The Right to Protest in the Inter-American Human Rights Framework

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Abstract

This paper examines the Inter-American standards on protests, which navigate complex social realities and a heterogenous human rights framework. The essay argues that Inter-American human rights law recognises a

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human right to protest derived from the freedoms of assembly, expression, and movement, as well as from political rights. The right to protest may further relate to other rights that are realised through protest. In addition, it explores the idea that, subject to a requirement of peacefulness, this right encompasses both a negative and a positive dimension, which may be exercised individually or collectively by all persons, including judges. Moreover, it may be exercised through diverse means and forms, such as expressive conducts, art, or the blocking of streets. The paper further analyses its guarantees, including the prohibition of content-based discrimination and the prohibition on the State from interfering with protests in a disproportionate manner, as occurs with the criminalisation of protesters or the use of force. Finally, it addresses its limits, outlining the three-part test that must be applied to assess the legitimacy of restrictions.

Keywords

Censorship – human rights – Inter-American system – right to protest

I. Introduction

Protests are significant for individuals and society.

However, international human rights instruments do not contain an explicit right to protest. Yet the main legal bodies of the Universal Human Rights System recognise various rights that usually serve as normative basis to formulate a distinctive right to protest.[1] According to the report of the Special Rapporteur of the Secretary General of the United Nations on Human Rights Defenders, presented in August 2007,[2] these include, among others, freedom of expression (Art. 19 Universal Declaration of Human Rights (UDHR) and Art. 19 International Covenant on Civil and Political Rights (ICCPR)), the right of assembly and association (Art. 20 UDHR and Arts 21 and 22 ICCPR), political rights (Art. 21 UDHR and Art. 25 ICCPR) and free movement (Art. 13 UDHR and Art. 12 ICCPR). This framework suggests a correlation between norms and social practices, underscoring a broad consensus on the importance of these rights and their specific expressions, such as the right to protest.

1 Joan Ridao Martín, La libertad de expresión y sus conflictos en el espacio público (Aranzadi 2019), 43-46.

2 Special Rapporteur of the United Nations Secretary-General on Human Rights Defenders Res 60/161 of 13 August 2007, A/62/225, para. 12.

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Like the universal human rights system, the Inter-American system has recognised that protest is grounded in rights protected by the American Convention on Human Rights (ACHR). In the 2015 decision of *López Lone et al. v. Honduras,* the Inter-American Court (IACtHR) considered acts of protests as an exercise of the rights to freedom of expression (Article 13), assembly (Article 15), association (Article 16), political participation (Article 23), and freedom of movement (Article 22.1).[3] This was echoed in the 2023 *Tavares Pereira et al. v. Brasil*[4] judgment and the 2024 *Huilcamán Paillama et al. v. Chile* judgment[5]. Drawing on the rights related to protest and the rulings of the Court, this article argues that the Inter-American human rights system recognises a right to protest. The remainder of this article therefore identifies the conventional basis, definition, scope, guarantees, and limitations of the right to protest.

II. The Right to Protest as a Human Right

1. Conceptual Foundations of the Right to Protest as a Human Right

Protests, for the purpose of this article, are defined as 'a form of individual or collective action intended to express ideas, visions or values of dissent, opposition, denunciation or vindication'.[6] Such acts may involve articulating political, social, or cultural views; voicing support for or criticism of a political party, group, or government; reacting to public policies; highlighting social grievances; or affirming the identity and exposing the marginalisation or discrimination of communities.[7] The subject matter of protest can range from political leadership to environmental concerns such as natural resource extraction,[8] or causes like animal rights.[9]

3 See IACtHR, *López Lone et al. v. Honduras*, judgment of 5 October 2015, para. 167; and IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II., Doc. 66, 31 December 2011, para. 106.

4 IACtHR, *Tavares Pereira et al. v. Brasil*, judgment of 16 November 2023, Series C No. 507, paras 89-92.

5 IACtHR, *Huilcamán Paillama et al. v. Chile*, judgment of 18 June 2024, Series C No. 527, para. 261.

6 IACHR, Office of the Special Rapporteur for Freedom of Expression, *Protest and Human Rights*, OEA/SER.L/V/II, CIDH/RELE/INF.22/19, September 2019, 5.

7 Special Rapporteur for Freedom of Expression (n. 6).

8 See Moisés Arce, *La extracción de recursos naturales y la protesta social en el Perú* (Pontificia Universidad Católica del Perú 2015), 95-121.

9 Corey Lee Wrenn, *Piecemeal Protest: Animal Rights in the Age of Nonprofits* (University of Michigan Press 2019), 46.

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The ACHR does not explicitly recognise the right to protest. Nonetheless, protest is rooted in the ACHR. Following Bernal Pulido's ideas, human rights are characterised by both formal and substantive properties. Formal properties relate to the normative basis from which a right is derived, while substantive properties concern the interests of the political person that such rights are intended to protect.[10] The notion of 'political person' reflects the relationship between the individual and political community. This conception originates in the public political culture of a democratic society, and it encompasses the scope of moral judgments expressed by individuals.[11]

While formal properties of a fundamental right consist in their recognition in the Constitution or in constitutional precedents,[12] formal properties of human rights are wider. They are defined by their inclusion in international human rights instruments – a condition that is both necessary and sufficient – or by their recognition in the precedents of conventional jurisdictional or quasi-jurisdictional bodies, such as the Inter-American Court.[13] They may also be recognised in legal norms of varying hierarchical levels, or they can consist in claims, that is, rights not yet codified in any legal instrument, but which emerge from social demands grounded in the same values that underpin recognised human rights.[14]

Protest meets the formal properties required to be classified as a human right. First, it is commonly derived from a set of rights explicitly recognised in core international human rights instruments, including the UDHR, ICCPR, and ACHR[15] (freedom of expression, peaceful assembly and association, political participation, and free movement). Second, the right to protest has been affirmed in the jurisprudence of adjudicative bodies of the Inter-American human rights system. Most importantly, the *López Lone* and *Huilcamán Paillama* judgments found a violation of the ACHR resulting from restrictions on protesters.[16]

10 See Carlos Bernal Pulido, 'La metafísica de los derechos humanos', Revista Derecho del Estado 25 (2010), 117-133 (123-133); Carlos Bernal Pulido, 'Derechos fundamentales' in: Jorge Luis Fabra Zamora and Verónica Rodríguez Blanco (eds), *Enciclopedia de filosofía y teoría del Derecho. Volumen 2* (Universidad Nacional Autónoma de México 2015), 1571-1594 (1574-1591).

11 See Hugo O. Seleme, *Neutralidad y justicia. En torno al liberalismo político de John Rawls* (Marcial Pons 2004), 292-299. This author develops his argument based on John Rawls's *A Theory of Justice* and *Kantian Constructivism in Moral Theory*.

12 Bernal Pulido, 'Derechos fundamentales' (n. 10), 1574-1583.

13 Bernal Pulido, 'La metafísica' (n. 10), 123-133. Also, see Robert Alexy, '¿Derechos humanos sin metafísica?', Doxa. Cuadernos de Filosofía del Derecho 30 (2007), 237-248 (238-239).

14 Pulido, 'La metafísica' (n. 10), 124-127.

15 See section I. Likewise, see Articles 13, 19, 20 and 21 UDHR; Articles 12, 19, 21, 22 and 25 ICCPR; and Articles 13, 15, 16, 22.1 and 23 ACHR.

