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**UNITED NATIONS
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**PROCEDURES SPECIALES ASSUMÉES PAR
LE CONSEIL DES DROITS DE L'HOMME**

**SPECIAL PROCEDURES ASSUMED BY THE
HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and association

**AMICUS CURIAE OF THE UN SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM
OF PEACEFUL ASSEMBLY AND OF ASSOCIATION**

IN THE CASE OF

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 544 OF 2015

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 12(1)(a), 19, 20(1)-(4), 21, 23, 33, 36, 37, 47, 59,
131(1)(a)&(b), 131(2), 132(1)(c)(i), 132(5), 159, 165(3),
238, 244, 245, 258 and 259 OF THE CONSTITUTION**

**IN THE MATTER OF DENIAL OF RIGHT TO FAIR ADMINISTRATIVE ACTION AND A
THREAT TO PEACEFULLY AND UNARMED ASSEMBLY,
DEMONSTRATE AND PRESENT PETITION TO PUBLIC
AUTHORITIES**

BETWEEN

BONIFACE MWANGI.....1ST PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

OFFICER COMMANDING POLICE DIVISION-

KILIMANI POLICE DIVISION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA NATIONAL COMMISSION OF HUMAN

RIGHTS.....INTERESTED PARTY

**UN SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND
OF ASSOCIATION.....AMICUS CURIAE**

I. Statement of Identity and Interest of Amicus Curiae

1. Maina Kiai is the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association.
2. Special Rapporteurs are part of the special procedures mechanism of the Human Rights Council, made up of independent human rights experts with the mandate to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As at October 1, 2015, there were 41 thematic and 14 country mandates.
3. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association was established by Human Rights Council resolution 15/21 in October 2010. The mandate was renewed for an additional three years by Human Rights Council resolution 24/5 adopted in September 2013. Maina Kiai took up his duties as the first Special Rapporteur on the rights to freedom of peaceful assembly and of association on May 1, 2011.
4. The Special Rapporteur examines, monitors, advises and publicly reports on the freedoms of assembly and association worldwide. He does this by receiving individual complaints, conducting country visits, issuing thematic reports, providing technical assistance to governments, and engaging in public outreach and promotional activities – all with the ultimate goal of promoting and protecting the rights to freedom of peaceful assembly and of association worldwide. It is against this background and within this mandate that the Special Rapporteur seeks to contribute to this case where the right to freedom of peaceful assembly is at stake.
5. This brief is submitted to the High Court of Kenya in Nairobi, Constitutional and Human Rights Division in the case of *Boniface Mwangi vs the Inspector General of Police et al.* by Maina Kiai in his capacity as Special Rapporteur on the rights to freedom of peaceful assembly and association pursuant to Human Rights Council Resolutions 15/21 and 24/5. This submission is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, has neither been sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

II. Summary of facts and arguments

6. The petitioner and other members of the public submitted a notification to the relevant authorities to hold an assembly and present a petition on December 9th 2015, from 10am-6pm, amongst others to request that the President of Kenya act firmly on corruption. The assembly planned to gather at Freedom Corner and march to State House Gate A, where a petition would be handed over. The relevant state authorities responded to the notice in writing, indicating '*March to State House Gate A NOT allowed*'. No reasons were provided as to why the location of the assembly indicated by the petitioner was rejected.
7. Both the location and the date, 9th of December - namely the international day against corruption - were symbolic to the organizers given ubiquitous reports of corruption in the public sector and the President's statements that he would act to combat corruption. The petitioner went to Court to seek an order to compel state authorities to allow the assembly. The Court ruled that the assembly could take place on the 9th of December, however it redirected the march to *Harambee House on Harambee Avenue, Nairobi* as opposed to State House Gate A.
8. From an international human rights perspective the facts at hand raise the question whether the prohibition on marching to State House Gate A conforms international law, standards and principles.
9. Assemblies under international law refer to both static and moving assemblies. Both the assembly route and the different venues that assemblies gather at or pass through fall within the notion of the "location" of the assembly. The ability to choose the location of an assembly is part of the right to freedom of peaceful assembly and belongs in principle to the organizers. Any restriction imposed on the location must meet the requirements under international law for legitimate restrictions to the right.
10. The U.N. Special Rapporteur observes that Kenyan authorities did not comply with the requirements for restrictions under international law, specifically article 21 of the International Covenant on Civil and Political Rights, in this case.

