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LEGAL ANALYSIS OF DRC LEGISLATION ON THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY



HOW NATIONAL LEGISLATION AND POLICIES FALL SHORT OF INTERNATIONAL HUMAN RIGHTS
STANDARDS, AND THE URGENCY TO CHANGE THE SITUATION

Abbreviations

UNJHRO: United Nations Joint Human Rights Office

ACHPR: African Commission for Human and People's Rights

ICCPR: International Covenant on Civil and Political Rights

OHCHR: Office of the United Nations High Commissioner for Human Rights

DRC: The Democratic Republic of Congo

UN: The United Nations

FARDC: Democratic Republic of Congo's Armed Forces

PNC: Congolese National Police

Introduction

The right to freedom of peaceful assembly is guaranteed by both regional and international human rights treaties to which the Democratic Republic of Congo (DRC) is a state party.¹ The freedom is also enshrined in the country's 2006 Constitution.² Yet the authorities have been systematically violating this right, especially in the context of the political deadlock over the failure to hold presidential elections in 2016. Authorities have been using different tactics to undermine and repress the exercise of the right to freedom of peaceful assembly, including through unlawful prohibitions of gatherings, harassment of organizers of protests; excessive use of force by police during protests; arbitrary arrests and detention, as well as fines and prison sentences following trumped-up charges and unfair trials. While the authorities have been facilitating meetings and rallies held by their supporters, they have continually targeted dissenting voices, including opposition members and supporters, civil society activists, as well as human rights defenders and journalists covering such protests.

This commentary examines the lack of adequate legislation and policies to effectively enforce the provisions of the Constitution of DRC relating to the right to freedom of peaceful assembly, in compliance with international standards. It also reviews the impact of this legislative gap in respect to other human rights in the country. Specifically, the commentary analyses the recent draft bill on "the implementation of the freedom of assembly", also known as the *Sesanga bill*³ pending in parliament, highlighting serious gaps and inconsistencies with respect to international human rights standards. It makes concrete recommendations to Congolese

¹ Articles 21 and 22 of the International Covenant on Civil and Political Rights ratified by the Democratic Republic of Congo (then Zaïre) in 1976; article 8 of the International Covenant on Economic, Social and Cultural Rights ratified in 1976; article 15 of the Convention on the Rights of the Child ratified in 1990; and articles 10 and 11 of the African Charter on Human and Peoples' Rights ratified in 1987.

² Articles 25 of the DRC Constitution stipulates: "the freedom of peaceful and unarmed assembly is guaranteed subject to the respect for law, public order and morality." Article 26 provides: "the freedom of protest is guaranteed. Any protest on the public roads or in the open-air requires the organizers to notify in writing the competent administrative authority. No one can be compelled to take part in a protest. The law lays down the implementing measures.

³ The bill is named after opposition's Member of Parliament Delly Sesanga Hipung who initiated it in November 2013.

authorities on improvements of legal and policy frameworks to respect, promote and ensure the right to freedom of peaceful assembly, in conformity with international standards.

I. Violations of the right to freedom of peaceful assembly and its impact on the enjoyment of other human rights

Violations of the right to freedom of peaceful assembly is a systematic and recurring problem in the DRC, especially since the beginning of the political crisis in 2015. The crisis was catalyzed by suspicions by many people that President Joseph Kabila would try to seek a third term, by changing the Constitution or indefinitely delaying the elections.

Over the last four years, at least 300 people were killed during public demonstrations across the DRC, mostly by the army, police, intelligence agents and members of the government including at local and provincial level. Thousands were injured, thousands others arbitrarily arrested, while countless public and private property was destroyed or looted during protests according to the United Nations (UN).⁴ Between 19 and 21 September 2016 alone, at least 48 people including children were unlawfully killed by the police and the army in Kinshasa during protests organized by the opposition and civil society groups to demand President Kabila to step down over his failure to hold elections.⁵ 143 people, including 11 children were injured, and more than 299 people were unlawfully arrested and detained.⁶

Between 15 and 31 December 2016, at least 40 people were killed and 147 individuals wounded, including 18 children, “as a result of the disproportionate use of force and the use of live ammunition by defense and security forces, mainly soldiers of Democratic Republic of Congo’s Armed Forces (FARDC), to prevent civilians from protesting.”⁷ On 31 December 2017, 21 January 2018 and 25 February 2018, peaceful demonstrations organized by the Catholic Lay Coordination Committee (CLC) were brutally repressed by the security forces using excessive force, killing at least 17 people and wounding scores, mostly by gunshot. At least 405 people were arbitrarily arrested.⁸

The figures of dead, wounded and arbitrarily arrested people might be higher than the estimates as not all incidents were fully reported and documented. Following the deadly crackdown of the September 2016 protests in Kinshasa, authorities announced a general prohibition of public protests “until further notice”, citing fears for security and public order⁹. In some cities including

⁴ Compilation of data from UNJHRO annual reports, 2015-2017.

