Submission to the Human Rights Committee in preparation for a General Comment on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights.

The Sexual Rights Initiative

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Introduction

This submission is made by the Sexual Rights Initiative (SRI)[1]. The Sexual Rights Initiative is a coalition of national and regional organizations based in Canada, Poland, India, Egypt, Argentina, and South Africa that work together to advance human rights related to sexuality, gender and bodily autonomy at the United Nations.

We welcome the opportunity to provide input to the Human Rights Committee (HRCttee) in preparation for a General Comment on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights (ICCPR). This submission addresses questions 1, 2, 4, 5, 6, 8, 9, 14, 17, and 19 of the Concept Note. This submission suggests the Committee (1) develops a comprehensive interpretation that recognizes the inextricable connection amongst the rights to peaceful assembly (ICCPR 21), freedom of expression (19), and freedom of association (22) and; (2) implements the strict tests of necessity and proportionality for restrictions of these rights. The lack of a cross-cutting standard for the restriction of these rights particularly affects those who are perceived to have transgressed sexual and gender norms.

By undertaking a critical analysis of neocolonialism and Western interventionism, this submission argues that the elements of article 21, including those shared with articles 19 and 22, must be reinterpreted to counter their colonialist ties and account for power asymmetries. In doing so, this submission shows how the push for neoliberal democracies has shaped the social, legal and spatial requirements for mobilisation. Finally, the submission addresses the impact of restrictions in regional and international multilateral bodies.

Answers to questions 1 and 17.

This General Comment is an opportunity for the HRCttee to elaborate a cross-cutting standard that encompasses the rights to freedom of assembly (article 21), freedom of expression (article 19) and freedom of association (article 22).

It has been common practice of treaty bodies to elaborate a conceptual analysis of an article and then, in one or a few paragraphs, address its relationship with other articles. The concept note put forward by the HRCttee for this General Comment follows the same logic. Its very first question is "What are the unique features of the right to peaceful assembly, which distinguishes it from other related rights such as freedom of expression and political

[1] http://www.sexualrightsinitiative.com/

participation?" Later in the document, paragraph 17 asks about the relationship of this article with "other rights in the ICCPR".

The rights to freedom of assembly, freedom of expression, to seek, receive and impart information, and freedom of association are inextricably linked. Not only are they freedoms that implicitly allow restrictions, these restrictions are explicit and practically the same.[2] As a result, international and regional human rights bodies, as well as national laws and judicial decisions, have elaborated on the close relation among them. Despite the increasing amount of legal analyses at all levels, most of them have not been comprehensive and have left gaps that should be addressed by the HRCttee in the drafting of the General Comment.

The General Comment should contain an integrated and robust framework on how these rights complement each other and how their links can be a platform for social movements' claims. The expansive approach on how these rights are linked must be balanced with an analysis that narrows the limitations to these rights (interpretation of limitations clauses), sets clear due diligence obligations, and monitor the implementation of these standards.

The interpretation of the legal framework must adapt to current realities of organizing and social movements. It should not be overly prescriptive of the ways, places and means of assembly. When human rights bodies do so, "international law becomes a ceiling for feminist claims instead of the baseline for more innovative and expansive claims."[3] The HRCttee must be careful of not issuing recommendations that hinder movements, communities, organisations. It can be challenging to strike the balance of providing a robust rights framework while observing the impact of recommendations on social movements and organizations, but it is an appropriate challenge for the HRCttee.

In 2010, the Human Rights Council established the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.[4] Through its reports, the mandate has built upon the connection between these rights, but has not yet provided a clear framework of how they are related. Although the mandate holder had the opportunity to do so when he issued a report on his view of the mandate, he did not elaborate on his approach to how these rights are interrelated, but rather on their connections with other issues or rights.[5]

[2] The limitations clause of the three articles is practically the same, but Article 19 does not have the qualifier "in a democratic society", shown later in the submission.

[3] Isabel Cristina Jaramillo Sierra, "Women's Suffrage in Colombia: Saving Face While Remaining the Same" (OxHRH Blog, 28 February 2018), <http://ohrh.law.ox.ac.uk/womens-suffrage-in-colombia-saving-face-while-remaining-the-same> [28/02/2019]

[4] Human Rights Council, *15/21 The rights to freedom of peaceful assembly and of association*, U.N. Doc A/HRC/RES/15/21 (2010) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/15/21

[5] Special Rapporteur on the rights to freedom of peaceful assembly and of association, The Special Rapporteur's vision of the mandate, (2017) A/72/135 See, e.g. para. 19.

