was not reasonably foreseeable and that they had taken reasonable steps to avoid such outcomes. In 2012, the Constitutional Court of South Africa had the opportunity to determine the constitutionality of section 11 in the case of *South African Transport and Allied Workers Union and Another v Garvis*.¹⁶⁹ The appellants in this case argued that tying the liability of organisers to their ability to reasonably foresee damage during demonstrations was an irrational requirement. They further argued that this requirement had a chilling effect on the exercise of the right to freedom of assembly. Although the Constitutional Court agreed that section 11 had a chilling effect, it held that the provision was a justifiable limitation on the right to freedom of assembly. The court stated:¹⁷⁰

The purpose of the limitation imposed by section 11 is very important. It is to protect members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation. When a gathering imperils the physical integrity, the lives and the sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organizations that are responsible for setting in motion the events which gave rise to the suffered loss. And that is what this important limitation is designed to achieve.

Communication and negotiation

It is common for negotiation to take place between the organisers, the police and the local authority in instances where the planned public assembly is expected to be large.¹⁷¹ Indeed, the Regulation of Gatherings Act provides for pre-assembly consultations between the organisers, the police, and

¹⁶² International Network of Civil Liberties Organizations (2013) 46.

¹⁶³ A/HRC/23/39, para 54.

¹⁶⁴ Regulation of Gatherings Act, section 7(1).

¹⁶⁵ *Ibid.*, section 7(2).

¹⁶⁶ The letter is available at www.equaleducation.org.za/sites/default/files/Banning%20Marches%20by%20Presidency.pdf (accessed on 12 April 2016).

¹⁶⁷ *Ibid.*

¹⁶⁸ See 'EE urgent court application to march' available at www.equaleducation.org.za/article/ee-urgent-court-application-to-march (accessed on 12 April 2016).

¹⁶⁹ Case CCT 112/11, [2012] ZACC 13.

¹⁷⁰ *Ibid.*, para. 67.

¹⁷¹ Freedom House (2015)56.

local authorities. This arrangement provides a forum for communication between all the relevant stakeholders and has been lauded as a 'useful model of good practice'.¹⁷² The purpose of the negotiation is to agree on a number of issues, including where and when the assembly will take place. In instances where a negotiated arrangement has been effectively put to use, the result has been peaceful and well-facilitated public protests or assemblies. One such public protest was the COSATU march in Cape Town on 7 March 2012, which involved an estimated 8 000 to 10 000 people.¹⁷³ The manner in which the march was conducted has been described in positive terms:¹⁷⁴

The march was well organized and occurred peacefully and according to the plan agreed with the police and the City of Cape Town. Adequate numbers of police were present at the meeting point before 9:00 am, when COSATU members began to assemble. COSATU had appointed 500 marshals and had their leaders on a truck ahead of the crowd to monitor the march and give instructions as it proceeded on the predetermined route to the center of Cape Town. COSATU first handed over a petition on e-tolls to a parastatal and then handed a second petition with their demands on labor brokers to the Minister of Labour at Parliament buildings. Residents of Cape Town were notified of potential disruption through a detailed notice on the city's website.

Authorities have, however, in certain instances used, or attempted to use, the requirement for negotiation to place impermissible restrictions on public assemblies. In 2011, the chairperson of the organising committee of the protest march that took place in Durban on 3 December 2011 for the purpose of submitting a petition to the 17th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP17), described the attitude and actions of the Durban city authorities as the 'the highest level of official resistance to a protest march' he had experienced in his entire career.¹⁷⁵ Although the organisers proposed that the march take the route normally taken by other protestors – through the city centre all the way to the International Convention Centre – the Durban City authorities insisted on an alternative route that would ensure the march bypassed the city centre. According to the organisers, the alternative route would have had the effect of defeating the aims and objectives of the protest march.¹⁷⁶ Two days before the protest march, the Durban city authorities allowed the march to take its original route, but this decision only came after the organisers had gone to court seeking orders to set aside the restrictions imposed by the authorities.

