



# EQUAL RIGHTS TRUST

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## The Equal Rights Trust

### Comments to the Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights

February 2020

#### **Introduction**

1. The Equal Rights Trust (ERT) is grateful for this opportunity to provide comments on the revised draft General Comment No. 37 on Article 21 (right of peaceful assembly).
2. The Equal Rights Trust is an independent international organisation whose mission is to eliminate all forms of discrimination and ensure everyone can participate in life on an equal basis. We work in partnership with equality defenders – civil society organisations (CSOs), lawyers, government representatives and others committed to using law to create an equal world – providing them with the technical, strategic and practical support they need to secure the adoption and implementation of comprehensive equality laws. In connection with this work, we engage with UN bodies and procedures with the aim of increasing knowledge and understanding of equality law and its role in the realisation of other rights and development.
3. Our focus in this submission and our central recommendation is that the General Comment should fully recognise the relevance of the right to non-discrimination to Article 21, both in framing the nature and scope of the right, and in determining the nature and scope of permissible restrictions. The equal and unfettered enjoyment of the right of peaceful assembly is particularly important for groups that are at risk of exclusion, marginalisation and discrimination. Its exercise is fundamental to the affirmation and expression of identity; essential to allowing group ideas, beliefs and interests to be heard and taken into account;<sup>1</sup> and necessary to ensure that those exposed to discrimination can come together to challenge it.
4. In our view, it is essential that the General Comment clearly asserts the importance of ensuring non-discrimination in the enjoyment of the right to freedom of assembly. As we set out below, our experience working with equality defenders around the globe is that barriers to the enjoyment of the right to freedom of assembly is frequently discriminatory in nature. Ensuring non-discrimination in the enjoyment of the right is essential both to preventing unwarranted interference and to meeting the positive duty to facilitate peaceful assembly. Denial, restriction or limitation of the right has a discriminatory and disproportionate impact on groups that have traditionally been marginalised.<sup>2</sup> As noted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association in

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<sup>1</sup> Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, UN Doc. A/HRC/26/29, 14 April 2014 (“Report of the Special Rapporteur on freedom of assembly and association 2014”), Para 72.

<sup>2</sup> *Ibid.*, Paras 8 & 14.

his 2014 report, “certain groups are at particular risk of having their space all but vanish”.<sup>3</sup> This is true both because states interfere – through legal and other means – with peaceful assemblies by communities exposed to discrimination and because they fail to facilitate such assemblies, whether by failing to protect from violence or by failing to accommodate the specific needs of certain communities.

5. Our submission focuses on recommendations for strengthening the recognition of the right to non-discrimination in the General Comment. As such, the submission does not seek to provide a comprehensive or exhaustive assessment of the draft; rather, we focus on those areas where we feel discussion of non-discrimination should be strengthened. The submission is in two parts. The first part presents selected evidence of different patterns of discriminatory denial and restriction of freedom of assembly, gathered in collaboration with our partners around the world. The second part makes specific recommendations for amendments or additions to the text of the General Comment itself.

#### **A. Discriminatory denial, restriction or limitation of peaceful assembly**

6. As the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted, States have the obligation to fully respect and protect the right of all individuals to assemble peacefully, including in particular those belonging to groups at risk of discrimination.<sup>4</sup> The right of peaceful assembly must not only be *protected* by the state, but also *fulfilled* through measures such as the creation of safe spaces for its exercise, the development of special measures of protection designed for each particular case, and public statements which advocate for a tolerant and conciliatory stance.<sup>5</sup>
7. In our experience working with equality defenders in more than 40 countries, discrimination is frequently a central factor in the failure to respect, protect or fulfil the right to peaceful assembly. We set out below some of the key patterns of discriminatory denial or limitation of the right which we have observed in recent years:

##### ***(i) Discriminatory denial of assembly through the law***

8. The Trust and our partners have identified multiple examples of laws which impose both directly and indirectly discriminatory restrictions or limitations on the right to freedom of assembly.
9. As highlighted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association in his 2014 report, “sexual orientation and gender identity have been increasingly used as a basis for explicit discrimination in the area of assembly rights.”<sup>6</sup> In **Russia**, for example, anti-propaganda laws against “non-traditional sexual relationships” have been used to severely restrict and deny the right of peaceful assembly (together with the rights to freedom of expression and association) to LGBT+ groups and individuals. These limitations have been criticised at the international and European levels as clear violations of both international and European human

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<sup>3</sup> *Ibid.*, Para 8.

