

Joint Contribution

General comment No. 37 by the United Nations Human Rights Committee on the Right to Freedom of Peaceful Assembly (Art. 21, ICCPR)

February 2020

Esteemed Committee Members:

We address the Committee in representation of a group of Latin American human rights organizations in relation to the Committee's open consultation with regard to the latest draft of General Comment No. 37 on the right to freedom of peaceful assembly (hereinafter, "the draft") in the International Covenant on Civil and Political Rights (hereinafter, "the Covenant").

This presentation resulted from the exchange that took place at the regional consultation for the Americas organized by Article 19 on the 4th and 5th of December 2019 at Mexico City with the participation of two members of the Committee. It aims to put at your disposal considerations on the draft and the specific content of the right to freedom of peaceful assembly, based on our organizations' experiences on the ground, as well as developments in standards and recommended practices in recent years at the regional and international levels.

The document focuses on the following issues: 1) general considerations and language in the report; 2) the notion of "violent protests;" 3) authorization and prior notice; 4) illegitimate restrictions on the right of peaceful assembly; 5) obligations of the States Party in relation to the right to freedom of peaceful protest; 6) accountability. The annex contains suggestions on alternative wording to the current text in a variety of paragraphs with a view toward incorporating these observations into the main body of this report.

We are at your disposal to expand on or clarify anything you deem necessary.

Alianza Regional por la Libre Expresión e Información¹

Article 19 – Oficina para México y Centroamérica

Blogueiras Negras (Brasil)

¹Integran la Alianza Regional las organizaciones:Acción Ciudadana (Guatemala), Artigo 19 (Brasil), Asociación Nacional de la Prensa – ANP (Bolivia), Centro de Archivos y Acceso a la Información – Cainfo (Uruguay), Comité por la Libre Expresión – C-Libre (Honduras), Espacio Público (Venezuela), Fundación Democracia sin Fronteras – FDsF (Honduras), Fundación Salvadoreña para el Desarrollo Económico y Social – FUSADES (El Salvador), Fundación Ciudadanía y Desarrollo –FCD (Ecuador), Fundación Violeta Barrios de Chamorro –FVBCH (Nicaragua), Fundar, Centro de Análisis e Investigación (México), Instituto de Derecho y Economía Ambiental – IDEA (Paraguay), Instituto de Prensa y Libertad de Expresión – IPLEX (Costa Rica), Observatorio Cubano de Derechos Humanos (Cuba), Participación Ciudadana (República Dominicana), Transparencia por Colombia (Colombia),y Transparencia Venezuela (Venezuela).

Casa da Cultura Digital Porto Alegre (Brasil)

Centro de Estudios de Derecho, Justicia y Sociedad - DeJusticia (Colombia)

Centro de Estudios Legales y Sociales - CELS (Argentina)

Centro por la Justicia y el Derecho Internacional – CEJIL

Derechos Digitales (América Latina)

Fundación Construir (Bolivia)

Fundación Internet (Bolivia)

Greenpeace USA (Estados Unidos)

InternetLab - Pesquisa emDireito e Tecnologia (Brasil)

National Lawyers Guild (Estados Unidos)

POJOAJU Asociación de ONGs del Paraguay

Red en Defensa de los Derechos Digitales - R3D (México)

SurSiendo – Comunicación y Cultura Digital (México)

1. General Considerations

1.1. Draft structure

One of the structural problems with the draft is that key issues for the right of assembly are developed in a dispersed way throughout the document, in many cases with significant differences in wording in different paragraphs. The result of this is that we find different, and even contradictory, standards in the draft for several such issues.

One example is the definition of "peaceful assembly" and the limits on state response in the event of verification of acts of violence in these contexts. There are clear contradictions and different wordings in paragraphs 10, 17, 19, 20, 21 and 49 that must be resolved in the new draft.

1.2. Contradictions with the most recent standards on the right of assembly

General Comment No. 37 is being discussed in a context in which the issue of the right of assembly has in recent years been the object of numerous consultations by regional systems of protection, international organizations and, particularly, by the United Nations Special Rapporteurs on the rights to freedom of peaceful assembly and association, and on extrajudicial, summary or arbitrary executions and, at the Americas level, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights.

The numerous spaces for discussion, forms and drafts distributed have resulted in the production of valuable reports that are moving forward to precisely define State obligations in the context of assemblies. These documents constitute a valuable foundation for the interpretation of Art. 21 of the Covenant in that they take into account the reality of the exercise of this right on the ground, in particular the realities of States' responses to protest. These responses tend increasingly toward the repression, criminalization and hindering of the exercise of assembly throughout the world. Nevertheless, at various points the draft presents a lower, more flexible or general standard than that developed in recent reports.

For instance, the draft moves backward in relation to the conclusion reached by different mechanisms in the sense that systems of prior authorization are incompatible with the right of assembly, and that according to how they are used, notification procedures may also be incompatible with this right (see Sect. 3 of this document). In its paragraph 84, the draft admits procedures of prior authorization by not establishing its incompatibility with Art. 21 of the Covenant. Insofar as systems of advance notification are concerned, it addresses them in general as positive and necessary, and a responsibility held by protesters that, if unmet, would warrant restrictive measures on the right of assembly. Paragraph 88 of the draft refers to the need to impose policing measures at assemblies "for which the authorities are not notified in advance and which may affect public order." This is a dangerous standard that authorizes intrusive measures and associates the failure to provide notification with an effect on public order. This standard is contrary to the one by the European Court of Human Rights, which considered that the dissolution of a peaceful assembly for not having complied with the requirement to provide advance

notification constitutes a disproportionate restriction on the freedom of peaceful assembly.²

At the same time, the wording in regard to use of force throughout the text makes reference to “control” and “policing” of assemblies, instead of standards on the positive obligations of facilitation and guarantee of the right and protection of people. This poses a problem for the progressive development of international law and for the instrument to be an effective tool to protect the exercise of the rights of assembly by persons on the ground.

Insofar as the concept of peaceful protests and violence, as the draft also takes a step back in relation to the documents by United Nations Special Rapporteurs from 2015-2017, the report by the IACHR Rapporteur on Freedom of Expression 2019, and the Organization for Security and Cooperation in Europe (OSCE) Guidelines for 2007, as we explain in section 2 of this report.

1.3. Lax language regarding State obligations

Many paragraphs of the draft present lax language with respect to the State obligations contained in Art. 21.

This is apparent in the wording chosen to refer to State practices with a proven impact on human rights in terms of “opportunities and challenges;” measures that may “restrict or protect” protests; suggestions for authorities to “consider carrying out partial restrictions;” the use, without further explanation, of the word “undue” for measures taken by the States or the imprecise reference to having to conform to “the international standards on the matter” without saying which ones; the reiterated use of the expression “to the extent possible” or “in general.” This can be seen in paragraphs such as 38, 41, 74 and 75, among others.

The generic statements about “costs and benefits” elude the Committee’s essential role when developing General Comments of clarifying the obligations held by States. Instead, it legitimizes the current political agenda on various issues; for instance, the use of new technologies proven to have consequences in terms of rights violations, without making any specification as to the serious impacts these may have on the rights contained in Art. 21 and other provisions in the Covenant. The language in paragraphs such as 11 may render General Comment No. 37, rather than an instrument that sets the conditions for State action and the protection of people, one that leaves them even less protected.

This same logic applies to Paragraph 41, which, instead of setting a clear standard that limits restrictions in a total or general sense, given their inherent disproportionality, seems to recommend, without further clarification, that States should apply partial restrictions, even when it is evident that even partial restrictions may be incompatible with Art. 21. In our opinion, we understand that considerations regarding measures of State intervention must be clearly framed within its positive duty to facilitate the exercise of the right or, as an exception, in its duty to protect the rights at stake. The authorization

² Bukta and others vs. Hungary, Application no. 25691/04 (2007).

of restrictive measures outside the framework of human rights protection puts their guarantee at risk and implies disregard for the Committee's mandate.