III. Obligations under international human rights law

11. The Republic of Kenya is a member of the United Nations and has ratified the African Charter. Article 21 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Kenya in 1972, protects the right of freedom of peaceful assembly, as does Article 11 of the African (Banjul) Charter on Human and Peoples' Rights¹.

¹ Article 11 of the Charter reads: Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others. The right to freedom of

Article 21 ICCPR:

The right of peaceful assembly shall be recognized. 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.

12. Article 2 of the Constitution of Kenya recognizes that the general rules of international law shall form part of the law of Kenya (Article 2 (5)) and states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. The Constitution also underscores the importance of upholding the international obligations of the States (see Article 132 (5)). Finally, the Kenyan Constitution incorporates the right to freedom of peaceful assembly in article 37: 'Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities'².
13. The obligations of States in international human rights law are twofold. On the one hand, States have a positive obligation to create an enabling environment in which the right to freedom of peaceful assembly can be exercised; hence they have the obligation to facilitate and protect peaceful assemblies³.
14. On the other hand, States have the negative obligation to refrain from interference with the rights guaranteed. The U.N. Human Rights Committee⁴ – the body charged with authoritative interpretation and monitoring of implementation of the ICCPR – in its general comment No. 27 on the freedom of movement underscored:

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.⁵

15. The Human Rights Committee further recalls that the right to freedom of peaceful assembly is a fundamental human right that is essential for public expression of one's views and opinions and indispensable in a democratic society⁶. Any restriction on this right is only permissible when it is: (1) in conformity with the law; (2) for a legitimate aim

peaceful assembly is also enshrined in article 20 of the Universal Declaration of Human Rights and article 8 of the International Covenant on Economic, Social and Cultural Rights.

² Restrictions to the right have to meet the criteria of article 24 of the Constitution, formulated in a similar manner as the second paragraph of article 21 of the ICCPR.

³ United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at para. 27, U.N. Doc. A/HRC/20/27 (May 21, 2012) [hereinafter U.N.Doc. A/HRC/20/27].

⁴ Hereinafter referred to as Human Rights Committee.

⁵ U.N. Human Rights Committee, *General Comment No. 27*, 1999, at para. 13.

⁶ Human Rights Committee, *Turchenyak et al. v. Belarus*, Communication No. 1948/2010, para. 7.4., (July 24, 2013); Reiterated in Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.4., CCPR/C/112/D/2029/2011, (October 10, 2014). The Nigerian Court of appeal also underscores 'the rights to freedom of assembly and freedom of expression are the bone or any democratic form of government', *Court of Appeal Nigeria: Inspector-General of Police v All Nigeria Peoples Party and Others*, (2007), AHRLR 179 (NgCA 2007), para 12.

as mentioned in article 21 of the ICCPR and (3) necessary in a democratic society. Any restriction must comply with the strict test of necessity and proportionality⁷.

16. In addition to international human rights law referring to legally binding obligations, the *amicus curiae* makes reference to standards and principles that emanate from legal and institutional frameworks, coming from international treaty bodies, regional courts or form part of an existing or emerging practice. These include the findings of UN treaty bodies or of experts under the special procedures. Further, given that the ICCPR, the African Charter on Human and Peoples' Rights, the European Convention on Human Rights⁸ and the American Convention on Human Rights⁹ use similar wording for the right to freedom of peaceful assembly, and given the elaborate track record of the regional mechanisms in providing interpretative guidance to human rights stipulations, these are relevant and shall be referred to in the discussion below. Similarly, the *amicus curiae* cites the OSCE Guidelines on the right to freedom of peaceful assembly¹⁰. The guidelines offer good-practice examples for the regulation of assembly issues, drawn from legislation and case law in OSCE States.