<sup>4</sup> *Ibid.*, Para 22.

<sup>5</sup> 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*, UN Doc. A/HRC/31/66, 4 February 2016, para. 16.

<sup>6</sup> *Ibid.*, Para 27.

rights law.<sup>7</sup> As the Equal Rights Trust has documented, pursuant to the Russian Federal Law on Assemblies, local authorities had refused permissions for LGBT+ groups to hold assemblies in more than 70 cases by 2016.<sup>8</sup> Refusals were often explicitly linked to the LGBT+ focus of the assemblies, using the justification of “public morals”: authorities have stated that these assemblies may offend religious feelings or violate public morals or be harmful to children and violate the prohibition of “homosexual propaganda”.<sup>9</sup> This approach runs contrary to the Committee’s clear statement, in its General Comment 34 on freedom of expression, that “purpose of protecting morals must be based on principles not deriving exclusively from a single tradition” and that “such limitations must be understood in the light of (...) the principle of non-discrimination.

10. Our research has also identified examples of laws which indirectly discriminate in respect of the right to freedom of assembly. In **Egypt**, for example, Article 5 of Decision of the President of the Arab Republic of Egypt relating to Law. No. 107 of 2013 “on Organising the Right to Peaceful Public Meetings, Processions and Protests”, prohibits the conduct of “public meetings for political purposes (...) in places of worship or their arena, or their annexes”. Given the close association between certain political parties and religious communities in Egypt, this Article has a discriminatory effect on such groups.<sup>10</sup>
11. We have also found multiple examples of laws which permit limitation of peaceful assembly and which are applied in ways which discriminate on various grounds. For example, in **Kazakhstan**, we found evidence that Article 400 of the Criminal Code, which prohibits any violation in the procedures for holding rallies or demonstrations, has been applied in ways which discriminate against those expressing political opinions which conflict with the government. For example, in April and May 2016, there were widespread protests in response to the government’s proposed amendments to the Land Code. The police responded aggressively, detaining hundreds of people, including journalists and human rights defenders seeking to monitor events.<sup>11</sup>

**(ii) Discriminatory use of force by law enforcement as a response to assemblies**

12. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that violence, harassment, and arbitrary detention during protests are mainly directed against women and sexual minorities.<sup>12</sup> Together with our partners, the Equal Rights Trust has collected evidence of the discriminatory use of force both against these groups and also against ethnic minorities.
13. During the protests that followed the electoral crisis in **Bolivia** in 2019, the media reported that, in Cochabamba, the police fired tear gas at indigenous supporters of President Morales who were

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<sup>7</sup> See Equal Rights Trust, *Justice or Complicity? LGBT Rights and the Russian Courts*, September 2016, available at: [https://www.equalrightstrust.org/sites/default/files/ertdocs/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts\\_0.pdf](https://www.equalrightstrust.org/sites/default/files/ertdocs/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts_0.pdf) (“Justice or Complicity?”), Part 2.3.2.

<sup>8</sup> *Ibid.*, p.89.

<sup>9</sup> *Ibid.*, p.88.

<sup>10</sup> Equal Rights Trust, *A Past Still Present: Addressing Discrimination and Inequality in Egypt*, 2018, p. 132, available at: [https://www.equalrightstrust.org/ertdocumentbank/Egypt\\_EN\\_online.pdf](https://www.equalrightstrust.org/ertdocumentbank/Egypt_EN_online.pdf)

<sup>11</sup> Equal Rights Trust, *In the Name of Unity: Addressing Discrimination and Inequality in Kazakhstan*, 2016, p. 200, available at: [https://www.equalrightstrust.org/sites/default/files/ertdocs/Kazakhstan\\_EN\\_0.pdf](https://www.equalrightstrust.org/sites/default/files/ertdocs/Kazakhstan_EN_0.pdf)