Management of public assemblies

Training and equipment

The Public Order Policing Unit (POP) has the function of policing and managing assemblies in South Africa. The Unit was established in late 1994 and soon thereafter police officers attached to the Unit underwent specialised training in the policing and management of public assemblies.¹⁷⁷ From 1994 to 2006, police officers joining the POP were required to attend three weeks of specialised training. This system was abandoned in 2007, leading to the conclusion a few years later that the training of South African police officers in crowd management 'lacked content'.¹⁷⁸

A number of other factors have contributed to the poor and inadequate training of South African police officers in the management of public assemblies. Since its establishment, the POP has undergone a series of restructuring initiatives. These initiatives have had numerous adverse effects on the POP, including shifting the focus away from specialised training in public-order

¹⁷² OSCE Office for Democratic Institutions and Human Rights (2010) 91.

¹⁷³ Freedom House (2015) 57.

¹⁷⁴ Ibid.

¹⁷⁵ International Network of Civil Liberties Organizations (INCLEO) (2013) 47.

¹⁷⁶ Ibid.

¹⁷⁷ S Tait and M Marks 'You strike a gathering, you strike a rock: Current debates in the policing of public order in South Africa', (2011) 38 15, 19.

¹⁷⁸ South African Ministry of Police (2011) 16.

management.¹⁷⁹ Another factor is the lack of clarity about the model of crowd management on which the training is based. For a long period after the establishment of the POP, the training in crowd management was modelled around the experience of the police in Belgium. In 2010, the South African Police Service (SAPS) decided to abandon the Belgian model for the French model. Training based on this new model was introduced but, according to the Ministry of Police, it was 'never formalised'.¹⁸⁰ As a consequence, although the SAPS favoured the French model, it continued to use the Belgian model.¹⁸¹

Police Service Standing Order 262 provides for the kinds of weapons and equipment which are either prohibited or restricted during crowd management. In this regard, the use of 37 mm stoppers, firearms, and sharp ammunition, including birdshot and buckshot, is prohibited.¹⁸² The use of rubber bullets (shotgun batons) is restricted. Rubber bullets may be used only in 'extreme circumstances' and if 'less forceful methods prove to be ineffective'.

Although it is relatively clear, Police Standing Order 262 has not prevented the use of prohibited weapons, particularly firearms and live ammunition. Police response to the Marikana strike, for instance, involved the use of R5 automatic rifles, which are a military weapon. Given the grave consequences of using this kind of weapon, the Marikana Commission of Inquiry recommended that R5 automatic rifles should never be used in policing assemblies:

The Commission is mindful of the dangers inherent in the situation when Public Order Policing members are faced with a crowd armed with sharp weapons and where non-lethal force is ineffective. However the use of R5 or any automatic rifle is clearly untenable, not only because of the Constitutional imperatives, but also because the effects seen at Marikana are just too disturbing and devastating for South Africa even to contemplate any recurrence.¹⁸⁴

Deployment, and command and control

Although its competency and mandate are mainly related to the management of assemblies, the POP is not deployed to every case of public protest. Police officers located at a given station serve as 'first responders' to a public protest within their respective localities and only call in the POP if they cannot manage the situation. It is also common for other units, such as the National Intervention Unit and the Tactical Response Team, to be jointly deployed with the POP during public protests or assemblies. Yet, these other units ordinarily lack training and skills in managing public assemblies.¹⁸⁴

As mentioned above, several units of the SAPS are often jointly deployed in response to public assemblies. Proceeding from the premise that 'the success of effective response by the SAPS to any public protest situation is dependent on a strong line of command and control', the 2011 Policy and Guidelines issued by the Ministry of Police stipulate that, where the Metro Police are the first responders to a public protest, the SAPS must take 'full control' of the situation upon arrival. The Guidelines also stipulate that, for all public gatherings and protests, the POP is mandated to take command and control 'without interference from other policing structures'.¹⁸⁵ The 2012 National Instruction provides that, in all cases of crowd management, the most senior POP member will take operational command of POP members, while members of all other agencies and disciplines will report to the overall commander of the entire operation.¹⁸⁶

¹⁷⁹ On the negative effects of these initiatives, see S Tait & M Marks 'You strike a gathering, you strike a rock: Current debates in the policing of public order in South Africa', (2011) 38 15.

¹⁸⁰ South African Ministry of Police (2011) 16.

¹⁸¹ Ibid.

¹⁸² Standing Order (General) Order 262, para. 11(4).

¹⁸³ Marikana Commission of Inquiry, Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West province (2016) 548–549 (hereinafter 'the Marikana Report').

¹⁸⁴ S Tait & M Marks 'You strike a gathering, you strike a rock: Current debates in the policing of public order in South Africa', (2011) 38 South Africa Crime Quarterly 15, 19.

