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COMMISSARIAT

## **Mandate of the Special Rapporteur on the promotion of the right to freedom of opinion and expression**

### **OBSERVATIONS ON REVISED DRAFT (NOVEMBER 2019) OF GENERAL COMMENT 37 ON ARTICLE 21 OF THE ICCPR**

Submission of David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression\*

21 February 2020

1. This submission responds to the public call for comments issued by the Human Rights Committee and conveys observations regarding the Revised Draft of General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights (“ICCPR”), concerning the right of peaceful assembly, adopted on first reading in November 2019. As the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, I welcome the opportunity to share the views expressed below.
2. I would like to begin by congratulating the Committee on its preparation of what will surely prove to be an essential resource for human rights defenders, scholars, advocates and others who exercise the right to peaceful assembly. In that light, I share these comments in a spirit of collaboration and support, and I welcome the opportunity for further discussion. I should add the traditional caveat that my specific comments here should be understood on their own terms and not as an endorsement or rejection of any other paragraphs in the Revised Draft for which I do not offer comments below.
3. This submission identifies a limited number of areas where, in my view, further emphasis or clarification may strengthen the Revised Draft’s articulation of the overlapping rights found in Articles 19 and 21 of the ICCPR. As such, these comments also review some of the language within the Revised Draft in order to provide my observations regarding how it may be seen through the lens of my own mandate.
4. The ICCPR codifies, *inter alia*, the basic human rights of peaceful assembly and freedom of opinion and expression. Article 2 calls upon Member States “to respect and to ensure” all of the rights recognized in the Covenant for all individuals “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”. Because the right to peaceful assembly has long been such a powerful tool for individuals asserting their Article 19 right to expression, it is of paramount importance that the right be protected and ensured for all in accordance with Article 2. In the context of my mandate, and in

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regular collaboration with the special rapporteurs on freedom of peaceful assembly and of association and on the situation of human rights defenders, I have observed serious efforts by States to suppress assemblies and stifle protests, in their many forms, and thereby also threaten freedom of expression.

5. The 2019 joint OSCE and Venice Commission Guidelines state that “certain restrictions or bans on assemblies may automatically also affect the right of individuals or groups to express their opinion on a given matter.”<sup>1</sup> Moreover, the relationship between several civil and political rights, including freedom of opinion and expression and the right to freedom of peaceful assembly, is of special importance in relation to protests. In this connection, I strongly support those aspects of the Revised Draft that highlight both the right to peaceful assembly and the freedom of opinion and expression. In particular, paragraphs 34 and 36 are of special importance to the interests and rights laid down in Article 19. Paragraph 48 also expresses well the point that national security is not a justification for restrictions on human rights where the deterioration of national security is the result of the suppression of human rights. These paragraphs will have particular force as statements of law and principle in the final document. In paragraph 34 of the Revised Draft, where Article 21 is cited as providing protection for “journalists, human rights defenders and others”, it may be prudent to add that Article 19 also protects the work of journalists and others, thus creating concurrent protections. Paragraph 38 would benefit from a similar approach.
6. It also bears noting that “[a]ssemblies are not always acts of protest, and individuals and groups may protest without assembling.”<sup>2</sup> The European Court of Human Rights has recognized one-person protests,<sup>3</sup> the establishment of protest camps<sup>4</sup>, and symbolic acts of protest.<sup>5</sup> While the consideration in paragraph 15 specifically reaffirms the protection of single protestors under Article 19, the Revised Draft may benefit from the reconsideration of language which limits the scope of both freedom of peaceful assembly and freedom of expression. At several points, the text of the Revised Draft indicates that an assembly should be understood to be a group of individuals expressing themselves “collectively.”<sup>6</sup> It may be prudent not to exclude a “protest of one” from the protection of Article 21. While Article 19 protects the freedom of individuals to express themselves, it is unclear what advantage may be derived from specifying that single-person protests cannot also benefit from Article 21 protection.
7. Paragraph 67 of the Revised Draft recognizes appropriately that privately owned spaces are frequently given over to public purposes or may be generally available to the public, such as shopping malls, university campuses, and social media platforms. Given this

<sup>1</sup> OSCE/ODIHR - Venice Commission, Guidelines on Freedom of Peaceful Assembly, 3rd ed., 2019, para. 4.

