**Observations of the United States of America**

**on the Human Rights Committee’s Draft General Comment No. 37**

**On Article 21: Peaceful Assembly**

February 14, 2020

1. The United States Government appreciates the opportunity to respond to Draft General Comment 37 regarding Article 21 of the International Covenant on Civil and Political Rights (ICCPR)[[1]](#footnote-2) and thanks the Committee for the important work it performs under its mandate as set out in the ICCPR and related Protocols. The United States is firmly committed to carrying out its obligations under the ICCPR and under other human rights treaties to which it is Party. The obligations of a State Party under Article 21 provide important protections for individuals within its territory and subject to its jurisdiction, and the United States supports the Committee’s efforts to assist and facilitate States Parties’ implementation of their ICCPR obligations.

2. The United States agrees, as the Committee states in paragraph 1 of its draft General Comment, that peaceful assembly, “[t]ogether with other rights related to political freedom,[] . . . constitutes the very foundation of a system of participatory government based on democracy.” The United States maintains protection for peaceful assembly, as provided for in the U.S. Constitution and the law of the United States.[[2]](#footnote-3)

**A. General Observations**

Authority and Capacity of the Committee

3. As the United States has stated previously, it is for each State to decide as an exercise of its sovereignty to assume treaty obligations which, once entered into, it has a legal obligation to fulfill.[[3]](#footnote-4) Treaty parties could, through provisions in the treaty, agree to allow another entity to render authoritative treaty interpretation or to resolve definitively legal disputes or questions relating to their obligations, but States Parties to the ICCPR have not given authority to the Human Rights Committee or to any other entity to fashion or otherwise determine their treaty obligations.[[4]](#footnote-5)

4. The United States repeatedly has expressed concerns with the Committee’s interpretive practice generally, explaining in detail our view that this practice is beyond the Committee’s authority and mandate and contrary to international law.[[5]](#footnote-6) The United States reiterates this view here with regard to draft General Comment No. 37.

5. The United States urges the Committee to make explicit at the beginning of any final general comment that it reflects the Committee’s views, which are not legally binding, and that the purpose of the general comment is to provide recommendations to States Parties with regard to their implementation of the Covenant and in fulfilling their periodic reporting requirements under Article 40 and to refrain from providing its recommendations in imperative (“must”) or mandatory (“required”) terms. As the United States stated in its Observations on General Comment No. 36, “To the extent that the Committee undertakes to express its views regarding States Parties’ obligations or how it believes a provision should be interpreted beyond the terms contained in the treaty text, we urge the Committee to frame any such interpretation as Committee views regarding best practices, and to ensure that the opposing views of States Parties, including the United States, are also reflected in the text of the general comment, in order to avoid the impression that the interpretation advanced is authoritative, legally-binding, or otherwise accepted by the States Parties.”[[6]](#footnote-7)

Relevance of Regional Jurisprudence and Guidance and Other Nonbinding Documents

6. Throughout the Draft Comment, the Committee relies on regional jurisprudence and guidance[[7]](#footnote-8) as the basis for its positions and views, a significant departure from the Committee’s past practice. In some cases, this is true even when a more obvious citation to the ICCPR itself is available. For example, in paragraph 8, footnote 11, the Comment cites to a European Court of Human Rights (ECtHR) judgment for the proposition that States Parties have an obligation “to respect and ensure the exercise of this right.” But Article 2(1) of the ICCPR states that States Parties to the ICCPR “undertake[] to respect and to ensure . . . the rights recognized in the present Covenant.” The United States reminds the Committee that the ECtHR is interpreting Article 11 of the European Convention on Human Rights (ECHR), rather than Article 21 of the ICCPR. Article 11, while similar to Article 21 in some regards, contains different language than the Covenant and is interpreted by a Court that was established under the ECHR to ensure the observance of the obligations by its States Parties and that binds States Parties to abide by its final judgment in any case to which they are party. Further, only a small subset of ICCPR States Parties are also party to the ECHR and are bound by final judgments of the ECtHR. The United States is not a party to the ECHR and the ECtHR does not have authority to interpret U.S. treaty obligations. Thus, the United States encourages the Committee in its final text to refrain from categorical statements regarding State Party obligations unless grounded in and referring to the specific text of the Covenant or other relevant sources of treaty interpretation under international law.[[8]](#footnote-9)

