



The State of Israel
The Ministry of Justice

The Office of the Deputy Attorney General (International Law)

Date: Shvat 18, 5780

February 13, 2020

Dear Prof. Heyns,

Re: **Draft General Comment No. 37 Regarding Article 21 of the International Covenant on Civil and Political Rights (1966): Right of Peaceful Assembly**

1. As part of its longstanding commitment to fulfill its obligations under the International Covenant on Civil and Political Rights (ICCPR) and to continue its fruitful cooperation with the United Nations Human Rights Committee in an open and constructive dialogue, the State of Israel welcomes the opportunity to comment on the draft General Comment No. 37, dated 14 November, 2019, regarding Article 21 of the ICCPR, on the right of peaceful assembly.
2. The State of Israel recognizes and respects the Committee's mandate, which enables it, *inter alia*, to publish General Comments. However, Israel would emphasize that General Comments are intended to provide useful guidance to States parties in interpreting their obligations under the Covenant and to recommend effective measures and "best practices". As such, General Comments do not create binding legal obligations, in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States parties.
3. The following remarks reflect Israel's principal observations and concerns arising from the draft General Comment and do not preclude the existence of other issues of concern arising from the Committee's interpretation of the obligations of States parties under the Covenant.

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General Remarks

4. **Paragraph 2:** Israel is of the view that the wording used in the previous draft of this paragraph, *i.e.*, "to ensure the **practical recognition** of a wide range of other human rights", better expresses the rationale behind the right of peaceful assembly.

Further, Israel attaches importance to including in the General Comment the following clarification made in the former draft: "Peaceful assembly is a legitimate use of the public space which is 'not only an area for circulation, but also for participation'". The said principle was established in Israel by the High Court of Justice in 1979 (H.C.J 148/79 *Sa'ar v. The Ministry of Interior and The Police*).

5. **Paragraph 4:** The words "the same" might exclude assemblies taking place simultaneously in different locations across the country. We therefore recommend omitting it.
6. **Paragraph 11:** It is Israel's view that the term "can be used" implies a permissive approach towards the use of surveillance technologies for the purpose of monitoring assemblies by States parties. We suggest replacing "can be" with "are being used". In addition, we propose adding the following passage: "...other rights of participants and bystanders, **and create a chilling effect on those wishing to organize assemblies via such technologies**".

Scope of the right of peaceful assembly

7. **Paragraph 22:** It is Israel's view that the second option expresses a less restrictive approach towards the exercise of the right for peaceful assembly. We therefore support the second option.

The obligation of States parties in respect of the right of peaceful assembly

8. **Paragraph 24:** Israel is of the view that the term "adjusted" does not properly encapsulate the legal principle expressed here. We would suggest returning to the former wording, as follows: "...may in some cases **be limited** in order to ensure the protection of other human rights".
9. **Paragraph 35:** It should be noted that the duties placed on private entities in Israel in this aspect are much more limited, as is the case for other States parties.

Restrictions on the right of peaceful assembly

10. **Paragraph 50:** The explanation provided for this ground is relatively vague compared to the rest of the grounds for restriction of the right to peaceful

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assembly. We suggest clarifying that **only a serious threat** to public order may fall within the scope of this ground for restriction.

11. **Paragraph 56:** The second option mentioned in paragraph 22 above should be referred to in this paragraph.
12. **Paragraph 64:** With respect to the last sentence in this paragraph, we suggest clarifying that such general restrictions on access to some spaces, insofar as these spaces are **public**, may only be used in exceptional circumstances.
13. **Paragraph 65:** Pursuant to Israeli practice, assemblies may not be held adjacent to the private homes of the civil servants who are being addressed in the assembly, insofar as an effective alternative location exists (*e.g.*, the office of the official). We believe it is important that the General Comment address this sensitive issue.
14. **Paragraph 66:** We suggest adding the words: "areas open to the public in" before the words: "places such as". The current wording implies that all areas in courts, parliament, etc. (*e.g.*, the judges' chambers) may be used to exercise the right of peaceful assembly.
15. **Paragraph 71:** Similar to our comment made in paragraph 11, we suggest adding the following passage before the last sentence in this paragraph: "...any information gathering, including through surveillance or the interception of communications, and the way in which data are retained and accessed, **may create a chilling effect on (would-be) participants in assemblies, and must therefore strictly conform to the applicable international standards...**".
16. **Paragraph 75:** "Assembly organizers and participants are obliged to make reasonable efforts to comply with legal requirements" – We believe the same should apply to the previous paragraph (paragraph 74), *i.e.*, that the reasonable efforts referred to in this paragraph may entail, under certain circumstances, expenses excessive to the costs covered by public funds (for example, when engineering approvals of constructions are required).

Duties and powers of law enforcement agencies

17. **Paragraph 90:** We propose to differentiate between the requirement of a legal authority to arrest or disperse an assembly without the use of force, and the requirement of a legal authority to use force as part of policing of assemblies. Both actions require authorities enshrined in domestic law.
18. **Paragraph 97:** The terms "area weapons" and "indiscriminate effects" derive from the context of armed conflict and international humanitarian law. They are unsuited to the present context, for both substantial reasons and policy reasons, as they militarize the situation under discussion.

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Further, being "indiscriminate" is dependent on the circumstances, as there may be instances where such "area weapons" can indeed be used against all those against whom it is directed, *i.e.*, intentionally used against groups of persons against whom such use is justified. Israel therefore suggests the following wording for the fourth sentence in this paragraph:

"In some circumstances, less-lethal weapons designed to affect an area, such as chemical irritants dispersed from a distance (tear gas) and water cannon, may result in the undesirable consequence of affecting other persons".

19. **Paragraph 99:** Insofar as this statement is based on Article 7 of the Rome Statute (as suggested by the footnote), such conduct would only constitute a crime against humanity if the other contextual elements of the said article (*i.e.*, that these acts are committed as part of an attack directed against any civilian population, with knowledge of the attack) and the specific elements of one of the particular crimes enumerated in that article, can be established as well. "Widespread or systematic" use of force, in and of itself, would not suffice from an international criminal law perspective.

Israel is not a party to the Rome Statute. Israel is committed to definitions that accurately reflect customary law and widely accepted principles of crimes against humanity. This, as part of its consistent commitment to the prevention and punishment of grave international crimes of concern to the international community as a whole, including crimes against humanity.

20. **Paragraph 106:** With regard to the reference to the term "autonomous weapons", this subject has been discussed thoroughly in recent years under the auspices of the CCW convention, and is still debated. It is clear that currently **there is no internationally agreed definition of what constitutes an "autonomous weapon"** (whether lethal or not). Moreover, discussions in the CCW clearly demonstrate the existence of a stark controversy between States regarding the appropriate level of human intervention, judgment or control regarding such systems, as well as the appropriate terminology in this regard. On the technological level, this is an emerging issue with numerous uncertainties and complexities. Israel believes it would not be responsible, nor legally accurate, to introduce controversial terminology and propose far-reaching suggestions regarding this novel issue. **The sentence concerning autonomous weapons should therefore be deleted.**

Regarding the sentence "Such methods of force delivery may escalate tensions and should be used only with great caution", this statement is factually unfounded and should therefore also be deleted. It is our impression that remotely controlled non-lethal means, when used responsibly and carefully,

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may in fact reduce tensions and contribute to de-escalation of the situation. Indeed, tensions may often be more prone to escalate in face to face encounters. **Therefore, Israel supports the deletion of this sentence.**

Alternatively, Israel suggests adopting in this regard a more cautious text, similar to paragraph 65 of General Comment No. 36: "[...] For example, the development of autonomous weapon systems lacking in human compassion and judgement raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law."

Assembly during states of emergency and armed conflict

21. **General remark:** While there may well be a convergence between the law of armed conflict and international human rights law in some respects, in the current state of international law and state-practice worldwide, it is Israel's view that the law of armed conflict and international human rights law, which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances.
22. **Footnote 144:** Israel calls upon the Committee to refrain from relying on ill-founded and politically tainted sources, such as the March 2019 report of the UN Commission of Inquiry. Further, as in any other case study mentioned in the draft General Comment, reference to the Gaza Border events of 2018-19 should be based on jurisprudence, rather than biased reports. In this regard, we respectfully refer the Committee to the decision of the Israeli High Court of Justice from 24 May, 2018, where allegations of violations of international law were examined and were finally rejected by the Court (H.C.J 3003/18 and H.C.J 3250/18; available: <https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\18\030\030\k08&fileName=18030030.K08&type=4>).
23. **Paragraph 110:** It is our view that the words "and to the extent that they are not otherwise protected under international law from attack" constitute a legal error, as a person directly participating in hostilities is targetable, and may therefore not be otherwise protected from attack under international law. We therefore suggest deleting this part of the sentence, and ending the sentence after the words "humanitarian law".