Regional human rights systems have jurisprudence and statements analyzing the links between these rights. The detailed study found in the report of the office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission of Human Rights (IACHR) issued in 2005 must be highlighted.[6] Chapter V of this report, titled "Public demonstrations as an exercise of freedom of expression and freedom of assembly", contains a review of standards across regional systems, as well as those from the UN. In referring to the jurisprudence of the African Commission of Human and Peoples' Rights (ACHPR) it recalled that it

> "has held that there is a close relationship between the rights established in Articles 9 (right to freedom of expression), 10 (right of association) and 11 (right of assembly), and that the right to freedom of expression is implicitly violated when there is a violation of the rights of association and of assembly."[7]

This report also cites several decisions of national tribunals that develop the relation between these rights.[8]

Answers to questions 6, 8 and 9 of the Concept Note: "[T]here is a 'presumption' under the Covenant in favour of allowing peaceful assemblies, and the onus is on those wishing to restrict such assemblies to justify such limitations."

The HRCttee has previously highlighted the nature of freedoms and their restrictions, cited by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, stating that

> "clearly, [...] freedom is to be considered the rule and its restriction the exception, [...] referr[ing] to general comment No. 27 (1999) of the Human Rights Committee on freedom of movement: "in adopting laws providing for restrictions [...] States should always be guided by the principle that the restrictions must not impair the essence of the right [...] the relation between right and restriction, between norm and exception, must not be reversed."[9]

In this case, the norm is not just the right to peaceful assembly, but the combination of articles 19, 21, and 22. This is so due not only to the previously argued link between the three of them, but also due to the similarities between their limitation clauses.

Article 19	Article 21	Article 22

[6] Special Rapporteur for Freedom of Expression of the Inter-American Commission of Human Rights, Annual Report, Chapter V (2005) Available at: http://www.oas.org/en/iachr/expression/docs/reports/annual/LE2005%20ENG.pdf

[7] Id. para. 7

[8] Id.

[9] Special Rapporteur on the rights to freedom of peaceful assembly and of association,s best practices that promote and protect the rights to freedom of peaceful assembly and of association, (2012) A/HRC/20/27, para. 16.

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.	No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a **[democratic society]** in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.	No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a **[democratic society]** in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

According to the jurisprudence of the HRCttee and General Comment No. 34, restrictions to article 19 can only be imposed if compliant with the required grounds and if they conform with strict tests of necessity and proportionality.[10] These tests derive from the same wording found in articles 21 and 22. As a result of these similarities and the links between these rights, any violation to any of these individual rights should conform to the strict tests of necessity and proportionality.

Considering that the ACHPR has stated that "the right to freedom of expression is implicitly violated when there is a violation of the rights of association and of assembly"[11], how can restrictions to freedom of assembly have to conform to a different standard?[12] This approach answers the Committee's question in the concept note: "Should those wishing to exercise this right be required to apply for authorisation?" In this General Comment, the Committee should replace its traditionally lower standard for restrictions to article 21, including notice requirements or authorizations, and replace it with the strict tests of necessity and proportionality in connection with article 19.

For example, this perspective can help in exploring the relations between the prohibition of prior censorship (restrictions to article 19) and notice requirements to assemble (restrictions to article 21). While building stronger standards, the HRCttee can help dismantle the colonialism

[10] CCPR Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, (2011) CCPR/C/GC/34. Paras. 22, 33, and 35.

[11] *Supra* note 8.

[12] According to the Committee's jurisprudence, restrictions to article 21 "should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant" CCPR Committee, Communication No. 1948/2010, *Turchenyak v. Belarus*, Views adopted by the Committee at its 108th session (8 – 26 July 2013), CCPR/C/108/D/1948/2010, para 7.4. *See* also: Communication No. 1984/2010, *Evgeny Pugach v. Belarus*, Views adopted by the Committee at its 114th session (29 June–24 July 2015) paras. 7.6, 7.7; Communication No. 2217/2012 *Elena Popova v. Russia*, Views adopted by the Committee under article 5 (4) of the Optional Protocol (2018), paras. 7.3 and 7.5.

and racism tied to these requirements. A recent decision of the South African Constitutional Court recognized the structures behind the notice requirements:

