

## **As Protests Surge Globally, the UN Human Rights Committee Provides Timely Guidance**

The past decade has seen a marked rise in protest movements, with 37 countries experiencing massive anti-government movements in late 2019 alone.<sup>1</sup> Despite COVID-19 restrictions on large gatherings, these trends have largely continued in 2020. The vast majority of these protests have been peaceful, and many have inspired important policy changes. Yet in other cases, often characterized by heavy-handed government responses, protests have escalated toward more violent outcomes. Against this backdrop, the UN Human Rights Committee has issued a timely new General Comment on the right of peaceful assembly under Article 21 of the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> The Comment emphasizes the potential for peaceful assemblies to create “opportunities for the inclusive, participatory, and peaceful resolution of differences,”<sup>3</sup> and it provides useful guidance for a rights-based approach that can help realize that potential in the many protests across the globe.

### **Current Trends in Global Protest Movements**

Varied factors are driving the current surge in protest movements, which in many countries are drawing broad and sustained support. Dissatisfaction with government is a prevalent cause, spurring protests in democracies and autocracies alike.<sup>4</sup> Economic distress and growing inequality are also contributing factors, for example fueling protests in Tunisia, France, Venezuela, and the United Kingdom, while corruption has driven movements in Indonesia, Zimbabwe, Peru, and Russia. Additionally, political repression and the violation of human rights have caused unrest in Haiti, Egypt, Bolivia, and India. The May 2020 killing of George Floyd and racially biased policing practices sparked Black Lives Matter demonstrations estimated to be the largest protest movement in U.S. history,<sup>5</sup> and the aftermath of a hotly contested U.S. presidential

election threatens to ignite further civil unrest. Moreover, many protests are garnering support among all strata of society regardless of age, political ideology, and socioeconomic status. In Hong Kong, a quarter of the city's population turned out in June 2019, while Santiago, Chile, saw 1.2 million people demonstrate in October 2019, the largest and most diverse demonstrations ever recorded in those cities.<sup>6</sup>

The proliferation of protest movements has coincided in many countries with tightening civil society controls. In response to increasing unrest, some governments have employed aggressive tactics, such as mass arrests and the wide-spread use of non-lethal weapons and chemicals to disperse crowds. Violent police tactics have led to hundreds of deaths in Iran and Iraq and serious injuries and human rights abuses in many other countries.<sup>7</sup> As technology and social media facilitate the coordination of protests, some governments have responded by shutting down the internet or using facial recognition technology and other surveillance methods to quash protests and crack down on civil society.<sup>8</sup>

The Covid-19 pandemic has done little to dampen protest movements and has created fresh challenges for governments in calibrating their response to unrest. The pandemic has compounded existing discontent with new grievances, and protestors in many countries have taken to the streets claiming that government responses to the crisis have been inadequate, excessive, or both.<sup>9</sup> Most countries have implemented curfews, stay-at-home orders, national lockdowns, and other measures that limit freedom of movement, assembly, and expression.<sup>10</sup> While public health interests justify many restrictions, in some countries, such as Hungary, Algeria, and Hong Kong, limitations on large gatherings have been particularly broad or have lacked a clear end date, raising concerns that the pandemic is being used opportunistically to curb protest movements.<sup>11</sup>

### **Timely Guidance from the Human Rights Committee**

In light of these global trends, the UN Human Rights Committee's General Comment No. 37 interpreting Article 21 of the ICCPR provides a timely articulation of key principles and best practices governing peaceful assembly. The General Comment reflects an eighteen-month deliberative process, through which the Committee received input from 22 states; a dozen international organizations; current and former representatives of UN human rights bodies and mechanisms; a dozen national human rights bodies; and more than 60 experts and non-governmental organizations.<sup>12</sup> Professor Christof Heyns of the University of Pretoria, a member of the Committee, led the process as its rapporteur.<sup>13</sup>

This is the first time the Committee has issued a General Comment on Article 21, which defines the right of peaceful assembly in broad terms and specifies that states may limit the right but only if codified in law and as necessary to protect the public and the rights and freedoms of others. The text of the Article leaves open many questions about the extent of the right, the obligations of states to protect it, and how, in practice, the right gets balanced with countervailing interests.<sup>14</sup> The new General Comment clarifies the Committee’s interpretation and addresses new questions raised by technological developments. The Comment builds on recent analysis and recommendations from UN and regional bodies and provides a synthesis of principles and guidance that can be very helpful as states respond to current protest movements.