16 See IACtHR, *López Lone* (n. 3) and *Huilcamán Paillama* (n. 5).

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In *López Lone*, a group of judges were dismissed after participating in a protest held in defence of democracy and the rule of law following the coup d'état in Honduras in June 2009. The Inter-American Court addressed the issue of protests and stated that, 'depending on the circumstances', protesting can qualify as an exercise of political rights, freedom of expression, the right of assembly, and freedom of association.[17]

In *Huilcamán Paillama*, 140 individuals of the Mapuche ethnic group were convicted for various offenses for participating in a protest that involved the occupation of 11 properties neighbouring their communities. The aim of the protest was to demand the restitution of the Mapuche ancestral lands, and to draw the attention of the Senate, which was debating an Indigenous Law bill. In this decision, the Court affirmed that the joint exercise of the rights to assembly, freedom of thought and expression, and freedom of association 'may take different forms, including demonstrations and protests'.[18] Also, the Inter-American Commission on Human Rights (IACHR), even before the Court's jurisprudence in the *López Lone* and *Huilcamán Paillama* rulings, has said:

> '[…] public protest is one of the forms of exercising the right of assembly and freedom of expression that is of fundamental social interest to guarantee the proper functioning of the democratic system. Therefore, expressions against government projects or policies, far from being a provocation to violence, are typical of any pluralist democracy.'[19]

The way the IIACtHR and the IACHR treat protest – as a form of exercising the aforementioned rights – satisfies the formal properties of a human right. Protests fall into the category of implicit fundamental norms or 'derived rights' that do not explicitly attach to the text of a human rights treaty, but derives from the exercise of explicitly protected rights. The explicit rights that embody the protected behaviour are the basic premise from which the implicit right is derived.[20] This is precisely what occurs when the rights expressly recognised in the ACHR are invoked to infer an implicit form of exercise with its own autonomy (protest). Protest has its own autonomy vis-à-vis the other rights as none of those rights in isolation account for the full scope of protest (for instance, a gathering without expression, such as football matches or religious services).

In line with the jurisprudence of the IACtHR and the IACHR, several constitutional courts in Latin America have likewise recognised the existence

17 IACtHR, *López Lone* (n. 3), para. 160.

18 IACtHR, *Huilcamán Paillama* (n. 5), para. 250.

19 IACHR, *Second Report* (n. 3), para. 106.

20 Riccardo Guastini, *Teoría analítica del Derecho* (Zela 2017), 123-126; Giorgio Pino, *Derechos e interpretación* (Universidad Externado de Colombia 2014), 210-213.

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of a right to peaceful protest[21] as a corollary of the aforementioned rights.[22] This underlines the formal recognition of a right to protest in the Inter-American system.

Turning to the substantive properties of a human right, Bernal Pulido divides these in terms of a political person's fundamental interests: liberal interests (protection of freedom), democratic interests (securing autonomy) and the satisfaction of basic needs (the vital minimum).[23] If a right meets the formal properties and, in addition, at least one of these material properties, it may be classified as a human right which enjoys an elevated level of protection.

The act of protesting affects all three interests. Regarding liberal interests, protests are a way through which people can participate in social cooperation and pursue goals that reflect their own conception of what is good or worthwhile.[24] Concerning democratic interests,[25] protests are important for developing the moral agency of individuals, as they allow people to self-affirm their identity.[26] Furthermore, due to its communicative function, protests promote certain decisions that reflect autonomy to be based on and informed by different possible worldviews. Finally, protests can also be a means to vindicate ideas or claims related to basic needs.[27] Therefore, protests align with all three categories available for a human right.[28]

2. The Contributions of the IACtHR

The IACtHR's recognition of a right to protest connects its protections to those of the rights from which it emanates. These pre-established standards inform the construction and interpretation of the right to protest and therefore merit further examination.

Based on *López Lone* and *Huilcamán Paillama*, the freedom of expression forms the core of the right to protest, as protests inherently involve a

21 Constitutional Court of Ecuador, judgment of 7 October 2019, No. 5-19-EE, para. 52.

22 Constitutional Court of Colombia, judgment of 7 March 2018, No. C-009/18.

23 Bernal Pulido, 'La metafísica' (n. 10), 127-133 and Bernal Pulido, 'Derechos fundamentales' (n. 10), 1584-1592.

24 Bernal Pulido, 'Derechos fundamentales' (n. 10), 1588.

25 Bernal Pulido, 'Derechos fundamentales' (n. 10), 1590.

26 John Charney Berdichewky, 'Libertad de expresión y pluralismo informativo: compatibilidades y tensiones en el contexto de la televisión', Revista Derecho del Estado 42 (2019), 117-148 (132).

27 IACtHR, *Huilcamán Paillama* (n. 5), para. 251 ('peaceful protests and demonstrations play a vital role in a democratic system, as they involve the mobilization of individuals to assert their claims and demands in a manner that can potentially influence the formulation or transformation of state action').

28 IACtHR, *Tavares Pereira* (n. 4), paras 98-99 ('the right to peaceful assembly does not include the right to act violently in the course of its exercise, nor to commit crimes').

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communicative or expressive act, while not necessarily entailing behaviour protected under other rights. In the first decision, the Court affirmed that 'the possibility of demonstrating publicly and peacefully is one of the most accessible ways to exercise the right to freedom of expression, through which the protection of other rights can be claimed',[29] and only after this passage, the Court mentioned freedom of assembly. In *Huilcamán Paillama*, the Court analysed the case on the basis of the right to freedom of assembly. This was, however, due to the specific form that those protests took, and still it was a central and overarching theme throughout the judgment that protesters sought to express their discontent.[30]

As this case illustrates, and as the IACtHR expressly stated in *López Lone*, protest may also be associated with other rights depending on the circumstances[31]: freedom of assembly, when it involves a group of people gathered in a particular place (however, some protests are individual and solitary in nature, such as a single person holding a sign or placard expressing a demand); political rights, when a protest pertains to political matters; or even environmental rights when it concerns environmental issues. Similarly, it may relate to indigenous people's rights, as illustrated in protests comparable to those examined in *Huilcamán Paillama*.[32] While the right to protest is in issue in each case, it is important to note that the application of any of these rights is but a reflection of the specific facts of the case, rather than a reflection of any necessary requirement of the right to protest as such under the ACHR.

Freedom of expression is enshrined in Article 13 ACHR. The intrinsic link between freedom of expression and the right to protest rests on several considerations: a) protests inherently involve a communicative or expressive act;[33] b) protests serve as vehicle for expressing opinions, disseminating information, and articulating demands (activities that lie at the heart of said freedom);[34] c) like free speech, protests may be carried out through diverse mediums, including art, conduct, speeches, and other symbolic forms; d) public demonstrations are a 'mode' of communication, which is at the core of what free speech protects. Thus, as previously stated, based on the case law of the IACtHR, it can be said that such freedom forms the core of the right to protest.

29 IACtHR, *López Lone* (n. 3), para. 167.

30 IACtHR, *Huilcamán Paillama* (n. 5), paras 250, 255, 256, 258, 260 and 261.

31 IACtHR, *López Lone* (n. 3), para. 160.

32 IACtHR, *Huilcamán Paillama* (n. 5), paras 255-256.

33 For some scholars, freedom of expression is part of a broader right to communication. See Juan José Solozábal Echavarría, 'La libertad de expresión desde la teoría de los derechos fundamentales', Revista Española de Derecho Constitucional 32 (1991), 73-113 (74).

