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## Fracking the Bedrock of Democracy: The United States Policing of Protests Violates the Right of Peaceful Assembly Under the ICCPR

Olivia Moulds

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# FRACKING THE BEDROCK OF DEMOCRACY: THE UNITED STATES POLICING OF PROTESTS VIOLATES THE RIGHT OF PEACEFUL ASSEMBLY UNDER THE ICCPR

OLIVIA MOULDS\*

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\* J.D. Candidate, May 2022, American University Washington College of Law; B.S. in Environmental Policy and Planning, May 2017, Virginia Polytechnic Institute and State University. I want to extend my sincerest gratitude to my editor, Meagan DeSimone, for her guidance and feedback throughout the writing process. I would also like to thank Professor Rebecca Hamilton for her generosity in acting as my faculty advisor. Finally, I would like to thank my partner, Matthew Batman, for his consistent support, unconditional love, and boundless encouragement. Without him, this Comment would not have come to fruition. This Comment is dedicated to my mom, who taught me to love others and hate injustice. This Comment is also dedicated to the activists, the protesters, the angry people who showed up to confront injustice, the hopeful people who showed up to create change, and everyone in between.

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## I. INTRODUCTION

At the end of May 2020, protests ignited across the United States in response to the police killing of George Floyd.<sup>1</sup> Protesters demanded justice for Mr. Floyd's death and called for police reform broadly.<sup>2</sup> While the protests were peaceful, police responded with dangerous crowd-control tactics.<sup>3</sup> Federal agents, who were eventually deployed to several major cities to help with the civil unrest, committed similar acts of violence against protesters.<sup>4</sup>

This Comment argues that the United States violated its obligations

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1. Nicole Chavez et al., *Tens of Thousands March in Largest George Floyd Protests So Far in the US*, CNN (June 6, 2020), <https://www.cnn.com/2020/06/06/us/us-george-floyd-protests-saturday/index.html>.

2. *See id.*

3. *See* Elizabeth N. Brown, *Protests Against Police Brutality Continue to Be Met with Police Brutality*, REASON (June 22, 2020, 9:31 AM), <https://reason.com/2020/06/22/protests-against-police-brutality-continue-to-be-met-with-police-brutality/>.

4. Kristofer Rios et al., *Legality of Federal Agents in Portland Scrutinized as Protests Become More Violent*, ABC NEWS (July 22, 2020), <https://abcnews.go.com/US/legality-federal-agents-portland-scrutinized-protests-violent/story?id=71908246>.

under Article 21 of the International Covenant on Civil and Political Rights (ICCPR) when federal, state, and local law enforcement restricted the right of peaceful assembly by attacking, injuring, and arresting peaceful protesters.

Part II of this Comment provides background on the summer 2020 protests, outlines U.S. law relating to the right of assembly, and examines the right of peaceful assembly under the ICCPR's Article 21. Part III analyzes the United States' actions during the protests in the context of Article 21 and determines that the United States violated its obligations. Part IV provides recommendations for preventing future violations, and Part V concludes.

## II. BACKGROUND

This section will explore the summer 2020 protests and the response by law enforcement. The section will also examine U.S. law surrounding the right of assembly. Finally, this section provides an overview of the ICCPR generally before reviewing Article 21.

### A. OVERVIEW OF THE 2020 BLACK LIVES MATTER PROTESTS

#### *i. THE 2020 BLACK LIVES MATTER MARCHES*

George Floyd, an unarmed Black man, was arrested on May 25, 2020, in Minneapolis, Minnesota, after a convenience store clerk called the police to report that Mr. Floyd used a counterfeit twenty-dollar bill.<sup>5</sup> In less than twenty minutes after the first police officer arrived, Mr. Floyd died after Officer Derek Chauvin used his knee to pin Mr. Floyd's neck to the ground.<sup>6</sup>

The next day, Minneapolis residents gathered for a memorial, and Mr. Floyd's family called on the City to hold the officers involved in Mr. Floyd's death responsible.<sup>7</sup> Later, protesters marched to the police

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5. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

6. *Id.*

7. Farah Stockman, *'They Have Lost Control': Why Minneapolis Burned*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/minneapolis-government-george-floyd.html>.

department's third precinct to call for the arrest and indictment of all the officers involved.<sup>8</sup>

While the rally organizers emphasized peaceful protest, some people separated from the main group to vandalize and loot.<sup>9</sup> The unrest continued for several days; peaceful assemblies were overshadowed by destruction often initiated by individuals not associated with the original protests.<sup>10</sup> The Minnesota National Guard eventually quelled the unrest.<sup>11</sup>

Other protests sprang up across the United States to demand justice for George Floyd.<sup>12</sup> People rallied and marched in the streets, demanding justice for Mr. Floyd and an end to police brutality generally.<sup>13</sup> These protests were identified as part of the larger social movement, Black Lives Matter (BLM).<sup>14</sup>

8. See Jasmine Aguilera & Josiah Bates, 'Knowing My Brother Is to Love My Brother.' *Family and Friends Mourn Minneapolis Police Killing Victim George Floyd*, TIME (May 27, 2020), <https://time.com/5842687/george-floyd-killed-minneapolis-police>.

9. See Angela Caputo et al., 'The Precinct is On Fire': What Happened at Minneapolis' 3rd Precinct — and What It Means, MPR NEWS (June 30, 2020), <https://www.mprnews.org/story/2020/06/30/the-precinct-is-on-fire-what-happened-at-minneapolis-3rd-precinct-and-what-it-means> (reporting how people spray-painted buildings and cars, broke windows, and stole merchandise from stores).

10. See Stockman, *supra* note 7 (describing the difference between the peaceful marchers and the looters); see also Emily Olson, *Antifa, Boogaloo Boys, White Nationalists: Which Extremists Showed Up to the US Black Lives Matter Protests?*, ABC NEWS (June 27, 2020), <https://www.abc.net.au/news/2020-06-28/antifa-boogaloo-extremists-at-us-floyd-protests/12388260> [hereinafter *Which Extremists Showed Up?*] (discussing the role of outside groups in escalating protests into riots).

11. See Kevin Doran, *How the Minnesota National Guard Connected with Protesters During the George Floyd Demonstrations*, KTSP (June 12, 2020), <https://kstp.com/news/how-the-minnesota-national-guard-connected-with-protesters-during-the-george-floyd-demonstrations/5757579/>.

12. See Chavez et al., *supra* note 1; see also Alisha Ebrahimji, *Black Lives Matter Protests Aren't Just Happening in Big Cities. They're Also in America's Small Towns*, CNN (June 6, 2020), <https://edition.cnn.com/2020/06/06/us/small-town-blm-protests-trnd/index.html>.

13. See generally Ebrahimji, *supra* note 12 (displaying pictures of the various marches, rallies, and memorials in towns and cities across the country).

14. See Jasmeet Sidhu, 'I Can't Breathe': The Refrain that Reignited a Movement, AMNESTY INT'L (June 30, 2020, 10:55 AM), <https://www.amnesty.org/en/latest/news/2020/06/i-cant-breathe-refrain-reignited-movement/#:~:text=%27I%20can%E2%80%99t%20breathe%27%3A%20The%20>

ii. UNITED STATES LAW ENFORCEMENT RESPONSE TO THE  
2020 PROTESTS

As the protests demanded defunding and restructuring police departments to curb police brutality, tensions ran high<sup>15</sup> and protests escalated to riots in some areas.<sup>16</sup> Large cities like Boston, New York, and Los Angeles saw violent protests and destruction.<sup>17</sup> However, many of the escalated situations have been attributed to provocateurs outside of the BLM movement.<sup>18</sup> In many places, police employed dangerous crowd control tactics<sup>19</sup> against participants of peaceful assemblies.<sup>20</sup> Police used tear gas, rubber bullets, and pepper spray to

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refrain%20that%20reignited%20a,Amnesty%20International%20USA%2030%20June%202020%2C%2014%3A55%20UTC.

15. See generally Brown, *supra* note 3 (providing descriptions, pictures, and videos of examples of police violence in several cities); Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across US*, THE GUARDIAN (June 6, 2020, 4:00 PM), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> (discussing how police have reacted to protests by “punching, kicking, gassing, pepper-spraying and driving vehicles at often peaceful protesters” at various events).

16. See Bradford Betz, *George Floyd Unrest: Riots, Fires, Violence Escalate in Several Major Cities*, FOX NEWS (May 31, 2020), <https://www.foxnews.com/us/george-floyd-cities-brace-riots-national-guard-troops-mobilize> (sharing pictures and videos of protests turning violent).

17. See *id.* (describing damage to private and public property in several cities); see also *George Floyd Death: Widespread Unrest as Curfews Defied Across US*, BBC NEWS (May 31, 2020), <https://www.bbc.com/news/world-us-canada-52865206> (summarizing the unrest that occurred in twelve large cities).

18. See *Which Extremists Showed Up?*, *supra* note 10 (explaining that outside groups escalated many of the riots that took place across the United States).

19. See Gabbatt, *supra* note 15 (describing the chemical agents and non-lethal munitions used by police on multiple occasions); see generally Michele Heisler et al., *Protests Against Police Violence Met by More Police Violence – A Dangerous Paradox*, JAMA NETWORK (June 11, 2020), <https://jamanetwork.com/channels/health-forum/fullarticle/2767270?resultClick=1> (explaining the danger of crowd-control weapons to physical health).

20. See Roudabesh Kishi & Sam Jones, *Demonstrations & Political Violence In America: New Data For Summer 2020*, ACLED, <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/> (last visited Oct. 25, 2020) (reporting that almost 95% of protests were peaceful); see also Grace Hauck et al., *‘A Fanciful Reality’: Trump Claims Black Lives Matter Protests Are Violent, But the Majority Are Peaceful*, USA TODAY (Oct. 24, 2020, 7:56 AM), <https://www.usatoday.com/in-depth/news/nation/2020/10/24/trump-claims-blm-protests-violent-but-majority-peaceful/3640564001/> (discussing how interviews with residents from cities

disperse crowds,<sup>21</sup> sometimes even retaliating against protesters.<sup>22</sup>

In Pittsburg, Pennsylvania, police fired tear gas and bean bags at protesters who were trying to follow an order to disperse.<sup>23</sup> The “Wall of Moms” in Portland, Oregon, were teargassed as they formed a protective barricade around BLM protesters.<sup>24</sup> In Austin, Texas, police severely injured a young man when they hit him in the head with a bean bag that was fired at a different protester.<sup>25</sup> Similarly, in Minneapolis, Minnesota, a photographer was hit with a tracer round fired by police, causing her to permanently lose sight in one eye.<sup>26</sup> On a different day in Minneapolis, police rounded up protesters to arrest them shortly after a curfew went into effect, using tear gas, flash grenades, and rubber bullets.<sup>27</sup>

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experiencing large protests revealed that the protests were mostly peaceful).

21. See Gabbatt, *supra* note 15 (describing multiple incidents of police violence against protests across the United States); see also Brown, *supra* note 3 (explaining how police attacked peaceful protesters on multiple occasions).

22. See Chad Loder (@chadloder), TWITTER (May 31, 2020, 12:40 AM), <https://twitter.com/chadloder/status/1267118313466822656> (sharing pictures and videos of officers retaliating against peaceful protesters); see also Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> (describing instances where police officers attacked protesters unprovoked and without warning).

23. See Claudia Lauer, *Pittsburgh Protesters Sue Police, Allege Excessive Force*, AOL NEWS (June 29, 2020), <https://www.aol.com/article/news/2020/06/29/pittsburgh-protesters-sue-police-allege-excessive-force/24540735/?guccounter=1>.

24. Emily Tannenbaum, *A ‘Wall of Moms’ Was Teargassed While Protecting Protesters in Portland, Oregon*, MSN (July 20, 2020), <https://www.msn.com/en-us/news/us/a-wall-of-moms-was-teargassed-while-protecting-protesters-in-portland-oregon/ar-BB16YBoE>.

25. Christina Maxouris & Raja Razek, *Austin Police Fired at a Crowd Transporting a Protester Injured by an Officer*, CNN (June 8, 2020), <https://edition.cnn.com/2020/06/07/us/austin-texas-police-bean-bag-20-year-old-injured/index.html> (explaining how the “less lethal” munition fractured the young man’s skull and caused brain damage).

