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**WRITTEN CONTRIBUTION ON THE REVISED DRAFT GENERAL COMMENT ON
ARTICLE 21 (RIGHT OF PEACEFUL ASSEMBLY) PREPARED BY THE INTERNATIONAL
NETWORK OF CIVIL LIBERTIES ORGANIZATIONS (INCLC)**

Submitted to: The United Nations Human Rights Committee
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Re: Written Contribution on the Revised Draft General Comment on Article 21
(Right of Peaceful Assembly)

Date: 21 February 2020

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A. INTRODUCTION

1. This written contribution is submitted to the United Nations Human Rights Committee (“**Committee**”) by the International Network of Civil Liberties Organizations (“**INCLLO**”) in response to the *Revised draft of General comment No. 37 prepared by the Rapporteur, Mr. Christof Heyns* (“**Revised Draft**”) and the call for comments on the Revised Draft issued by the Committee.
2. This written contribution follows an earlier written contribution filed by INCLLO in response to the *Note by the Rapporteur: Issues for consideration during a half-day general discussion in preparation for a General Comment on article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights* (“**ICCPR**”). It is endorsed by 13 INCLLO members organisations.
3. For ease of reference, this written contribution relies on in-text hyperlinks for ease of access by the Committee.

B. ABOUT INCLLO

4. INCLLO is a network of 15 independent, national human rights organizations¹ from different countries in the North and South that work together to promote fundamental rights and freedoms by supporting and mutually reinforcing the work of member organizations in their respective countries, and collaborating on a bilateral and multilateral basis.² INCLLO works on four thematic issues: (1) protest rights and policing; (2) surveillance and human rights; (3) religious freedom and equal treatment; and (4) protecting civic space.
5. In terms of protest rights and policing, INCLLO has become a recognised voice in regional and international fora and has produced four comprehensive research reports on matters related to protest rights and policing:
 - 5.1. *Take Back the Streets: Repression and Criminalization of Protest Around the World* (2013) (“**Take Back the Streets**”) (accessible [here](#)).
 - 5.2. *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons* (2016), prepared in partnership with Physicians for Human Rights (“**Lethal in Disguise**”) (accessible [here](#)).

¹ INCLLO’s 15 member organizations are: Agora International Human Rights Group (Russia), the American Civil Liberties Union (ACLU, United States), the Association for Civil Rights in Israel (ACRI, Israel), the Canadian Civil Liberties Association (CCLA, Canada), Centro de Estudios Legales y Sociales (CELS, Argentina), the Commission for the Disappearances and Victims of Violence (KontraS, Indonesia) Dejusticia (Colombia), the Egyptian Initiative for Personal Rights (EIPR, Egypt), the Human Rights Law Centre (HRLC, Australia), the Human Rights Law Network (HRLN, India), the Hungarian Civil Liberties Union (HCLU, Hungary), the Irish Council for Civil Liberties (ICCL, Ireland), the Kenya Human Rights Commission (KHRC, Kenya), the Legal Resources Centre (LRC, South Africa) Liberty (United Kingdom). **This submission is endorsed by all INCLLO member organizations, with the exception of the Canadian Civil Liberties Association and Liberty.**

² Learn more at <https://inclo.net>.

- 5.3. *Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest* (2018), researched and co-authored in partnership with the International Human Rights Clinic at the Law School of the University of Chicago ("**Defending Dissent**") (accessible [here](#)).
- 5.4. *Spying on Dissent: Surveillance Technologies and Protest* (2019) ("**Spying on Dissent**") (accessible [here](#)).
6. This written contribution is based on the joint work of INCLLO on the aforementioned reports, various submissions that INCLLO has made to regional and international fora, and the unique expertise of its members, based on the domestic contexts within which they operate.