34 See Special Rapporteur for Freedom of Expression (n. 6), para. 18.

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Political rights (Article 23 ACHR) also constitute a foundation for the right to protest, as was affirmed in *López Lone*.[35] They are essential for democratic deliberation;[36] and, as the Constitutional Court of Peru has stated, the right to protest is linked with popular sovereignty, particularly in contexts marked by a crisis of representativeness or the need to defend the rights and interests of minorities.[37] Similarly, the United Nations Human Rights Council has emphasised that Article 25 of the ICCPR necessitates enjoyment and protection of Articles 19, 21, and 22 ICCPR, including the right to peacefully criticise or oppose the government.[38]

While the freedom of association may become relevant for some forms of protests, protests are more often linked to the right to freedom of assembly[39] (Articles 15 and 16 ACHR). IACHR has observed that 'peaceful social protest, as a manifestation of the right to assembly, is a fundamental tool for the labor of defending human rights, essential for the political and social critical expression of the activities of authorities, as well as for the establishment of positions and action plans regarding human rights'.[40] Along similar lines, the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association of the inter-American system found that:

> 'The ability to hold peaceful assembly is a fundamental and integral component of the multifaceted right to freedom of peaceful assembly, which must be enjoyed by all. This capacity is of capital importance for the work of civil society actors, particularly those who promote the effectiveness of economic, social, and cultural rights, since it allows them to publicly express their ideas, which is ultimately beneficial for the effectiveness of the rights they wish to promote and protect, especially in the context of the current serious economic crisis.'[41]

This protection extends to physical meetings, which are defined as an 'intentional and temporary congregation of people in a private or public space for a specific purpose. Therefore, the concept encompasses demonstrations, indoor assemblies, strikes, processions, rallies, and even sit-ins.'[42]

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35 IACtHR, *López Lone* (n. 3), paras 165-168.

36 IACtHR, *Castañeda Gutman v. México*, judgment of 6 August 2008, Series C No. 184, para. 140.

37 Constitutional Court of Peru, judgment of 2 June 2020, No. 0009-2018-PI/TC, para. 72.

38 Human Rights Council General Comment No. 25 of 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 25. Also, see Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Res 21/16 of 7 August 2013, A/68/299, para. 5.

39 The difference between an assembly and an association lies in the fact that the latter is, in principle, of a permanent nature.

40 IACHR, *Second Report* (n. 3), para. 129.

41 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Res 15/21 and 21/16 of 24 April 2013, A/HRC/23/39, para. 43.

42 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Res 15/21 of 21 May 2012, A/HRC/20/27, para. 24.

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Finally, if protests include mobilisations, they may also involve an exercise of the right to freedom of movement (Article 22.1). In such cases, protests require that individuals be able to move from one place to another without undue interference, which forms part of the content of that freedom.

In summary, the IACtHR and IACHR construct the right to protest based on a plethora of rights. Their respective limitations and protections therefore inform the right to protest. Before turning to the more specific content of these rights, this article turns to another fundamental aspect of protests: their peacefulness.

3. The 'Peacefulness' Requirement in Protests

The right to protest is sometimes regarded as a form of resistance to the law[43] and considered an indeterminate concept by nature.[44] For some academics, it is part of a broader 'right to resistance'.[45] However, the right to protest protects peaceful exercises, unlike other forms of resistance to the law that are recognised in some constitutions. Accordingly, the concept of peacefulness is central to its definition.

The limitation on peacefulness derives from the freedom of assembly (Article 15 ACHR), which is one of the central tenets of the right to protest. While this condition operates as a limitation on the right of assembly it also serves as a distinguishing characteristic of the right to protest itself. According to the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association of the Inter-American system, an assembly is considered peaceful when it is non-violent in nature and when participants are presumed to act with intentions consistent with peaceful aims.[46]

Some courts in Latin America have denied a right to protest through an overly restrictive interpretation of peacefulness. For example, the Permanent Criminal Chamber of Peru (which is the higher court in criminal matters in Peru) has stated that:

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43 See Pedro Martín Páez Bimos, 'Aproximaciones jurídico-sociales de la protesta social', Revista Electrónica Iberoamericana 14 (2020), 73-108 (75-87).

44 Kurt Schock, 'Introduction: Civil Resistance in Comparative Perspective' in: Kurt Schock (ed.), *Civil Resistance. Comparative Perspectives on Nonviolent Struggle* (University of Minnesota Press 2015), 1-32 (1-2).

45 For authors like Gargarella, there is a right to resist situations of legal alienation, defined as circumstances in which the Law is not representative of a faithful expression of the will of a community, but rather a set of norms foreign to its design and control, which affects the basic interests of the majority of the population, but to which it appears subject. See Roberto Gargarella, *El derecho a la protesta* (Ad-Hoc 2005), 205-237.

46 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 42), para. 25.

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> 'The right to protest – as a vehement and belligerent claim – has the difficulty of not revealing a value, but rather a disvalue, that is, the intransigence of imposing an opinion at any price, minority or not, even if it must damage or injure. On the other hand, the right to freedom of expression, freedom of assembly, the right to have a dissenting opinion and even the right to criticism contain the values of truth and tolerance; for this reason, they are exercised peacefully, which means that all actions of force (*vis compulsiva* or *vis absoluta*) that harm the rights of others are prohibited, such as physical aggression, damage to public or private property, obstruction of basic services, the blocking of roads, the violent entry into public or private facilities, the destruction of social or public property, the destruction of judicial documents, the burning of political party premises, the destruction of historical monuments or works of art, the vandalism, etc., which can only be explained by the adoption and defense of belligerent positions and the intransigent conquest of opinions or ideologies.'[47]

The criteria adopted by the Permanent Criminal Chamber of Peru could be construed as its particular understanding of what constitutes a peaceful assembly. However, even under this reading, its approach entails a significant risk of an overly discretionary application of the concept of 'peacefulness' for protests. The Chamber's reasoning rests on the premise that protests are distinct from the behaviour protected by the rights to freedom of expression and assembly, insofar as – unlike the latter, which are grounded in tolerance – protests are seen as acts of intransigence that may even condone harm. This, however, is a flawed assumption.[48] Several examples cited by the Peruvian court as forms of 'violence' do not meet that threshold. For instance, road blockades may involve only minor disruptions to traffic flow and may be neither disproportionate nor violent.[49]

In contrast to the Peruvian higher criminal court, the IACtHR's decision in *Huilcamán Paillama* does not regard peaceful blockades as an act of violence:

> 'as is the case with demonstrations held in public spaces – which may affect, among other rights, freedom of movement –, the exercise of peaceful protest […] requires from society at large, including those who may feel their peace or legitimate interests disturbed, a degree of tolerance that enables the mutual exercise of rights'.[50]

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47 Permanent Criminal Chamber of Peru, judgment of 17 April 2023, No. 1464-2021, para. 15.

48 The Chamber's assumption is mistaken because, as previously explained, the material properties of the right to protest are correlated with basic human values, none of which is grounded in intransigence. On the contrary, values such as liberty entail pluralism and tolerance.

49 Carlos Bernal Pulido, 'La inexistencia de un derecho fundamental o humano a bloquear vías en situación de protesta', Revista Chilena de Derecho 49 (2022), 137-154 (142-143).

50 IACtHR, *Huilcamán Paillama* (n. 5), para. 263.

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These considerations recognise that the exercise of the right to protest may entail interferences with freedom of movement of others without jeopardising the peacefulness of any such acts.

Moreover, even if some individuals engage in violent conduct during a demonstration, this should not justify the restriction of the protest as a whole,[51] or a denial of the existence of the right to protest. In such cases, only those individuals who commit acts of violence may have their right to demonstrate restricted; and even then, such limitations must be temporary and applied on an individual basis.[52] A protest cannot be deemed non-peaceful solely 'based on the actions of a few people'.[53] Classifying an entire demonstration as non-peaceful on such grounds is both inappropriate and incompatible with a rights-based framework.