<sup>12</sup> See above, note 1, Paras 59-60.

attempting to march peacefully.<sup>13</sup> The police also reportedly used tear gas to disperse a peaceful vigil held by indigenous groups in a public square in central La Paz.<sup>14</sup>

14. The Chilean non-governmental organisation ABOFEM has reported to the Trust that, during 2019 protests in **Chile**, the police (*carabineros*) used sexual violence, physical violence, and harassment against women as a way to repress, control, and punish protests. ABOFEM reported 2 cases of sexual assault; 18 cases of degrading, cruel, and inhuman treatment; 1 case of attempted murder; 1 case of kidnapping and rape; 24 cases of torture, and 1 case of rape.<sup>15</sup> According to information provided by ABOFEM, in many of these cases women were arbitrarily detained and forced to strip; once naked, they were forced to squat in front of police officers for long periods of time, while officers mocked them; hit them; insulted them; groped them; and threatened them with physical violence, rape, disappearance, and murder.<sup>16</sup> We were also provided with evidence that lesbian women were also arbitrarily detained due to their sexual orientation or gender expression, and were locked in cells with men, where police officers forced them to remove their clothes and squat while they called them homophobic slurs and humiliated them by hitting them, choking them, and subjected them to repetitive genital inspections.<sup>17</sup> ABOFEM reported that equality and human rights defenders have been harassed by the police and have been followed around by vehicles with no license plates.<sup>18</sup>

**(iii) Discrimination in failing to facilitate assembly**

*Protection from violence*

15. The obligation to facilitate peaceful assembly entails – at a minimum – an obligation to protect those involved in assemblies from violence by both state and non-state actors.<sup>19</sup> This obligation takes on particular significance when the group in question is subject to severe social stigma and at risk of violence because of their identity or beliefs. Yet our partner organisations have shared numerous examples in which states have failed to meet this essential obligation.
16. In **Armenia**, in November 2018, LGBT+ Christian Groups and New Generation (an NGO) were forced to cancel an event called “Forum of LGBT Christians of Eastern Europe and Central Asia” because the organisers of the event received various death threats. Despite the fact that they warned the police,

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<sup>13</sup> Kurmanaev, A. and Krauss, C. “Ethnic Rifts in Bolivia Burst Into View With Fall of Evo Morales”, 15 November 2019, available at: <https://www.nytimes.com/2019/11/15/world/americas/morales-bolivia-Indigenous-racism.html>

<sup>14</sup> Telesur, “Policía reprime con gas a indígenas bolivianos en el Centro de la Paz”, 19 November 2019, available at: <https://www.telesurtv.net/news/bolivia-fuerzas-policiales-represion-indigenas-ancianos-la-paz-20191119-0015.html>

<sup>15</sup> ABOFEM, Estadísticas Abofem Emergencias (Provided to the Equal Rights Trust by ABOFEM upon request).

<sup>16</sup> ABOFEM (Asociación de Abogadas Feministas de Chile), informe preliminar sobre acceso a la justicia y la situación de derechos humanos en Chile, 2019 (Provided to the Equal Rights Trust by ABOFEM upon request)

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> See above, note 1, Para 9; see also, *M.C. and A.C. v Romania* (Application No. 12060/12), European Court of Human Rights (ECtHR), 12 April 2016, para. 105 *Identoba and Others v Georgia* (Application No. 73235/12), ECtHR, 12 May 2015, para. 63.

the government took an indifferent stance and refused to provide adequate security which would have allowed the event to occur peacefully.<sup>20</sup>