<sup>2</sup> *Id.*, para. 9.

<sup>3</sup> See, for example, [Novikova and Others v. Russia](#), ECtHR, Judgment of 26 April 2016, where the Court recognized one-person protests through interpreting Article 10 ECHR in light of the principles of Article 11 ECHR, see para. 91. *See generally*, Maina Kiai FOAA Online, [The right to freedom of peaceful assembly](#), 2017.

<sup>4</sup> See [G and E v. Norway](#), EComHR, Decision of 3 October 1983 and [Frumkin v. Russia](#), ECtHR, Judgment of 5 January 2016, para. 107.

<sup>5</sup> Such as: hanging out clothing representing the “dirty laundry of the nation” in [Tatár and Fáber v. Hungary](#), ECtHR, Judgment of 12 June 2012, para. 29; pouring paint on a sculpture in [Murat Vural v. Turkey](#), ECtHR, Judgment of 21 October 2014, paras. 40-56; or burning flags and photos [Christian Democratic People’s Party v. Moldova \(no. 2\)](#), ECtHR, Judgment of 2 February 2010, para. 27. *See generally*, Maina Kiai FOAA Online, [The right to freedom of peaceful assembly](#), 2017.

<sup>6</sup> See, e.g., paragraphs 1, 4, 13, and 14.



fact of contemporary life, it is important to ensure that the freedom of peaceful assembly is not limited in any formalistic way to spaces deemed “public”. Certain paragraphs of the Revised Draft may suggest that the right to peaceful assembly under Article 21 is limited to public areas.<sup>7</sup> Such a limitation could be used to articulate undue restrictions on assembly and protest and could incentivize the transformation of public space into private space.<sup>8</sup> I would urge the Committee to reconsider this issue and take into account the implications of such a limitation.

8. I strongly support the position noted in paragraph 19 of the Revised Draft recognizing the presumption of peacefulness of assemblies and emphasizing that “isolated acts of violence by some participants should not be attributed to other participants”.<sup>9</sup> This is a principle that protects not only assemblies but also freedom of expression. Language demonstrating the overlapping protections of Articles 19 and 21 of the ICCPR would strengthen, for instance, paragraph 18. Moreover, as the Inter-American Commission has stated, the use of face coverings or other disguises by assembly participants “cannot be considered sufficient indicators of a threat of violence, nor can they be used as grounds for the dispersal, arrest, or repression of demonstrators”<sup>10</sup> and, therefore, it may be of value to adapt the language of paragraph 70 of the Revised Draft to reflect this principle.
9. I am concerned about the Revised Draft’s approach to liability for the acts of third parties. Such liability is not in keeping with freedom of expression guarantees and entails risk of repression of public expressions of dissent and a consequent chilling effect on the exercise of free expression and of peaceful assembly. The Special Rapporteur on Peaceful Assembly and of Association found that “assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others”.<sup>11</sup> I would urge amending current paragraph 75, which grants excessive discretion to States to hold organisers and participants liable for the acts of others. It states that civil and criminal liability for the acts of third parties is permissible as long as it is limited to what they “could have foreseen and prevented with reasonable efforts”. Instead, I would encourage the Committee to consider following the OSCE and Venice Commission guidelines, which highlight that responsibility for the acts of third parties should be limited to situations where the organiser or participant “incited, caused or participated” in actual damage or disorder.<sup>12</sup>
10. Limitations on the right of peaceful assembly present opportunities for manipulation if they are not phrased with clarity and exactitude. For this reason, it will likely prove beneficial to phrase such limitations similarly to what other General Comments have provided. For example, paragraph 24 – “the obligation to respect and ensure the right of peaceful assembly may in some cases be adjusted accordingly” – could present unintended openings in interpretation. General Comment No. 34 may provide guidance in its use of the language that the right to freedom of expression “may be restricted in

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<sup>7</sup> See paragraphs 4, 13, 64, and 67 of the Revised Draft.