26. Frances Robles, *A Reporter’s Cry on Live TV: ‘I’m Getting Shot! I’m Getting Shot!’*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/minneapolis-protests-press.html>.

27. Julia Lurie, *Weeks Later, 500 People Still Face Charges for Peacefully Protesting in Minneapolis*, MOTHER JONES (July 15, 2020), <https://www.motherjones.com/crime-justice/2020/07/weeks-later-500-people-still-face-charges-for-peacefully-protesting-in-minneapolis/>.

A young woman in Seattle, Washington, who was standing between police and protesters, was hit in the chest by a blast ball, causing her to go into cardiac arrest.<sup>28</sup> A child attending a protest in Seattle was hit in the face with pepper spray.<sup>29</sup> In New York, New York, police “kettled” protesters—a tactic in which police surround people to prevent them from moving—and then attacked them.<sup>30</sup> New York police also drove an SUV into a peaceful crowd.<sup>31</sup> A college student in Denver, Colorado, was shot in the face by a foam bullet while helping another protester, causing him to almost lose his eye.<sup>32</sup> Similar attacks also occurred in Los Angeles, California.<sup>33</sup>

Not only were many protesters injured by police,<sup>34</sup> many were also

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28. Liz Jones & Isolde Raftery, *This Woman ‘Died Three Times’ After Seattle Police Hit Her with a Blast Ball*, NPR (June 10, 2020), <https://kuow.org/stories/this-26-year-old-died-three-times-after-police-hit-her-with-a-blast-ball>.

29. See Martha Bellisle, *Seattle Police Officers Used Excessive Force at Protests, Independent Agency Report Finds*, STAR ADVERTISER (Oct. 23, 2020), <https://www.staradvertiser.com/2020/10/23/breaking-news/seattle-police-officers-used-excessive-force-at-protests-independent-agency-report-finds/> (explaining how police declared the assembly unlawful and fired pepper spray, accidentally hitting the child in the face).

30. Julie Ciccolini & Ida Sawyer, “Kettling” Protesters in the Bronx, HUM. RTS. WATCH, <https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states#> (last visited Oct. 25, 2020) (explaining that police used pepper spray and batons on the trapped protesters).

31. Rob Bennett (@rob\_bennett), TWITTER (May 30, 2020, 8:50 PM), [https://twitter.com/rob\\_bennett/status/1266895719455248385](https://twitter.com/rob_bennett/status/1266895719455248385) (sharing pictures and videos of a New York Police Department SUV ramming into a crowd of protesters).

32. Noelle Phillips, *College Student Hit in Face by 40mm Round During Police Protests Sues Denver*, AMERICAN MILITARY NEWS (Oct. 24, 2020), <https://americanmilitarynews.com/2020/10/college-student-hit-in-face-by-40mm-round-during-police-protests-sues-denver/>.

33. Accord Kevin Rector et al., *LAPD’s Use of Batons, Other Weapons Appears to Violate Rules, Significantly Injuring Protesters, Times Review Finds*, L.A. TIMES (June 11, 2020), <https://www.latimes.com/california/story/2020-06-11/lapd-violated-protocols-for-batons-and-less-lethal-bullets-injuring-many-protesters> (describing a range of injuries inflicted on protesters by police).

34. See Heisler et al., *supra* note 19 (discussing examples of the widespread injury inflicted by police on protesters across the U.S.); see generally Michael Sainato, *‘They Set Us Up’: US Police Arrested Over 10,000 Protesters, Many Non-Violent*, GUARDIAN (June 8, 2020, 06:00), <https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters> (describing the variety of weapons and munitions law enforcement used against protesters).



arrested for exercising their right to peaceful protest.<sup>35</sup> In Minneapolis, Minnesota, nearly 500 protesters were arrested for nonviolent misdemeanors.<sup>36</sup> A man in Minneapolis even reported getting arrested at 10:30 AM as he cleaned up his neighborhood.<sup>37</sup> In Los Angeles, California, most of the protesters that were arrested were taken into custody for either failing to disperse or violating curfew orders.<sup>38</sup> A protester in Los Angeles described how police stopped her two blocks from her apartment as she was returning home and arrested her for violating the curfew.<sup>39</sup>

Eventually, federal agents were deployed to several major cities to assist local law enforcement with crowd control.<sup>40</sup> National Guard troops and federal agents did not see the same success<sup>41</sup> as the

35. Alexandra Sternlicht, *Over 4,400 Arrests, 62,000 National Guard Troops Deployed: George Floyd Protests By The Numbers*, FORBES (June 2, 2020), <https://www.forbes.com/sites/alexandrasternlicht/2020/06/02/over-4400-arrests-62000-national-guard-troops-deployed-george-floyd-protests-by-the-numbers/#29d7e11d4fe1> (providing an estimate of 4,400 protesters arrested by the beginning of June).

36. Lurie, *supra* note 27 (explaining that the 493 protesters were arrested for curfew violation or unlawful assembly, both misdemeanors punishable by 90 days in jail or a \$1,000 fine).

37. Sainato, *supra* note 34 (reporting that even though there were no protests at the time the man was arrested, the police charged him with rioting).

38. Cindy Von Quednow, *More Than 92% of 2,700 Arrests in L.A. Were for 'Failure to Disperse' or Curfew Violations*, KTLA (Jun 2, 2020, 11:50 AM), <https://ktla.com/news/local-news/lapd-arrests-more-than-2700-people-amid-protests-chief/> (revealing that the Los Angeles police chief reported that about 2,500 of the 2,700 protesters were arrested for nonviolent offenses).

39. Sainato, *supra* note 34 (quoting the protester as saying that the curfew had just gone into effect).

40. See Jack Arnholz et al., *US Protests Map Shows Where Curfews and National Guard are Active*, ABC NEWS (June 4, 2020), <https://abcnews.go.com/US/locations-george-floyd-protests-curfews-national-guard-deployments/story?id=70997568> (showing a color-coded map that depicts most states as having an activated National Guard, a curfew, or both); see also Liz Turrell, *Roughly 5,000 National Guard Members Have Been Activated in 15 States and Washington, DC*, CNN (May 31, 2020, 3:39 PM), [https://edition.cnn.com/us/live-news/george-floyd-protests-05-31-20/h\\_2e4021d1dc151ed19b203295de82280a](https://edition.cnn.com/us/live-news/george-floyd-protests-05-31-20/h_2e4021d1dc151ed19b203295de82280a) (explaining which states had activated National Guard by the end of May and that more states could join that list).

41. Cf. Sergio Olmos et al., *Federal Officers Deployed in Portland Didn't Have Proper Training*, D.H.S. MEMO SAID, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/portland-protests.html> (detailing the contents of a Department of Homeland Security Memo that revealed federal agents

Minnesota National Guard did in Minneapolis.<sup>42</sup> Instead, these federal agents engaged in similarly dangerous crowd-control techniques as local police did, using chemical agents and munitions, such as tear gas and rubber bullets.<sup>43</sup>

In particular, Portland, Oregon, saw a high incidence of violence by federal agents, as they assaulted peaceful protesters on numerous occasions.<sup>44</sup> An agent in one instance even used a technique that was similar to the one that killed George Floyd.<sup>45</sup> There were also disturbing reports of unmarked federal agents in unmarked vehicles detaining protesters without cause.<sup>46</sup>

By the end of summer, law enforcement arrested hundreds of

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lacked proper training).

42. See Doran, *supra* note 11 (explaining how the troops were able to quell the unrest with few incidents).

43. See Jennifer Selva & Hollie Silverman, *A Navy Veteran Says He Was Beaten and Pepper Sprayed by Authorities While Attending His First Protest in Portland*, CNN (July 20, 2020), <https://www.cnn.com/2020/07/20/us/portland-protester-navy-veteran-beaten/index.html> (describing how federal agents pepper-sprayed and beat a peaceful protester, breaking his hand); see also Jonathan Levinson, *Federal Officers Shoot Portland Protester In Head With 'Less Lethal' Munitions*, OREGON PUB. BROAD. (July 12, 2020), <https://www.opb.org/news/article/federal-officers-portland-protester-shot-less-lethal-munitions/> (explaining that federal troops fired impact munitions at a peaceful protester, hitting him in the head and rendering him unconscious).

44. See Rios et al., *supra* note 4 (describing several incidents of federal agents assaulting peaceful protesters); see also Tim Dickinson, *How Oregon Is Pushing Back Against 'Kidnap and False Arrest' by Trump's Agents*, ROLLING STONE (July 21, 2020), <https://www.rollingstone.com/politics/politics-news/oregon-sues-trump-administration-federal-agents-arrest-protesters-1032174/> (discussing how federal agents have arrested and attacked protesters).

45. See Joshua Rhett Miller, *Federal Agent Kneels on Portland Protester's Back as She Screams 'I Can't Breathe'*, N.Y. POST (July 27, 2020), <https://nypost.com/2020/07/27/federal-agent-kneels-on-portland-protesters-back-as-she-screams-i-cant-breathe/>.

46. See Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> (noting reports of individuals driving around in camouflage and grabbing people off the streets); see also Dickinson, *supra* note 44 (adding that some protesters were taken from the streets by federal agents and subsequently jailed without being formally arrested).

peaceful protesters<sup>47</sup> and wounded dozens.<sup>48</sup> United States government officials asserted concerns about “law and order” and public safety as they justified law enforcement’s response.<sup>49</sup> However, there was broad criticism for the United States’ handling of the protests.<sup>50</sup>

### iii. UNITED STATES LAW ON THE RIGHT TO ASSEMBLY

The First Amendment of the United States Constitution provides for the right of assembly.<sup>51</sup> While the Supreme Court affirmed the right of peaceful assembly as a right in and of itself,<sup>52</sup> it is generally seen as a component of freedom of expression in modern jurisprudence, which

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47. See Sternlicht, *supra* note 35 (explaining that there were thousands of arrests for low-level offenses committed during protesters in June alone); see also Michael Sainato, *supra* note 34 (reporting how police used low level crimes, such as unlawful assembly and disorderly conduct, to arrest peaceful protesters).

48. See Heisler et al., *supra* note 19 (providing examples of the types of injuries inflicted by law enforcement on protesters). See generally Sainato, *supra* note 34 (describing the variety of weapons and munitions law enforcement used against protesters).

49. See David Smith, *Trump Announces ‘Surge’ of Federal Officers into Democratic-Run Cities*, GUARDIAN (July 22, 2020), <https://www.theguardian.com/us-news/2020/jul/22/donald-trump-federal-officers-police-surge-chicago> (reporting that then President Donald Trump announced the use of law enforcement for public safety and law and order); see also Tyler Olson, *Barr: Violence from Antifa, Other Groups ‘Is Domestic Terrorism and Will Be Treated Accordingly’*, FOX NEWS (May 31, 2020) <https://www.foxnews.com/politics/barr-george-floyd-violence-from-antifa-other-group-is-domestic-terrorism-and-will-be-treated-accordingly> (quoting Attorney General William Barr as saying, “[t]he continued violence and destruction of property endangers the lives and livelihoods of others”); Katelyn Burns, *Trump Called Governors “Weak” and Said They Need to “Dominate” George Floyd Protesters*, VOX (Jun 1, 2020, 2:50 PM), <https://www.vox.com/policy-and-politics/2020/6/1/21277062/trump-governors-dominate-george-floyd-protesters> (describing President Trump’s demand that governors regain control of the streets).

50. See Nick Cumming-Bruce, *U.N. Panel Takes Aim at Heavy-Handed Police Tactics at Protests*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/07/29/world/americas/united-nations-portland-protests.html> (highlighting the Human Rights Committee’s condemnation of the handling of the protests); see also Gabbatt, *supra* note 15 (discussing several lawsuits filed against the U.S. at the federal and state level, evidencing public disapproval).

51. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble.”).

52. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“[P]eaceful demonstrations in public places are protected by the First Amendment”).

governs how local, state, and the federal government can regulate it.<sup>53</sup> Though the Court acknowledged a commitment to open debate on public issues,<sup>54</sup> restrictions on the right of assembly are allowed,<sup>55</sup> usually in the form of permits,<sup>56</sup> which organizers apply for to protest in public spaces.<sup>57</sup>

Federally, there are few laws governing assemblies; to protest on federal land, an organizer must file an application with the National Park Service.<sup>58</sup> At the state and local level, there is a plethora of permit laws that require organizers to file applications.<sup>59</sup> These permit applications vary in requirements, such as prior notice, application fees, and to whom they must be submitted.<sup>60</sup> Finally, even when a permit is granted, the government can still regulate the time, place, and manner of the assembly.<sup>61</sup>

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53. See Tabitha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) (discussing how freedom of expression jurisprudence swallowed the right of peaceful assembly).

54. See *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

55. See *Grayned*, 408 U.S. at 115 (explaining that “reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests and are permitted”).

56. See *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (explaining that the right must be balanced with municipal authority to ensure public order).

57. See Jesse D. Proctor, *So When Did Public Order Start Trumping Fundamental Constitutional Rights? Rethinking the Modern Interpretation of the Right to Assemble and the Role Police Should Play in Protecting that Right*, 8 DREXEL L. REV. ONLINE 77, 84 (2016) (describing how permits work); see also Tabatha El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 964 (2015) [hereinafter *Defining Peaceably*] (explaining permit ordinances are used to manage how citizens use public space for assemblies).

58. See 36 C.F.R. § 2.51 (2019) (detailing when a permit is required and how it is to apply for it).

59. See Jay M. Zitter, Annotation, *State Constitutional Right of Freedom to Assembly Provisions*, 41 A.L.R. 7th § 2 (2019) (summarizing various ways states and municipalities regulate protests and demonstrations); see also *Protest Laws by State*, FINDLAW, <https://civilrights.findlaw.com/enforcing-your-civil-rights/protest-laws-by-state.html> (last updated June 8, 2020); Proctor, *supra* note 57, at 84 (citing a survey that found permits are common throughout the United States). See generally *Defining Peaceably*, *supra* note 57, at 964 (explaining how municipal ordinances on public space access work to restrict protests).

60. See generally *Protest Laws by State*, *supra* note 59 (providing examples of permit requirements from a major city in each state).

61. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293–94 (1984)

Many jurisdictions also regulate assemblies through criminal law.<sup>62</sup> While several federal codes criminalize riots and similar conduct,<sup>63</sup> there is little addressing assemblies federally because criminal law is generally reserved to the states.<sup>64</sup> At the state and local level, there are laws criminalizing unlawful assembly, failure to disperse, disorderly conduct, and curfew violation.<sup>65</sup>

Due to publication and access procedures, federal and state laws are available online.<sup>66</sup> However, federal, state, and local laws are published in different places, which can make locating them difficult.<sup>67</sup> Navigating these websites can also be difficult because there is a lack of uniformity in their structure.<sup>68</sup> Additionally, once a person locates a statute or regulation, understanding it presents another challenge; legal sources often use specialized terms, and older sources may use outdated language.<sup>69</sup> Because these laws vary by jurisdiction,<sup>70</sup> it is not

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(holding that reasonable restrictions on the time, place, and manners of assemblies are allowed).

62. See *Defining Peaceably*, *supra* note 57, at 964 (discussing how states and localities use low-level criminal law to manage assemblies).

63. See 18 U.S.C. § 231 (authorizing punishment for interfering with the work of federal official); 18 U.S.C. § 2101 (authorizing punishment for organizing, promoting, or inciting riots across state lines); 18 U.S.C. § 2383 (authorizing punishment for organizing, inciting, or participating in a rebellion against the United States).

64. See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that the Constitution grants states the power to regulate crime).

65. Cf. *Defining Peaceably*, *supra* note 57, at 965–66 (citing the Ferguson riots as an example of how police use nonviolent misdemeanors to restrict assemblies).

66. See KENT C. OLSON, *LEGAL INFORMATION: HOW TO FIND IT, HOW TO USE IT* 9–10, 243, 250–51 (1999) [hereinafter *LEGAL INFORMATION*] (describing the various ways state and federal laws are published).

67. *Compare Access to Public Laws*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/laws/access.html> (last updated Nov. 6, 2018) (explaining the three places where public laws can be found), with *LEGAL INFORMATION*, *supra* note 66, at 145–46, 250–51 (discussing how laws are published on different websites, even within the same jurisdiction, and are not always uniform in organization).

68. See *LEGAL INFORMATION*, *supra* note 66, at 145, 243 (discussing how state law databases are less uniform than federal ones).

69. See *id.* at 12–13 (discussing how understanding legal information can be difficult because legal terminology is specialized, and older laws may be written in confusing, outdated ways).

70. See Zitter, Annotation, *supra* note 59, § 2 (2019) (discussing the various regulations on protests and demonstrations used in different states); see also *Protest*

always clear to the public what the laws governing assemblies require<sup>71</sup> and what citizens' rights are under these laws.<sup>72</sup> Finally, even if people know the laws in their jurisdiction, they might not know the laws in other jurisdictions, which is relevant because protests—especially large ones centered on mainstream social issues—can attract non-residents, meaning those participants are even more unlikely to be familiar with the applicable laws on protest.<sup>73</sup>

## B. OVERVIEW OF THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS

### *i. Generally*

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 and entered into force for the original thirty-five State parties in 1976.<sup>74</sup> The United States ratified the Covenant in 1992 with reservations, none of which are relevant for the purpose of this Comment.<sup>75</sup> The Covenant contains generally applicable provisions,

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*Laws by State*, *supra* note 59 (providing examples of different permit codes from different states).

71. See LEGAL INFORMATION, *supra* note 66, at 6 (explaining that determining which laws govern is difficult in a federal system); see also *Learn about the Law*, FINDLAW, <https://public.findlaw.com/> (last visited Nov. 6, 2020) (evidencing the lack of awareness on how citizens can access their state's laws).

72. See *Know Your Rights: Protesters' Rights*, ACLU, <https://www.aclu.org/know-your-rights/protesters-rights/> (last visited Oct. 4, 2020); see also Scottie Andrew, *If You're Planning to Take Part in Protests, Know Your Rights. Read This.*, CNN (June 3, 2020), <https://www.cnn.com/2020/06/02/us/how-to-protest-safely-know-your-rights-wellness-trnd/index.html>.

73. See Evan Perez, *Isolated Cases of People Traveling for Protests, but No Indication of Trump's 'Thugs' on a Plane*, CNN (Sep. 3, 2020, 10:23 PM), <https://www.cnn.com/2020/09/03/politics/protesters-traveling-on-plane-william-barr-donald-trump/index.html> (explaining that the protests have attracted some non-residents but not on a large scale). But see Lurie, *supra* note 27 (telling the story of a 25-year-old activist who traveled from Beaumont, Texas, to Minneapolis to participate in the protests).

74. See International Covenant on Civil and Political Rights, Apr. 2, 1991, T.I.A.S. 92-908; see also U.N. Off. of the High Comm'r for Hum. Rts., *Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev. 1)*, 3 (May 2005) [hereinafter *HRC Fact Sheet*] (explaining that it took ten years for the necessary number of State parties to ratify of the ICCPR).

75. See International Covenant on Civil and Political Rights, S. Treaty Doc. No. 95-20 (1992) (explaining the United States' reservations on articles relating to

substantive individual rights, and the establishing articles for the Human Rights Committee, which is the body tasked with monitoring the implementation of the Covenant.<sup>76</sup>

The ICCPR obliges a State party to respect the rights of all individuals in its territory and under its jurisdiction.<sup>77</sup> The Covenant also provides that a State party, if it is a federal state, is responsible for all of its components.<sup>78</sup> Thus, the United States is responsible for the actions of its officials at all levels in respect to its obligations under the ICCPR.<sup>79</sup>

## ii. Article 21

Article 21 provides for the right of peaceful assembly, which protects non-violent gatherings of people, regardless of the form of the gathering.<sup>80</sup> However, the Article also outlines a limited scope for

capital punishment; racist and war propaganda; cruel, inhumane or degrading treatment; criminal sentence mitigation; and the separation of juvenile and adult offenders).

76. *HRC Fact Sheet*, *supra* note 74, at 4 (describing the structure of the ICCPR as having three major categories).

77. *See* International Covenant on Civil and Political Rights, *supra* note 74, at 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . .”).

78. *See id.* at 24 (providing in Article 50 that “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”)

79. *See* Hum. Rts. Comm., *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13, ¶4 (May 26, 2004) (reminding State parties that government branches at any level are responsible for that State party’s obligations and that an executive branch cannot skirt responsibility merely because a violation was committed by another branch); *see also HRC Fact Sheet*, *supra* note 74, at 9 (explaining that a State does not avoid its obligations simply because some domestic law is delegated to states or provinces).

80. *See* International Covenant on Civil and Political Rights, *supra* note 74, at 11 (“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of the right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”); *see also* Hum. Rts. Comm., *General Comment No. 37*, CCPR/C/GC/37, ¶ 6 (July 27, 2020) (explaining that Article 21 applies to all gatherings—inside or outside, in public or private spaces, stationary or mobile); Karl J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS* 209,

when restrictions on this right are permitted, stating:

No restriction may be placed on the exercise of the right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>81</sup>

The following section will describe how to meet the three elements necessary to comply with Article 21's requirement for a permissible restriction on the right to peaceful assembly: imposed in conformity with law; necessary in a democratic society; and, necessary in the interest of one of the permissible grounds.

### 1. *"Imposed in Conformity with Law"*

One of the requirements for a permissible restriction on Article 21's right of peaceful assembly is that a restriction must be imposed in conformity with law, meaning the restriction must be based on generally applicable domestic law, not custom or tradition.<sup>82</sup> The law must also be clear and accessible to citizens so they can conform their behavior to it.<sup>83</sup>

In *Popova v. The Russian Federation*, a woman was arrested and fined for allegedly instigating a public demonstration without prior authorization.<sup>84</sup> The restriction was imposed in conformity with law

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232 (Louis Henkin ed., 1981) (explaining that Article 21 embraces both the right to organize and participate in assemblies).

81. International Covenant on Civil and Political Rights, *supra* note 74, at 11.

82. See AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS, SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶¶ 15–16 (1985) [hereinafter SIRACUSA PRINCIPLES] (explaining that the restriction must be provided by a law of general application that is in force at the time of the restriction and is not arbitrary nor unreasonable); see also Alexandre C. Kiss, *Permissible Limitations on Rights*, in THE INTERNATIONAL BILL OF RIGHTS 290, 305 (Louis Henkin ed., 1981) (explaining that the condition of "provided by law" is a formal one that requires a general rule, normally meaning the rule must be imposed by a legislative body).

83. See SIRACUSA PRINCIPLES, *supra* note 82, at ¶ 17.

84. *Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, Decision by the Committee Concerning Communication No. 2217/2012, ¶¶ 2.1, 2.2 (May 16, 2018).



because the municipal code required an assembly organizer to get authorization before any demonstration could occur.<sup>85</sup> Conversely, in *Kim v. Uzbekistan*, a woman participated in a peaceful protest from which she dispersed quietly and voluntarily but was arrested and fined for not receiving prior authorization.<sup>86</sup> The restriction, in this case, was not imposed in conformity with law because the woman was not the organizer of the protest, so punishing her under a prior authorization law was an inadequate legal basis for the imposition of a restriction.<sup>87</sup>

## 2. “Necessary in a Democratic Society”

The second requirement of Article 21 for a permissible restriction on the right of peaceful assembly is that the restriction is necessary in a democratic society.<sup>88</sup> A restriction is necessary in a democratic society when it is directly related to a legitimate purpose,<sup>89</sup> meaning it is more than just reasonable or convenient; the restriction must be necessary in light of political freedom and individual rights.<sup>90</sup> The necessity requirement also requires the restriction to be proportionate and the least intrusive means.<sup>91</sup> A restriction is proportionate when the benefits of the restriction outweigh the harm of restricting the right.<sup>92</sup>

In *Kim v. Uzbekistan*, where a woman was arrested and fined ten months’ wages for participating in a protest,<sup>93</sup> the arrest and fine were

85. *Id.* ¶ 7.4.