17. In **Paraguay**, the Mayor of Hernandarias, enacted Resolution No. 3076/19 prohibiting LGBT+ pride marches due to the fact that the town had been “declared pro-life and pro-family.”<sup>21</sup> This followed the declaration of other cities and of the Paraguayan Congress itself as “pro-life and pro-family”. The Mayor of Hernandarias stated that he could not allow LGBT+ persons to “walk around the streets acting immorally.”<sup>22</sup> He argued that Article 32 of the Constitution, which establishes the right to peaceful assembly, does not provide protection to expressions which contradict the “framework of respect” and which are “outside the scope of morality.”<sup>23</sup> LGBT+ groups nonetheless went ahead with a peaceful assembly in Hernandarias on 30 September 2019. Participants had planned to march from a public square to a private rented space.<sup>24</sup> The marchers were faced with attacks from right wing “pro-life and pro-family” groups which threw stones, debris, eggs, and fireworks at them. One man tried to run over the persons who were marching with his truck, while another one took a rainbow flag and set it on fire.<sup>25</sup> Regarding the attacks, the Mayor of Hernandarias publicly declared that the assembly had constituted a “provocation” because participants were acting “shamelessly” “disrespectfully” and against the laws of nature” in front of children, such that the violent attacks against them were justified.

*Other obligations to facilitate*

18. As noted in the draft General Comment, the obligation to facilitate peaceful assembly extends beyond protection from violence, and entails *inter alia* obligations to enable access to spaces for protests or assembly. Our research has identified examples where states have failed to fulfil this obligation, in ways which discriminate against particular groups.
19. Our partner in **Mongolia**, the LGBT Centre, has documented cases of failure to facilitate the celebration of peaceful assemblies by LGBT+ persons.<sup>26</sup> In 2017, the LGBT Centre attempted to organise its annual Equality Pride Days (which featured events such as public concerts, marches, art exhibitions, a film festival, and other human rights-oriented events). The government of Mongolia denied access to the public square where the concert was meant to take place. The police also obstructed access to the roads used by the march, and dispersed participants.
20. Moreover, in order to ensure the full enjoyment of the right to freedom of assembly without discrimination, states have an obligation to accommodate the specific needs of groups and individuals

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<sup>20</sup> Khandikian, K., “Rainbow Hysteria: How LGBTI Issues Became A Mainstream Topic of Conversation”, 26 February 2019, available at: <https://www.evnreport.com/raw-unfiltered/rainbow-hysteria-how-lgbt-issues-became-a-mainstream-topic-of-conversation>

<sup>21</sup> ABC Color, “Intendente prohíbe una marcha LGBT en Hernandarias”, 27 September 2019, available at: <https://www.abc.com.py/nacionales/2019/09/27/intendente-prohibe-una-marcha-lgbt-en-hernandarias/>

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> ABC Color, “Marcha LGBT: Intendente justificó agresión de los ‘provida’”, 30 September 2019, available at: <https://www.abc.com.py/nacionales/2019/09/30/marcha-lgbt-intendente-justifico-agresion-de-los-provida/>

<sup>25</sup> Quintana, J., “Grupos antiderechos atacaron marcha LGBT en Paraguay”, 30 September 2019, available at: <http://agenciapresentes.org/2019/09/30/grupos-antiderechos-atacaron-marcha-lgbt-en-hernandarias/>

<sup>26</sup> The LGBT Centre, *Report on the Human Rights Situation of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in Mongolia for the 118<sup>th</sup> Session of the UN Human Rights Committee (CCPR)*, available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared Documents/MNG/INT CCPR ICO MNG 24697 E.docx](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MNG/INT_CCPR_ICO_MNG_24697_E.docx)

exposed to discrimination, including in particular persons with disabilities. Recent protests by the Extinction Rebellion group in London saw reports that the government of the United Kingdom had failed in this obligation, with allegations that the police had confiscated accessible toilets, ramps and wheelchairs, thus preventing persons with disabilities from exercising their right to freedom of assembly.<sup>27</sup>

## **B. Specific Comments**

21. As noted above, we consider it essential that General Comment No. 37 recognises the importance of non-discrimination to the determination of both the scope of the right to freedom of assembly and the scope of permissible restrictions to it, and that it acknowledges the potential for discrimination to be both a cause of interference with peaceful assembly and of failure to facilitate assemblies. To this end, we offer the following specific comments on the text of the draft.

