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**WRITTEN COMMENTS ON**

**DRAFT GENERAL COMMENT NO. 37**

**ON ARTICLE 21 (PEACEFUL ASSEMBLY),**

**AS ADOPTED BY THE HUMAN RIGHTS COMMITTEE**

**IN THE FIRST READING**

**Submitted by the Open Society Justice Initiative**

**21st February 2020**

**INTRODUCTION**

The Open Society Justice Initiative (the Justice Initiative) welcomes the opportunity to provide the following comments to the Human Rights Committee concerning draft General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights (ICCPR) on the right to freedom of peaceful assembly.

The Justice Initiative undertakes litigation and other forms of legal advocacy to empower people, defend the rule of law, and advance human rights around the world. We pursue accountability for international crimes, counter-terrorism abuses and grand corruption, and promote equality, criminal justice reform, economic justice, access to information and a vibrant civic space. Our staff is based in Abuja, Berlin, Brussels, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C. The Justice Initiative has submitted information and research to the Committee on numerous occasions including concerning General Comments No. 34 on Article 19 (right to freedom of opinion and expression) and No. 36 on Article 6 (right to life); several cases pursuant to the First Optional Protocol; and comments on State reports, most recently, that of Hungary.

The Justice Initiative wholeheartedly welcomes the Committee’s initiative to elaborate a General Comment on Article 21, and we welcome this draft as a useful and important articulation of the framing principles.

In comments that we submitted to the Committee in March 2019, we addressed three main points: the relationship between Article 21 and the right

of access to information guaranteed by Article 19; use of undercover agents and other forms of surveillance; and facilitation of simultaneous and counter-demonstrations. We are pleased to see that these issues are addressed in some detail in the current draft.

In this submission we suggest that deeper integration of the right of access to information throughout the text would considerably strengthen paragraphs concerning the “Obligations of States parties” (set forth in part 3) and the “Duties and powers of law enforcement agencies” (set forth in part 6).

1. **RECOMMENDATIONS ON TRANSPARENCY, ACCOUNTABILITY AND THE RIGHT OF ACCESS TO INFORMATION**

We suggest changes to paragraphs 32, 33, 71 and 112 and additions to part 6 (on duties and powers of law enforcement agencies) in order to make clear the duties concerning the right of access to information about the handling of protests that should be set forth in law; the subjects that should be set forth in policies, standard operating procedures, training manuals and disciplinary codes, and made available to the public; and information that should be collected and made publicly available in order to deter arbitrariness or discrimination in the handling of protests. Following are our specific recommendations:

* + - 1. Para. 32 should be expanded to state that public authorities should proactively publish and supply upon request and free of charge the laws, regulations, other legally binding documents, as well as training manuals, standard operating procedures, police disciplinary codes and other guidance documents that can be used to facilitate or limit assemblies, and could reference part 6 as providing an elaboration of the subjects that such laws, policy statements and guidelines should address concerning the handling of assemblies.
			2. Two introductory paragraphs could be added to part 6. The first could state the matters that should or must be set forth in domestic law consistent with international standards, because mishandling of these matters could result in human rights violations and/or injuries to police, protesters or by-standers. These include any duties imposed on protestors, including any notification requirements (para. 80) and the procedures for appeals; the circumstances in which dispersal of protests are permissible, as well as the arrest, detention, containment and/or “stop and search” of protesters (paras. 90, 93, 94, 95, 96); the circumstances in which different types of use of force are permissible (para. 89-90, 98), as well as deployment of plainclothes officers (para. 103), other uses of surveillance (para. 71), and special units, including private security companies (para 103); the handling of counter-protests (para. 30 and 88); and the right of the media and other public watchdogs to observe and record protests (para. 34).
			3. A second introductory paragraph could add that, to assist in promoting compliance and effective monitoring, it is good practice for States to issue detailed written policies, training manuals, standard operating procedures, and disciplinary codes about the above matters, as well as about these additional matters: procedures for communicating with protesters, the media, and bystanders (para. 86); the duty to develop plans for assemblies that “detail the instruction, equipping and deployment of all relevant officials and units” (para. 87); handling of assemblies for which the authorities are not notified in advance (para. 88); procedures for recording and documenting events (para. 88); duty to create a clear command structure (para. 88); use of equipment (92); duty of law enforcement officers to display a form of identification (paras. 88 and 100); duty to record all use of force and, where injury occurs, to include sufficient information to establish whether the use of force was necessary and proportionate (para. 102); and the use of recording devices by law enforcement officials during assemblies (para. 104).
			4. We suggest strengthening para. 33, on ensuring independent and transparent oversight of all bodies involved in managing peaceful assemblies, by adding a sentence to make clear that public authorities are obliged to investigate and publish reports about protests where force was used as soon as practicable, and to publish information, at least annually, in sufficient detail to be able to track trends concerning the management of protests – including numbers and types of use of force, injuries, arrests, charges, and penalties imposed – that could impact the rights of protesters and others. Such information is crucial not only for accountability but also for purposes of future planning.
			5. Para. 71 currently reads: “The collection of relevant information and data by authorities may under certain circumstances assist the management of assemblies, improve public accountability and constitute part of a proactive approach to preventing violations and abuses of rights from occurring.” Given the importance of protecting against arbitrary or discriminatory treatment in the handling of protests, we suggest adding that public authorities should devote special attention to collecting *and making available* information needed to address arbitrary or discriminatory handling of protests, including public information disaggregated by gender, religion, ethnicity, and any other ground considered relevant, based on the context. Guidance on how to collect such information without violating the right to privacy is provided by the OHCHR and CERD, among others.
			6. Para. 112 refers to freedom of information guaranteed by Art. 19(2). Freedom of information can be misconstrued to refer simply to the freedom of persons to seek and receive information from, and impart information to, others free from government interference. It would be clearer to refer instead to the right of access to information held by public bodies. That is the term that is used in General Comment No. 34 (paras. 18 and 19) and it has gained widespread acceptance, including by the regional human rights courts and other bodies.
1. **SUPPORT FOR OUR RECOMMENDATIONS**
	* 1. **GAPS IN THE DRAFT GENERAL COMMENT**

