



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

**SUBMISSIONS ON GENERAL COMMENT NO 37 OF THE HUMAN RIGHTS
COMMITTEE ON ARTICLE 21 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS ON THE RIGHT TO PEACEFUL ASSEMBLIES**

SUBMITTED TO:

HUMAN RIGHTS COMMITTEE
OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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A. BACKGROUND

The Kenya National Commission on Human Rights (“the Commission”) is an Independent National Human Rights Institution established under article 59 of the Constitution of Kenya and operationalized by the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya. The Commission’s mandate is implemented through various strategies including research, advocacy and lobbying, education and training, complaints and investigations, litigation, monitoring, partnership building and networking among others. The Commission’s functions are guided by the 1993 United Nations approved principles on the establishment and functioning of national institution (Paris Principles) and is accredited as an ‘A’ status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples’ Rights.

The Commission makes this Submission pursuant to its mandate to promote constitutionalism; develop a culture of human rights in the Republic and the constitutional duty to enhance state compliance with regional and international human rights obligations and in line with the Paris Principles on the role of NHRIs.

B. GENERAL OBSERVATIONS

The Commission welcomes the draft General Comment which it perceives as comprehensive and well thought out. Indeed, the General Comment will go a long way in guiding the interpretation and application of the various aspects of the right to peaceful Assembly under Article 21 of the Covenant which has been problematic for the member States.

We particularly welcome the General Comment’s coverage of the core issues in the enjoyment of the right to peaceful assembly including the scope of protection under the Article, the elaborate clarification on the obligations of state parties with regard to the right to assembly as well as the duties and powers of law enforcement agencies. The General Comment does well to demystify the hitherto problematic elements such as the question of notification *vis* authorization; liability of organisers of peaceful assemblies and the often overlooked yet important nuggets as to time, place and manner of conducting peaceful assemblies. The Commission therefore lauds the Committee on this bold and progressive Guide.

The Commission however notes that the General Comment relies extensively on European jurisprudence and standards. While there is nothing fundamentally wrong with citing decisions of the lower chambers of the ECtHR, the risk is future determinations of the Grand Chamber may develop different standards. The relevance of sections of the General Comment that rely on

decisions of the ECtHR will then be diminished. For consistency and predictability, it is desirable that the General Comment places greater reliance on the Human Rights Committee's own work (Communications, Concluding observations and other General Comments e.g. GC 34 and 36 etc); jurisprudence from other human rights systems and other relevant sources some of which are encapsulated under Article 38(1) of the Statute of the International Court of Justice.

C. SPECIFIC COMMENTS ON GENERAL COMMENT NO 37 ON THE RIGHT TO PEACEFUL ASSEMBLY

1. Role of National Human Rights Institutions (NHRIs)

Paragraph 33 of the General Comment calls on State Parties to ensure independent and transparent oversight of all bodies involved in managing peaceful assemblies. National Human Rights Institutions established in accordance with Principles relating to the Status of National Institutions (Paris Principles) play a critical role in the protection and promotion of human rights including the right to peaceful assemblies. As described by United Nations Office of the High Commissioner for Human Rights in its publication on National Human Rights Institutions, National Human Rights Institutions serve as the cornerstone of national human rights protection systems.¹ The Paris Principles describe the responsibilities of NHRIs as falling within two categories: human rights protection and human rights promotion. Human rights promotion entails, 'creating a national culture of human rights where tolerance, equality, and mutual respect thrive.'² Human rights protection involves 'helping to identify and investigate human rights abuses, to bring those responsible for human rights violations to justice, and to provide a remedy and redress for victims.'³

The Paris Principles mandate national human rights institutions to:

- (i) Submit advisory on legislative or administrative provision; provision of judicial organizations; situation of violation of human rights
- (ii) Monitoring and drawing to the government any situation in any part of the country where human rights is violated and make proposals to the government for initiatives to put to an end to such situations

¹ Office of the High Commissioner for Human Rights 'National Human Rights Institutions: History, Principles and Responsibilities (United Nations New York and Geneva, 2010) available at https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf

² Ibid page 21

³ Ibid page 21

- (iii) Promote harmonisation of national legislation, regulations, and practices with the international human rights instruments to which the state is a party and their effective implementation.
- (iv) Public awareness and human rights education
- (v) For National Human Rights Institutions with quasi-jurisdictional competence, the power to hear and consider complaints and petitions concerning individual situation and to seek redress or remedy where violations have been established.