¹⁸⁵ South African Ministry of Police (2011) 18.

¹⁸⁶ National Instruction on Crowd Regulation and Management during Public Gatherings and Demonstrations, 2012, section 13(1)(g).

In practice, the joint deployment of several units of the SAPS during public-order events has often led to coordination problems and weak lines of command and control, not least because the levels of training in crowd management of the various units differs significantly. During the Marikana strike, for instance, police response involved four separate units: the POP, the National Intervention Unit, the S9 Unit, and the Tactical Response Team. There was no effective coordination between these teams during the operation. Indeed, the exact roles of these different units during a joint response to a public protest are uncertain, partly because these roles are not spelt out in Standing Order 262. The 2012 National Instruction provides for the command structure within the POP but fails to stipulate the lines of command during joint operations. Against this backdrop, the Commission of Inquiry into the Marikana incident recommended that Standing Order 262 be revised so that it clearly indicates the instances during which the Tactical Response Team may be deployed together with the POP, and who will be in overall command in such instances.¹⁸⁷

Dispersal of public assemblies

Use of force

According to the Regulation of Gatherings Act, the police are permitted to use force if and only when an assembly has ignored an order to disperse.¹⁸⁸ In conformity with continental and international norms on policing, the degree of force should be that which is necessary for dispersing the gathering and proportionate to the circumstances of the case and the object to be attained.¹⁸⁹ The law specifically stipulates that, for purposes of dispersing a gathering, the use of weapons likely to cause serious bodily injury or death is not allowed.¹⁹⁰

In practice, there have been numerous reports of police brutality and excessive use of force while responding to public protests in South Africa. The policing civilian oversight authority, officially known as the Independent Police Investigative Directorate, has recorded increasing levels of police brutality since 2006. Indeed, the death of protesters at the hands of the police has become relatively frequent in the country.¹⁹¹ Of the many recorded deaths of protesters, two prominent instances stand out.

The first instance is the violent death of Andries Tatane on 13 April 2011. He died after he was brutally beaten and shot at close range with rubber bullets by police officers who were dispersing a service-delivery protest in Ficksburg in the Free State province. The live recording of the incident ensured that the death of Andries Tatane at the hands of the police received national and international publicity. The second prominent instance is what has come to be known as the Marikana massacre. On 16 August 2014 at Lonmin Mine, which is located in Marikana, North West province, police opened fire during a wage-related strike involving mine workers. A total of 34 mine workers were fatally wounded, while many others suffered serious injury. In the aftermath of the incident, the African Commission urged the South African government to fully investigate the acts of violence perpetrated by both the police and the striking miners.¹⁹² The South African government established a Commission of Inquiry into the incident. The findings and recommendations of the Commission were published in June 2015.

A confluence of factors account for the increasingly violent nature of the police's response to protests in South Africa. To begin with, although they are the first responders to public protests, police officers from local stations are rarely properly briefed or trained. Furthermore, they ordinarily lack the appropriate equipment for policing assemblies. They are therefore more inclined to use excessive force 'very rapidly'.¹⁹³ Even where members of the POP are deployed, briefing of such

¹⁸⁷ Marikana Report, 354, 550.

¹⁸⁸ Regulation of Gatherings Act, section 9(2).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ S Tait & M Marks 'You strike a gathering, you strike a rock: Current debates in the policing of public order in South Africa', (2011) 38 .

¹⁹² See 'Press statement on the 10th anniversary of the adoption of the Robben Island Guidelines and on the deaths of miners at the Lonmin Marikana mine' available at www.achpr.org/press/2012/08/d124/ (accessed on 12 April 2016).

¹⁹³ S Tait & M Marks 'You strike a gathering, you strike a rock: Current debates in the policing of public order in South Africa', (2011) 38 19.

members has been found to be absent or improperly given. For instance, shortcomings in the planning, briefing, and decision-making permeated the entire police response to the Marikana strike.¹⁹⁴ According to the Commission of Inquiry:¹⁹⁵ 'The tragedy did not occur because the SAPS were not issue[d] with the correct equipment. It occurred because of poor planning, poor briefing and poor decision-making.'