In this submission we focus on paragraphs 32, 33 and 112, which address the relationship between transparency, accountability and freedom of information; paragraph 71, which concerns the collection of relevant information and data by authorities; and part 6, which concerns the duties and powers of law enforcement agencies.

Paragraph 32 and several paragraphs in part 6 share the problem of being both under inclusive concerning the duties and procedures that should be set forth in domestic law and guidelines, and not being explicit that these should be available to the public.

Paragraph 32 notes the central role of a “functioning and transparent legal and decision-making system” in discharging “the duty to respect and ensure peaceful assemblies,” and elaborates as follows:

Domestic law must clearly set out the duties and responsibilities of all functionaries involved in managing assemblies and must ensure public awareness about what the law provides with respect to the right to assemble; what, if any, procedures those wanting to exercise the right have to follow; who the responsible authorities are; the rules applicable to those officials; and the remedies available in the case of alleged violations of rights.

Paragraph 32 is under-inclusive. There are several more categories of duties that should be set forth in domestic law, and considerably more information about the handling of assemblies that should be publicly available (see recommendations 2, 3, and 5, above).

In addition, several paragraphs in part 6 share the problem of being both under inclusive concerning the duties and procedures that should be set forth in domestic law and guidelines, and not being explicit that these should be available to the public. In particular, three paragraphs state that requirements must be set forth in domestic law that complies with international principles: para. 89, regarding “all use of force”; para. 90, regarding “arrests and dispersals of assemblies”; and para. 103, regarding “the nature and consequences of acts by private security service providers.” Two paragraphs mention the need for written protocols: para. 88 calls for “training protocols … for the policing of assemblies for which the authorities are not notified in advance and which may affect public order” and for “protocols for recording and documenting events, ensuring the identification of officers and reporting of any use of force”; and para. 104 calls for “clear and publicly available guidelines” concerning “the use of recording devices by law enforcement officials during assemblies”.

These paragraphs, along with paragraph 32 raise two concerns. First, the fact that only these paragraphs expressly call for requirements to be set forth in law or protocols could create a negative inference that other requirements do not similarly need to be codified. Second, the fact that only one paragraph, para. 104, calls for guidelines to be clear and publicly available could raise a negative inference that others guidelines, and even laws, do not need to be.

* + 1. **THE RIGHT OF ACCESS TO INFORMATION**

While it may seem self-evident that laws and policies that affect human rights should be publicly available, in many countries even laws are not readily available and policy and other documents can be difficult to obtain or are withheld on spurious grounds. For instance, the Mexico City Police refused to release its training materials concerning the handling of protests on the ground that the training books were copyright-protected – even though they had been developed with public funds. A more common objection is that materials contain operational information that must be withheld in the interests of public order and effective policing so that protesters, or *agents provocateurs*, are not able to access and learn from the measures the police intend to deploy if a crowd becomes unruly or violent and, by learning them, render the policing less effective. There is some legitimacy to this concern, but the remedy is not to withhold documents that otherwise should be public; rather police forces should take care to segregate information that legitimately may be withheld from the public. This approach to information handling may impose some burdens, and considerable shift in the culture of most police departments, but it is necessary in order to give effect to the right of access to information held by public bodies.

