



# CHILDREN

AND THE RIGHT TO

# PEACEFUL ASSEMBLY

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*Submission to the Human Rights Committee: Drafting of the General Comment on Article 21 (Right to Peaceful Assembly) of the International Covenant on Civil and Political Rights.*  
(125<sup>th</sup> Session, March 2019)

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## EXECUTIVE SUMMARY

*The Human Rights Committee has invited submissions to inform the drafting of a General Comment (the “**draft General Comment**”) on Article 21 of the International Covenant on Civil and Political Rights (the “**right to peaceful assembly**”). The purpose of this submission is to highlight the importance of the right to peaceful assembly for children and to make recommendations regarding the specific recognition of children when preparing the draft General Comment.*

*In the submission we recommend that the draft General Comment should recognise and reiterate that children are bearers of the right to peaceful assembly, which is inextricably linked to the right of children to freedom of expression and to participation in social and political life. We recommend further that the draft General Comment should emphasise State Parties’ negative and positive obligations in relation to the right to peaceful assembly, which includes the adoption of special measures of protection in relation to children. This entails taking into account their rights and specific interests of children when developing laws, policies and administrative measures regulating and giving effect to the right to peaceful assembly.*

*In relation to prior notification requirements, the submission recommends that the draft General Comment specifically state that the purpose of any prior notification requirement should be to facilitate and enable the exercise of the right to protest and that the mere failure to provide prior notification of an assembly should not result in sanctions or penalty, which has particularly restrictive effects on children. Furthermore, we recommend that State Parties should be encouraged to provide for accessible methods of prior notification, specifically considering the needs and best interests of children seeking to exercise the right to protest.*

*Finally, we recommend that the draft General Comment advises State Parties to avoid criminalisation of peaceful assemblies and emphasises that criminalisation may only be used as a measure of last resort in relation to children.*



## INTRODUCTION

1. The Human Rights Committee has invited submissions to inform the drafting of a General Comment (the “**draft General Comment**”) on Article 21 of the International Covenant on Civil and Political Rights (the “**right to peaceful assembly**”).
2. The purpose of this submission is to highlight the importance of the right to peaceful assembly for children and to make recommendations regarding the specific recognition of children when preparing the draft General Comment.
3. The Equal Education Law Centre (the “**EELC**”) is a public interest law clinic based in Cape Town, South Africa. The EELC regularly provides legal support to child activists who work to advance campaigns for education justice in the country.
4. In particular the EELC works with a democratic social movement (Equal Education) comprised primarily of high school learners called “Equalisers”. Equalisers utilise various forms of peaceful assembly to mobilise public awareness around education and other social injustices.
5. In the course of the EELC’s work with Equalisers we have noted various ways in which children’s right to peaceful assembly is limited and stifled. As a result, the EELC has and currently represents Equal Education in litigation before South African courts specifically on ensuring that children’s right to peaceful assembly, freedom of expression and related rights are protected.
6. In this submission, we proceed as follows:
  - 6.1. First, we highlight the need for the draft General Comment to specifically recognize that children are bearers of the right to peaceful assembly in international law, and to emphasize that the right holds particular importance for them.
  - 6.2. Second, we discuss the nature of State Party obligations to ensure and further the right to peaceful assembly for children.
  - 6.3. Third, we consider the role and impact of prior notification requirements in relation to the exercise of the right to peaceful assembly by children.



- 6.4. Finally, we note the impact on children when criminalization and other coercive measures are used to regulate the right to peaceful assembly.
7. For purposes of this submission, we utilize the terms “**right to peaceful assembly**” and “**the right to peaceful protest**” interchangeably.

## IMPORTANCE OF THE RIGHT TO PEACEFUL ASSEMBLY FOR CHILDREN

8. The right to peaceful assembly is critical in any democratic country. The right serves as an important mechanism by which to “*give a voice to the powerless*”.<sup>1</sup> This right is particularly important for children who constitute one of the most vulnerable groups in society.
9. Unlike adult citizens, in many countries children cannot vote and therefore lack a critical avenue of political expression and power. Exercising the right to protest is therefore an important way in which children’s voices, in particular, are heard. It enables them to participate in social and political life, particularly on matters affecting them as children.<sup>2</sup>
10. The Constitutional Court of South Africa recently held:

*“In particular, it must be emphasised that for children, who cannot vote, assembling, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right [right to peaceful assembly] has special significance for children who have no other realistic means of expressing their frustrations.”*<sup>3</sup> (Emphasis added)