With respect to the right to peaceful assembly, national human rights institutions by virtue of their mandate can undertake the following:

- (i) *Advise parliament on legislation touching on peaceful assembly in a bid to promote harmonization with international human rights instruments including the International Covenant on Civil and Political Rights-* The United Nations Principles relating to the Status of National Institutions requires National Human Rights Institutions to submit to Government, Parliament and any other competent body... recommendations... on any matter concerning the promotion and protection of human rights.’ In relation to the right to peaceful assembly, the Kenya National Commission on Human Rights has previously submitted an advisory to the National Assembly on proposed amendment to the Public Order Act which proposes to empower courts to order organisers of assemblies that have turned violent and have resulted in damage to property or loss of earnings, to pay compensation to the persons who have been affected.⁴
- (ii) *Advocacy towards the domestication of regional and international framework and harmonization of national framework touching on peaceful assemblies:* The Commission has been on the forefront towards advocating for the domestication of article 21 of the Covenant and the African Commission on Human and People’s Rights Guidelines for the policing of assemblies by law enforcement officials. In 2016, the Commission together with the National Police Service drafted regulations on the police use of force and firearms and public order management. These draft regulations are however yet to adopted.
- (iii) *Monitoring and documenting violation arising out of assemblies-* The Commission in view of its constitutional mandate to *monitor and report on the observance of human rights in all spheres of life in the Republic* have continuously monitored assemblies,

⁴ The advisory of the Commission to the National Assembly on the Public Order (Amendment) Bill, 2019 is annexed to this submissions

documented rights violations arising therefrom and drawn the attention of duty bearers to violations committed in the context of policing assemblies.⁵

- (iv) *Developing publication guides on the right to peaceful assembly-* The Commission in noting violations arising out of policing assemblies, has developed guidelines for the Kenya Police and the Public on the right to peaceful assembly in collaboration with Office of the High Commissioner for Human Rights, the Independent Policing Oversight Authority (civilian police oversight authority) and civil society organizations.⁶
- (v) *Monitoring and engaging with international human rights system-* Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions has stated in its General Observations, that the Paris Principles ‘recognises that monitoring and engaging with the international human rights system in particular the Human Rights Council and its mechanisms and the United Nations Human Rights Treaty Bodies can be an effective tool for NHRIs in the promotion and protection of human rights domestically.’⁷ Engagement can be done through submitting parallel or shadow reports to treaty body committee and to the Universal Periodic Review and monitoring and promoting the implementation of relevant recommendations originating from human rights mechanisms. National Human Rights Institutions can effectively promote right to peaceful assembly by providing information on the implementation of the right to treaty body mechanisms and promote implementation of concluding observations and recommendations domestically.
- (vi) *Complaints handling and redress for human rights violation arising out of disruption peaceful assemblies*
- (vii) *Creating awareness amongst public and duty bearers including law enforcement agencies on their human rights obligations including the right to peaceful assembly*

⁵ See Press Release of the Kenya National Commission on Human Rights the Right to Peaceful Assembly dated 30th May 2016 available at

https://www.knchr.org/Portals/0/Statements/KNCHR_Right_To_Assembly_May30.pdf?ver=2016-05-31-162802-527 (accessed 11th February 2020)

⁶ The Right to Freedom of Peaceful Assembly: A Checklist for the Kenyan Police and the Public available at <https://www.knchr.org/Portals/0/Statements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> (accessed 11th February 2020).

⁷ Global Alliance of National Human Rights Institutions (GANHRI) ‘General Observations of the Sub-Committee on Accreditation (adopted by the GANHRI Bureau on 21st February 2018)’ available at https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf (accessed on 11th February 2020).

Recommendation 1: Taking into account the critical role NHRIs play, the Commission proposes that the Human Rights Committee consider including within the text of the General Comment the role of National Human Rights Institutions in promoting and protecting the right to peaceful assembly. National Human Rights Institutions can:- *advise parliament on legislation touching on peaceful assembly in a bid to promote harmonization with international human rights instruments; Monitor and document violation arising out of assemblies; develop publication guides on the right to peaceful assembly; public awareness; monitoring and engaging with international human rights system;* . National Human Rights Institutions are an important avenue through which remedy for violations and promotion of compliance with international human rights standards can be pursued.