IV. Choice of location: part of the right to freedom of assembly

17. The first relevant question to analyze is whether the right to freedom of peaceful assembly, as stipulated by article 21 of the International Convention on Civil and Political Rights (ICCPR) includes the right of the organizers to choose the location of the assembly.

18. Article 21 protects peaceful assemblies that are both static and moving¹¹. Therefore the location of an assembly for purposes of international law can include a single location (for a static assembly) or multiple locations (for moving assemblies).

19. A key measure with regard to the positive obligation of the State to facilitate the right to freedom of peaceful assembly is to make public space available to the organizers and

⁷ Human Rights Committee, *Sergey Praded v. Belarus*, Communication No. 2029/2011, para. 7.5., CCPR/C/112/D/2029/2011, (October 10, 2014), with reference to Human Rights Committee, *Comment No. 34*, para. 22.

⁸ Article 11 (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

⁹ Article 15 of the ACHR: 'The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.'

¹⁰ The OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe's Commission for Democracy through Law (Venice Commission) have been providing legislative support and uses the guidelines as a basis for this work.

¹¹ United Nations Human Rights Council. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, at para. 66, U.N. Doc. A/HRC/23/39 [hereinafter U.N. Doc. A/HRC/23/39].

participants. In its resolution 25/38 of April 2014, the Human Rights Council ‘urges States to facilitate peaceful protests by providing protestors with access to public space and protecting them, without discrimination, where necessary, against any form of threat and harassment, and underlines the role of local authorities in this regard.’¹² Access to public space means in practice that protesters should have access to streets, roads, squares to peacefully protest (statically or moving)¹³. Peaceful assembly naturally comes with some disturbances. Institutions at both the Inter-American¹⁴ and European regional level¹⁵ have clearly stated that tolerance, from the public and the authorities, towards those disruptions of life is required. In his reports, the UN Special Rapporteur underscored that such disruptions are part of the mechanics of a pluralistic society in which diverse and sometimes conflicting interests coexist and find forums and channels in which to express themselves¹⁶.

20. The choice of the venue or location of an assembly by the organizers is an integral part of the right to freedom of peaceful assembly, as demonstrated by the decision of the United Nations Human Rights Committee in *Chebotareva v Russian Federation*. In *Chebotareva*, the Committee found a violation of the right to freedom of assembly because authorities wanted to redirect the assembly to another location – which would not serve the purpose of the assembly, according to the organizer – and because this redirection did not meet the requirements of restrictions set out in article 21 of the ICCPR¹⁷. This decision underscores that the right to choose a venue belongs in principle to the organizers and any limitations to this choice of location should meet the criteria for legitimate restrictions under international law.
21. The ability of organizers to choose the location of the assembly resonates with the Human Rights Committee recalling that the right of peaceful assembly is a fundamental human right that is essential for public expression of one’s views and opinions and is indispensable in a democratic society¹⁸. The effectiveness of assemblies often depends on the use of symbolism related to the message organizers wish to express. A protest demanding accountability for a gas explosion, for example, may be held at the exact time of the explosion. Likewise, public areas around iconic buildings may be identified as

¹² UN General Assembly, *Resolution adopted by the Human Rights Council on the promotion and protection of human rights in the context of peaceful protests*, U.N. Doc. A/HRC/Res/25/38, no. 4.

¹³ U.N. Doc. A/HRC/23/39, at para. 66. The Inter-American Commission on Human Rights has also explicitly recognized that in a democratic society ‘the urban space is not only an area for circulation, but also a space for participation’ IACHR, *Report*, para. 136, citing a decision of the Constitutional Tribunal of Spain, Decision 66/1995, p. 3.

¹⁴ IACHR, *Annual Report of the Inter-American Commission on Human Rights, Volume II. Report of the Special Rapporteur for freedom of expression to the Inter-American Commission*, 2008, Chapter IV, para. 70.