### *General Remarks*

22. **§2.** We suggest it is noted that a failure to recognise the right to participate in peaceful assemblies is a marker of repression and discrimination. Denial of the right of peaceful assembly is a driver of discrimination: it compounds the marginalisation of groups at risk of discrimination, limiting their ability to articulate their views and concerns, and exacerbates their inability to effectively exercise their rights.<sup>28</sup>
23. **§5.** We suggest that text is added to this paragraph to underline the fact that, by virtue of Article 2(1) of the Covenant, the right to peaceful assembly must be guaranteed without discrimination.
24. **§8.** In our submission, it is essential to emphasise not only that any restrictions to the right of peaceful assembly must be narrowly drawn but that any restriction must not violate the non-discrimination provisions of the Covenant. We would recommend that the Committee adopts language similar to that used in its General Comment 34 on the right to freedom of expression<sup>29</sup>
25. **§10.** In our view, this paragraph would benefit from recognition that responses to non “peaceful” assemblies can be disproportionate for reasons connected to discrimination, as for example with the use of such as sexual violence in response to protests in Chile, cited above.
26. **§11.** It is our submission that this paragraph would benefit from recognition that the use of surveillance technologies to monitor assemblies can have discriminatory impacts, and that states have an obligation to ensure that the use of such technologies is not discriminatory in purpose or effect. For example, in the UK, a freedom of information request found that the use of automated facial recognition by London’s Metropolitan Police Service (MPS) at the annual Notting Hill Carnival in 2016 and 2017 returned false positives in more than 98% of cases.<sup>30</sup>

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<sup>27</sup> Disability News Service, “Anger as police confiscate Extinction Rebellion accessible toilets, ramps and wheelchairs”, 10 Oct 2019, available at: <https://www.disabilitynewsservice.com/anger-as-police-confiscate-extinction-rebellion-accessible-toilets-ramps-and-wheelchairs/>.

<sup>28</sup> See above, note 1, Para 8.

<sup>29</sup> See: Human Rights Committee, *General Comment No. 34: Article 19 (freedom of opinion and expression)*, UN Doc CCPR/C/GC/34, 12 December 2012 (“General Comment No.34”), Para 26.

<sup>30</sup> Available at: [https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure\\_2018/april\\_2018/information-rights-unit---mps-policies-on-automated-facial-recognition-afr-technology](https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2018/april_2018/information-rights-unit---mps-policies-on-automated-facial-recognition-afr-technology)

*Scope of the right to peaceful assembly*

27. **§14.** In addition to the expression of a collective position and the assertion of group solidarity or identity, we recommend that the General Comment recognises that participation in peaceful assembly can play a key role in empowering individuals belonging to groups exposed to discrimination to claim other rights and overcome the challenges associated with marginalisation.<sup>31</sup>
28. **§18.** It is our submission that Article 21 not only protects individuals that have not met all the domestic legal requirements, but also those individuals that violate such requirements if the requirements themselves are incompatible with the provisions of the Covenant, including for reasons of discrimination. We consider this to be a particularly important clarification, given the potential for restrictions on freedom of assembly to be discriminatory in nature, as exemplified by the legal prohibition on assemblies by LGBT+ groups cited above: as these restrictions are themselves violative of the right to non-discrimination, contravention of such restrictions must be protected by Article 21.
29. **§22.** We suggest that Option 1 is preferred. The reference to Article 20 is appropriate and necessary in framing the scope of the right of peaceful assembly. However, given the potential for Article 20 to be misapplied in ways which might restrict – particularly pre-emptively – legitimate peaceful assembly, we recommend that the General Comment makes explicit reference to the threshold test set out in the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*.<sup>32</sup>
30. **§23.** We recommend that this paragraph makes reference to the need to ensure that law enforcement officials do not rely on racial, ethnic or other profiling or stereotyping and do not otherwise discriminate in the determination of whether the carrying of objects renders an assembly violent.

