IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application nos. 5591/10
17802/12
23138/13
25474/14

**B E T W E E N:**

**MILICA ĐORĐEVIĆ AND OTHERS**

Applicants

– and –

**SERBIA**

Respondent

**WRITTEN SUBMISSIONS ON BEHALF OF THE ICJ AND ILGA-EUROPE**

Interveners

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## A. Introduction

1. This case raises questions of considerable importance about the nature and scope of the obligations of Contracting Parties under Article 11 of the European Convention on Human Rights (the 'Convention'). Indeed, pursuant to Article 1 and Article 46 of the Convention, the case brings into sharp focus the obligation upon States to adopt a legislative and administrative framework that ensures the practical and effective enjoyment of the right to freedom of peaceful assembly.

2. This intervention is lodged by the International Commission of Jurists ('ICJ') and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA-Europe') (together, 'the interveners'). The expertise and experience of the interveners is set out in the application for leave to intervene dated 16 September 2014.

3. This Court's jurisprudence recognizes that Convention rights are not applied in a vacuum,[1] but instead fall to be interpreted in the light of and in harmony with other international law standards and obligations,[2] including under treaty and customary international law.[3] The present intervention thus draws principally upon the authoritative interpretation of the UN Human Rights Committee of certain relevant provisions of the International Covenant on Civil and Political Rights (the 'ICCPR'), as well as the commentary in the reports of the UN Special Rapporteur on the rights to freedom of assembly and of association (henceforth, the 'UN Special Rapporteur'). It also highlights relevant passages from the OSCE/ODIHR-Venice Commission *Guidelines on Freedom of Peaceful Assembly* (The 'OSCE/ODIHR-Venice Commission *Guidelines*').[4]

4. The interveners's submissions are divided into two sections: the first, section (B), briefly overviews the essential role of the right to freedom of peaceful assembly in a democratic society. It then examines the scope of discretion properly afforded to States in determining the measures required to prevent disorder at an assembly where counter-demonstrators threaten violence against groups most at risk. The second part, section (C), focuses on the nature and scope of the State's obligations under Article 21 of the ICCPR,[5] focusing in particular on the obligation of States to adopt legislative and administrative measures in order to fulfil their legal obligations.

## B. Freedom of peaceful assembly as a fundamental right, and the discretion properly afforded to States in determining the appropriate measures to prevent disorder at an assembly where counter-demonstrators threaten violence against groups most at risk

5. This Court has, on numerous occasions, affirmed the relationship between democracy, pluralism and the right to freedom of peaceful assembly.[6] It has emphasized that this right is one of the foundations of a democratic society and should not, therefore, be interpreted

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[1] *Öcalan v. Turkey* [GC] (App. no. 46221/99, judgment of 12 May 2005), para. 163.
[2] *Demir and Baykara v. Turkey* [GC] (App. no. 34503/97, judgment of 12 November 2008), para. 67; *Al-Adsani v. UK* [GC] (App. no. 35763/97, judgment of 21 November 2001), para. 55.
[3] *Al-Adsani*, *ibid*.; *Waite and Kennedy v. Germany* [GC] (App. no. 26083/94, judgment of 18 February 1999); *Taskin v. Turkey* (App. no. 46117/99, judgment of 10 November 2004).
[4] OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010), available at: http://www.osce.org/odihr/73405.
[5] Article 21 of the ICCPR provides that, '[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this 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.'
[6] See, among many authorities, *United Communist Party of Turkey (TBKP) and others v. Turkey* (App. no. 19392/92, judgment of 30 January 1998) at para. 42 et seq; *Socialist Party and others. v. Turkey* (App. no. 21237/93, judgment of 25 May 1998) at para. 41. See also A/HRC/20/27, *Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association* (21 May 2012) at para. 84(a): 'the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected.'

restrictively.[7] On this basis, in *Stankov and Others v Bulgaria* (2001), the Court recalled that:

> '*Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles … do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means.*'[8]

6. The right to freedom of peaceful assembly imposes both positive and negative obligations upon State authorities who '*must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right*.'[9] Indeed, in *Plattform 'Ärzte für das Leben' v. Austria* (1988), this Court observed: that '*[g]enuine, effective freedom of peaceful assembly cannot … be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.*'[10]