7. The United States is also concerned about the Committee’s use of other non-authoritative materials[[9]](#footnote-10) as the basis for statements about the meaning of Covenant provisions. In a number of places, the Committee makes statements about the meaning of terminology in the ICCPR for which the only authority cited is a nonbinding, nonauthoritative document. The meaning of the ICCPR’s provisions should be discerned through application of standard principles of treaty interpretation reflected in VCLT Articles 31 and 32, not by reference to the views of outside bodies.

8. Regional jurisprudence and guidance, as well as other nonbinding documents, may be useful in identifying good practices that might help advance some objective of the Covenant. But in referring to such documents the Committee should clarify that they are not sources relevant to interpreting the Covenant’s meaning, but rather have informed the Committee’s recommendations regarding steps States may wish to consider taking in connection with their implementation of the Covenant.

**B. Scope of Peaceful Assembly Protection**

9. The first sentence of Article 21 states that “[t]he right to peaceful assembly shall be recognized.” For clarity, we encourage the Committee to use the language from Article 21 consistently throughout the Comment and avoid variations such as “right of assembly” (para. 80) or “freedom of assembly” (para. 112), or even “freedom of peaceful assembly,” which draws from the Universal Declaration rather than the Covenant. Further, while the United States agrees that “the right of peaceful assembly is not absolute” as stated in paragraph 8, we consider only the limitations delineated by Article 21—that is, those that are “imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public safety (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”—to be permissible. Any references to such limitations should track Article 21’s language precisely.

10. In paragraph 6, the Committee lists examples of various forms of assemblies. Footnote 10 of the Comment explains that “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.” For the same reason, the United States cautions against including a list in the Committee’s comment. If a list is included, the United States urges that it be as expansive as possible, use broader terms such as “protest,” and be explicitly non-exhaustive. At the same time, it should be clear that inclusion on the list in paragraph 6 does not imply that these activities may not be regulated in accordance with Article 21. The United States supports inclusion of illustrations that indicate Article 21 applies to all peaceful assembly, as in the second and third sentences of paragraph 6 (mobile or stationary, indoors or outdoors).

11. “Publicly accessible space”: The text of Article 21 does not limit the right to gatherings in public or publicly accessible spaces. Rather, concerns for property rights are addressed by the language in Article 21 that allows restrictions to be placed on the right of peaceful assembly that are necessary for the protection of the rights and freedoms of others. The United States recommends that the comment be revised to reflect that the right itself protects peaceful assembly whether the assembly is on publicly accessible or private property, *provided that* the owner of the private, non-publicly accessible property consents. Laws protecting private property (e.g., prohibitions on trespass) are legitimate restrictions on the right of peaceful assembly and generally are permissible under the limitations clause of Article 21 itself, but the individuals peacefully assembling have no less protection from government interference in the assembly because they happen to be doing so on private property. Such a reading would be contrary to the text of Article 21, as a restriction on peaceful assembly on private land that was permitted or even supported by the owner of that land would hardly be “necessary” for the landowners’ rights or freedoms. A contrary reading could provide justification for governments to restrict peaceful gatherings on private land without meeting the strict test in Article 21. Limitations on government action towards a peaceful assembly should apply with equal force whether the assembly is on publicly accessible or fully private land, so long as the individuals gathering are rightfully present on the private land. Given the brackets in paragraph 4 and 13, it appears that the Committee is not in agreement on this issue. Likewise, paragraph 67 states that “assembly rights may require some recognition on private property that is open to the public.” The United States believes the Comment would be strengthened by a clear statement that Article 21 applies to peaceful assembling wherever it takes place.