C. COMMENTS ON THE REVISED DRAFT

7. In order to facilitate ease of use, this written contribution follows the structure of the Revised Draft and comments on the text of the Revised Draft at the conclusion of each section. INCLLO bases its submission on the following thematic areas:
 - 7.1. The appropriate distinction between peaceful and non-violent assemblies.
 - 7.2. Expanding the definition of assembling in private spaces.
 - 7.3. Considerations around damage to property and the right to peaceful assembly.
 - 7.4. Concerns around the express requirement for notification of peaceful assemblies.
 - 7.5. Expanded guidance on blocking access to internet services and the use of online surveillance technologies.
 - 7.6. Appropriate restrictions on law enforcement agencies.
 - 7.7. Further defining the role, if any, of non-state actors.
 - 7.8. Expanding on the right to an effective remedy.

General Remarks (paras 1-11 of the Revised Draft)

Peaceful and "non-violent" protest

8. **At para 4:** The Revised Draft provides that the "right of peaceful assembly protects the non-violent gathering of persons". Notwithstanding INCLLO's expanded submissions on this below, INCLLO is of the view that the sentence already expressly recognises "peaceful assembly" and need not duplicate the position to include "non-violent". The inclusion of the additional "non-violent" may have the effect of negatively associating the right of peaceful assembly with presumptive violence.
9. **At para 10:** The Revised Draft provides that where "peaceful assemblies" become "violent", they are no longer protected by article 21. While the question of "violent" assemblies is dealt with at paragraph 17 of the Revised Draft, INCLLO submits that this paragraph, as presently phrased, is vague and overbroad, and when read in conjunction with paragraph 4 of the Revised Draft creates a negative association between the right of peaceful assembly and violence. Accordingly, and read with the submissions detailed in paragraph 13 onwards below, INCLLO is of the view that this paragraph should be removed from the General

Remarks of the Revised Draft in its entirety or rephrased to accommodate and expressly recognise the individuated nature of the right to peaceful assembly.

Scope of the right of peaceful assembly (paras 12-23 of the Revised Draft)

10. **General comments:** In determining the scope of the right to peaceful assembly and throughout the Revised Draft, primary emphasis is placed on distinguishing between peaceful and “violent” or “non-peaceful” assemblies. This occurs in paragraphs 17-23 of the Revised Draft and constitutes a significant portion of this section of the Revised Draft, which is seemingly intended to frame the right. As a result, the section frames the right in the negative and does not appropriately capture positive obligations on the state and its law enforcement agencies, or the positive spirit of expression and rights-vindication which the right entrenches. Further, the framing of the section presupposes or infers that individuals engaged in peaceful assemblies are likely to turn violent, without adequate evidence for this proposition.

Assembling on privately owned property

11. **At para 13:** The Revised Draft provides that “assemblies can be held on publicly or privately-owned property [provided the property is publicly accessible].” Notwithstanding the expanded position postulated in paragraph 67 of the Revised Draft, INCLLO is of the view that the caveat contained in paragraph 13 is insufficient and should contain express recognition for assemblies on privately-owned property, which is accessible to the public and / or is being used for the justifiable vindication of rights. This may include, for example, farm land which is far removed from public spaces but where farm workers have concerns around labour conditions or government-owned land historically appropriated from indigenous peoples and leased to the extraction industry. In this regard, farm workers and indigenous peoples may seek to exercise their right to protest against these practices on privately-owned land which is not accessible to the public but which is used for the purpose of the vindication of rights. Accordingly INCLLO submits that the sentence should be phrased as follows:

“Assemblies can be held on publicly or privately-owned property provided the property is publicly accessible and / or is being justifiably used for the vindication of rights”.³

Damage to property

12. **At para 17:** Alongside “injury” and “death”, the Revised Draft elevates “serious damage to property” as an instance which constitutes “violence”. INCLLO urges the Committee to remove this inclusion, particularly in the light of the failure of the Revised Draft to appropriately acknowledge the individuated nature of the right to peaceful assembly. Importantly, and to the extent that the Committee resolves to maintain reference to “serious damage to property”, express examples on what constitutes “serious damage to property” should be included. In addition, the Committee should consider the inclusion of the word

³ *Defending Dissent*, Glossary of Acronyms and Terms, page 15.