⁵ UNJHRO, Report on human rights violations in the Democratic Republic of the Congo in the context of the events of 19 to 21 September 2016: www.ohchr.org/Documents/Countries/CD/UNJHROSeptember2016_fr.pdf

⁶ Ibid.

⁷ UNJHRO, Report on human rights violations in the Democratic Republic of the Congo in the context of the events of 19 December 2016: www.ohchr.org/Documents/Countries/CD/UNJHRODecember2016_fr.pdf

⁸ www.amnesty.org/download/Documents/AFR6283952018ENGLISH.pdf

⁹ See www.jeuneafrique.com/371327/politique/rd-congo-police-fera-observer-linterdiction-de-manifester-a-kinshasa/

Lubumbashi, Kalemie, Kananga and Bunia, provincial and local authorities went even further by banning or requiring prior authorization for private events such as mourning ceremonies and wedding celebrations.

In a report published in September 2016, Amnesty International documented dozens of cases of prohibition or police repression of peaceful demonstrations, restrictions on the right to freedom of movement, leading to widespread violence.

As shown in the examples above, the violation of the right to freedom of peaceful assembly often results in the violations of other human rights, including the right to life¹⁰ and the right to liberty and security of person.¹¹

Furthermore, by preventing people from freely exercising their right to protest to demand for accountability, expressing their opinion and defending any lawful causes that are important to them through marches, sit-ins, meetings and other public demonstrations, DRC authorities are impermissibly restricting the protection of many other human rights, including social, economic and cultural rights.

II. Legal framework: The Constitution, other subsidiary laws, policies and practices in the DRC, and international standards

The right to the freedom of peaceful assembly is enshrined in Articles 25 and 26 of the Constitution of the DRC. Article 25 states: “The freedom of peaceful and unarmed assembly is guaranteed subject to the respect for law, public order and morality.” Article 26 further states: “The freedom of demonstration is guaranteed. Any demonstration on the public roads or in the open air, requires organizers to inform the competent administrative authority in writing. No one can be compelled to take part in a demonstration. The law lays down the implementing measures.”

The DRC is a State Party to the International Covenant on Civil and Political Rights and Article 215 of the Constitution of the DRC provides that “Treaties and international agreements duly concluded and promulgated have an authority superior to that of the [national] laws, subject to the application of each treaty or agreement by the other Party.” Thus, the Constitution recognizes international human rights treaties that the DRC has ratified such as ICCPR and ACHPR as well as other international human rights norms which have attained the status of customary international law to be part of the domestic law and therefore to be directly applicable in the DRC.

Article 21 of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides: “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

¹⁰ ICCPR, Article 6

¹¹ ICCPR, Article 9

order, the protection of public health or morals or the protection of the rights and freedoms of others.”¹²

Article 11 of the African Charter on Human and Peoples’ Rights also provides: “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.”¹³

1. Obligations to respect, protect, promote, and fulfil the enjoyment of the right to peaceful assembly

Every person has the right to freedom of peaceful assembly. According to the Guidelines on Freedom of Association and Assembly in Africa adopted in May 2017 by the African Commission on Human and Peoples’ Rights (ACHPR), “an assembly refers to an act of intentional gathering, in private or in public, for an expressive purpose and for extended duration.”¹⁴

The right to the freedom of assembly may be exercised in several ways, including through demonstrations, protests, meetings, processions, rallies, sit-ins, funerals, or using online platforms, or in any other way people choose.¹⁵ Regardless of their specific form, all peaceful assemblies enjoy protection under international human rights law. Two UN Special Rapporteurs have noted that in determining whether an assembly deserves this protection, “the peacefulness of an assembly should be presumed, and a broad interpretation of the term ‘peaceful’ should be afforded.”¹⁶