With respect to the last sentence in **paragraph 110**, there are divergent views on the question of whether military necessity, distinction, proportionality and

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precautions in attack should be characterized as "rules", "principles" or another category, and whether they all have the same legal status and meaning. To allow for more latitude for different views on this question, we suggest changing the word "rules" to "principles and rules" (note that following a similar debate on the issue which recently took place in a CCW GGE working group, the terminology agreed by consensus was "requirements and principles"; see CCW/GGE/.1/2019/3). Likewise, note that there are two references to proportionality, and one is redundant.

24. **Footnote 145:** It is Israel's view that the reference to the ICRC in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) should be deleted. First, the publication does not support the main text in paragraph 110. Second, Article 51(3) of the First Additional Protocol to the Geneva Conventions is a more solid legal source for the rule regarding direct participation in hostilities. Third, the General Comment should avoid making references to such controversial legal sources. This publication has been rejected by several States, including Israel, criticized by scholars, and its main conclusions are considered highly contentious. As suggested, the reference to this source should be replaced with a reference to Article 51(3) of the First Additional Protocol.
25. **Paragraph 113:** The wording of this paragraph implies that those bound by the obligation to refrain from infringing on the rights of others are States parties' **nationals** participating in peaceful assemblies. However, the Covenant does not impose obligations on individuals, but rather on States parties' governments and governmental authorities.

Human Rights Committee

General comment No. 37

Article 21: right of peaceful assembly*

Revised draft prepared by the Rapporteur, Mr. Christof Heyns

[] indicate language on which consensus was not reached during the first reading.

1. General remarks

1. The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping their societies. The right of peaceful assembly is important in its own right, as it protects the ability of people to exercise individual autonomy in solidarity with others. Together with other rights related to political freedom, it also constitutes the very foundation of a system of participatory government based on democracy, human rights [, the rule of law] and pluralism, where change is pursued through persuasion rather than force. Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain, and to establish the extent of support for or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for inclusive participatory and peaceful resolution of differences.

2. The right of peaceful assembly is, moreover, a valuable tool that can and has been used for the realisation of a wide range of other human rights, including socio-economic rights. It can be of particular importance to marginalised and disenfranchised members of society. Peaceful assembly is a legitimate use of the public space. A failure to recognise the right to participate in peaceful assemblies is a marker of repression.

3. The first sentence of article 21 of the International Covenant on Civil and Political Rights provides that: "The right of peaceful assembly shall be recognized". The right is articulated in similar general terms in other international, including regional, instruments.¹ The content of the right has been elaborated upon by international bodies, for example in their views, concluding observations, resolutions, interpretive guidelines, and judicial decisions.² In addition to being bound by international law to recognize the right of peaceful assembly, the vast majority of States also recognize the right in their respective national constitutions.³

Commented [X1]: Israel is of the view that the wording used in the previous draft of this paragraph, *i.e.*, "to ensure the **practical recognition** of a wide range of other human rights", better expresses the rationale behind the right of peaceful assembly.

Commented [X2]: Israel attaches importance to including in the General Comment the following clarification made in the former draft: "Peaceful assembly is a legitimate use of the public space which is 'not only an area for circulation, but also for participation'". The said principle was established in Israel by the High Court of Justice in 1979 (H.C.J 148/79 *Sa'ar v. The Ministry of Interior and The Police*).

* Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019).

¹ See, e.g., the Universal Declaration of Human Rights (art. 20 (1)); the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (art. 11); the American Convention on Human Rights (art. 15); the African Charter on Human and Peoples' Rights (art. 11); and the Arab Charter on Human Rights (art. 28).

² See, e.g., 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).

³ A total of 180 of the 193 States Members of the United Nations recognize the right of peaceful assembly in their constitutions. For an exposition of the various national domestic legal regimes on peaceful assemblies, see www.rightofassembly.info.

4. The right of peaceful assembly protects the non-violent gathering of persons with a common expressive purpose in [a publicly accessible / the same] place.⁴ The right of peaceful assembly constitutes an individual right that is exercised collectively.⁵ Inherent to the right is thus an associative element.

Commented [x3]: The words "the same" might exclude assemblies taking place simultaneously in different locations across the country. We therefore recommend omitting it.

5. Everyone can exercise the right of peaceful assembly. This includes children.⁶ In addition to its exercise by citizens, the right may also be exercised by, for example, foreign nationals,⁷ including migrant workers,⁸ asylum seekers and refugees,⁹ as well as stateless persons.

6. Peaceful assemblies may take many forms, including demonstrations, meetings, processions, strikes, rallies, sit-ins and flash-mobs.¹⁰ 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.

7. 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 sometimes used to pursue ideas or goals that are somehow contentious, and their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. They may be intended to have these consequences, without necessarily calling into question the protection such assemblies should enjoy. To the extent that these events may create security or other risks, they have to be managed within a human rights framework.

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.¹¹ 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, but any restrictions must be narrowly drawn. There are, in effect, limitations on the limitations that may be imposed.

9. The full protection of the right of peaceful assembly is possible only when the other, often overlapping, rights related to political freedom are also protected, notably freedom of expression, but also rights such as freedom of association and political participation.¹²

⁴ In *Kivenmaa v. Finland* (CCPR/C/50/D/412/1990), para. 7.6, the Committee described a public assembly as "the coming together of more than one person for a lawful purpose in a public place that others than those invited also have access to". (See, however, the dissenting opinion in the annex, para. 2.5, which questions the application of this definition to the facts of the case). The Committee has subsequently emphasized the expressive element of the exercise of the right. See, e.g., *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 9.3; and *Poplavny v. Belarus* (CCPR/C/118/D/2139/2012), para. 8.5. On the requirement of a public space, see *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.3. According to the OSCE *Guidelines on Freedom of Peaceful Assembly*, an assembly entails "the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose" (para. 1.2). The ACHPR *Guidelines on Freedom of Association and Assembly in Africa* describe assembly as "an act of intentionally gathering, in private or in public, for an expressive purpose and for an extended duration" (para. 3).

⁵ Cf. General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 9.

⁶ Convention on the Rights of the Child, art. 15; and African Charter on the Rights and Welfare of the Child, art. 8.

⁷ General comment No. 15 (1986) on the position of aliens under the Covenant, paras. 1–2; and CCPR/C/KWT/CO/3, para. 42.

⁸ CCPR/C/DOM/CO/6, para. 32.

⁹ CCPR/C/NPL/CO/2, para. 14.

¹⁰ 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.

¹¹ European Court of Human Rights, *Primov and others v. Russia* (application No. 17391/06), judgment of 12 June 2014, paras. 118–119.

¹² Cf. A/HRC/39/28, para. 14.

Protection of the right of peaceful assembly is in many cases also dependent on the realization of a broader range of rights, such as non-discrimination, movement, privacy, religion, freedom from cruel, inhuman or degrading treatment and from arbitrary detention, and the right to life.

10. Where gatherings do not fall within the scope of “peaceful assemblies”, for example if they become violent, they are no longer protected by article 21, but the individuals involved retain their other rights under the Covenant, including those listed above, subject to the applicable restrictions.

11. The way in which public assemblies are conducted changes over time, and the same applies to their context. This may in turn affect the way in which the right is to be approached by the authorities. For example, emerging technologies present new spaces and opportunities as well as challenges for the exercise of the right of peaceful assembly. Communication technologies often play an integral role in organizing and monitoring, but also in impeding assemblies. Surveillance technologies can be used to detect threats of violence and thus to protect the public, but they could also infringe on the privacy and other rights of participants and bystanders. A range of less-lethal weapons, as well as remote-controlled weapons systems, have become available for use during the policing of assemblies, which can restrain or increase the force that is employed during assemblies. Moreover, there is increased private ownership of public spaces. Considerations such as these need to inform a contemporary understanding of the legal framework required to give full effect to article 21.

2. Scope of the right of peaceful assembly

12. Establishing whether someone’s right of peaceful assembly is protected by article 21, as is the case with other rights, entails a two-stage process. It must first be established whether the conduct in question falls within the *scope* of the protection offered by the right. It must thus be determined whether the conduct amounts to participation in a “peaceful assembly,” as the term is used in the article. Secondly, it must be established whether or not legitimate *restrictions* apply to the exercise of the right in that context.

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

14. The common expressive purpose of those participating in a peaceful assembly may, for example, entail conveying a collective position on a particular issue. It can also entail asserting group solidarity or identity. Assemblies may, in addition to having such an expressive purpose, also serve other goals and still be protected by article 21. While commercial gatherings would not generally fall within the scope of what is protected by article 21, they are covered to the extent that they have an expressive purpose.

15. While the notion of an assembly implies that there will be more than one participant in the gathering,¹³ a single protester enjoys comparable protections under the Covenant, for example under article 19. Moreover, although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, comparable human rights protections also apply to acts of collective expression through digital means, for example online.¹⁴ At the same time, the fact that people can communicate online should not be used as a ground for restrictions on in-person assemblies.

