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**NETHERLANDS HELSINKI COMMITTEE**

**COMMENTS ON THE DRAFT GENERAL COMMENT NO. 37**

**AS ADOPTED BY THE HUMAN RIGHTS COMMITTEE**

**IN THE FIRST READING**

*10 February 2020*

*The Hague, the Netherlands*

Introduction

1. The Netherlands Helsinki Committee welcomes the Human Rights Committee’s (“the Committee”) release of the revised Draft General Comment no. 37 on the right of peaceful assembly as adopted by the Committee in the first reading (“the Draft General Comment”).
2. The Netherlands Helsinki Committee, in close collaboration with its partners, was part of the long deliberative process which led to this significant milestone. In particular, we submitted a written contribution in advance of the half-day general discussion on the matter held by the Committee in the course of its 135th session last year.
3. We are pleased to note that the Draft General Comment now includes most of the points we raised. In our opinion, the Draft General Comment makes significant contribution to both the codification and the progressive development of international human rights law. It is hard to overestimate the enormous significance of this very timely normative exercise undertaken by the Committee.
4. At this critical juncture, one would only benefit from repeating the wise *dictum* of the Constitutional Court of South Africa: “People who lack political and economic power have only protests as a tool to communicate their legitimate concerns” (*Mlungwana and Others v. The State and Another*, [2018] ZACC 45, § 49). It is imperative both for those people to be able to express themselves without fear and undue limitations and for the Governments to be able to hear their messages.

General remark

1. There is an ongoing worrying trend of the criminalization of the mere fact of participation in peaceful protest actions as such. This trend is reflected, *inter alia*, in an important precaution expressed by the Committee in § 79 of the Draft General Comment.
2. It is our submission that the Committee is well placed to remind States Parties that those individuals who exercise their fundamental right to peaceful protest, including those who convene mass protest actions, should not be held criminally liable for taking part in peaceful protests. At the very least, those actions should not, under any circumstances and within any legal framework, lead to imprisonment as a possible punishment.
3. Given that the rationale for the recognition of the freedom of assembly and the freedom of expression and the acceptable restrictions overlap in many ways (§ 112 of the Draft General Comment), the NHC invites the Committee to draw inspiration from §§ 9 and 42 of General Comment no. 34 on the freedom of opinion and expression, and consider including the following sentences in the Draft General Comment: “It is in principle incompatible with article 21 of the Covenant to criminalize the holding of peaceful assembly or participation in it as such. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment, solely for the reason of that person’s participation in a peaceful assembly constitutes a violation of article 21. The penalization of a peaceful protestor, or protest organizer solely for being critical of the government or particular public policies can never be considered to be a necessary and proportional restriction of the right of peaceful assembly”.
4. It is proposed that the above wording is added to § 76 of the Draft General Comment on the proportionality of criminal sanctions used against participants in a peaceful assembly, in order to make the overall message of this provision clearer and less ambiguous.
5. The possible concerns of some States can be addressed by the reminder that penalization of particular criminal conduct, such as destruction of property, looting, rioting, or arson, and prosecution of those responsible remains in their purview, in full compliance with their applicable legislation and fair-trial guarantees.

Specific comments

1. The Netherlands Helsinki Committee notes that several paragraphs of the Draft General Comment contain square brackets indicating language on which consensus has not yet been reached in the Committee. We therefore offer our input on those issues.
2. **§ 1**. We suggest to retain reference to the rule of law in this important introductory remark. It is imperative for the rule of law to be associated with respect for fundamental human rights, such as the right to peaceful assembly.
3. **§ 22**. We suggest that Option 1 is preferred. The reference to article 20 of the Covenant is, in our submission, appropriate at this point.
4. **§ 27**. We suggest that the text in square brackets is retained. It is important to refer to the private security providers here.
5. **§ 31**. The use of the word “appropriate” is preferential in this paragraph.
6. **§ 33**. We suggest that the word “alleged” is used, at it is in line with the most common usage in this context.
7. **§ 34**. We suggest that the reference to article 21 of the Covenant is retained in this paragraph. The journalists, human rights defenders, and human rights monitors observing peaceful assemblies should enjoy specific protections flowing directly from article 21 of the Covenant.
8. **§ 46**. In our respectful submission, the use of either of the proposed words is possible in this paragraph. Alternatively, the reference may be made to “the balancing exercise”, in line with the terminology applied by the European Court of Human Rights.
9. **§ 53**. In our submission, it is imperative to retain the word “fundamental” in this paragraph.
10. **§ 60**. It is suggested that the following wording of the second sentence of this paragraph is retained: “In exceptional cases, where such symbols are intrinsically and exclusively linked with incitement to acts of violence, restrictions may be justified”.
11. **§ 75**. We suggest that the reference to civil or criminal remedies is removed from the first sentence of this paragraph, as other forms of accountability may be utilized as well.
12. **§ 81.** In our respectful submission, it is imperative that it is explicitly underlined by the Committee in this paragraph, that a failure to notify the authorities of an assembly should not of itself render participation in the assembly in question unlawful, and used as a sole basis for the assembly’s dispersal.
13. **§ 114**. We suggest that this paragraph is retained, as it serves its own purpose and has a specific added value.

Conclusion

1. The Netherlands Helsinki Committee applauds the Committee once again on its valuable work undertaken in elaboration of the Draft General Comment to date.
2. In our opinion, the Draft General Comment is suitable for adoption in the second reading at the Committee’s 128th session in Geneva this month, subject to minor editorial revisions; in particular, we strongly advocate for the addition of clear wording as proposed in § 7 above.
3. The Netherlands Helsinki Committee will be represented by Senior Advisor, Dr. Sergei Golubok, at the forthcoming 128th session of the Committee. Dr. Golubok remains available to provide additional input to the Committee experts.