7. Against this backdrop, the interveners recall that Contracting Parties are also obliged under international human rights law and standards to take positive measures to 'protect people from homophobic and transphobic violence'.[11] The interveners recognize that this Court has generally emphasized that '*national authorities have a wide discretion in determining the appropriate measures to be taken for the prevention of disorder at an assembly*'.[12] This Court has also previously stated that the authorities may be unable to provide *absolute* guarantees of the right to freedom of peaceful assembly in the face of potentially violent counter-demonstrators, and that the State's obligation in this regard concerns primarily 'measures to be taken and not as to results to be achieved'.[13] The interveners further recognize that the scope of this positive obligation must '*be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'* given, in particular, *'the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources*'.[14]

8. If restrictions are imposed on the basis of potential disorder or public safety, '*the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes*.'[15] Moreover, it is well established in this Court's jurisprudence that, where the expression of views is met with opposition or hostility, *'the role of the authorities in such circumstances is not to remove*

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[7] See, for example, *Rassemblement Jurassien & Unité Jurassien v. Switzerland* (App. No. 8191/78, decision of 10 October 1979) at p. 119; *Galstyan v. Armenia* (App. No. 26986/03, judgment of 15 November 2007), para.114; *Primov and Others v. Russia* (App. no. 17391/06, judgment of 12 June 2014), para.116; *Nemtsov v. Russia* (App. no. 1774/11, judgment of 31 July 2014), para.72.

[8] *Stankov and the United Macedonian Organisation ILINDEN v. Bulgaria* (App. nos. 29221/95 and 29225/95, judgment of 2 October 2001) at para. 97.

[9] *Djavit An v. Turkey* (App. no. 20652/92, judgment of 20 February 2003), paras. 56-57 citing *Ezelin v. France* (App. no. 11800/85, judgment of 26 April 1991).

[10] *Plattform 'Ärzte für das Leben' v. Austria* (App. no. 10126/82, judgment of 21 June 1988), at para. 32.

[11] OHCHR, 'Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law' (2012), see Chapter 1. Available at: http://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf. To the interveners' knowledge, this Court has not yet had the occasion directly to consider Contracting Parties' obligations to protect people from homophobic and transphobic violence. The Court has, however, considered hate crimes against individuals motivated by prejudice against other protected characteristics.

[12] *Fáber v. Hungary* (App. no. 40721/08, judgment of 24 July 2012), para. 47.

[13] Fáber, *ibid*., at para. 39 citing *Plattform 'Ärzte für das Leben' v. Austria* (App. no. 10126/82, judgment of 21 June 1988), paras. 32-34.

[14] See, *inter alia*, *Milanović v. Serbia* (App. no. 44614/07, judgment of 14 December 2010), para. 84.

[15] *Alekseyev. v. Russia* (App. nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010), para. 75; *Fáber v. Hungary* (App. no. 40721/08, judgment of 24 July 2012), para. 40, also citing *Barankevich v. Russia*, (App. no. 10519/03, judgment of 26 July 2007) para. 33.

*the cause of tension by eliminating pluralism, but to ensure that the competing political groups tolerate each other.'*[16]

9. The interveners therefore consider that the wide discretion ordinarily afforded to the national authorities in determining the measures to be used to prevent disorder should give way to a more narrow discretion in cases where:

   a. The primary threat of violence and/or intimidation emanates from counter-demonstrators. As this Court (and the former European Commission) has emphasized, '*the possibility of violent counterdemonstrations, or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right.*'[17] Moreover, participants in a peaceful demonstration must: '*… be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.*'[18] The OSCE/ODIHR – Venice Commission *Guidelines* further emphasize that:

      *'The State's duty to protect peaceful assembly is of particular significance where the persons holding, or attempting to hold, the assembly are espousing a view which is unpopular, as this may increase the likelihood of hostile opposition. However, potential disorder arising from hostility directed against those participating in a peaceful assembly must not be used to justify the imposition of restrictions on the peaceful assembly. … The State should therefore make available adequate policing resources to facilitate demonstrations and related simultaneous assemblies within 'sight and sound' of one another …'*[19]

   b. The nature of the threat of violence and/or intimidation can reasonably be anticipated by the authorities. The obligation to protect from violence (e.g. under Articles 2 and 3 ECHR) arises where the risk of harm is '*real, immediate and predictable*'[20] and where the authorities had *'more than sufficient fore-knowledge of that treatment to trigger their obligation to take preventive action.'*[21] The argument that foreknowledge on the part of the State serves to narrow the discretion afforded to it is implicit in this Court's judgment in *Fáber v. Hungary* (2012) where it was held that:

      '*[i]n the exercise of the State's margin of appreciation, … [e]xperience with past disorders is less relevant where the situation, as in the present case, allows the authorities to take preventive measures, such as police presence keeping the two*

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[16] See, amongst other authorities, *Serif v Greece* (App. no. 38178/97, judgment of 14 December 1999), para. 53; *Ouranio Toxo and Others v. Greece* (App. no. 74989/01, judgment of 20 October 2005), para. 40; *Barankevich v. Russia* (App. no. 10519/03, judgment of 26 July 2007), para. 30.