The language used by other mechanisms of protection and experts on the subject conveys presumption of the peaceful nature of protest and the obligation to facilitate, i.e., not only must States not prohibit protest, they also must not restrict it and, when they decide to do so, they must strictly respect the test of legality, necessity and proportionality, and the legitimate objectives established under the Covenant. The Committee contradicts existing standards on the matter by recommending, in an abstract fashion, "intermediate" or "partial" restrictions.

The same lax language can be seen with regard to States' obligations when it comes to the management of connectivity and internet access – for example, on paragraph 38 of the draft. Just as expressed by the UN Rapporteur on freedom of expression, the blocking or slowing down of internet access before, during or after an assembly is a restriction of that right. At the mention of self-regulation, it does not oppose the consideration of policies of regulation and control by the State of the activity of private internet providers in order to protect the rights contained in the Covenant. General Comment No. 37 must clearly indicate that the State has the obligation to guarantee internet provision and access in the context of exercising the right of assembly, including when this is provided by private entities.

The first sentence of paragraph 75 of the draft restricts the use of criminal law against assembly organizers for acts committed by third parties. However, the ambiguity of the wording subsequent to that relativizes the standard established by the UN Special Rapporteurs and Inter-American Commission on Human Rights: it is not clear what is meant by "could have foreseen and prevented" such acts "with reasonable efforts." Such language poses serious risks and could be used to incriminate social leaders and protesters.

1.4. The role of new technologies and the upholding of the human rights enshrined in the United Nations system in online activities

Paragraph 11 of the draft refers to the transformation in the way public gatherings have been held over time, which impacts the way in which the authorities handle the right of peaceful assembly and association. The reflection contained in this paragraph should be linked to a more general consideration that the right of peaceful assembly can be exercised in the physical world, or it may be exercised or facilitated by activities that take place in digital spaces and, therefore, the protection of the exercise of this right must be guaranteed in both cases, as different United Nations bodies have stated.

The Human Rights Council has affirmed in its resolution on the Promotion, protection and enjoyment of human rights on the Internet:³

"that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with

³ A/HRC/38/L.10/Rev.1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G18/203/76/PDF/G1820376.pdf?OpenElement>

article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights."

This has also been expressly addressed by the United Nations General Assembly in insisting that all States:

"ensure that the same rights that individuals have offline, including the rights to freedom of expression, of peaceful assembly and of association, are also fully protected online, in accordance with human rights law."⁴

In the Inter-American System, the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (ESCER) has observed in its most recent report:

*"que Internet y diversos medios electrónicos o digitales de comunicación constituyen una plataforma para el ejercicio de derechos humanos, incluyendo derechos civiles y políticos, como también derechos económicos, sociales, culturales y ambientales."*⁵

The relevance of protecting digital spaces for the exercise of the right of peaceful assembly and association is not limited to the State's obligation to abstain from generating interference in that right but, as indicated by the Special Rapporteur, also covers initiatives that aim to:

"bridge the digital divides, including the gender digital divide, and to enhance the use of information and communications technology, in order to promote the full enjoyment of human rights for all" set forth in paragraph 5 of the resolution on the Promotion, protection and enjoyment of human rights on the Internet.⁶

Finally, the Special Rapporteur also observes that:

"the obligation to protect requires that positive measures be taken to prevent actions by non-State actors, including businesses, that could unduly interfere with the rights to freedom of peaceful assembly and of association."⁷

With regard to the connection of the rights of peaceful assembly and association with the exercise of other rights, **contemporary understanding of the legal framework required for Art. 21 to have full effect requires that privacy be addressed as an essential basis for the exercise of said right.**

⁴ General Assembly Resolution 73/173 adopted 17 December 2018. Available at: <https://undocs.org/pdf?symbol=es/A/RES/73/173>

⁵ The report is still not available in English. See: REDESCA, Informe Empresas y DDHH, January 2020. Para. 267, available at: <http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>

⁶ A/HRC/38/L.10/Rev.1

⁷ A/HRC/41/41, para. 14.

When it comes to the risks of use of surveillance technologies that impact the right of peaceful assembly, it is worth recalling the Human Rights Council Resolution on the right to privacy in the digital era, which sets forth that:

"the right to privacy can enable the enjoyment of other rights and the free development of an individual's personality and identity, and an individual's ability to participate in political, economic, social and cultural life;"

"violations or abuses of the right to privacy might affect the enjoyment of other human rights, including the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association." ⁸

The United Nations Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression also notes that:

"[v]iolations of the rights of peaceful assembly and association may also interfere with the enjoyment other human rights, both offline and online. These include the right to privacy and the right to freedom of opinion and expression, which are intimately related to the enjoyment of peaceful assembly and association rights. Other rights may also be affected, particularly economic, social and cultural rights."⁹

In the same sense, the 2013 joint declaration by the UN and IACHR Special Rapporteurs on the protection and promotion of the right to freedom of opinion and expression states that:

"The rights of freedom of assembly and freedom of expression, guaranteed by the American Convention on Human Rights and the International Covenant on Civil and Political Rights, are fundamental, and guaranteeing them is a vital condition to the existence and proper functioning of a democratic society. A State may impose reasonable limitations on demonstrations for purposes of ensuring that they are conducted peacefully, or to disperse those that turn violent, provided that such limits are governed by the principles of legality, necessity, and proportionality. In addition, the breaking-up of a demonstration must be warranted by the duty to protect individuals, and authorities must use the measures that are safest and least harmful to the demonstrators. The use of force at public demonstrations must be an exception, used under strictly necessary circumstances consistent with internationally recognized principles."¹⁰

⁸ A/HRC/42/L.18, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/282/26/PDF/G1928226.pdf?OpenElement>

⁹ A/HRC/41/41, para. 16.

¹⁰ United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the OAS Inter-American Commission on Human Rights. Joint declaration on violence against journalists and media workers in the context of protests, 2013. Available at: <http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=951&lID=2>

2. The concept of “violent protests”

2.1. International and regional standards on the definition of “peaceful protest”

The discussion about the meaning of the word “peaceful” present in Art. 21 is of fundamental importance; nevertheless, the **draft version of General Comment No. 37 addresses it in an imprecise and contradictory manner.**

It is common knowledge to civil society organizations working on the ground that the argument that a protest “is violent” and therefore “illegal” is regularly used by States to justify repressive responses to protests, their dispersal or restriction and criminalization of participants and organizers. This highlights the primary importance of having a precise definition of the word “peaceful.”

In the Americas, as the IACHR has acknowledged:

"The notion of public order and social peace that is imposed appears to be concerned solely with guaranteeing order as an expression of the power of the state, and it accords priority to the rights and interests of those who may be negatively impacted by the protests. Even though some normative advances can be identified, the disproportionate use of force observed indicates that state authorities in the Americas are still inclined to quickly de-legitimate social protests because of the negative impact they may have on, for example, traffic, failing to acknowledge the importance of the rights to expression and petition that are at stake and how they are bound up with democracy."¹¹

For this reason, and through the use of extensive processes of consultation, the IACHR and the UN Special Rapporteurs on freedom of association and assembly and on extrajudicial, summary or arbitrary executions, have jointly developed standards in recent years to make the qualification of “peaceful” more precise in international standards on the right to assembly. In its recent report on Protest and Human Rights, the IACHR considered:

"As for restrictions on modes of protest, “the right of assembly, as defined in international instruments and in the domestic laws that have the force of constitutional law in the countries of the region, is that it be exercised peaceably and without arms.” Given the State's obligation to protect human rights in protest contexts, including the life and safety of demonstrators, this qualification in Article 15 of the American Convention must be interpreted as meaning that the State may restrict the

¹¹ IACHR, Annual Report 2015, chap. IV.A, “Use of Force,” para. 59.

participation in public demonstrations and protests of persons who commit acts of violence or who carry weapons." ¹²

The draft version of General Comment No. 37, paragraph 19, correctly incorporates the inter-American standard of the presumption of the peaceful nature of assemblies. It also states that acts of violence committed by some participants must not be attributed to other participants. This last point is consistent with fundamental standards of criminal law, but insufficient to protect the right of assembly. It is essential that the draft clarify that acts of violence committed in the context of a protest do not warrant declaring the entire protest as violent in order to stop, restrict, repress it or criminalize its organizers and participants.