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. 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.

Commented [x4]: It is Israel's view that the term "can be used" implies a permissive approach towards the use of surveillance technologies for the purpose of monitoring assemblies by States parties. We suggest replacing "can be" with "are being used". In addition, we propose adding the following passage: "...other rights of participants and bystanders, and create a chilling effect on those wishing to organize assemblies via such technologies".

¹³ *Coleman v. Australia* (CCPR/C/87/D/1157/2003), para. 6.4.

¹⁴ A/HRC/41/41.

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 that is likely to result in injury or death,¹⁵ or serious damage to property.¹⁶ 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.¹⁷

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.¹⁸ Moreover, isolated acts of violence by some participants should not be attributed to other participants.¹⁹ Some participants or parts of an assembly may thus be covered by article 21, while others in the same assembly are not.

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.²⁰

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, the participants have violent intentions and plan to act on them,²¹ 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, participation in the gathering as such is no longer protected under article 21.

22. [Option 1: The scope of article 21 is further determined by article 20 of the Covenant, which requires States parties to prohibit propaganda for war (art. 20 (1)) and advocacy of national, racial or religious hatred that constitutes incitement to discrimination or hostility, in addition to violence (art. 20 (2)). Participation in assemblies where the expressive purpose is covered by article 20 does not fall within the scope of, and is not protected by, article 21. Such assemblies must be prohibited. Option 2 is that this paragraph be deleted, and the need to act against incitement of discrimination or hostility (not violence, that is part of the scope) be dealt with in the section on restrictions that require justification.]

Commented [X5]: It is Israel’s view that the second option expresses a less restrictive approach towards the exercise of the right for peaceful assembly. We therefore support the second option.

23. The carrying by participants of objects that are or could be viewed as weapons is not necessarily sufficient to render the assembly violent. That has to be determined on a case-by-case basis, dependent on, among other considerations, local cultural practices, whether there is an indication of violent intent, and the risk of violence presented by the presence of such objects.

¹⁵ For the WHO definition of violence, see WHO Global Consultation on Violence and Health, WHO/EHA/SPI.POA.2.

¹⁶ OSCE, *Guidelines on Freedom of Peaceful Assembly*, paras. 26–27.

¹⁷ 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.”

¹⁸ 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.

¹⁹ European Court of Human Rights, *Frumkin v. Russia*, para. 99.

²⁰ However, as far as restrictions on such assemblies are concerned, see paras 58–59 below.

²¹ European Court of Human Rights, *Lashmankin and others v. Russia*, para. 402.

3. The obligation of States parties in respect of the right of peaceful assembly

24. The Covenant imposes the obligation on States parties to “respect and ensure” all the rights in the Covenant (article 2 (1)); to take legal and other measures to achieve this purpose (article 2 (2)); and to pursue accountability, and provide effective remedies for violations of Covenant rights (article 2 (3)).²² The obligation of States parties in respect of the right of peaceful assembly under article 21 thus comprises these various elements. Because the right of peaceful assembly is not absolute, the obligation to respect and ensure the right of peaceful assembly may in some cases be adjusted accordingly.

25. Importantly, States must leave it to the participants freely to determine the purpose or expressive content of the assembly. The approach of the authorities to peaceful assemblies and any restrictions imposed must thus in principle be “content neutral”.²³ While the “time, place and manner” of assemblies may under some circumstances be the subject of legitimate restrictions under article 21, given the expressive nature of assemblies, participants must as far as possible be able to conduct assemblies within “sight and sound” of the target audience.²⁴

26. The obligation to respect and ensure peaceful assemblies imposes essentially negative as well as positive duties on States. They have the negative duty of *no unwarranted interference* with participants in peaceful assemblies. States are obliged, for example, not to prohibit, restrict, block or disrupt assemblies without compelling justification, and not to sanction participants without legitimate cause.

27. 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, provide security, 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,²⁵ counter-demonstrators [and private security providers].

28. States must not deal with assemblies in a discriminatory manner, for example on the basis of nationality, race, ethnicity, age, political opinion, religion, belief, minority status, disability, sexual orientation or gender identity.²⁶ Particular efforts should be made to ensure equal and effective protection of the right of peaceful assembly of individuals who are members of groups who are or have been subjected to discrimination.²⁷ This includes the duty to protect participants from homophobic, sexual or gender-based attacks.²⁸

29. In dealing with assemblies, 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.

30. The right of peaceful assembly does not exempt participants from challenges by other members of society. States must respect and ensure counter-assemblies as assemblies in their own right, while preventing undue disruption of the assemblies to which they are opposed. Counter-assemblies should also be treated in a content-neutral way, and be

Commented [x6]: Israel is of the view that the term “adjusted” does not properly encapsulate the legal principle expressed here. We would suggest returning to the former wording, as follows: “...may in some cases be limited in order to ensure the protection of other human rights”.

²² General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

²³ OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 3.3.

²⁴ OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 3.5.

²⁵ *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.

²⁶ CCPR/C/GEO/CO/4, para. 8; CCPR/C/MNG/CO/6, para. 11; and A/HRC/31/66, paras. 15-16.

²⁷ A/HRC/31/66, para. 16.

²⁸ CCPR/C/CHL/CO/6, para. 19. See also *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), para. 10.4.

allowed to take place, where possible, within sight and sound of the assemblies against which they are directed.

31. The possibility that a peaceful assembly may provoke violent reactions from some members of the public is not in and of itself a legitimate reason to prohibit or restrict the assembly. The State is obliged to take all [possible / appropriate] measures to protect the participants and as far as possible to allow the assembly to take place in an uninterrupted manner.

32. A functioning and transparent legal and decision-making system lies at the core of the duty to respect and ensure peaceful assemblies. Domestic law must clearly set out the duties and responsibilities of all functionaries involved in managing assemblies, and be aligned with the relevant international standards. States 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.

33. States parties must moreover ensure independent and transparent oversight of all bodies involved in managing peaceful assemblies, including through timely access to judicial remedies in case of [alleged/potential] violations of the right.

34. The role of journalists, human rights defenders and others involved in monitoring, including documenting or reporting on assemblies, is of special importance, and they are entitled to protection under [article 21 of] the Covenant.²⁹ They may not be prohibited from exercising these functions, also in respect of the actions of law enforcement officials. The equipment they use must not be confiscated or damaged. Even if the assembly is declared unlawful or is dispersed, that does not terminate the right to monitor it. No one should be harassed or penalised as a result of their attendance at demonstrations.³⁰ It is a good practice for independent national human rights institutions and non-governmental organizations to monitor assemblies.

35. States parties hold the primary responsibility as far as the realization of the right of peaceful assembly is concerned. Private entities and the broader society, however, may be expected to accept some level of disruption, if this is required for the exercise of the right of peaceful assembly. Business enterprises have a responsibility to respect human rights, including the right of peaceful assembly.³¹

36. Given that peaceful assemblies have an expressive function, and political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should likewise enjoy a heightened level of accommodation and protection.³²

37. Article 21 and its related rights do not only protect assemblies while and where they are ongoing. Activities conducted outside the immediate scope of the gathering but that are integral to making the exercise meaningful are also covered. The obligations of States parties thus extend to actions such as participants' or organizers' dissemination of information about an upcoming event;³³ travelling to the event;³⁴ communication between participants leading up to and during the assembly; conveying information about the assembly to the outside world; and leaving the assembly afterwards. These activities may, like the assembly itself, be subjected to restrictions, but such restrictions are also to be narrowly construed. For example, publicity for an upcoming assembly before notification

Commented [X7]: It should be noted that the duties placed on private entities in Israel in this aspect are much more limited, as is the case for other States parties.

²⁹ *Pranevich v. Belarus* (CCPR/C/124/D/2251/2013), para. 6.3 and 6.4; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), paras. 13.2–13.5.

³⁰ CCPR/C/MRT/CO/1, para. 22. See also General Assembly resolution 66/164, operative para. 6.

³¹ Guiding Principles on Business and Human Rights, A/HRC/17/31, annex.

³² General comment No. 34 (2011) on the freedoms of opinion and expression, paras. 34, 37–38 and 42–43. See also CCPR/C/LAO/CO/1, para. 33.

³³ *Tulzhenkova v. Belarus* (CCPR/C/103/D/1838/2008), para. 9.3.

³⁴ *Evezov and others v. Belarus* (CCPR/C/112/D/1999/2010 and Corr.1), para. 8.5.

has taken place cannot be penalized in the absence of a specific indication of what dangers would have been created by the early distribution of the information.³⁵

38. 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 Internet connectivity in relation to demonstrations.³⁶ 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.³⁷

39. While all organs of State carry the obligation to respect and ensure the right of peaceful assembly, decisions on assemblies are often taken at the local level. It is important therefore that the necessary understanding and expertise are available at the local level.