[17] *Christians Against Racism and Facism v. UK* (*CARAF*) (App. no. 8440/78, decision of 16 July 1980) at p.148; *Christian Democratic People's Party v. Moldova (no. 2)* (App. no. 25196/04, judgment of 2 February 2010), para. 23.

[18] *Plattform 'Ärzte für das Leben' v. Austria* (App. no. 10126/82, judgment of 21 June 1988), para. 32.

[19] OSCE/ODIHR – Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010), para.33.

[20] *Milanović v. Serbia* (App. no. 44614/07, judgment of December 14, 2010), at para.90 (concerning the failure to protect a member of the Hare Krishna religious community from violent attacks by members of far-right organisations). See also, *Osman v. UK* (87/1997/871/1083, judgment of 28 October 1998) at para.116; See also, *Gongadze v. Ukraine* (App. no. 34056/02, judgment of November 8, 2005) at para.165; *Dink v. Turkey* (Application nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of September 14, 2010), at para. 65 (in French only); *Kontrová v. Slovakia* (App. no. 7510/04, judgment of May 31, 2007), para. 50; *Opuz v. Turkey* (App. no. 33401/02, judgment of June 9, 2009), para. 129; and *Branko Tomašic and Others v. Croatia* (App. no. 46598/06, judgment of January 15, 2009), para. 50.

[21] The UN Human Rights Committee has emphasized the State's obligation to protect demonstrators from similar risks in a case against Paraguay: 'the State has an obligation to protect the life of persons under its jurisdiction and, in the present case, the State party had the obligation to protect the life of the demonstrators'. *Olmedo v. Paraguay* (CCPR/C/104/D/1828/2008, 22 March 2012).

*assemblies apart and offering a sufficient degree of protection, even if there was a history of violence at similar events necessitating police intervention*.'[22]

and

c. Counter-demonstrators seek to intimidate and/or perpetuate prejudice against at risk groups. This Court's jurisprudence in relation to the heightened protection properly afforded to 'vulnerable', 'marginalized' or 'at-risk' groups is especially relevant in this regard. This Court has held that where individuals are members of groups that have historically faced societal stigmatization, a State's margin of appreciation '*should be substantially narrower and it must have very weighty reasons for the restrictions in question*'.[23]

In evidencing the extent of stigmatization against individual members of lesbian, gay, bisexual, transgender or intersex (LGBTI) communities, it is significant that the UN Special Rapporteur, in his 2014 annual report to the Human Rights Council on freedom of assembly by groups most at risk,[24] highlighted examples of cases in which 'unidentified individuals violently disrupted LGBTI events' where 'the police failed to provide protection to the organizers and participants.' The Special Rapporteur observed that '[i]n several countries, stigmatization and counter-demonstrations against LGBTI pride parades and marches have also dissuaded organizers from holding such events.'[25]

Similar concerns have been expressed at the Council of Europe. In a 2011 report the Commissioner for Human Rights noted that, since 2004, counter-demonstrations in at least 15 Member States had taken the form of organised attacks on participants in Pride parades. Sometimes these were promoted and sustained by political or religious figures.[26] The report also noted that in eight Council of Europe Member States no large-scale cultural or Pride events had ever been organised.[27]

Violence against events organised by the LGBTI community in Europe have continued. For example, in Georgia, in 2012 and 2013, events to mark the International Day against Homophobia and Transphobia were the object of attacks, in the latter case, by a mob numbering in the thousands.[28] Other events attacked recently include the 2013 St Petersburg Pride,[29] Montenegro's first Pride (October 2013),[30] and an international LGBTI film festival in Sarajevo (February 2014).[31]

10. The interveners consider that this latter ground (c) – namely, where counter-demonstrators seek to intimidate and/or perpetuate prejudice against at-risk groups – is to be afforded particular weight in narrowing the State's discretion regarding the means to be used or measures to be taken in preventing violence or disorder. In this context, the interveners

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[22] *Fáber v. Hungary* (App. no. 40721/08, judgment of 24 July 2012) at para.44.

