

THE INTERNATIONAL LAW OF PROTEST

This panel was convened at 10:30 a.m. on March 31, 2023 by its moderator, Nadia Ben-Youssef of the Center for Constitutional Rights, who introduced the speakers: Karim Medhat Ennarah of EIPR; Yanilda María González of the Harvard Kennedy School; and Florian Kriener of the Max Planck Institute for Comparative Public Law and International Law.

PROTEST MOVEMENTS: ON THE FRINGES OF INTERNATIONAL LAW

*By Florian Kriener**

Throughout my introductory statement, I want to develop the thesis that protest movements sit on the fringes of international law. I want to detail that thesis through the analysis of international democracy regimes, the protections afforded to protests under international human rights law and the ways through which international law allows for protests to be repressed. To close, I will give an example how protest movements are successfully incorporated within international law regimes. However, before I delve into the analysis, I want to provide my definition of a protest movement.

Four characteristics define a protest movement. First, it has to be a movement, which means that it reunites a conglomerate of people that pursue a common goal over an extended period. Second, a protest movement must seek profound changes in their societies, including governmental change. Third, the movement pursues those goals by extra-institutional means. This presupposes that there are no established forms for the movement to achieve its goal. Accordingly, the movement tries to pursue its goals through other tactics than institutional participation. Fourth, the movement must overwhelmingly resort to non-violent tactics in achieving those goals. I think all of these characteristics can be controversial and extensively debated.¹ For our debate, however, the extra-institutional character of protest movements is most interesting.

International law struggles with the extra-institutional character of protests because both the human rights and democracy regimes have an institutional framework and an institutional orientation. All international democracy regimes center on the prohibition of unconstitutional change in government (e.g., Article 23 of the African Charter on Democracy, Elections, and Governance; Article 9 of the Charter of the Organization of American States). Only constitutionally pre-established forms for change in government conform to this norm. This is generally not the case when non-violent protest movements provoke a change in government. For example, in the cases of governmental changes through non-violent protests in Tunisia and Egypt in 2011, no provision existed in the respective constitutions that allowed for governmental change through protest or peaceful revolution. Therefore, the African Union's Peace and Security Council was confronted with a very

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¹ See FLORIAN KRIENER, *DIE STAATLICHE UNTERSTÜTZUNG GEWALTFREIER PROTESTBEWEGUNGEN IM VÖLKERRECHT* (2024, forthcoming with Nomos Publishing).

difficult task when assessing these changes in government. From the face of the law, the change in government was unconstitutional and therefore in violation of the African Charter on Democracy, Elections, Governance. However, the protests espoused the democratic values that are enshrined in the Democracy Charter. Moreover, they were directed against governments that did not allow for comprehensive public participation in public affairs, such as free and fair elections. Deeming the change in government provoked by pro-democratic protest movements undemocratic would accordingly constitute a misconception. In this line, the Peace and Security Council accepted the two mentioned changes in government by highlighting the democratic goals and the non-violent nature of the protests.² Egypt and Tunisia were not suspended despite the unconstitutional changes in government. Since then, the Peace and Security Council has tried to resolve the underlying tensions between pro-democratic protests and the prohibition of unconstitutional change in government—however unsuccessfully to date.³ The African Union's example shows that protest movements are generally not contemplated within international democracy regimes. However, there are occasionally democratic forces that produce favorable outcomes. The exact conditions are, however, still unclear and subject to discussions. Accordingly, protest movements can be considered both within and outside of the democracy framework—a fringe situation.

Similar observations apply to protest movements within international human rights law. Human rights law protects the majority of actions taken by protesters, most importantly through the right to peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights (ICCPR)), the right to association (ICCPR Article 22), the right to political participation (ICCPR Article 25), the right to strike (ICESCR Article 8(d)), and the right to freedom of expression (ICCPR Article 19). However, due to the extra-institutional character of protests there are significant caveats in the human rights protection, of which I will highlight three. The first is the longevity of human rights protection. The freedom of assembly only covers the period of one assembly, including the preparation and aftermath. However, the protection does not extend to multiple assemblies. Therefore, a protest movement that seeks to create momentum by staging multiple assemblies in a short time period is not protected. This also applies to infrastructure that is required to maintain momentum. For example, human rights law does not protect protest camps.⁴ Second, civil resistance is not covered by human rights protections. Civil resistance measures are non-violent interferences in the public spheres that impede or hamper elements of public order. They are important forms of protest and key for raising awareness and situating protest in the public realm. The European Court of Human Rights has an extended jurisprudence that deems civil resistance measures reprehensible.⁵ They are not prohibited, but can be ended or dissolved by security forces and the protesters exercising civil resistance can be subject to administrative and even criminal proceedings. Third, human rights protection is institutional. For example, ICCPR Article 25 guarantees the right to political participation in institutional forms of exercising powers. This includes the right to vote in elections and referenda. However, it does not protect extra-institutional forms of participating in public affairs. The Human Rights Council's General Comment 25 qualifies assemblies as important mechanisms to prepare for elections, but does not bestow assemblies with an autonomous

² African Union Peace and Security Council, Communiqué 257th Meeting, PSC/PR/COMM.2(CCLVII), Jan. 15, 2011; African Union Peace and Security Council, Communiqué 260th Meeting, PSC/PR/COMM.(CCLX), Feb. 16, 2011.