4. Restrictions on the right of peaceful assembly

40. The right of peaceful assembly is not absolute. While the right may be limited, there is a presumption against restrictions.³⁸ The onus is on the authorities to justify any restrictions,³⁹ and where this onus is not met, article 21 is violated.⁴⁰ 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.⁴¹ Restrictions should not be aimed at discouraging participation in assemblies, potentially causing a chilling effect.

41. Where the imposition of restrictions on an assembly is contemplated, the authorities should, where appropriate, consider intermediate or partial restrictions, rather than viewing the choice as one between no intervention and prohibition. It is, moreover, often preferable to allow an assembly to take place and to decide afterwards whether measures should be taken regarding transgressions during the event, rather than to impose prior restraints in an attempt to eliminate all risks.⁴²

42. 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.

43. 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, and which spells out a limited number of grounds on which restrictions may be based.

44. The second sentence of article 21 provides that no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law. This poses the formal requirement of *legality*, akin to the requirement that limitations must be "provided by law" in other articles of the Covenant. Restrictions must thus be imposed through law or administrative actions based on law. The laws in question must be sufficiently precise to

³⁵ *Tulzhenkova v. Belarus*, para. 9.3.

³⁶ CCPR/C/CMR/CO/5, para. 41.

³⁷ General comment No. 34, para. 34.

³⁸ OSCE *Guidelines on Freedom of Peaceful Assembly*, para. 2.1.

³⁹ *Gryb v. Belarus* (CCPR/C/108/D/1316/2004), para. 13.4.

⁴⁰ *Chebotareva v. Russian Federation* (CCPR/C/104/D/1866/2009), para. 9.3.

⁴¹ *Turchenyak and others v. Belarus* (CCPR/C/108/D/1948/2010 and Corr.1), para. 7.4.

⁴² OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 109.

allow members of society to decide how to regulate their conduct and may not confer unfettered or sweeping discretion on those charged with its execution.⁴³

45. In addition, there are also the interrelated, substantive requirements that restrictions shall be both necessary and proportionate. Article 21 provides that any restrictions must be *necessary* in a democratic society. In order to satisfy this requirement, it must be established that a restriction responds to a pressing social need related to one of the permissible grounds recognised by article 21. Any restrictions should be considered imperative, in the context of a society based on democracy, political pluralism and human rights, as opposed to being merely reasonable or expedient.⁴⁴ They must also be the least intrusive among the measures that might serve the relevant protective function. Establishing whether a restriction is necessary requires a factual assessment.

46. Restrictions, moreover, must also be shown to be *proportionate*, which requires a value [judgment/ assessment], balancing the nature and the extent of the interference against the reason for interfering.⁴⁵ If the former outweighs the latter, the restriction is disproportionate and thus not permissible.

47. The last part of the second sentence of article 21 sets out the legitimate grounds on which the right of peaceful assembly may be restricted. This is an exhaustive list, consisting of the following grounds: the interests of national security; public safety; public order (*ordre public*); the protection of public health; or morals; or the protection of the rights and freedoms of others.

48. The “interests of national security” may serve as a ground for restrictions if such restrictions are necessary to protect the existence of the nation, its territorial integrity or political independence against force or a real threat of force.⁴⁶ This threshold will only exceptionally be met by assemblies that can be described as “peaceful”. Moreover, where the very reason that national security has deteriorated is the suppression of human rights, such deterioration cannot be used to justify further restrictions on those rights, including assembly rights.⁴⁷

49. For the protection of “public safety” to be invoked as a ground for restrictions on the right of peaceful assembly,⁴⁸ it must be established that the assembly creates a significant and immediate risk of danger to the safety of persons (to their life or physical integrity) or a similar risk of serious damage to property.⁴⁹

50. “Public order” refers to the sum of the rules that ensure the functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly.⁵⁰ States parties should not rely on some vague notion of “public order” as a ground to justify overbroad restrictions on the right of peaceful assembly.⁵¹ Peaceful assemblies are in some cases inherently disruptive. “Public order” and “law and order” are not synonyms, and the prohibition of “public disorder” in domestic law should not be used to impose undue restrictions on peaceful assemblies.

51. The “protection of public health” ground may exceptionally permit restrictions to be imposed, for example where there is an outbreak of an infectious disease and gatherings are

Commented [x8]: The explanation provided for this ground is relatively vague compared to the rest of the grounds for restriction of the right to peaceful assembly. We suggest clarifying that only a serious threat to public order may fall within the scope of this ground for restriction.

⁴³ *Nepomnyashchiy v. Russian Federation* (CCPR/C/123/D/2318/2013), para. 7.7; and General comment No. 34, para. 25.

⁴⁴ European Court of Human Rights, *Chassagnou and others v. France* (application Nos. 25088/94, 28331/95 and 28443/95), judgment of 29 April 1999, para. 113; and General comment No. 34, para. 34.

⁴⁵ *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012), para. 7.4; and OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 39.

⁴⁶ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex), para. 29.

⁴⁷ *Ibid.*, para. 32.

⁴⁸ See CCPR/C/MKD/CO/3, para. 19; *Alekseev v. Russian Federation*, para. 9.5.

⁴⁹ Siracusa Principles, para. 33.

⁵⁰ Siracusa Principles, para. 22.

⁵¹ CCPR/C/KAZ/CO/1, para. 26; CCPR/C/DZA/CO/4, para. 45.

dangerous. This may in extreme cases also be applicable where the sanitary situation during the assembly presents a substantial health risk to the general public or to the participants themselves.⁵²

52. Restrictions on peaceful assemblies should only exceptionally be imposed for “the protection of morals”. If used at all, this ground should not be used to protect parochial understandings of morality or be based on principles deriving exclusively from a single social, philosophical or religious tradition⁵³ and any such restrictions must be understood in the light of the universality of human rights and the principle of non-discrimination.⁵⁴ Restrictions based on this ground may not for instance reflect opposition to expressions of sexual orientation.⁵⁵

53. 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 they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions.⁵⁶

54. In addition to the general framework for restrictions provided for in article 21 as discussed above, a number of *additional considerations* are relevant to restrictions on the right of peaceful assembly. Central to the realisation of the right of peaceful assembly is the requirement that any restrictions must in principle be content neutral, and thus not be related to the message conveyed by the assembly.⁵⁷ A contrary approach defeats the very purpose of peaceful assemblies as a tool of political and social participation aimed at allowing members of the population to advance ideas and establish the extent of support that exists for them.

55. Restrictions on peaceful assemblies must thus not be used, explicitly or implicitly, to stifle expression of political opposition to a government,⁵⁸ including calls for changes of government, the constitution, the political system, or political independence for part of the country. They should not be used to prohibit insults to the honour and dignity of officials or State organs⁵⁹ or to pursue other objectives favoured by the authorities. Restrictions must moreover not be discriminatory.⁶⁰

56. The rules applicable to freedom of expression should be followed when dealing with the expressive element of peaceful assemblies, also when it provokes a hostile reaction. As with freedom of expression, restrictions on peaceful assembly may only under strictly limited circumstances be based on the message conveyed by the participants.

57. 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).⁶¹ Assemblies which [in their entirety] fall within the scope of article 20 must be prohibited.

Commented [x9]: The second option mentioned in paragraph 22 above should be referred to in this paragraph.

⁵² European Court of Human Rights, *Cisse v. France* (application No. 51346/99), judgment of 9 April 2002.

⁵³ General comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 8.

⁵⁴ General comment No. 34, para. 32.

⁵⁵ *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), paras. 10.5–10.6; *Alekseev v. Russian Federation*, para. 9.6.

⁵⁶ *Stambrovsky v. Belarus* (CCPR/C/112/D/1987/2010), para. 7.6; *Pugach v. Belarus* (CCPR/C/114/D/1984/2010), para. 7.8.

⁵⁷ *Alekseev v. Russian Federation*, para. 9.6.

⁵⁸ CCPR/C/MDG/CO/4, para. 51.

⁵⁹ CCPR/C/79/Add. 86, para. 18.

⁶⁰ See para. 28 above.

⁶¹ Article 20 (1) and (2).

As far as possible, action should be taken in such cases against the individual perpetrators, rather than against the assembly as a whole.⁶²

58. The fact that an assembly provokes or may provoke a hostile reaction from members of the public against participants, as a general rule, does not justify prohibition; the assembly must be allowed to go ahead and its participants must be protected.⁶³ However, in the exceptional case where the State is manifestly unable to protect the participants from such threat, restrictions on the assembly may be imposed.

59. Any such restrictions must be able to withstand strict scrutiny. An unspecified risk of violence, or the mere possibility that the authorities will not have the capacity to prevent or neutralize the violence emanating from those opposed to the assembly, is not enough; the State must be able to show, based on a concrete risk assessment, that it would not be able to contain the situation, even if significant law enforcement capability were to be deployed.⁶⁴ In such cases, alternatives such as postponement or relocation of the assembly must be considered before resort to prohibition.