This is not the standard set in the draft. Paragraph 10, for instance, establishes that entire protests could be unprotected under the Covenant based on a general and unclear definition of violence. Paragraph 17, in turn, contains a new formulation of the word "peaceful" that departs from recent developments at the European and Inter-American levels and UN Special Procedures to classify an entire assembly as peaceful or violent; worse still, it includes the possibility of States declaring an assembly to be violent based on vague concepts such as "incitement," the "intention to provoke" or "because the violence is imminent."

In turn, paragraph 21 of the draft enables entire assemblies to go unprotected due to such vague concepts as the incitement or intention of violence, "generalized violence" or that an assembly's "leaders convey" a violent message. This paragraph needs reformulating and clarification that **in any scenario, this restriction of the right of assembly must be based on the duty to protect other rights**, in particular, the right to life and the physical integrity of persons. Otherwise, these will be standards used to justify violent responses by the State, with serious consequences for people's safety.

Likewise, **paragraphs 17 and 49 of the current draft are particularly concerning in that they include "serious damage to property" as criteria for classifying a protest as violent.**

The Committee offers two references to speak of property damage. In paragraph 49, it cites the Syracuse Principles, a document from the 1980s. Paragraph 17 cites much more recent standards in keeping with the latest legal developments on the subject: the 2010 OSCE Guidelines on Freedom of Peaceful Assembly: ¹³

26. The term "peaceful" should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, and even include conduct that temporarily hinders, impedes or obstructs the activities of third parties. Thus, by way of example, assemblies involving purely passive resistance should be

¹² IACHR – Special Rapporteur for Freedom of Expression, "Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State," OEA/Ser.L/V/II CIDH/RELE/INF.22/19, September 2019, para. 81. Available at <http://www.oas.org/es/cidh/expresion/publicaciones/ProtestayDerechosHumanos.pdf>

¹³ OSCE, Guidelines on Freedom of Peaceful Assembly, 2010, para. 26 – 27, 15

characterized as peaceful. Furthermore, in the course of an assembly, “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.

27. The spectrum of conduct that constitutes “violence” should be narrowly construed but may exceptionally extend beyond purely physical violence to include inhuman or degrading treatment or the intentional intimidation or harassment of a “captive audience.” In such instances, the destruction of rights provisions may also be engaged.

[15 - The imperative of adopting a holistic approach to freedom of assembly is underscored by the “destruction of rights” provisions contained in Article 30 of the Universal Declaration of Human Rights (UDHR), Article 5 of the ICCPR and Article 17 of the ECHR.]

A careful reading reveals that **paragraph 17 erroneously cites the OSCE Guidelines on Freedom of Peaceful Assembly**. The guidelines are very clear in formulating a broad interpretation of the classification of “peaceful” and a strictly concise concept of “violence.” This concise definition includes physical violence, cruel, inhuman or degrading treatment and intentional intimidation or harassment of a captive audience. This document **does not mention serious damage to property** as a criterion for classifying an assembly as violent; what it does mention is the possibility of considering “the destruction of rights provisions” as part of the definition of violence.

Paragraph 93 on detentions contains the same broad and imprecise wording as paragraph 21, and the problem with the definition of “violence.” The ANNEX hereto proposes modification in the sense of withdrawing the standard of “intention” or “incitement” to “violence” and limiting the possibility of detention to the commitment of crimes, considering the seriousness of the crime and its effect on people's rights.

2.2. Scope of incitement to violence on digital media

The interpretation of the scope of the right of peaceful assembly pursuant to Art. 21 of the Covenant faces the challenge of the use of digital media to define the purpose, expressive content or the course of an assembly.

One of the trends noted in the most recent report by the Special Rapporteur on the freedom of peaceful assembly is the criminalization of activities on social networks belonging to individuals or organizations.¹⁴ In some cases, attempts have been made to criminalize acts of expression to call an assembly, as well as the event itself. This has a paralyzing effect: if the call to assemble can be arbitrarily deemed a form of incitement to violence, this discourages participation in that assembly even when it may be peaceful.

It is true that the mere act of convening an assembly, which can be done via digital media, is a relevant indicator of the ends pursued in that act and probable expressive content (including whether such ends are covered under Art. 21); however, acts of violence-

¹⁴ 1A/HRC/41/41, para. 39.

inciting rhetoric on digital media (for example, insulting, threatening or discriminatory rhetoric) must receive specific legal treatment in accordance with international human rights standards, and particularly the guarantees to protect freedom of expression contained in Art. 19 of the Covenant.

Collective acts of violent expression online, whether prior, simultaneous or subsequent to an assembly, must be assessed based on analysis that is not necessarily equivalent to a risk assessment of physical acts committed in the context of an assembly. Because exclusion of an assembly from protection based on acts of expression around said assembly would restrict both freedom of expression as well as freedom of assembly, **we believe it is necessary to only exceptionally consider the incitement to violence via digital media as grounds for determining the exclusion of protection provided under Art. 21 of the Covenant**; any restriction must be submitted to the test of legality, proportionality and necessity. The necessity to protect people cannot serve as the basis for the State to disproportionately restrict other rights. And we would underscore that, in digital media in particular, false acts of incitement to violence are increasingly common and intended to delegitimize and categorize the event as illegal or not covered by the right to peaceful assembly.

Moreover, given the complexity involved in the regulation of digital forms of expression reflecting discrimination, hate and incitement to violence under the terms of Art. 20, regulating it poses a complex task for States and for the international community, that must not be carried out based on policy contingencies or contingent tensions with other States or institutions.

As a general rule, the convening of meetings and assemblies for the purpose of protest and demonstration against authority cannot be classified as a form of incitement to violence, nor as advocacy for national, racial or religious hate that constitutes incitement to discrimination, hostility or violence under the terms of Art. 20 of the Covenant. In other words, the State cannot take advantage of its obligations under Art. 20 to restrict by law acts to organize or convene meetings or assemblies with content that is contrary to the government or its interests, nor in general to avoid its State duty to maintain neutrality when it comes to the expressive content of an assembly.

It is for this reason that **we do not consider the first option contained in paragraph 22 of the draft to be adequate** insofar as it is a lax interpretation of what constitutes incitement to violence under the terms of Art. 20 of the Covenant.

3. Advance notification and authorization

With regard to the procedures for notification and authorization, the draft version of General Comment No. 37 establishes in its paragraph 80 a duty to inform the authorities in advance of any intention to carry out a peaceful assembly. The wording, along with that contained in paragraphs 84 and 88, must be reformulated in order to clarify the nature of this requirement.

The right to peaceful assembly is, in its essence, disruptive. **Systems of notification may exist in a State, but they should not be mandatory. When they do exist, they must be**

duly justified based on legitimate ends such as to ensure participants' rights during the assembly. They must be understood as a means of safeguarding legitimate rights and interests and not as an end in and of themselves. In this sense, the IACHR has expressed through its Rapporteur on freedom of expression:

"The Special Rapporteur believes that the exercise of fundamental freedoms should not be subject to previous authorization by the authorities (as explicitly expressed in the Spanish Constitution), but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic."¹⁵

These systems of notification must not, in being too burdensome or difficult to meet, become an obstacle for the people organizing or participating in a peaceful assembly. They must instead be quick, efficient, accessible and, above all, proportionate to the possible repercussions that may arise from the assembly on the rights of those who do not participate. Advance notice must not be required for assemblies in which the number of participants does not warrant taking measures to mitigate such repercussions or strike a balance with the rights of those who do not participate or when the place and duration are limited. Nor should such notice be required when peaceful assemblies are formed spontaneously, since time would not allow for it.