¹⁵ ECtHR, *Ashughyan v. Armenia*, App. No. 33268/03, 2008, para. 90. See also ECtHR, *Balcik v. Turkey*, App. No. 25/02, 2007, para. 52: ‘In the Court’s view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance’. Also ECtHR, *Oya Ataman v. Turkey*, App. No. 74552/01, 2006, para. 41-41.

¹⁶ U.N. Doc. A/HRC/23/39, para. 65,

¹⁷ Human Rights Committee, *Chebotareva v Russian Federation*, Merits, UN Doc CCPR/C/104/D/1866/2009, para 2.3.-2.6. and 9.3.

¹⁸ Human Rights Committee, *Turchenyak et al. v. Belarus*, Communication No. 1948/2010, para. 7.4., (July 24, 2013); Reiterated in Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.4., CCPR/C/112/D/2029/2011, (October 10, 2014).

locations to convey a message with regard to institutions housed in these buildings. The UN Special Rapporteur has underscored that limiting protests to specific areas: ‘... prevents organizers and participants from choosing venues they consider the most appropriate to express their aspirations and grievances’.¹⁹ In the same sense, the European Court of Human Rights found a violation of the right to freedom of peaceful assembly in a case where authorities diverted the assembly to another location and took into account that the time and place of the events were crucial to the organizers²⁰.

22. The practice of States requiring notification and the scrutiny by the Human Rights Committee of such practices also confirm that the right to choose a location or venue for the assembly belongs to the organizers. While it is not necessary under international human rights law for domestic legislation to require advance notification of an assembly, State authorities may require a notification where a certain degree of disruption is anticipated in view of fulfilling their positive obligation²¹. The rationale is to allow State authorities to facilitate and safeguard the exercise of the right to freedom of peaceful assembly, to protect public safety and order and the rights and freedoms of others, *inter alia* rerouting traffic and deploying security forces when necessary²². Two typical elements requested in notifications are the time and the location of the assembly; without any indication on these elements it might be challenging for the authorities to take the appropriate measures as indicated. As authorities may not turn the notification into an authorization process²³, this implies that the organizers may identify the public location for the assembly as part of identifying their preferred way of conveying the message, targeting its ‘sight and sound’ audience.

¹⁹ UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association, Mission to Kazakhstan*, para. 53, U.N. Doc. A/HRC/29/25/Add.2

²⁰ European Court of Human Rights, *United Macedonian Organisation Ilinden and Ivanov v Bulgaria*, Application No. 44079/98, 20 October 2005, para. 103.

²¹ OSCE-ODIHR (Office for Democratic Institutions and Human Rights), *Guidelines on freedom of peaceful assembly*, Warsaw, paras 113-120. See also U.N. Doc. A/HRC/20/27, paras. 52 and 90. See also U.N. Doc. A/HRC/23/39, para. 52.

It is the view of the Inter-American Commission on Human Rights [hereinafter IACHR] that the requirement of an advance permit is not compatible with the right to freedom of assembly, IACHR, *Second Report on the Situation of Human Rights Defenders*, para. 137.

²² U.N. Doc. A/HRC/20/27, paras. 26-28. See also U.N. Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, Para. 7.8., CCPR/C/112/D/2029/2011, (October 10, 2014): ‘The State party should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it’. The UN Human Rights Committee, observed that, ‘even if, in principle, a State party may introduce a system aimed at reconciling an individual’s freedom to impart information and to participate in a peaceful assembly with the general interest of maintaining public order in a certain area, that system must not operate in a way that is incompatible with the object and purpose of articles 19 and 21 of the Covenant.’ UN Human Rights Committee, *Turchenyak et al. v. Belarus*, UN Doc. CCPR/C/108/D/1948/2010 (24 July 2013), § 7.8; UN Human Rights Committee, *Bazarov. v. Belarus*, UN Doc. CCPR/C/111/D/1934/2010, 24 July 2014), § 7.4. It equally recognized that such procedures can indeed result ‘in de facto limits of the right of assembly’. UN Human Rights Committee, in UN Doc. UN doc. CCPR/79/Add. 113, § 24. For similar observations, see also Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders*, (2011), para. 136.