¹² www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

¹³ www.achpr.org/instruments/achpr/

¹⁴ ACHPR, Guidelines on freedom of peaceful association and assembly in Africa, adopted at the 60th Ordinary Session held in Niamey, Niger, in May 2017. Explanatory Note: These guidelines were developed within the framework of the mandate of the African Commission for Human and People’s Rights (ACHPR), under Article 45(1) (b) of the African Charter, “to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and people’s rights and fundamental freedoms upon which African Governments may base their legislation.” Although the guidelines do not constitute a binding legal instrument, they are a reference as regards the implementation of the provisions of the African Charter on Human and Peoples’ Rights, especially its article 11 in this case, by State Parties. The DRC is a full party to the African Charter on Human and Peoples’ Rights, which it ratified in July 1987.

¹⁵ ACHPR, Guidelines on freedom of peaceful association and assembly in Africa, Niger, May 2017. See also: Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/20/27, 21 May 2012 (Maina Kiai Report, May 2012), para 24.

¹⁶ Christof Heyns and Maina Kiai, 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, U.N. Doc. A/HRC/31/66, 4 Feb. 2016 (Joint SR Report, Feb. 2016), para 18. Explanatory Note: Special Rapporteurs are independent experts mandated by the UN to promote human rights and facilitate states’ compliance with their obligations under international human rights law. Their mandate is set forth in resolutions adopted by member states of the UN Human Rights Council which explicitly call on UN member states to take their views, guidance and recommendations, which include authoritative interpretations of international human rights law, into account when adopting laws, setting policies and taking or not taking specific actions. They are recognized experts on their matter of competence and as such provide an authoritative source of interpretation of international law.

The authorities in DRC have an obligation to ensure full enjoyment of this right including to protect and facilitate peaceful assemblies, and not to place undue restrictions. The state's duty to facilitate peaceful assemblies requires authorities to actively assist organizers and participants of an assembly in exercising their right. According to the Special Rapporteur on peaceful assembly and association, the authorities should try to enable people to have their voice heard within "sight and sound" of the intended target audience and provide them with access to public space including public streets, roads, and squares.¹⁷

2. Limited restrictions on the rights to peaceful assembly and association¹⁸

The constitution states that this right is "subject to the respect for the law, public order and morality." This provision has been regularly used or abused by the political, administrative and even judicial authorities in the DRC to justify all kinds of restrictions and the repression of the right to freedom of peaceful assembly.

International human rights law and standards allow certain restrictions to be imposed by states. Article 21 of the ICCPR clearly states that only those restrictions are permissible that are *"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". The restriction must also be proportionate to the legitimate purpose it intends to achieve. No limitation should be imposed in a way that infringes the essence of the right.*¹⁹

The principle of legality means that any restriction must be based in law and that the laws or regulations restricting the right must be clearly formulated without any ambiguity so that people can anticipate the possible consequences of their actions.

¹⁷ Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/23/39, 24 Apr. 2013 (Maina Kiai Report, Apr. 2013), paras 60, 65, 66.

¹⁸ Any restriction on freedom of peaceful assembly should be established in law, and it must be necessary and proportionate to the legitimate purpose. (Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004 (Human Rights Committee, General Comment No. 31, 2004), para 6.)

¹⁹ Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004 (Human Rights Committee, General Comment No. 31, 2004), para 6.

The principle of necessity and proportionality requires states to prove that the restrictions are needed to serve legitimate purposes and it is proportional to the legitimate aim to be pursued. In other words, restrictions should only be imposed when there is “pressing social need” for the interference,²⁰ and the authorities must show a direct and immediate connection between the restriction and the protected interest. To meet the requirements of proportionality, any restriction being imposed must be of proportionate measure to achieve an intended legitimate aim. It must be the least intrusive instrument among those which might achieve the desired result, and it must be proportionate to the interest to be protected²¹. In addition, it must be noted that the test of necessity and proportionality of any restriction requires a case-by-case analysis of the assembly in question with consideration given to all the circumstances such as nature, purpose, manner and place.

