





**WRITTEN CONTRIBUTION TO HALF-DAY GENERAL DISCUSSION**

**ON ARTICLE 21 OF THE COVENANT**

 *1 March 2019 The Hague, the Netherlands*

Introduction

1. Netherlands Helsinki Committee (The Hague), Moscow Helsinki Group (Moscow), Kadyr Kasiet (Astana), Association for Monitoring Equal Rights (Istanbul) and Human Rights Club (Baku) are a coalition of civil society partners (Coalition) that work to reinforce activities in human rights protection and upholding the rule of law, with particular attention to support to human rights defenders.
2. The Coalition applauds the initiative of the Human Rights Committee (Committee) to draft General Comment no. 37 - its first ever General Comment on Article 21 of the International Covenant on Civil and Political Rights (Covenant) which protects the right of peaceful assembly.
3. This contribution reflects the day-to-day experience of human rights defenders in countries in the region of the Organization for Security and Cooperation in Europe (OSCE region). It takes into account monitoring results on the ground in various jurisdictions of the OSCE region.
4. We pay due consideration to the well-thought list of questions put together by Professor Christof Heyns, Special Rapporteur of the Committee, in his Note. Although this contribution is in no way comprehensive and does not contain positions on all issues raised by the Special Rapporteur in his Note, references to that document are made where appropriate.
5. Peaceful protest remains one of the core human rights. It is particularly relevant for those groups of society who do not have access to other means of expression. As the Constitutional Court of South Africa recently put it, “[p]eople 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, § 69).

Criminalization of participation in peaceful protest

1. There is an ongoing worrying trend of the criminalization of participation in peaceful protests as such. Under various pretexts— such as the establishment of onerous notification requirements and the provision of criminal responsibility for the failure to comply with those requirements— the authorities of various countries tend to criminalize the mere participation in peaceful protests. It is often the case that additional forms of legislation are also used to criminalize peaceful protests. For example, the use in recent years of anti-terrorism legislation in Turkey.
2. The Constitutional Court of the Russian Federation in its Judgment of 10 February 2017[[1]](#footnote-1) dealt with the provision of the Criminal Code of that country that makes it a crime to take part in a peaceful protest without complying with notification requirements if the defendant had committed the same offence (classified as “administrative offence” or misdemeanor) on at least three occasions during the preceding half-year. Admittedly, this provision of the Russian Criminal Code had as its objective the creation of a “chilling effect”[[2]](#footnote-2) in respect to those who dare to show up at unauthorized protests regularly.
3. The Constitutional Court reinterpreted the relevant provision of the Russian Criminal Code. The Court stated that repeated failure to comply with the notification requirements *alone* was not sufficient, but that also causing a real threat to health, property, environment, public order, public security or other constitutional values as a result of taking part in an unauthorized assembly was an indispensable constitutive element of the *corpus delicti* in question.
4. In other words, it is not enough for the individual citizen to disregard the existing notification requirements with respect to peaceful assemblies to commit a crime; her or his actions should be objectively dangerous to constitutional values, such as public order, and it is up to the authorities in each case to prove that danger.
5. The rationale for this approach is simple. The notification requirements are established to benefit the peaceful protesters themselves. The notification gives time and information to the authorities to prepare for the discharge of their positive obligation to facilitate peaceful assembly (see next chapter of this contribution). If failure to comply with notification requirements does not create any danger, then it does not justify criminalization of the protesters’ conduct. According to the European Court of Human Rights, imposing severe sanctions on participants of peaceful protest demonstrations for the mere act of attending a protest, without the participants committing any reprehensible acts, impairs the very essence of the right to freedom of peaceful assembly (see *Galstyan v. Armenia*, no. 26986/03, § 117, Judgment of 15 November 2007). Public authorities must show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly is not to be deprived of all substance (see *Frumkin v. Russia*, no. 74568/12, § 97, Judgment of 5 January 2016).
6. In response to the questions posed by the Special Rapporteur in § 6 of his Note, it is important to highlight that individuals exercising their right to peaceful protest, including organizers or convenors of mass protest actions, should not be held liable, and above all, not be held criminally responsible, for the actions of other individuals exercising the same right in the same location or for the actions of other third parties. There is no place for the principle of collective responsibility or strict liability in this area of law. This is particularly important in light of documented instances when various actors have employed thugs whose only aim was to infiltrate the protest action, commit various unlawful acts and ultimately discredit legitimate protesters. The unlawful actions of those particular individuals should be met with the appropriate response on the part of the authorities; however, they should never justify criminalization of protests and protesters in general. In this respect, reference is made to § 5.7 of the Guidelines on Freedom of Peaceful Assembly (second edition) jointly prepared by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly and the European Commission for Democracy through Law (Venice Commission),[[3]](#footnote-3) according to which, “[t]he organizers [of assemblies] should not be liable for the actions of individual participants or for the actions of non-participants or *agents provocateurs*”.
7. Therefore, it is respectfully suggested that a point of principle is made in General Comment no. 37 that taking part in peaceful protests as such should never constitute a crime and, in any event, the principle of individual responsibility should apply. Drawing inspiration from § 9 and § 42 of General Comment No. 34 on Article 19, the following wording is proposed for General Comment No. 37 on Article 21: “*It is incompatible with article 21 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 protester, or protest convenor (organizer) solely for being critical of the government or particular public policies can never be considered to be a necessary restriction of freedom of peaceful assembly* ”.