11. Indeed, the right of children to freedom of peaceful assembly and association is specifically recognised in international law. Article 15 of the *United Nations Convention on the Rights of the Child* (the “**UNCRC**”) provides as follows:

*“Article 15*

- 1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.*



2. *No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.”*

12. Article 8 of the African Charter on the Rights and Welfare of the Child (the “ACRWC”) is equally specific:

*“Article 8*

*Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.”*

13. In addition, it bears emphasis that the UN Human Rights Committee has also reiterated that *“children benefit from all of the civil rights enunciated in the [ICCPR]”,* which includes the right to peaceful assembly as enshrined by Article 21.<sup>4</sup>

14. The recognition of the right of the child to freedom of association and peaceful assembly is directly linked to the right of children to be heard and participate in all matters affecting them,<sup>5</sup> and the right of children to freedom of expression.<sup>6</sup>

15. Ensuring children the broadest space for free expression of ideas is crucial to their development. Individually and collectively, children are *“independent social beings... and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.”*<sup>7</sup> It is in recognising the inherent worth of individual children, and the value of the choices that they make, that we realise their right to dignity.<sup>8</sup>

#### CHILDREN’S VOICES HAVE IMPACT: CASE STUDY 1

In August 2013, Equalisers in Tembisa, a township outside Johannesburg, launched the Gauteng Sanitation Campaign and campaigned for safe sanitation in their schools. As part of the campaign, 2000 EE members organized, protested and picketed. The protestors met with state officials to express their demands. In response to the campaign and the subsequent protests, schools’ toilets, taps, pipes and basins were fixed or replaced. Some schools have also received new toilet blocks.





16. The significance of the right to peaceful assembly is borne out in the direct experience of EELC working with high school activists who regularly advocate for, amongst others, clean water and sanitation in schools, safe learning environments, scholar transport and menstrual hygiene products. Their advocacy takes various forms including peaceful actions that range from pickets and long marches to silent protests and creative forms of art protest.
17. The right to peaceful assembly is therefore critical to furthering children’s meaningful ability to self-advocate and express themselves as “*independent social beings*”.<sup>9</sup> We submit therefore that it is essential for the draft General Comment to specifically acknowledge that Article 21 of the ICCPR contemplates that children are the bearers of the right to peaceful assembly.

**The EELC therefore recommends that the draft General Comment:**

- a) Recognises and reiterates that children have the right to peaceful assembly as contemplated by Article 21 of the ICCPR.
- b) Acknowledge that a child’s right to peaceful assembly is inextricably linked to the right of children to freedom of expression and to participation in social and political life.
- c) Emphasise that the right to peaceful assembly has special significance for and is integral to children’s involvement in political process.

**CHILDREN’S VOICES HAVE IMPACT: CASE STUDY 2**

In response to inadequate school infrastructure across South Africa, Equalisers launched a campaign to compel the Minister of Basic Education to promulgate legally-binding regulations for Norms and Standards for public school infrastructure. High school activists marched and picketed, petitioned, wrote countless letters to the Minister, went door-to-door in communities to garner support for the campaign and went as far as spending nights fasting and sleeping outside of Parliament. On Human Rights Day in March 2011, 20 000 learners and supporters marched to Parliament to demand that the Minister adopt a Minimum Norms and Standards law. The campaign has been sustained over many years, involving thousands of young people from across the country. The law was eventually published, demonstrating the importance and impact of the right to protest for children.



## STATES' NEGATIVE AND POSITIVE OBLIGATIONS IN RESPECT OF THE RIGHT TO PEACEFUL ASSEMBLY FOR CHILDREN

18. As set out above, the right to peaceful assembly holds special significance for our children. It is important therefore for the draft General Comment to reiterate the nature of State Party obligations in respect of the right generally, and also specifically in relation to children.
19. Article 2(1) of the ICCPR stipulates that all State Parties must undertake, without distinction, to respect and to ensure to all individuals the rights recognized in the Covenant. Read together with article 21 of the ICCPR, State Parties are required to respect and to ensure the right to peaceful assembly for all, including children.
20. This means that all state parties have both negative and positive obligations in relation to the right to peaceful assembly.<sup>10</sup>
21. Significantly, Article 24(1)<sup>11</sup> of the ICCPR affords children the right to special measures of protection, which General Comment 17 of the Human Rights Committee has clarified are “in addition to the measures that States are required to take under Article 2”. (Emphasis added)
22. Furthermore, the Committee on the Rights of the Child has emphasised that *“States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.”*<sup>12</sup>