Extract of Kananga Mayor’s decree n° 3073/04/2017 of November 23, 2017, prohibiting public demonstrations in the city of Kananga in the Kasaï Central province

"Whereas the city of Kananga has just come out of a calamitous situation due to the incursion of the Kamuina Nsapu militia, and that it is declared until now a "military operational sector";

Whereas public demonstrations may favor the unpredictable infiltration of negative forces of any kind in the city if we are not careful;

Considering the wisdom of the phrase which states that prevention is better than cure;

Considering opportunity and necessity, DECIDES:

Article 1: The organization of public events of any kind is prohibited throughout the city of Kananga until further notice."

Restrictions can be made to the “time, place and manner” of an assembly, but such restrictions must pass the test of necessity and proportionality as described above.²² In such cases, the authorities should always give preference to the least intrusive means. Even in cases where certain restrictions to the time, place and manner of an assembly are imposed, the authorities should try to facilitate such an assembly by offering reasonable alternatives.²³ As a rule,

²⁰ Maina Kiai Report, May 2012, para 17.

²¹ See: Human Rights Committee, General Comment No. 27 Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9, 1999, para 14.

²² OSCE/ODIHR and the Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2010, para 99. Explanatory note: Although the DRC is not part of the OSCE, there is no reason for Congolese lawmakers and policymakers not to refer to these Guidelines in the process of making progressive laws and policies in the field of freedom of peaceful assembly.

²³ OSCE/ODIHR and the Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2010, para 45.

assemblies should be facilitated within “sight and sound” of their target audience.²⁴

This decision of the Mayor of Kananga seems to suggest that the town was in a state of emergency or a state of siege, although no such state of emergency was declared. Furthermore, even under a state of emergency or a state of siege, it does not permit the unlimited restriction of fundamental rights and freedoms. As Article 21 of the ICCPR provides, “no restrictions may be placed on [the exercise of the right to freedom of peaceful assembly] 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.” Although the Kasai region, comprising the town of Kananga, was declared a Military Operational Sector by presidential order in April 2017, there is no provision in the presidential order to serve as legal basis for such a restrictive measure by the Mayor of Kananga. Finally, content-based restrictions of the right to freedom of peaceful assembly are not acceptable under international law except in the case of those forms of expression that states must prohibit under Article 20 of the International Covenant on Civil and Political Rights (ICCPR) – that is, propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.²⁵ Any pressing need to restrict the right to freedom of peaceful assembly based on anticipated risks must be clearly demonstrated.

By stating that “public demonstrations may favor the unpredictable infiltration of negative forces of any kind in the city” without further description of the risk, the Mayor of Kananga’s decision is a blanket prohibition based on a vague and superfluous presumption, which falls short of international standards that impose a case by case assessment. In short, this is an illustration of an unnecessary, disproportionate, and unlawful prior restriction of the right to freedom of assembly.²⁶

III. The *Sesanga bill* and its contradictions

On 16 November 2013, Delly Sesanga Hipung, an opposition leader and Member of Parliament, presented to the National Assembly a draft bill aimed at “determining the implementation measures for the freedom of assembly in public space, as enshrined in articles 25 and 26 of the DRC’s 2006 Constitution.” If promulgated, the bill would then replace Legislative Decree of 29 January 1999 on “public demonstrations and assemblies”,²⁷ providing that demonstrations

²⁴ OSCE/ODIHR and the Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2010, 3.5 and para.45; Joint SR Report, Feb. 2016, para 24.

²⁵ Article 20 of the International Covenant on Civil and Political Rights.

²⁶ *The authorities can prohibit or disperse an assembly. However, any prohibition or dispersal must be used as a measure of last resort where no other less intrusive response would achieve the legitimate aim pursued. In this case, the authorities should promptly communicate the probation to organizers. Prompt resort to an independent court to determine any dispute on such matter should be available. The burden rests on the authorities to justify and substantiate any restrictions imposed.* See ACHPR’s Guidelines, paragraph 92 and 93, pages 29-30. See also the 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, II.C. (http://freeassembly.net/wp-content/uploads/2016/02/A.HRC_.31.66_E_with_addendum.pdf)

²⁷ www.leganet.cd/Legislation/Droit%20Public/Ordre/DL.29.01.1999.htm

held in public or in open space could be subject to prior authorization. In fact, the authorities have continued to subject public demonstrations, and private meetings to prior authorization based on article 4 of the 1999 decree, even though this provision is null and void because it contravenes article 26 of the current Constitution (which entered into force in February 2006). Article 221 of the Constitution provides that the laws and regulations then in force [only] remain in force if they are not contrary to the new Constitution.²⁸

After many back and forth within the parliament, the *Sesanga bill* was eventually adopted by MPs and Senators in October 2015 and sent to the President of Republic's office for promulgation. Nevertheless, it was never promulgated, and in press conference in Kinshasa on 26 January 2018, President Joseph Kabila declared that the bill was sent back to the parliament for reconsideration.²⁹

Although presented by its initiator as an important step forward to provide the DRC with an appropriate legal framework for the exercise of the right to freedom of peaceful assembly, the *Sesanga bill* falls short of both the international law and standards and the DRC Constitution itself.