[23] See, for example, *Alajos Kiss v. Hungary* (App. no. 38832/06, judgment of 20 May 2010); *M.S.S. v. Belgium and Greece* (App. no. 30696/09, judgment of 21 January 2011); *Kiyutin v. Russia* (App. no. 2700/10, judgment of 10 March 2011). See also, *Vedjeland and Others v. Sweden* (App. no. 1813/07, judgment of 9 February, 2012) at paras. 54-55.

[24] A/HRC/26/29 *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, 14 April 2014, assessing the threats to the rights to freedom of peaceful assembly and of association for groups most at risk.

[25] *Ibid*., at para. 46.

[26] Council of Europe – Commissioner for Human Rights *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd ed., 2011) p. 75.

[27] *Ibid.,* pp. 73-74.

[28] The 2012 IDAHO event is the subject of *Identoba and Others v. Georgia* (App. no. 73235/12, communicated on 18 December 2013); the 2013 IDAHO event is the subject of *Identoba and Others v. Georgia* (74959/13); see also Amnesty International, *Georgia: Homophobic violence mars Tbilisi Pride event* (17 May 2013), available at: http://www.amnesty.org/en/news/georgia-homophobic-violence-mars-tbilisi-pride-event-2013-05-17.

[29] The St Petersburg Times *Gays stoned, beaten and arrested*, 3 July 2013. Available at: http://sptimes.ru/story/37521.

[30] BBC, *Clashes in Montenegro during gay pride march*, 20 October 2013. Available at: http://www.bbc.co.uk/news/world-europe-24603445.

[31] Amnesty International, *Bosnia and Herzegovina: Failure to protect LGBTI festival 'Merlinka' in Sarajevo*, 3 February 2014. Available at: http://www.amnesty.org/en/library/info/EUR63/001/2014/en.

consider that, while security-based restrictions, or even bans, may, on occasion, be imposed on participants in an otherwise peaceful assembly, the public interest in confronting and eliminating homophobic and transphobic violence militates against the imposition of restrictive measures on members of at-risk groups where those groups are themselves being threatened.

11. Relatedly, the interveners consider that medium- to long-term preventive and awareness-raising measures are of critical importance in satisfying the positive obligations to encourage greater tolerance, such as providing human rights training and education for the relevant authorities on how best to respond to assembly notifications. In this regard, the UN Special Rapporteur has described as best practices 'training materials developed with a view to preventing discriminatory treatment and measures against … individuals and groups of individuals belonging to minorities and other marginalized groups.'[32] The OSCE/ODIHR – Venice Commission *Guidelines* further provide that:

> '*The officials responsible for making decisions concerning the regulation of the right to freedom of assembly should be fully aware of and understand their responsibilities in relation to the human rights issues bearing upon their decisions. To this end, such officials should receive periodic training in relation to the implications of existing and emerging human rights case law. … [T]raining can help ensure that the culture and ethos of law-enforcement agencies adequately prioritizes a human-rights-centred approach to policing … A "diversity awareness" perspective should be integrated into the development and implementation of law enforcement training, policy and practice.*'[33]

## C. Protection by the law: the Nature and Scope of the State's Obligations Under Article 11 ECHR and Article 21 ICCPR

12. This Court has long recognized the connection between the particular obligations (such as the positive measures discussed above)[34] and the general obligations under Article 46 ECHR, as interpreted in the light of Article 1.[35] In recognition of its subsidiary role, the Court has emphasized that it in no way aims '*to take the place of the competent national courts in the interpretation of domestic law*'.[36] Moreover '*[i]n theory it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention.*'[37] Nonetheless, where violations of Article 11 stem from '*a legislative lacuna concerning freedom of assembly*', the Court, out of its concern '*to facilitate the rapid and effective suppression of a shortcoming found in the national system of protection of human rights*' has previously sought '*to identify its source in order to assist the Contracting States in finding an appropriate solution and the Committee of Ministers in supervising the execution of judgments*'.[38]

13. Similarly, the particular obligations (including the taking of positive measures) deriving from Article 21 ICCPR (guaranteeing the right to peaceful assembly) are linked, and give effect, to the general obligations of a State Party under Article 2 ICCPR to guarantee the rights

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[32] A/HRC/20/27, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' (21 May 2012), at para.47.

[33] OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010) paras. 62 and 148.

[34] See, for example, *Plattform 'Ärzte für das Leben' v. Austria* (App. no. 10126/82, judgment of 21 June 1988) at para. 32.

[35] *Vyerentsov. v. Ukraine* (App.no. 20372/11, judgment of 11 April 2013), paras. 93-95.

[36] *X and Y v. Netherlands* (App. no. 8978/80, judgment of 26 March 1985), para. 29.