Positive obligations on the part of the authorities while handling peaceful assemblies

1. In practice, safe and unhindered exercise of the right enshrined in Article 21 of the Covenant almost always presupposes the discharge, on the part of public authorities, of a duty “to facilitate and protect peaceful assembly” (§ 2.2 of OSCE Guidelines on Freedom of Peaceful Assembly), or, using the terminology of the European Court of Human Rights, “positive obligations to secure the effective enjoyment” of the freedom of peaceful assembly (*Baczkowski and Others v. Poland*, no. 1543/06, § 64, Judgment of 3 May 2007) (reply to the question in § 4 of the Note of the Special Rapporteur).
2. First, the relevant public authority should fairly distribute access to public spaces ensuring that all interested groups are able in practice to stage peaceful assemblies “within sight and hearing of their target audience” (*Severinets v. Belarus*, no. 2230/2012, § 8.5, Views of 19 July 2018). This duty includes distribution of available locations and timeslots, for example, through making information about the locations and timeslots already taken by other groups publicly available, including on-line, in order to allow those who plan their own peaceful assembly to avoid overlap. This does not require significant public resources but permits fair distribution of limited spaces between different groups willing to exercise their Article 21 rights without discrimination.
3. In some countries various pretexts are used to justify prohibitions to hold peaceful assemblies in particular locations. Along with outright arbitrary prohibitions, reference is often made to possible objections from the third parties. For example, it is common practice in Azerbaijan for the authorities to prevent peaceful assemblies from taking place with reference to the complaints submitted by individuals who live nearby and who do not want protest demonstrations to take place near their residences. Regardless of whether those complaints are genuine or not, freedom of peaceful assembly should not be dependent on the wishes of third parties who might not like the message of protesters. Public spaces belong to everyone, and the freedom of peaceful assembly would be deprived of its essence if the right to assemble becomes dependent on the wishes of third parties. It is precisely the role of the authorities, while discharging their positive obligation to facilitate an assembly, to establish cooperation between everyone involved with the aim of seeking practical solutions— for example, reasonably limiting the time allocated for the assembly in question— that would, from the one hand, ensure meaningful exercise of the right protected by Article 21, and, from on the other hand, take into account the legitimate concerns of all interested parties.
4. The positive obligation of the authorities to facilitate peaceful assembly may, in certain circumstances, also include an obligation to provide, subject to reasonable conditions of costs sharing, publicly owned venues, such as congress halls or similar spaces, if they are appropriate for holding an assembly, and other suitable venues in the same vicinity are not accessible.
5. Second, police should protect participants of peaceful assemblies. This positive obligation is particularly pertinent in respect of those gatherings that express views or opinions known to be controversial in a society. In the words of the European Court of Human Rights, given that, “[t]he State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness… [the positive obligation to protect] is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimization… A peaceful demonstration may annoy or give offence to persons opposed to the ideas or claims that it seeks to promote. The participants must, however, be able with the State’s assistance, to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents” (*Identoba and Others v. Georgia*, no. 73235/12, §§ 94-95, Judgment of 12 May 2015).
6. Third, the duty to facilitate peaceful assembly implies taking care of a variety of practical arrangements, such as provision of medical assistance, cleaning services, regulation of traffic— those duties that would normally in any event be exercised by public authorities, but with modifications necessarily required by the holding of a peaceful assembly.
7. The shifting of this burden to the organizers of a peaceful assembly (reply to the question posed by the Special Rapporteur in § 7 of his Note) is just another method to create a “chilling effect” and to prevent mass protest actions from being orderly and peacefully held. The following case recently adjudicated by a district court in St Petersburg, Russian Federation, is illustrative of this tendency. Opposition political activists Messrs B.Litvin and D. Mikhaylov were ordered to pay damages totalling approximately EUR 100 000 as a result of a civil suit brought by the office of the city public prosecutor.[[4]](#footnote-4) With reference to the posts in their widely popular social media accounts, the district court decided that the respondents had been *de facto* organizers of the unauthorized protest rally that had taken place in the historical centre of St Petersburg in 2018 on the eve of the public holiday (Victory Day). The district court proceeded to hold the two individuals liable for the value of all decorative vegetation destroyed allegedly by those who had taken part in the rally. The court accepted that some of the plants and flowers might had been damaged by the police officers who had been chasing the protesters, but concluded that the two respondents should nevertheless be held liable for their destruction. Ironically, the district court took note of the legal argument made on behalf of the respondents that they should not be punished for exercise of their freedom of peaceful assembly, with reference to OSCE Guidelines on Freedom of Peaceful Assembly, but used it only to cut down the amount of damages awarded against the two individuals. In the end, the compensation awarded to the city totalling around EUR 100 000 was capable of ruining two political activists financially. It is impermissible to apply strict liability in respect of organizers of peaceful assemblies, including unauthorized ones, and hold them liable for any damages that might be caused by protesters or other individuals, such as police officers, in connection with the protest. The chilling effect thus created will be enormous. It is up to the authorities and specially trained police officers who are financed by the taxpayer’s money to be able to facilitate the assembly in the manner that will mitigate all possible damage to third parties and public property. Of course, individuals, including protest participants and organizers, as well as police officers and other officials, should still be liable for the damage directly caused by their own actions, in line with ordinary applicable civil-law rules. However, it is not compatible with the freedom of peaceful assembly to impose additional civil-law obligations upon convenors or organizers of such actions and hold them responsible for the damage that might be caused by the participants of the event or other parties in connection with the event.
8. Therefore, the following wording is proposed for General Comment No. 37: “*Effective exercise of the right enshrined in article 21 requires relevant public authorities to facilitate and protect peaceful assemblies, including, in particular, ensuring fair, transparent and non-discriminatory distribution of locations and timeslots suitable for assemblies, protection of physical integrity and dignity of participants of assembly, provision of various practical means of support, including medical assistance, cleaning services, management of traffic, etc.*”