1. Presumption in favor of peaceful assembly, prior notification and recognition of informal associations, spontaneous assemblies and counter-demonstrations

Participating in and organizing assemblies is a right, not a privilege, thus its exercise does not require the authorization of the State.³⁰ A system of prior notification, such as the one provided for in Article 26 of the 2006 Constitution of the DRC, should only aim at allowing the authorities to facilitate the exercise of this right and to take necessary measures to protect public safety and order and the rights of other people.³¹ It should not be used as a means to restrict or prohibit an assembly or to place undue burdens on the organizers. Any notice period should be as short as possible,³² and the procedure should be simplified, flexible – including in terms of the information required³³ –, and free of charge. Lack of notification should not make an assembly illegal or be subject to criminal or administrative sanctions resulting in fines or imprisonment.³⁴ Exception should be made for spontaneous assemblies, or other assemblies which occur

²⁸ Official Gazette of the DRC, the Constitution of the Democratic Republic of Congo of 18 February 2006 as revised by law n° 11/002 of 20 January 2011, www.leganet.cd/Legislation/JO/2011/JOS.05.02.2011.pdf

²⁹ www.voaafrique.com/a/kabila-promet-une-loi-pou-recadrer-les-manifestations-en-rdc/4227018.html

³⁰ ACHPR Guidelines, paragraph 71

³¹ See paragraph 71 of ACHPR's Guidelines, p.24. See also Maina Kiai Report, May 2012, para 28.

³² ACHPR's Guidelines propose that the period be not more than 5 days; « ideally 48 hours ». (Paragraph 72.a., page 24)

³³ For example, organizers should not be required to be a registered entity (association, political party, foundation). See ACHPR's Guidelines, paragraph 67, p.23

³⁴ ACHPR's Guidelines, paragraph 71 b. See also: Joint SR Report, Feb. 2016, para 23.

without an identifiable organizer, for example because of mobilization through social media.³⁵ Such assemblies should be protected and facilitated in the same way as assemblies which have been planned. Counter-demonstrations, either planned or spontaneous, are recognized and should be facilitated. However, they should not be allowed to violate the right to freedom of assembly of the first party, nor vice-versa. Authorities should ensure that all demonstrations may proceed peacefully.³⁶

In practice, however, DRC authorities keep requiring prior authorization, referring to the outdated Article 4 of the 1999 Decree, or simply citing security and public order reasons.³⁷ Sometimes they have refused to acknowledge notification letters, they have required detailed information including the identity and number of participants (which is hard to predict), and made other obstacles. In practice, in the DRC, unregistered associations are wrongly considered illegal by the authorities, and not allowed to organize demonstrations.

In its current state, the *Sesanga bill* would just formalize these violations. The failure by the organizers of a peaceful demonstration to comply with the five conditions set in Article 10 for prior notification³⁸ render the notification inadmissible. Moreover, organizers incur one to six months in prison or 100,000 to 500,000 Congolese Francs of fine if they fail to comply with such purely administrative conditions, which is an extremely harsh consequence. Article 13 gives total discretion to the authorities to restrict in terms of time or place of an assembly, without establishing any clear criteria that would be in line with international standards. The bill fails to establish that restrictions should be the exception rather than the rule, and that the first duty of the authorities is to facilitate the assembly, as opposed to use any excuse to ban or restrict it. Article 14 (2) implies that as a rule the assembly cannot take place if there is no agreement on the changes to the time or place, as it requires organizers to go to court. Thus, it is an equivalent to a prohibition of an assembly that must be last resort and be justified by particularly valid reasons. Yet given the vagueness of the considerations as mentioned in Article 13 (1), it is unlikely that the organizers would succeed in court. Altogether, the bill establishes a *de facto* prior authorization scheme, which obviously is not consistent with Article 26 of Constitution of the DRC, nor relevant international standards.³⁹

The bill fails to make an exception, regarding prior notification, for spontaneous demonstrations and demonstrations organized online without necessarily identifiable organizers, nor for small assemblies that do not require preparations on the side of the authorities. In addition, the prior notification period is unnecessarily too long (seven days),⁴⁰ and, in case of harassment or administrative obstructions, the organizers' right to legal remedy provided for under Article 32

³⁵ See Paragraph 75 of ACHPR's Guidelines.