### Negative obligations of State Parties to refrain from limiting children’s right to protest

23. State Parties must refrain from interfering with the exercise of the right to peaceful assembly and must not unfairly or unreasonably limiting the exercise of the right. Despite this clear obligation on State Parties, unlawful practices are often used to stifle the right to protest.
24. In South Africa, the Constitution guarantees all, *“the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”*.<sup>13</sup> The Regulation of Gatherings Act 205 of 1993 (the **“Gatherings Act”**), regulates this right. However, what we often observe is





the stifling of the right to assemble by unlawful and irregular practices used by state officials to dis-incentivise people from protesting.

25. In a submission to the South African Human Rights Commission, Equal Education has detailed such experiences in the South African context.<sup>14</sup> One such example is when EE members, high school children, held peaceful sleep-in protests in three cities: Cape Town, Pretoria and King William's Town in April 2015. Despite South African laws only requiring notification (not permission), 'permits' were demanded as a prerequisite to protest and other arbitrary restrictions were imposed. Legal action was ultimately threatened to compel the allowance of the protests and the ability of the children members of Equal Education to peacefully assemble.
26. We return to the issue of prior notification requirements in further detail below, however it is important for the General Comment to specifically recognize that State Parties have an obligation to eliminate *any* unreasonable legislative, administrative or other barriers to the exercise of peaceful assembly, particularly in relation to children.
27. When assessing the reasonableness of any measures imposed, State Parties must specifically take into account the effect of such measures on children having regard to their particular interests.

*Positive obligations of State Parties to further and fulfill children's right to protest*

28. State Parties must take positive steps to create an enabling environment for citizens, including children, to exercise their right to assemble.
29. As stated by the Special Rapporteur on the Right to Protest: "[T]he enjoyment of the right to hold and participate in peaceful assemblies entails the fulfilment by the State of its positive obligation to facilitate the exercise of the right [to assemble]"<sup>15</sup>.
30. State Parties must therefore adopt legislative, administrative and other measures to *facilitate* the exercise of the right to protest.
31. We submit that it is important to adopt special measures that specifically take into account the needs and best interests of children when adopting and implementing measures regulating and giving effect to the right to peaceful assembly.



**The EELC therefore recommends that the draft General Comment:**

- a) Emphasizes that Article 21 of the ICCPR places positive and negative obligations on all State Parties in relation the right to peaceful assembly, and moreover State Parties must adopt special measures of protection of the right in relation to children.
- b) The General Comment should make it clear that State Parties are required to take into account the rights and interests of children when developing laws, policies and administrative measures regulating and giving effect to the exercise of the right to peaceful assembly.

## **PRIOR NOTIFICATION REQUIREMENTS AND CHILDRENS' RIGHT TO PEACEFUL ASSEMBLY**

32. Prior notification requirements are used in various jurisdictions to regulate the right to protest.
33. Prior notification requirements need not be inherently limiting of the right to peaceful assembly. However, such notification requirements must serve a legitimate purpose and the mere failure to meet such requirements should not result in criminal, administrative or other sanctions.
34. The OSCE/ODIHR<sup>16</sup> and Venice Commission Guidelines on Freedom of Peaceful Assembly emphasise the need to limit prior notification requirements to what is essential and only for a legitimate aim:

*"[I]n an open society, many types of assembly do not warrant any form of official regulation. Prior notification should, therefore, only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others."*<sup>17</sup> (Emphasis added)

35. The Constitutional Court of South Africa has recently held that criminalisation of the failure to give prior notice of an assembly is an unconstitutional limitation on the right.<sup>18</sup> The Court held that criminalisation in that case would have a chilling effect on the right to peaceful assembly.<sup>19</sup>
36. Regional courts and other international committees have also found such criminalisation to constitute a limitation on freedom of peaceful assembly.<sup>20</sup> In addition, the UN Special



Rapporteur on the rights to peaceful assembly and of association has indicated that protests should not be automatically disbanded, nor criminal or other sanctions imposed for mere failure to provide prior notice of a protest.<sup>21</sup>