12. “Peaceful or Violent Assemblies”: The United States is concerned by the Comment’s articulation of a “two-stage process” for determining whether an individual is engaging in a peaceful assembly as protected by Article 21. The right of peaceful assembly, like human rights generally, belongs to individuals, not to groups. When some members of an assembly resort to violence, the other individuals do not lose protection under Article 21, as paragraph 10 *et seq.* of the current draft suggests. This does not mean that law enforcement cannot lawfully disperse an assembly that has become violent, but this action should be analyzed through the applicable exceptions articulated in Article 21 rather than an assessment that Article 21 no longer applies at all. By separating the questions of whether an assembly is peaceful and whether any peaceful assembly is otherwise subject to restrictions permitted by Article 21, the Committee is suggesting that once the government deems an assembly “violent,” it may impose restrictions that are not in conformity with law or not necessary for one of the governmental interests listed exhaustively in Article 21, or both. In many cases, law enforcement may be able to lawfully arrest and/or detain individuals engaging in violence while allowing the majority of those engaging in peaceful protest to continue; widespread arrests or dispersing an assembly should only be done when necessary. Indeed, this appears to be the Committee’s approach in paragraph 19, and the United States believes this should be the Committee’s consistent approach throughout the Comment. This approach also obviates the need for a more searching assessment of whether an assembly itself is peaceful or violent, since the appropriate question is whether an individual is peaceful.

13. The United States does not dispute that an *individual*’s activity does not fall within the scope of Article 21’s protection if the *individual* becomes violent, e.g., if the individual engages in criminal use of force against another person or property. The United States also recognizes that in some very narrow circumstances, an individual may be deemed as violent who has not yet engaged in criminal use of force, such as where an individual is involved in a conspiracy to commit violence or where the individual’s violence is imminent. It is the United States’ position that any restriction on an individual’s rights under Article 21 based on their speech alone must also comply with Article 19. As the United States explained in its observations on Draft General Comment No. 34,

there are some types of advocacy of national, religious, or racial hatred, namely incitement to *imminent* violence, or to imminent hostile acts such as when genuine, intentional threats of violence or intimidation are made to an individual, whereby prohibition is a legitimate government response to protect public order given the potential immediacy of the harm that may be caused by the speech. Given the difficulties in countering or preventing violence resulting from incitement to imminent violence or to hostile acts due to its immediacy, it is an appropriate governmental response to prohibit such expression to maintain public order without risking the underlying human right.”[[10]](#footnote-11)

The United States therefore recommends that the Committee remove the brackets from “imminent” in paragraph 21.

14. Peaceful Assemblies and Civil Disobedience: The United States agrees that an individual engaging in peaceful but unlawful activity, including civil disobedience, is still protected by Article 21.[[11]](#footnote-12) However, Article 21 does not protect an individual from arrest or detention for breaking the law, including laws relating to trespass, so long as the law itself is “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,” and the arrest and/or detention are consistent with the State’s other obligations under the Covenant, and in particular Article 9.

15. Similarly, the United States agrees that assemblies that fail to meet domestic legal requirements do not fall outside the scope of Article 21 protection, as stated in paragraph 18 of the draft Comment. Once again, however, this does not mean that the assembly cannot be subjected to the restrictions permissible under Article 21. Depending on the facts and circumstances, this may mean that an assembly that fails to meet domestic legal requirements can lawfully be disbanded or the organizers fined, so long as such actions are in conformity with law and necessary for one of the legitimate governmental interests articulated in Article 21.

**C. Permissible Limitations**

16. Time, Place, and Manner: The United States strongly agrees that reasonable “time, place, and manner” restrictions on assemblies in traditional public fora, such as streets, parks and other places traditionally used for public assembly and debate, are lawful under Article 21 of the Covenant. In the United States, such restrictions must be content-neutral and be narrowly tailored to serve a legitimate state interest.[[12]](#footnote-13) Indeed, time, place, and manner restrictions are often the simplest way to maintain public order and protect the rights and freedoms of others without discriminating on the content or viewpoint of the individuals peacefully assembling. However, in limited public fora where the government has opened property for certain types of communicative activity, we believe it is consistent with Article 21 for the government to limit the forum to use by certain types of groups or discussion of certain subjects.[[13]](#footnote-14) In such fora, any restrictions based on content must still be justified by a compelling state interest.[[14]](#footnote-15) In areas that the government has reserved for a specific intended purpose, the United States believes that restrictions on peaceful assembly are permissible under Article 21 so long as the limitation is reasonable. The United States believes that the Comment could be strengthened by clarification that the appropriateness of restrictions under Article 21 may depend on the location of the peaceful assembly.