[37] *Vyerentsov. v. Ukraine,* (App.no. 20372/11, judgment of 11 April 2013), para. 94.

[38] *Ibid*., at paras. 94-95. See also, *Shmushkovych v. Ukraine* (App. no. 3276/10, judgment of 14 November 2013), and (in relation to Article 10) *Manole and Others v. Moldova* (App. no. 13936/02, judgment of 17 September 2009), at para.117, in which this Court held that: 'the respondent State is under a legal obligation under Article 46 to take general measures at the earliest opportunity to remedy the situation which gave rise to the violation of Article 10. In the light of the deficiencies found by the Court, these general measures should include legislative reform, to ensure that the legal framework complies with the requirements of Article 10.'

under the Covenant.[39] In this regard, in its authoritative interpretation of the nature of the general legal obligation imposed on State Parties to the ICCPR by Article 2 of the Covenant, the UN Human Rights Committee has stated (in its General Comment 31) that in order for the rights in the Covenant to be fully enjoyed in the State Party: '*Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations…*'[40] Furthermore, '*in certain circumstances, there is a 'need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices*.'[41]

14. The interveners draw this Court's attention to the fact that the UN Human Rights Committee, in cases where inadequacies have been identified in the underlying legal framework protecting freedom of assembly, has called on the domestic authorities to review the applicable law. The Committee has on several occasions invited Belarus to review the Belarussian legislation on public assemblies and its application on the basis that '*[t]he State party is … under an obligation to take steps to prevent similar violations in the future.*'[42]

15. Such findings are especially significant in relation to the Court's determination of the present case given that deficiencies in the legislative framework have been highlighted in the 'Joint Opinion on the Public Assembly Act of the Republic of Serbia' adopted in 2010 by the Venice Commission and OSCE/ODIHR,[43] and more recently, by the European

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[39] Article 2 of the ICCPR provides that: '*1. 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, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
*2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
*3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.*'

[40] Human Rights Committee, General Comment no. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, at para.7. The Committee has, however, emphasized that 'the provisions of article 2 of the Covenant … do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol' or 'cannot be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the *proximate cause of a distinct violation* of the Covenant directly affecting the individual who claims to be a victim' (emphasis added). See, *Kuznetsov. v. Belarus* (CCPR/C/111/D/1976/2010, 24 July 2014) at para.8.4.

[41] General Comment no. 31, *ibid.* at para. 17.

[42] See, for example, *Levinov. v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010, 19 July 2012), at para.12; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008, 23 July 2012) at para. 11; *Govsha, Syritsa and Mezyak* v. *Belarus* (CCPR/C/105/D/1790/2008, 27 July 2012) at para. 11; *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010, 24 July 2013), at para. 9; and *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008, 28 October 2013), at para. 11; *Kuznetsov. v. Belarus* (CCPR/C/111/D/1976/2010, 24 July 2014); *Bazarov. v. Belarus* (CCPR/C/111/D/1934/2010, 24 July 2014), at para.9. Previously, see *Maria Tulzhenkova v. Belarus* (CCPR/C/103/D/1838/2008, 26 October 2011), and, in particular, the individual opinions of Mr Fabián Salvioli (arguing, at para. 7, that '[j]ust as States parties to the Covenant must adopt legislative measures to give effect to rights, they also bear a negative obligation, deriving from article 2, paragraph 2, not to adopt legislative measures which violate the Covenant; if it does so, the State party commits per se a violation of the obligations laid down in article 2, paragraph 2' *cf.* Mr. Rajsoomer Lallah, stating: '…my colleague Salvioli's concerns, regarding the failure by the State party in its obligation to adopt appropriate legislation, could have been sufficiently allayed by a request for a review of the legislation in pursuance of article 2, paragraph 2, of the Covenant'.

[43] CDL-AD(2010)031, Opinion no. 597/2010 (Strasbourg and Warsaw, 18 October 2010). Available at: http://www.osce.org/serbia/73335?download=true

Commission in its Progress Report regarding Serbia (October 2014): '*[t]he public assembly law has yet to be fully aligned with the Constitution.*'[44]

16. Indeed, the interveners draw the Court's attention to four important legislative practices identified by the UN Human Rights Committee, the UN Special Rapporteur, and by the OSCE/ODIHR and Venice Commission, which, in turn, compel clarification of the minimum State obligations (both negative and positive) as these pertain to the domestic legal framework:

    a. <u>The legislative framework should ensure that notification requirements are proportionate</u>. This Court has previously asserted '*that notification, and even authorisation, procedures for a public event do not normally encroach upon the essence of the right under Article 11 of the Convention as long as the purposes of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly …*'[45] The interveners note, however, that this Court has qualified this approach with a more circumspect and conditional acceptance of mandatory notification procedures: '*In the Court's view, such requirements do not, as such, run counter to the principles embodied in Article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention*'.[46]