86. *Kim v. Uzbekistan*, CCPR/C/122/D/2175/2012, Decision by the Committee Concerning Communication No. 2175/2012, ¶¶ 2.1, 2.2 (Hum. Rts. Comm. Aug. 29, 2018).

87. *Id.* ¶ 13.5.

88. See International Covenant on Civil and Political Rights art. 21, Apr. 2, 1991, T.I.A.S. 92-908.

89. See SIRACUSA PRINCIPLES, *supra* note 82, ¶ 10 (1985).

90. See *General Comment No. 37*, *supra* note 80, ¶ 40; see also Kiss, *supra* note 82, at 307 (discussing how a democratic society includes political freedoms and individual rights that allow people to moderate state authority).

91. See *General Comment No. 37*, *supra* note 80, ¶ 40; see also SIRACUSA PRINCIPLES, *supra* note 82, ¶ 10 (explaining that a necessary restriction must be proportionate to its aim and that restrictions should be “the least intrusive among the measures that might serve the relevant protective function”).

92. See *General Comment No. 37*, *supra* note 80, ¶ 40.

93. *Kim v. Uzbekistan*, CCPR/C/122/D/2175/2012, Decision by the Committee Concerning Communication No. 2175/2012, ¶¶ 2.1, 2.2, 2.4 (Hum. Rts. Comm. Aug. 29, 2018).

not necessary nor proportionate because the protest neither disrupted traffic, included shouting or cursing, nor involved fighting or weapons.<sup>94</sup> Further, arrest for the legitimate exercise of the right of peaceful assembly is arbitrary.<sup>95</sup> Similarly, in *Popova v. The Russian Federation*, a woman was arrested and fined for inciting a protest without prior authorization.<sup>96</sup> The arrest and fine were not necessary nor proportionate because the woman was peaceful and neither disrupted traffic nor prevented the flow of pedestrians.<sup>97</sup>

In *Gimenez v. Paraguay*, a man participated in an occupation of a hospital as part of a protest.<sup>98</sup> A court, in sentencing the man under an anti-squatting law, prohibited him from attending assemblies larger than three people for two years.<sup>99</sup> This restriction on the man's right of peaceful assembly was not proportionate because the court sought only to prevent recidivism of a nonviolent crime while severely limiting the man's exercise of his right.<sup>100</sup>

### 3. "Necessary in the Interest of Permissible Grounds"

A restriction also must be based on one of the four grounds provided in Article 21.<sup>101</sup> A restriction may only be imposed in the interest of national security or public safety, public order,<sup>102</sup> the protection of public health or morals, or the protection of the rights and freedoms of others.<sup>103</sup> "National security" refers to the protection of governmental

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94. *Id.* ¶ 13.6.

95. *Id.* ¶ 13.10; Hum. Rts. Comm., *General Comment No. 35*, CCPR/C/GC/35, ¶ 17 (Dec. 16, 2014) (explaining that detention for the exercise of Article 21 is always arbitrary).

96. *Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, Decision by the Committee Concerning Communication No. 2217/2012, ¶¶ 2.1, 2.5 (Hum. Rts. Comm. May 16, 2018).

97. *Id.* ¶ 7.6.

98. *Gimenez v. Paraguay*, CCPR/C/123/D/2372/2014, Decision by the Committee Concerning Communication No. 2372/2014, ¶ 2.4 (Hum. Rts. Comm. Sep. 26, 2018).

99. *Id.* ¶¶ 2.8, 2.10.

100. *Id.* ¶ 8.5.

101. *See* International Covenant on Civil and Political Rights art. 21, Apr. 2, 1991, T.I.A.S. 92-908.

102. *See* Kiss, *supra* note 82, at 298 (distinguishing public order and public safety as different concepts that are linked yet distinctive).

103. International Covenant on Civil and Political Rights, *supra* note 101.

independence and territorial integrity,<sup>104</sup> while “public safety” implicates concerns about people’s physical safety in the public sphere.<sup>105</sup> “Public order” refers to preventing dangerous conduct and prohibiting disruptive behavior in public areas.<sup>106</sup> Protection of public health means preventing the spread of disease or widespread injury in the population or members of the population,<sup>107</sup> while “protection of public morals” refers to fundamental principles that are collectively held by the population.<sup>108</sup> Finally, protecting the rights and freedoms of others refers to protecting people that are not participating in an assembly.<sup>109</sup>

In *Kim v. Republic of Korea*, a man was arrested at a meeting in which the South Korean government was criticized and a plea for national reunification was discussed.<sup>110</sup> The State could not justify the arrest in the interest of national security because there was no proof of a specific threat nor any actual damage to state security.<sup>111</sup> In *Alekseev*

104. See SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 29, 30 (explaining that national security cannot be invoked against local threats to law and order); see also Kiss, *supra* note 82, at 297 (concluding that “national security” refers to the protection of territorial integrity and political independence).

105. See SIRACUSA PRINCIPLES, *supra* note 82, ¶ 33 (stating that public safety refers to protecting people’s lives).

106. *Id.* ¶ 22 (explaining that public order is the sum of rules that ensure society’s functioning).

107. See Kiss, *supra* note 82, at 303 (discussing how the drafting history of the Covenant provides little definition for ‘public health’ other than a few examples, such as the prevention of epidemics, that fall under the term); see also *General Comment No. 37*, *supra* note 80, ¶ 45 (providing examples of when public health is a permissible ground, such as preventing the spread of an infectious disease or removing people from a sanitary situation that present a substantial health risk).

108. See Kiss, *supra* note 82, at 304 (explaining that ‘public morals’ refers to principles accepted by a great majority of the population); see also *General Comment No. 37*, *supra* note 80, ¶ 46 (explaining that public morals should not be derived from just one tradition). See, e.g., *Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010, Decision by the Committee Concerning Communication No. 1932/2010, ¶¶ 10.5, 10.6 (Hum. Rts. Comm. Nov. 30, 2012) (noting that the State did not show how opposition to homosexuality meets the “reasonable and objective criteria” for justifying a restriction on the ICCPR’s Article 19’s right to freedom of expression the grounds of public morals).

109. See *General Comment No. 37*, *supra* note 80, ¶ 47.

110. *Kim v. Republic of Korea*, CCPR/C/56/D/574/1994, Decision by the Committee Concerning Communication No. 574/1994, ¶ 2.1 (Hum. Rts. Comm. Mar. 14, 1994).

111. *Id.* ¶ 6.3; See *General Comment No. 37*, *supra* note 80, ¶ 42 (stating the

*v. The Russian Federation*, the author's application for a picket was denied because authorities feared that the controversial content of the picket would incite violent counter-protests and riots.<sup>112</sup> However, the restriction was not justified by public safety because there was no evidence that counter-protests or violence would have occurred.<sup>113</sup> In *Insenova v. Kazakhstan*, a woman was fined for participating in a peaceful spontaneous protest without seeking prior authorization; the State argued that the restriction was necessary to protect public order, safety, and operation of public infrastructure.<sup>114</sup> However, the restriction could not be justified on public order grounds because the protest was peaceful and did not pose an actual threat to public infrastructure.<sup>115</sup>

### III. ANALYSIS

The United States violated the rights of protesters under the ICCPR's Article 21 when it imposed restrictions that were not in conformity with law and not necessary in a democratic society for any of the permissible reasons outlined in the Article. This section will argue that the United States violated its obligations under Article 21 when law enforcement officers attacked and arrested peaceful protesters during the summer 2020 protests. It will also examine the requirements for a permissible restriction under Article 21 and explain why the United States failed to meet all of them in its response to the protests.

The United States violated Article 21 because the restrictions imposed by law enforcement were neither imposed in conformity with law nor necessary in a democratic society to further one of the

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threshold for the grounds of national security will rarely be met by peaceful assemblies).

112. *Alekseev v. The Russian Federation*, CCPR/C/109/D/1873/2009, Decision by the Committee Concerning Communication No. 1873/2009, ¶¶ 2.2, 2.3 (Hum. Rts. Comm. Nov. 5, 2013).

113. *Id.* ¶ 9.6 (finding that unspecified fear of a violent counter-demonstration or the authorities' ability to control it is not sufficient to ban a demonstration).

114. *Insenova v. Kazakhstan*, CCPR/C/126/2542/2015, Decision by the Committee Concerning Communication Nos. 2542/2015 and 2543/2015, ¶¶ 2.3, 9.8 (Hum. Rts. Comm. Aug. 7, 2019).

115. *Id.* ¶¶ 9.8, 9.10 (explaining that there was no evidence to show that the nature of the peaceful assembly, though spontaneous, was necessary).

permissible grounds.

A. "IMPOSED IN CONFORMITY WITH LAW"

Per Article 21, restrictions on the right of peaceful assembly must be imposed in conformity with law.<sup>116</sup> This requirement of legality refers to laws being general in the application as well as clear and accessible to the public.<sup>117</sup> This requirement also includes notice, i.e., providing individuals with knowledge of the law so that they can make decisions about their behavior.<sup>118</sup> However, the United States' restrictions were not imposed in conformity with law because the laws are not sufficiently clear nor accessible, and many protesters did not have notice.

In the United States, laws restricting assembly are primarily imposed on the state and local level through permits, which vary from jurisdiction to jurisdiction in how assembly organizers apply for them and what they allow assembly organizers to do.<sup>119</sup> Additionally, permits only require the assembly organizers to file applications.<sup>120</sup> Individuals only participating in assemblies cannot be punished for failing to obtain authorization under these laws; in *Kim v. Uzbekistan*, where a protester was arrested and fined for participating in an unauthorized event, the restriction was not imposed in conformity with law because she was only a participant of the protest and thus could

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116. See International Covenant on Civil and Political Rights art. 21, Apr. 2, 1991, T.I.A.S. 92-908.

117. See SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 15–17 (explaining that the legality requirement entails laws being generally applicable, reasonable, clear, and accessible); see also Kiss, *supra* note 82, at 305 (explaining that the condition of “provided by law” is a formal one that requires a general rule, normally meaning the rule must be imposed by a legislative body).

118. See *General Comment No. 37*, *supra* note 80, ¶ 39 (stressing that domestic law must be clear, accessible, and “sufficiently precise to allow members of society to decide how to regulate their conduct”).

119. See Proctor, *supra* note 57, at 84 (discussing the popularity of permits with municipal governments). See *generally Protest Laws by State*, *supra* note 59 (compiling permit application requirements from a major city in every state).

120. See Proctor, *supra* note 57, at 84 (explaining that assembly permits generally work by requiring an organizer to apply on behalf of the group holding the protest). See *generally Protest Laws by State*, *supra* note 59 (providing examples of permits laws that evidence only assembly organizers are required to apply for them).

not be punished for failing to get authorization.<sup>121</sup>

Assemblies are also frequently regulated through criminal law, which applies to all individuals at an assembly, both organizers and participants alike.<sup>122</sup> Laws on unlawful assembly, failure to disperse, disorderly conduct, and curfew violations are commonly used to control access to and use of public spaces.<sup>123</sup> Across the United States, peaceful protesters were arrested and charged with low-level crimes.<sup>124</sup> In Minneapolis, Minnesota, 493 peaceful protesters were arrested and charged with nonviolent misdemeanors.<sup>125</sup> A man in Minneapolis even reported being arrested at 10:30 AM as he cleaned up his neighborhood.<sup>126</sup> In Los Angeles, California, a large number of protesters were arrested for either failing to disperse or violating curfew orders.<sup>127</sup> One protester in Los Angeles described how police stopped her two blocks from her apartment as she was returning home and arrested her for violating the 6 PM curfew.<sup>128</sup>

Another aspect of the legality requirement is notice, which means that individuals must be provided with knowledge of the law so that

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121. See *Kim v. Uzbekistan*, CCPR/C/122/D/2175/2012, Decision by the Committee Concerning Communication No. 2175/2012, ¶¶ 2.1, 2.2, 13.5 (Hum. Rts. Comm. Aug. 29, 2018); see also *Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, Decision by the Committee Concerning Communication No. 2217/2012, ¶ 7.5 (May 16, 2018) (finding that the restriction was imposed in conformity with law because the woman who was detained and fined for an unauthorized assembly was the organizer of that assembly).