As General Comment No. 34 makes clear, the right of access to information applies to all public bodies: law enforcement and even the armed services are not exempt. (paras. 18 and 7) The General Comment continues:

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information …. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failures to respond to requests. (Para. 19)

If a document includes information that should be disclosed and information that legitimately may be withheld, good practice requires the redaction of the secret information so that the other information can be made public.[[1]](#footnote-1) The first principle of the right of access to information is that disclosure is the rule and withholding the exception.[[2]](#footnote-2)

* + 1. **PRINCIPLES AND GUIDELINES ON PROTEST AND THE RIGHT TO INFORMATION**

Support for the above recommendations may be found in the [Principles and Guidelines on Protest and the Right to Information](https://www.justiceinitiative.org/publications/principles-and-guidelines-on-protest-and-the-right-to-information) developed by the Justice Initiative and the Committee on the Administration of Justice in consultation with civil society groups, police officials, and other experts around the world. These Principles have been welcomed and cited by the current UN Special Rapporteur on Freedom of Assembly and Association, the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, and the OSCE-ODIHR and Venice Commission Working Group on Freedom of Peaceful Assembly.[[3]](#footnote-3) The Principles and Guidelines are based on international (including regional) and national law, standards and good practices. Attached as Appendix A are relevant excerpts from those Principles and Guidelines.

**ANNEX**

**PRINCIPLES 1 and 4 and ACCOMPANYING GUIDELINES**

**of the**

**PRINCIPLES AND GUIDELINES ON PROTEST AND THE RIGHT TO INFORMATION**

***issued by the Open Society Justice Initiative and the Committee on the Administration of Justice (2018)***

**PRINCIPLE 1**: **Public authorities should make proactively available information that individuals and watchdogs need in order to be able to: (a) exercise democratic oversight of the policing of protest and promote accountability; (b) safeguard rights to freedom of assembly and expression; and (c) be aware of conduct that could result in penalties.**

***GUIDELINES:***

1. Public authorities should proactively publish in accessible formats,[[4]](#endnote-1) including for persons with disabilities, and in all of the jurisdiction’s official languages, and should supply upon request and free of charge:
2. the laws, regulations, executive decrees, judicial orders, official interpretations, and other legally binding documents that can be used to facilitate or limit protests (hereafter referred to as “the legal framework”);
3. the policy documents concerning protests that bind or guide decision-makers, as well as police standard operating procedures (SOPs), training manuals (both in-service and trainee), and disciplinary codes and procedures concerning matters that may arise during protests;
4. the types of equipment routinely used in managing assemblies, and equipment available for exceptional situations, including appropriate protective gear;
5. information regarding the responsibilities and procedures of agencies and bodies that manage protests;
6. information about special units that may be deployed, including military units and private security companies; and
7. the procedures for requesting information from, submitting complaints to, and lodging appeals with, relevant public authorities, including oversight bodies.
8. The above-listed information should never be withheld. Authorities should routinely generate such information and draft said documents bearing in mind the public’s right of access to them, and should include any operational details in separate annexes to facilitate transparency without imposing unnecessary administrative burdens. If a document includes both information that falls into any of the above categories as well as operational details, the operational details may be redacted in accordance with permissible restrictions on the right of access to information set forth in international law, if necessary and proportionate to protect a legitimate interest such as public safety or crime prevention. Release of annexes containing operational details should also be subject to such a test.[[5]](#endnote-2)

1. The legal framework, policy documents, SOPs, training manuals, and disciplinary codes and procedures should address, in particular, the following items, because missteps in these areas could result in human rights violations and/or injuries to police, protesters or by-standers, and because detailed written policies and related materials can assist in promoting compliance and effective monitoring:[[6]](#endnote-3)
2. the circumstances in which dispersal of protests or arrest of protesters are permissible;
3. the permissible uses of force in various circumstances;
4. the handling of counter-protests;
5. the right of the media and other public watchdogs to observe and record protests;
6. the use of surveillance and agents (informants and undercover officers) in a protest context; and
7. any duties imposed on protestors, including any notification requirements.
8. Policy documents, SOPs, training manuals, and disciplinary codes and procedures (but not necessarily the legal framework itself) should, in addition to the matters noted in section (c), above, address the following topics:[[7]](#endnote-4)
9. procedures for communicating with protesters, the media, and bystanders;
10. use of equipment (including weapons, offensive equipment, drones, and other new technologies), and the basis for approving the acquisition of new equipment;
11. handling of traffic to accommodate protests, and planning for safe and sufficient routes for dispersal of demonstrators;
12. duties to document information, including as elaborated in Principles 4, 5, 6, 8, and 10;
13. details of the relevant law enforcement leadership chain of command;
14. procedures for handling injuries suffered by police, protesters, and bystanders; and
15. protest-related criminal investigation procedures, bail criteria, interpretation of offenses, and test for prosecution.