    This latter qualified approach is consistent with the stance adopted by the UN Human Rights Committee, recognizing that notification procedures can result '*in de facto limits of the right of assembly*'.[47] The Human Rights Committee has observed that, '*even if, in principle, a State party may introduce a system aimed at reconciling an individual's freedom to impart information and to participate in a peaceful assembly with the general interest of maintaining public order in a certain area, that system must not operate in a way that is incompatible with the object and purpose of articles 19 and 21 of the Covenant.*'[48]

    Similarly, both the UN Special Rapporteur and the Venice Commission and OSCE-ODIHR, have argued that, 'notification should be subject to a proportionality assessment …'[49] Indeed, the UN Special Rapporteur has additionally emphasized that even informal requirements that assembly organizers negotiate the time and place of the assembly with the authorities are tantamount to an interference and thus '*would need to pass the strict test of necessity and proportionality, as defined in article 21 of the Covenant*'.[50]

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[44] See, *European Commission, Serbia: Progress Report* (October 2014). Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf at pp.46-47.

[45] See, for example, *Kuznetsov. v. Russia* (App. no. 10877/04, judgment of 23 October 2008), para. 42; *Rai and Evans v. the United Kingdom* (App. nos. 26258/07 and 26255/07, decision of 17 November 2009).

[46] Emphasis added. See, *Oya Ataman v. Turkey* (App. no. 74552, judgment of 5 December 2006), para. 38; *Éva Molnár v. Hungary* (Application no. 10346/05, judgment of 7 October 2008), para.34; *Samüt Karabulut v. Turkey* (App. no. 16999/04, judgment of 27 January 2009), para. 35; *Berladir v. Russia* (App. no. 34202/06, judgment of 10 July 2012), para.39.

[47] Human Rights Committee, Concluding Comments on Morocco [1999] UN doc. CCPR/79/Add. 113, para.24.

[48] See, for example, *Turchenyak et al.* v. *Belarus* (CCPR/C/108/D/1948/2010, 24 July 2013), at para.7.8; *Bazarov. v. Belarus* (CCPR/C/111/D/1934/2010, 24 July 2014), at para. 7.4.

[49] A/HRC/20/27, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai* to the UN Human Rights Council, 21 May 2012, at para.28, citing submission by the OSCE-ODIHR Panel of Experts. See also, David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Hart: 2010) at p.80 noting that '[c]onstruing the need to obtain an authorisation as an interference would be a more favourable approach under a system of supra-national adjudication'.

[50] *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai* A/HRC/23/39 (24 April 2013) at para. 56, and more generally regarding notification procedures, paras. 52-58. Available at: http://freeassembly.net/wp-content/uploads/2013/04/A.HRC_.23.39_EN-funding-report-April-2013.pdf. See also, UN Special Rapporteur, *Freedom of Assembly: Best Practices Fact Sheet* (5 November 2014); available at: http://freeassembly.net/wp-content/uploads/2014/11/Freedom-of-Assembly-best-practices-factsheet.pdf

b. The legislative framework should not impose the costs policing and/or traffic regulation on assembly organisers. The interveners consider that adequate resourcing of any policing operation deemed necessary by the authorities forms part of the positive obligation of States to protect and facilitate the right to freedom of peaceful assembly. In this regard the interveners point to the emphasis in the 2nd edition of the OSCE/ODIHR – Venice Commission *Guidelines* that '*the costs of providing adequate security and safety measures (including traffic and crowd management, and first-aid services) should be fully covered by the public authorities. The State must not levy any additional financial charge for providing adequate and appropriate policing*'.[51] The UN Special Rapporteur has similarly stated that assembly organizers should not incur any financial charges for the provision of public services during an assembly (such as policing, medical services and other health and safety measures).[52]

c. The legislative framework should enable proportionate interventions. In order to satisfy the requirement of proportionality, the legislative and administrative framework should enable a range of interventions by the authorities, not solely the banning of an assembly. Guideline 3.4 of the OSCE/ODIHR – Venice Commission *Guidelines* recommends that, '*[a] wide spectrum of possible restrictions that do not interfere with the message communicated is available to the regulatory authority.*'[53]