> "South Africa's pre-constitutional era was replete with draconian legislation that, in an attempt to preserve the apartheid political order, punished people for assembling when it did not suit the State. The High Court in Tsoaeli recalls how Acts such as the Riotous Assemblies Act, the Suppression of Communism Act and the Internal Security Act were used to suppress anti-apartheid assemblies. They did so by giving the State sweeping, unchecked powers to prohibit gatherings that were contrary to "public order". Yet the history of suppressing assembly stretches even further back."[13]

The Supreme Court of Ghana also highlighted this in 1993:

> "... police permits are colonial relics and have no place in Ghana in the last decade of the twentieth century.... Those who introduced police permits in this country do not require police permits in their own country to hold public meetings and processions. Why should we require them?"[14]

Prior denial of the exercise of article 21 is, as it is explained in the following section, a prior restriction to article 19. As a consequence, they should conform to the same standard.

Question 19: The role of gender, sexuality and bodily autonomy in the exercise of the right of peaceful assembly.

Women, adolescents, sex workers, people living with HIV, lesbian, gay, bisexual, transgender, gender non-conforming and intersex persons, and anyone who is perceived to have transgressed sexual and gender norms, are subjected to rights violations every day through laws, policies and practices that criminalize, stigmatize and put their lives and health at risk. To protest, even when only occupying a space, by "assembling", "expressing" and "associating" constitutes a life risk. To protest, by placing bodies "on the line", is a risk, but is also a disruption. As activists within the Coalition of African Lesbians have said: "the battle is for ideas and any space where ideas are being articulated and contested is a space we need to be in, even if the physical manifestation of that space may be the UN building."[15]

Feminist geography has argued that the body is a place of conflict and violence, but also a platform for social transgression.[16] Like contemporary problems, they make visible logics of

[13] Constitutional Court of South Africa, Mlungwana and Others v S and Another (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC) (19 November 2018) Available at: http://www.saflii.org/za/cases/ZACC/2018/45.html

[14] Supreme Court of Ghana, *Nav Patriotic Party v. Inspector-General of Police*, 1993, unreported; cited in Joanna Stevens, Colonial Relics I: The Requirement of a Permit to Hold a Peaceful Assembly, 41 J. Afr. L. 118 (1997)

[15] http://ralf.cal.org.za/the-cal-footprint/

[16] Maria Victoria Castro Cristancho, Derecho Espacio y Poder: Aproximación a la Geografía Legal desde el Análisis Distributivo, Tesis de grado para optar el título de Doctora en Derecho. (2015)

categorization, hierarchization and marginalization of people discriminated by their sexual and gender identities, who are subjected to practices of violence, control and subordination for being bodies "out of place" or that do not "belong".[17]

An example of *"poner el cuerpo"* (putting your body [on the line]), of transgressing through political embodiment, is the Mothers of Plaza de Mayo in Argentina. "Mothers fought with their own bodies, which they offered as evidence of the existence of the children the regime had "disappeared." They had birthed those children, and now, in their absence, they had to speak for them and birth them again as words and as ideas."[18] Political embodiment meant opposing the dictatorship, claiming their own idea of motherhood, and embodying their disappeared children.

Anyone who is perceived to have transgressed sexual and gender norms actively challenges the established social order, making it a marginal discourse that challenges power. On the other hand, "as David Halperin describes the marvelous efficiency with which prejudice relies on unstated "truths" in communication, 'if the message is already waiting at the receiver's end, it doesn't even need to be sent; it just needs to be activated.'"[19] Prevalent discourses upholding social norms have an inherent power and, therefore, there is a power asymmetry when a confrontation takes place between marginalized groups and "mainstream" groups. "Picketing [...] works for marginalized groups because it demands notice in a way that dispassionate discourse simply cannot. Orderliness can thus quite easily serve power..."[20]

Peaceful assembly is therefore an issue of expression and association, but also of bodily autonomy. Bodily autonomy is the right to make free and informed decisions about one's own body without coercion, violence or discrimination and it is at the heart of international human rights law. Yet, people all over the world are denied this basic right when it relates to their sexual and reproductive health and rights. While people's individual circumstances may differ, their oppressions share a commonality in restrictions to bodily autonomy grounded in patriarchal gender norms and stereotypes that seek to subordinate women, girls' and gender non-conforming persons' decisions about their own bodies to the State, through laws, policies or their implementation. Most often, these practices, laws and policies are driven through institutions – State or non-state, that have a vested interest in maintaining these stereotypes – hence maintaining the status quo.