“serious” before “injury”, to avoid the unjustifiable limitation of the right to peaceful assembly in instances where “pushing and shoving”, which may be occasioned by law enforcement authorities, may occur as a product of crowd dynamics.

Peaceful and “non-violent” assembly

13. **At para 17:** In addition to the submissions made in paragraphs 8-9 above, the phrasing of the Revised Draft, both in this paragraph and in paragraph 10, suggests that assemblies themselves may become violent. This phrasing does not accord with recent jurisprudence and international standards which seek to distinguish individual participants in an assembly, who may become violent, with all participants in an assembly or the assembly itself, which is not a rights holder.⁴ This also disregards due process requirements which militate against “guilt by association”. Additionally, the use of the word “participants”, without a caveat again implies a presumption exercised against all participants as opposed to recognition that individuals in an assembly may become violent, and not the assembly as a whole. While this is partially clarified in paragraphs 19 and 21 of the Revised Draft, the Committee should consider remaining consistent in its acceptance of the individuated nature of the right to avoid confusion and inexactness.
14. In this regard, INCLLO submits that the Revised Draft “should indicate that actions of individual protesters or a sub-group participating in a protest do not render the protest itself or other individual or sub-group participants “illegal” – even where such actions may be violent.”⁵ As such, the right to peaceful assembly must be respected, protected, and promoted by law enforcement agencies, even in instances where sub-groups are engaged in violent conduct. In these instances, law enforcement agencies should ensure that the free exercise of the right continues, unabated, for those who are not reasonably suspected of engaging in acts of violence. Additionally, reliance on historical relations or conduct between law enforcement authorities and participants from previous assemblies should not be used as a justifiable ground by law enforcement authorities to not facilitate an assembly.
15. Additionally, and while the inclusion of the phrase the “mere disruption of vehicular or pedestrian movement or daily activities does not amount to violence” is welcomed, the phrase needs to go further in expressing that these disruptions do not constitute violence *or* grounds on which to justifiably limit the right to peaceful assembly. Further, the Committee may wish to express that these disruptions can occur for “extended periods of time”.
16. Accordingly, and read with the submissions detailed paragraph 9 above, INCLLO is of the view that this paragraph should be removed from the General Remarks of the Revised Draft in its entirety or rephrased to accommodate and expressly recognise the individuated nature of the right to peaceful assembly.

⁴ See, for example, *Yaroslav Belousov v Russia* (Applications No 2653/13 and 60980/14), European Court of Human Rights, at para 173-183, accessible here:

[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-166937%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-166937%22]}).

⁵ *Defending Dissent*, recommendation 2, page 35.

17. **At para 18:** In-line with INCLLO's submissions detailed above, the Revised Draft presupposes that "domestic legal requirements" are in place in all jurisdictions. This may not be the case. Additionally, the use of the words "legal requirements" suggests that persons wanting to assemble need to meet these "legal requirements" to exercise their fundamental right to peaceful assembly which, in and of itself, constitutes a limitation to the right. INCLLO is of the view that the first sentence of paragraph 18 should be phrased as follows:

~~"If an assembly is peaceful, Where they exist, T~~the fact that not all the domestic legal or administrative requirements pertaining to the assembly have been met by the organisers or participants does not, on its own, place organisers or participants outside the scope of protection of article 21.

18. **At para 19:** This paragraph appears to contradict or only partially clarify the concerns that have been raised in paragraphs 10 and 13-16 above and should be redrafted.
19. **At para 20:** The Revised Draft seeks to clarify that "violence by the authorities against participants in a peaceful assembly does not in itself render the assembly violent" and that "the same applies to violence by members of the public aimed at the assembly, or by participants in counter-assemblies." While the inclusion of these sentences is useful, the sentences, in their present permissive phrasing, appear to imply that violence against persons exercising their right to peaceful assembly may not be unlawful. This is simply not the case. INCLLO is of the view that while the sentences are useful they should include: (1) express recognition of de-escalation and non-escalation tactics; and (2) that unjustifiable "violence" or any other unlawful conduct by law enforcement officers, members of the public, or participants in counter-assemblies constitute acts of criminality and the violation of article 21, which must be subject to legal redress and an effective remedy. In the alternative, the sentences should be removed in their entirety.

