**Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association**

21 February 2020

Dear Human Rights Committee members,

I have the honor to address you as Special Rapporteur of the United Nations on the rights to freedom of assembly and of association to provide my inputs for the revised draft of the General Comment No. 37 prepared by the Rapporteur, Mr. Christoph Heyns.

The need to develop a General Comment on article 21 of the International Covenant on Civil and Political Rights has been identified since the beginning of my mandate as an important tool to assist our work and more broadly to contribute to the protection of the right of everyone to peaceful assembly. The mandate has consistently used the Human Rights Committee’s General Comments with a view of strengthening its work. In this regard, I salute the initiative to invite a broad range of stakeholders to provide their comments on this new version of the draft.

I would like this General Comment 37 to be considered by States as a guidance tool to facilitate peaceful assemblies, instead than a guidance tool to restrict them. Unfortunately, I have noticed a worrying increase in the arbitrary interpretation of the grounds for restriction that are permitted under the Covenant, as well as the strengthening of a negative narrative around protests. However, we all have to remember that protests are a human right, the exercise of the right to peaceful assemble is the rule and restrictions must be an exception.

Before diving into the substance of my comments on the revised draft, I would like to advise the members of the Human Rights Committee to consider where we stand today in relation to the protection of freedom of assembly, and to keep this in mind while pursuing this initiative. I am alarmed by the extraordinary wave of peaceful protests around the globe which have been responded to with acute repression by States, who seem to be addressing the protests as a threat to public security rather than a vehicle to drive change and encourage participation in a time where it is most needed. This trend is noticeable not only in fragile contexts but in stable ones as well. I have noticed an increasing trend of excessive use of force by security forces, leading to killings, ill-treatment and arbitrary arrest of demonstrators, journalists and bystanders. In general, the causes of such protests rooted in deep seated frustrations over inequalities, weak governance and rule of law and impunity have been relegated to the backseat thus preventing addressing such causes and consequences in a sustainable way. I therefore believe that the General Comment 37 should explicitly acknowledge that the right to freedom of peaceful assembly is critical to the exercise of all human rights, civil, cultural, economic, political and social, , as well as to achieving sustainable development.

The development of this general comment presents a unique opportunity for us as international human rights mechanisms, to clearly define States obligations, and fill in the gaps in standards which have been used to repress legitimate social movements, human rights defenders, activists, minorities and other groups with pretexts such as national security, obstruction of freedom of movement of others or counter terrorism operations.

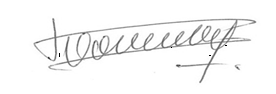
In my view, the revised draft, in general, succeeds at defining various concepts and providing clarity regarding the exercise of the right to peaceful assembly and its relation to other essential human rights. There are many areas of the revised draft that set out essential components of the right and provide successful guidance for its protection.

For the purpose of this submission, I will focus on the areas that, in my opinion, need to be strengthened, with a view to ensuring a maximum level of protection of this right

You will find my comments as Annex to this letter; these follow the structure of the revised draft and include some language suggestions where it is deemed necessary.

I hope the Human Rights Committee will find this contribution helpful and look forward to continuing our fruitful collaboration.

Yours sincerely,



Clément Nyaletsossi Voulé

Special Rapporteur on the rights to freedom of peaceful assembly and of association



**Written comments from the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voulé for the General Comment No. 37 on Article 21: right of peaceful assembly – Revised draft prepared by the Rapporteur, Mr. Christof Heyns.**

1. General remarks
2. First, it is important to emphasize that the Special Rapporteur has noticed an increasing arbitrary interpretation of the grounds for restriction prescribed by IHRL. It is crucial to be cautious against an environment in which the enjoyment of the right of peaceful assembly is seriously impeded. Therefore, it would be of paramount value to include a reference to the exceptionality of restrictions and the three-limited framework for limitations in the section of general remarks instead of waiting until the section of restrictions on the right of peaceful assembly.
3. **In this regard, paragraph 40 of the revised draft should be moved to the general remarks section as a paragraph 1bis with the following changes:**

*The right of peaceful assembly* ***can be subject to restrictions****. While the right may be limited, there is a presumption against restrictions.[[1]](#footnote-1) The onus is on the authorities to justify any restrictions,[[2]](#footnote-2) and where this onus is not met, article 21 is violated.[[3]](#footnote-3) Restrictions are not permissible unless they can be shown to have been provided for by law, and are necessary and proportionate to the permissible grounds for restrictions enumerated in article 21, and discussed below. The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it.[[4]](#footnote-4) Restrictions should not be aimed at discouraging participation in assemblies, potentially causing a chilling effect.*

1. The right to freedom of peaceful assembly plays a key role as an enabling right in opening spaces and opportunities for genuine and effective engagement by civil society actor and individuals in decision-making processes. This right helps to foster increased transparency and accountability and is a basic prerequisite for the goal of securing the substantive enjoyment of different human rights and the sustainable development goals. The right to peaceful assembly can facilitate constructive dialogue, which is necessary given the shared interests and sometimes competing priorities that are intrinsic to societies.
2. **In this regard, it is suggested that paragraph 114 be moved to the general remarks section as a paragraph 9bis**:

*[The right of peaceful assembly is often exercised with the aim of advancing the implementation of other fundamental human rights, as well as other norms and principles of international law. In such cases, the duty to respect and ensure the right of peaceful assembly derives its legal justification from the intrinsic value of the right, but also from the importance of the other rights, norms and principles whose implementation it advances.]*

1. On **paragraph 4** of the revised draft, the definition of the right to freedom of assembly presented is not in line with the definition that the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association has developed and has been using for 10 years. It is problematic to emphasize the “non-violent” and “public” elements of the assembly at the beginning of the general comment without providing an explanation, leaving room for a wide interpretation. These concepts contain many nuances and exceptions and should not be taken as the norm. In this sense, this paragraph seems to be highly restrictive and prescriptive. At the same time, the Special Rapporteur believes that the issue of evolution of assembly participant’s behavior is complex and the inclusion of **paragraph 10** in the introductory section goes too far. It does not take into account various issues, such as infiltration by provocateurs; isolating violent actors; protecting the rights to peaceful assembly for other participants, etc. Therefore, **it is suggested to remove paragraph 10 of the revised draft from the general remarks section and include it at a later stage**.
2. **In this regard, the Special Rapporteur offers the following suggestions to paragraph 4 of the revised draft and exceptions regarding the peacefulness, the commonality of the purpose and the publicly accessibility be explained later in the text of the general comment:**

***An assembly is the intentional and temporary gathering in a private or public space for a specific purpose. The right to peaceful assembly protects assemblies that are peaceful, and where participants have peaceful intentions, which should be presumed.[[5]](#footnote-5)*** *The right of peaceful assembly constitutes an individual right that is exercised collectively.[[6]](#footnote-6) Inherent to the right is thus an associative element.*

1. As it was stated in resolution 15/21 of the Human Rights Council “everyone has the rights to freedom of peaceful assembly and of association”. The Special Rapporteur welcomes that the revised draft shows that this provision must be read jointly with article 2 of the ICCPR. However, the Special Rapporteur considers of paramount importance to emphasize that individuals are “right holders” of freedom of assembly more than mere ability to exercise it. At the same time, the Special Rapporteur does not understand why the text of the revised draft allows for the interpretation that there are different levels or categories of right holders. Paragraph 5 first mentions the citizens and then goes on to enumerating other groups that may be entitled to the same right. The right to freedom of peaceful assembly, just as all human rights, is universal, indivisible, interdependent and interrelated[[7]](#footnote-7).
2. **The Special Rapporteur offers the following suggestions to paragraph 5 of the revised draft:**

*Everyone* ***has*** *the right of peaceful assembly. This includes children[[8]](#footnote-8),* ***nationals and foreign nationals,[[9]](#footnote-9) migrant workers,[[10]](#footnote-10) asylum seekers and refugees,[[11]](#footnote-11) stateless persons and undocumented migrants.***

1. **The Special Rapporteur offers the following suggestions to paragraph 6 of the revised draft:**

*Peaceful assemblies may take many forms, including demonstrations,* ***inside*** *meetings, processions, strikes, rallies, sit-ins, flash-mobs* ***and online protests****.[[12]](#footnote-12) Such gatherings are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches. They may take place outdoors or indoors.*

1. The Special Rapporteur acknowledges the importance of recognizing that also those assemblies that may create security or other risks should be protected; but suggests a clearer language to avoid abuse. Alternatively **paragraph 7 could read as follows:**

*In many cases, peaceful assemblies do not pursue controversial ideas or goals and cause little or no disruption. The aim might indeed be, for example, to commemorate a national day or celebrate the outcome of a sporting event. However, peaceful assemblies are used to pursue ideas or goals that are* ***can be*** *contentious, and their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity.* ***The scope of article 21 embraces these types of assemblies even when they cause disruption or disagreement. To the extent that assemblies may create risks, they may be restricted in accordance with the framework provided for in article 21.***

1. **The Special Rapporteur suggest the following changes to paragraph 8:**

*The recognition of the right of peaceful assembly imposes a corresponding obligation on States parties to respect and ensure the exercise of the right.[[13]](#footnote-13) This requires States to allow such assemblies to take place with no unwarranted interference and, whenever it is needed, to facilitate the exercise of the right and to protect the participants. The right of peaceful assembly* ***~~is not absolute~~ may be subject to******~~but any~~*** *restrictions,* ***which*** *must be narrowly drawn. There are, in effect, limitations on the limitations that may be imposed.*

1. The principle of dynamic (or evolutive) interpretation in the context of treaty interpretation aims to ensure the effective application and implementation of treaties. Assuming that **paragraph 11** of the revised draft refers to this, the Special Rapporteur considers that it must be further clarified. The current version of the revised draft infers that there are different approaches to the right to freedom of peaceful assembly, depending on the moment and on the context, which does not contribute to a practical and effective protection for human rights. At the same time, it is hard to understand the reason why numerous examples are included in this paragraph, all of very complex nature without further developing.
2. **The Special Rapporteur suggests to simplify paragraph 11 as this would in return result in more protection for right holders. It should read as follows:**