And then, what is "peaceful" in peaceful assembly and where does it come from? If assembling is often the enactment of a counter-discourse, the political embodiment of otherness and

[17] Id.

[18] Bergman and Szurmuk 2001, 390 as cited in Barbara Sutton, *Poner el Cuerpo: Women's Embodiment and Political Resistance in Argentina,* Available at: https://www.amherst.edu/media/view/92082/original/poner%25252Bel%25252Bcuerpo%25252BAg.pdf

[19] Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev. 179 (2002). Available at: https://repository.law.umich.edu/mlr/vol101/iss1/4

[20] Don Mitchell. The right to the City. Social Justice and the Fight for Public Space. P. 73

disruption, is peaceful assembly an oxymoron? From the *travaux préparatoires*, peaceful was supposed to qualify protests done in democracy:

> "34. Mr. HOARE (United Kingdom) favoured the original text of article 18. He thought the phrase "peaceful assembly" should be retained, firstly because it was used in the English legal system, where its meaning was fully understood..." [...]"32. He [representative of Uruguay] thought the term expressed a concept vital to democratic society and should be retained."[21]

But these same States who insisted on including "peaceful," as related to democracy, could not even reach consensus on what democracy means for its inclusion in the limitations clause.[22] As a result, the "in democracy" qualifier does not appear consistently throughout the articles in question.[23] Nevertheless, the lack of meaningful democracy is precisely among the key factors leading to protests and assembly. The Office of the High Commissioner on Human Rights, as well as other human rights bodies and scholars, recognize that the denial of rights leads to protests and peaceful assembly.[24]

The concept of 'peaceful', even if related to democracy, should then focus on power imbalances resulting from the lack of social justice, not on individual behavior or on the behavior of those who protest. Peace is a State obligation. Peace is solidarity. Peace is mobilization. Peace is the answer to institutional violence. Peace is constant negotiation and struggle and so "peaceful" cannot be understood as a monolithic concept. Recognizing a broad understanding of what is peaceful in an assembly, including disruption, and questioning other concepts in which it is supported allows to deliberately dilute its colonialism by "de-centering the Western analytic categories and subjecting them and their histories to critical scrutiny."[25] Peace cannot be the vertical, downward, foreign aid (and aid conditionality), savior-complex product.

Democracy is also a contentious concept. One of many theorists from the South who have studied the relationship between the law and protests is Roberto Gargarella. He explains that judges usually subscribe to a concept of democracy between two positions:

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[21]UN Economic and Social Council, Summary Record of the Hundred and Sixty-ninth Meeting, (1950) E/CN.4/SR.169

[22] Marc J. Bossuyt, 1987. Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights. Dordrecht: M. Nijhoff.

[23] For instance, it does not appear in Article 19. It is clear in the travaux préparatoires that any language related to "the interests of democracy" was rejected because it could allegedly lead to systems of censorship due to the lack of consensus on the meaning of democracy. Marc J. Bossuyt, 1987. *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights. Dordrecht*: M. Nijhoff. P. 418.

[24] OHCHR, *Concept note for the Seminar on effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*. (2013)

[25] Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev. 179 (2002). Available at: https://repository.law.umich.edu/mlr/vol101/iss1/4 ...paraphrasing Dipesh Chakrabarty, Provincializing Europe: Postcolonial Thought and Historical Difference 16 (2000).

> "[t]hey could, on the one hand, subscribe to an idea of restricted, limited, rather elitist democracy, based on what I would call the principle of distrust: distrust in what citizens can do. On the other hand, they could defend a vision of democracy that is more inclusive and broad, based on the alternative principle of trust: trust in the citizen, in our collective capacities, in public discussion."[26]

For example, in this conversation arises the question of who can, in fact, meaningfully engage with judges in protest contexts. Who shapes the legal systems of other States?

In a global context, power is used to appropriate the concept of peace and democracy, which is why Global North States often have the platform to point to those who they consider not democratic enough or not peaceful enough. The labeled "uncivilized" and "violent" (Global South) States are therefore subjected to an exceptionalisation that focuses on its problems only while those wielding moral superiority often cannot approve those same standards. The HRCttee must then reevaluate the idea of exceptionalising standards related to political contexts, particularly if those political contexts respond to third-party influence.

<u>Answers to questions 2 and 14: the public/private divide and the struggle for spaces</u>.
Construction of spaces for peaceful assembly and participation responds to neocolonialist and neoliberal interventionism that deliberately intends to shape social movements.