Use of force by law-enforcement against protesters

1. Regretfully, the response of the authorities to peaceful assemblies in many jurisdictions is that of excessive use of force and even inhuman and degrading treatment of protesters, with instances of torture.
2. The authorities that lack legitimacy and confidence in their own eyes and particularly in the eyes of the members of the public use law-enforcement forces which they control in order to send a very powerful signal to the population: anyone who dares to publicly confront the elites will have to pay the price. In order to prove the seriousness of their intentions, such authorities disperse peaceful assemblies under various pretexts or with no explanation at all using excessive violence, beatings, various forms of ill-treatment, very often at random. The real objective of those attacks is the human right to freedom of peaceful assembly. As a rule, use of excessive force against peaceful protesters or threats of such use are counterproductive as they escalate the situation and thus provoke the cycle of violence. The report of Toronto Police in the aftermath of protest actions during the G20 Summit in that city aptly concluded: “Crowd behaviour is often influenced by the type and manner of police deployment. Displays of real or implied force can lead to negative crowd reactions that may escalate a situation”.[[5]](#footnote-5)
3. Although different efficient policing techniques and good practices exist in various countries of the world, it is, with respect, not the Committee’s task to provide trainings in handling peaceful assemblies to the police. However, the human rights perspective requires every police officer involved in handling peaceful assemblies always to start from the presumption that a participant of the peaceful protest is not causing public nuisance but exercising his or her right protected by international human rights law. Even if some individuals are involved in offences, that fact should not justify the use of excessive force against all those taking part in peaceful assembly. As the Human Rights Handbook on Policing Assemblies published by the OSCE Office for Democratic Institutions and Human Rights in 2016 explained: “There are many examples of how conflicts have arisen and tensions have escalated when the police have intervened in an indiscriminate manner. A group of people is never homogeneous from the beginning, but may begin to behave as such if they are treated as a single entity… If one individual initiates a conflict, it is important that the police reaction to this does not lead to others being drawn into the conflict”.[[6]](#footnote-6)
4. All instances of the use of force against participants of peaceful protests fall under both Articles 7 and 21 of the Covenant (see § 11 of the Special Rapporteur’s Note) and it is up to the respective Government to provide persuasive and cogent reasons justifying absolute necessity and intensity of the intervention in question. In order to satisfy the procedural limb of their obligations under Article 7 of the Covenant, the authorities should in any event and, if necessary, on their own initiative conduct prompt, thorough, effective, impartial and independent investigation into all instances where credible information is available that physical force and coercive means such as teargas were employed by police and other law-enforcement personnel against participants of peaceful assembly. Failure to conduct such investigation, in line with the well-established case-law of the Committee, constitutes a separate violation of the Covenant.
5. An independent oversight mechanism should review and report on any large-scale or contentious policing operation relating to public assemblies. When accounts of police brutality, maltreatment or torture at the hands of law-enforcement around assemblies arise during trials, they should be followed up by serious and thorough investigation. Judges and prosecutors should have a clear obligation to refer all relevant incidents that come to their attention to an independent authority with a mandate to investigate them.