17. Disruptions: In paragraph 7, the Committee correctly observes that the disruption of vehicular or pedestrian traffic or economic activity does not necessarily call into question the protection such (peaceful) assemblies should enjoy. The United States believes that this paragraph could be clarified by stating that any risks such assemblies may cause should be managed in a manner consistent with the permissible limitations in Article 21 itself and other provisions in the Covenant, rather than using the phrase “human rights framework.” The phrase “human rights framework” is not well-defined.

18. Permitting vs. Prior Notification: The United States believes that permitting regimes are consistent with Article 21 so long as they do not delegate overly broad licensing discretion to government officials, are narrowly tailored to serve a significant government interest, and leave open ample alternatives for communication.[[15]](#footnote-16) They should not discriminate on the basis of the viewpoint of the speakers or organizers or the content of their speech or message unless such restrictions comply with the strict tests set out in Articles 19(3) and 21 of the Covenant. In general, permitting regimes should provide for flexibility where a peaceful assembly is responding to emerging current events.

19. Proportionality: The Comment articulates a number of standards for when limitations on peaceful assembly are permissible. For example, in paragraph 40, the draft General Comment states, “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 in paragraph 43, the draft General Comment states, “Article 21 spells out a *general framework* which any restrictions on the right of peaceful assembly must meet, namely the cumulative requirements of legality, necessity and proportionality . . . .”

20. The United States respectfully submits that these standards are not sound because they are not grounded in the treaty text. Under Article 21, the only circumstances in which peaceful assembly may be restricted is when the restriction is 1) imposed in conformity with law and 2) necessary in a democratic society in the interests of a) national security or public safety; b) public order; c) the protection of public health or morals; or d) the protection of the rights and freedoms of others.

21. As noted above, the United States believes that Article 21 provides a strict and exhaustive list of the requirements for limiting peaceful assembly. As a general matter, restrictions that are truly necessary for one of the governmental interests articulated in Article 21 will not be disproportionate. As the United States explained in its observations on Draft General Comment No. 34 regarding freedom of expression:

the Committee should also clarify that for a restriction to be “necessary,” it must be the least restrictive means for protecting one of the legitimate purposes described in [Article] 19(3), it cannot be overly broad, and must be narrowly tailored to prohibit the least amount of expression possible.

. . .The principle of proportionality [] appears to depart from the strict test of justification [discussed earlier in draft General Comment No. 34] and as is required for any permissible limitation of the freedom of expression under Article 19(3). The United States respectfully recommends that the Committee revise this section for greater clarity, precision reflective of the language in Article 19(3) and the principles discussed in paragraph 4 of these Observations.[[16]](#footnote-17)

22. Derivations from the text of the Covenant, even for the purpose of narrowing the permissible limitations on peaceful assembly, creates precedent for derivations from the text of the Covenant that may not be harmless in the future.[[17]](#footnote-18) The United States urges the Committee to consistently apply the strict test from Article 21 itself, rather than introducing new, nontextual standards.

23. Similarly, in paragraph 8, the Draft states that “any restrictions [on peaceful assembly] must be narrowly drawn.” While the United States agrees that Article 21 places significant limitations on any restriction the government might place on peaceful assembly, the fact that a limitation is narrowly drawn does not make it lawful under Article 21. To be permissible under Article 21, a restriction must imposed in conformity with the law and necessary *for* one of the legitimate government interests articulated in the Article.