60. Generally, the use of flags, uniforms, signs and banners is to be regarded as a legitimate form of expression that should not be restricted, even if such symbols are reminders of a painful past. In exceptional cases, where such symbols are intrinsically and [exclusively / directly] associated with [incitement to discrimination, hostility or violence / acts of violence, or are aimed at intimidating members of the population], restrictions may be justified.⁶⁵ Where such symbols are used as part of a broader message of incitement to violence, this may lead to the conclusion that the assembly does not fall within the scope of the “peaceful” assemblies protected by article 21.

61. The regulation of the “time, place and manner” of assemblies is generally content neutral, and while there is some scope for restrictions that regulate these elements, the onus remains on the authorities to justify any such restriction in terms of the grounds set out above on a case-by-case basis.⁶⁶ Any such restrictions should still, as far as possible, allow participants to assemble “within sight and sound” of their target audience.⁶⁷

62. Concerning restrictions on the *time* of assemblies: while there are no fixed rules about restrictions on the duration of peaceful assemblies, participants must have sufficient opportunity to effectively manifest their views.⁶⁸ Peaceful assemblies are generally by their nature temporary, and should be left to end by themselves. Assemblies should, moreover, not be limited solely because of their frequency. The duration and frequency of a demonstration may play a central role in conveying its message to its target audience. However, the cumulative impact of sustained gatherings should not disproportionately impact the rights of others.

63. Restrictions on the precise time of day or date when assemblies can or cannot be held, raise concerns about their compatibility with the Covenant.⁶⁹ At the same time, it should be recognized that the timing of assemblies can affect their impact and may warrant

⁶² 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. 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).

⁶³ *Alekseev v. Russian Federation*, para. 9.6

⁶⁴ *Alekseev v. Russian Federation*, para. 9.6.

⁶⁵ OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 97. See also European Court of Human Rights, *Osmani and others v. the former Yugoslav Republic of Macedonia* (application No. 50841/99) decision of 11 October 2001; and *Fáber v. Hungary* (application No. 40721/08), judgment of 24 October 2012, paras. 56–58, in which the Court outlined a threshold of intimidation.

⁶⁶ OSCE, *Guidelines on Freedom of Peaceful Assembly*, paras. 99–100.

⁶⁷ *Turchenyak et al. v. Belarus*, para. 7.4.

⁶⁸ European Court of Human Rights, *Éva Molnár v. Hungary* (application No. 10346/05), judgment of 7 October 2008, para. 42.

⁶⁹ CCPR/C/KOR/CO/4, para. 52.

restrictions. For example, assemblies held at night in residential areas might have an undue impact on the lives of those who live nearby.

64. 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.

65. Participants in assemblies may not be relegated to remote areas where they cannot effectively capture the attention of those who are being addressed, or the general public.⁷⁰ As a general rule, prohibitions on all assemblies anywhere in the capital;⁷¹ in any public location except a single specified place, either in a city,⁷² or outside the city centre;⁷³ or prohibitions on assemblies in “all the streets in the city”, may not be imposed.

66. The designation of the perimeters of places such as courts, parliament or other official buildings as areas where assemblies may not take place should generally be avoided, because these are public spaces. To the extent that assemblies in such places are prohibited, the restrictions must be specifically justified and narrowly circumscribed.⁷⁴

67. The increased privatization of public spaces highlights the fact that assembly rights may require some recognition on private property that is open to the public.⁷⁵ The interests of private owners have to be given due weight, but may have to be limited if the participants have no other reasonable way to convey their message to their target audience.⁷⁶ Assemblies held on privately owned property with the consent of the owners enjoy the same protection as other assemblies.

68. As far as restrictions on the *manner* of peaceful assemblies are concerned: participants should generally be left to determine whether they want to use equipment such as posters or megaphones or musical instruments to convey their message. Assemblies may entail the erection of structures, and the setting up of sound systems, to reach their audience, but given the temporary nature of assemblies, they need to be non-permanent constructions.⁷⁷

69. In general, States parties should not place a limit on the number of participants in assemblies. Any such restriction can be accepted only if there is a clear connection with a legitimate ground for restrictions as set out in article 21, for example where public safety considerations dictate a maximum crowd capacity for a stadium or a bridge.⁷⁸

70. 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.⁷⁹ As such, blanket bans can only be justified on an exceptional basis.

71. The collection of relevant information and data by authorities may under certain circumstances assist the management of assemblies, improve public accountability and

Commented [κ10]: With respect to the last sentence in this paragraph, we suggest clarifying that such general restrictions on access to some spaces, insofar as these spaces are public, may only be used in exceptional circumstances.

Commented [κ11]: Pursuant to Israeli practice, assemblies may not be held adjacent to the private homes of the civil servants who are being addressed in the assembly, insofar as an effective alternative location exists (e.g., the office of the official). We believe it is important that the General Comment address this sensitive issue.

Commented [κ12]: We suggest adding the words: “areas open to the public in” before the words: “places such as”. The current wording implies that all areas in courts, parliament, etc. (e.g., the judges’ chambers) may be used to exercise the right of peaceful assembly.

⁷⁰ Ibid.; CCPR/C/KAZ/CO/1, para. 26.

⁷¹ CCPR/C/DZA/CO/4, para. 45.

⁷² *Turchenyak et al. v. Belarus*, para. 7.5.

⁷³ *Sudalenko v. Belarus* (CCPR/C/113/D/1992/2010), para. 8.5.

⁷⁴ European Court of Human Rights, *Yilmaz Yildiz and others v. Turkey* (application No. 4524/06), judgment of 14 October 2014, para. 43.

⁷⁵ European Court of Human Rights, *Annenkov and others v. Russia* (application No. 31475/10), judgment of 25 July 2017, para. 122; United States Supreme Court, *Marsh v. Alabama* (*United States Reports*, vol. 326, No. 501, 1946), p. 2.

⁷⁶ European Court of Human Rights, *Appleby and others v. United Kingdom* (application No. 44306/98), judgment of 6 May 2003, para. 47. In *Giménez v. Paraguay* (CCPR/C/123/D/2372/2014), para. 8.5, the Committee held that a two-year restriction on participation in assemblies after the occupation of a private property was excessive.

⁷⁷ See para. 60 on the use of symbols as forms of expression. Also see *Frumkin v. Russia*, para. 107.

⁷⁸ CPR/C/THA/CO/2/1, para. 39.

⁷⁹ Cf. OSCE *Guidelines on Peaceful Assembly*, para. 98; ACHPR, *Guidelines on Freedom of Association and Assembly in Africa*, para. 81.

constitute part of a proactive approach to preventing violations and abuses of rights from occurring. However, any information gathering, including through surveillance or the interception of communications, and the way in which data are retained and accessed, must strictly conform to the applicable international standards, including on the right to privacy, and may never be aimed at intimidating or harassing (would-be) participants in assemblies.⁸⁰ Such practices should be regulated by appropriate and publicly accessible domestic legal frameworks compatible with international standards and subject to scrutiny by the courts.⁸¹

72. The mere fact that assemblies take place in public does not mean that participants' privacy is not capable of being infringed, for example, by facial recognition and other technologies that can identify individual participants in a crowd. The same applies to the monitoring of social media to glean information about participation in peaceful assemblies. Independent scrutiny and oversight must be exercised over the collection of personal information and data of those engaged in peaceful assemblies.

73. The freedom of State officials to participate in peaceful assemblies should not be limited more than is strictly required by the need to ensure public confidence in their impartiality, and thus their ability to perform their service duties.⁸² Ensuring that members of the security forces in particular retain public confidence in their impartiality is a legitimate State concern.

74. Requirements for participants to cover the costs of policing or security⁸³ or medical assistance or cleaning⁸⁴ associated with peaceful assemblies are generally not compatible with article 21. These costs should as a rule be covered by public funds and should not be transferred to the participants.⁸⁵

75. Assembly organizers and participants are obliged to make reasonable efforts to comply with legal requirements, but they should be held accountable [i.e., civilly or criminally,] for their own conduct only.⁸⁶ Responsibility of organizers or participants for damage caused by other participants in an assembly should as a general rule not be imposed.⁸⁷ If this is done, responsibility must be limited to what they could have foreseen and prevented with reasonable efforts. It is good practice for assembly organizers to appoint marshals where necessary, but such an obligation must not be imposed.

76. Where criminal or administrative sanctions are used against participants in a peaceful assembly, such sanctions must be proportionate and cannot apply where their conduct is protected by the right.