The obligation of States parties in respect of the right of peaceful assembly (paras 24-39 of the Revised Draft)

Within sight and sound

20. **At para 25:** The Revised Draft suggests that "given the expressive nature of assemblies, participants must as far as possible be able to conduct assemblies with "sight and sound" of the target audience." INCLLO is of the view that the words "as far as possible" should be removed from this sentence to avoid creating undue ambiguity and a threshold which permits restrictions on the fundamental "sight and sound" principle, which is central to the full enjoyment of the right to peaceful assembly. This, however, requires law enforcement agencies to remain proactive in their facilitation of counter-assemblies.

Duty to facilitate peaceful assemblies

21. **At para 27:** The Revised Draft provides that "States must thus promote an enabling environment for the exercise of the right of peaceful assembly and put into place a legal and

institutional framework within which the right can be exercised effectively.” INCLLO submits that recognition of the creation of an “enabling environment” should be a central theme underpinning the General Comment as a whole. It presently only finds express reference in this paragraph and should be included in both the general remarks and the scope of the right to peaceful assembly sections to better frame the General Comment. In addition, INCLLO submits that the sentence does not go far enough and should expressly recognise the obligations on state actors, including the judges and prosecutors, to fully comply with the institutional and legal frameworks.

Non-state actors

22. **At para 27:** In terms of reference to non-state actors at the conclusion of the paragraph, INCLLO suggests that the words “and provide security providers” should be retained and that the reference, as a minimum, should be expanded to include that absent express recognition of the role of non-state actors in policing assemblies, the state remains liable for the conduct of these actors. Preferably, INCLLO suggests that non-state actors should be prohibited from facilitating assemblies. To the extent that Committee deems it appropriate to permit non-state actors to facilitate assemblies, INCLLO enjoins the Committee to include the following text:

“Non-state actors may only be deployed in the context of assemblies where there is express enabling legislation and policies that subject them to the same, if not more restrictive, principles and oversight mechanisms than those governing law enforcement authorities.”⁶

Notification

23. **At para 37:** With reference to use of notification procedures in the example at the conclusion of the paragraph, INCLLO takes the view that the present phrasing suggests that notification procedures are a mandatory requirement in international law, which may be penalised. This, in INCLLO’s view, does not recognise the fact that certain jurisdictions within the INCLLO network do not legally require notification. Resultantly, reference to notification procedures in this paragraph should be removed.

Blocking access to internet services

24. **At para 38:** While the inclusion of this paragraph is welcomed, its contents are limited and certain sentences should be rephrased. As a point of departure, the paragraph is confined to internet blockages and hindrances. INCLLO is of the view that this paragraph should be expanded to acknowledge that protest may take place entirely online. Additionally, the paragraph should also provide guidance on, among others, social media intelligence gathering, data retention, data aggregation and brokering, and justifiable limitations.⁷

⁶ *Defending Dissent*, page 90.

⁷ See *Spying on Dissent*.

25. In terms of phrasing, the use of the term “unduly” should be removed in its entirety throughout the paragraph. In particular, sentence two should read:

“States parties ~~shall~~ must not, for example, ~~refrain from unduly blocking block, or in any way hinder~~. Internet connectivity in relation to ~~demonstrations~~ assemblies.