37. It is submitted that for children, in particular, failure to provide prior notification of a protest cannot bar or otherwise prejudice the exercise of the right to peaceful assembly. Children, particularly from disadvantaged backgrounds, are unlikely to have the resources available to either be informed about or comply with such requirements. It would be particularly limiting and onerous on children to impose sanctions for the mere failure to meet the notice requirement.
38. By way of concrete example, the Gatherings Act regulates the right to assemble in South Africa. The Gatherings Act requires the convener of a gathering of more than 15 people to “*give notice in writing signed by him of the intended gathering in accordance with the provisions of this section*”.
39. To adequately give notice to the relevant authorities, one must have some knowledge of the Gatherings Act and the notice requirement, obtain a copy of the requisite notice form, be able to read and write, have transport and / or internet access to submit the form etc. This process may be cumbersome on children. Without access to a computer, internet, printing equipment, transport, money and access to legal support, it would be extremely difficult to access, complete and submit the gatherings application forms required by the various local authorities responsible for dealing with the Gatherings Act notices.
40. In recognising that criminalisation of the mere failure to give notice is unconstitutional the Constitutional Court of South Africa recognised:

*“[C]hildren – who may not even know about the notice requirements in the Act or have the resources to adhere to the notice requirement – are indiscriminately held criminally liable if they fail to give notice before convening a gathering.”<sup>22</sup>*

41. In our experience, while the notification process is important for facilitating the right to protest it has, in practice, become more of an obstacle to people wishing to exercise their right. In submissions to the South African Human Rights Commission, Equal Education details experiences demonstrating the manner in which the notification process is either



misunderstood or intentionally abused by officials in South Africa to impose unlawful conditions on protests, including in relation to children.<sup>23</sup>

42. The General Comment should therefore make it clear that while State Parties may allow for prior notification provisions, any provisions must be aimed at enabling and facilitating the exercise of the right.
43. We submit that the General Comment should provide guidelines on the nature and form of such prior notification. For example, children may need mechanisms of providing prior notice verbally and not only in writing, and States should disseminate information on how the exercise of the right can be facilitated once notice is given.

**The EELC therefore recommends that the draft General Comment:**

- a) Specifically states that the purpose of any prior notification requirement should be to facilitate and enable the exercise of the right to protest.
- b) Advises that mere failure to provide prior notification of an assembly should not result in criminal, administrative or other penalties.
- c) Encourages State Parties to provide for accessible methods of prior notification, specifically taking into account the needs and best interests of children seeking to exercise the right to protest.

**CRIMINALISATION AND OTHER COERCIVE MEASURES IN THE CASE OF CHILDREN**

44. Criminalisation is one of the measures used to coerce conveners of and participants in peaceful assemblies to comply with regulation of assemblies.
45. In South Africa, various criminal penalties are imposed by the Gatherings Act.<sup>24</sup> While there are different criminal penalties that apply to conveners and participants in assemblies (or 'gatherings', as described in the Act), no distinctions are drawn between adult and child conveners.
46. The spectre of a criminal penalty has a chilling effect on the right to protest, especially in the context of children. As noted above, in a recent Constitutional Court case in South Africa, the



Court specifically noted the effects of criminalisation of peaceful assembly in respect of children and emphasised that *“exposing children to the criminal justice system...is traumatic and must be a measure of last resort.”*<sup>25</sup>

47. This decision is in conformity with international law, as Article 37(b) of the UNCRC specifically provides that the arrest, detention or imprisonment of a child *“shall be used only as a measure of last resort”*.
48. The impact of criminalisation on children is not an abstract concern. There are real and damaging effects to children when criminalisation of the right to protest is normalised by State Parties. In our experience, even when children comply with the relevant notice requirements, law-enforcement officials tend to adopt a highly aggressive stance toward protest action.

#### IMPACT OF CRIMINALISATION OF PROTEST ON CHILDREN

On 17 July 2017, high school members of Equal Education assembled outside the offices of the provincial education department to screen a film as a form of protest. The demonstration was peaceful and Equalisers had complied fully with prior-notice requirements. Despite this, their assembly was violently dispersed through the use of teargas by police officials and they were threatened with arrest. In statements collected about the day, Equalisers and other youth members of Equal Education shared their experiences of victimisation:

*“I don’t think it was necessary to call the police because it is not good that when people are voicing their issues to use police. It shows that they undermine us and the learners in Nquthu, and we are being discriminated against.”* (Grade 11 Equaliser)

*“I felt threatened when a lot of police came because I don’t know what tear gas do[es] to people. When police arrive, I should feel safe, but I didn’t because they were angry and threatened me and EE members. I felt really scared and imagined myself at a police station or prison.”* (Equal Education Community Leader)