***The scope of the rights to peaceful assembly must be interpreted in the light of present-day conditions. This means that its effective protection requires taking into account developments in society. For example, emerging technologies present new spaces and opportunities as well as challenges for the exercise of the right of peaceful assembly. Considerations such as these need to inform an evolutive reading of article 21.***

1. Scope of the right of peaceful assembly
2. Regarding the issue of the common expressive purpose and the public accessibility of assemblies, the Special Rapporteur is worried that the revised draft of the general comment remains too restrictive. For example, it can be difficult for indigenous people contesting the ownership of the land through the exercise of their right to peaceful assembly to fall under the scope of protection as it is provided by the current text. The Special Rapporteur refers to the report of the visit to Chile by the former Special Rapporteur on FoAA per which the “majority of protests by Mapuche take place in rural areas, on the lands that they consider as theirs ancestrally and which are, today, owned by non-indigenous farmers. Many of the protests are occupation-style demonstrations”.
3. Additionally, the Special Rapporteur does not fully agree with the necessity to have a common expressive purpose. It is not clear what the common expressive purpose means and what would happen to gatherings of individuals which do not have a common expressive purpose or an expressive purpose at all. Would they not be protected under article 21 anymore, and either under article 19? What needs to be in common is the expression or the purpose? And how common do they need to be? Even though an assembly is generally understood as the gathering of people, the mandate of the Special Rapporteur has accepted that one individual still enjoys the same protections provided by article 21, as the right is ultimately an individual right and not a collective one.
4. Furthermore, the Special Rapporteur emphasizes that more than the purpose of expressing collectively, persons that gather have a purpose to enable other rights, to open up space and opportunities for genuine and effective engagement by civil society actors and individuals in decision making-processes. The right should not be reduced only to its expressive purpose.
5. The Special Rapporteur also wishes to strongly reiterate that article 21 fully applies to the gathering of individuals through digital means, for example online, and that gatherings enjoy the whole set of protections provided by the right to freedom of peaceful assembly, not comparable ones.
6. **In this sense the Special Rapporteur suggest the following changes to paragraphs 13, and 15 of the revised draft:**

*13. To qualify as an “assembly”, there must be a gathering of persons with* ***a specific purpose******~~with the purpose of expressing themselves collectively~~****. Assemblies can be held on publicly or privately-owned property.* ***~~[provided the property is publicly accessible].~~***

*15. While the notion of an assembly implies that there will be more than one participant in the gathering,[[14]](#footnote-14) a single protester enjoys* ***~~comparable~~******the same*** *protections under the Covenant, for example under article 19* ***and under article 21****. Moreover, although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons,* ***the protections of the right to freedom of assembly also ~~comparable human rights protections also~~*** *apply to* ***the gathering of individuals******~~acts of collective expression~~*** *through digital means, for example online.[[15]](#footnote-15) At the same time, the fact that people can communicate online should not be used as a ground for restrictions on in-person assemblies.*

1. The Special Rapporteur is concerned by the current version of **paragraph 16** of the revised draft. First, it is not clear where the necessity to imply that most assemblies are organized well in advance lies, particularly because this is not the case as well demonstrated by the latest waves of protest in Latin-American. Secondly, the language could be interpreted to say that notification is a requirement and that organizers have generally enough time to deal with it. Finally, it would seem that spontaneous assemblies are an exception to a rule. However, not all spontaneous assemblies are direct responses to current events, some may simply arise spontaneously in response to a continuing state of affairs. The Special Rapporteur therefore considers this paragraph to be too restrictive and not relevant in practice given the global state of civic space. The Special Rapporteur suggests to rephrase the paragraph in order to emphasize the positive obligations of the State to protect both types of assemblies.
2. **The Special Rapporteur suggests the following changes to paragraph 16:**

***~~Peaceful assemblies are often organized well in advance, allowing enough time for the organisers to notify the authorities to make the necessary preparations. However, spontaneous assemblies, as direct responses to current events that do not allow enough time to provide such notification, whether coordinated or not, are also protected by article 21.~~******The right to peaceful assembly covers both organized and spontaneous assemblies.*** *Counter-assemblies occur when one peaceful assembly takes place to express opposition to another peaceful assembly. Both of these assemblies fall within the scope of the protection of article 21.*

1. Regarding the peacefulness of the assembly, the Special Rapporteur emphasizes that the criteria of violence should be applied to individuals and not to the assembly as a whole, given that the right to peaceful assembly is the individual right of all persons. At the same time, it is of outmost importance to be as precise as possible when defining or the qualifying violence or violent acts as the result is for the participant to forfeit the protection under article 21 without the requirement for the State to justify it.
2. First, on **paragraph 17** of the revised draft the issue of what constitutes violence is addressed. The Special Rapporteur considers that in the cases of injury, death and property damage, these should be inflicted on others. One wonders if assemblies that take the form of hunger strikes would still be protected under the current version of the text.
3. At the same time, it appears from **paragraph 21** of the revised draft that there are instances where violence by the authorities will deprive participants of their right to assemble. It is not clear if the “unlawful” use of force” refers to force by the authorities, which then would mean for example that law enforcement officers must assess if participants are inciting their use of force which would in turn deprive participants from their right to assemble? Clarification is needed.
4. On **paragraph 21**, The Special Rapporteur would like to emphasize the difficulties in practice to ascertain intentions and to qualify speech as incitement. The ambiguity leaves significant room for abuse and is highly problematic in practice.
5. **The Special Rapporteur suggests the following changes to paragraphs 17, 18, 19, 20 and 21:**