Restrictions on the right of peaceful assembly (paras 40-79 of the Revised Draft)

26. **At para 46:** In terms of the options of “judgment” or “assessment” affixed to value, INCLLO takes the view that the term “assessment” is more appropriate and speaks to a broader consideration of relevant factors.
27. **At para 48:** INCLLO is of the view that the second and third sentences in this paragraph should be rephrased, particularly the second sentence which creates confusion between “national security” restrictions and “peaceful” assembly.
28. **At para 52:** The first two sentences of this paragraph may create confusion and should be redrafted. INCLLO is of the view that any restrictions to assembly based on “public morals” must cohere entirely with international law and standards. In this regard, INCLLO is firmly of the view that no situation presently exists which would justifiably warrant the use of this restriction.
29. **At para 58:** In relation to the final sentence of this paragraph, INCLLO is concerned that this exception may become routine and that prohibitions on assembly as a result of an incapacity on the part of the state to facilitate an assembly should carry a heightened threshold, which may include, at the very least, judicial oversight over such a prohibition and publicly-accessible forward planning documents by law enforcement agencies to ensure that any capacity constraints are fully considered and mitigated.
30. **At para 64:** Further to our submission in paragraph 11 above, the phrase “peaceful assemblies may in principle be conducted in all places to which the public has access or should have access, such as public squares and streets” appears to further restrict the definition of private spaces. INCLLO persists with its submission that the definition of private space should be expanded as proposed in paragraph 11.
31. **At para 66:** INCLLO submits that the word “generally” should be removed as it has the possible effect of introducing unnecessary and permissive text.

Assembling on privately owned property

32. **At para 67:** Further to our submission in paragraphs 11 and 30 above, INCLLO persists with its submission that the definition of private space should be expanded as proposed in paragraph 11. This is particularly so as owners of private land who may be the target of the assembly may unjustifiably withhold “consent”, despite the message of an assembly pertaining to the necessary vindication of rights.

Face masks

33. **At para 70:** The phrase “blanket bans can only be justified on an exceptional basis” is unnecessary given the evidentiary burden on the state created in the preceding sentence and should be removed.

The right to privacy and online surveillance technologies

34. **At para 72:** INCLLO is of the view that the final sentence of this paragraph is too permissive and should be removed. In its place, we suggest relying on the following phrasing:

“In the case when there is an allegation of a suspected serious criminal offences or risks to public security within an assembly, the collection of personal data by online surveillance technologies by law enforcement agencies should be restricted to that which is strictly necessary. The indiscriminate collection of any personal data should be prohibited, including through the use of facial recognition technology. The data collected must be precisely categorised to preclude the collection of irrelevant content. Any information that is categorised as irrelevant should be deleted and the deletion documented.”⁸

Criminalisation

35. **At para 76:** Notwithstanding our further submissions detailed below, INCLLO is concerned with the indication that participants engaged in “peaceful assembly” may be subject to criminal and administrative sanctions. We suggest that this sentence be removed in its entirety.

Notification and authorization regimes (paras 80-84 of the Revised Draft)

36. **General comments:** INCLLO takes the view that states should not impose any sanctions when prior notice is not given and a peaceful assembly takes place, without such notification. It is not unlawful to participate in a peaceful assembly that was not notified. “The lack of notification or co-operation with pre-event discussions cannot be used as an excuse to label an assembly “illegitimate” or “unlawful”. Failure to submit prior notification does not justify limiting the rights to protest or legitimise the use of force.”⁹ To the extent that a sanction may be imposed, it becomes an authorization regime. Authorization regimes are incompatible with the exercise of the right of peaceful assembly. The right to assemble and speak cannot be dependent on the permission of the state.”¹⁰ It becomes a disproportionate limitation on the exercise of the right assembly.¹¹

⁸ *Spying on Dissent*, page 17.

⁹ *Defending Dissent*, page 45.

¹⁰ *Defending Dissent*, page 44.

¹¹ *Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression. Protest and human rights. OEA/Ser.L/V/II CIDH/RELE/INF.22/19, 2019, para. 57.*

37. **At para 80:** This paragraph seemingly establishes a duty to inform authorities when a peaceful assembly is planned. Such language should be rephrased to provide that notification systems may exist, but should not be mandatory and should not constitute permitting systems. Where notification regimes exist, they must be justified on the basis of a legitimate purpose, such as guaranteeing the rights of participants during an assembly. Notification systems should be understood solely as a means to safeguard legitimate rights and interests and not as an end in itself. Therefore, these regimes cannot become an obstacle for those who convene and participate in a peaceful meeting because they are too onerous or difficult to comply with. Instead, they must be “simple, quick, widely accessible, free, and [should] not have a chilling effect on the rights to protest.”¹² Notification cannot be required for meetings where the number of participants does not need measures to mitigate its effects. Equally, notification cannot be required when peaceful meetings are formed spontaneously.
38. **At para 84:** INCLLO submits that this paragraph should be rephrased to include the phrase “authorization regimes are not permitted in international law”.