States should not impose any sanction in the event that advance notice is not given and the peaceful assembly takes place without notification. Participation in a peaceful assembly without notification in keeping with the requirements is not illegal. **If there is any type of sanction, regardless of the nature, this turns into an authorization system.** And authorization systems are incompatible with the exercise of the right of peaceful assembly.¹⁶

This type of authorization or permit system must be eradicated from countries that still have it, even in practice, given that it becomes a disproportionate limit on the exercise of the right of peaceful assembly. In this sense, the IACHR Special Rapporteur on the exercise of the freedom of expression points out:

"Prior notice, generally justified by States on the basis of the need to provide greater protection to a demonstration, cannot function as a covert authorization mechanism. The IACHR maintained in its report on the "Criminalization of the Work of Human Rights Defenders" that the requirement of prior notification must not be confused with the requirement of prior authorization granted in a discretionary manner, 91 which must not be established in the law or practice of the administrative authorities, even when it comes to public spaces" ¹⁷.

¹⁵ Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, A/HRC/20/27, May 2012, para. 28.

¹⁶ A/HRC/23/39, April 24, 2013, para. 51.

¹⁷ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, September 2019, para. 57.

4. Illegitimate restrictions on the right of peaceful assembly

4.1. Surveillance

Surveillance activities conducted by the State have increased in their level of sophistication to apply restrictions on the exercise of rights, including the freedom of peaceful assembly and association. The thematic report by the Special Rapporteur on the rights to freedom of peaceful assembly and association points out that:

"[t]he digital age has opened new space for the enjoyment of the rights to freedom of peaceful assembly and of association. There are numerous examples across the globe which demonstrate the power of digital technology in the hands of people looking to come together to advance democracy, peace and development. However, the digital revolution has also brought a range of new risks and threats to these fundamental rights." Adding to this that "over the past decade, States have used technology to silence, surveil and harass dissidents, political opposition, human rights defenders, activists and protesters, and to manipulate public opinion. Governments are ordering Internet shutdowns more frequently, as well as blocking websites and platforms ahead of critical democratic moments such as elections and protests."¹⁸

These tendencies include intervention in telephone or electronic communications, the implantation of malicious code to extract information from electronic devices, the monitoring of communications metadata or other types of data, either analogue or electronic, the collection and analysis of metadata obtained in various ways, and the collection of biometric data, among others.¹⁹

Surveillance actions have been implemented on different occasions as an excuse to infringe the rights guaranteed under the Covenant, among them the right to privacy, freedom of expression and of peaceful assembly and association.²⁰ From the Inter-American System of Human Rights, a recent report by the Special Rapporteur on freedom of expression has identified:

"reports in the region of police and military officers infiltrating social networks or using false identities in order to obtain information about social movements and the organization of demonstrations and protests"²¹

¹⁸ A/HRC/41/41, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, 17 May 2019, paras. 2 and 3.

¹⁹ A/HRC/41/35, Surveillance and Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 28 May 2019. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/148/79/PDF/G1914879.pdf?OpenElement>

²⁰ Ibid, para. 21.

²¹ IACHR – Special Rapporteur for Freedom of Expression, "Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State," OEA/Ser.L/V/II CIDH/RELE/INF.22/19, September 2019, para. 300.

These actions include interventions in communications and withholding of data, as recognized by the UN Human Rights Council in its periodic reviews of compliance with the Covenant,²² and which also expressed concern in 2017 over the use of hacking for surveillance purposes.²³

Authorities of international human rights organizations have on different occasions expressed their concern²⁴ about the impact of this on both the population in general as well as specific groups, such as human rights defenders, journalists or social communicators.²⁵ The interception, collection and use of metadata interferes with the right to privacy, as pointed out by human rights experts, including the UN Special Rapporteur on freedom of expression, the UN Special Rapporteur on the protection of human rights and fundamental freedoms in the fight against terrorism²⁶ and the High Commissioner for Human Rights.²⁷

On this subject, the IACHR Special Rapporteur for freedom of expression has concluded that "[s]uch a practice may be considered a serious violation of the rights of assembly and freedom of association, and even of the right to privacy" and signaling that "[u]nder no circumstances are online intelligence actions allowed to monitor people who organize or take part in social protests."²⁸ The European Union Court of Justice (EUCJ) has considered that the withholding of metadata related to a person's private life and communications is, in and of itself, an infringement upon the right to privacy.²⁹

Such interferences may be in violation of the right to peaceful assembly. The IACHR, in its declaration on the use of surveillance on the Internet, in any of its formats or nuances, has found that it

²² Human Rights Committee, Concluding Observations of the Fourth Periodic Report of the United States of America, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 22.

²³ Human Rights Committee, Concluding Observations of the Fourth Periodic Report of Italy, UN Doc. CCPR/C/ITA/CO/6, 28 March 2017, para. 36.

²⁴ UN. General Assembly. Resolution adopted by the General Assembly on 17 December 2018. 73/179. The right to privacy in the digital age. A/RES/73/179. Available at <<https://undocs.org/en/A/RES/73/179>>.

²⁵ Report of the Special Rapporteur on the situation of human rights defenders. UN Doc. A/70/217, 30 July 2015, para. 46, available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2016/10399.pdf>. United Nations (UN) Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression Special Rapporteur for Freedom of Expression of the OAS Inter-American Commission on Human Rights. Joint declaration on violence against journalists and media workers in the context of protests. 2013. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=951&IID=1>

²⁶ A/69/397, 23/09/2014. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, para. 18, available at: <https://undocs.org/pdf?symbol=es/A/69/397>

²⁷ A/HRC/27/37, 30/06/2014. Report of the High Commissioner for Human Rights on the right to privacy in the digital age. Paras 19 and 20, Available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf

²⁸ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 300.

²⁹ Judgment of the Court, 8 April 2014, Digital Rights Ireland Ltd, C-293/12 and Kärntner Landesregierung, C-594/12, EU:C:2014:238, para. 27, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=150642&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=635772>

"constitutes interference in the private lives of people and, when conducted illegally, can also affect the rights to due process and a fair trial, freedom of expression, and access to information. It is recognized both regionally and universally that illegal or arbitrary surveillance and interception and collection of personal data affect not only the right to privacy and freedom of expression but can also run contrary to the precepts of a democratic society."³⁰

In turn, the Special Rapporteur on the freedom of expression for the Inter-American System recently expressed that

"[in] no case can mere participation in protests, or in their announcement or organization, justify the violation of the right to privacy with respect to private communications made by a person, whether in writing, by voice or images, and regardless of the platform used. The right to privacy encompasses not only individual communications, but also communications that take place in closed groups to which only members have access."³¹

This Special Rapporteur likewise indicates a presumption against intelligence activities applied to contexts of protest, deeming such activities to be, in principle, contrary to Inter-American standards:

"Any intelligence activity related to the political freedoms and rights involved in a protest must have a warrant and external oversight."³²

Because of the intimate relationship previously examined between the freedoms of expression, privacy and peaceful assembly, the above also applies to surveillance actions that may impact the full exercise of such rights, as explicitly recognized by the special rapporteurs on freedom of expression in a joint statement in 2015:

"Conflict situations should not be used to justify an increase in surveillance by State actors given that surveillance represents an invasion of privacy and a restriction on freedom of expression. In accordance with the three-part test for restrictions on freedom of expression and, in particular, the necessity part of that test, surveillance should be conducted only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs, on the one hand, and the rights to freedom of expression and privacy, on the other. Untargeted or "mass" surveillance is inherently disproportionate and is a violation of the rights to privacy and freedom of expression."³³

³⁰ Annual Report of the Inter-American Commission on Human Rights 2016, para. 212, available at: <http://www.oas.org/es/cidh/expresion/docs/informes/anuales/InformeAnual2016RELE.pdf>

³¹ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 299.

³² Ibid, para. 346.