77. Recourse to courts or other tribunals concerning restrictions must be readily available. The length of appeal or review procedures against restrictions on an assembly must not jeopardize the exercise of the right.⁸⁸ The procedural guarantees of the Covenant apply in all such cases, and also to issues such as deprivation of liberty and the imposition of sanctions, such as fines, in connection with participation in peaceful assemblies.⁸⁹

78. States parties may not require pledges from individuals not to participate in future assemblies.⁹⁰ Conversely, no one may be forced to participate in an assembly.⁹¹

Commented [N13]: Similar to our comment made in paragraph 11, we suggest adding the following passage before the last sentence in this paragraph: "...any information gathering, including through surveillance or the interception of communications, and the way in which data are retained and accessed, may create a chilling effect on (would-be) participants in assemblies, and must therefore strictly conform to the applicable international standards...".

Commented [N14]: We believe the same should apply to the previous paragraph (paragraph 74), i.e., that the reasonable efforts referred to in this paragraph may entail, under certain circumstances, expenses excessive to the costs covered by public funds (for example, when engineering approvals of constructions are required).

⁸⁰ A/HRC/31/66, para. 73.

⁸¹ CCPR/C/KOR/CO/4, paras. 42–43.

⁸² OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 60.

⁸³ CCPR/C/CHE/CO/4, para. 48.

⁸⁴ *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), paras. 8.2–8.3.

⁸⁵ ACHPR, *Guidelines on Freedom of Association and Assembly in Africa*, para. 102(b).

⁸⁶ A/HRC/31/66, para. 26.

⁸⁷ OSCE, *Guidelines on Freedom of Peaceful Assembly*, para. 197. Compare Constitutional Court of South Africa, *South African Transport and Allied Workers Union and another v. Garvas and others* (case CCT 112/11) [2012] ZACC 13.

⁸⁸ CCPR/C/POL/CO/6, para. 23.

⁸⁹ *E.V. v. Belarus* (CCPR/C/112/D/1989/2010), para. 6.6.

⁹⁰ CCPR/C/KHM/CO/2, para. 22; CCPR/C/JOR/CO/5, para. 32.

⁹¹ CCPR/C/TKM/CO/2, para. 44.

79. While terrorism and other similar acts of violence must be criminalised, such crimes must not be defined in a vague or overly broad manner that may curtail or discourage peaceful assembly.⁹²

5. Notification and authorization regimes

80. Notification systems entail that those intending to organize a peaceful assembly are required to inform the authorities accordingly in advance and provide certain salient details. Such a requirement is permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others.⁹³ At the same time, this requirement can be misused to stifle peaceful assemblies. Like other interferences with the right of assembly, notification requirements have to be justifiable on the grounds listed in article 21.⁹⁴ The enforcement of notification requirements must not become an end in itself.⁹⁵ Notification procedures should not be unduly burdensome and must be proportionate to the potential public impact of the assembly concerned.

81. A failure to notify the authorities of an assembly [should not render participation in the assembly unlawful, and] should not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or the imposition of undue sanctions such as charging them with criminal offences.⁹⁶ It also does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants.

82. In general, assemblies should be excluded from notification regimes where the impact of the assembly on others can reasonably be expected to be minimal, for example because of the nature, location or limited size or duration of the assembly. Notification must not be required for spontaneous assemblies since they do not allow enough time to provide such notice.⁹⁷

83. The minimum period of advance notification required for pre-planned assemblies might vary according to the particular context.⁹⁸ It should not be excessively long, but should allow enough time for recourse to the courts to challenge restrictions, if necessary.

84. Authorization regimes, where those wishing to assemble have to apply for permission (or a permit) from the authorities to do so, undercut the idea that peaceful assembly is a basic right.⁹⁹ Where such requirements persist, they must in practice function as a system of notification, with authorization being granted as a matter of course, in the absence of compelling reasons to do otherwise. Such systems should also not be overly bureaucratic.¹⁰⁰ Notification regimes, for their part, must not in practice function as authorization systems.¹⁰¹

6. Duties and powers of law enforcement agencies

85. The fundamental duty of any law enforcement agency involved in policing a peaceful assembly is to respect and ensure the exercise of the fundamental rights of the participants, while also taking reasonable measures to protect other members of the public, including journalists,¹⁰² monitors and observers, as well as public and private property, from harm.¹⁰³

⁹² CCPR/C/SWZ/CO/1, para. 36; CCPR/C/BHR/CO/1, para. 29. See also A/HRC/40/52.

⁹³ *Kivenmaa v. Finland*, para. 9.2. See also ACHPR, *Guidelines on Freedom of Association and Assembly in Africa*, para. 72.

⁹⁴ *Ibid.* See also *Sekerko v. Belarus*, para. 9.4.

⁹⁵ *Popova v. Russian Federation*, para. 7.5.

⁹⁶ Where administrative sanctions are imposed for the failure to notify, this must be justified by the authorities. See, e.g., *Popova v. Russian Federation*, para. 7.4, 7.5. See also A/HRC/31/66, para. 23.

⁹⁷ *Popova v. Russian Federation*, para. 7.5. See also European Court of Human Rights, *Éva Molnár v. Hungary*, para. 38.

⁹⁸ CCPR/CO/83/KEN, para. 23; CCPR/C/CHE/CO/4, para. 48; CCPR/C/DZA/CO/4, para. 45.

⁹⁹ CCPR/C/MAR/CO/6, para. 45; CCPR/C/GMB/CO/2, para. 41; and ACHPR, *Guidelines on Freedom of Association and Assembly in Africa*, para. 71.

¹⁰⁰ *Poljakov v. Belarus*, para. 8.3.

¹⁰¹ CCPR/C/JOR/CO/5, para. 32.

¹⁰² CCPR/C/AGO/CO/1, para. 21; CCPR/C/GEO/CO/4, para. 12; and CCPR/C/KOR/CO/4, para. 52.

86. Law enforcement agencies should as far as possible work towards establishing channels for communication and dialogue between the various parties involved in assemblies, before and during the assembly, aimed at ensuring predictability, de-escalating tensions and resolving disputes.¹⁰⁴ While engaging in such contact is generally good practice, participants and organisers cannot be required to do so.

87. Where the presence of law enforcement officials is required, the policing of an assembly should be planned and conducted with the intention of enabling the assembly to take place as planned, and with a view to minimizing the potential for injury to any person and damage to property.¹⁰⁵ A plan should be elaborated for the policing of each assembly for which the authorities have received notification in advance, or are otherwise informed about, and through which public order may be affected. The plan should detail the instruction, equipping and deployment of all relevant officials and units.

88. More generic contingency plans and training protocols should also be elaborated by relevant law enforcement agencies, in particular for the policing of assemblies for which the authorities are not notified in advance and which may affect public order.¹⁰⁶ These include spontaneous assemblies and counter-assemblies. Clear command structures must exist to underpin accountability, as well as protocols for recording and documenting events, ensuring the identification of officers and reporting of any use of force.

89. Law enforcement officials, in carrying out their duties, are obliged, as far as possible, to apply non-violent means before resorting, when absolutely necessary, to the use of force.¹⁰⁷ In any event, all use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination applicable to articles 6 and 7 of the Covenant, and those using force must be accountable for each use of force.¹⁰⁸

90. Where it is lawful and required to arrest certain participants or to disperse an assembly, such actions must comply with international law and have a basis in the domestic law provisions on the permissible use of force.¹⁰⁹ Domestic legal regimes on the use of force by law enforcement officials must be brought in line with the requirements posed by international law, where that is not already the case. Domestic law must not grant officials largely unrestricted powers, for example to use “force” or “all necessary force” to disperse assemblies, or to “shoot for the legs”. In particular, domestic law must not allow use of force against participants in an assembly on a wanton, excessive or a discriminatory basis.¹¹⁰

91. Only the minimum force necessary may be used where this is required for a legitimate law enforcement purpose. Once the need for any use of force has passed, such as when a violent individual is safely apprehended during an assembly, no further resort to force is permissible.¹¹¹ Law enforcement officials may not use greater force than is reasonably necessary under the circumstances for the dispersal of an assembly, prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders.¹¹²

92. Wherever possible, only law enforcement officials who have been trained in the policing of assemblies should be deployed for that purpose.¹¹³ As a general rule, the military should not be used to police assemblies.¹¹⁴ The law enforcement officials

Commented [X15]: We propose to differentiate between the requirement of a legal authority to arrest or disperse an assembly without the use of force, and the requirement of a legal authority to use force as part of policing of assemblies. Both actions require authorities enshrined in domestic law.

¹⁰³ A/HRC/31/66, para. 41.

¹⁰⁴ Ibid., para. 38.

¹⁰⁵ Human Rights Council resolution 38/11, preambular para. 10; A/HRC/26/36, para. 51.

¹⁰⁶ A/HRC/31/66, para. 37.

¹⁰⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principle 4.

¹⁰⁸ General comment No. 36 (2018) on the right to life; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Code of Conduct for Law Enforcement Officials.

¹⁰⁹ CCPR/C/MDV/CO/1, para. 23.