<sup>8</sup> See HRC/20/27 para. 41 and A/HRC/23/39 paras. 65-67.

<sup>9</sup> See also paragraphs 20 and 42 of the Revised Draft.

<sup>10</sup> IACHR, [Report on Protest and Human Rights](#), 2019, para. 88. See also African Commission on Human and Peoples’ Rights, [Guidelines on Freedom of Association and Assembly in Africa](#), para. 81.

<sup>11</sup> See A/HRC/20/27 para. 31.

<sup>12</sup> See the OSCE/ODIHR - Venice Commission, [Guidelines on Freedom of Peaceful Assembly](#), 3rd ed., 2019, para. 224, which provides further guidance.



accordance with the provisions [provided by the Covenant]”.<sup>13</sup> Similarly, paragraph 31 would benefit from language from General Comment No. 36, paragraph 21.<sup>14</sup> Paragraphs 45 and 46 should express the assessment of proportionality (restriction be suitable to achieve its purported aim, least restrictive means, and proportionate *strictu sensu*) as done in General Comments 27 and 34.<sup>15</sup> Paragraph 55 may benefit from adopting the stronger language of General Comment No. 34, paragraphs 38 and 47 to better exclude prohibitions on expression.<sup>16</sup> Paragraph 98 should also borrow language from General Comment No. 34, paragraph 23, to say, “It is never *compatible with the Covenant* to fire indiscriminately into a crowd.”<sup>17</sup> (Emphasis added to edit).

11. In the current draft, there are few references to online assemblies and the established protections for them.<sup>18</sup> The Human Rights Council has long “[a]ffirm[ed] that the same rights that people have offline must also be protected online”.<sup>19</sup> Given this principle, and to ensure that the right to peaceful assembly remains relevant in an increasingly digital era, it would be beneficial to specify clearly how the scope of rights guaranteed all individuals applies to online assemblies. The Revised Draft could also benefit from clear provisions regarding internet shutdowns and their impact on online and offline assembly.<sup>20</sup> As stated by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, “access to Internet and mobile telephony services should be maintained at all times, including during times of civil unrest.”<sup>21</sup>
12. I would urge that the Committee consider emphasizing that the use of surveillance technologies against those exercising their rights of peaceful assembly and association may only be conducted exceptionally and only when compatible with the Covenant’s guarantees of non-discrimination, freedom of opinion and expression, privacy, public participation and other fundamental rights. Surveillance should be strongly disfavored and permitted only in accordance with the strict tests of necessity and proportionality and under robust judicial supervision.<sup>22</sup> The generalized use of surveillance tools, including but not limited to facial recognition, hinders the possibility of assembly participants to enjoy an appropriate level of anonymity to facilitate their participation. As stated in the joint OSCE and Venice Commission Guidelines, “States should therefore refrain from using surveillance tools to track (or less still, persecute) persons taking part in assemblies and protest actions. Such technologies include police video recordings and facial recognition tools, surveillance of the Internet portals and social media sites used by activists and identification of a person’s whereabouts through

<sup>13</sup> See General Comment No. 34, 12 September 2011, CCPR/C/GC/34.

<sup>14</sup> See General Comment No. 36, 30 October 2018, CCPR/C/GC/36.

<sup>15</sup> See General Comment No. 27, 2 November 1999, CCPR/C/21/Rev.1/Add.9 and General Comment No. 34, 12 September 2011, CCPR/C/GC/34.

<sup>16</sup> See General Comment No. 34, 12 September 2011, CCPR/C/GC/34.

<sup>17</sup> *Id.*

<sup>18</sup> For example, the mention of online assembly could be added to paragraph 6 of the Revised Draft.

<sup>19</sup> See, e.g., Human Rights Council Resolution 20/8 (A/HRC/RES/20/8) (2012).

<sup>20</sup> See paragraph 38 of the Revised Draft. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/35/22 (2017), paras. 8–16.

<sup>21</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, [A/HRC/41/41](#) (2019), para. 74.