Duties and powers of law enforcement agencies (paras 85-106 of the Revised Draft)

39. **At para 85:** INCLLO is of the view that the first sentence of this paragraph should be rephrased to read: “The fundamental duty of any law enforcement agency involved in policing a peaceful assembly is to respect, promote and ensure the exercise of the fundamental rights of the participants.”
40. **At para 88:** As with our submissions in paragraphs 23 and 36-38 above, INCLLO is of the view that contingency plans should be prepared both in the event of notification and also in its absence. In the latter instance, the Revised Draft should indicate that law enforcement agencies have a duty to facilitate an assembly in the absence of notification.

Use of force and less-lethal weapons

41. **At para 91:** As a result of limited reference to “de-escalation” earlier in the Revised Draft and with reference to our submission in paragraph 21 above, INCLLO submits that reference to the exhaustion of “de-escalation techniques” should precede reference to the minimum use of force. In addition, the term “proportionate” should find reference alongside “reasonably necessary” in the last sentence of this paragraph.
42. **At para 92:** While referred to in the last sentence of paragraph 100 of the Revised Draft, the display of visible identification by law enforcement officers may be better placed in this paragraph to frame the section on the use of force. In this regard, the third sentence could read that “law enforcement officials responsible for policing assemblies should be suitably equipped and easily identifiable by participants in assemblies”. Additionally, the following sentence should include that the less-lethal weapons too should be clearly identifiable. In relation to the phrase “all firearms, including less-lethal weapons”, INCLLO urges the

¹² *Defending Dissent*, page 47.

Committee to exercise caution in the use of the word “all firearms”, which we suggest should be removed in the light of the opening sentence in paragraph 98 of the Revised Draft.

43. **At paras 93 and 94:** With reference to the second sentence of paragraph 93, INCLLO submits that “preventive detention” constitutes a violation of human rights and should not be phrased in permissive language. Preventive detention is speculative and should only be authorised, at the very least, by a judicial officer, if at all, on a reasonable suspicion of the commission of a crime and based on credible evidence. Additionally, the phrasing of paragraph 94 should include the phrases “reasonable suspicion” and exceptional circumstances in relation to “stop and search” procedures. Importantly, neither “preventive detention” nor “stop and search” procedures should be used to create a chilling effect on the right to peaceful assembly, or to criminalise assembly participants.

Kettling, containment and other measures which restrict the right to peaceful assembly

44. **At para 95:** The first sentence of this paragraph appears circular in its argument. While authorising kettling, the current phrasing suggests containment has a “legitimate aim” to facilitate non-violent participants. However, this paragraph provides no guidance as to how contained non-violent participants are meant to continue to fully enjoy the right of peaceful assembly while contained. In addition, containment constitutes only one of a multitude of public order policing techniques, which do not find reference in the Revised Draft. Resultantly, this paragraph should be substantially revised or removed in its entirety. Alternatively, this paragraph may be rephrased as follows:

“Containment, where groups or sections of demonstrators are confined to a certain area, may be used only where it is lawful, necessary and proportionate to do so in order to prevent violence during an assembly, particularly when opposing groups of demonstrators are assembling within the same area. Containment must never be used in a way that amounts to preventive, arbitrary or collective detention. Where the tactic of containment is used indiscriminately or punitively, it violates the right of peaceful assembly, and may also violate other rights such as freedom from arbitrary detention and freedom of movement.”