*17. A “peaceful” assembly stands in contradistinction to one that is violent (or is deemed to be violent, because of the incitement or intention of violence, or because violence is imminent). The terms “peaceful” and “non-violent” are thus used interchangeably in this context. The right of peaceful assembly may by definition not be exercised in a violent way. “Violence” in this context typically entails the use by participants of physical force* ***on others*** *that is likely to result in injury or death,[[16]](#footnote-16) or serious damage to* ***other’s*** *property.[[17]](#footnote-17) Mere disruption of vehicular or pedestrian movement or daily activities does not amount to violence.*

*18. If an assembly is peaceful, the fact that not all the domestic legal requirements pertaining to the assembly have been met by the organisers or participants does not, on its own, place the participants outside the scope of the protection of article 21. Civil disobedience or direct-action campaigns are* ***~~in principle~~*** *covered by article 21, provided they are non-violent.[[18]](#footnote-18)*

*19.* ***~~A violent assembly is one that is characterized by [widespread and serious] violence [, and is sometimes referred to as a riot]. There is not always a clear dividing line between assemblies that are peaceful and those that are violent, but there is a presumption in favour of considering assemblies to be peaceful.~~*~~[[19]](#footnote-19)~~ *~~Moreover.~~*** *Isolated acts of violence by some participants should not be attributed to* ***organizers*** *or other participants.*[[20]](#footnote-20) *Some participants or parts of an assembly may thus be covered by article 21, while others in the same assembly are not.* **An assembly ceases to be peaceful when it is characterized by widespread and serious violence.**

*20. The question of whether an assembly ceases to be peaceful must be answered with reference to violence that originates or is deemed to originate from the participants. Violence by the authorities against participants in a peaceful assembly does not* ***~~in itself~~*** *render the assembly violent. The same applies to violence by members of the public aimed at the assembly, or by participants in counter- assemblies.[[21]](#footnote-21)*

*21. Participants’ conduct may be deemed violent if, before or during the event, the participants are inciting others to the [imminent] use of* ***~~unlawful force~~******violence****, the participants have violent intentions and plan to act on them,[[22]](#footnote-22) or violence is imminent. Isolated instances where this is the case will not suffice to taint an entire assembly as no longer peaceful, but where the incitement or intention of violence is widespread, or if the leaders or organizers of the assembly themselves convey this message* ***to the public****, participation in the gathering as such is no longer protected under article 21.* ***These determinations should be transparent, supported by evidence and subject timely and effective judicial control.***

1. The obligation of State parties in respect of the right of peaceful assembly
2. The choice of the venue or location of an assembly by the organizers is an integral part of the right to freedom of peaceful assembly. In many instances the location where an assembly takes part is an important part of its message; a protest demanding accountability for a gas explosion, for example, may be held at the site and exact time of the explosion. Likewise, public areas around iconic buildings are a logical place for to convey a message with regard to institutions housed in these buildings. The Special Rapporteur warns against authorities proposing an alternative time and place for an assembly, when processing a notification, as this would also be imposing restrictions on the right to freedom of peaceful assembly.[[23]](#footnote-23)
3. **In this regard, the Special Rapporteur suggests the following changes to paragraph 27 of the revised draft:**

*States parties moreover have the positive duty to facilitate peaceful assemblies, and to make it possible for participants to achieve their legitimate objectives. States must thus promote an enabling environment for the exercise of the right of peaceful assembly and put into place a legal and institutional framework within which the right can be exercised effectively. In some cases, specific intervention may be required on the part of the authorities. For example, they may need to block off streets, redirect traffic,* ***and*** *provide security.* ***However, the choice of location and route of an assembly principally belongs to the organizers of the assembly and the authorities cannot unilaterally/arbitrarily determine the route of the protest.******~~or identify an alternative site where the assembly may be conducted.~~*** *Where needed, States must also protect participants against possible abuses by non-State actors, such as interference or violence by other members of the public,[[24]](#footnote-24) counter-demonstrators [and private security providers].*

1. **The Special Rapporteur suggests that paragraph 29 reads as follows:**

***~~In dealing with assemblies~~ While facilitating the right to assemble****, States parties must take precautionary measures aimed at preventing violations and abuses of the different rights at stake. At the same time, the need to take such precautionary measures cannot serve as a justification for measures that violate human rights, such as the right to privacy.*

1. The Special Rapporteur is concerned that access to new communications technologies, in particular the Internet, or to specific websites, has allegedly been temporarily blocked prior to, during or after peaceful assemblies. The Special Rapporteur also warns against possible abusive use of laws governing the prevention and fight against offences linked to information and communications technologies, which “should be applied only as an exception to the general norm of permitting the open and free use of the Internet, like all other forms of communication; only very few qualified and clearly legislated exceptions should be permitted”.[[25]](#footnote-25)
2. The Special Rapporteur stresses that limitations on access to the internet including partial disconnections, temporary or permanent blocking of different sites and applications and internet shutdowns before or after peaceful gatherings constitute unlawful and disproportionate restrictions on the right to freedom of peaceful assembly. Authorities need to ensure access to the Internet at all times and this includes during periods of political unrest[[26]](#footnote-26) and there is no possible justification for internet shutdowns. **The Special Rapport suggests to incorporate this in paragraph 38 as follows:**