This reading of the concept of peacefulness is echoed by the Court, which clearly distinguishes protected protests from violent forms of action, while maintaining a narrow understanding of 'violence'. In *Huilcamán Paillama*, it stated that 'the right to peaceful assembly does not include the right to engage in violent conduct during its exercise, nor to commit criminal acts'.[54] In that specific case, the Court found that the occupation of private property did not strip the protest of its peaceful nature, as the land in question was located in a rural area, lacked significant constructions for housing, industry, or any other specific activity, and had been temporarily occupied by the victims, who offered no resistance during their eviction or arrest by security forces.[55]

III. Content of the Right to Protest

The right to protest in the Inter-American system involves a variety of specific protections. For the IACHR, these include the right to demonstrate without prior authorisation (Article 13.2 ACHR); the freedom to choose the content and messages expressed (Article 13.1 ACHR); and the ability to decide its time, manner, and location[56] (Article 13.1 ACHR). The IACtHR has confirmed the Commissions reading regarding the last point, but it was not yet confronted with a case requiring it to decide on the other issues. States also have a duty not to repress protests, which obliges them to avoid using firearms, to refrain from arbitrary arrests, or the forced dispersal of

51 IACtHR, *Tavares Pereira* (n. 4), paras 98-99.
52 Special Rapporteur for Freedom of Expression (n. 6), para. 84.
53 Special Rapporteur for Freedom of Expression (n. 6), para. 83.
54 IACtHR, *Huilcamán Paillama* (n. 5), para. 251.
55 IACtHR, *Huilcamán Paillama* (n. 5), para. 262.
56 IACtHR, *Huilcamán Paillama* (n. 5), para. 263.

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demonstrators, and to abstain from criminalising protest leaders or participants; the latter obligation also inhibits the creation of vague or overly broad criminal offenses, as well as the use of stigmatising language in official statements.[57]

Building on the doctrine and jurisprudence of the relevant human rights bodies the next four sections define some of the most important contents of the right to protest.

1. Negative and Positive Dimensions

Like all human rights, the right to protest involves both negative and positive dimensions.[58] The first refers to its defensive function and is characterised by the duty of authorities and private actors to refrain from interfering with its exercise. The positive dimension reflects the State's obligation to take active measures to protect individuals who participate in protests, as well as those who cover them (such as journalists), from actions by authorities or private individuals that may endanger them or attempt to disrupt or disperse the demonstration. This positive obligation does not fall on the organisers of the protest.[59]

The *Lopez Lone* ruling by the IACtHR does not specify concrete elements or specific dimensions of the right to protest. But in *Huilcamán Paillama*, the Court recognised that part of this right includes the ability to choose the place and manner of the protest.[60] Moreover, the Special Rapporteur for Freedom of Expression has identified some of its specific elements: a) regarding the negative dimension, it includes the right to participate in a protest without prior authorisation and to determine its content, message, time, place, and manner without undue interference;[61] and b) regarding the positive dimension, it entails, for example, the duty to investigate, prosecute, and punish those who commit acts of violence against protesters or journalists covering the demonstrations.[62]

57 Special Rapporteur for Freedom of Expression (n. 6), 25-78; IACHR, *Criminalization of the Work of Human Rights Defenders*, OEA/Ser.L/V/II., Doc. 49/15, 31 December 2015, para. 129. On the repression of protests, see Vince Boudreau, *Resisting Dictatorship* (Cambridge University Press 2004).

58 Stephen Holmes and Cass R. Sunstein, *El costo de los derechos* (Siglo XXI Editores 2011), 55-69; Aharon Barak, *Proporcionalidad* (Palestra Editores 2017), 461-462.

59 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 41), paras 33-42.

60 IACtHR, *Huilcamán Paillama* (n. 5), para. 263.

61 Special Rapporteur for Freedom of Expression (n. 6), paras 56-89.

62 Special Rapporteur for Freedom of Expression (n. 6), paras 251-285.

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2. Individual and Collective Dimensions

Due to its foundation in the right to freedom of expression (Article 13 ACHR), the right to protest has both an individual and a collective dimension.[63] Since the right to freedom of expression includes the right to seek and receive information and ideas of all kinds, in the context of protests, such a collective dimension translates into the ability to access or receive the messages, ideas, perspectives, or viewpoints expressed through these protests. Therefore, it may entail a prohibition on the State to restrict access to communications that describe a protest, express support for it, or explain the reasons behind it.

3. For Whom and Against Whom?

The norms of the Inter-American system and the jurisprudence of the IACtHR concerning the right to freedom of expression also helps determine the right-holder of this human right. Since Article 13.1 ACHR establishes that this right belongs to 'everyone', the Court has held that it applies not only to natural persons, but also to legal entities.[64] In the latter instance, the exercise of the right to freedom of association becomes particularly relevant in matters of protest. Furthermore, the IACtHR has stated that judges' status as public officials do not preclude them from exercising fundamental freedoms (and even protest), because such acts do not necessarily undermine their judicial independence or impartiality.[65] The Report of the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations is consistent with the jurisprudence of the IACtHR.[66]

On the other hand, States are the primary duty-bearers of the right to protest. The term 'State' encompasses all branches of government, particularly the Executive, Legislative, and Judicial branches, as they assume a

63 On these dimensions of freedom of expression, see IACtHR, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, judgment of 29 May 2014, Series C No. 279, para. 371; *Urrutia Laubreaux v. Chile*, judgment of 27 August 2020, Series C No. 409, para. 80; *Álvarez Ramos v. Venezuela*, judgment of 30 August 2019, Series C No. 380, para. 100; *Ricardo Canese v. Paraguay*, judgment of 31 August 2004, Series C No. 111, para. 79; *Palamara Iribarne v. Chile*, judgment of 22 November 2005, Series C No. 135, para. 69; *Carvajal Carvajal et al. v. Colombia*, judgment of 13 March 2018, Series C No. 352, para. 171.

64 See IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, judgment of 22 June 2015, Series C No. 293, paras 146-160.

65 IACtHR, *Urrutia Laubreaux* (n. 63), paras 78-82. Regarding the right of judges to protest, *López Lone* (n. 3).

66 Special Rapporteur on the Independence of Judges and Lawyers Report of 21 June 2024, A/HRC/56/62, paras 2 and 68.

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guarantor role. However, private individuals can also be held as obligated subjects under the right to protest, due to the horizontal application of human rights.[67] Indeed, Article 13.3 ACHR directly binds private individuals as duty-bearers in the context of certain modes of the exercise of freedom of expression by prohibiting indirect censorship.[68] For example, a private individual occupies a special position regarding the right to protest in cases such as private security companies contracted by the State that repress or disperse a peaceful protest by force; or private entities that manage public spaces (e. g. malls, university campuses, or concessioned infrastructure open to the public) and impose an absolute prohibition on peaceful protests related to matters of public interest.

4. Forms and Mediums of Exercise

The final relevant issue concerning the content of the right to protest pertains to the forms and mediums through which it may be exercised. Given its foundation in the right to freedom of expression, it is important to highlight that Article 13.1 ACHR stipulates that this right 'includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice'. Articles 19 UDHR and 19.2 ICCPR have similar provisions.

In its judgment in the *Huilcamán Paillama* case, the IACtHR identified several elements relevant to this matter. Among them, it affirmed that the right to protest includes the possibility of choosing the place and manner in which it is exercised, even when this entails certain limitations on freedom of movement of others or involves the non-violent occupation of private property, provided that such property is not used as a residence and lacks other active human uses. The Court also recognised that this right encompasses acts such as displaying banners or cloths bearing messages of demands or claims.[69]

Thus, within the Inter-American framework, the right to protest can be exercised through a wide range of forms and mediums, which may include expressive conducts. Therefore, protests would not necessarily involve speech acts but may also encompass other actions and conducts capable of conveying

67 See Martín Borowski, 'La *Drittwirkung* ante el trasfondo de la transformación de los derechos morales en derechos fundamentales', Revista Derecho del Estado 45 (2020), 3-27 (5).