²³ Authorization turns the right into a privilege, see United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at § 60, U.N. Doc. A/HRC/29/25/Add.2 (June 2015). Same approach taken by African Commission on Human and People’s Rights [ACHPR], *Sudan: Amnesty International and Others v Sudan*, 2000, AHRLR 297 (ACHPR 1999), para 81-82 and in ACHPR, *Mauritania: Malawi African Association and Others v Mauritania*, 2000, AHRLR 149 (ACHPR 2000), para 108-111.

23. Finally, the OSCE guidelines on peaceful assemblies underscore that, as part of the positive obligation, States should seek to facilitate and protect assemblies at the organizers' preferred location²⁴. States should take appropriate facilitating measures²⁵. The same guidelines, hold it as a general rule that assemblies should be facilitated within "sight and sound" of their target audience since public assemblies are held to convey a message to a particular target person, group or organization. The organizers are of course the ones determining whom that target person or group is, which may range from the President of a country to the public at large.

V. Permissible restrictions under international law

24. The right to freedom of peaceful assembly as protected under article 21 of the ICCPR is not absolute, and restrictions may be imposed. Restrictions to this right are however only permissible when they are: (1) in conformity with the law, (2) for a legitimate aim as mentioned in article 21 of the ICCPR and (3) necessary in a democratic society. Any restriction must comply with the strict test of necessity and proportionality²⁶.

25. Restricting the right for other considerations or assessments, such as whether the location chosen by the organizers does or does not best achieve the objectives of the assembly, is not permissible under international law.

26. **First**, any restriction must be "in conformity with the law". Any law regulating the right to freedom of assembly must prevent arbitrary interferences with the right and meet the requirements of legality²⁷. This has been interpreted by the Human Rights Committee to mean that the law must not only be duly enacted, but also that that the provisions of the law are not overly 'broad or vague'²⁸. The Human Rights Committee in its General Comment No. 34 clarifies that to meet the principle of legality, a law may not confer unfettered discretion and it must provide sufficient guidance to those charged with its execution to enable right holders to ascertain what sort of behavior is restricted and what is not²⁹.

²⁴ OSCE-ODIHR (Office for Democratic Institutions and Human Rights), *Guidelines on freedom of peaceful assembly*, Principle 2.2., Warsaw.

²⁵ The Inter-American Commission on Human Rights has clearly indicated that 'the competent institutions of the state have a duty to design operating plans and procedures that will facilitate the exercise of the right of assembly ...[including] rerouting pedestrian and vehicular traffic in a certain area'. Inter-American Commission on Human Rights, *Report on citizen security and human rights*, at para. 193, OEA/Ser.L/V/II. Doc 57 (2009). Also in para. 193: The State has an obligation to supply its police officers with the equipment and communication devices, vehicles, means of personal defense and non-lethal deterrence suitable for intervening in the event of problems. The police must also receive clear and unequivocal instructions that their job is to protect the participants in a public meeting or demonstration or mass gathering so long as they are exercising their right.

²⁶ Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.5., CCPR/C/112/D/2029/2011, (October 10, 2014), with reference to Human Rights Committee, *General Comment No. 34*, para. 22.

²⁷ On the need for legality see Manfred Nowak, *CCPR Commentary*, N.P. Engel, 2005, p. 489-490.

²⁸ UN Human Rights Committee, *Kungurov v. Uzbekistan*, Communication No 1478/2006, UN Doc CCPR/C/102/D/1478/2006 (8.5-8.7), 15 September 2011. See also generally UN Human Rights Committee, *General Comment No. 27*, UN Doc CCPR/C/21/Rev.1/Add.9 (13), 2 November 1999.

²⁹ U.N. Human Rights Committee, *General Comment No. 34*, para. 25.