Further, the Special Rapporteur has emphasized that:

> '*States also have a negative obligation not to unduly interfere with the right to peaceful assembly. The Special Rapporteur holds as best practice 'laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and provide for the possibility of other less intrusive restrictions … Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities*.'[54]

In light of the foregoing, the interveners submit that Contracting Parties should not be able to hide behind an inadequate legislative and administrative framework and purport that they merely sought to comply with the 'prescribed by law' requirement. Indeed, Contracting Parties' failure to provide in their legislative and administrative framework for a wide range of measures to which, depending on the circumstances, lawful resort may be had, discloses violations of their obligations under Article 11, as interpreted in the light of Article 1 of the Convention.

d. The legislative framework should provide for an effective remedy. In *Klass v. Germany* (1978), this Court clarified that Article 13 must not be construed literally; there is no prerequisite for its application that the Convention be in fact violated. That means that

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[51] OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010), at paras. 31-34 and 104.

[52] UN Special Rapporteur, A/HRC/20/27 (21 May 2012), at para. 31.

[53] The explanatory notes to the Guidelines emphasize that this entails that 'a wide spectrum of possible restrictions that do not interfere with the message communicated is available to the regulatory authority […]. In other words, rather than the choice between non-intervention and prohibition, the authorities have recourse to many "mid-range" limitations that might adequately serve the purpose(s) they seek to achieve [….]. These limitations can relate to changes to the time or place of an event, or the manner in which the event is conducted. [….] The regulatory authority must not impose restrictions simply to pre-empt possible disorder or interference with the rights of others. The fact that restrictions can be imposed during an event (and not only before it takes place) enables the authorities to avoid imposing onerous prior restrictions and to ensure that restrictions correspond with and reflect the situation as it develops. This, however, in no way implies that the authorities can evade their obligations in relation to good administration […] by simply regulating freedom of assembly by administrative fiat.' OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010), paras. 99-100.

[54] UN Special Rapporteur, A/HRC/20/27 (21 May 2012) at para. 39, footnote in the original omitted. In a case involving a demonstration and counter-demonstration (*Fáber v. Hungary*, App. no. 40721/08, judgment of 24 July 2012) at para. 43, this Court similarly emphasized that the State 'should find the least restrictive means that would, in principle, enable both demonstrations to take place.'

individuals are not only entitled to a national remedy when a violation of their rights has already occurred, but also, that Article 13 entitles those who consider that they are, or would be prejudiced by certain measures in breach of the Convention, to a remedy before a national authority so that they can have their claim determined and, if appropriate, obtain redress.[55] As the Grand Chamber of this Court held, *inter alia*, in *Kudla v. Poland* (2000), 'the remedy required by Article 13 must be "effective" in practice as well as in law'.[56] In this context, effectiveness means either a remedy capable of 'preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred'.[57] The interveners submit that the effectiveness of the national remedy should be gauged and construed in the light of the relationship between Article 35 of the Convention, which, *inter alia*, addresses the obligation to exhaust domestic remedies, and the obligations of Contracting Parties under Article 13. In this respect, this Court in *Kudla* emphasized that:

> '[*t*]*he purpose of Article 35(1), which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. ... The object of Article 13, as emerges from the travaux … is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.*'[58]

In light of this, the interveners submit that, if the national remedy is effective, then applicants will be less likely to consider it necessary or appropriate to seek resort to this Court to vindicate their Convention rights. Conversely, where the national remedy is generally ineffective, this Court will be more likely to consider that applicants have discharged their Article 35 obligations. This is particularly the case when the national remedy is either unlikely to provide effective relief or is *ex post facto* in nature; *a fortiori* when it is both. In relation specifically to the right to freedom of peaceful assembly, this Court has further emphasized the significance of the timeliness of the available domestic remedies.[59]

While Contracting Parties are afforded some discretion as to the manner in which they discharge their Convention obligations under Article 13, they are obliged to ensure that domestic remedies be capable of dealing with the substance of an 'arguable complaint' under the Convention and, if so warranted, '*to grant appropriate relief*'.[60] As an instrument for the protection of human rights, the Convention requires that the Contracting Parties' obligations, including those under Article 13, be interpreted and construed in a manner that ensures that their protection is practical and effective, and not theoretical and illusory.[61]

In a similar vein, the Human Rights Committee has stressed that even where a State's legal system is formally endowed with what may seem on the surface to be appropriate avenues for seeking a remedy, such remedies must 'function effectively in practice.' In other words, such remedies must be 'accessible, effective and enforceable' if they are to