*The obligation of States parties in respect of the right of peaceful assembly*

31. **§24.** In our submission, it is essential that the where reference is made to Article 2(1), it is stated that the obligation to “respect and ensure” Covenant rights is an obligation to do so without discrimination.
32. **§28.** We consider that this paragraph presents an opportunity for the Committee to underscore the fact that the right to freedom of assembly must be guaranteed without discrimination and to clarify that this gives rise to specific obligations in respect of the duties to refrain from interference with, and to facilitate, peaceful assembly. We would recommend that the paragraph is revised to focus on the positive duty to ensure enjoyment of the right without discrimination, rather than the negative obligations to “not deal with assemblies in a discriminatory manner” and “ensure equal and effective protection”. We would urge the Committee to state explicitly that as part of the obligation of non-interference, states must ensure that neither law nor law enforcement practice should discriminate in the restriction or limitation of freedom of assembly. Similarly, we would recommend that the Committee highlights the fact that the obligation to facilitate entails specific obligations both to prevent violence against, and to facilitate assemblies by, members of groups exposed to discrimination.

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<sup>31</sup> See above, note 1, Para 72.

<sup>32</sup> United Nations Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Addendum*, UN Doc. A/HRC/22/17/Add.4, 11 January 2013, Para 29.

33. **§31.** We would urge the Committee to remove the words “in and of itself” in the first sentence, and to use the word “possible”, rather than “appropriate” in the second sentence. Further, we recommend that this paragraph underlines that in cases where there is a specific risk of violent counterdemonstrations or manifestations, the state must protect the assembly in question, rather than prohibiting for the ostensible protection of those involved.<sup>33</sup> In Russia, for example, it is frequently argued that LGBT+ assemblies may disturb the public order because they are disapproved of by the majority of society and so can result in clashes between activists and counter-protesters.<sup>34</sup> Discrimination is not a valid justification for this type of restriction. States have a duty to “take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully”;<sup>35</sup> this duty entails the obligation to adequately assess security risks and to effectively mitigate them in order to protect the right to freedom of assembly, rather than banning the assembly itself. We note that there is reference to these obligations in paragraph 58 of the General Comment, however it is our submission that these considerations are relevant both in framing the nature and scope of State obligations in respect of the right, and the nature and scope of restrictions.
34. **§37.** We suggest that the words “and must not discriminate” are added after the phrase “such restrictions are also to be narrowly construed”.
35. **§38.** We suggest that General Comment No. 37 highlight that State parties should ensure the activities of Internet service providers do not unduly infringe upon the privacy or safety of assembly participants and do not discriminate.

*Restrictions on the right to peaceful assembly*

36. **§40.** It is in our submission important that this paragraph should state explicitly that any restrictions must be understood in the light of universality of human rights and the principle of non-discrimination. Although we acknowledge that this language is included in paragraph 52 of the General Comment in relation to restrictions imposed for “the protection of morals”, we believe that the obligation to ensure non-discrimination is an important and relevant consideration in relation to any restriction to the right of peaceful assembly and it would be appropriate to include such language, or words to that effect, in this paragraph. In this respect, we would once again urge the Committee to adopt the approach taken in its General Comment 34 on freedom of expression.<sup>36</sup>
37. **§44.** For the reasons set out above in respect of paragraph 40, we recommend that text is added here to the effect that any restrictions on assembly must not violate the non-discrimination provisions of the Covenant.
38. **§45.** For the reasons set out above in respect of paragraph 40, we recommend that text is added here to the effect that any restrictions on assembly must not violate the non-discrimination provisions of the Covenant.

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<sup>33</sup> Human Rights Committee, *Alekseev v. Russian Federation*, Communication No. 1873/2009, UN Doc CCPR/C/109/D/1873/2009, 25 Marc 2009, Para 9.6.

<sup>34</sup> European Court of Human Rights, *Alekseyev v Russia*, Application No. 4916/07, 25924/08 and 14599/09, 21 October 2010, Paras 56-63.

<sup>35</sup> *Ibid.*, Para 73.