*In the digital age, many of these associated activities happen online or otherwise rely upon digital services. Such associated activities are also protected under article 21. States parties shall, for example, refrain from* ***~~unduly~~*** *blocking* ***or shutting down*** *the Internet connectivity in relation to demonstrations.[[27]](#footnote-27) The same applies to geo-targeted or technology-specific interference or hindering of connectivity. States parties should ensure that self-regulation by Internet service providers does not unduly affect assemblies and that the activities of those providers do not unduly infringe upon the privacy or safety of assembly participants. Any restrictions on the operation of information dissemination systems must conform with the tests for restrictions on freedom of expression.[[28]](#footnote-28)*

1. Restrictions on the right of peaceful assembly
2. **The Special Rapporteur offers the following suggestions to paragraph 42 of the revised draft:**

*Any restrictions on participation in peaceful assemblies should* ***~~in principle~~*** *be based on a differentiated or individualized assessment of the conduct of the individual and the assembly concerned. Blanket restrictions on participation in peaceful assemblies are presumptively disproportionate.*

1. **The Special Rapporteur offers the following suggestions to paragraph 53 of the revised draft:**

*Restrictions imposed on an assembly on the ground that they are for “the protection of the rights and freedoms of others” may relate to the protection of Covenant or other [fundamental] rights of people not participating in the assembly. The protection of the right to life, freedom from ill-treatment, movement,* ***~~[property~~**~~rights]~~*** *or the right to work may, for example, potentially justify restrictions. At the same time, since assemblies may entail by their very nature a certain level of disruption to ordinary life, such disruptions have to be accommodated,* ***unless authorities can prove that restrictions on the grounds of the protection of other rights are necessary and proportionate. Excessive restrictions on the grounds of the right to freedom of movement must be avoided.******~~unless they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions~~****.[[29]](#footnote-29)*

1. **The Special Rapporteur offers the following suggestions to paragraph 57 of the revised draft:**

*In accordance with article 20 of the Covenant, peaceful assemblies may not be used for any propaganda for war (paragraph 1), or for any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (paragraph 2).[[30]](#footnote-30) Assemblies* ***whose purpose explicitly and unequivocally******~~which~~*** *[in their entirety] fall****s*** *within the scope of article 20 must be prohibited. As far as possible, action should be taken in such cases against the individual perpetrators, rather than against the assembly as a whole.[[31]](#footnote-31)*

1. In relation to the mention of sustained gatherings in **paragraph 62** of the revised draft, even if it is an important argument, the Special Rapporteur suggest to remove it. There are contexts in which sustained gatherings are done by the most disenfranchised people in society and those who advocate the most ignored causes (mothers of disappeared facing years of impunity, victims of forced eviction that established camps, indigenous people occupying lands or farmers blocking roadways. It is dangerous to include in the text of the general comment this proportionality requirement for sustained gatherings because it is complicated to do a test of proportionality, each case is different and the only way to address such gatherings is through dialogue.
2. The Special Rapporteur would like to emphasize again that **blanket bans, including bans on the exercise of the right entirely or on any exercise of the right in specific places or at particular times, are intrinsically disproportionate**, because they preclude consideration of the specific circumstances of each proposed assembly[[32]](#footnote-32). The Special Rapporteur is worried that the revised draft gives more reasons than needed for States to restrict assemblies and considers it dangerous.
3. **The Special Rapporteur offers the following suggestions to paragraphs 63, 64 and 70 of the revised draft:**

***Blanket*** *restrictions on the precise time of day or date when assemblies can or cannot be held,* ***are incompatible******~~raise concerns about their compatibility~~*** *with the Covenant.[[33]](#footnote-33) At the same time, it should be recognized that the timing of assemblies can affect their impact and may warrant restrictions.* ***~~For example, assemblies held at night in residential areas might have an undue impact on the lives of those who live nearby.~~***

*As for any restriction on the element of place: peaceful assemblies may in principle be conducted in all places to which the public has access or should have access, such as public squares and streets.* ***~~General restrictions on access to some spaces, such as buildings and parks, may limit the right to assemble in such places.~~***

*The wearing of face coverings or other disguises by assembly participants, such as hoods or masks, may form part of the expressive element of a peaceful assembly or serve to counter reprisals, also in the context of new surveillance technologies, and serve to protect privacy. Assembly participants should not be prohibited from wearing face coverings where there is no demonstrable evidence of imminent violence on their part and probable cause for arrest.[[34]](#footnote-34)* ***~~As such, blanket bans can only be justified on an exceptional basis.~~***

1. **The Special Rapporteur offers the following suggestions to paragraphs 78 considering recent developments in some contexts:**

*States parties may not* ***impose restrictions or*** *require pledges from individuals not to participate in future assemblies.[[35]](#footnote-35) Conversely, no one may be forced to participate in an assembly.[[36]](#footnote-36)*