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[55] *Klass v. Germany* (App. no. 5029/71, judgment of 6 September 1978), para. 64.
[56] *Kudła v. Poland* (App. no. 30210/96, judgment of 26 October 2000), para. 157.
[57] *Ibid.*, para. 158.
[58] *Ibid.*, para. 152.
[59] See, for example, *Zeleni Balkani v Bulgaria* (App. no. 63778/00, judgment of 12 April 2007) at paras. 42-45, holding that 'the appeal procedure under the Meetings and Marches Act was not effective as it resulted in the domestic court declaring the municipality's prohibition as null and void almost a year after the planned event when the need for such a rally no longer existed'; *Bączkowski and Others v. Poland* (App. no. 1543/06, judgment of 3 May 2007), para. 81; See also, OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010), paras. 66 and 138.
[60] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] (App. no. 47848/08, judgment of 17 July 2014), para. 148 (emphasis added).
[61] See, for example, *El-Masri v. 'the former Yugoslav. Republic of Macedonia'* [GC] (App. no. 39630/09, judgment of 13 December 2012), para. 134.

satisfy the requirements of Article 2(3) of the Covenant.[62] In 2010, for example, the Committee expressed concerns that under Poland's Assemblies Act of 5 July 1990, 'the length of the appeals procedure against a prohibition to hold an assembly may jeopardize the enjoyment of the right of peaceful assembly.' In light of this, the Committee recommended that Poland, 'should introduce legislative amendments to the Assemblies Act in order to ensure that appeals against a ban to hold a peaceful assembly are not unnecessarily protracted and are dealt with before the planned date.'[63]

In its determination of the present case, this Court may also find instructive the *Recommendation (2004)6 of the Committee of Ministers of the Council of Europe* to Member States on the improvement of domestic remedies. The Recommendation recalls that, pursuant to Article 1 of the Convention, the rights and freedoms enshrined therein should be protected and implemented in the first place at national level by national authorities; and that Contracting Parties should ensure the effectiveness of national remedies in law and in practice, including by providing for a decision on the merits of a complaint, as well as adequate reparation for any violation found.[64] The Appendix to the Recommendation underlines that the Contracting Parties are encouraged '*to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by Article 13*'.

## D. Conclusion

17. This intervention has elaborated upon the obligations of States to protect and facilitate the right to freedom of peaceful assembly. The interveners believe that the present case provides the Court with an opportunity to further underscore and clarify the State's obligations relating to the right to freedom of peaceful assembly in two key areas:

    a) First, the State's positive obligations in relation to freedom of peaceful assembly should be realized in a way that is commensurate with the nature of the threat and extent of the State's foreknowledge. Drawing upon the case law of this Court, and the commentaries of both the UN Special Rapporteur and the Venice Commission and OSCE/ODIHR, the interveners have made submissions to the effect that States should be afforded a narrow discretion in relation to the means used or measures to be taken in preventing violence or disorder, where the threat of violence or intimidation comes primarily from counter-demonstrators, can reasonably be anticipated, and is directed at groups most at risk.

    b) Second, States must put in place an adequate legislative and administrative framework to guarantee and facilitate the right of assembly. In this regard, the interveners have sought to highlight, in particular, the stance of the UN Human Rights Committee (under Article 2, ICCPR) in cases where the domestic legislative framework itself has been found to undermine the effective enjoyment of the right to peacefully assembly. The interveners pointed to four important legislative practices which serve to protect against structural violations of the right to peacefully assemble: the proportionality of the notification process (including any formal or informal negotiations that notification may trigger); not imposing the costs of policing and/or traffic regulation on the organizer; provision for a range of interventions to allow the authorities to follow the 'least restrictive' approach; and the need for the law to provide for an effective remedy. As such, the interveners consider that in its determination of the present case the Court may wish to consider the Contracting Parties' obligations in respect of recurrent, underlying structural flaws in their legislative and administrative frameworks pursuant to their obligations under Article 11 interpreted in the light of the general obligations under Article 1 of the Convention.

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[62] See, for example, *George Kazantzis v. Cyprus* (CCPR/C/78/D/972/2001, 7 August, 2003) para. 6.6; *Yasoda Sharma v. Nepal* (CCPR/C/94/D/1469/2006, 28 October 2008) para. 9.6.

[63] Concluding observations of the Human Rights Committee, Poland, CCPR/C/POL/CO/6, 27 October 2010, para. 23.

[64] Recommendation (2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (adopted on 12 May 2004 at the Committee's 114th Session), preamble.