27. Is it in conformity with the law not to allow the march to State House Gate A; this means prohibiting access to the roads leading to State House Gate A and Gate A itself? While the *Protected Areas Act* indicates that access to certain areas may be restricted, it is the subsidiary legislation, namely the *Protected Areas Order*, which lists State House in Nairobi as a protected area. While the *Protected Areas Order* mentions State House as protected area, it does not mention the roads leading to State House or the outside of State House Gate A. Generally, restrictions to fundamental rights are to be interpreted narrowly. Applying this principle to the restriction in question, there is no legal basis to include the roads to State House or Gate A of the State House as protected areas where assemblies are restricted.
28. **Second**, allowable restrictions on the right to freedom of peaceful assembly are further limited to those, which protect national security or public security, public order (ordre public), public health or morals, or the protection of the rights and freedoms of others. These legitimate aims must be interpreted strictly.³⁰ The State has the duty to specify the aim it seeks to protect and to indicate the specific threat³¹.
29. In the case at hand, the State has not specified the aim it sought to protect by denying access to the location, nor was such aim communicated to the organizers of the assembly. While national security may be a legitimate aim and while it is recognized that State House premises need to be kept secure, the outside of gates surrounding or roads leading to iconic buildings may not be generally considered as areas where national or public security is at stake. On the contrary, and as underscored by the Special Rapporteur, they should be considered as public spaces and peaceful assemblies should be allowed to take place³².
30. In addition, disturbances are naturally to be expected with peaceful assemblies. Trying to avoid them for the population, or even for the President, clearly does not in itself amount to one of the legitimate aims mentioned in article 21 of the ICCPR. The Special Rapporteur has also warned that the free flow of traffic should not automatically take precedence over

³⁰ U.N. General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, at ¶19, U.N. Doc. A/61/267 (August 16, 2006).

³¹ The Human Rights Committee has found that when a State invokes national security and protection of public order as a reason to restrict the right to association, the State party must prove the precise nature of the threat. U.N. Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 at para. 7.3 (2005); See also Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, (December 31 2011) [Hereinafter IACHR Report] at para. 166. The European Court on Human Rights clarified, in a case on the freedom of association that restrictions based on national security concerns must refer to the specific risks posed by the association; it is not enough for the State to generally refer to the security situation in the specific area. See ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, (1999), para. 44-48; See also ECtHR, *Parti Nationaliste Basque-Organization Regionale D'Ipparralde v. France*, App. No. 71251/01, Eur. Ct. H.R. (2007), para. 47.

³² See United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association, Mission to Oman*, para. 66, U.N. Doc. A/HRC/23/39/Add.2.

freedom of peaceful assembly³³; this view is shared by the findings of the ECtHR and the Organization of American States' Special Rapporteur on freedom of expression³⁴.

31. **Third**, necessary in a democratic society means that any restriction has to pass the necessity and proportionality test. A restriction must be directly related to the specific needs on which they are predicated³⁵. In its General Comment No. 31 on the nature of the general legal obligations imposed on States, the Human Rights Committee indicates that 'where [...] restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims.'³⁶ The Human Rights Committee has clarified that the State must demonstrate that the restrictions placed on the right are in fact necessary to avert a real and not only a hypothetical danger³⁷. In other words, the State measure must pursue a pressing need, and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need.³⁸
32. It is noted on several occasions that blanket restrictions or bans on time, locations or any other aspect of the assembly are intrinsically disproportionate and should thus not be imposed³⁹.

Spaces in the vicinity of iconic buildings such as presidential palaces, parliaments or memorials should also be considered public space, and peaceful assemblies should be allowed to take place in those locations. In this regard, the imposition of restrictions on "time, place and manner" should meet the aforementioned strict test of necessity and proportionality⁴⁰.

33. A total ban is, by definition, not the least restrictive measure available to the State and the U.N. Special Rapporteur holds as best practice those laws:

... that both avoid blanket time and location prohibitions and provide for the possibility of other less intrusive restrictions. Prohibition should be a measure of last resort and authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the

³³ U.N. Doc, A/HRC/23/39, para. 65.