122. See *Defining Peaceably*, *supra* note 57 at 964 (discussing how states and municipalities use low-level criminal offenses to manage public areas).

123. See Tabitha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 961–62 (2014) (explaining the frequency with which police use minor crimes to control protests).

124. See Sternlicht, *supra* note 35 (“At least 4,400 have been arrested across the country for alleged offenses ranging from stealing to breaking curfew.”).

125. Lurie, *supra* note 27 (explaining that the 493 protesters were arrested for curfew violation or unlawful assembly, both misdemeanors punishable by 90 days in jail or a \$1,000 fine).

126. Sainato, *supra* note 34 (reporting that although there were no protests at the time the man was picking up fragments of rubber bullets and tear gas canisters in his neighborhood, he was nonetheless arrested for rioting).

127. Von Quednow, *supra* note 38 (discussing that the Los Angeles police chief reported about 2,500 of the 2,700 protesters arrested were taken into custody for those nonviolent offenses).

128. Sainato, *supra* note 34 (quoting the protester as saying “it had just turned 6pm”).

they may conform their behavior to it.<sup>129</sup> Therefore, once an assembly is declared unlawful or a crowd is ordered to disperse, individuals should have an opportunity to obey before being punished for violations.<sup>130</sup> Additionally, laws must be accessible and clear to the public.<sup>131</sup>

In New York, New York, police ordered a peaceful assembly to disperse but then prevented the protesters from leaving by “kettling” them.<sup>132</sup> These protesters were then pepper-sprayed and beat with batons.<sup>133</sup> Similarly, in Seattle, Washington, within minutes of declaring an assembly unlawful, police pushed protesters back, assaulting those who resisted even though the order had just been given, resulting in an eight-year-old participant accidentally being pepper-sprayed.<sup>134</sup> In Minneapolis, Minnesota, minutes after a curfew went into effect, protesters who were simply marching were rounded up for arrest by police officers and National Guard soldiers deploying tear gas, flash grenades, and rubber bullets.<sup>135</sup> A protester in Los Angeles, California, described how police stopped her two blocks from her apartment as she was returning home and arrested her for violating the 6 PM curfew even though “it had just turned 6 PM”.<sup>136</sup>

These low-level criminal laws, like permits laws, vary by jurisdiction and are not always common knowledge.<sup>137</sup> Further, these

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129. See SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 15–17 (explaining that the legality requirement entails laws being generally applicable, reasonable, clear, and accessible).

130. See *General Comment No. 37*, *supra* note 80, ¶¶ 36, 37 (explaining that States should facilitate the exercise of the right instead of “chilling” it).

131. See SIRACUSA PRINCIPLES, *supra* note 82, ¶ 17 (“Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.”).

132. Ciccolini & Sawyer, *supra* note 30 (describing how police formed walls around the protesters, forcing them to crowd together).

133. *Id.*

134. See Bellisle, *supra* note 29 (explaining how immediately after police declared the assembly unlawful, they fired pepper spray, accidentally hitting the child in the face).

135. Lurie, *supra* note 27.

136. Sainato, *supra* note 34.

137. See *Learn about the Law*, *supra* note 71 (evidencing the inaccessibility of government websites by providing more simple interface for people to access laws); see also *Know Your Rights: Protesters’ Rights*, *supra* note 72 (evidencing the lack of public knowledge surrounding legal rights to protest); Andrew, *supra* note 72 (demonstrating the lack of public awareness laws governing assemblies).

laws are not always easily accessible or clear.<sup>138</sup> Thus, restrictions imposed under these laws were not in conformity with law.<sup>139</sup>

Federal laws around assemblies are even less well-known and can be similarly challenging to access.<sup>140</sup> Thus, when federal law enforcement officers were deployed for the summer 2020 protests, protesters did not know the laws that the officers were acting under nor the impact of the laws on their individual rights.<sup>141</sup> Therefore, the restrictions on the right of peaceful assembly imposed by law enforcement's actions were not in conformity with law since the laws authorizing the restrictions are neither adequately clear nor accessible to the general public.<sup>142</sup>

### B. "NECESSARY IN A DEMOCRATIC SOCIETY"

Article 21 requires that any restriction imposed on the right of peaceful assembly be necessary in a democratic society, meaning the restriction considers political freedom and individual rights.<sup>143</sup> This

138. See LEGAL INFORMATION, *supra* note 66, at 250-51 (discussing the various sources of federal laws and state); see also *Learn about the Law*, *supra* note 71 (providing articles on legal issues and topics, evidencing that laws are not easy to find or understand for laypeople).

139. See SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 15-17 (explaining that the legality requirement means laws should be clear and accessible).

140. See LEGAL INFORMATION, *supra* note 66, at 150 (discussing the various electronic formats for different sources of federal law).

141. See Soo Kim, *Protests Near Me—List of Cities Rioting, States Where National Guard Has Been Deployed*, NEWSWEEK (June 1, 2020), <https://www.newsweek.com/protests-near-melist-cities-rioting-states-where-national-guard-has-been-deployed-1507770> (explaining that, in total, over 60,000 National Guard troops were deployed to twenty-four states and Washington, D.C.); see also Domenico Montanaro, *What Is the Insurrection Act that Trump Is Threatening to Invoke?*, NPR (June 1, 2020, 9:00 PM), <https://www.npr.org/2020/06/01/867467714/what-is-the-insurrection-act-that-trump-is-threatening-to-invoke> (evidencing that the general public is unaware of federal laws).

142. See *General Comment No. 37*, *supra* note 80, ¶¶ 28, 39 (stressing that domestic law must be clear, accessible, and "sufficiently precise to allow members of society to decide how to regulate their conduct"); see also SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 15-17 (explaining that the legality requirement means laws should be clear and accessible).

143. International Covenant on Civil and Political Rights art. 21, Apr. 2, 1991, T.I.A.S. 92-908; see also *General Comment No. 37*, *supra* note 80, ¶ 40 (emphasizing that the necessity requirement means any restrictions should be



Article also necessitates that the restriction is proportionate and the least intrusive means.<sup>144</sup> The United States' restrictions were not necessary in a democratic society.

For example, arrest is unnecessary in a democratic society and is a presumptively arbitrary restriction on the exercise of the right of peaceful assembly.<sup>145</sup> In *Popova v. The Russian Federation*, the arrest of a woman who created a spontaneous protest was not necessary because the woman was peaceful and neither disrupted traffic nor prevented the flow of pedestrians.<sup>146</sup>

Many people were arrested during summer 2020 for exercising their right of assembly, even though they were doing so peacefully.<sup>147</sup> For example, in Portland, Oregon, federal agents "kidnapped" protesters off the streets without cause or warning.<sup>148</sup> Further, since arrest is unnecessary,<sup>149</sup> then physical assault on peaceful protesters is also unnecessary because the use of batons, chemical agents, and "less-lethal munitions" is highly restrictive of the protesters' legitimate exercise of a protected right.<sup>150</sup>

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"appropriate responses to a pressing social need").

144. *General Comment No. 37*, *supra* note 80, ¶ 40 (explaining that a restriction is proportionate when it is not overly broad and the benefits of the restriction outweigh the harm of restricting the right); *see also* SIRACUSA PRINCIPLES, *supra* note 82, ¶ 10 (clarifying that the term "necessary" mean a restriction should be responding to a pressing social need and is proportionate to the pursuit of a legitimate aim).

145. *See Kim v. Uzbekistan*, CCPR/C/122/D/2175/2012, Decision by the Committee Concerning Communication No. 2175/2012, ¶ 13.10 (Hum. Rts. Comm. Aug. 29, 2018) (explaining that detention for the legitimate exercise of Article 21 is presumptively arbitrary under the ICCPR).

146. *Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, Decision by the Committee Concerning Communication No. 2217/2012, ¶ 7.6 (Hum. Rts. Comm. May 16, 2018).

147. *See Sternlicht*, *supra* note 35 (explaining that over 4,000 protesters have been arrested across the country for low-level offenses committed during protests); *see also* Sainato, *supra* note 34 (reporting how police used low-level crimes, such as unlawful assembly and disorderly conduct, to arrest peaceful protesters and describing the variety of injuries inflicted by law enforcement on protesters).

148. Levinson & Wilson, *supra* note 46 (describing multiple occasions when unidentified federal agents arrested protesters without warning).

149. *Kim*, CCPR/C/122/D/2175/2012, ¶ 13.10 (explaining that detention for the legitimate exercise of Article 21 is presumptively arbitrary under the ICCPR).

150. *See General Comment No. 35*, *supra* note 95, ¶ 17 (explaining that detention for the legitimate exercise of Article 21 is arbitrary); *see also* Heisler et al., *supra*

A restriction must also be the least intrusive means of achieving the objective.<sup>151</sup> Arrest is an impermissible restriction because it is a significantly very intrusive means of regulating peaceful protests;<sup>152</sup> accordingly, the use of chemical agents, batons, and munitions is similarly impermissible because it is also highly intrusive upon the protesters' exercise of their right.<sup>153</sup>

For example, the "Walls of Moms" in Portland, Oregon, whose goal was to protect peaceful protesters from police violence, was teargassed as they stood still.<sup>154</sup> If the police wanted to dissuade such acts, they could have peacefully and less intrusively demanded the group's dispersal and then ticketed them for refusing.<sup>155</sup> In Austin, Texas, after telling a group of protesters to disperse after curfew, police fired

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note 19 (discussing how physically dangerous law enforcement's crowd-control tactics are).

151. *General Comment No. 37*, *supra* note 80, ¶ 40 (stating that restrictions should be "the least intrusive among the measures that might serve the relevant protective function").

152. *Cf. Kim v. Uzbekistan*, CCPR/C/122/D/2175/2012, Decision by the Committee Concerning Communication No. 2175/2012, ¶ 13.10 (Hum. Rts. Comm. Aug. 29, 2018) (discussing how the deprivation of liberty for exercising a legitimate right is arbitrary without a permissible justification).

153. *See* GENEVA CENTRE FOR DEMOCRATIC CONTROL OF ARMED FORCES, INTERNATIONAL POLICE STANDARDS: GUIDEBOOK ON DEMOCRATIC POLICING ¶¶ 65 (2009) [hereinafter INTERNATIONAL POLICE STANDARDS] (discussing how policing in a democratic society means protecting the exercise of democratic activities, which means that even in the face of unlawful assemblies, police must avoid, or at least keep to a minimum, the use of force); *see also* U.N. Off. of the High Comm'r for Hum. Rts. (OHCHR), *International Human Rights Standards for Law Enforcement*, 7 (1997) [hereinafter *Standards for Law Enforcement*] (stressing that use of force should be restrained and proportional to lawful objectives); Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 4 (Sept. 7, 1990) [hereinafter *Principles on the Use of Force and Firearms*] (emphasizing that law enforcement officers should use non-violent means as much as possible before resorting to force).

154. *See* Tannenbaum, *supra* note 24.

155. *See Standards for Law Enforcement*, *supra* note 153, at 7 (stating that non-violent means should be used first); *see also Principles on the Use of Force and Firearms*, *supra* note 153, ¶ 13 (explaining that when dispersing non-violent, unlawful assemblies, police should avoid force or at least minimize it when it is needed); DEFENDING DISSENT: TOWARDS STATE PRACTICES THAT PROTECT AND PROMOTE THE RIGHT TO PROTEST 9 (2019) (emphasizing the need for de-escalation and non-escalation techniques for policing that promotes and protects the right to protest).

projectiles at them, causing a young man to suffer serious brain damage.<sup>156</sup> The peaceful individuals could have been warned rather than shot, and any violent individuals could have been justifiably detained.<sup>157</sup> In Seattle, Washington, police shot a young woman in the chest with a blast ball, causing her to go into cardiac arrest.<sup>158</sup> These methods are not the least intrusive means because they hurt people and can cause serious bodily injury and even death.<sup>159</sup>

Finally, the restrictions were not proportionate because law enforcement used violent force against protesters who, by definition, were not violent and were unarmed.<sup>160</sup> Under the proportionality principle, a restriction's benefit must outweigh the harm of imposing it.<sup>161</sup> In *Gimenez v. Paraguay*, a sentence prohibiting a man from attending assemblies larger than three people for two years was not proportionate because the court sought only to prevent recidivism of a nonviolent crime while severely limiting the man's exercise of his right.<sup>162</sup>

In Austin, where police cracked a young man's skull and caused brain damage, the need to disperse the demonstration outside of a police station did not outweigh the detrimental impact on the young man's life.<sup>163</sup> Similarly, police in New York "kettled" a peaceful

156. Maxouris & Razek, *supra* note 25.

157. See *Standards for Law Enforcement*, *supra* note 153, at 7 (emphasizing that non-violent means should be tried first and that force should be limited if used).