Recommendation 2: Paragraph 34 of the General Comment recognises the role of journalists, human rights defenders and others involved in monitoring, including documenting or reporting on assemblies. Paragraph 34 highlights the protection these groups are entitled to as well as the need for them to be allowed to monitor and report on assemblies. The Commission calls on the Human Rights Committee to amend paragraph 34 and to specifically recognise national human rights institutions staff as part of the groups that are entitled to protection under the Covenant. As highlighted above, national human rights institutions play a critical role in monitoring, documenting and seeking remedy for rights violations arising out of assemblies. In addition, it is important to highlight that NHRI officials should also not be prevented from carrying out monitoring assemblies.

2. Responsibility of organizers

Paragraph 75 of the General Comment notes that assembly organisers and participants are obliged to make all reasonable efforts to comply with legal requirement but should be held responsible for their own conduct. Responsibility of organisers or participants for damage caused by other participants in an assembly should not be imposed as a general rule. *Responsibility must be limited to what could have been foreseen or prevented with reasonable effort.*

The Commission calls on the Human Rights Committee to consider including within paragraph 75 that laws/policies which impose criminal liability on organizers and participants for the unlawful behaviour of others as being contrary to article 21 of the ICCPR.

In addition, the Commission proposes that the General Comment clarify that organisers should not be held criminally responsible for the unlawful conduct of others. Towards the end of paragraph 75 the phrase: *...responsibility must be limited to what they could have foreseen and prevented with reasonable efforts* may be interpreted as allowing criminal responsibility for organisers of assemblies .

The proposal is made because this provision tends to claw back on the basic principle that assembly organisers must not be criminalised for acts of others. It would be against general principles in most legal systems whereby criminal liability is not ‘vicarious’ and requires the elements of both ‘*mens rea*’ and ‘*actus reus*’- both the act and state of mind for a person to be criminally liable. Unless the General comment goes further to unpack such a consideration and in a judicial context as well, it still leaves a chilling effect on would-be organisers of peaceful assemblies. The phrase appears vague and could be misused and militates against the duty of the State to protect its citizens.

In Kenya, there have been attempts by the National Assembly through the Public Order (Amendment) Bill, 2019⁸ to introduce amendments to the Public Order Act to the effect that where a person is found criminally responsible for causing harm or damage to property during an assembly, the organiser must compensate the affected persons on terms that the court deems fit. The effect of the Clause is that organisers of peaceful meetings/processions will be held financially responsible on terms that the court deems fit for harm to person or damage to property where courts have found another individual criminally responsible. Formalising civil liability of organisers for the unlawful behaviour of others in law would have chilling effects on the exercise of the right to peaceful assembly.

Imposing liability shifts the responsibility of maintaining order to organisers. The Special Rapporteur on the right to freedom of peaceful assembly and of association has noted in his first thematic report to the Human Rights Council⁹ in paragraph 31 *[m]ost importantly, ‘assembly organisers and participants should not be considered (or held liable) for the unlawful conduct of others... [and together with] assembly stewards should not be made responsible for maintenance of public order (emphasis added).’* The Special Rapporteur has also in his second thematic report to the Human Rights Council expressed concern over legal provisions criminalising organisers for the violent conduct of others in Switzerland.¹⁰ Lastly, laws that impose responsibility on organisers of assemblies for the unlawful conduct of others does not fall within permissible restrictions contemplated in article 21 of the ICCPR. There are less restrictive means of averting

⁸ Clause 2 of the Public Order (Amendment) Bill, 2019 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/PublicOrder_Amendment_Bill_2019.pdf (accessed 1st February 2020).

⁹ Human Rights Council ‘First Thematic Report of the Special Rapporteur on the Freedom of Peaceful Assembly and of Association Maina Kiai (A/HRC/20/27) available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf (accessed 1st February 2020) para 31.