45. **At para 96:** As with our submissions in paragraphs 13-16 above, the first sentence of this paragraph fails to distinguish between individuals within an assembly and an assembly as a whole. As with our previous submissions, INCLLO submits that emphasis needs to be placed on the individuated nature of the right to peaceful assembly. Accordingly, the phrase “if the assembly as such is no longer peaceful” should be removed.
46. **At para 97:** INCLLO takes the view that the following phrase should be added as a new sentence three in this paragraph: “Where force is used, restraint should constantly be exercised and any escalation in the use of force or deployment of less-lethal weapons should always be necessary and proportionate.” Additionally, INCLLO submits that the following phrase should be included as an addition to the last sentence of this paragraph: “. . . and under no circumstance should teargas canisters be aimed at the bodies of participants in assemblies or fired directly into crowds.”

47. **At para 98:** At the commencement of this paragraph, INCLLO suggests the inclusion of two phrases: “Firearms, including weapons discharging rubber-coated bullets, should only be used to protect human life or against serious injury, and are not an appropriate tool for the policing or management of assemblies” and “Given the threat such weapons pose to life and the significant threat of serious injury, this minimum threshold should also be applied to the firing of kinetic impact projectiles, including rubber and plastic bullets”.
48. With reference to the last sentence of this paragraph, INCLLO suggests that it be rephrased as follows: “the authorities must also ensure that adequate medical facilities are available and accessible to participants.”
49. **At para 101:** INCLLO takes the view that reference to less-lethal weapons should be included in the first sentence of this paragraph which should read as follows:

“There is a duty to investigate effectively, impartially and in a timely manner any allegation of unlawful use of force, including the misuse of less-lethal weapons, by law enforcement officials during, after or in connection with assemblies.”

Undercover policing

50. **At para 103:** In relation to the deployment of plainclothes officers, INCLLO submits that this is in conflict with paragraph 100 of the Revised Draft which refers to the requirement that law enforcement officers must be “display a form of identification during assemblies”. INCLLO is of the view that the deployment of plainclothes officers to peaceful assemblies may constitute a violation of the right of peaceful assembly¹³ and should not be permitted.

Non-state actors

51. **At para 104:** In line with our submission in paragraph 22 above, INCLLO submits that in addition to the current phrasing of paragraph 104, which is welcomed, the additional text suggested in paragraph 22 above should be included. Additionally, as “private security service providers” is expressly used in this paragraph it should equally be used in paragraph 27 of the Revised Draft. Equally, this paragraph should also refer to “non-state actors” for consistency.

Remotely controlled weapons

52. **At para 106:** In addition to text of this paragraph, INCLLO suggest making reference to the following and redrafting the paragraph accordingly:

¹³ See *Defending Dissent*, page 86. The Inter-American Commission on Human Rights (“IACHR”) stresses that the absence of identification by police institutions opens the way to infiltration for intelligence purposes. Police officers should always carry visible badges that show their name or identification number. Accountability for violations in the context of protests is compromised if individual officers cannot be identified. IACHR Annual Report 2015, chapter IV A paras 225-226.

“Alongside the detrimental health effects of [less-lethal weapons], remotely piloted aircraft or drones are increasingly deployed in the context of protests to discharge [less-lethal weapons], such as tear gas. These armed or weaponised drones often discharge [less-lethal weapons] from the air which predispose their discharges, in the form of projectiles or canisters, to striking protesters in the upper portions of their bodies or their heads, which can lead to death or serious injury. Accordingly, the discharge of [less-lethal weapons] from armed drones may fall foul of the legality, necessity, and proportionately principles governing the use of force. In the absence of legal certainty from the international community on the interpretation of the principles of the use of force relating to armed drones, their use should be prohibited in the context of protests.”¹⁴

Relationship between article 21 and other provisions of the Covenant and other legal regimes (paras 111-114 of the Revised Draft)

53. **At para 113:** The first sentence of this paragraph provides that “participants in peaceful assemblies must not infringe on the rights of others. This may for example include their freedom of movement”. INCLLO submits that this proposition, which finds reference in the second last paragraph of the Revised Draft and which contains no further explanation, does violence to the spirit and purport of the Revised Draft and has the effect of creating a substantial chilling effect on the right of peaceful assembly. Equally, it conflicts with numerous earlier statements contained in the Revised Draft. The proposition should be substantially clarified and developed or it should be removed in its entirety.