158. Jones & Raftery, *supra* note 28.

159. See Heisler et al., *supra* note 19 (discussing the variety of health threats associated with law enforcement's violent actions); see also *Standards for Law Enforcement*, *supra* note 153, at 7 (evidencing that force is an intrusive means by stressing that damage and injury should be minimized when law enforcement officers use force).

160. See Kishi & Jones, *supra* note 20 (reporting that almost 95% of protests were peaceful).

161. See *General Comment No. 37*, *supra* note 80, ¶ 40 (explaining that restrictions must be proportionate, which requires weighing the nature and detrimental impact of the restriction on the right against the benefit to one of the permissible grounds).

162. *Gimenez v. Paraguay*, CCPR/C/123/D/2372/2014, Decision by the Committee Communication No. 2372/2014, ¶¶ 2.8, 2.10, 8.4, 8.5 (Hum. Rts. Comm. Sep. 26, 2018).

163. See Maxouris & Razek, *supra* note 25 (discussing the long-term impact the severe injury will have on the young man); see also Austin Police Department (@Austin\_Police), TWITTER (June 1, 2020, 6:00 PM),

crowd right before a curfew went into effect and then fired pepper spray and beat individuals with batons.<sup>164</sup> There was no benefit to outweigh the harm of attacking the protesters because the police deliberately prevented the protesters from obeying the curfew.<sup>165</sup>

This type of violence was not limited to local law enforcement; federal agents perpetuated similar violent acts.<sup>166</sup> In one disturbing example, a federal officer in Portland, Oregon, used a technique on a protester similar to the one that killed George Floyd.<sup>167</sup> These methods are much more severe than the sentence in *Gimenez*; thus, they are not proportionate.<sup>168</sup> Accordingly, the restrictions imposed by state and federal law enforcement were not necessary in a democratic society.

### C. “NECESSARY IN THE INTEREST OF PERMISSIBLE GROUNDS”

Article 21 dictates that a State’s restriction must be necessary for one of the permissible grounds.<sup>169</sup> The grounds permitted are: (1) in the interest of national security or public safety; (2) in the interest of public order;<sup>170</sup> (3) for the protection of public health or morals; and (4) for the protection of the rights and freedoms of others.<sup>171</sup> The United States’ restrictions were not necessary for any of these grounds.<sup>172</sup>

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[https://twitter.com/Austin\\_Police/status/1267576866946211841](https://twitter.com/Austin_Police/status/1267576866946211841) (explaining the police’s goals in firing munitions).

164. Ciccolini & Sawyer, *supra* note 30.

165. *See id.* (explaining that police trapped protesters minutes before a curfew went into effect so that no one could obey it).

166. *Cf. Olmos et al.*, *supra* note 41 (explaining that federal agents faced criticisms for their mishandling of the unrest).

167. *See* Miller, *supra* note 45; *see also* Selva & Silverman, *supra* note 43 (describing how federal agents pepper-sprayed and beat a protester, breaking his hand).

168. *See* *Gimenez v. Paraguay*, CCPR/C/123/D/2372/2014, Decision by the Committee Concerning Communication No. 2372/2014, ¶¶ 8.2, 8.4 (Hum. Rts. Comm. Sep. 26, 2018) (finding a two-year prohibition on attending assemblies was disproportionate to the aim of preventing recidivism).

169. *See* International Covenant on Civil and Political Rights art. 21, Apr. 2, 1991, T.I.A.S. 92-908.

170. *See* Kiss, *supra* note 82, at 298 (distinguishing public order and public safety as two different concepts that are linked yet distinctive because the drafters of the ICCPR mentioned them both separately).

171. International Covenant on Civil and Political Rights, *supra* note 169, at 11.

172. *See* *Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, Decision

### *i. National Security*

The restrictions also cannot be justified on national security grounds because the protesters were not threatening government independence or territorial integrity.<sup>173</sup> Like in *Kim v. Republic of Korea*, where a man met with others just to discuss the government's failures,<sup>174</sup> the U.S. protesters did not present a specific intent to cause actual harm to the country's national security; they merely criticized police practices and demanded reform and accountability.<sup>175</sup> The goal of the summer 2020 BLM protests was police reform, not the compromise of the United States' political independence or territorial integrity.<sup>176</sup>

### *ii. Public Order*

The purpose of most permits is to maintain public order, so it could be assumed that that is the United States' intention in using permits for assemblies.<sup>177</sup> As for using criminal law to regulate protests,<sup>178</sup> the United States insisted that law enforcement's response was necessary

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by the Committee Concerning Communication No. 2217/2012, ¶ 7.3 (May 16, 2018) (explaining that the burden lies with the State to justify the restriction on one of the Article 21 grounds).

173. See *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Feb. 28, 2021) (describing the values and goals of the BLM movement in achieving equal treatment for Black people in the United States).

174. See *Kim v. Republic of Korea*, CCPR/C/56/D/574/1994, Decision by the Committee Concerning Communication No. 574/1994, ¶ 6.3 (Hum. Rts. Comm. Mar. 14, 1994) (holding that mere criticism of the government was not a sufficient threat).

175. See *About*, *supra* note 173 (explaining that BLM is a response to disproportionate violence against Black Americans). See generally Jay Caspian Kang, *Our Demand is Simple: Stop Killing Us*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> (explaining the growth of BLM to a national movement about disproportionate violence against Black Americans, particularly police violence).

176. See Sidhu, *supra* note 14 (describing the motives and accomplishments of the 2020 BLM protests, evidencing that they were not a threat to national security); see also SIRACUSA PRINCIPLES, *supra* note 82, ¶¶ 29–30 (explaining that national security applies to protecting a State's existence and cannot be invoked against local threats to law and order).

177. See Proctor, *supra* note 57, at 77, 83–84 (discussing how permits are used to regulate access to and conduct in public spaces).

178. See Sternlicht, *supra* note 35 (explaining that several thousand protesters have been arrested across the United States for low-level offenses).

to protect other citizens and maintain law and order.<sup>179</sup>

However, the restrictions on peaceful protesters cannot be justified on the ground of public order.<sup>180</sup> Law enforcement officers escalated situations on multiple occasions by attacking peaceful protesters,<sup>181</sup> which does not promote public order.<sup>182</sup> The officers thereby incited violence and chaos because peaceful protesters panicked, seeking escape and safety.<sup>183</sup>

Restricting an assembly due to fear of disorder or violence from counter-protests cannot be justified on public order grounds when there has been no disruption to public order.<sup>184</sup> Further, democracy demands the exercise of individual rights, which includes the right to express views, even potentially contentious ones.<sup>185</sup> Thus, fear of

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179. See Cumming-Bruce, *supra* note 50 (discussing how Attorney-General William Barr defended the use of force against protesters); see also Smith, *supra* note 49 (reporting that President Trump announced the use of law enforcement for public safety and law and order).

180. See *General Comment No. 37*, *supra* note 80, ¶ 44 (stating that even peaceful assemblies can be disruptive by their nature, and thus preventing disorder cannot justify unduly restricting the right of peaceful assembly).

181. See Loder, *supra* note 22 (reporting times when officers retaliated against protesters with violence); see also Dewan & Baker, *supra* note 22 (describing instances where police officers attacked protesters unprovoked and without warning).

182. See SIRACUSA PRINCIPLES, *supra* note 82, ¶ 22 (explaining that public order refers to preventing dangerous conduct and disruptive behavior in public).

183. See Loder, *supra* note 22 (reporting times when officers retaliated against protesters with violence); see also Dewan & Baker, *supra* note 22 (describing instances where police officers attacked protesters unprovoked and without warning).

184. See *Alekseev v. The Russian Federation*, CCPR/C/109/D/1873/2009, Decision by the Committee Concerning Communication No. 1873/2009, ¶ 9.6 (Hum. Rts. Comm. Nov. 5, 2013) (explain that the State's reasons for denying the picket were inadequate because they were based on an "unspecified and general risk" without evidence that a violent counter-demonstration would occur and that police would be unable to control it).

185. See *Koreshkov v. Belarus*, CCPR/C/121/D/2168/2012, Decision by the Committee Concerning Communication No. 2168/2020, ¶ 8.5 (Hum. Rts. Comm. Dec. 21, 2017) (explaining that public expression of opinions is critical to a democratic society); see also *General Comment No. 37*, *supra* note 80, ¶ 1 (discussing how the right of peaceful assembly is important because it enables individuals to exercise autonomy in solidarity with others, constitutes the foundation of participatory governance, allows individuals to present ideas and goals for public issues, and can lead to inclusive and peaceful resolutions of public concerns).

counter-protest is an insufficient reason to restrict the right of peaceful assembly.<sup>186</sup> In *Alekseev v. The Russian Federation*, a man's right of peaceful assembly was restricted when government officials denied his picket application, fearing that a controversial topic would provoke violent counter-protests and lead to violations of public order.<sup>187</sup>

Similarly, many of the U.S. summer 2020 protests were peaceful,<sup>188</sup> yet some were restricted due to the fear of anticipated disorder.<sup>189</sup> For example, in Seattle, Washington, police declared a peaceful protest unlawful, fearing unrest as tensions rose, and tried to force the protesters back, even though no violence had occurred.<sup>190</sup> One officer fired pepper spray at a rowdy participant and accidentally hit an eight-year-old participant in the face instead.<sup>191</sup> In Austin, Texas, police fired upon a group of protesters, fearing growing unrest, even though the group was merely seeking medical attention for a severely injured protester.<sup>192</sup> Thus, similar to the denial of the picket in *Alekseev*, some protests were impermissibly restricted for fear of public disorder.<sup>193</sup>

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186. See *Alekseev*, CCPR/C/109/D/1873/2009, ¶ 9.6 (explaining that a speculative and unspecified fear of a violent counter-protest or the authorities' ability to control it is insufficient for a complete denial of an individual's right to peaceful assembly).

187. *Id.*

188. Kishi & Jones, *supra* note 20 (reporting that most protests were peaceful); see Hauck et al., *supra* note 20 (discussing how interviews with multiple residents from cities experiencing large protests revealed that the protests were mostly peaceful).

189. See Scott Pham, *Police Arrested More Than 11,000 People at Protests Across The US*, BUZZFEED (June 2, 2020), <https://www.buzzfeednews.com/article/scottpham/floyd-protests-number-of-police-arrests> (explaining how many arrests were predicated on failure to disperse and violation of curfew, which are both orders given to avoid public disorder).

190. Bellisle, *supra* note 29.

191. *Id.*

192. See Maxouris & Razek, *supra* note 25 (explaining how the "less lethal" munition fractured the young man's skull and caused brain damage); see also Austin Police Department, *supra* note 163 (posting a video statement by the Police Chief explaining that officers were trying to get protesters to disperse).

193. See *Alekseev v. The Russian Federation*, CCPR/C/109/D/1873/2009, Decision by the Committee Concerning Communication No. 1873/2009, ¶ 9.6 (Hum. Rts. Comm. Nov. 5, 2013) (finding that restricting an assembly because of the sensitive nature of the topic was not a permissible use of the public order justification); see also *General Comment No. 37*, *supra* note 80, ¶¶ 18, 19 (explaining that the peacefulness of an assembly is determined by participants, not

While some protests escalated to riots, and there were cases of looting and vandalism,<sup>194</sup> that does not excuse a deviation from obligations under the ICCPR.<sup>195</sup> Not all protests escalated, and most protesters were peaceful.<sup>196</sup>

### iii. Public Health

The restriction cannot be justified on public health grounds. First, law enforcement's use of chemical agents and physical weapons against citizens is itself a threat to public health.<sup>197</sup> While it may be argued that dispersing crowds during the COVID-19 pandemic is a legitimate aim, law enforcement officers increased protesters' risk of contamination; the injuries caused by munitions and chemical agents caused people to seek medical attention from others, which could have exposed them to COVID.<sup>198</sup>

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what authorities provoke them into doing, and that isolated incidents of misconduct from participants do not condemn the entire assembly).