68 IACtHR, *Opinión Consultiva OC-5/85*, judgment of 13 November 1985, Series A No. 5, para. 48.

69 IACtHR, *Huilcamán Paillama* (n. 5), paras 259-263.

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a message.[70] Expressive conducts, defined as behaviour or attitudes that communicate meaning within a context in which it is reasonable to expect the observer to understand the intended message, would be a valid form of protest.[71]

Additionally, in principle, a protest may take place in any location, as recognised in *Huilcamán Paillama* regarding the types of private property where protests may take place. This consideration is particularly significant in the context of street demonstrations or protests in public spaces, which are often chosen for their capacity to enhance the visibility of the message being conveyed.[72] For this reason, it has been said that '[a]ccess to public space specifically means that organizers and participants should be able to use public squares, roads and streets to hold peaceful gatherings, whether static or moving'.[73]

Also, any form of art may serve as a vehicle for protest. The IACtHR has already extended protection to artistic expression under Article 13 ACHR.[74] And, although the definition of art is not easily delineated, it illustratively includes dance,[75] music,[76] literary works, among others that have been used to protest.

The internet occupies a privileged position as a decisive medium in the context of protest, particularly in relation to the coordination and organisation of participants. It plays a critical role in determining the time, place, and manner of protests. State authorities should regard digital platforms as spaces for democratic engagement and potential dialogue with the public, allowing them to better understand the roles, objectives, and claims of protesters.[77]

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70 See Eric Barendt, *Freedom of Speech* (Oxford University Press 2005), 74.

71 James Weinstein, Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine (Westview Press 1999), 33.

72 Alison Van Rooy, The Global Legitimacy Game. Civil Society, Globalization, and Protest (Palgrave Macmillan 2004), 24.

73 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 41), para. 66.

74 IACtHR, *'The Last Temptation of Christ' (Olmedo Bustos et al.) v. Chile*, judgment of 5 February 2001, Series C No. 73.

75 See Judith Lynne Hanna, 'Dance, Protest, and Women's "Wars": Cases from Nigeria and the United States' in: Guida West and Rhoda Lois Blumberg (eds), *Women and Social Protest* (Oxford University Press 1990), 333-345 (333-345). Also, Supreme Court of the United States, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), judgment of 1 June 1981.

76 James Sullivan, Which Side Are You On? 20th Century American History in 100 Protest Songs (Oxford University Press 2019); and Reiland Rabaka, Black Power Music! Protest Songs, Message Music, and the Black Power Movement (Routledge 2022). Also, Supreme Court of the United States, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), judgment of 22 June 1989.

77 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 42), paras 72-74.

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Before concluding this section, it is necessary to address one of the most significant debates that Latin American constitutionalism offers regarding the form and location of protests: the use of 'roadblocks', or the obstruction of public thoroughfares, as a form of protest.[78] Without intending to oversimplify the complexity of this debate, it may be said that two principal positions dominate the discussion, represented by Gargarella and Bernal Pulido. Gargarella conceptualises roadblocks as the collective decision of a group to obstruct passage along a national route with the purpose of drawing public attention to the seriousness of a particular social issue. He views such actions as legitimate and justified forms of protest.[79] Bernal Pulido, by contrast, argues that there is no fundamental or human right to block public roads as a means of protest, unless the obstruction results only in minimal interference with the rights of others or with the ordinary functioning of society. Accordingly, criminal sanctions against such conduct would be legitimate if they were proportional.[80]

At first it may seem that Bernal's position is, to some extent, similar to the adopted by the Permanent Criminal Chamber of Peru.[81] However, there is a crucial distinction between them: Bernal holds that roadblocks are illegitimate only when they cause disproportionate harm to the rights of others. In contrast, the Permanent Criminal Chamber appears to consider them inherently illegitimate, asserting that 'the blocking of roads' constitutes 'acts of force' that inherently infringe upon such rights. Between these two slightly different perspectives, Bernal's approach appears more consistent with a wider interpretation of the clauses that permit the limitation of human rights – such as the requirement that protests be 'non-violent' – and thus offers a broader scope of protection. Moreover, the reasoning of the Criminal Chamber stands at odds with the standards of the IACHR, which has recognised that the temporary obstruction of public roads may constitute a legitimate form of social protest:

> '[…] in the face of a possible clash between freedom of assembly and, for instance, freedom of movement, when the mode of protest involves cutting off or occupying part of a roadway or route, "it should be borne in mind that the right to freedom of expression is not just another right, but one of the primary and most important foundations of any democratic structure: the undermining of freedom of expression directly affects the central nerve of the democratic system".'[82]

78 See Roberto Gargarella, 'Expresión cívica y "cortes de ruta"' in: Felipe González and Felipe Viveros (eds), *Igualdad, libertad de expresión e interés público* (Universidad Diego Portales 2000), 285-294; and Bernal Pulido, 'La inexistencia' (n. 49), 137-154.

79 Gargarella, 'Expresión cívica' (n. 78), 285.

80 Bernal Pulido, 'La inexistencia' (n. 49), 152.

81 Permanent Criminal Chamber of Peru (n. 47), para. 15.

82 Special Rapporteur for Freedom of Expression (n. 6), para. 87. This position is also supported in *Huilcamán Paillama* by the IACtHR (n. 5), para. 263.

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IV. State Obligations Derived from the Right to Protest

Like all human rights, the right to protest requires effective guarantees. Within the Inter-American legal framework, State's obligation to ensure an adequate protection of human rights generally derives from Articles 1.1 and 25 ACHR.[83] However, given the broad range of possible guarantees, this section will focus on the following four key aspects: 1) those deriving from the right's objective dimension; 2) prohibition of censorship, including standards governing the use of force; 3) prohibition of content-based discrimination; and 4) the positive obligation to create the necessary conditions for the fulfilment of the positive dimensions of the right to protest.

1. Guarantees Derived from the Objective Dimension of the Right to Protest

Many constitutional courts in Latin America hold that all fundamental and human rights comprise both a subjective and an objective dimension. This view has been adopted, among others, by the Constitutional Court of Colombia,[84] the Constitutional Court of Peru,[85] the Plurinational Constitutional Court of Bolivia,[86] and the Constitutional Chamber of El Salvador.[87] The objective dimension implies that, although fundamental rights primarily function as defensive claims held by individuals against the State, they also embody an objective order of values. As one formulation puts it, 'in the provisions of fundamental rights […] an objective order of values is also incorporated, which as a fundamental constitutional decision is valid across all spheres of Law'.[88] As a result, fundamental rights produce radiating and reciprocal effects, have horizontal applicability, and impose a prohibition against measures that disincentivise or discourage their exercise (chilling effect doctrine).

According to the conception prevailing among constitutional courts in Latin America, the guarantees that arise from the objective dimension of the

83 Eduardo Ferrer Mac-Gregor, 'La obligación de "respetar" y "garantizar" los derechos humanos a la luz de la jurisprudencia de la Corte Interamericana', Estudios Constitucionales 10 (2012), 141-192 (151-154); IACtHR, *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4, para. 166.

84 Constitutional Court of Colombia, judgment of 5 June 1992, No. T-406/92.

85 Constitutional Court of Peru, judgment of 11 August 2005, No. 3330-2004-AA/TC.

86 Plurinational Constitutional Court of Bolivia, judgment of 19 December 2014, No. 0169/2014-S1.

87 Constitutional Chamber of El Salvador, judgment of 25 June 2009, No. 26-2008 (unconstitutionality).

88 German Federal Constitutional Court, ruling BVerfGE 7, 198 (*Lüth*).

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right to protest are the following three key conditions: a) any restriction on this right must be prescribed by a substantive and formal law, drafted in clear and precise terms;[89] b) such restrictions must satisfy the criteria of suitability, necessity, and proportionality in the narrower sense, meaning that they must pursue a legitimate aim, be suitable to achieve it, constitute the least restrictive means among equally effective alternatives, and result in a net gain in the pursuit of the legitimate aim that outweighs the impact on the right;[90] and c) they must not impair the essential core of the right to protest beyond the interference justified by the proportionality test.[91]

2. Prohibition of Censorship and Standards on the Use of Force

The prohibition of censorship is one of the most fundamental guarantees of freedom of expression, as recognised in Article 13.2 ACHR, which provides that expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability'. An exception is made for public entertainments under Article 13.4 ACHR.