**PRINCIPLE 4: Public authorities should devote special attention to collecting and making available information needed to protect against arbitrary or discriminatory treatment in the handling of protests.**

***GUIDELINES:***

1. Police, prosecuting authorities, other relevant decision-making authorities, and oversight bodies should, in order to create documentation needed to monitor, and protect against, arbitrary or discriminatory treatment, ensure that they have policies and systems established that oblige and enable them to:
2. state reasons in writing for any restrictions imposed on a protest;[[8]](#endnote-5)
3. provide information on gender-specific considerations in operational decisions;
4. provide information on positive steps to protect protestors, including children and other vulnerable groups; and
5. collect and make publicly available statistics, disaggregated by gender, ethnicity, and any other protected ground which has been the basis for discriminatory treatment in the jurisdiction in the past, on the use of powers in relation to protests, including to stop and search, make arrests, and detain persons.[[9]](#endnote-6)
6. The dutyto establish systems to create such documentation increases where there has been a history of arbitrary or discriminatory treatment.
1. Model Inter-American Law on Access to Public Information, OAS AG/RES. 2607 (XL-O/10), adopted June 8, 2010, art. 42; Model Law on Access to Information for Africa, adopted by the African Commission on Human and Peoples’ Rights (2013), Sec. 36(1); Global Principles on National Security and the Right to Information (“Tshwane Principles”), issued June 12, 2013 by 22 CSOs and academic centers, Principle 22. [↑](#footnote-ref-1)
2. E.g., Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (Dec. 2004), 1st operative paragraph: “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation . . . based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.” [↑](#footnote-ref-2)
3. See Guidelines on Freedom of Peaceful Assembly (3rd ed., July 2019), CDL-AD (2019)017, at fn. 170. [↑](#footnote-ref-3)
4. In jurisdictions where a significant percentage of the population communicates orally, it is good practice to make information available orally as well. [↑](#endnote-ref-1)
5. “Operational details” that legitimately may be withheld from the public include details of plans, operations, and capabilities whose disclosure could thwart legitimate law enforcement activities. [↑](#endnote-ref-2)
6. For instance, written and publicly available notification requirements can help public watchdogs ensure that the requirements are not so onerous as to constitute *de facto* authorization requirements, which violate protest rights. An assessment of these documents can also determine whether any protest-related powers granted to the military or private security contractors are human rights compliant. [↑](#endnote-ref-3)
7. The items in this sub-paragraph, while important, are more detailed than the types of information typically addressed by the legal framework, and for that reason they are listed separately from the items in sub-paragraph (c). [↑](#endnote-ref-4)
8. International law permits imposition of restrictions on a protest so long as the restrictions are provided by law, are strictly necessary to protect a legitimate aim, and are proportionate to the threat posed. One of these legitimate aims is protection of the “rights of others,” and in pursuit of this aim, expression that constitutes advocacy of hatred on the basis of ethnicity or other protected ground may be restricted. In order to ensure that decision-making authorities do not subjectively apply this term or others, it is especially important that authorities state reasons in writing for any restrictions on protests. It is a good practice for libraries to make this information available as part of their collections of national and local law. [↑](#endnote-ref-5)
9. This Principle should not be interpreted either as imposing a duty to conduct individual monitoring of persons at a protest or as granting powers to authorities to collect sensitive personal identity information other than information that is either: (a) available through officer perception (as may be the case to varying degrees of reliability regarding grounds such as age, gender, and ethnicity); or (b) volunteered by individuals. In addition, the nature of a protest relating to a protected ground (for example, relating to LGBT, migrant, national, minority, or women’s rights) should be recorded, as should the general composition of protestors if known to be or likely to be from a particular protected group. The exercise of police powers against individuals may be subject to equality monitoring requirements that are compliant with international standards balancing the rights to privacy and self-identification with duties to ensure non-discriminatory practice. [↑](#endnote-ref-6)