194. See Betz, *supra* note 16 (sharing pictures and videos of protests turning violent in several major cities across the United States); see also Stockman, *supra* note 7 (discussing how people took advantage of the protests to wreak havoc).

195. See *General Comment No. 37*, *supra* note 80, ¶¶ 18, 19 (explaining that the peacefulness of an assembly is determined by participants, not what authorities provoke them into doing, and that isolated incidents of misconduct from participants do not condemn the entire assembly).

196. Kishi & Jones, *supra* note 20 (reporting that almost 95% of protests were peaceful). Accord Hauck et al., *supra* note 20 (discussing how interviews with multiple residents from cities experiencing large protests revealed that the protests were mostly peaceful).

197. See Heisler et al., *supra* note 19 (discussing the variety of injuries that crowd-control tactics inflict).

198. See Laura Studarus, *The Volunteer Medics Protecting Protestors — And Your Rights*, SHONDALAND (Oct. 6, 2020), <https://www.shondaland.com/act/a34274473/the-volunteer-medics-protecting-protestors-and-your-rights/> (discussing the widespread use of street medics through the summer 2020 protests); see also Juliana Kim, *From Bike Blockers to Street Medics: The Anatomy of an N.Y.C. Protest*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/nyregion/street-protest-nyc.html> (describing the different ways street medics in New York City assisted during the summer 2020 protests). But see Akshay Syal, *Black Lives Matter Protests Haven't Led to COVID-19 Spikes. It May Be Due to People Staying Home*, NBC NEWS (June 24, 2020, 3:31 PM), <https://www.nbcnews.com/health/health-news/black-lives-matter-protests-haven-t-led-covid-19-spikes-n1232045> (reviewing a study from the National Bureau of Economic Research that reported there was no evidence to demonstrate that the Summer 2020 protests spiked COVID-19 outbreaks); Matt Berger, *Why the Black*



Second, causing injury on the basis of public health is antithetical to the aim of the justifying ground since protecting public health is defined as the prevention of widespread disease or injury.<sup>199</sup> Yet dozens of protesters were injured by law enforcement's use of dangerous control tactics, which included chemical agents, projectiles, and even physical assault.<sup>200</sup> For example, in Austin, Texas, a young man's skull was cracked by a bean bag fired by police.<sup>201</sup> In Denver, Colorado, and Minneapolis, Minnesota, protesters almost lost their eyes to projectiles.<sup>202</sup> In Los Angeles, California, police assaulted and injured protesters in dozens of cases.<sup>203</sup> One police officer fired a projectile at a young man at close range, leaving him with cracked bones and in need of stitches in his face.<sup>204</sup> Other protesters suffered a range of injuries from bruises made by police batons to broken bones from non-lethal munitions.<sup>205</sup> Thus, because police brutality presented its own health risk, the restrictions imposed by law enforcement officers cannot be justified on public health grounds.

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*Lives Matter Protests Didn't Contribute to the COVID-19 Surge*, HEALTHLINE (July 8, 2020), <https://www.healthline.com/health-news/black-lives-matter-protests-didnt-contribute-to-covid19-surge> (discussing how data and statistics did not provide evidence that the protests increase cases of COVID-19).

199. See SIRACUSA PRINCIPLES, *supra* note 82, ¶ 25 (explaining that public health grounds can be invoked to prevent widespread disease or injury); see also Kiss, *supra* note 82, at 303 (discussing the drafting history of the ICCPR, as well as examining other human rights instruments, to conclude that "public health" embodies spread of disease and public hygiene and sanitation).

200. See Heisler, *supra* note 19 (discussing how physically dangerous law enforcement's crowd-control tactics are). See generally Brown, *supra* note 3 (describing various injuries inflicted on protesters by police throughout the United States).

201. Maxouris & Razek, *supra* note 25 (explaining how the "less lethal" munition fractured the young man's skull and caused brain damage).

202. See Phillips, *supra* note 32 (reporting how a college student was retreating to the sidewalk when he turned to face officers, raised his fist in the air, and one officer shot him in the face with a kinetic impact projectile); see also Robles, *supra* note 26 (telling the story of a photographer who lost sight in one eye after being shot with a rubber bullet by police).

203. See Rector et al., *supra* note 33 (describing the variety of injuries reported by dozens of protesters from separate incidents with police).

204. *Id.* (explaining that the young man was left with two cracked bones in his face, a head injury, and stitches).

205. *Id.* (describing the various injuries inflicted by police).

#### iv. Public Morals

The restrictions also cannot be justified under the protection of public morals, because the protests' message was "Black Lives Matter",<sup>206</sup> which is a principle reflecting many cultural and religious beliefs that all life is valuable.<sup>207</sup> A restriction based on public morals must be implemented to protect universal human rights,<sup>208</sup> which the protests were already promoting through their message on the equal protection of Black Americans from police brutality.<sup>209</sup>

#### v. Rights and Freedoms of Others

Finally, the restrictions cannot be justified on the protection of the rights and freedoms of others. First, most of the protests were peaceful and did not pose a threat to order or safety.<sup>210</sup> Second, even though the protests occurred in public areas, the right of assembly necessarily includes the right to protest in public spaces, and so there will always be a level of disturbance to people's daily lives that must be tolerated.<sup>211</sup>

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206. See generally *About, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about/> (last visited Feb. 28, 2021); Sidhu, *supra* note 14 (describing the motives and accomplishments of the 2020 Black Lives Matter protests).

207. See Zamira Rahim & Rob Picheta, *Thousands Around the World Protest George Floyd's Death in Global Display of Solidarity*, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/world/george-floyd-global-protests-intl/index.html> (describing BLM marches and rallies in several different countries); see also *George Floyd Protests Around the World*, FOX NEWS (June 1, 2020), <https://www.foxnews.com/world/george-floyd-protests-around-the-world> (providing pictures of BLM solidarity events around the world).

208. Kiss, *supra* note 82, at 304 (explaining that "public morals" refers to principles accepted by a great majority of the population and that are reflective of rights recognized throughout internal human rights instruments).

209. See *About*, *supra* note 206 (explaining that BLM started in response to the acquittal of Trayvon Martin's killer to protest violence against Black Americans).

210. See *General Comment No. 37*, *supra* note 80, ¶ 47 ("Restrictions imposed for the protection of 'the rights and freedoms of others may relate to the protection of Covenant or other human rights of people not participating in the assembly'"); see also Kishi & Jones, *supra* note 20 (reporting that almost 95% of protests were peaceful).

211. See *General Comment No. 37*, *supra* note 80, ¶ 47 ("assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption to ordinary life, such disruptions have to be accommodated, unless they impose a disproportionate burden"); see also Insanova

Therefore, the United States violated its obligations under the ICCPR when law enforcement officers imposed restrictions on the right of peaceful assembly that were not in conformity with law and not necessary in a democratic society for any of the permissible grounds outlined in Article 21.

#### IV. RECOMMENDATIONS

Despite ratifying the ICCPR, the United States is resistant to international accountability.<sup>212</sup> However, it still remains responsible for its obligations under the ICCPR.<sup>213</sup> Thus, this section recommends three measures the United States can take to prevent future violations. Due to retroactivity issues associated with some of these recommendations,<sup>214</sup> this section focuses on solutions in light of guarantees of non-repetition as a form of reparation for the violations that occurred during the summer 2020 protests.<sup>215</sup> This section first

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v. Kazakhstan, CCPR/C/126/2542/2015, Decision by the Committee Concerning Communication Nos. 2542/2015 and 2543/2015, ¶ 9.5 (Hum. Rts. Comm. Aug. 7, 2019) (recognizing that the right to assembly includes the right to public protest); *Defining Peaceably*, *supra* note 57, at 965 (noting that in modern cities, outdoor protests always disrupt public order to a degree).

212. See Amy C. Harfield, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard--Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59, 62 (2001) (explaining that the United States is currently "the only major world power who has failed to fully ratify or adhere to any of the significant human rights instruments introduced by the U.N. or other human rights bodies"); see also Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 347-49 (2000) (explaining how, by not adhering to the implementation mechanisms of the few human rights treaties that the United States has ratified, its ratification of those treaties is virtually a facade).

213. See International Covenant on Civil and Political Rights art. 50, Apr. 2, 1991, T.I.A.S. 92-908 (stating that the provisions apply to all levels of a federal State – national, state, and local).

214. See *Retroactive Legislation: A Primer for Congress*, CONGRESSIONAL RESEARCH SERVICE (Aug. 15, 2019), <https://fas.org/sgp/crs/misc/IF11293.pdf> (explaining that U.S. legislation has limits on retroactive application); see also Hum. Rts. Comm., *General Comment No. 33*, CCPR/C/GC/33, ¶ 9 (Nov. 5, 2008) (explaining that the Committee will not review conduct that occurred before the State party acceded to the Optional Protocol if the State invokes the rule of *ratione temporis*).

215. G.A. Res. 60/147, ¶ 18 (Mar. 21, 2006) (explaining that guarantees of non-repetitions are a type of reparations for addressing harm suffered from human rights violations); see also *Ukteshbaev v. Kazakhstan*, CCPR/C/126/D/2420/2014,

recommends establishing civilian oversight boards. It next recommends abolishing the qualified immunity defense. Finally, this section recommends acceding to the Optional Protocol to the ICCPR (“Optional Protocol”).

#### A. ESTABLISHING CIVILIAN OVERSIGHT BOARDS

A civilian oversight board is an agency that monitors municipal police departments.<sup>216</sup> These boards vary in structure,<sup>217</sup> but they all primarily aim to increase accountability for misconduct, improve transparency in policing practices, and boost community relations with law enforcement.<sup>218</sup>

Civilian oversight boards generally fall into one of several models.<sup>219</sup> Civilians in the investigative model examine individual complaints of misconduct, while in the review model, they oversee internal investigations and make recommendations about department practices.<sup>220</sup> Finally, civilians in the audit model investigate systemic

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Decision by the Committee Concerning Communication No. 2175/2012, ¶ 11 (Hum. Rts. Comm. Sept. 25, 2019) (reminding State parties that they are obligated to “take all steps necessary to prevent similar violations from occurring in the future”).

216. Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability and Improve Community Relations*, SCHOLARS STRATEGY NETWORK (June 25, 2020), <https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations>.

217. *FAQs*, NAT’L ASS’N FOR CIVILIAN OVERSIGHT OF L. ENF’T, <https://www.nacole.org/faqs> (last visited Sep. 13, 2020) [hereinafter *NACOLE*] (explaining three different models civilian review boards can follow); Justina R. Cintron Perino, *Developments in Citizen Oversight of Law Enforcement*, 36 THE URB. LAW. 387, 388-89 (2004) (discussing four different forms civilian review boards take).

218. See *NACOLE*, *supra* note 217 (discussing benefits of police oversight); see also INTERNATIONAL POLICE STANDARDS, *supra* note 153, ¶¶ 83-84 (discussing the goal of police oversight institutions in police accountability); U.N. Off. of the High Comm’r for Hum. Rts. (OHCHR), *Guidance on Less-Lethal Weapons in Law Enforcement*, ¶ 3.1 (2020) [hereinafter *Guidance on Less-Lethal Weapons*] (encouraging countries to take measures to hold law enforcement accountable for use of force).

219. Compare PETER FINN, *Citizen Review of Police: Approaches and Implementation* vii (2001) (separating oversight types into four groups, dividing the review model into an appeal system and a review system), and Cintron Perino, *supra* note 217, at 388-89 (reviewing four models of civilian oversight boards), with Ajilore, *supra* note 216 (describing three models of civilian oversight boards).