Censorship is associated with the obstruction or impairment of communicating a message. Scholars have defined censorship as 'any intervention in the content, form, or tone of an expression, based on ideological, moral, or political reasons'.[92] The IACtHR has similarly said that censorship constitutes a mechanism to prevent the free circulation of information, ideas, or opinions.[93] Thus, its prohibition is grounded in the recognition of the dangers posed by filters or deterrents that determine what may be expressed or received by others. In the context of protest, censorship may take the form of broad or selective restrictions on which individuals are deemed acceptable for protest. This can manifest in the requirement of authorisation from the authorities.[94]

Censorship may originate from any of the corresponding duty-holders on freedom of expression, and its prohibition constitutes a guarantee applicable to protest. Accordingly, both authorities and private individuals may engage in acts of censorship. Public demonstrations may be censored through a variety

89 IACtHR, *Palamara Iribarne* (n. 63), para. 79; *Fontevecchia and D'Amico v. Argentina*, judgment of 29 November 2011, Series C No. 238, para. 43; *Mémoli v. Argentina*, judgment of 22 August 2013, Series C No. 265, para. 123; *Herrera Ulloa v. Costa Rica*, judgment of 2 July 2004, Series C No. 107, para. 120.

90 IACtHR, *Álvarez Ramos* (n. 63), para. 104; *Herrera Ulloa* (n. 89), para. 120.

91 This point will be discussed later in this paper.

92 Natalia Tobón Franco, Libertad de expresión, derecho al buen nombre, a la honra y a la imagen (University of Rosario 2015), 39.

93 IACtHR, *Opinión Consultiva OC-5/85* (n. 68), para. 54.

94 Special Rapporteur for Freedom of Expression (n. 6), para. 129.

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of means, including outright prohibition, disproportionate restrictions, criminalisation, or the use of public force to disperse or suppress protests.[95]

Censorship may result from both acts and omissions, although it is more common to censor through positive actions. With respect to omissions, Botero has noted that, in Latin America, 'one of the most serious attacks on freedom of expression took the form of absolute impunity for crimes that had been committed with the intention of silencing a dissident opinion, an inconvenient point of view, a different way of seeing and thinking about the State and society'.[96] This reflects the failure of the State to adopt measures regarding its duty to investigate, prosecute, and punish those responsible for these obstructive acts (Article 1.1 ACHR[97] and Principle 9 of the Declaration of Principles on Freedom of Expression). In the context of protests, this obligation involves investigation, prosecution, and punishment of crimes committed against protesters as well as against individuals who cover demonstrations, such as journalists, whose work is essential to ensuring the social dimension of this right.[98]

Censorship can affect a wide range of elements and actors involved in the exercise of free speech and protest. It may target the speaker, by prohibiting the individual from expressing themselves; the medium, by impeding its full or partial operation; the message, by altering or suppressing its content; the material support, by restricting its circulation, reproduction, or transmission; or the recipient, by erecting barriers to access the expression in question.

Additionally, censorship may take various forms. Two key distinctions are particularly relevant. The first is between direct and indirect censorship[99]: the former aims to suppress the circulation of a specific idea, opinion, or piece of information, while the latter seeks to control individuals, communication channels, or expressive media more broadly, thereby limiting the dissemination of potential ideas, opinions, or facts. The second distinction concerns prior and subsequent censorship[100]: prior censorship refers to attempts to

95 See Special Rapporteur for Freedom of Expression (n. 6), para. 153.

96 Catalina Botero Marino, 'Jurisprudential Advances and Persistent Challenges for Freedom of Expression in the Americas' in: Péter Molnár (ed.), *Free Speech and Censorship Around the Globe* (Central European University Press 2015), 105-136 (106).

97 See IACtHR, *González et al. ('Cotton Field') v. Mexico*, judgment of 16 November 2009, Series C No. 205, para. 502; *Río Negro Massacres v. Guatemala*, judgment of 4 September 2012, Series C No. 250, para. 222.

98 This is what occurred in IACtHR, *Vélez Restrepo and Family v. Colombia*, judgment of 3 September 2012, Series C No. 248 (State was held internationally responsible for its failure to conduct a diligent investigation into the military aggression against Vélez Restrepo, a journalist who was covering a public protest).

99 IACtHR, *Urrutia Laubreaux* (n. 63), para. 81.

100 IACtHR, *'The Last Temptation of Christ'* (n. 74) and *Palamara Iribarne* (n. 63).

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prevent the dissemination of expression before it occurs, whereas subsequent censorship involves reactions or sanctions imposed after the expression has been made public. Both can have chilling effects and hence effectively constitute censorship.

Prior censorship is categorically prohibited, as Article 13.2 ACHR mandates that only subsequent sanctions may be imposed. In matters of demonstrations, prior authorisation is the equivalent of prior censorship. The IACHR has affirmed that the exercise of the right to protest should not be subject to prior authorisation or to excessive requirements that unduly hinder its realisation.[101] In contrast, the European Court of Human Rights (ECtHR) has held that 'subordinating the holding of a meeting on a public street to a prior authorization process does not in principle violate the essence of the right to peaceful assembly'.[102] Nevertheless, dispersing a peaceful protest solely due to the absence of prior authorisation – where participants have not otherwise acted unlawfully – is a disproportionate restriction on the right to freedom of assembly, even according to the ECtHR.[103]

In cases of prior censorship, the purposes invoked by the authority imposing it are irrelevant, as such measures are categorically incompatible with the ACHR.[104] For example, the State may not invoke public order concerns to justify the prior prohibition of a demonstration based solely on the assumption that it might lead to violence or public disorder. In such cases, the State may respond to concrete events as they arise but cannot lawfully impose a blanket ban on a protest before any specific unlawful act has occurred.

Finally, the prohibition of censorship in the context of protests is closely linked to the standards governing the use of public force, as the latter may act as a deterrent or silencing mechanism that leads to self-censorship. The Office of the Special Rapporteur for Freedom of Expression has outlined standards concerning the matter.[105] In summary, it has affirmed:

> '(i) the use of public force must be strictly exceptional and governed by the principles of legality, absolute necessity, and proportionality;
>
> (ii) firearms should only be used as a last resort, and only when police forces are unable to neutralize or detain individuals posing an imminent threat to the life or physical integrity of officers or third parties through non-lethal means;
>
> (iii) States must prioritize the acquisition, regulation, and use of non-lethal or less-lethal weapons;

101 Special Rapporteur for Freedom of Expression (n. 6), para. 129.
102 ECtHR, *Bukta and others v. Hungary*, judgment of 17 July 2007, para. 35.
103 ECtHR, *Bukta and others* (n. 102), para. 36.
104 IACtHR, *Opinión Consultiva OC-5/85* (n. 68), para. 38.
105 Special Rapporteur for Freedom of Expression (n. 6), paras 90-244.

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(iv) any arrests carried out in the context of a protest must comply with both domestic legal standards and applicable international human rights norms;

(v) the forced dispersal of a protest is only justified in highly exceptional circumstances, based on a specific and immediate threat to the life or physical integrity of persons, and only when no less harmful means are available to mitigate such risk;

(vi) Law enforcement and military agencies must adopt clear operational protocols regulating the use of force in protest contexts;

(vii) the primary role of Law enforcement should be to facilitate the exercise of the right to protest, not to suppress or confront it. Dialogue, deliberation, and negotiation should be actively pursued;

(viii) criminalization of protesters, vague or overly broad legal provisions, arbitrary arrests, formalistic application of Criminal Law, or stigmatizing official discourse must be avoided.'