### *The Right of Peaceful Assembly as an Individual Right*

The General Comment makes clear that the right of peaceful assembly is an individual right, and the focus should be on the conduct of each individual, not the assembled group, when determining whether individuals are protected under Article 21. One participant committing acts of violence may lose his or her protection under Article 21, but that conduct should not be attributed to others or the assembly as a whole. Only if violence is widespread and serious—entailing “physical force against others that is likely to result in injury or death, or serious damage to property” or the widespread incitement to use violence and such violence is imminent—should the assembly as a whole be considered violent, such that all individuals’ participation in the assembly is unprotected under Article 21.<sup>15</sup>

As a corollary, the Committee recommends that restrictions on exercise of the right be focused on “a differentiated or individualized assessment of the conduct of the participants and the assembly concerned.”<sup>16</sup> Thus, if an individual participant or group of participants in a peaceful assembly engage in violent conduct, the state response should, to the extent possible, focus on the perpetrators while allowing others to continue to exercise their right of peaceful assembly uninterrupted.<sup>17</sup>

### *Appropriate State Regulation of Peaceful Assemblies*

The General Comment elaborates state obligations to facilitate peaceful assembly and the extent to which they can restrict the right in order to serve other public interests. It explains that states have a negative duty requiring “no unwarranted interference in peaceful assemblies,”<sup>18</sup> as well as a positive duty requiring that they create “an enabling environment for the exercise of the right ... without discrimination.”<sup>19</sup> This includes

putting in place a legal framework supportive of the right and may require specific actions to protect participants. The Comment recognizes that assemblies may invite counter-demonstrations, which must be protected as well.<sup>20</sup>

The General Comment makes clear that restrictions on the right of peaceful assembly must be based in law and be both necessary for, and proportionate to, interests of national security, public order, the protection of public health or morals, or the protection of others' rights and freedoms. As an important overarching consideration, the Comment explains that "any restrictions should be guided by the objective of facilitating the right" and should employ the "least intrusive measures" available.<sup>21</sup> Moreover, it elaborates the language in Article 21, which provides that restrictions must be "necessary in a democratic society." The Committee explains this to mean that "[r]estrictions must therefore be necessary and proportionate in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to being merely reasonable or expedient."<sup>22</sup> The Committee urges a cost-benefit analysis, weighing the detrimental impact of a restriction against the benefit to the interest it serves.

Recognizing the benefits of peaceful assemblies in a democracy, the Comment urges that their regulation be infused with a spirit of accommodation and tolerance. It cautions against overbroad reliance on vague "public order" justifications for restrictions on assemblies, noting that assemblies "can in some cases be inherently or deliberately disruptive and require a significant degree of toleration."<sup>23</sup> The Comment makes clear that restrictions must be the least intrusive available, non-discriminatory, and content-neutral, that is, not related to the message conveyed by the assembly. States may require organizers of assemblies to notify authorities in advance, provided that the notification requirements are specified in law and are not implemented in a way that stifles the right. Moreover, failure to comply with notification requirements should not, in itself, render the assembly unlawful or result in the dispersal or arrest of participants.<sup>24</sup>

### *Policing Peaceful Assemblies*

Police practices surrounding protest movements have been a flashpoint globally, and the General Comment provides valuable guidance on best practices. Here again, the Comment underscores that the authorities' role is "to facilitate peaceful assemblies."<sup>25</sup>

The Comment outlines a number of recommended policing approaches, including establishing channels for communication between the police and organizers to facilitate preparedness and the de-escalation of tensions as necessary; careful planning for

policing assemblies; establishing clear command structures and accountability protocols, including a general rule against plain-clothes or unidentifiable law enforcement except when strictly necessary; and ensuring proper training and equipment for policing that upholds the right of peaceful assembly.<sup>26</sup>

Regarding the use of force, the General Comment urges law enforcement to de-escalate situations that might result in violence and “to exhaust non-violent means and to give prior warning if it becomes absolutely necessary to use force, unless doing either would be manifestly ineffective.”<sup>27</sup> It incorporates requirements of Articles 6 and 7 of the Covenant on the right to life and the prohibition against torture and cruel, inhuman, or degrading treatment or punishment, specifying that “any use of force must comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination.”<sup>28</sup> Only the minimum force necessary should be used, only for a legitimate law enforcement purpose, and only for as long as that need persists.