D. ADDITIONAL MATTERS FOR CONSIDERATION

Effective remedy

54. **General comments:** The right to an effective remedy is dealt with only in passing in the Revised Draft and warrants express recognition. INCLLO suggests that paragraph 24 of the Revised Draft be developed to provide expressly for the right to an effective remedy in relation to the right of peaceful assembly.

Criminalisation of assemblies

55. **General comments:** The Revised Draft lacks an express recognition of the duties of states in relation to the criminalisation of the exercise of the right to peaceful assembly.
56. Criminalisation is understood as the use of a systematic strategy of silencing assembly participants. It operates by delegitimizing the motives and repertoires of action of the leaders and participants of peaceful assemblies through arbitrary arrests and detentions without due process, judicial persecution through the opening of criminal or administrative

¹⁴ See *Defending Dissent*, page 77.

proceedings due to the organization or participation in a meeting,¹⁵ and punitive legislation that seeks to suppress or limit the exercise of the right,¹⁶ among others. It has a dissuasive effect that undermines the right to peaceful assembly. The main perpetrator of this systematic strategy of criminalization is the state itself. The IACHR has established that criminalisation affects both a personal dimension, since it causes fear and anguish to the individual because of the possible deprivation of his or her liberty, and a collective dimension, since it has the effect of intimidating and inhibiting more people from exercising their right to peaceful assembly in the future for fear of reprisals of being subjected to unfounded criminal proceedings¹⁷.

57. The Revised Draft should be more precise on the duties of judiciaries within states to fulfil the obligation to respect and ensure the right of peaceful assembly. The absence of clear standards in this area has led to criminal and administrative laws being instrumentalised by the states through its various public institutions to discredit, stigmatise and persecute the organisers and participants of peaceful meetings just for exercising their right. The individual's conduct has to be assessed independently from the conduct of the other participants in the meeting. The state, through the appropriate authorities, has to prove the violent actions of each participant and not to justify the criminal proceedings based on different manifestations of violence that might have arisen during the assembly.
58. The criminalisation of the right to peaceful assembly through the excessive and arbitrary use of criminal law is incompatible with a rule of law that guarantees freedom of expression and freedom of assembly as one of its manifestations. "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 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."¹⁸ Likewise, the criminal definitions must use strict and unambiguous terms that do not give rise to a wide field of interpretation and application for judges. Criminal legislation and its application on a case-by-case basis must always be limited to the principle of legality in order to avoid the criminalisation of legitimate conduct carried out by individuals in the exercise of their right to peaceful assembly but which may be seen as a threat or an obstacle to the state.

¹⁵ 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 misdemeanors or criminal offenses, the imposition of fines, and/or arbitrary arrests with or without a conviction. *IACHR. Office of the Special Rapporteur for Freedom of Expression. Protest and human rights.* OEA/Ser.L/V/II CIDH/RELE/INF.22/19, 2019, para. 188.

¹⁶ *Take back the streets*, page 63.

¹⁷ *IACHR. Office of the Special Rapporteur for Freedom of Expression. Second Report on the Situation of Human Rights Defenders in The Americas.* OEA/Ser.L/V/II. Doc.66, 2011, para. 79.

¹⁸ *IACHR. Office of the Special Rapporteur for Freedom of Expression. Second Report on the Situation of Human Rights Defenders in The Americas.* OEA/Ser.L/V/II. Doc.66, 2011, para. 76.

E. CONCLUSION AND ORAL CONTRIBUTION

59. INCLO is thankful to the Committee, and its Rapporteur, for its consideration of this written contribution, and it requests an opportunity to present an oral contribution to the Committee during the General Discussion on 9 March 2020 to further clarify its various positions.

ENDS.