6. It is therefore respectfully proposed that the following wording is considered by the Committee while drafting General Comment No. 37: “*Use of physical force and special means, such as teargas, against participants of peaceful protest raises issues under both articles 7 and 21. In order to comply with the Covenant it should not be indiscriminate. It is always up to the public authorities to prove convincingly that the use of such force and means was absolutely necessary in the circumstances. In any event, independent, effective, prompt, thorough, and impartial investigation should be carried out in the circumstances of every such situation*”.

Access of media

1. The primary objective of most peaceful assemblies, especially those of political nature, is to express opinions in order to spread them further, for the wider public to become aware of the views and demands of those assembling and presumably join them.
2. Hence, one of the methods to stifle dissent employed by many oppressive governments is to target media professionals covering public protest events or to prevent them from effectively, under various pretexts, exercising their duties. It is therefore very important that the Committee highlights, in its General Comment no. 37, the crucial role played by media professionals in informing the general public of peaceful assemblies, their participants and messages, and thus exercising their rights pursuant to Article 19 of the Covenant (see § 12 and § 17 of the Note of the Special Rapporteur). Journalists should not be equated with simple bystanders as they exercise their human rights and, above all, play the critically important role of public watchdog. Moreover, experience shows that mere presence of media professionals at the location of assemblies is often capable of mitigating the risks of ill-treatment and police brutality.
3. The European Court of Human Rights has emphasized that the media fulfils an essential function in a democratic society. This includes providing information about the authorities’ handling of public demonstrations and the containment of disorder therefore, any attempt to remove journalists from the scene of demonstrations or to prosecute them for an alleged offence in relation to a demonstration must be subject to strict scrutiny (*Butkevich v. Russia*, no. 5865/07, § 130, Judgment of 13 February 2018).
4. The Committee has acknowledged that journalists’ participation in a public event organized by a third party is protected by Article 19 of the Covenant (see *Pranevich v. Belarus*, no. 2251/2013, § 6.3, Views of 15 October 2018). In a recent case brought by a Kazakhstani journalist who was detained and imprisoned for covering anti-governmental protests in Zhezkazgan in 2013, the Committee established violations of both Articles 19 and 21 of the Covenant (*Zhagiparov v. Kazakhstan*, no. 2441/2014, §§ 13.2-13.5, Views of 29 November 2018).
5. Indeed, the right of journalists to have access to and to cover without hindrances public protest actions is closely connected with both Articles 19 and 21 of the Covenant. It reflects both right of the media to collect information of public significance and that of the participants of protest actions to express their grievances and opinions in order for them to be broadcast for the benefit of the public at large.
6. It is therefore respectfully suggested that the following wording be adopted by the Committee in its General Comment No. 37: “*The right of journalists to attend peaceful assemblies with the aim to cover the events is protected by article 19. It is closely connected with the rights under article 21. The authorities should have very weighty reasons to justify restrictions of media access to public protest actions*”.