1. Duties and powers of law enforcement agencies
2. The current wording of **paragraph 85** may suggest that the duty of law enforcement agencies is protection of the public against the demonstrators but only respecting the rights of demonstrators. Whereas protection of participants in an assembly, first from the abuse of police officers and then from the public/other demonstrators is the primary responsibility of law enforcement agencies.
3. In order to reinforce this notion, the Special Rapporteur suggests that protection be extended to the participants as well, which goes beyond mere respect (negative obligation) and ensure (weak positive obligation).
4. The Special Rapporteur considers that it is necessary to refer to how to approach violent elements in an assembly, before **paragraph 90**, which sets the ground for lawful arrest of participants. It was mentioned above in paragraph 20 of this submission that it must be made clear that what can be violent is “participants in an assembly” and not an “assembly” itself, because, given the fact that the right to peaceful assembly is an individual right of all persons, the criteria of violence should be applied to individuals not to assemblies as a whole. This distinction is very important to be made clear before addressing the issue of how to handle violence.
5. In this regard, the Special Rapporteur would like to recommend that a paragraph be added before **paragraph 90**, following the position of the mandate as clearly set forth in paragraph 61 of the joint report on proper management of assemblies[[37]](#footnote-37).

**W*henever violence is observed in an assembly, the law enforcement officials have the obligation to isolate and remove violent elements from an otherwise peaceful assembly, in a manner which is respectful of their rights to life and physical integrity. The acts of violence by some, does not render an assembly not peaceful. Only if a considerable part of participants in an assembly are violent and that they cannot be at all isolated from the rest of an assembly, the law enforcement officials will have the right to disperse the assembly.***

1. **The Special Rapporteur offers the following suggestions to paragraphs 92:**

***~~Wherever possible, only law~~******Law*** *enforcement officials who have been trained in the policing of assemblies should be deployed for that purpose.[[38]](#footnote-38) As a general rule, the military should not be used to police assemblies.[[39]](#footnote-39)* ***In exceptional circumstances where this becomes necessary, military personnel deployed for law enforcement purposes should be considered law enforcement officers and therefore subject to civilian control and international norms and standards on the use of force.[[40]](#footnote-40)"*** *The law enforcement officials responsible for policing assemblies should be suitably equipped, including where needed with appropriate less-lethal weapons and adequate personal protective equipment.[[41]](#footnote-41) States parties should ensure that all weapons, including less-lethal weapons, are subject to strict independent testing and should evaluate and monitor their impact on the rights to life and bodily integrity and the mental well-being of those affected.[[42]](#footnote-42)*

1. The Special Rapporteur believes that the second sentence of **paragraph 93** of the revised draft, on preventive detention of individuals based on their intent to incite violence, can set grounds for abuse and disproportionate application towards, for example, political opponents of governments and organisers of an assembly in order to restrict space for civic activism and opposition. In some legal systems and for some crimes, intent is not sufficient for preventive detention and this must be taken into account while drafting this paragraph. In the current context of increasing threats to civic space, it is of utmost importance that the general comment ensure that loopholes and windows open to misuse and abuse be completely closed.
2. Regarding **paragraph 94** of the revised draft, the Special Rapporteur has on numerous occasions witnessed how the practice of “stop and search” or “stop and frisk” been used indiscriminately against certain profile of participants in assemblies and predominately target individuals belonging to minorities[[43]](#footnote-43). The Special Rapporteur has already warned against the chilling effect of this practice and stated that “stop-and-search must not be arbitrary and must not violate the principle of non-discrimination. It must be authorized by law, necessary and proportionate. The mere fact that an individual is participating in a peaceful assembly does not constitute reasonable grounds for conducting a search”. Stop and search has also been widely practiced in antiterrorism operations, giving rise to many cases of abuse and violation of the right to privacy and human dignity.
3. In this regard, the Special Rapporteur suggests that the paragraph in question includes a stronger language on the exceptional nature of the stop and search practices, the fact that “systematic” conduct of searches must be avoided, and that it can only be applied to participants and not those who are about to do so, or peaceful participants. The paragraph would then read as follows:

*Powers of “stop and search” or “stop and frisk”, applied to those who participate in assemblies,* ***~~or are about to do so~~,*** *must be exercised based on* ***strong amount of evidence of an imminent threat posed. A mere suspicion by law enforcement officials must not constitute the ground for stopping and searching participants in an assembly. Stop and search should in principle never be used against peaceful participants in an assembly;*** *otherwise, they constitute an unwarranted interference with the right to privacy****. Stop and search must not be used in a discriminatory manner.[[44]](#footnote-44)***

1. Regarding the practice of “kettling” mentioned on **paragraph 95** of the revised draft, the Special Rapporteur has found the practice of “kettling” to be intrinsically detrimental to the exercise of the right to peaceful assembly due to its indiscriminate and disproportionate nature[[45]](#footnote-45). Kettling has been used for intelligence-gathering purposes and can lead to mass indiscriminate arrests violating international human rights law and standards. The Special Rapporteur has previously observed that “the practice of containment also undeniably has a powerful chilling effect on the exercise of freedom of peaceful assembly … {since} many people refrained from exercising their right to freedom of peaceful assembly for fear of being “kettled”. Finally, it appears that “kettling” has been used for intelligence gathering purposes, by compelling peaceful protestors, and even bystanders, to disclose their names and addresses as they leave the kettle, increasing the chilling effect it has on potential protesters.”[[46]](#footnote-46) It is therefore highly recommended that this paragraph be **eliminated** on this basis.
2. On **paragraph 96**, the Special Rapporteur suggests to include a reference to article 20 of the ICCPR when an assembly begins peaceful and then turns violent as follows:

*Only in exceptional cases may an assembly be dispersed. This may be the case if the assembly as such is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence, but in all cases the rules on the use of force must be strictly followed. An assembly that remains peaceful but which nevertheless causes a high level of disruption, such as the extended blocking of traffic, may be dispersed, as a rule, only if the disruption is “serious and sustained”.[[47]](#footnote-47) An* ***assembly that starts peaceful, but turns to inciting discrimination, hostility or violence, in contravention of article 20 of the covenant, may warrant dispersal if all less intrusive and discriminatory means of managing the situation have failed.***

1. On **paragraph 97**, the Special Rapporteur suggests the following addendum to the beginning of the sentence:

***Only governmental authorities or high-ranking officers with sufficient and accurate information of the situation unfolding on the ground should have the authority to order dispersal. If dispersal is deemed necessary, the assembly and participants should be clearly and audibly informed, and should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further[[48]](#footnote-48).*** *Where a decision is lawfully taken to disperse an assembly, force should be avoided. Where that is not possible in the circumstances, only the minimum force necessary should be used. As far as possible, any force used should be directed against a specific individual or group of participants in an assembly* ***identified as violent****. Area weapons such as chemical irritants dispersed at a distance (tear gas) and water cannon tend to have indiscriminate effects* ***and for this reason, they must be used only when absolutely necessary and in small quantities and over a short and limited time frame.*** *When such weapons are used, all reasonable efforts should be undertaken to limit risks such as causing harm to bystanders or causing a stampede. Tear gas should not be used in confined spaces.*

1. On **paragraph 98**, which limits the use of firearms to an imminent threat of death or serious injury or a grave and proximate threat to life, practice shows that firearms aimed at the human body (even the non-vital parts) is intentionally a lethal force. The threshold should therefore be kept at imminent threat to life and exclude serious injury.
2. On **paragraph 100**, the Special Rapporteur believes that the responsibility of the states goes far beyond merely “promoting a culture of accountability” for law enforcement officials; States must **“ensure and guarantee”** accountability for law enforcement officials during assemblies. The SR has identified various global trends aiming at increasing repression of social movements, demonizing assemblies and protests, stigmatization of activists and criminalizing their activities. In this sense, major restrictions on use of force should be prescribed by the general comment, and when force has been used illegally, firm consequences should be applied to ensure accountability and not only promote it, which bears a passive meaning.