³ African Union Peace and Security Council, Press Statement 432nd meeting, PSC/PR/BR.(CDXXXII), Apr. 29, 2014; African Union Peace and Security Council, Press Statement 871st Meeting, PSC/PR/BR.(DCCCLXXI), Aug. 22, 2019.

⁴ Case of *Frumkin v. Russia*, App. No. 74568/12, Judgment (ECtHR Jan. 5, 2016); Case of *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia*, App. Nos. 75734/12 and 2 Others, Judgment (ECtHR Nov. 19, 2019).

⁵ From *Drieman and Others v. Norway*, App. No. 33678/96, Decision (ECtHR May 4, 2000), to Case of *Kudrevičius and Others v. Lithuania* (Grand Chamber), App. No. 37553/05, Judgment (ECtHR Oct. 15, 2015).

function with regard to shaping public affairs.⁶ So again, we can observe that protests are not conceptualized within international human rights law. Some elements are guaranteed, but essential characteristics are not. Therefore, protest movements also sit on the fringes of international human rights law.

This assessment is reinforced by the enabling function of international law in repressing protests. The freedom of assembly only extends to peaceful assemblies. If they turn violent in a comprehensive form, they do not enjoy human rights protection. This is generally an adequate standard. Violence results in the violation of other human's rights and is highly inefficient in achieving the goals pursued by protest movements. Erica Chenoweth and Maria Stephan have proven that non-violent movements are far more successful than violent movements.⁷ However, states have frequently abused the standard of violence to repress non-violent protests. The Human Rights Committee's General Comment 37 of 2020 has provided some clarity on the issue and restricted the interpretation of violence.⁸ In particular, the violence by few members of an assembly must not be attributed to the entirety of an assembly if it is not widespread. Nonetheless, many states, and most importantly autocratic states, still have an expansive conception of violence in terms of ICCPR Article 21 and therefore base their actions against overall peaceful protests on the ICCPR. Moreover, the qualification of civil resistance measures as reprehensible likewise enables repression against protests. Beyond that, international law, to date does not prevent states from assisting each other in quashing protests abroad.⁹ The last years have seen a significant increase in cooperation among authoritarian states in repressing protests that endanger their power.¹⁰ For example, in 2022 the Collective Security Treaty organization intervened in Kazakhstan to end a protest movement unfolding against the Kazakh government. This intervention was largely seen as a legal intervention by invitation.¹¹ International law, therefore, does not only afford inadequate protection to protests. It also contains a provision that either directly allows for their repression or can be abused by states for this purpose. This highlights the fringe status of protests in international law.

However, there are some examples in which these fringes were bridged. To close, I want to highlight one of the few cases. In the *López Lone Case* of 2015, the Inter-American Court of Human Rights set out a template for dealing with protests in times of democratic breakdown.¹² The case concerned protests by judges against a 2009 coup d'état in Honduras. In reaction to their acts of protest, they were suspended and some were dismissed from their positions as judges. The Honduran government argued that the protests constituted a violation of their neutrality, which they must always observe as judges. The Inter-American Court generally confirmed that judges must remain neutral with regard to political events. However, this principle only justifies the restriction of their rights to freedom of assembly and political participation under "normal"

⁶ Human Rights Committee, General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, Art. 25, CCPR/C/21/Rev.1/Add.7, June 12, 1997.

⁷ ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* (2011).

⁸ Human Rights Committee, General Comment No. 37, Art. 21: Right to Peaceful Assembly, CCPR/C/GC/37, July 27, 2020.

⁹ See Florian Kriener & Leonie Brassat, *Quashing Protests Abroad: The CSTO's Intervention in Kazakhstan* 10 J. USE OF FORCE IN INT'L L. 271 (2023).

¹⁰ Erica Chenoweth, *The Future of Nonviolent Resistance*, 31 J. DEMOCRACY 69 (2020).

¹¹ Julia Emtseva, *Collective Security Treaty Organization: Why are Russian Troops in Kazakhstan?*, EJIL:TALK! (Jan. 13, 2022), at <https://www.ejiltalk.org/collective-security-treaty-organization-why-are-russian-troops-in-kazakhstan/>; Seyfullah Hasar, *Kazakhstan: Another Intervention by Invitation That Played Out as Expected*, OPINIO JURIS (Feb. 7, 2022), at <https://opiniojuris.org/2022/02/07/kazakhstan-another-intervention-by-invitation-that-played-out-as-expected>.

¹² *Caso López Lone y otros v. Honduras*, Sentencia (IACtHR Oct. 5, 2015).

circumstances. According to the Court, these restrictions do not apply when there is a breakdown in democracy. The Court argued that the judges were exercising their “right to defend democracy” when protesting against the 2009 coup d’état. Accordingly, it found the suspension and destitution of the judges to be a violation of American Convention on Human Rights.

This case shows that there are paths to integrate protests within the human rights system. Situating protests as a central element in the defense of democracy after a breakdown is one option. However, there are other conceivable ways and I look forward to discussing these forms with my co-panelists.