**Written comments of Greenpeace International on
revised draft General Comment No. 37

21 February 2020**

*Contact person: Daniel Simons, Legal Counsel, daniel.simons@greenpeace.org*

Greenpeace International (GPI) welcomes the opportunity to comment on the UN Human Rights Committee’s revised draft of General Comment No. 37.

The draft deals with a large number of important issues in a succinct and sensible manner, and it will give valuable guidance both to national authorities and those exercising the right to freedom of peaceful assembly.

In this submission, we briefly highlight a number of points on which we believe the draft could be further improved.
 **Scope of the right of peaceful assembly**

Paragraph 12 of the draft explains that the question whether an assembly is protected by Article 21 ICCPR entails a two-stage process: it must first be established whether the conduct falls within the *scope* of the right, and if so, it must secondly be established whether or not legitimate *restrictions* apply.

National authorities will sometimes be tempted to interpret the scope of the right unduly narrowly, so as to avoid reaching the second stage in which they must justify the restriction. There are a few places in which the draft in our view leaves too much room for such manoeuvring.

One example occurs in paragraph 18, which states that “[c]ivil disobedience or direct-action campaigns are in principle covered by article 21, provided they are non-violent” (emphasis added). The wording seems to imply that there may also be assemblies of this kind that, while non-violent, are nevertheless outside of article 21. That should not be the case.

Secondly, paragraph 20 provides that “[v]iolence by the authorities against participants in a peaceful assembly does not in itself render the assembly violent.” This creates the troubling impression that violence used by authorities can nevertheless contribute in some way to removing an otherwise peaceful assembly from the protection offered by article 21.

**Assemblies on privately-owned property**

Paragraph 13 states that “[a]ssemblies can be held on publicly or privately-owned property [provided the property is publicly accessible].” The square brackets indicate a yet-unresolved debate whether a gathering on property that is not publicly accessible can constitute an assembly.

We can see no good reason why a peaceful, expressive gathering on such property – for example, a protest within a fenced-off industrial site, or a lecture in a private home – should fail to attract the protection of article 21 ICCPR. This would have as a consequence that the public authorities were no longer bound by the requirements of legality, necessity and proportionality in their approach to such an event.

Regional instruments do not limit the scope of the right to gatherings that take place on publicly accessible property. For example, the *Guidelines on Freedom of Association and Assembly in Africa* state simply that “[a]ssembly refers to an act of intentionally gathering, in private or in public, for an expressive purpose and for an extended duration.”[[1]](#footnote-1) The *OSCE-ODIHR and Venice Commission Guidelines on Freedom of Peaceful Assembly* provide that “all types of peaceful assembly – both static and moving assemblies, as well as those that take place on publicly or privately owned premises or in enclosed structures – deserve protection.”[[2]](#footnote-2) This position appears correct to us.

**Assemblies and business**

It is GPI’s experience that authorities in many jurisdictions display low or zero tolerance towards assemblies that cause disruption to a corporation or other private party. Such protests are often promptly dispersed, and courts seem to set a low threshold for the issuance of injunctions or the awarding of compensation. Accordingly, we welcome the statement in paragraph 35 that “[p]rivate entities and the broader society … may be expected to accept some level of disruption, if this is required for the exercise of the right of peaceful assembly.”

Particular tolerance can be expected of wealthy figures and large corporations, given their position of influence and greater ability to absorb such impacts. The European Court of Human Rights (ECtHR) has repeatedly held that “large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.”[[3]](#footnote-3) While these judgments concerned criticism in written form, in our view there is no reason to take a different approach where it concerns criticism expressed through an assembly. A statement to this effect in the General Comment would be of meaningful help to organisers of and participants in assemblies who find themselves at the receiving end of SLAPP suits, *i.e.*, lawsuits by large corporations or powerful individuals designed to silence critics by intimidating and harassing them, and draining their resources.

As the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Ms. Annalisa Ciampi, has pointed out, effectively deterring such SLAPPs also requires procedural guarantees:

“States should protect and facilitate the rights to freedom of expression, assembly and association to ensure that these rights are enjoyed by everyone by, *inter alia*, enacting anti-SLAPPs legislation, allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse.”[[4]](#footnote-4) (emphasis added)

We respectfully submit that the Committee should consider recognising in the General Comment that Article 21 ICCPR entails a duty to enact such safeguards.

**Criminal and administrative proceedings**

Paragraph 76 of the draft states that “criminal or administrative sanctions … against participants in a peaceful assembly … must be proportionate and cannot apply where their conduct is protected by the right.” We agree with this statement, but consider that it should be widened to encompass the full investigative process, not only the sentencing phase. There is a lamentable practice in many jurisdictions of bringing unreasonable charges in response to assemblies (such as sedition, terrorism or hooliganism), and holding suspects in prolonged pre-trial detention. A helpful overview of such cases in the Americas is presented in the IACHR’s 2015 Report on the Criminalization of the Work of Human Rights Defenders.[[5]](#footnote-5) Often, the individual is ultimately not convicted, or convicted on a lesser charge and given a minor sentence, creating a façade of proportionality, despite the very real chilling effect exerted.

It would therefore be very useful if the General Comment clarified that the requirements of necessity and proportionality apply to all stages of the pre-trial process,including decisions whether to bring charges, what type of charge to bring (criminal or administrative), which specific charge to press, and whether to impose restrictions on the individual’s freedom of movement pending trial.

**Notification requirements**

The draft points out in paragraph 82 that prior notification must not be required for spontaneous assemblies, since they do not allow enough time to provide such notice. We believe there is a further category of assemblies that should be exempted from any notice requirements, namely, assemblies whose effectiveness depends on the element of surprise. There at least two varieties of assemblies that fit this description: flash-mobs and direct action protests.

Flash-mobs are by definition unexpected events, and informing the authorities in advance would often defeat their purpose. Direct action protests typically consist of a symbolic confrontation. If prior notice is given, word may reach the action target, which may then make preparations that cause the action to lose its sting, or even prevent it from going ahead entirely.

In *Chernega and Others v. Ukraine,* the European Court of Human Rights recognised that requiring prior notice is not appropriate in the case of obstructive protest actions:

The Court is not convinced, moreover, that a purely obstructive protest action which, by its very nature, would normally be unlawful as infringing on the rights and legitimate interests of third parties, could, in principle and as a practical matter, be subjected to prior notification requirements. Such a requirement would deprive many such actions of much effect and would amount to a requirement to declare the intention to break the law.[[6]](#footnote-6)

While the Court speaks about purely obstructive actions, its concern about depriving protests of their effect is equally relevant in relation to non-obstructive protest actions, such as activists unfurling a banner on a landmark or chaining themselves to a fence, without impeding any person or activity.

1. African Guidelines, para. 3. [↑](#footnote-ref-1)
2. OSCE Guidelines, para. 1.2. [↑](#footnote-ref-2)
3. See, for example, *Steel and Morris v. United Kingdom*, ECtHR, 15 February 2005,para. 94; *Timpul Info-Magazin and Anghel v. Moldova,* ECtHR, 27 November 2007, para. 33. [↑](#footnote-ref-3)
4. Info Note on SLAPPs and FOAA Rights, 2017, available online at <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>. [↑](#footnote-ref-4)
5. IACHR, *Report on the Criminalization of the Work of Human Rights Defenders,* OEA/Ser.L/V/II, Doc.49/15, 31 December 2015. See in particular paras. 45-46, discussing excessive charges against people participating in protests. [↑](#footnote-ref-5)
6. *Chernega and Others v. Ukraine,* ECtHR, Judgment of 18 June 2019, para. 239. [↑](#footnote-ref-6)