Similarly, responding to the argument that the incident happened because of a lack of adequate communication, the Commission of Inquiry observed that, if 'attention is not given to the underlying problems of the lack of adequate planning, the lack of adequate briefing, and inadequate command and control, then tragedies of this kind are likely to occur, whatever communication system is purchased by the SAPS'.¹⁹⁶ The Commission of Inquiry also emphasised the need for proper training of all those involved in policing assemblies. It concluded that the catastrophic turn of events at Marikana was 'hardly surprising' because the entire response was under the command of individuals who had between them little to no training whatsoever in public-order policing.¹⁹⁷

The high rate of fatalities during the Marikana incident is specifically attributed to the use of lethal force when such force was neither necessary nor justified. In particular, police response to the Marikana strike involved 60 members of the Tactical Response Team, each with an R5 automatic rifle – a military weapon – that they fired randomly in the direction of the striking miners.

We have submitted above that it is reasonable to accept that when the group of strikers came around the kraal at Scene 1, moving in the direction of the TRT line, some members of the TRT line may have had the apprehension that they or their colleagues were under attack, and needed to be protected in self-defence or private defence. Whether or not their apprehension was correct, there were grounds for such an apprehension.

That, however, did not provide any justification for a fusillade of fire, by multiple members of the TRT, using high velocity weapons, some of which may have been on automatic. If shooting was necessary and justified, the justification was limited to identifying and dealing with particular members of the approaching group who posed a direct threat, and doing so in a manner which was aimed not at killing them, but at incapacitating them. Instead, what happened was a fusillade of uncoordinated shooting, some of the shots being fired at a time when it was impossible to see precisely what was happening and whether [there] was actually still a threat, and some of it plainly going well beyond the time when there was any conceivable threat of imminent harm or danger to life.

[Marikana Report, 364–365]

The deployment of the Tactical Response Team and the eventual use of R5 automatic rifles to disperse the striking miners at Marikana is a manifestation of a broader trend towards the [re] militarisation of the police force in South Africa. According to the Commission of Inquiry into the Marikana incident, the conduct of the police during the operation was 'typical of a military rather than a police response'.¹⁹⁸ It further described the police response as 'a paramilitary operation, with the aim of annihilating those who were perceived as the enemy'.¹⁹⁹ The Commission of Inquiry endorsed the recommendation contained in the 2011 National Development Plan that the police force be demilitarised.²⁰⁰

Arrests and detentions

The question of arrest and detention of protestors has come under sharp scrutiny in the context of the 'Fees Must Fall' protests which started in early 2016. It is estimated that more than 500 students

¹⁹⁴ See, for instance, Marikana Report, 345–348.

¹⁹⁵ Ibid., 358.

¹⁹⁶ Ibid., 357.

¹⁹⁷ Ibid., 366–370.

¹⁹⁸ Ibid., 375.

¹⁹⁹ Ibid., 376.

²⁰⁰ Ibid., 371–380.

have been arrested since February 2016.²⁰¹ Police response to the protests has been described as 'harsh, marked by random arrests and a heavy presence on campus'.²⁰²

Medical response

The police in South Africa have yet to entrench the practice of providing medical assistance and aftercare for participants of assemblies injured as a result of police action. The existing police protocols relating to management of public assemblies in South Africa do not require police officers to provide such medical assistance, despite the fact that members of the SAPS generally receive some training in first aid. In several cases, including the Andries Tatane and the Marikana cases, the failure of the police to render medical assistance to the injured has had grave consequences, including death. In the Marikana incident, the Commission of Inquiry found that there was no justifiable reason explaining the failure of the police to provide assistance for the injured.²⁰³

After the shootings at scene 1, no medical attention was provided to those who had been wounded for nearly an hour. The television footage shows SAPS members grouped around the dead and wounded, not providing any assistance at all to those who had been wounded for a very long period. There was similarly a substantial delay in providing medical attention to the wounded at Scene 2. Even if the delay in providing expert attention can be justified on the grounds that the scene first needed to be secured, there is no evidence that suggests that there was any lack of safety for such a long period of time.

There is a notion amongst the police that they would be potentially conflicted if they were to be asked to offer medical assistance to the injured. The Marikana Commission of Inquiry dispelled this notion. It observed that the purpose of policing is achieved when a police officer incapacitates a would-be-offender and, as such, there is no conflict if the officer proceeds to render medical assistance to such a person.²⁰⁴

Oversight and accountability

Standing Order 262 provides that a detailed record of each and every police response to public assemblies must be maintained. The record must contain details of 'actions and developments during the operation'. Other documents that should form part of the record include operational plans, execution reports, and debriefing reports.