Persons, organizations and social movements are often related to the places they convene at. Thinking how law could take geography seriously means understanding places not as containers of events and regulations, but as relevant factors in the interaction between law, society and culture.[27] In this way, law is considered to be

> "more than a set of positive, external commands; it [is] to be understood as implicated in an array of social relationships. For example, law can produce many social and political effects, as it is able to define relationships, confer status, and selectively empower. This is important, given the reach of law in our lives, defined either formally (in the sense of statutes, judicial interpretation, etc.) or informally (the more messy, but no less important, legal sensibilities that we carry in our heads and express in our daily practices)."[28]

Law and public space are not neutral or invariable.[29] Both are sources of power for "those best able to capture them and turn them toward their own particular interests."[30] State laws and regulations, and their implementation, are constantly in the center of power struggles.

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[26] Roberto Gargarella, El Derecho Frente a la Protesta Social. Revista de la Facultad de Derecho de México, 58 (250), 183-199. (2017). doi: http://dx.doi.org/10.22201/fder.24488933e.2008.250.60938
[27] Blomley and Lebove. Law and Geography. Intl. Encyclopedia of Soc. & Behavioral Sc. P. 475.
[28] Id.
[29] Don Mitchell. The right to the City. Social Justice and the Fight for Public Space. P. 73
[30] Id.

Regulations might not be openly determining access to public space, but they define who can and who cannot occupy public space.

Black persons are more often targeted by the police.[31] Sex workers are confined to certain areas or arrested and detained, while anti-trafficking measures criminalize their efforts to organize and support each other.[32] Persons with disabilities can be kidnapped by the police and forcibly institutionalized if they are considered to be a risk to themselves, to others, or a threat to public order and morality.[33]

For instance, poor people living on the streets are often arrested for minor crimes. After being labeled as criminals or offenders, they are

> "rounded up because some [...] may have committed crimes. The appalling implications—in terms of basic human rights, let alone the right to the city—are clear enough: whole classes of people are being made suspect and their elimination is regarded as not only desirable but also socially necessary."[34]

In this way, zoning laws, police practices and administrative rules, amongst others, are the factors that, in practice allow people to assemble in "public spaces". The increasing use of private security in public spaces, gated communities and "private" spaces open to the public are part of this power struggle of who can occupy certain spaces. Not only States refuse access to those marginalized, the private sector has huge part to play in this. As a result, States have the positive obligation to review laws, police practices and administrative rules that may restrict the access to spaces for assembly, as well as to ensure that private actors do not enable or effectively restrict these spaces.

In changing contexts, social movements have faced new requirements to survive. In this way social movements and organizations have had to transform to stay relevant. As a result, organizational structures have transformed.

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[31] See, e.g.: CERD Committee, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, para. 8, CERD/C/USA/CO/7-9 (2014). "the Committee remains concerned at the practice of racial profiling of racial or ethnic minorities by law enforcement officials, including the Federal Bureau of Investigation (FBI), the Transportation Security Administration, border enforcement officials and local police (arts. 2, 4 (c) and 5 (b))."

[32] See, CEDAW Committee, Half-day general discussion on trafficking in women and girls in the context of global migration, Submissions by Global Alliance Against Traffic in Women (GAATW), Liberty Shared Humanitarian Organization for Migration Economics (HOME), Reframe Health and Justice, Asia Pacific Network of Sex Workers (APNSW), APROASE, Sex Workers' Rights Advocacy Network (SWAN), SWARM and Decrim Now, and The Sexual Rights Initiative (SRI). Available at: https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DiscussionOnTrafficking.aspx

[33] CRPD Committee. Concluding observations on the initial report of Colombia, paras. 32-33, (2016) CRPD/C/CO/COL/1. "32. The Committee is concerned about the provision made, in Decree No. 1500 of 2014 of the Medellín Mayoral Office, for judicial interdiction in programmes for persons with disabilities living in the streets."

[34] Mitchell, Don. The Right to the City: Social Justice and the Fight for Public Space (p. 198). Guilford Publications.