³⁴ Concurring opinions in various legal systems: IACHR, *Annual Report of the Inter-American Commission on Human Rights, Volume II. Report of the Special Rapporteur for freedom of expression to the Inter-American Commission*, 2008, Chapter IV, para. 70; ECtHR, *Ashughyan v. Armenia*, App. No. 33268/03, 2008, para. 90. See also ECtHR, *Balcik v. Turkey*, App. No. 25/02, 2007, para. 52: 'In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance'. Also ECtHR, *Oya Ataman v. Turkey*, App. No. 74552/01, 2006, para. 41-41. And OSCE-ODIHR, *Guidelines on Freedom of Assembly*, op. cit., para. 3.2. on the equally legitimate use of public space.

³⁵ Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.8., CCPR/C/112/D/2029/2011, (October 10, 2014).

³⁶ Human Rights Committee, General Comment No, 31, para. 6, CCPR/C/21/Rev.1/Add.13 de 26 May 2004.

³⁷ U.N. Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, Communication No. 1296/2004, UN Doc. CCPR/C/90/D/1296/2004, 7 August 2007, para. 7.3.

³⁸ U.N. Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 at para. 7.2 and 7.3 (2005).

³⁹ UN General Assembly, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association*, para. 25, U.N. Doc, A/68/299. See also A/HRC/29/25 Add.1, para. 29 and A/HRC/23/39 Add.1, para. 62.

⁴⁰ U.N. Doc, A/HRC/23/39/Add.2, para 66.

legitimate aims pursued by the authorities.⁴¹

34. The European Court of Human Rights takes the same approach vis-à-vis nationally created 'no-go zones' and fully upholds the protection of the rights to freedom of peaceful assembly in such zones. In the case of *Nurettin Aldemir and others vs Turkey*⁴², it found a violation of the freedom of assembly where public authorities forcibly ended a peaceful assembly held at the parliament, a location where assemblies were not permitted by Turkish law. The actions of the authorities were disproportionate and not necessary for the prevention of disorder⁴³.
35. On its face, the prohibition of all access to State House and its vicinity for peaceful assemblies does not meet the proportionality requirement. Full prohibition of the location indicated by the organizers is severe, especially when the location has a symbolic meaning for the message the assembly organizers wish to convey. Alternative measures, such as agreeing with the organizers on the time to access that location, would be less intrusive, presuming a legitimate aim for a restriction were to be identified by the State.

VI. Conclusion

36. The U.N. Special Rapporteur finds it important to underscore that organizers have the right to choose the location of their assemblies. This is part and parcel of the right to freedom of peaceful assembly as protected by article 21 of the International Covenant on Civil and Political Rights. Any restriction imposed by the State authorities on this choice of location must meet all three criteria for allowable restrictions under international law: (1) in conformity with the law; (2) for a legitimate aim as mentioned in article 21 of the ICCPR and (3) necessary in a democratic society. The U.N. Special Rapporteur believes these requirements are not complied with in the instant case.
37. The Special Rapporteur invites the High Court of Kenya in Nairobi to proceed with a thorough analysis of the case at hand against the positive obligations of the State, such as the obligation to facilitate the assembly at the preferred location and for the target 'sight and sound' audience, and the three-pronged test for allowable restrictions to the right to freedom of peaceful assembly under international law. In this manner, the High Court of Kenya in Nairobi may fulfill a critical role in ensuring respect for human rights, as determined by international laws, for the people of Kenya.

11 April, 2016

⁴¹ U.N. Doc. A/HRC/20/27, para 39.

⁴² ECtHR, *Nurettin Aldemir and others vs Turkey*, App Nos. [32124/02](#), [32126/02](#), [32129/02](#), [32132/02](#), [32133/02](#), [32137/02](#) and [32138/02](#), para. 34 and 44-48.

⁴³ The assembly protested against a draft bill in the Turkish parliament and the Court found the measures taken disproportionate. ECtHR, *Nurettin Aldemir and Others v Turkey*, op. cit., para. 34-35 and 47.

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