¹⁰ Human Rights Council ‘Second Thematic Report of the Special Rapporteur on the Freedom of Peaceful Assembly and of Association Maina Kiai (A/HRC/23/39) available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf (accessed on 1st February 2020).

looting and destruction of property as there is in place laws that protect against vandalism, incitement to violence and other related offences.

Recommendation 1: Add within paragraph 75 of the General Comment a statement expressly stating that any laws which impose liability to organisers or participants in an assembly/gathering for the unlawful behaviour of others is contrary to article 21 of the ICCPR. Further, the mere fact of participating in an unlawful assembly should not be criminalised including assemblies where notifications have not been issued as required. The Commission proposes that the Committee clarify within paragraph 75 that assembly organisers shall not be criminally responsible on the basis of acts committed by individuals aimed at disrupting assemblies or clashes provoked by law enforcement agencies.¹¹

Recommendation 2: Delete the phrase: “...responsibility must be limited to what they could have foreseen and prevented with reasonable efforts.” In the alternative, should the Committee find it fit to retain the phrase ‘responsibility must be limited to what they could have foreseen and prevented, the Commission proposes that the General Comment adopts the standards laid out by the *African Commission on Human and Peoples Rights Guidelines on Freedom of Association and Assembly*¹² in Africa. The Guideline provides for four conditions that must be met for an organiser to be subjected to monetary sanctions. The four conditions are:

- (i) The organiser fails to notify
- (ii) There is harm caused by the assembly. The African Commission has clarified that the harm in this context refers to violence and destruction of property
- (iii) The harm was reasonably foreseeable
- (iv) The organiser fails to take reasonable steps within their power to prevent the act or omission in question

¹¹ African Commission on Human and Peoples Rights ‘Guidelines on Freedom of Association and Assembly in Africa (adopted in the 60th Ordinary Session of the African Commission 2017) available at https://www.ishr.ch/sites/default/files/documents/guidelines_on_foaa-english.pdf (accessed 19th February 2020) Paragraph 102 (d).

¹² Available at https://www.ishr.ch/sites/default/files/documents/guidelines_on_foaa-english.pdf (accessed 19th February 2020).

3. Linkage between freedom of peaceful assembly and the right to participate in public affairs and elections

The Human Rights Committee in *General Comment No 25 on article 25 of the ICCPR on the Right to Participate in Public Affairs, Voting Rights and Access to Public Service*¹³ has noted that the 'freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.' The Committee has further noted that citizen's ability to take part in the conduct of public affairs through public debate and dialogue is supported by ensuring freedom of expression, assembly and association.

Recommendation: Taking note of the General Comment No 25 and importance of protecting the right to assembly as pre-condition of realising the right to participate in public affairs, to vote, the Commission recommends that the relationship between article 25 and article 21 of the ICCPR be emphasized in section 8 of the General Comment on relationship between article 21 and other provisions of the Covenant and other legal regimes. Whereas paragraph 112 mentioned the linkage between freedom of expression and the right of political participation to peaceful assembly, it does not give prominence to how the exercise of peaceful assembly is an essential condition for the effective exercise of the right to vote and to take part in public affairs.

4. Establishing intent of participants of Peaceful Assembly

Paragraph 21 of the General Comment states that *"participants' conduct may be deemed violent if, before or during the event, the participants are inciting others to the [imminent] use of unlawful force, the participants have violent intentions and plan to act on them"*. The statement is vague and subject to misinterpretation and abuse. This provision gives a wide discretion to law enforcement officers to determine if the participants of an assembly have violent intentions, especially within the context of elections. It is vague and can be abused by security agents.

Recommendation: The General Comment to elaborate further on how it could be determined that "participants have violent intentions" to guide interpretation. In the alternative, it is proposed that this phrase be deleted altogether.

¹³ UN Human Rights Committee (HRC) '*ICCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (CCPR/C/21/Rev.1/Add.7) available at <https://www.refworld.org/docid/453883fc22.html> (accessed 11th February 2020).

5. Notification

On authorization and notification systems addressed from paragraphs 80 to 84, the Commission proposes that the Committee clarifies that authorisation systems are incompatible with Article 21. The General Comment states this but it also provides that where authorisation systems exist they should in fact operate like notification systems. It is advised that the HRC should categorically do away with the notion of authorisation.

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