> "Capitalism, market requirements, and globalization [are] part of the structure of the Human Rights field, they quickly get immersed in logics that push both advocates and organizations to be less radical and vocal about important issues, as they know that drastic changes are near impossible in a system that only allows subtle changes and rejects massive mobilizations. As established by Dauvergne and LeBaron, 'Without a doubt most activists still want to speak truth to power. But nowadays they are entangled in this power.'"[35]

Governments tend to co-opt radical, social organizing ideas, only to keep promoting neoliberal agendas with more power than before.[36] Concepts are appropriated to fit a neoliberal framework, and the twisted definitions are often accepted over those of social movements.[37]"Cooptation gives the public the illusion of inclusivity and liberalism, while deflecting attention from the deeper shifts in ideology and power demanded by communities and required to disrupt the colonial imposition."[38]

During the 90s Colombia and some other countries of Latin America saw how feminist spaces increased.[39] That growth resulted in more spaces that included legal reform and legal agenda as part of the conversation.[40] As a result of advocacy on public policy, a great part of the feminist movement professionalized and specialized, turning to the creation of NGOs.[41] In Colombia this transformation happened in the context of economic opening and neoliberal reforms.

Following the trend of cooptation and corporatization, institutional spaces for negotiation and advocacy become narrow. States, and also multilateral institutions, have created requirements for accreditation and participation that segregate and exclude. At the same time these requirements force small organizations to fit their demands into those of bigger organizations. As a result, small organizations have to resign their opportunity to be in the space (assemble), their demands and interests are minimized, and, in the broader picture, social movements do not have the opportunity to dissent and create agreements organically. Not to mention that organizations that convene digitally are also left out.

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[35] Sebastián Rodríguez & Valentina Montoya, The Unrestrained Corporatization and Professionalization of the Human Rights Field, https://intergentes.com/the-unrestrained-corporatization-and-professionalization-of-the-human-rights-field/

[36] Nikisha Shally Khare, Community Resistance To Canadian Transnational Mining Operations In Latin America, Thesis Submitted to the College of Graduate and Postdoctoral Studies In Partial Fulfillment of the Requirements For the Degree of Master of Public Health In the School of Public Health University of Saskatchewan (2018). Available at: https://harvest.usask.ca/bitstream/handle/10388/9523/KHARE-THESIS-2018.pdf?sequence=1&isAllowed=y

[37] Id.

[38] Id.

[39] Emilio Lehoucq,(2016). Constitución de 1991, Ley de Cuotas y movimiento feminista: el papel del derecho en la generación de estructuras de movilización. Precedente. Revista Jurídica, 8, 9-41. https://doi.org/10.18046/prec.v8.2359 p. 19.

[40] Id.

[41] Id.

States must be accountable in international and regional spaces when undermining the rights to peaceful assembly, participation and association of human rights defenders, particularly women human rights defenders, and civil society organizations.

In the international human rights arena, human rights mechanisms establish formal procedures that often lead organizations, directly or indirectly, to access resources to support the work.[42] In other words, those who can have effective access to multilateral institutions are better candidates for funding because they can be present and participate in relevant advocacy settings. As a consequence, the requirements for effective participation (e.g. ECOSOC consultative status) of multilateral bodies are an incentive for corporatization in two ways: they require organizations to follow a corporate discipline[43] and they provide funding opportunities.

> "The unrestrained corporatization and professionalization of the Human Rights field has served as a tool to arguably legitimize and perpetuate the existing misdistribution of wealth and power. These power structures are based on privilege and supremacy that continue to systematically affect communities that are already disadvantaged."[44]

The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association issued a report on the exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral institutions. The Special Rapporteur noted that, in general, corporate interests have better chances at accreditation.[45] This inequality creates a power imbalance in international governance that favors for-profit interests.[46]

In the same report, the Special Rapporteur noted that there is a relation

> "between the effective exercise of the rights to freedom of peaceful assembly and of association at the national level, and the effective participation by civil society at the multilateral level. Enabling environments for civil society should exist at both these levels. [D]ecision-making at the international level having a

[42] Id.

[43] Similarly to ECOSOC consultative status, the criteria for granting observer status with th African Commission on Human and Peoples' Rights require "statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities." African Commission on Human and Peoples' Rights, ANNEX - CRITERIA FOR THE GRANTING OF AND FOR MAINTAINING OBSERVER STATUS WITH THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, Available at: http://www.achpr.org/sessions/25th/resolutions/33/

[44] Sebastián Rodríguez & Valentina Montoya, The Unrestrained Corporatization and Professionalization of the Human Rights Field, https://intergentes.com/the-unrestrained-corporatization-and-professionalization-of-the-human-rights-field/

[45] Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, The exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral institutions, A/69/365 (2014) para. 12

[46] Id.