With respect to specific tools and tactics, the Comment points to other relevant international policing standards and guidance, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement.<sup>29</sup> It notes that use of less-lethal weapons, such as tear gas and water cannons, should be a last resort and only following a warning and opportunity for participants to disperse.<sup>30</sup>

The Committee cautions against the use of preventive detention, urging its use only in exceptional cases. It states unequivocally that “indiscriminate mass arrest prior to, during or following an assembly are arbitrary and thus unlawful.”<sup>31</sup>

Finally, the Committee observes that an assembly may be dispersed “[o]nly in exceptional cases,” for example, if it is no longer peaceful and is characterized by widespread and serious violence or a threat of it, and lesser measures cannot be reasonably deployed.<sup>32</sup>

#### *Other Hot Topics: Health Considerations, Masks, Privacy, and Assemblies Online*

The General Comment also addresses a number of topics particularly relevant to current protests unfolding during a pandemic and making use of new technology. In particular, it flags that restrictions based on public health considerations are permissible in exceptional circumstances, such as during an outbreak of infectious disease.<sup>33</sup> Generally, the authorities should not impose restrictions on the size of assemblies, but

the Committee says this is permissible if clearly tied to a public interest such as public health.<sup>34</sup>

The Comment acknowledges that data collection about assemblies and their participants may be acceptable, but it notes that data collection must be regulated by domestic law and compliant with international standards, including the right to privacy. The Comment provides further that participants in assemblies should be permitted to wear masks, hoods, or face coverings and otherwise to maintain their anonymity, as long as their conduct does not otherwise run contrary to Article 21.<sup>35</sup> At a time when technology is facilitating more online gatherings, the Comment also breaks important new ground, clarifying that Article 21 protection extends to online assemblies.<sup>36</sup>

### **Harnessing Peaceful Protest as a Tool of Participatory Governance**

As the General Comment observes, “[t]he right of peaceful assembly is ... a valuable tool that can and has been used to recognize and realize a wide range of other rights, including economic, social and cultural rights. It is of particular importance to marginalized individuals and groups.”<sup>37</sup> With minority and other marginalized groups suffering the brunt of the Covid-19 pandemic, harnessing peaceful assembly as a tool of constructive participatory governance is more important than ever. In July 2020, global risk assessor, Verisk Maplecroft, predicted 37 countries would face major spikes in unrest during the second half of 2020. This phenomenon has already occurred in Belarus, Ethiopia, Bulgaria, Kyrgyzstan, Israel, Nigeria, and Iraq, among others.<sup>38</sup> Long-standing grievances coupled with the effects of the pandemic, unless effectively managed, provide a “perfect storm” for instability in the coming years.<sup>39</sup> Managing these dynamics presents a critical governance challenge, and the General Comment provides a helpful roadmap for doing so.

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<sup>1</sup> Samuel J. Brannen, Christian S. Haig, & Katherine Schmidt, *The Age of Mass Protests: Understanding an Escalating Global Trend*, CENTER FOR STRATEGIC & INT’L STUDIES (Mar. 2020), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303\\_MassProtests\\_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke)

<sup>2</sup> U.N. Human Rights Committee, General Comment No. 37 on Article 21 - on Right of peaceful assembly, U.N. Doc. CCPR/C/GC/37 (July 23, 2020) [hereinafter General Comment],

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11).

<sup>3</sup> *Id.* ¶ 1.

<sup>4</sup> Richard Wike & Shannon Schumacher, *Democratic Rights Popular Globally but Commitment to Them Not Always Strong*, PEW RESEARCH CENTER (Feb. 27, 2020), <https://www.pewresearch.org/global/2020/02/27/democratic-rights-popular-globally-but-commitment-to-them-not-always-strong/>.