³³ United Nations and IACHR Special Rapporteurs on Freedom of Opinion and Expression. Joint Declaration on Freedom of Expression and Responses to Conflict Situations. 2015. Para. 8, available at: <http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=987&IID=2>

The draft needs to clearly and directly incorporate these elements to define a framework to be able to identify illegitimate interferences in the right of assembly established under Art. 21 of the Covenant. **Surveillance tasks in the context of assemblies must be exceptional and authorized by independent judicial authorities,**³⁴ who must account for the reasons the measure is called for to attain the ends pursued in any given case; whether the measure is sufficiently limited so as not to affect the right involved any more than necessary; and whether it is proportionate to the interest it seeks to promote.³⁵ Measures of mass surveillance, such as technologies of large-scale intervention represent a form of indiscriminate surveillance that goes against all considerations of proportionality.³⁶

In this sense, our view is that a review of paragraphs 11, 29, 38, 70, 71, 72 and 105 of the draft is essential. The language here normalizes and uses permissive wording with regard to surveillance activities. The draft does not sufficiently establish the State's obligation to limit the use of technologies for the mass monitoring or recording of participation in assemblies. Nor is there any reference to the need for focused surveillance to abide by the minimum requirements of necessity and proportionality.

We believe it is particularly relevant to bear in mind what the IACHR has pointed out with regard to conditions of surveillance that are permissible and compatible with the observation and protection of human rights, which

"must be established beforehand in a law and established explicitly, strictly, precisely and clearly, both substantively and procedurally. In view of the inherent risk of abuse of any surveillance system, these measures should be based on legislation that is particularly precise, clear and detailed, and States have to ensure a plural, democratic, and open consultation prior to the adoption of the applicable regulations. The objectives for which surveillance or the interception of communications would be permissible must be explicitly established in the law, and in all cases the laws must establish the need for a prior court order. The nature of the measures, as well as their scope and duration, must be regulated, establishing the facts that could lead to them and the bodies responsible for authorizing, implementing and monitoring them."³⁷

³⁴ UN Special Rapporteur for Freedom of Opinion and Expression and the OAS Special Rapporteur for Freedom of Expression. Joint Declaration on surveillance programs and their impact on freedom of expression, 21 June 2013, points 1-3 and 9; UN Special Rapporteur on the Promotion and Protection of the right to freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHRP) Special Rapporteur on freedom of Expression and Access to Information. 1 Jun 2011. Joint Declaration on Freedom of Expression and the Internet. Points 1 (a) and (b).

³⁵ Para. 165. Available at:

http://www.oas.org/es/cidh/expresion/docs/informes/2014_04_08_internet_web.pdf

³⁶ HRC. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. 17 April 2013, para. 62. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

³⁷ IACHR, Special Rapporteur for Freedom of Expression, "Standards for a Free, Open, and Inclusive Internet," 15 March 2017, para. 217-218.

Furthermore, we recommend that the draft incorporate the call for the States of the United Nations General Assembly to:

a) To respect and protect the right to privacy, including in the context of digital communication;

b) To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;

c) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;

d) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data.”³⁸

4.2. Criminal law and criminalization

General Comment No. 37 **does not include any express mention of the duties of the States party in relation to the criminalization of the exercise of the right to peaceful assembly.**

Criminalization is understood to mean a systematic strategy of silencing that operates by delegitimizing the motives and repertoires of action by leaders and participants in peaceful assemblies through the use of arbitrary detentions and jailing without respect for due process; judicial persecution through criminal or misdemeanor charges filed for organizing or participating in an assembly; punitive legislation that seeks to suppress or place limits upon the exercise of the right,³⁹ among others. In this sense, the Special Rapporteur on freedom of expression for the IACHR has asserted:

³⁸ United Nations. General Assembly. Resolution adopted by the General Assembly on 18 December 2013. 68/167. The right to privacy in the digital era. A/RES/68/167. 21 January 2014. Para. 4. Available for consultation at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167 ; General Assembly. Department of Public Information. General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee.

³⁹ “Criminalization and regulatory suppression of protest does not only take fore form of repressive, blanket restrictions on freedom of assembly such as those found in some undemocratic regimes. It also operates more subtly, through laws that are used to stifle or put a chilling effect on participation in public assembly or in protest.” Take back the streets: Repression and criminalization of protest around the world, International Network of Civil Liberties Organizations-INCLO, Oct. 2013, p. 63.

"The criminalization of social protest consists in the use of the punitive power of the State to deter, punish, or prevent the exercise of the right to protest, and in some cases, to social and political participation more broadly, through the arbitrary, disproportionate, or repeated use of the criminal justice system against demonstrators, activists, and social or political leaders for participating in or allegedly organizing a social protest, or for being part of the organizing or convening group or entity. As the Inter-American Commission has pointed out, its effects often include arbitrary and prolonged prosecution for misdemeanor or criminal offenses, the imposition of fines, and/or arbitrary arrests with or without a conviction."⁴⁰

The aim is to single out those who exercise this right as a threat to public order and national security, which ultimately has a dissuasive effect that hinders the right to peaceful assembly. The IACHR has established that criminalization has an effect both on a personal level, in that it incites fear and anguish in the individual due to the potential loss of freedom, as well as in a collective dimension, because it has the effect of intimidating or inhibiting more people from exercising their right to peaceful assembly in the future for fear of reprisals or also being subjected to unfounded criminal proceedings.⁴¹

General Comment No. 37 **must be more precise about the duties held by judicial systems within States to comply with their obligation to respect and guarantee the right of assembly.** The State itself uses criminal and misdemeanor laws to discredit, stigmatize and pursue organizers and participants in peaceful assemblies merely for exercising that right. Before or during the assembly, arbitrary detentions are made and charged with crimes related to public order, or even for more serious crimes such as terrorism, with no proof other than participation in the assembly. It must be emphasized that individual conduct must be evaluated independently from that of the other participants in a demonstration. **The State holds the burden of proving, through the proper authorities, any violent action by an individual participant, and must not justify criminal charges based on different acts of violence that may have arisen during the assembly.**

The criminalization of the right to peaceful assembly through the excessive and arbitrary use of criminal law is incompatible with the rule of law that guarantees the freedom of expression and freedom of assembly as one of its precepts.

"[...] States have the obligation to take all necessary measures to avoid having State investigations lead to unjust or groundless trials for individuals who legitimately claim the respect and protection of human rights. Opening

⁴⁰ "The criminalization of social protest consists in the use of the punitive power of the State to deter, punish, or prevent the exercise of the right to protest,²⁷³ and in some cases, to social and political participation more broadly, through the arbitrary, disproportionate, or repeated use of the criminal justice system against demonstrators, activists, and social or political leaders for participating in or allegedly organizing a social protest, or for being part of the organizing or convening group or entity. As the Inter-American Commission has pointed out, its effects often include arbitrary and prolonged prosecution for misdemeanor or criminal offenses, the imposition of fines, and/or arbitrary arrests with or without a conviction." OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 188.

⁴¹ IACHR. Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II. Doc. 6631 December 2011, para. 79.

groundless criminal investigations or judicial actions against human rights defenders not only has a chilling effect on their work but it can also paralyze their efforts to defend human rights, since their time, resources, and energy must be dedicated to their own defense”⁴²

Furthermore, the formulation of criminal offenses must comply with a series of elements so as to impede the persecution of certain individuals through alleged protection of legal assets, accusing them of crimes without sufficient criminal-political grounds. **Definitions of criminal offenses must employ strict, unmistakable terms that leave no room for broad interpretation or application by judges, but instead are clearly constrained to punishable conduct.**⁴³ In other words, criminal legislation and its application, case by case, must always be circumscribed to the principle of legality so as to prevent the criminalization of legitimate conduct by individuals while exercising their right to peaceful assembly, but that may be seen as a threat or obstacle to the State.