*“At this point [when the police came to disperse the gathering] I was really scared and thought of the massacres that the police have been responsible for”.* (Grade 10 Equal Education member)

*“I feel sad and disappointed that police arrived because I did not get to do what I wanted – to watch the screening. It was so important because learners need scholar transport and the screening would make a change...I think the message they send is that learner’s lives are not important and they take our right to protest away from me and others by kicking us out”.* (Equal Education Facilitator, Nquthu)



The EELC therefore recommends that the draft General Comment:

- a) Advises State Parties to avoid criminalisation of peaceful assemblies.
- b) Reiterate that in relation to children State Parties may only use criminalisation as a measure of last resort.

## CONCLUSION

49. International law requires that special measures of protection should be adopted in relation to the exercise of rights by children.

50. The EELC submits that the draft General Comment presents a critical opportunity to reiterate that children are bearers of the right to peaceful assembly and to provide guidance on the nature of State Party obligations in relation thereto.

51. In addition to this written submission, the EELC intends on making oral submissions to the Committee.

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## ENDNOTES

<sup>1</sup> South African Constitutional Court, *SATAWU v Garvas* 2013 (1) SA 83 (CC) at para 61: “[The right to peaceful assembly] exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns.”

<sup>2</sup> Ally, Nurina. (2017). Failing to respect and fulfil. South African law and the right to protest for children. *SA Crime Quarterly*, (62), 33-38. <https://dx.doi.org/10.17159/2413-3108/2017/v0n62a3109>.

<sup>3</sup> South African Constitutional Court, *Mlungwana and Others v S and Another* [2018] ZACC 45 at para 72.

<sup>4</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989 at para 2.

<sup>5</sup> Article 12(1) of the UNCRC provides: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child...” Paragraph 3 of the United Nations Committee on the Rights of the Child General Comment 12, Right of the child to be heard, CRC/C/GC/12 1 July 2009 states: “[T]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.” Paragraph 13 of General Comment 12 provides: “The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children’s lives.”

<sup>6</sup> Article 13(1) of the UNCRC provides: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

Article 7 of the ACRWC states “[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws”.

<sup>7</sup> South African Constitutional Court *S v M* [2007] ZACC 18 at paras 18 -19.

<sup>8</sup> See: South African Constitutional Court *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35 at para 52.

<sup>9</sup> South African Constitutional Court *S v M* [2007] ZACC 18 at paras 18 -19.

<sup>10</sup> UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 at para 6 clarifies: “The legal obligation under article 2, paragraph 1, is both negative and positive in nature.”

<sup>11</sup> Article 24(1) provides: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

<sup>12</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 at para 11.

<sup>13</sup> Section 17 of the Constitution of the Republic of South Africa.

<sup>14</sup> Equal Education Submission to the South African Human Rights Commission (June 2016) available at <https://equaleducation.org.za/wp-content/uploads/2016/07/9.-EE-SAHRC-Submission-June-2016.pdf>

<sup>15</sup> UN Report of the Special Rapporteur on the Right of Freedom of Peaceful Assembly and Association, para. 27 Doc [A/HRC/20/27/May 21, 2012].



<sup>16</sup> Organisation for Security and Cooperation in Europe / Office for Democratic Institutions and Human Rights

<sup>17</sup> OSCE/ODIHR Venice Commission Guidelines on Freedom of Peaceful Assembly, 4 June 2010 at para 113.

<sup>18</sup> See: South African Constitutional Court, *Mlungwana and Others v S and Another* [2018] ZACC 45.

<sup>19</sup> See: *Ibid* at para 88.

<sup>20</sup> See for example: *Novikova and Others v Russia* ECtHR Judgment of 26 April 2016.

<sup>21</sup> See: “A step-by-step checklist for monitoring implementation of the practical recommendations on the management of assemblies report” by United Nations Special Rapporteurs Maina Kiai and Christof Heyns (A/HRC/31/66).

<sup>22</sup> South African Constitutional Court, *Mlungwana and Others v S and Another* [2018] ZACC 45 at para 89.

<sup>23</sup> See paragraph 25.

<sup>24</sup> See sections 12(1)(a) – (e) of the Gatherings Act.

<sup>25</sup> South African Constitutional Court, *Mlungwana and Others v S and Another* [2018] ZACC 45 at para 89.