24. Indeed, the United States believes that the Draft Comment could be strengthened by greater elaboration of the necessity prong of Article 21 rather than discussing alternative standards. For example, in paragraph 90, the Draft Comment discusses the possibility that an assembly may need to be dispersed by law enforcement. However, the paragraph focuses solely on the use of force, rather than alternatives to force that could achieve the same objective, such as providing a verbal warning to non-violent assembly participants.

**D. The Relationship Between Article 20 and Article 21**

25. The United States has a reservation to Article 20 given its potential to be interpreted and applied in an overbroad manner. The United States respectfully submits that the Committee’s discussion of the relationship of Articles 21 and 20 should be consistent with the Committee’s discussion of Articles 19 and 20 in General Comment No. 34, in which the Committee wrote:

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States Parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.[[18]](#footnote-19)

26. In particular, the Committee’s discussion of Article 20 in paragraphs 22 and 57 of the draft Comment should be revised. In the bracketed paragraph 22, the draft Comment states that “[t]he scope of article 21 is *further determined* by article 20” (emphasis in original). Because, as the Committee has previously articulated, Article 20 does not expand the bases for restricting other rights in the Covenant, this paragraph should be deleted.

27. In paragraph 57, the Committee does not make any reference to the permissible limitations under Article 21 but looks only to Article 20 for its discussion of the circumstances in which an assembly must be prohibited. Paragraph 57 should be revised to reflect the Committee’s earlier analysis of Article 20 and state explicitly that any restriction of peaceful assembly pursuant to Article 20 must also meet the requirements of Article 21, which articulates when restrictions on peaceful assembly are permitted: when they are 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, the protection of public health or morals or the protection of the rights and freedoms of others. As the United States made clear in its observations on Draft General Comment 34:

Indeed, to protect public order or national security, it is not *necessary* to prohibit all advocacy of racial, religious or national hatred. There are other less restrictive (and more effective) means of protecting public order in the face of this type of expression. For example, a combination of efforts can protect public order in the face of hateful expression: ensuring robust protections for freedom of expression of all individuals allows everyone to have a voice and to counter any offensive speech, encouraging government leaders to speak out against such speech, promoting initiatives to create environments of mutual respect and understanding, reaching out to affected communities, providing conflict-resolution services, and rigorously enforcing anti-discrimination and violent hate crimes laws to contribute to a climate of respect. The efficacy of these types of actions in maintaining public order in the face of hostile expression negates any premise that a prohibition on advocacy of hatred, even when some may consider it amounting to incitement to hostility, discrimination or violence, is necessary for public order or national security. In fact, there are instances in which such prohibitions can actually contribute to discrimination, hostility or violence.[[19]](#footnote-20)

We strongly urge the Committee to revise the draft Comment, and in particular paragraphs 22 and 57, to reflect its past discussion of Article 20’s relationship to other rights in the Covenant.

**D. Relationship to Other Rights & Provisions**

28. The United States strongly agrees that in addition to Article 21, many other provisions may provide protection for individuals engaging in peaceful assembly, including but not limited to Articles 6, 9, 17, 18, 19, and 22. The United States also agrees that even when an individual engages in violence and whose activity therefore falls outside the scope of Article 21, or when a peaceful assembly is restricted lawfully pursuant to Article 21, other rights of the Covenant generally remain applicable.

29. Throughout the Comment, the Committee makes use of shorthand reference to a number of rights in this Covenant and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The United States recommends using the language directly from the Covenants to avoid confusion about the source of these rights.

30. Freedom of Expression: The United States agrees with the Committee that freedom of expression is often directly relevant to the exercise of the right of peaceful assembly. We strongly agree that “[t]he rules applicable to freedom of expression should be followed when dealing with the expressive element of peaceful assemblies” and that “restrictions on peaceful assembly may only under strictly limited circumstances be based on the message conveyed by the participants.”[[20]](#footnote-21) Any restriction based on the message of the individuals exercising their right of freedom of expression must comply with the narrow test for restrictions on freedom of expression articulated in Article 19(3) of the Covenant. As noted above, this is true for restrictions under Article 20 as well.