<sup>22</sup> See Report of the Special Rapporteur on the right to freedom of opinion and expression, A/HRC/41/35 (2019); Report of the Special Rapporteur on the right to freedom of opinion and expression, A/HRC/23/40 (2013); Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41 (2019).



location tracking (to establish attendance at a demonstration or rally).”<sup>23</sup> Paragraphs 71 and 72 of the Revised Draft should be reviewed to ensure that they conform with these standards.

13. Where the draft specifies particular purposes that may justify an assembly, it may prove valuable to remove such references, since assemblies without an easily identifiable or politically motivated purpose, such as sports clubs or private meetings, should also be protected from state interference. The existence or non-existence of a given purpose should not serve as a deciding factor for whether an assembly is protected by Article 21.<sup>24</sup>
14. The Revised Draft would benefit from ensuring that obligations which are binding are clearly defined as such. In paragraph 28, the protection of participants from discriminatory attacks is a duty. Accepting that this is the case, the “efforts” that “should be made to ensure equal and effective protection of the right of peaceful assembly” would more appropriately read, “*must* be made to ensure...” since the duty creates a binding obligation to protect. Similarly, in paragraph 56, “rules applicable to freedom of expression *should be* followed when dealing with the expressive element of peaceful assemblies,” should be changed to “*must* be followed” to be consistent with state obligations under Article 19. Paragraph 97 should also specify that “[a]s far as possible, any force used *must* be directed...” (emphasis added to edit), in order to firmly restrict the use of indiscriminate force.
15. Paragraph 22 of the Revised Draft offers two options concerning the relationship between Articles 20 and 21 of the ICCPR. I have serious reservations concerning the Revised Draft’s “Option 1”, which would provide for the prohibition of assemblies where “the expressive purpose is covered by Article 20”. Article 20 requires States to prohibit “(a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence”.<sup>25</sup> As the Committee noted in General Comment 34, enforcement of Article 20 must also comply with the requirements of legality, necessity and proportionality under Article 19(3) of the ICCPR.<sup>26</sup> Option 1 suggests that an allegation that an assembly would constitute incitement under Article 20(2) would be sufficient to deem the assembly without the coverage of Article 21. Such an assertion goes too far; its overbreadth and denial of legal coverage could lead to the prohibition of legitimate assemblies and act as a kind of prior censorship that would be inconsistent with Articles 19 and 21. I would thus support Option 2.
16. As I mentioned in my 2019 report to the UN General Assembly on online hate speech (A/74/486), the scope of protection against incitement to violence, discrimination and hostility has expanded over time. Human rights law now provides protection against these forms of incitement beyond the categories of nationality, race or religion. It is important that references to Article 20 within the General Comment reflect this development. This is in line with developments in the practice of the Committee itself

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<sup>23</sup> OSCE/ODIHR - Venice Commission, Guidelines on Freedom of Peaceful Assembly, 3rd ed., 2019, para. 71.

<sup>24</sup> See paragraphs 1, 14, and 27 of the Revised Draft.

<sup>25</sup> Report of the Special Rapporteur on the promotion of the right to freedom of opinion and expression, A/74/486 (2019), para. 8.

<sup>26</sup> See General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 50.



by way of reference to Article 2 (1) of the Covenant, which guarantees rights to all individuals “without distinction of any kind”, and article 26, which provides that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”.<sup>27</sup> The Committee should highlight that its references to Article 20 in the Revised Draft (paragraphs 57 and 60) should be understood to apply to other categories protected under international human rights law,<sup>28</sup> such as sex, language, political or other opinion, social origin, property, birth or other status, including indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status.

17. Once again, I want to congratulate the Committee on this Revised Draft and reiterate my willingness to engage in further discussion on the important topics General Comment 37 will ultimately address.

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<sup>27</sup> See e.g. Concluding Observations on the United States (2006), CCPR/C/USA/CO/3/Rev.1, para 25; Concluding Observations on the Russian Federation (2009), CCPR/C/RUS/CO/6, para 28; Concluding Observations on Sweden (2009), CCPR/C/SWE/CO/6, para 19. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd Edition 2013, OUP).

<sup>28</sup> See also Report of the Special Rapporteur on the promotion of the right to freedom of opinion and expression, A/74/486 (2019), para 9.