In its Report on the Situation of Human Rights Defenders in the Americas, the IACHR emphasised the need to regulate the use of public force through the adoption of specific control mechanisms. These include a prohibition on the use of lethal force as a method of crowd control during public demonstrations; systems for the registration and monitoring of ammunition; and communication recording systems to document operational orders, their origin, and those responsible for their execution.[106] In situations where military forces are deployed, their involvement must be subject to civilian command and oversight.[107]

In conclusion, the prohibition of censorship applies to matters related to the right to protest, subject to the specific nuances that characterise this right. The most significant qualification relates to prior censorship, which in the context of protests takes the form of requirements of prior authorisation; and to the standards applicable to the use of force to deter or silence protests.

3. Prohibition of Content-Based Discrimination

Based on the general definition of discrimination adopted by the IACtHR (Article 24 ACHR),[108] this particular form of discrimination may be understood as any distinction, exclusion, restriction, or preference based on the

106 IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124, 7 March 2006, para. 68.

107 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Res 44/20 of 16 May 2022, A/HRC/50/42, para. 33.

108 See IACtHR, *Atala Riffo and Daughters v. Chile*, judgment of 24 February 2012, Series C No. 239, para. 81.

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content of the speech or protest that an individual or group seeks to express, which has the purpose or effect of nullifying or impairing the recognition or exercise on equal terms of rights related to protest, such as freedom of expression or freedom of assembly. In simpler terms, this implies a duty of neutrality on the part of the State (Article 1.1 ACHR).[109]

It can be said that the elements of a discourse that fall within the notion of 'content' include[110]: a) the viewpoint expressed; b) the subject matter of the speech; c) specific components of the speech, such as words, images, or format; d) the audience's reaction to or interest in the message; e) the speaker's intention or tone; f) the source; and g) the speaker.

The importance of respecting the prohibition of censorship and discriminatory treatment lies in the fact that protests organised by minority groups (people with disabilities, young people, women, etc.), or those expressing dissenting views critical of the government, are frequently subject to stigmatisation, stereotyping, or unfavourable distinctions.[111] This concern is particularly acute in the case of demonstrations with a clear ideological orientation which must not be discriminated against based on their content or viewpoint.

4. Obligation to Create the Conditions to Satisfy the Positive Dimension of the Right to Protest

As seen earlier, the right to protest also entails a positive duty on the State to create the necessary conditions for its exercise.[112] As a consequence of this positive obligation, protest organisers must not be subjected to 'financial charges for public services provided during the holding of an assembly or meeting (such as police presence, medical services, or other health and safety measures)'. Nor may they be held accountable for 'the criminal behavior of other people'. The State cannot 'attribute to them the responsibility of protecting public order'.[113]

Finally, the State should protect protesters against the action of other individuals that threatens them or that interferes with the protest by use of

109 See Leslie Gielow Jacobs, 'Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations', McGeorge Law Review 34 (2003), 595-635 (596-602).

110 See John Fee, 'Speech Discrimination', Boston University Law Review 85 (2005), 1103-1170 (1122-1130).

111 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Res 15/21 and 24/5 of 14 April 2014, A/HRC/26/29, paras 10-11.

112 IACtHR, *Ríos et al. v. Venezuela*, judgment of 28 January 2009, Series C No. 194, para. 106.

113 All quotes are from Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 41), para. 31.

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force. This duty does not create a right to demand the prohibition of simultaneous counterdemonstrations and protests because they are held at the same time. In that case, the State must take 'reasonable and timely positive measures to protect participants in all of them. The State must ensure that they do not interfere with each other so that demonstrators will not have any cause to fear violence from their opponents'.[114]

V. The Limits of the Right to Protest and the Three-Part Test

1. On the Limits of the Right to Protest in General

Like most human rights, the right to protest is not absolute. However, any restrictions imposed on its exercise must be reasonable and aimed at preserving the peaceful nature of demonstrations. Such restrictions must comply with the principles of legality, necessity, and proportionality.[115] Given the variety of rights that underpin the right to protest, it can be assumed that it is subject to the same limitations applicable to each of them.

In this sense, the limitations established for freedom of expression under Article 13.2 ACHR are applicable (respect for the rights or reputations of others, and the protection of national security, public order, or public health or morals). Similarly, restrictions applicable to the rights to freedom of assembly and association, as set out in Articles 15 and 16 ACHR, must also be observed. These include the requirement that such gatherings be peaceful and unarmed, as well as limitations grounded in the protection of national security, public safety or order, public health or morals, and the rights and freedoms of others. These legitimate aims are consistent with the grounds for restricting free movement under Article 22.3 ACHR.[116]

The legitimate aims invoked to restrict the right to protest must be interpreted in a manner consistent with the guarantees that secure said right, and thus, in a restrictive way. Such aims should be assigned with a meaning that tends to expand the threshold of protection and not diminish it. As a rule, all forms of protest (including those that shock, offend, or disturb certain sectors of the population or the authorities)[117] are protected and must be tolerated,

114 Special Rapporteur for Freedom of Expression (n. 6), para. 344.

115 IACHR (n. 3), para. 107.

116 See Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 42), para. 15.

117 See IACtHR, *Kimel v. Argentina*, judgment of 2 May 2008, Series C No. 177, para. 88.

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since freedom is the rule and its restriction, an exception. For example, some protests may convey messages that are controversial or even objectionable from a human rights perspective, such as demonstrations opposing the rights of asylum seekers.[118] Nevertheless, this alone does not justify their censorship.

This paper cannot address in detail the specific content attributed to each of these legitimate aims in the case law of the IACtHR. However, it is important to note that, in its decisions concerning free speech, the Court has clarified issues such as the protection of others' reputation;[119] the scope and limits of invoking national security;[120] and the meaning of 'public order', including the necessity to apply a restrictive interpretation when invoked as a ground for limitation.[121] In addition, the Human Rights Committee has interpreted the concept of 'morality' as being informed by long-standing social, philosophical, and religious traditions. Nevertheless, any restriction based on this ground must be assessed considering the universality of human rights and the principle of non-discrimination.[122]

2. The Three-Part Test

Although the right to protest may be subject to limitations, such restrictions cannot be imposed automatically. To assess their legitimacy, it is necessary to apply the 'three-part test'. While this test has been primarily developed in the context of freedom of expression,[123] it has also been conceptually adopted by the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association in relation to the right to protest.[124] Under this test, the restrictions must satisfy the following conditions: a) be previously established by law; b) respond to a purpose permitted by the ACHR, and c)

118 Iris Beau Segers, Mobilization Against Asylum Seekers in Contemporary Urban Spaces (Routledge 2022).

119 IACtHR, *Herrera Ulloa* (n. 89), para. 128; *Ricardo Canese* (n. 63), para. 98; *Palamara Iribarne* (n. 63), para. 82; *Kimel* (n. 117), para. 86.

120 IACtHR, *Usón Ramírez v. Venezuela*, judgment of 20 November 2009, Series C No. 207, paras 92-94; *López Álvarez v. Honduras*, judgment of 1 February 2006, Series C No. 141, para. 166.

121 IACtHR, *Opinión Consultiva OC-5/85* (n. 68), paras 64-67.

122 Human Rights Committee, General Comment No. 34 of 12 September 2011, CCPR/C/GC/34, para. 32.

123 Although, the IACtHR affirmed in *Tavares Pereira* (n. 4), para. 89, that this test needed to be used when analysing limitations on peaceful demonstrations.

124 Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (n. 42), para. 15.