<sup>36</sup> See above, note 29, Para 32

39. **§49.** For the reasons set out in our comments on paragraph 31 of the General Comment above, we recommend that text is added to this paragraph to clarify that the possibility of violent reaction to a peaceful assembly is not a legitimate reason to prohibit or restrict the assembly.
40. **§53.** For the reasons set out above in respect of paragraph 40, we recommend that text is added here to the effect that any restrictions on assembly must not violate the non-discrimination provisions of the Covenant.
41. **§55.** We recommend that the final sentence is amended to read “[r]estrictions must moreover not discriminate, either directly or indirectly, or be open to discriminatory application”.
42. **§57.** We refer to our comments on paragraph 22 of the General Comment above.
43. **§58.** We refer to our comments on paragraph 31 of the General Comment above.
44. **§60.** We urge the Committee to consider the use of the word “intrinsic” in the context of incitement within the meaning of Article 20 of the Covenant. We note that the Rabat Plan of Action does not make use of the word “intrinsic”; indeed, we are concerned that the notion of symbols being “intrinsic (...) associated with incitement” may be in conflict with the Rabat Plan’s recognition that “the question of distinguishing those forms of expression that should be defined as incitement to hatred and thus prohibited is contextual”. In respect of the remainder of the paragraph, we suggest that the words “incitement to discrimination, hostility of violence/acts of violence” are retained and recommend that this paragraph makes explicit reference to the threshold test set out in the Rabat Plan of Action.<sup>37</sup>
45. **§71.** We consider that this paragraph would benefit from highlighting that the way in which data are retained and accessed, must strictly conform to the applicable international standards, including on the right to privacy and on the right to non-discrimination.
46. **§72.** It is our submission that the discriminatory risks of the use of facial recognition and other new technologies are highlighted in this paragraph. For example, a test conducted by the American Civil Liberties Union in July 2018 found that the facial recognition tool “Rekognition” incorrectly matched 28 members of Congress, identifying them as people who have been arrested for a crime.<sup>38</sup> The false matches were disproportionately of people of colour, including six members of the Congressional Black Caucus.
47. **§76.** It is important, in our view, to highlight that any such sanctions must not discriminate. We recommend the inclusion of language to the effect that particular care must be taken to ensure that measures of sanction do not have a disproportionate impact on individuals at risk of discrimination.

#### *Duties and powers of law enforcement agencies*

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<sup>37</sup> See above, note 32, Para 10.

<sup>38</sup> Show, J. “Amazon’s Face Recognition Falsely Matched 28 Members of Congress With Mugshots,” 26 July 2018, ACLU, available at: <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>. It is noted 11 of the 28 false matches misidentified people of colour (roughly 39%), including civil-rights leader Rep. John Lewis (D-GA) and five other members of the Congressional Black Caucus. Only 20% of current members of Congress are people of colour, which indicates that false-match rates affected members of colour at a significantly higher rate.

48. **§85.** We submit that this paragraph should make explicit reference to the duty of law enforcement agencies to prevent and protect participants of assemblies from discriminatory violence.
49. **§92.** We suggest that the General Comment would benefit from recognising that law enforcement officials responsible for policing assemblies should be provided with equality training, sensitisation and guidelines.
50. **§94.** We recommend that that the phrase “[t]hey may not be used in a discriminatory manner” is replaced with the words “[t]hey may not be used in a manner which discriminates directly or indirectly”.
51. **§101.** It is suggested that this paragraph also refers to the duty to investigate effectively, impartially and in a timely manner any allegation of discriminatory treatment by law enforcement officials during or in connection with assemblies.
52. **§105.** In our submission, the authorities should also be provided with equality training to combat the discriminatory impacts of the use of recording devices.

*Relationship between article 21 and other provisions of the Covenant and other legal regimes*

53. **§111.** We urge the Committee to take the opportunity to reiterate in this paragraph that Article 2(1) of the Covenant obliges states to ensure the enjoyment of the right to freedom of assembly without discrimination.

**Conclusion**

54. For the reasons set out above, we consider that it is vital that an equal rights approach to freedom of assembly is adopted in the draft of the General Comment No. 37 on Article 21 of the Covenant. This requires an acknowledgement of the essential role of the right to non-discrimination in understanding both the scope of the right and the scope of possible limitations, and in understanding the state’s obligations both of non-interference and of facilitation. We hope that our comments and recommendations assist in this respect.
55. In closing, we would like to once again express our gratitude to the Human Rights Committee for the opportunity to set out our position on the essential role of the principles of equality and non-discrimination in the understanding of the right of peaceful assembly.