4.3. Detentions

The draft version of the General Comment repeatedly mentions elements related to the detention of participants. In broad strokes, it establishes that the protection of the right to peaceful assembly is related to the right to not be submitted to arbitrary detention, i.e., to not be illegally deprived of one's freedom. It likewise establishes that, in cases where the detention of certain individuals is legal and required, said detention must comply with international and national legislation on the use of force.

We recommend, however, that the draft **incorporate the most advanced standards regarding detentions and their use in the context of the exercise of the right of assembly** as a way to impede the exercise of that right, deter, punish, prevent the recording and spread of images of police action and generate a dissuasive effect in the population, **particularly those established by the Inter-American System of Human Rights.**

These detentions must adhere not only to national and international standards on the use of force, but also "those that refer to the rights of privacy, liberty and procedural guarantees."⁴⁴ Indeed, detentions must be sufficiently justified and grounded in reasonable motives, not simply as a consequence of the exercise of the right of assembly. No participant in a peaceful assembly can be subjected to arbitrary detention or prison, because

"No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." ⁴⁵

⁴² Ibid, para. 76.

⁴³ OEA/Ser.L/V/II. Doc. 6631 December 2011, para. 80 and 81.

⁴⁴ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 128, available at: <https://www.oas.org/es/cidh/expresion/publicaciones/ProtestayDerechosHumanos.pdf>

⁴⁵ Convención Americana de Derechos Humanos, art. 7.2.

That said, "the force used by police officers to immobilize or arrest someone at a demonstration must be strictly proportional to the intended objective and shall only be applied to the extent necessary according to the resistance offered by the person against whom it is to be used."⁴⁶ Once the person is detained, protection cannot be suspended from the other rights protected, such as the right to life, human dignity, non-discrimination, privacy, the right to not be submitted to cruel, inhuman or degrading treatment, among others. In this sense:

"Detained persons have the right to live in conditions of detention that are compatible with their personal dignity and the State must guarantee their right to life and to humane treatment. State authorities exercise total control over persons under their custody and therefore States are guarantors of the physical integrity of detainees."⁴⁷

Detentions, retentions or transfers of persons in contexts of assemblies, demonstrations or social protests must not be used for the purpose of repressing, punishing, stigmatizing, pursuing or discouraging participation in future assemblies. In other words,

"An arrest based exclusively on the act of participating in a protest or public demonstration does not meet the requirements of reasonableness and proportionality established by international standards. The deprivation of liberty during a demonstration has the immediate effect of preventing the detainee from exercising the right to protest and has a chilling effect on participation in public demonstrations, all of which affects the enjoyment and exercise of the right to social protest."⁴⁸

It is important to remember that arbitrary detentions are a practice which law enforcement officials often resort to in order to punish participants in a demonstration, thus failing to comply with all international protocols and standards when it comes to procedural guarantees and the principle of legality. It is intimately related to the criminalization of the exercise of the right of assembly. Moreover, during the course of the detention, it is common for other rights to be violated, such as the right to physical integrity, to information, privacy, and defense, among others. In this sense, any detention or arbitrary incarceration must be investigated and sanctioned. States must comply with a series of specific obligations on this subject, including:

- i. stipulating that no person shall be deprived of his or her liberty except under the circumstances that the law specifically prescribes;
- ii. guaranteeing that persons in the custody of State authorities will receive decent treatment;

⁴⁶ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 129, available at:

<https://www.oas.org/es/cidh/expresion/publicaciones/ProtestayDerechosHumanos.pdf>

⁴⁷ OEA/Ser.L/V/II. Doc.57, 2009, para. 151, available at:

<https://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CIUDADANA%202009%20ESP.pdf>

⁴⁸ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 228, available at:

<https://www.oas.org/es/cidh/expresion/publicaciones/ProtestayDerechosHumanos.pdf>

- iii. incorporating into its domestic laws the obligation of State agents to immediately inform the person detained of the reasons for his or her detention;
- iv. immediately reporting the detention to the competent judge for a determination of the detained person's rights;
- v. informing the detained person's next of kin and loved ones of his or her whereabouts and the reasons for the detention;
- vi. guaranteeing the detained person the services of legal counsel from the moment of his or her arrest; and
- vii. organizing a public record of persons taken into custody.⁴⁹

5. Obligations of States parties regarding the right to peaceful assembly

5.1. Exclusion of the Armed Forces

The standard excluding the Armed Forces from security tasks is extensively developed in the Inter-American Human Rights System. The attached document proposes re-wording paragraph 92 by deleting the expression “generally” and inserting greater precision regarding the need to exclude the Armed Forces from functions of facilitating assemblies, in line with state obligations within the framework of article 21. As the Inter-American Court observed,

“States should limit to the utmost the use of the armed forces for controlling internal disturbances because their training is aimed at defeating the enemy, not at protecting and controlling civilians, which is what police forces are trained to do.”⁵⁰

Broadening this principle, in the 2007 Zambrano Vélez vs. Ecuador case, the Court considered that it is

“[a]bsolutely necessary to emphasize the extreme care that states should exercise upon using the Armed Forces as a means to control social protest, internal riots, internal violence, exceptional situations and common crime. As noted by this Court, ‘states should limit to the utmost the use of the armed forces to control internal riots because their training is aimed at defeating the enemy, not at protecting and controlling civilians, which is what police forces are trained to do’.

⁴⁹ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 140, available at:

<https://www.oas.org/es/cidh/expresion/publicaciones/ProtestayDerechosHumanos.pdf>

⁵⁰ Inter-American Court of HR, Montero Aranguren et al. (Retén de Catia) vs. Venezuela, 2006, para. 78.

The boundary between military and police functions should guide strict compliance with the duty of prevention and protection of the rights at risk, for which domestic authorities are responsible.”⁵¹

Within a context of rapid militarization of state action in the context of assemblies, we consider it crucial that General Observation No. 37 should include these developments made over several years in the Inter-American Human Rights System.

6. Accountability

6.1. Transparency and Access to Information

In different parts of the American continent, people’s right to assemble and protest has been violated. The right to protest arises from the articulation of the right to assembly and the right to freedom of expression, as well as from the right to political participation.

It falls to the State to ensure that these rights can be exercised effectively, wherefore it is essential to activate effective mechanisms of citizen oversight of state action. This requires transparency, access to information and accountability. **In such regard, we note that General Observation No. 37 is not precise in its reference to the state obligations of producing information and ensuring that it is available to citizens.**

Freedom of information is part of the fundamental right to freedom of expression recognized by Resolution 59 of the United Nations General Assembly of 1946, and by article 19 of the Universal Declaration of Human Rights, which establishes that everyone has the right to freedom of expression, which includes the right to “seek, receive and impart information and opinions through any media and regardless of frontiers.”

Moreover, freedom of information has also been enshrined as deriving from freedom of expression in other international human rights instruments, such as the Pact and American Convention on Human Rights, which indicate:

“Everyone has the right to freedom of expression; this right includes freedom to seek, receive and impart information and ideas of any kind, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any medium procedure of one’s choice.”⁵²

Access to information is considered a “key right” because it enables citizens to enjoy other rights. For the purposes hereof, it would involve, for example, access to the information needed to exercise the right to protest and the right to assembly; but also to information that may be essential to enabling other rights such as the right to access justice if there are violations of demonstrators’ rights or excessive use of force by security forces during an assembly; or to protect the right to privacy in the case of someone being the object of surveillance policies. For these cases, it is essential that citizens should be able to know in advance the intended security arrangements or action protocols, and subsequently to

⁵¹ Inter-American Court of HR, Zambrano Vélez vs. Ecuador, 2007, para. 51.

⁵² United Nations International Covenant on Civil and Political Rights, 1966. Article 19.
OAS, American Convention on Human Rights (Pact of San José), 1969. Article 13.

have access to accounts of the actual use of arms, video recordings or other data and records.