Access of human rights defenders

1. Human rights defenders should have an opportunity to monitor peaceful assemblies in order to document, if necessary, actions of those taking part, law-enforcement personnel and other parties. Experience proves that this monitoring is capable of easing potential tensions. The very presence of human rights defenders on the ground during demonstrations can deter human rights violations, such as ill-treatment of protesters.
2. The General Assembly has called upon States, “to ensure that human rights defenders can perform their important role in the context of peaceful protests, in accordance with national legislation consistent with the Charter of the United Nations and international human rights law” (Resolution 66/164, § 6). When human rights defenders are able to monitor assemblies, it can help to assess the conduct of assemblies and operations of police forces, it can also contribute to an informed public debate about measures that may be needed to address shortcomings concerning the legal framework on assemblies, training needs of law-enforcement officers, or whether they require additional resources (OSCE Guidelines on the Protection of Human Rights Defenders,[[7]](#footnote-7) §§ 178-180).
3. The following wording is therefore respectfully suggested for General Comment no. 37: “*States should ensure unhindered access of human rights defenders to peaceful assemblies, and their protection*”.

Conclusion

1. The Coalition hopes that this written contribution will be useful for the Committee’s elaboration of the first draft of General Comment No. 37. A Senior Expert of the Netherlands Helsinki Committee will be present at the half-day general discussion at the Committee’s 125th session in Geneva on 20 March 2019 in order to highlight the issues raised in this submission. He will also be able to reply to the questions of the Committee experts and elaborate on our experiences in the countries of the OSCE region.
2. The Coalition stands ready to interact with the Committee in the course of its drafting of General Comment no. 37. We would like to re-emphasize the timeliness and appropriateness of the Committee’s initiative to tackle freedom of peaceful assembly, an indispensable element of an open democratic society composed of strong and independent individuals who are exercising their rights and freedoms responsibly and with dignity.
1. For the English translation see: <http://www.ksrf.ru/en/Decision/Judgments/Documents/2017__January_19_2-P.pdf> [↑](#footnote-ref-1)
2. See European Court of Human Rights, *Imret v. Turkey (no. 2)*, no. 57316/10, § 58, Judgment of 10 July 2018. [↑](#footnote-ref-2)
3. Available at: <https://www.osce.org/baku/105947?download=true> (OSCE Guidelines on Freedom of Peaceful Assembly). [↑](#footnote-ref-3)
4. The text of the judgment (in Russian) is available at: <https://bit.ly/2tRaWWh>. It is not yet final at the moment of submission of this contribution. [↑](#footnote-ref-4)
5. Available at: <http://www.torontopolice.on.ca/publications/files/reports/g20_after_action_review.pdf>, at p.31. [↑](#footnote-ref-5)
6. Available at: <https://www.osce.org/odihr/226981?download=true>, at p. 27. [↑](#footnote-ref-6)
7. Available at: <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders?download=true>. [↑](#footnote-ref-7)