¹¹⁰ CCPR/C/MAR/CO/6, paras. 45–46; CCPR/C/BHR/CO/1, para. 55. For an exposition of domestic laws on the use of force, see www.policinglaw.info.

¹¹¹ Code of Conduct for Law Enforcement Officials, art. 3.

¹¹² Ibid., commentary to art. 3.

¹¹³ CCPR/C/KHM/CO/2, para. 12; CCPR/C/GRC/CO/2, para. 42; and CCPR/C/BGR/CO/4, para. 38.

¹¹⁴ CCPR/C/VEN/CO/4, para. 14; and ACHPR, *Guidelines on Policing Assemblies in Africa*, para. 3.2.

responsible for policing assemblies should be suitably equipped, including where needed with appropriate less-lethal weapons and adequate personal protective equipment.¹¹⁵ 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.¹¹⁶

93. Preventive detention of targeted individuals, in order to keep them from participating in assemblies, may constitute arbitrary deprivation of liberty, which is incompatible with the right of peaceful assembly.¹¹⁷ It may be done only in exceptional cases and where the authorities have actual knowledge of the intent of the individuals involved to engage in or incite acts of violence during a particular assembly, and where other measures to prevent violence from occurring will clearly be inadequate.¹¹⁸ Practices of indiscriminate mass arrest prior to, during or following an assembly, are arbitrary.¹¹⁹

94. 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 evidence of a threat posed. Otherwise, they constitute an unwarranted interference with the right to privacy.¹²⁰ They 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.¹²¹

95. Containment, sometimes referred to as “kettling”, where law enforcement officials encircle and close in a section of the demonstrators, may be used only where it is necessary and proportionate to do so, in order to prevent violence during an assembly. A legitimate aim is to facilitate the right of non-violent participants to continue to exercise their right of peaceful assembly. Necessary and targeted law enforcement measures taken against specific individuals are often preferable to containment. Particular care must be taken to contain, as far as possible, only people who could be linked directly to violence and to limit the duration of the containment to the minimum necessary. Where the tactic of containment is used indiscriminately or punitively, it violates the right of peaceful assembly,¹²² and may also violate other rights such as freedom from arbitrary detention and freedom of movement.

96. 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”.¹²³

97. 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.¹²⁴ As far as possible, any force used should be directed against a specific individual or group of participants in an assembly. Area weapons such as chemical irritants

¹¹⁵ *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.

¹¹⁶ General comment No. 36.

¹¹⁷ CCPR/C/MKD/CO/3, para. 19.

¹¹⁸ European Court of Human Rights, *S., V. and A. v. Denmark* (Applications Nos. 35553/12, 36678/12 and 36711/12), judgment of 22 October 2018 (Grand Chamber), paras. 77 and 127.

¹¹⁹ CCPR/C/CAN/CO/6, para. 15.

¹²⁰ CCPR/C/NOR/CO/7, paras. 20–21; European Court of Human Rights, *Gillan and Quinton v. United Kingdom* (Application No. 4158/05), judgment of 12 January 2010, paras. 63–65 and 84–85.

¹²¹ A/HRC/31/66, para. 43.

¹²² European Court of Human Rights, *Austin and others v. United Kingdom* (Applications Nos. 39629/09, 40713/09; and 41008/09), judgment of 15 March 2012 (Grand Chamber), para. 68.

¹²³ A/HRC/31/66, para. 62.

¹²⁴ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 13; A/HRC/26/36, para. 75.

dispersed at a distance (tear gas) and water cannon tend to have indiscriminate effects. 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.¹²⁵

98. Firearms are not an appropriate tool for the policing of assemblies.¹²⁶ Firearms must never be used simply to disperse an assembly.¹²⁷ In order to comply with international law, any use of firearms by law enforcement officials must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat of death or serious injury or, in truly exceptional circumstances, a grave and proximate threat to life.¹²⁸ Given the threat such weapons pose to life, this minimum threshold should also be applied to the firing of rubber-coated or plastic bullets.¹²⁹ It is never acceptable to fire indiscriminately into a crowd. Where law enforcement officials are prepared for the use of force, or violence is considered likely, the authorities must also ensure adequate medical facilities.

99. The use of unnecessary or excessive or disproportionate force may breach articles 7 and 9 of the Covenant and, where death results, may violate article 6.¹³⁰ In an extreme case, widespread or systematic use of lethal force against participants in peaceful assemblies may constitute a crime against humanity.¹³¹

100. The State is responsible under international law for the actions and omissions of its law enforcement agencies and should promote a culture of accountability for law enforcement officials during assemblies. To enhance effective accountability, uniformed law enforcement officers should always display a form of identification during assemblies.¹³²

101. There is a duty to investigate effectively, impartially and in a timely manner any allegation of unlawful use of force by law enforcement officials during or in connection with assemblies.¹³³ Both intentional and negligent action or inaction can amount to a violation of human rights. Law enforcement agencies and individual officials must be held accountable for their actions and omissions under domestic and, where relevant, international law and effective remedies must be provided to victims.

102. All use of force by law enforcement officials should be recorded and reflected in a transparent report.¹³⁴ Where injury occurs, the report should contain sufficient information to establish whether the use of force was necessary and proportionate, and set out the details of the incident, including: the surrounding circumstances; the decision-making processes; measures taken to avoid the use of force and to de-escalate the situation; the type and manner of force employed, including specific weaponry; the reasons for the use of force; its effectiveness; and the consequences.¹³⁵

Commented [R16]: The terms "area weapons" and "indiscriminate effects" derive from the context of armed conflict and international humanitarian law. They are unsuited to the present context, for both substantial reasons and policy reasons, as they militarize the situation under discussion.

Further, being "indiscriminate" is dependent on the circumstances, as there may be instances where such "area weapons" can indeed be used against all those against whom it is directed, *i.e.*, intentionally used against groups of persons against whom such use is justified. Israel therefore suggests the following wording for the fourth sentence in this paragraph:

"In some circumstances, less-lethal weapons designed to affect an area, such as chemical irritants dispersed from a distance (tear gas) and water cannon, may result in the undesirable consequence of affecting other persons".

Commented [R17]: Insofar as this statement is based on Art. 7 of the Rome Statute (as suggested by the footnote), such conduct would only constitute a crime against humanity if the other contextual elements of the said article (*i.e.*, that these acts are committed as part of an attack directed against any civilian population, with knowledge of the attack) and the specific elements of one of the particular crimes enumerated in that article, can be established as well. "Widespread or systematic" use of force, in and of itself, would not suffice from an international criminal law perspective.

Israel is not a party to the Rome Statute. Israel is committed to definitions that accurately reflect customary law and widely accepted principles of crimes against humanity. This, as part of its consistent commitment to the prevention and punishment of grave international crimes of concern to the international community as a whole, including crimes against humanity.

¹²⁵ S/2009/693, annex, para. 62; and *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, para. 7.3.7.

¹²⁶ ACHPR, *Guidelines on Policing Assemblies in Africa*, para. 21.2.4.

¹²⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principle 14.

¹²⁸ *Ibid.*; Principles 9 and 14; and General comment No. 36.

¹²⁹ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, para. 7.5.8.

¹³⁰ CCPR/C/ISR/CO/3, para. 9; CCPR/C/UZB/CO/3, para. 8; and *Olmedo v. Paraguay* (CCPR/C/104/D/1828/2008), para. 7.5.

¹³¹ Rome Statute of the International Criminal Court, 1998, article 7.

¹³² European Court of Human Rights, *Hentschel and Stark v. Germany* (Application No. 47274/15), judgment of 9 November 2017, para. 91.

¹³³ CCPR/C/COD/CO/4, paras. 43–44; CCPR/C/BHR/CO/1, para. 36. See also *The Minnesota Protocol on the investigation of potentially unlawful death* (2016) (United Nations publication, Sales No. E.91.IV.1).

¹³⁴ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, paras. 3.3 and 3.5.

¹³⁵ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, paras. 3.4, 3.5.