The Independent Police Investigative Directorate (IPID) is responsible for providing civilian oversight of the police. In this regard, the IPID has a mandate to investigate deaths as a result of police action or in police custody. It also has powers to investigate complaints relating to the discharge of a firearm by a police officer. Although it has instituted several investigations into excessive use of force by the police during public assemblies, the capacity of the IPID to conduct effective investigations has been found to be wanting. For this reason, the Marikana Commission of Inquiry recommended that 'the staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively'.

At a more general level, a 2013 study of police impunity in South Africa found that, 'whilst oversight institutions receive large volumes of complaints, very few are thoroughly investigated and even less result in criminal convictions and appropriate punishments'.²⁰⁵ The study proceeded to conclude that, 'while the legislation provides for holding state officials criminally responsible for human rights violations, this happens so rarely that the current situation can only be described as one of *de facto* impunity'.²⁰⁶

²⁰¹ 'South African police have arrested more than 500 people during protests for free university education' available at <http://qz.com/813400/south-african-police-have-arrested-more-than-500-people-during-protests-for-free-university-education/> (accessed on 10 November 2016).

²⁰² *Ibid.*

²⁰³ Marikana Report, 360.

²⁰⁴ *Ibid.*, 362.

²⁰⁵ L Muntingh & G Dereymaeker (2013) 56.

²⁰⁶ *Ibid.*

Conclusion

The 2014 Report of the African Commission's Study Group on Freedom of Association and Assembly in Africa affirmed that 'the right to freedom of assembly resides in the people' and, as such, that 'a state's duty is to facilitate the conduct of peaceful assembly'.²⁰⁷ A number of African states have already taken measures to facilitate the enjoyment of the right to freedom of assembly, including by first enshrining the right in their respective national constitutions and then proceeding to enact statutory laws governing the conduct of public assemblies. As this study has shown, however, numerous challenges persist.

The focus has been on six selected countries. The experiences analysed and the challenges identified include the following:

- The existence of laws that impose impermissible restrictions on the right to freedom of assembly or those that grant wide discretionary powers to authorities to prevent, stop or severely restrict the parameters of public assemblies;
- The lack of mechanisms to foster negotiation and effective communication between all the relevant stakeholders involved during public assemblies, including the organisers, the police and local authorities;
- Misunderstanding or deliberate misapplication of notification procedures;
- Failure to provide for exceptions to the notification procedures, including for spontaneous assemblies;
- The lack of appropriate and adequate training of the police and other security agencies in human rights issues relating to the right to freedom of assembly and in modern and proper approaches to the management of public assemblies;
- Poor planning, lack of coordination, and blurred lines of command and control when different police units or multiple security agencies are jointly deployed to respond to demonstrations or protests;
- The use of excessive force, including lethal force, in the dispersal of public assemblies;
- Unclear, or the total absence of, prescribed procedures outlining when the use of force is permissible;
- Arbitrary and mass arrest and detention of demonstrators or protestors coupled with hefty penalties for organising or participating in what are deemed unlawful public assemblies;
- The lack of protection of vulnerable groups during demonstrations, including children, women, journalists, and human rights defenders;

²⁰⁷ African Commission on Human and Peoples' Rights (2014) 60.

- Failure on the part of the police and other security agencies to render medical assistance to injured demonstrators or protestors; and
- A lack of mechanisms of oversight and accountability, or the existence of inadequate mechanisms of oversight and accountability.

The right to gather in public and demonstrate peacefully is a cornerstone of democracy. It is a key aspect of the freedoms of expression and of assembly, and on several occasions, the African Commission on Human and Peoples' Rights (ACHPR) has confirmed the important role of the police in ensuring the peaceful conduct of public assemblies.

The African Policing Civilian Oversight Forum (APCOF) and the Danish Institute for Human Rights (DIHR) are providing the ACHPR with technical support with a view to developing guidelines and other tools for facilitating a rights-based approach to policing assemblies, with funding from the European Union.

This study forms part of a highly-inclusive process and provides information on how assemblies are policed in a representative group of African states – Burkina Faso, Cameroon, Egypt, Kenya, Nigeria and South Africa – and the extent to which this is done in a way that conforms to international and continental norms on the policing of assemblies.