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be necessary in a democratic society (meet the requirements of suitability, necessity and proportionality in the narrower sense).[125]

The term 'law' in the first condition refers to a legislative act oriented towards the common good, enacted by constitutionally established and democratically elected legislative bodies, and adopted in accordance with the procedures set forth both in the constitutions of the States Parties and in the ACHR.[126] Such laws must establish restrictions expressly, exhaustively, and in advance – i. e., non-retrospectively.[127] The required degree of precision varies depending on the nature of the law: criminal laws must meet a significantly higher standard of clarity than civil laws.[128]

Furthermore, any restriction must be 'necessary' to achieve one of the legitimate aims for limiting the right to protest. The notion of 'necessity' implies that the measure must be effective in achieving the intended purpose, and that such purpose cannot be reasonably attained by less restrictive means.[129] In addition, for a restriction to be deemed necessary in a democratic society, it must meet the cumulative requirements of suitability, necessity, and proportionality in the narrower sense[130]: that is, it must pursue a legitimate aim; there must be no equally effective but less harmful alternative; and the harm caused by the restriction must not be excessive in relation to the benefit it seeks to achieve.[131]

At this point, it is relevant to highlight important considerations on proportionality that can be drawn from the IACtHR's judgment in *Huilcamán Paillama*. First, the Court held that 'any measures taken in response to the impact that protest-related acts may cause are subject to a proportionality analysis based on the specific circumstances of each individual case, as not every reaction by the authorities can be deemed legitimate'.[132]

Second, a proportional approach to protests 'should include not only responses that consider the specific situation arising from the confrontation of rights or interests of different individuals or social groups, but also, and even more importantly, measures that address the underlying factors or problems that motivated the acts of protest in the first place, which are, precisely, the subject of the claims and demands being made'.[133] In other

125 IACtHR, *Álvarez Ramos* (n. 63), para. 104; *Herrera Ulloa* (n. 89), para. 120; and *Palamara Iribarne* (n. 63), para. 79.

126 IACtHR, *Opinión Consultiva OC-6/86*, judgment of 9 May 1986, Series A No. 6, paras 35-37.

127 IACtHR, *Palamara Iribarne* (n. 63), para. 79.

128 IACtHR, *Fontevecchia* (n. 89), para. 89.

129 IACtHR, *Opinión Consultiva OC-5/85* (n. 68), para. 79.

130 IACtHR, *Álvarez Ramos* (n. 63), para. 104; and *Herrera Ulloa* (n. 89), para. 120.

131 IACtHR, *Kimel* (n. 117), paras 71-83.

132 IACtHR, *Huilcamán Paillama* (n. 5), para. 265.

133 IACtHR, *Huilcamán Paillama* (n. 5), para. 265.

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rulings, the IACtHR has said that certain speeches receive heightened protection and are subject to strict scrutiny when restricted. This applies to political speech and speech on matters of public interest,[134] expressions concerning public officials or candidates for public office,[135] and those addressing fundamental aspects of individual identity or human dignity.[136]

In relation to the right to protest, the IACtHR stated in *López Lone* that demonstrations are especially protected '[i]n situations of institutional breakdown, after a coup d'état […], especially when they are exercised […] with the purpose of protesting against the actions of State powers that contravene the constitutional order and of demanding the restoration of democracy'.[137]

Third, given the coexistence of the right to protest with other rights, it is acceptable that such acts may involve the occupation of private property. For example, recall that in *Huilcamán Paillama* the properties in question were located in rural areas, without any significant buildings used for housing, industry, or other specific purposes.[138] Similarly, when protests are held in public spaces, it is acceptable that they may affect freedom of movement. Although the judgment does not specify the acceptable degree of such interference, it notes that pluralism and respect for differing views must lead to a level of tolerance that allows for the mutual exercise of rights, even by those who may feel disturbed in their peace or in their legitimate interests.[139]

VI. Conclusions

The right to protest is one of the most complex rights in contemporary democracies. On the one hand, it is grounded in several rights that have their own distinct characteristics, limits, and definitions, yet interact with one another to serve as foundations to a right to protest. At the same time, it constitutes a core element of a democratic system, as it enables the protection of the principles of pluralism, dissent, and tolerance. Based on the foregoing analysis, several conclusions may be drawn.

The right to protest meets both the formal and substantive properties required to be considered a human right. From a formal perspective, this right is an implicit norm that derives from the rights to freedom of expres-

134 IACtHR, *Ivcher Bronstein v. Peru*, judgment of 6 February 2001, Series C No. 74, para. 155; *Tristán Donoso v. Panamá*, judgment of 27 January 2009, Series C No. 193, para. 121.

135 See IACtHR, Palamara Iribarne (n. 63), para. 82.

136 IACtHR, *López Álvarez* (n. 120), para. 171.

137 IACtHR, *López Lone* (n. 3), para. 160.

138 IACtHR, *Huilcamán Paillama* (n. 5), para. 262.

139 IACtHR, *Huilcamán Paillama* (n. 5), para. 263.

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sion, freedom of assembly and association, political rights, and freedom of movement (all of them guaranteed in the UDHR, ICCPR, and ACHR), and it may also be connected to other rights that form the substantive basis of the claims advanced through protest. From a substantive perspective, the right to protest serves fundamental liberal and democratic interests, as well as the protection of basic needs that may be vindicated through collective action.

Also, protests, as an activity, may be understood as forms of individual or collective action aimed at expressing ideas, visions, or values of dissent, opposition, denunciation, or vindication. Hence, they function as a central vehicle for social and political participation in democratic societies. However, unlike other forms of resistance to the law, protest – as a right, rather than as an activity – must comply with requirements of peacefulness. This raises complexities in cases such as road blockades carried out in the context of protests.

The essential content of the right to protest comprises several core elements. It entails both a negative and a positive dimension; it operates in both individual and collective forms; and it is a universal right held by all persons, including legal entities and public officials such as judges. Correspondingly, it imposes obligations not only on all branches of the State (that is, Executive, Legislature, and Judiciary) but, in certain circumstances, also on private actors such as private entities that manage spaces open to the public. It follows from the obligations that such private entities cannot impose an absolute prohibition on peaceful protests related to matters of public interest. In addition, the right may be exercised through a wide range of expressive forms, in public spaces, and by means of diverse channels of communication.

Also, the right to protest must be effectively guaranteed in accordance with Article 1.1 of the ACHR. Its protection involves multiple guarantees, including those derived from its objective dimension, such as the requirement that any limitations be established by law, the application of the principle of proportionality, and the obligation to respect its essential core. It also includes (a) the prohibition of censorship, which extends to specific standards governing the use of public force, including the involvement of military personnel; (b) the prohibition of content-based discrimination, which protects, inter alia, protests in defence of the rights of vulnerable groups; and (c) the State's positive duty to create the legal and material conditions necessary to ensure the full and effective exercise of this right.

However, like most human rights, the right to protest is not absolute. Demonstrations must be peaceful and unarmed, and the ACHR permits restrictions for the purpose of protecting the rights or reputations of others, national security, public order or safety, and public health or morals. Under the existing jurisprudence in this context, a protest is considered peaceful

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when it is non-violent and when participants are presumed to act with intentions consistent with peaceful aims. Nevertheless, acts like the occupation of private property do not always strip the protest of its peaceful nature, in instances such as, when the land in which they take place is located in a rural area, lacks significant constructions for housing, industry, or any other specific activity, and has been temporarily occupied with no resistance during their eviction or arrest by security forces.

Finally, any restriction, however, must satisfy the three-part test developed within the Inter-American system: (a) it must be established by law, (b) pursue one of the legitimate aims recognised by the Convention, and (c) be necessary in a democratic society. This last requirement entails compliance with the cumulative criteria of suitability, necessity, and proportionality in the strict sense.

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