31. Privacy: The Committee correctly highlights the important relationship between privacy and the exercise of the right of peaceful assembly. As noted above in paragraph 29 discussing the importance of using proper terminology rather than shorthand, wherever privacy is discussed as a human right or “international standard,” we urge the Committee to use the language from the ICCPR, specifically the right to be free from arbitrary or unlawful interference with privacy, as set out in Article 17, to be clear that privacy is not an absolute right. Paragraph 94 should also be revised, as it currently suggests that law enforcement may only engage in stop and search or frisk activity on suspicion of a “threat,” rather than any unlawful activity. The United States suggests the following alternative: “Powers of ‘stop and search’ or ‘stop and frisk,’ applied to those who participate in assemblies, or are about to do so, may not be used in a discriminatory manner. The mere fact that an individual is connected to a peaceful assembly does not constitute reasonable grounds for stopping and searching them.”

32. Similarly, paragraph 72 should be clarified and revised to indicate that lawful surveillance for *legitimate* law enforcement or national security purposes is not an infringement of Article 17. The fact that an individual is appearing in a public space diminishes their reasonable expectation of privacy; further, a warrant, court order, or similar legal process (which the Committee’s language in the final clause of this paragraph appears to contemplate) may not be legally necessary or required by respective domestic legal regimes of the Parties to the ICCPR. We recommend deletion of this final clause, or a change from “must be” to “may need to be.” This is also consistent with how the Committee has crafted paragraph 112, with the permissive “may” in the first clause of that paragraph.

33. Liability of States: In Paragraphs 100 and 101, the Committee represents that the State is “responsible under international law for the acts and omissions of its law enforcement agencies and individual officials.” Under the United States’ domestic accountability structure, the State does not always assume liability for the bad acts of law enforcement officials; rather, there are a number of factors to consider regarding whether liability will shift to the individual suspected of acting negligently, recklessly, or potentially criminally. We recommend revising the Paragraph 100 to read “The State is responsible under international law for the acts and omissions of its law enforcement agencies and individual officials acting in their official capacity and should promote a culture of accountability for law enforcement officials during assemblies. This may be achieved under domestic law by holding either the government liable or by holding the individual liable, depending on the specific facts and circumstances.” Similarly, in Paragraph 101, we recommend changing “[l]aw enforcement agencies and individual officials must be held accountable for their actions . . .” to read “those responsible for a violation of international human rights law should be held accountable for their actions . . . .”

34. Non-discrimination: In paragraph 112, the Committee suggests that Article 26 provides a right to non-discrimination that protects individuals from discrimination in their exercise of the right of peaceful assembly. The United States respectfully submits that reference to Article 2(1), which requires States Parties to respect and ensure the rights recognized in the 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,” would be more appropriate than reference to Article 26, which addresses only equality before the law and equal protection of the law. The United States notes that Article 26 does not create a freestanding right to non-discrimination.

35. Economic, Social and Cultural Rights: The United States reiterates that only States are parties to this Covenant and to the ICESCR, and thus only States, not private individuals, have the capacity to violate the rights under the Covenants. Further, the United States reminds the Committee that not all States Party to the ICCPR are party to the ICESCR, and that States only have the obligations they have undertaken.

**E. Obligations**

36. The United States believes that it is a good practice of States Parties to facilitate the right of peaceful assembly, including where necessary and appropriate, through the use of law enforcement to maintain order and protect individuals exercising their right of peaceful assembly. However, from the start of negotiations in 1948, the United States has maintained that the Covenant was intended to protect individuals from State action and that existing codes of criminal law already covered actions committed by individuals or groups.[[21]](#footnote-22) The United States has repeatedly made known its longstanding view that the Covenant in general does not impose an affirmative duty on the State to protect individuals’ life, liberty, or security of person from interference by private actors[[22]](#footnote-23) and consequently such interference does not constitute a violation of the Covenant; our position on Articles 6 and 9 does not change simply because an individual is exercising their right of peaceful assembly. The United States objects to the Committee’s imputing affirmative obligations to States Parties to prevent, regulate, or punish the non-governmental conduct of private actors. The ordinary meaning of the text of the Covenant does not support such a reading,[[23]](#footnote-24) and the negotiating history makes clear that there was not universal agreement among the negotiating parties to impose obligations on States to prevent interference from private actors.[[24]](#footnote-25) The provisions concerning the affirmative duties of the state should be revised to reflect that these are good practices of states to promote enjoyment of the right of peaceful assembly.