1. OSCE *Guidelines on* *Freedom of Peaceful Assembly*, para. 2.1. [↑](#footnote-ref-1)
2. *Gryb v. Belarus* (CCPR/C/108/D/1316/2004), para. 13.4. [↑](#footnote-ref-2)
3. *Chebotareva v. Russian Federation* (CCPR/C/104/D/1866/2009), para. 9.3. [↑](#footnote-ref-3)
4. *Turchenyak and others v. Belarus* (CCPR/C/108/D/1948/2010 and Corr.1), para. 7.4. [↑](#footnote-ref-4)
5. A/HRC/20/27, para. 25 [↑](#footnote-ref-5)
6. Cf. General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 9. [↑](#footnote-ref-6)
7. A/72/135, para. 17 [↑](#footnote-ref-7)
8. Convention on the Rights of the Child, art. 15; and African Charter on the Rights and Welfare of the Child, art. 8. [↑](#footnote-ref-8)
9. General comment No. 15 (1986) on the position of aliens under the Covenant, paras. 1–2; and CCPR/C/KWT/CO/3, para. 42. [↑](#footnote-ref-9)
10. CCPR/C/DOM/CO/6, para. 32. [↑](#footnote-ref-10)
11. CCPR/C/NPL/CO/2, para. 14. [↑](#footnote-ref-11)
12. During the drafting of article 21 of the Covenant, specific examples of peaceful assemblies were not included, in order to keep the formulation of the right open. Marc J. Bossuyt, *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1987), p. 414. See also European Court of Human Rights, *Navalny v. Russia* (application No. 29580/12), judgment of 15 November 2018, para. 98. [↑](#footnote-ref-12)
13. European Court of Human Rights, *Primov and others v. Russia* (application No. 17391/06), judgment of 12 June 2014, paras. 118–119. [↑](#footnote-ref-13)
14. *Coleman v. Australia* (CCPR/C/87/D/1157/2003), para. 6.4. [↑](#footnote-ref-14)
15. A/HRC/41/41. [↑](#footnote-ref-15)
16. For the WHO definition of violence, see WHO Global Consultation on Violence and Health, WHO/EHA/SPI.POA.2. [↑](#footnote-ref-16)
17. OSCE, *Guidelines on Freedom of Peaceful Assembly*, paras. 26–27. [↑](#footnote-ref-17)
18. According to the European Court of Human Rights, in *Frumkin v. Russia* (application No. 74568/12), judgment of 5 January 2016, para. 97: “It is important for public authorities … to 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.” [↑](#footnote-ref-18)
19. European Court of Human Rights, *Lashmankin and others v. Russia* (applications Nos. 57818/09 and 14 others), judgment of 7 February 2017, paras. 402–403. [↑](#footnote-ref-19)
20. European Court of Human Rights, *Frumkin v. Russia*, para. 99. [↑](#footnote-ref-20)
21. However, as far as restrictions on such assemblies are concerned, see paras 58-59 below. [↑](#footnote-ref-21)
22. European Court of Human Rights, *Lashmankin and others v. Russia*, para. 402. [↑](#footnote-ref-22)
23. A/HRC/23/39, para. 56 [↑](#footnote-ref-23)
24. *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 9.6. See also European Court of Human Rights, *Plattform “Ärzte für das Leben” v. Austria* (application No. 10126/82), judgment of 21 June 1988, para. 25. [↑](#footnote-ref-24)
25. A/HRC/20/17/Add.1, para. 105; A/HRC/23/39, para. 73 [↑](#footnote-ref-25)
26. A/HRC/41/41 [↑](#footnote-ref-26)
27. CCPR/C/CMR/CO/5, para. 41. [↑](#footnote-ref-27)
28. General comment No. 34, para. 34. [↑](#footnote-ref-28)
29. *Stambrovsky v. Belarus* (CCPR/C/112/D/1987/2010), para. 7.6; *Pugach v. Belarus* (CCPR/C/114/D/1984/2010), para. 7.8. [↑](#footnote-ref-29)
30. Article 20 (1) and (2). [↑](#footnote-ref-30)
31. Any restrictions pursuant to article 20 (2) should be justified in terms of the requirements posed for restrictions by article 19 or 21. See General comment No. 34, paras. 50–52; article 4, Convention on the Elimination of Racial Discrimination; and Committee on the Elimination of Racial Discrimination, General recommendation No. No. 35 (2013) on combating racist hate speech. See also the threshold test for incitement to hatred in the Rabat Plan of Action (2012), A/HRC/22/17/Add.4, appendix, para. 29 as well as the Beirut Declaration and its 18 commitments on “Faith for Rights” (A/HRC/40/58, annexes I and II). [↑](#footnote-ref-31)
32. A/HRC/31/66, Para. 30 [↑](#footnote-ref-32)
33. CCPR/C/KOR/CO/4, para. 52. [↑](#footnote-ref-33)
34. Cf. OSCE *Guidelines on Peaceful Assembly*, para. 98; ACHPR, *Guidelines on Freedom of Association and Assembly in Africa*, para. 81. [↑](#footnote-ref-34)
35. CCPR/C/KHM/CO/2, para. 22; CCPR/C/JOR/CO/5, para. 32. [↑](#footnote-ref-35)
36. CCPR/C/TKM/CO/2, para. 44. [↑](#footnote-ref-36)
37. A/HRC/31/66, paragraph 61 indicates: *“dispersing an assembly carries the risk of violating the rights to freedom of expression and to peaceful assembly as well as the right to bodily integrity. Dispersing an assembly also risks escalating tensions between participants and law enforcement. For these reasons, it must be resorted to only when strictly unavoidable. For example, dispersal may be considered where violence is serious and widespread and represents an imminent threat to bodily safety or property, and where law enforcement officials have taken all reasonable measures to facilitate the assembly and protect participants from harm. Before countenancing dispersal, law enforcement agencies should seek to identify and isolate any violent individuals separately from the main assembly and differentiate between violent individuals in an assembly and others. This may allow the assembly to continue.”* [↑](#footnote-ref-37)
38. CCPR/C/KHM/CO/2, para. 12; CCPR/C/GRC/CO/2, para. 42; and CCPR/C/BGR/CO/4, para. 38. [↑](#footnote-ref-38)
39. CCPR/C/VEN/CO/4, para. 14; and ACHPR, *Guidelines on Policing Assemblies in Africa*, para. 3.2. [↑](#footnote-ref-39)
40. Article 1, a) and b), the 1979 Code of Conduct for Law Enforcement Officials; A/HRC/31/66.)  [↑](#footnote-ref-40)
41. *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement* (2019); European Court of Human Rights, *Güleç* *v.* *Turkey* (application No. 21593/93), judgment of 27 July 1998, para. 71; and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principle 2. [↑](#footnote-ref-41)
42. General comment No. 36. [↑](#footnote-ref-42)
43. See for example A/HRC/35/28/Add.2, paragraphs 38 and 59. [↑](#footnote-ref-43)
44. A/HRC/23/39/Add.1, paragraph 44 [↑](#footnote-ref-44)
45. A/HRC/23/39/Add.1, paragraph 37 [↑](#footnote-ref-45)
46. A/HRC/23/39/Add.1, paragraph 38 [↑](#footnote-ref-46)
47. A/HRC/31/66, para. 62. [↑](#footnote-ref-47)
48. A/HRC/31/66, paragraph 63 [↑](#footnote-ref-48)