103. Any deployment of plainclothes officers in assemblies must be reasonably necessary in the circumstances and such officers (or other State agents) must never incite violence on the part of other participants, for example, by acting as *agents provocateurs*.¹³⁶

104. Where private security service providers are used by the authorities for law enforcement tasks during an assembly, the State remains responsible for their actions.¹³⁷ This is in addition to the accountability of the private security service providers under domestic and, as and where relevant, international law. States are obligated to regulate and control the actions of private security companies employed during assemblies in conformity with international law standards.¹³⁸ In any event, the nature and consequences of acts by private security service providers in law enforcement should be clarified by the authorities in national legislation and their use of force strictly regulated.¹³⁹

105. The use of recording devices by law enforcement officials during assemblies, including through body-worn cameras, may play an important role in securing accountability. However, the authorities should have clear and publicly available guidelines to ensure that their use is consistent with international standards on privacy and does not have a chilling effect on participation in assemblies.¹⁴⁰

106. The State is fully responsible for any remotely controlled weapons systems that it uses during an assembly. Such methods of force delivery may escalate tensions and should be used only with great caution. Fully autonomous weapons systems, where lethal or less-lethal force can be used against assembly participants without meaningful human intervention once a system has been deployed, shall never be used for law enforcement during an assembly.¹⁴¹

7. Assembly during states of emergency and armed conflict

107. The right of peaceful assembly is not listed as a non-derogable right in article 4 (2) of the Covenant, but some of the other rights potentially applicable to assemblies, such as those provided in articles 6, 7 and 18, are non-derogable. If States derogate from the Covenant in response, for instance, to a mass demonstration including acts of violence, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.¹⁴²

108. If not derogated from, the right of peaceful assembly continues during states of emergency. The possibility of restricting the right of peaceful assembly is generally sufficient in such cases and no derogation from the provisions in question would be justified by the exigencies of the situation.¹⁴³

109. Assemblies that are civilian in nature remain governed by the rules governing law enforcement during situations of armed conflict, even if acts of violence short of direct participation in hostilities occur in them.¹⁴⁴ In all decisions, the safety and protection of assembly participants and the broader public should be a primary consideration.

110. Civilians participating in an assembly during an armed conflict are not protected from being targeted with lethal force, for such time as they are participating directly in hostilities, as that term is understood under international humanitarian law, and

¹³⁶ European Court of Human Rights, *Ramanauskas v. Lithuania*, judgment of 5 February 2008, para. 54.

¹³⁷ Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, judgment of 11 May 2007, para. 102.

¹³⁸ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, para. 3.2; and General comment No. 36, para. 15.

¹³⁹ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, para. 3.2.

¹⁴⁰ CCPR/C/CHN-HKG/CO/3, para. 10; CCPR/C/CHN-MAC/CO/1, para. 16.

¹⁴¹ A/HRC/31/66, para. 67.

¹⁴² General comment No. 29 on derogations from provisions of the Covenant during a state of emergency, para. 5.

¹⁴³ *Ibid.*

¹⁴⁴ Cf. A/HRC/40/CRP.2, summary and para. 106.

Commented [x18]: With regard to the reference to the term "autonomous weapons", this subject has been discussed thoroughly in recent years under the auspices of the CCW convention, and is still debated. It is clear that currently there is no internationally agreed definition of what constitutes an "autonomous weapon" (whether lethal or not). Moreover, discussions in the CCW clearly demonstrate the existence of a stark controversy between States regarding the appropriate level of human intervention, judgment or control regarding such systems, as well as the appropriate terminology in this regard. On the technological level, this is an emerging issue with numerous uncertainties and complexities. Israel believes it would not be responsible, nor legally accurate, to introduce controversial terminology and propose far-reaching suggestions regarding this novel issue. **The sentence concerning autonomous weapons should therefore be deleted.**

Regarding the sentence "Such methods of force delivery may escalate tensions and should be used only with great caution", this statement is factually unfounded and should therefore also be deleted. It is our impression that remotely controlled non-lethal means, when used responsibly and carefully, may in fact reduce tensions and contribute to de-escalation of the situation. Indeed, tensions may often be more prone to escalate in face to face encounters. **Therefore, Israel supports the deletion of this sentence.**

Alternatively, Israel suggests adopting in this regard a more cautious text, similar to paragraph 65 of General Comment No. 36: "[...] For example, the development of autonomous weapon systems lacking in human compassion and judgement raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law."

Commented [x19]: While there may well be a convergence between the law of armed conflict and international human rights law in some respects, in the current state of international law and state-practice worldwide, it is Israel's view that the law of armed conflict and international human rights law, which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances.

Commented [x20]: Israel calls upon the Committee to refrain from relying on ill-founded and politically tainted sources, such as the March 2019 report of the UN Commission of Inquiry. Further, as in any other case study mentioned in the draft General Comment, reference to the Gaza Border events of 2018-19 should be based on jurisprudence, rather than biased reports. In this regard, we respectfully refer the Committee to the decision of the Israeli High Court of Justice from 24 May, 2018, where allegations of violations of international law were examined and were finally rejected by the Court (H.C.J 3003/18 and H.C.J 3250/18; available: <https://supremecourt.gov.il/Home/Download?path=EnglishVerdicts/18030/030/k08&fileName=18030030.K08&type=4>)

to the extent that they are not otherwise protected under international law from attack.¹⁴⁵ Any use of force is subject to the rules of military necessity, precaution and proportionality in attack, discrimination and proportionality.

8. Relationship between article 21 and other provisions of the Covenant and other legal regimes

111. The full protection of the right of peaceful assembly depends on the protection of a range of rights. The right to life (art. 6)¹⁴⁶ and the right not to be subjected to cruel, inhuman or degrading treatment (art. 7)¹⁴⁷ may both be implicated if law enforcement officials use excessive force. Restrictions on people's ability to travel in order to participate in assemblies, including to travel abroad (art. 12 (2)), and to participate in marches and other moving assemblies, may violate their freedom of movement (art. 12 (1)). Decisions restricting the exercise of assembly rights fall under the protection of fair trial rights (art. 14 (1)).¹⁴⁸

112. The surveillance of those involved in assemblies and other data-gathering may violate their right to privacy (art. 17). Religious assemblies may also be protected under the freedom to manifest one's religion or beliefs (art. 18).¹⁴⁹ Freedom of assembly is more than a manifestation of freedom of expression (art. 19 (2)),¹⁵⁰ but it has an expressive element and the rationale for the recognition of these two rights and the acceptable restrictions overlap in many ways. Freedom of information (art. 19 (2)) underlies the ability of the public to know about the legal and administrative framework within which they participate in assemblies and enables them to hold public officials accountable. Freedom of association (art. 22) also protects collective action, and restrictions on this right often affect freedom of assembly. Like freedom of expression, the right of political participation (art. 25) is closely linked to peaceful assembly.¹⁵¹ The right to non-discrimination protects participants against discriminatory practices in the context of assemblies (art. 26).

113. At the same time, participants in peaceful assemblies must not infringe on the rights of others. This may for example include their freedom of movement (art. 12 (1)), Socio-economic rights, such as the right to health or to education, may be implicated by assemblies in or proximate to amenities such as hospitals or educational facilities.

114. 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.

Commented [x21]: It is our view that the words "and to the extent that they are not otherwise protected under international law from attack" constitute a legal error, as a person directly participating in hostilities is targetable, and may therefore not be otherwise protected from attack under international law. We therefore suggest deleting this part of the sentence, and ending the sentence after the words "humanitarian law".

Commented [x22]: It is Israel's view that the reference to the ICRC in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) should be deleted. First, the publication does not support the main text in paragraph 110. Second, Article 51(3) of the First Additional Protocol to the Geneva Conventions is a more solid legal source for the rule regarding direct participation in hostilities. Third, the General Comment should avoid making references to such controversial legal sources. This publication has been rejected by several States, including Israel, criticized by scholars, and its main conclusions are considered highly contentious. As suggested, the reference to this source should be replaced with a reference to Article 51(3) of the First Additional Protocol.

Commented [x23]: There are divergent views on the question of whether military necessity, distinction, proportionality and precautions in attack should be characterized as "rules", "principles" or another category, and whether they all have the same legal status and meaning. To allow for more latitude for different views on this question, we suggest changing the word "rules" to "principles and rules" (note that following a similar debate on the issue which recently took place in a CCW GGE working group, the terminology agreed by consensus was "requirements and principles"; see CCW/GGE/1/2019/3). Likewise, note that there are two references to proportionality, and one is redundant.

Commented [x24]: The wording of this paragraph implies that those bound by the obligation to refrain from infringing on the rights of others are States parties' nationals participating in peaceful assemblies. However, the Covenant does not impose obligations on individuals, but rather on States parties' governments and governmental authorities.

¹⁴⁵ See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, International Committee of the Red Cross, 2009), pp. 41–45.

¹⁴⁶ *Olmedo v. Paraguay*, para. 7.5.

¹⁴⁷ *Benitez Gamarra v. Paraguay* (CCPR/C/104/D/1829/2008), para. 7.4.

¹⁴⁸ *Evrezov et al. v. Belarus*, paras. 3.3 and 8.9.

¹⁴⁹ Article 18 does not allow restrictions on the ground of "national security". See General comment No. 22, para. 8.

¹⁵⁰ The Committee has often dealt with assembly cases under article 19 without finding a violation of article 21, e.g., *Komarovsky v. Belarus* (CCPR/C/109/D/1839/2008), while in others it has found a violation of both articles 19 and 21, e.g., *Derzhavtsev v. Belarus* (CCPR/C/115/D/2076/2011).

¹⁵¹ *Sudalenko v. Belarus*, para. 8.6.