220. Ajilore, *supra* note 216.

patterns of misconduct instead of individual incidents.<sup>221</sup>

The choice of model to use is individual to each locality.<sup>222</sup> However, regardless of the model a board follows, several features are needed for it to be effective.<sup>223</sup> Boards need resources, such as access to internal department information and funding to pay staff.<sup>224</sup> An effective board needs autonomy as well, which includes authority and independence.<sup>225</sup> Authority is needed so that the board can thoroughly investigate complaints and make appropriate recommendations.<sup>226</sup> Independence is important for unbiased investigations and recommendations.<sup>227</sup>

Finally, a civilian review board should be community-oriented.<sup>228</sup> Community orientation is important to establish the community's trust in the board so that residents actually use the board, target

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221. *Id.*; FINN, *supra* note 219, at 6 (categorizing this as “type 4” where civilians audit the policing process rather than individual allegations).

222. *See* NACOLE, *supra* note 217; *see also* FINN, *supra* note 219, at 1 (explaining the different systems of civilian oversight have various advantages and disadvantages that localities must decide on).

223. *See* NACOLE, *supra* note 217 (outlining eight features of an effective police oversight body: independence; adequate funding; access to all critical pieces; rapport; ample authority; transparency; ability to review police policies, training, and other systematic issues; and community and stakeholder outreach and support); *See also* INTERNATIONAL POLICE STANDARDS, *supra* note 153, ¶¶ 83–87 (discussing the various features oversight bodies need to be effective, such as independence, authority, and resources).

224. *See* Ajilore, *supra* note 216 (citing the need for adequate resources to effectively oversee departmental activities); *see also* James R. Hudson, *Police Review Boards and Police Accountability*, 36 L. & CONTEMP. PROBLEMS 515, 520 (1971) (explaining that oversight boards need staff for prompt and thorough work).

225. *See* Rudi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1045–46 (2016) (explaining the need for authority and independence for an effective oversight body).

226. *See* Cintron Perino, *supra* note 217, at 389–90 (discussing the lack of investigatory and disciplinary authority has the reason many civilian oversight boards are not more effective).

227. *See* Ajilore, *supra* note 216 (emphasizing the need for independence in effective oversight to prevent biased reviews); *see also* FINN, *supra* note 219, at 109 (discussing the pushback from law enforcement against civilian oversight); Ofer, *supra* note 225, 1046 (discussing why a board's independence is necessary).

228. *See* NACOLE, *supra* note 217 (explaining the importance of community relations so people utilize the oversight system); *see also* *Standards for Law Enforcement*, *supra* note 153, at 17 (encouraging community policing as good policing practice).

demographics get involved in the process to better reflects the community's needs, and faith in the process is maintained by both residents and police officers.<sup>229</sup>

By increasing accountability and improving transparency, instances of police misconduct and brutality will be noticed and punished.<sup>230</sup> Thus, rates of police misconduct will decrease because police will regulate their conduct to avoid consequences that they might other face.<sup>231</sup>

## B. ABOLISHING THE QUALIFIED IMMUNITY DEFENSE

The qualified immunity defense is a judicial doctrine that protects law enforcement officers from civil liability for conduct performed while in their official capacity.<sup>232</sup> While Section 1983 of the United States Code provides that law enforcement is liable for misconduct,<sup>233</sup> decades of judicial interpretation led to this doctrine that has been called an effective shield for wrongful conduct.<sup>234</sup>

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229. Ajilore, *supra* note 216 (emphasizing the need for the community to connect with the oversight body). Compare Rodney D. Green & Jillian Aldebron, *In Search of Police Accountability: Civilian Review Boards and Department of Justice Intervention*, 56 PHYLON 111, 115 (2019) (discussing the negative feelings many residents of over-policed communities feel towards law enforcement), with FINN, *supra* note 219, at 112–13 (explaining that many law enforcement officers worry that the civilian oversight process is uninformed and thus unfair).

230. See Ajilore, *supra* note 216 (recognizing that oversight boards are not a cure-all for police misconduct but that they are an effective reduction method and accountability mechanism). See generally *Guidance on Less-Lethal Weapons*, *supra* note 218, ¶ 3.1 (discussing the role of oversight bodies in accountability for unlawful use of force by law enforcement).

231. See Green & Aldebron, *supra* note 229, at 116 (explaining that civilian oversight boards are intended to increase accountability over time); see also FINN, *supra* note 219, at 12 (explaining how civilian oversight boards discourage police misconduct).

232. Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 501 (2008).

233. 42 U.S.C. § 1983 (authorizing civil lawsuits by citizens against governments official for violations of their Constitutional rights).

234. See Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (discussing the trend in case law that strongly favors government defendants against citizen plaintiffs); see also Blum, *supra* note 232, at 501 (explaining that qualified immunity protects officials from both liability and suit).

The Civil Rights Act of 1871 first gave citizens the right to sue government officials who violated their civil rights.<sup>235</sup> In response, the Supreme Court created the qualified immunity defense to protect law enforcement officers when they acted in good faith.<sup>236</sup> Years later, the Court changed the test to simply whether the officer's conduct violated clearly established law.<sup>237</sup> Thus, even malicious misconduct could avoid liability as long as the violated right was not "clearly established".<sup>238</sup>

The Supreme Court directed courts to apply a two-pronged test when analyzing a qualified immunity defense.<sup>239</sup> A court must first ask whether the plaintiff has experienced a deprivation of a constitutional right, and then determine whether that right was clearly established in law at the time of the deprivation.<sup>240</sup> This test led to a trend of demanding very fact-specific precedent in deciding that a right is clearly established.<sup>241</sup>

Eventually, courts were allowed to skip the first question, only having to determine whether the right was clearly established in law.<sup>242</sup> The result is that suits are easily dismissed before trial because the

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235. See Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, THE APPEAL (June 20, 2020), <https://theappeal.org/qualified-immunity-explained/#:~:text=The%20Supreme%20Court%20invented%20qualified%20immunity%20in%201967%2C,v.%20Fitzgerald%2C%20the%20Court%20drastically%20expanded%20the%20defense> (explaining that this was recently codified in section 1983 of the United States Code).

236. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967); see also Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 6, 13 (2017) (explaining the Court's concern that government officials would be discouraged from doing their work for fear of being held financially liable in civil suits).

237. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 818 (1982).

238. See Ali, *supra* note 235 (explaining how "bad faith" misconduct is protected by qualified immunity); see also Chung, *supra* note 234 (providing examples of malicious misconduct from which officers have avoided liability).

239. See Blum, *supra* note 232, at 505–08 (discussing how the Court mandated the "constitutional-question-first" approach for lower courts when faced with a qualified immunity defense).

240. See *id.* at 510.

241. See *id.* at 521–22; see also Ali, *supra* note 235 (explaining the consequences of a fact-specific threshold); see also Chung, *supra* note 234 (providing examples of the consequences of the modern interpretation of the qualified immunity defense).

242. See *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009) (deciding that the two-pronged test was not mandatory because it could be burdensome on litigation and waste judicial resources).

demand for fact-specific precedent makes it less likely for a plaintiff to sufficiently demonstrate that their right was clearly established.<sup>243</sup> This creates a negative feedback loop: fewer cases resolved as violations of constitutional rights means fewer rights are clearly established.<sup>244</sup>

By legislating an end to this defense, citizens whose right to assembly has been violated can hold those officials liable.<sup>245</sup> Subsequently, law enforcement will be more responsible because there will be legal consequences for their misconduct.<sup>246</sup> Thus, the United States can prevent future acts of police brutality.

### C. ACCEDING TO THE OPTIONAL PROTOCOL TO THE ICCPR

The Optional Protocol establishes a system for individuals to submit complaints alleging violations of their rights under the Covenant by a State party.<sup>247</sup> The goal of the Optional Protocol is to ensure the effective implementation of the ICCPR through the consideration of these complaints.<sup>248</sup>

The process under the Optional Protocol begins with an individual submitting a complaint to the Human Rights Committee, alleging a violation of a right protected by the ICCPR.<sup>249</sup> The State may

243. See Ali, *supra* note 235 (explaining that courts have required that plaintiffs show a past case with the same “specific context” and “particular conduct” to qualify their right as clearly established).

244. *Cf. id.* (discussing how qualified immunity also “freezes” constitutional law, leaving many rights not clearly established); Chung, *supra* note 234 (explaining the difficulty plaintiffs face in finding cases similar enough to theirs to qualify as precedent).

245. See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2019) (explaining there are significant reasons to abolish the defense and that abolishment would “shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority”).

246. See Joanna C. Schwartz & Seth Stoughton, *The Unnecessary Protection of Qualified Immunity*, VERDICT (June 26, 2020), <https://verdict.justia.com/2020/06/26/the-unnecessary-protection-of-qualified-immunity> (discussing how eliminating the defense will not affect police decision-making because other constitutional standards protect good-faith mistakes).

247. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302, 302 (Dec. 19, 1966) [hereinafter Optional Protocol].

248. *Id.*

249. *General Comment No. 33*, *supra* note 214, ¶ 6.



challenge the complaint's admissibility and merits, to which the individual may respond.<sup>250</sup> The Committee will consider the admissibility of the complaint,<sup>251</sup> and if it finds the complaint admissible, it will then decide whether the allegations disclose a violation.<sup>252</sup> When the Committee finds a violation, it suggests a remedy.<sup>253</sup>

Acceding to the Optional Protocol provides individuals a remedy when they have none under domestic law.<sup>254</sup> Because individuals can submit complaints for any alleged violations by the State party, this will work to hold the United States accountable for misconduct by any of its law enforcement officers.<sup>255</sup>

## V. CONCLUSION

"The exercise of the right to peaceful assembl[y] is the rule and restrictions must be an exception."<sup>256</sup>

The right of peaceful assembly is a fundamental right essential for a democratic society.<sup>257</sup> Despite claiming to champion democracy and human rights, the United States continued its meager human rights record<sup>258</sup> in its actions during the summer 2020 protests. Protesters had their right of peaceful assembly restricted when the United States not

250. *See id.* ¶¶ 5, §§ 7, 8.

251. *See* Optional Protocol, *supra* note 247, at 303.

252. *General Comment No. 33*, *supra* note 214, ¶ 12; Optional Protocol, *supra* note 247, at 303.

253. *General Comment No. 33*, *supra* note 214, at ¶ 12.

254. *But see* Optional Protocol, *supra* note 247, at 302 (explaining that individuals must exhaust domestic remedies before submitting a complaint).

255. *See id.* at 304 (holding federal States responsible for their obligations under the Optional Protocol at all levels).

256. Clément Nyaletsossi Voulé (Special Rapporteur), *Written Comments from the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Clément Nyaletsossi Voulé for the *General Comment No. 37 on Article 21: Right of Peaceful Assembly*, 1 (Feb. 21, 2020).

257. *See General Comment No. 37*, *supra* note 80, ¶ 1 (discussing how the right of peaceful assembly enables individual autonomy, participatory governance, the sharing of ideas and goals for public issues, and the inclusive and peaceful resolutions of public concerns).

258. *See generally* Aaron X. Fellmeth, *Leading from (a Bit) Behind: The United States and international Human Rights Law*, 40 N.C.J. INT'L L. & COM. REG. 977, 981–88 (2015) (discussing the U.S.' poor human rights history).

only allowed state and local law enforcement to commit violent acts against peaceful protesters but also allowed federal law enforcement to perpetrate similar violent acts.<sup>259</sup>

To prevent repetition in the future, the United States must take measures to improve accountability for misconduct by law enforcement officers, such as by establishing civilian oversight boards for police departments, abolishing the qualified immunity defense, and acceding to the Optional Protocol to the ICCPR. These recommendations are just a few of many solutions to protect one of the bedrocks of democracy: the right of peaceful assembly.

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259. See Michael Sainato, *supra* note 34 (describing violence by local police across the country); see also Rios et al., *supra* note 4 (recounting multiple occasions of violence against peaceful protesters by federal agents); Hauck et al., *supra* note 20 (discussing how interviews with multiple residents from cities experiencing large protests revealed that the protests were mostly peaceful).