It is thus essential for citizens to have access to the information needed to exercise the rights related to article 21 of the Pact, for which it is essential that there should not be undue restrictions to information. In such regard, the IACHR Office of the Special Rapporteur for Freedom of Expression has expressed itself by developing a set of standards on access to information related to the right to social protest⁵³, which note that there should be broad criteria for access to information and the consequent obligation for the State to produce information and records.

We believe that it is critical that the United Nations international standard should not be lower than the regional standard, and in this regard, **the signatory organizations adopt as our own the suggestions of the aforementioned RFOE report which includes previous standards and opinions generated by various international bodies.** The report also adds some clarifications, stressing that the State should guarantee that citizens can access information, which must cover at least the following:

- The right to access information includes the right to “record an assembly, which includes the right to record the law enforcement operation. This also includes the right to record an interaction in which the he or she is being recorded by a state agent, sometimes referred to as the right to “record back.” The state should protect this right. Confiscation, seizure and/or destruction of notes and audio or audiovisual recording equipment without due procedural guarantees should be prohibited and punished.”⁵⁴
- The State has the duty to document and record the actions of its agents, in order to enable review and improvement of their actions, with the aim of enabling any necessary oversight in case of any irregularity.⁵⁵
- The regulations governing social protest should be accessible and published. This includes not only laws, but also protocols or procedural manuals and orders on how to conduct operations.⁵⁶

⁵³ OEA/Ser.L/V/II CIDH/RELE/INF.22/19

⁵⁴ Human Rights Council. “Joint report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies,” A/HRC/31/66, 4 February 4 2016, para. 71 / Also at: OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 308.

⁵⁵ ROEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 309.

⁵⁶ “*Legislation guiding the police shall be accessible to the public and sufficiently clear and precise and, if need be, completed by clear regulations equally accessible to the public.*” European Code of Police Ethics. Recommendation Rec. (2001) 10 of the Committee of Ministers to the member states on the European Code of Police Ethics. II 4) / Also in: OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 310.

- The state should keep a detailed record of assigned weapons and ammunition, and establish procedures and forms of supervision so that, in the context of demonstrations, only permitted weapons are assigned.⁵⁷

6.2. Protocols for criteria for use of force

Related to the general obligation of States parties to respect and guarantee the right to peaceful assembly is the obligation of accountability and providing effective remedies when this right is violated.

General Observation No. 37 mentions accountability with regard to its importance in preventing violations and abuses of rights (paragraph 71), the duty to report any use of force (paragraph 88), state responsibility for actions and omissions of its law enforcement agencies (paragraph 100) and the use of recording devices by law enforcement officials (paragraph 105).

However, there is no specific development of the duty of accountability in relation to the protocols and criteria for use of force. Transparency and the possibility of everyone being able to access the information on the use of force are highly relevant in the context of the right to peaceful assembly. This means that the rules and regulations on this subject **must clearly establish the duties and responsibilities of those officials who participate in managing assemblies**, the procedures to be followed in relation to the exercise of the right, which authorities are responsible and what resources are available in the event that there is a violation of this right and others within the framework of a peaceful assembly.

Given that during the exercise of the right there may be different events involving use of violence by participants or others infiltrated in the assembly, the possibility arises that the law enforcement agents may employ force. This use of force cannot under any circumstances be arbitrary, excessive or discriminatory. In this context:

“Legislation should mandate collection and reporting of data on the use of force, including: numbers and types of weapons deployed; arrests; stops and searches conducted; and the training that officers have received on the use of CCWs and equipment. There should be a centralized system for reporting each instance a CCW or a firearm is used or drawn, whether it resulted in injury or death, and the demographic information of the individuals against whom force was used. An unjustified failure to report or keep adequate records should constitute grounds for disciplinary action.”⁵⁸

⁵⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 11. IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, OEA/Ser.L/V/II.Doc. 34, 28 June 2007 Chapter I, Introduction. Par. 45 b) / Also in: OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 312.

⁵⁸ Defending dissent: Towards State Practices that Protect and Promote the Rights to Protest. International Network of Civil Liberties Organizations-INCLO & The International Human Rights Clinic (IHRC). 2018. p. 11.

The use of force should follow a series of protocols previously established in the national legislation, respecting the highest international standards, with sufficiently clear principles and criteria enabling evaluation of when force was deployed adequately and when it was not. Thus, said protocols should be available and easily accessible to everyone, whether or not they participate in a peaceful assembly.

“All regulations governing social protest must be accessible and published. These regulations include not only laws, decrees and ordinances, but also general protocols, procedural manuals and specific orders on how to conduct operations. The knowledge and disclosure of these protocols and ethical norms reduce the arbitrary margins of decisions and actions by state agents in relation to social protests.”⁵⁹

Being easily accessible means not only that they are easy to find, but also that their language can be understood by everyone without major difficulty. Moreover, **the criteria governing the use of force: legality, necessity, proportionality, caution and non-discrimination, should be defined as clearly as possible** in order to prevent broad, ambiguous interpretations that could cause an illegitimate use of force to be considered acceptable, thereby enabling agents who commit abuse and arbitrary actions not to be held accountable for doing so.

Agents should apply techniques of social dialog and de-escalating conflict before using force, which should only be employed as the last resort. As noted by the UN, **governments shall ensure that arbitrary or abusive use of force is punished as a criminal offence**⁶⁰. This includes knowledge and timely access to legal remedies by anyone in case of alleged violations of the right to peaceful assembly or other rights that may be affected during its exercise. However, knowing the legal remedies that are available to individuals is not sufficient to ensure protection of rights. Access to legal remedies must be effective and efficient; the authorities in charge of processing the remedies must act independently and transparently so that investigations have the necessary momentum, they must not allow themselves to be influenced by corruption, and they must be able to impose a penalty at the end of the process.

In addition to the above, we highlight the obligation to provide **command structures which are clear and known to everyone, in order to support accountability** regarding the management of peaceful assemblies⁶¹ and, if relevant, also regarding the use force. Any use of force by law enforcement agents must be reported, notified, recorded in detail and duly justified.

⁵⁹ OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 310.

⁶⁰ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principles 6, 7 and 22.

⁶¹ “It is also important that the operational planning instructions identify the senior command officers responsible for the operation and the participating units. The main orders and instructions given during the operation must also be recorded and substantiated. Protocols should clearly set out the levels of responsibility for different orders..” OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 315.

“It is the duty of the state to keep a detailed record of assigned weapons and ammunition. It is essential to establish procedures and forms of supervision so that, in the context of demonstrations, only authorized officials are assigned the weapons permitted for potential use. This is done by individually assigning weapons and ammunition, as well as identifying the officers responsible for supervising and documenting proper and effective compliance with these provisions.”⁶²

When, as a consequence of the use of force, whether legitimate or illegitimate, there are deaths or injuries, these events should be reported and subject to a strict investigation process in order to determine whether or not the state was responsible for improper procedure. These **investigations, at both criminal and administrative level, should be transparent, independent and fair.** This contributes to preventing the state and its agents from committing further violations of the right to peaceful assembly and the other rights which may be affected during its exercise, since in addition to individual criminal liability that may be identified, the responsibility of the institution can also be determined, as well as related organizational factors such as lines of command, procedural norms, operation planning, type of weapons used and even agent training.

“The State also has the duty to document and record the actions of its agents, in order to allow for the review and improvement of their actions [...]. The accessibility and conservation of these records also facilitate the necessary oversight of any reported irregularities.”⁶³

Thus, robust mechanisms for accountability are an essential component for protecting the right to peaceful assembly, because they enable detailed knowledge of the legal framework governing the action of law enforcement agents, thereby monitoring its compliance with required human rights standards, applying penalties when there is any shortcoming in the right to peaceful assembly and other rights related to its exercise.

6.3. Accountability regarding use of surveillance technologies

Considering that the use of surveillance technologies by states involves interference with the inherent right to privacy and subsequent impact on other rights, including the right to assembly, additional measures should be adopted to enable conditions of transparency and accountability in the acquisition and use of these technologies.