37. This is not to suggest that the government has no duties with regard to the right of peaceful assembly. In addition to continuing to comply with the State’s other obligations under the Covenant, in particular Articles 6 and 9,[[25]](#footnote-26) law enforcement, once engaged in maintaining order during an assembly, must not discriminate against individuals on the basis of the viewpoint they are presenting, as discussed above in section C. And where a permitting or notification system is in place, government officials must administer the system in an impartial and timely way, consistent with Article 21.

38. Nor does the United States disagree that as a general matter it is the government’s role to protect individuals from violent and other crime. However, the government must ensure that its actions in this regard do not conflict with the right of peaceful assembly or other obligations under the Covenant. In paragraph 31, the Draft states that the “State is obliged to take all [possible / appropriate] measures to protect the participants . . . .” The United States strongly suggests the Committee use “appropriate” rather than “possible”, because “possible” could include measures inconsistent with the right of peaceful assembly, such as refusing to issue a permit for a protest that could spark violence rather than a more targeted, and thus appropriate response.

**F. Conclusion**

39. Though the United States supports many other aspects of the Committee’s guidance on Article 21 that are not addressed here, these observations focus on a few key areas for Committee’s consideration.[[26]](#footnote-27)

40. The United States Government appreciates the important work the Human Rights Committee performs consistent with its mandate as set out in the Covenant. The United States also appreciates the Committee’s work with respect to draft General Comment No. 37. The United States hopes its views will be taken into account as the Committee finalizes its general comment on Article 21 of the Covenant.