<sup>5</sup> Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, THE NEW YORK TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

<sup>6</sup> Brannen et al., *supra* note 1.

<sup>7</sup> Miriam Berger, *'Nonlethal weapons' fired at protesters in Hong Kong, Chile and Iraq are having very dangerous — even deadly — effects*, WASHINGTON POST (Nov. 23, 2019), <https://www.washingtonpost.com/world/2019/11/23/non-lethal-weapons-fired-protesters-hong-kong-chile-iraq-are-having-very-dangerous-even-deadly-effects>

<sup>8</sup> Brannen et al., *supra* note 1.

<sup>9</sup> Thomas Carothers & David Wong, *Global Protests Start to Return*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (June 30, 2020), <https://carnegieendowment.org/2020/06/30/global-protests-start-to-return-pub-82225>; Thomas Carothers & Benjamin Press, *The Global Rise of Anti-Lockdown Protests—and What to Do About It*, WORLD POLITICS REVIEW (Oct. 15, 2020), <https://www.worldpoliticsreview.com/articles/29137/amid-the-covid-19-pandemic-protest-movements-challenge-lockdowns-worldwide>.

<sup>10</sup> International Center for Not-For-Profit Law, European Center for Not-For-Profit Law, and United Nations Human Rights Special Procedures, COVID-19 Civic Freedom Tracker, <https://www.icnl.org/covid19tracker/>.

<sup>11</sup> Congressional Research Service, *Global Democracy and Human Rights Impacts of Covid 19: In Brief*, CRS Report R46430 (June 26, 2020), <https://fas.org/sgp/crs/row/R46430.pdf>.

<sup>12</sup> See all formal submissions to the Committee on the website of the UN Human Rights Committee, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>.

<sup>13</sup> For an interview with Professor Heyns about General Comment No. 37, see Elizabeth Andersen & Christof Heyns, *Interview with Christof Heyns: Major New UN Comment on Right of Peaceful Assembly*, JUST SECURITY BLOG (July 29, 2020), <https://www.justsecurity.org/71736/interview-with-christof-heyns-unhrc-general-comment-37-on-the-right-of-peaceful-assembly/>.

<sup>14</sup> The verbatim text of Article 21 is: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right 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 (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” Article 21, International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A(XXI) of Dec. 16, 1966, entered into force Mar. 23, 1976, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>15</sup> General Comment, ¶¶ 15-19.

<sup>16</sup> *Id.* ¶ 38.

<sup>17</sup> *Id.* ¶¶ 84-86.

<sup>18</sup> *Id.* ¶ 23.

<sup>19</sup> *Id.* ¶ 24.

<sup>20</sup> *Id.* ¶ 26.

<sup>21</sup> *Id.* ¶¶ 36-37.

<sup>22</sup> *Id.* ¶ 40.

<sup>23</sup> *Id.* ¶¶ 44, 48.

<sup>24</sup> *Id.* ¶¶ 70-71.

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<sup>25</sup> *Id.* ¶ 74.

<sup>26</sup> *Id.* ¶¶ 75-77, 80-81.

<sup>27</sup> *Id.* ¶ 78.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, citing United Nations publication, Sales No. E.20.XIV.2.

<sup>30</sup> *Id.* ¶ 87.

<sup>31</sup> *Id.* ¶ 82.

<sup>32</sup> *Id.* ¶ 85.

<sup>33</sup> *Id.* ¶ 45.

<sup>34</sup> *Id.* ¶ 59.

<sup>35</sup> *Id.* ¶ 60.

<sup>36</sup> *Id.* ¶ 10.

<sup>37</sup> *Id.* ¶ 2.

<sup>38</sup> Carothers & David, *supra* note 9.

<sup>39</sup> Miha Hribernik & Tim Campbell, *Emerging Markets Face Acute Instability as Pandemic Fuels Unrest*, VERISK MAPLECROFT (July 16, 2020), <https://www.maplecroft.com/insights/analysis/emerging-markets-face-unparalleled-civil-unrest-as-economic-impacts-of-pandemic-unfold--study/>.