> significant impact in national policies and practices, it is essential that such decisions are made in a transparent, accountable and participatory manner."[47]

The concerning trend of increasing restrictions by States to civil society involvement across multilateral systems has materialized in the targeting of organizations by these systems. The African Commission on Human and Peoples' Rights revoked the observer status of the Coalition of African Lesbians (CAL) using a decision by the African Union Executive Council arguing that CAL is an NGO promoting values contrary to African values.[48] "As civil society organizations have noted, this withdrawal of status raises concerns about the Commission's independence and impartiality, views of women's rights and sexual rights and the space for defending human rights in the continent."[49]

The removal of CAL's observer status under the argument of *unAfricanness* cannot be understood as a lawful restriction under the limitations clause of articles 21 or 22 of the ICCPR. As mentioned before, restrictions are exceptional and cannot threaten the essence of the right. The limitations clause, when it mentions "in democracy", refers to the full implementation of human rights, including equality, non-discrimination and due process.[50] As a result, a restrictive measure like revoking an observer status should approve a strict proportionality test. However, the measure is not only arbitrary, disproportionate and unnecessary, it is rooted in a static view of African values and morality that must be challenged in all human rights bodies.

> "In addition, this provision and the African Union Executive Council decisions, do not appear to recognise or anticipate the possible evolution of norms in Africa and fluctuations in which attitudes hold majority status: they do not regard our cultures, traditions, and black peoples as capable of change or evolution. It suggests an assumption that we had a patriarchal past, have a patriarchal present, and must necessarily have a patriarchal future in order to retain Africanness. The powers that be seem to think that any snapshot of "tradition" and "culture" taken will lead to the creation and maintenance (presumably by any means necessary) of a "moral" society marked by the erasure of, and sanction on the basis of difference and perceived deviance through non-normativity."[51]

The removal of CAL's observer status is a perfect example of the dangers associated with a low standard for restrictions to article 21 and the need for mechanisms to hold States accountable for their authoritarian actions in multilateral bodies. "[It] should not be seen as an isolated

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[47] Id. para. 13

[48] Special Rapporteur on the situation of Human Rights Defenders, Situation of women human rights defenders, para. 51 (2019) A/HRC/40/60

[49] Id.

[50] Marc J. Bossuyt, 1987. Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights. Dordrecht: M. Nijhoff.

[51] Coalition of African Lesbians (CAL), Internal Brief (to be published).

event, or a single expression of a patriarchal and misogynic backlash against activists who challenge conservative norms in Africa."[52]

Conclusions

- **General Comment on article 21 should include the rights to freedom of assembly (article 21), freedom of expression (article 19) and freedom of association (article 22), elaborating on their inextricable connections.**
- **In this General Comment the Committee should replace its traditionally lower standard for restrictions to article 21, including notice requirements or authorizations, and replace it with strict tests of necessity and proportionality in connection with article 19.**
- **The concepts of "peaceful" and "democracy", as well as the grounds for restriction of articles 19, 21 and 22, must be interpreted in relation to the lack of social justice and enjoyment of human rights.**
- **As a result of the previous points, States have the obligation, amongst others already derived from the implementation of articles 19, 21 and 22, to:**
    - **consider restrictions to articles 19, 21 and 22 only exceptionally and as a last resort measure,**
    - **Ensure that those restrictions:**
        - **Conform to the strict tests of necessity and proportionality**
        - **Conform to the grounds provided by the Covenant;**
        - **Are enshrined in law;**
        - **Are applied under human rights standards, including the right to due process;**
        - **Do not restrict the rights of those who are perceived to have transgressed sexual and gender norms and are consulted and approved with them;**
        - **Do not restrict the right to bodily autonomy;**
- **States have the obligation to review, in broad consultation with civil society, particularly including those who are perceived to have transgressed sexual and gender norms, their laws, administrative regulations and implementation practices that fracture, restrict or hinder the enjoyment of article 21 in connection with articles 19 and 22. Laws, regulations and practices that restrict access to public spaces, broadly understood, must be of special concern.**
- **States have the obligation to comply and ensure the observation of the exercise of rights enshrined in articles 19, 21 and 22 in regional and international multilateral spaces, including effective access to those spaces.**

[52] CAL, Women and Sexual Minorities Denied a Seat at the Table by the African Commission on Human and Peoples' Rights, Available at: http://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/