Throughout the wording of General Observation No. 37 proposed by the Committee, reference is made to various ways of using technologies during surveillance tasks. However, **it does not address the importance of having monitoring tools, among which we highlight measures of transparency and access to information in cases when these technologies are implemented** before, during or at activities related to the right to peaceful assembly.

In relation to these ideas, both the regulation of the conditions and exceptional circumstances that authorize surveillance activities, and the procedure for their licit use,

⁶² Ibid, para. 312.

⁶³ Ibid, para. 309.

should be included in the law, known by citizens. Moreover, monitoring tools for citizens should be provided legally, including obligations of active and passive transparency, and the mechanisms for evaluation and penalty of abuse in surveillance actions. Similarly, there is a need for transparency and access to information on the contracts, remedies, practices and statistics reflecting how the states perform these intrusive activities.

Faced by the risk of arbitrary action, which is especially evident in cases where discretionary faculties are exercised, the European Court of Human Rights (ECtHR) takes the view that regarding secret surveillance measures, the requirement that they must be provided by law means that sufficiently clear terms must be used to indicate adequately the circumstances and conditions under which public authorities are authorized to take such measures, because it is essential to have clear, detailed rules on the subject.⁶⁴

The former United Nations Special Rapporteur for the promotion and protection of the right to freedom of expression and opinion, Frank La Rue, has called upon the states to review national legislation regulating surveillance of communications so that it adapts to international standards through measures such as independent judicial supervision; establishment of measures related to the scope, nature, duration and circumstances under which surveillance can be adopted; deferred notification of the affected person; access to adequate, effective judicial remedy; respect of the principle of proportionality; supervision by an independent agency; measures of transparency and other measures inhibiting abuse of surveillance powers.⁶⁵

The lack of oversight on the surveillance activities employed in the context of a peaceful assembly, whether massively or specifically regarding a given participant, involves the inherent risk of abuse;⁶⁶ therefore, tools such as transparency are essential to the existence of social oversight over this type of measures, in order to inhibit risks of abuse and ensure adequate informed public discussion of the risks involved in surveillance measures, particularly when performed secretly or in a manner unknown to the persons affected.

The importance of transparency regarding secret surveillance measures has been widely recognized by various international human rights agencies; among others, in the resolution “*The right to privacy in the digital age*,” adopted by consensus by the members of the UN General Assembly of December 18, 2013 and again on November 19, 2014:

Recommends that states should establish or maintain “independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for state surveillance of communications, their interception and collection of personal data”⁶⁷.

⁶⁴ European Court of HR. *Uzun vs. Germany*. Application No. 35623/05. Sentence of 2 September 2010, para. 61; *Valenzuela Contreras vs. Spain*. Application No. 58/1997/842/1048. Sentence of 30 July 1998, para. 46.

⁶⁵ UN. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. 17 April 2013. A/HRC/23/40.

⁶⁶ European Court of HR. *CASE OF THE ASSOCIATION FOR EUROPEAN INTEGRATION AND HUMAN RIGHTS AND EKIMDZHIEV vs. BULGARIA*, paras. 90-94.

⁶⁷ UN. General Assembly. Resolution approved by the General Assembly on December 18, 2013. 68/167. *The right to privacy in the digital age*. A/RES/68/167. 21 January 2014.

A similar idea was expressed in the Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression by the UN and the IACHR Special Rapporteur for Freedom of Expression:

“All persons have the right to access information held by the state, including information having to do with national security. The law may establish specific exceptions as long as those exceptions are necessary in a democratic society. The laws must ensure that the public can access information on private communications surveillance programs, including their scope and any regulation that may be in place to guarantee that they cannot be used arbitrarily. Consequently, states should, at the very least, make public any information regarding the regulatory framework of surveillance programs; the agencies in charge of their implementation and oversight; the procedures for authorization, selection of targets, and data management; and information on the use of these techniques, including aggregate data on their scope. At all times, states must establish independent oversight mechanisms that are capable of ensuring program transparency and accountability. (...)”

The state has the obligation to make known widely any information on the existence of illegal programs of surveillance of private communication. This duty must be satisfied without prejudice to the right to personal information of anyone affected. In every case, states must perform exhaustive investigations to identify and punish anyone responsible for these types of practices and provide timely notification to those who may have been victims.”⁶⁸

Notwithstanding the above, **states often adopt laws and procedures that foster uncertainty and serve as protection for abuse by authorities; the example *par excellence* is withholding information on surveillance for reasons of “national security.”** Reliance on reasons of national security in order not to deliver information on intrusive activities and technologies constitutes a risk to the obligations and transparency and makes accountability impossible, seriously limiting the exercise of fundamental rights included in the right to assembly.

In such regard, Principle 1.3 of the Johannesburg Principles⁶⁹ establishes that in order to impose a restriction on freedom of expression or information, it must be necessary to protect a legitimate interest, and the government must prove that:

“1. The expression or information at issue poses a serious threat to a legitimate national security interest;

⁶⁸ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the OAS, Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression. Available at:

<https://www.oas.org/es/cidh/expresion/showarticle.asp?artID=926&IID=2>

⁶⁹ Article 19. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information. November 1996. Available at:

<https://www.article19.org/data/files/medialibrary/1803/Johannesburg-Principles.Spa.pdf>

2. The restriction imposed is the least restrictive means possible for protecting that interest; and
3. The restriction is compatible with democratic principles.”

The above was reinforced by the development of instruments such as the Global Principles on National Security and the Right to Information (Tshwane Principles)⁷⁰, which have worked on the requirements to restrict the right to information due to reasons of national security, emphasizing that:

“No restriction on the right to information may be imposed on the grounds of national security unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate interest of national security; and (2) the law provides adequate safeguards against potential abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restrictions by an independent oversight authority and full review by the courts.”⁷¹

The Tshwane Principles make very clear the need to recognize the obligation of states to ensure transparency regarding surveillance programs for purposes of national security, because, as noted in Principle 10, the information categories on which there is a strong assumption or essential interest in favor of it being made public consist of the following:

“E. Surveillance (1) The laws and main regulations concerning secret surveillance of all kinds, as well as the procedures to be followed for authorizing such surveillance, selecting targets, and using, sharing, storing, and destroying intercepted material, should be accessible to the public.

(2) The public should also have access to information about entities authorized to conduct surveillance, and statistics about the use of such surveillance.

(3) In addition, the public should be informed regarding illegal surveillance. Information about such surveillance should be disclosed to the maximum extent without violating the privacy rights of those who were subject to surveillance.

(4) These Principles address the right of the public to access information and are without prejudice to the additional substantive and procedural rights of individuals who have been, or believe that they may have been, subject to surveillance.”

⁷⁰ Global Principles on National Security and the Right to Information (“Tshwane Principles”) concluded in Tshwane, South Africa and published on 12 June 2013. Available at: https://www.aclu.org/sites/default/files/assets/spanish-version_of_the_tshwane_principles.doc

⁷¹ Global Principles on National Security and the Right to Information (“Tshwane Principles”) concluded in Tshwane, South Africa and published on 12 June 2013. Principle 3. Available at: https://www.aclu.org/sites/default/files/assets/spanish-version_of_the_tshwane_principles.doc

Considering the importance of reiterating the need to have in place measures for transparency associated to surveillance activities by states, it is equally important not to ignore the mechanisms by which authorities may disregard their obligations of transparency. It is therefore suggested that the General Observation should add a paragraph considering this situation.

Conclusion

The group of Latin American human rights organizations signing this contribution call for the review of the draft of General Observation No. 37 on the right to assembly in the light of the information shared herein based on the experience in the field of our organizations.

It is essential that the General Observation should be clear regarding state obligations in relation to Article 21 of the Pact and consistent with developments in standards and practical recommendations in recent years at regional level, in particular in the European and Interamerican System, and those developed at international level by the different agencies encompassed in the United Nations.

We urge Committee members to review the specific suggestions for improvements or adjustments in the wording, which we have attached as an ANNEX to this document.