1. *Draft General Comment No. 37: Article 21*, Human Rights Committee, 126th session, Geneva, Jul. 1-26, 2019, (hereinafter “Draft General Comment No. 37”), available at <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>. [↑](#footnote-ref-2)
2. Because, as the United States declared upon ratification, the provisions of articles 1 through 27 of the Covenant are not self-executing, the United States generally meets its obligations regarding Article 21 through the United States Constitution and other domestic laws. *See* United Nations Treaty Collection Depositary, Chapter IV Human Rights, 4. International Covenant on Civil and Political Rights, “United States of America”, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>. [↑](#footnote-ref-3)
3. *See* Statement of Robert K. Harris to the UN Human Rights Committee, July 17-18, 2006, reprinted in Digest of United States Practice in International Law 2006 pp. 284-287 at p. 285, paragraph 2, available at <https://2009-2017.state.gov/s/l/c24878.htm>. [↑](#footnote-ref-4)
4. *Id*. at p. 286. *See* *also* Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights December 22, 2008 (hereinafter “U.S. Observations on General Comment No. 33”), paragraph 9, available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx. [↑](#footnote-ref-5)
5. *See, e.g.,* Observations of the United States of America on the Human Rights Committee’s General Comment No. 24, transmitted March 28, 1995, reprinted in substantial part in Digest of United States Practice in International Law 1991-1999, available at <https://www.state.gov/documents/organization/139394.pdf>, at pp. 879, and generally pp. 878-883; U.S. Observations on General Comment No. 33, *supra* note 4, at paragraphs 5-13; Observations of the United States of America On the Human Rights Committee’s Draft General Comment No. 36 On Article 6 – Right to Life October 6, 2017 (hereinafter “U.S Observations on General Comment No. 36”), at paragraphs 10-12, available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx. [↑](#footnote-ref-6)
6. *See* U.S Observations on General Comment No. 36, *supra* note 5, at paragraph 12. [↑](#footnote-ref-7)
7. Including, for example, caselaw of the European Court of Human Rights (“ECtHR”) and the Inter-American Court of Human Rights, as well as the Organization for Security and Cooperation in Europe (“OSCE”), *Guidelines on Freedom of Peaceful Assembly* (Warsaw, OSCE Office for Democratic Institutions and Human Rights, 2010); and the African Commission on Human and Peoples’ Rights (“ACHPR”), *Guidelines on Freedom of Association and Assembly in Africa* (2017); and *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa* (2017). [↑](#footnote-ref-8)
8. For the United States views on treaty interpretation, *see* U.S. Observations on General Comment No. 36, *supra* note 5, in particular paragraph 7. [↑](#footnote-ref-9)
9. Including, for example, the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officers. [↑](#footnote-ref-10)
10. Observations of the United States of America On the Human Rights Committee’s Draft General Comment No. 34 On Article 19 – Freedom of Expression July 5, 2011, (hereinafter “U.S. Observations on Draft General Comment No. 34”), *excerpted in* Digest of U.S. Practice in International Law 2011, pp. 225-230, at 229 paragraph 13, available at <https://2009-2017.state.gov/s/l/2011/index.htm>. [↑](#footnote-ref-11)
11. Draft General Comment No. 37, *supra* note 1, at paragraph 18. [↑](#footnote-ref-12)
12. Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, December 30, 2011, at paragraph 376, available at <https://2009-2017.state.gov/j/drl/rls/179781.htm#art21>. [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. *Id.* [↑](#footnote-ref-15)
15. *Id.* at paragraph 378. [↑](#footnote-ref-16)
16. U.S. Observations on General Comment No. 34, *supra* note 10, at 228, paragraphs 9-10. [↑](#footnote-ref-17)
17. For similar reasons, the United States objects to the Committee’s assertion that “all use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination applicable to articles 6 and 7.” For a detailed discussion of the United States’ views on the standards applicable to Article 6, *see* the U.S. Observations on General Comment No. 36, *supra* note 5. [↑](#footnote-ref-18)
18. General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, paragraphs 50-52 (footnotes omitted), available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [↑](#footnote-ref-19)
19. U.S. Observations on General Comment No. 34, *supra* note 10, at 228-29, paragraph 12. [↑](#footnote-ref-20)
20. Draft General Comment No. 37, *supra* note 1, at paragraph 56. [↑](#footnote-ref-21)
21. U.S. Observations on General Comment No. 36, *supra* note 5, at paragraph 34. [↑](#footnote-ref-22)
22. *See generally* Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 35: Article 9, June 10, 2014 (hereinafter “U.S. Observations on Draft General Comment No. 35”), *excerpted in* Digest of U.S. Practice in International Law 2014, pp. 178-184, available at <https://2009-2017.state.gov/s/l/2014/index.htm>, and No. 36, *supra* note 5. [↑](#footnote-ref-23)
23. For examples of treaty text that requires States to protect individuals from private actors, s*ee* U.S. Observations on Draft General Comment No. 35, *supra* note 22, at paragraphs 14-17. [↑](#footnote-ref-24)
24. Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights 414 (Marc. J. Bossuyt ed., 1987); [E/CN.4/SR121, p.3 (F)]. [↑](#footnote-ref-25)
25. In this regard, we object to the broad assertion that “firearms are not an appropriate tool for the policing of assemblies” in Paragraph 98. First, the assertion does not even take into consideration whether those assembling are doing so peacefully but makes a blanket statement that apparently applies to all assemblies. Second, in many jurisdictions, including the United States, many law enforcement officials are routinely armed, including for the purpose of maintaining public order at a peaceful assembly. The Comment should focus on whether States Parties are complying with other provisions of the Covenant, such as Articles 6 and 9, rather than asserting new, nontextual standards based on regional guidance, as discussed in Section A. [↑](#footnote-ref-26)
26. However, the United States’ silence on topics not addressed in these observations should not be understood as agreement with the Committee’s views. [↑](#footnote-ref-27)