³⁶ See ACHPR's Guidelines, paragraph 97.

³⁷ See for example: Tribunal de Grande Instance de Goma, Serge Sivyavugha & Cie, April 2016.

³⁸ Those conditions are: identity, address, telephone and/or email contacts of organizers; identity, address, telephone and/or email contacts of representatives in case the organizers are legal persons; purpose, date and duration of the demonstration; itinerary, assembly or stationary point as the case may be.

³⁹ The provisions of Article 14 in fact presents of State censorship against people's rights in their very substance and modalities.

⁴⁰ Article 9 of the *Sesanga bill*.

is unclear as to which judiciary court is competent.⁴¹ Under international standards, prior notification is only intended to allow the authorities to get prepared to ensuring that an assembly can go ahead with in the best conditions for both assembly participants and non-participants. Prior notification should therefore not be required if no preparation by the authorities is required (small assemblies, for instance), and the administrative arrangements for its completion should not be unnecessarily burdensome, long or expensive.

2. Legal Liability in the context of peaceful demonstration and assemblies

Organizers should never be held responsible for the unlawful behavior of others; to do so would violate the principle of individual liability and, among other things, discourage potential assembly organizers from exercising their rights.⁴² While individuals who commit an offence or fail to follow lawful directions of the law enforcement officials may be subjected to criminal or administrative sanctions, “no person should be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest.”⁴³ As is possible, authorities should avoid imposing specific criminal sanctions in the context of laws governing assemblies. As the ACHPR puts it, “assemblies shall not be governed by provisions of criminal law different from the generally applicable provisions of the penal code. Liability must be personal. Neither the organizers nor fellow participants of a public assembly should be subjected to sanctions of any kind based on acts committed by others.”⁴⁴

These provisions of the *Sesanga bill*, also, fall short of international standards. The bill makes the organizers liable (both civil⁴⁵ and criminal⁴⁶ responsibility) for damages incurred during assemblies. Thus, the bill severely punishes (up to six months' imprisonment) on grounds of: (1) organizing an assembly without prior notification; (2) bypassing the instructions of the authority to postpone a meeting or to hold it in a different place, time, or following a different itinerary; (3) making an incomplete or inaccurate notice. Article 28 states: “The fact of continuing a demonstration voluntarily after three summonses [...] is punishable from one to three years of imprisonment [...]”

Similar provisions from the outdated 1999 decree, the criminal law as well as the military penal code have been already used widely by the authorities as grounds to establish the liability of organizers and participants of assemblies.

3. Policing assemblies, remedy and accountability⁴⁷

⁴¹ Article 32 of the *Sesanga bill* says: “Pending the installation of the administrative courts, the current judiciary courts are competent to settle disagreements provided for by Article 14 of the present law.”

⁴² Joint SR Report, Feb. 2016, para 26.

⁴³ Joint SR Report, Feb. 2016, para 27.

⁴⁴ ACHPR's Guidelines, paragraph 99 - 102

⁴⁵ Articles 23 para.2, 24 and 26 para. 2.

⁴⁶ Especially Article 28.

⁴⁷ In regard to the use of force in policing assemblies, Amnesty International Netherlands, Police and Human Rights
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In policing assemblies, the first and foremost responsibility of the authorities is to facilitate and protect peaceful assemblies and should not from the outset be shaped by the anticipation of violence and use of force. If organizers have expressed their peaceful intention, the peacefulness of the assembly should be presumed,⁴⁸ and handling of assemblies by the authorities should be guided by an approach of facilitation of the assembly, rather than the anticipation of violence and use of force.

The ACHPR has established principles and guidelines for policing assemblies in Africa⁴⁹, which set out the principles that law enforcement authorities should follow to avoid violating the right to freedom of assembly over the efforts or the pretext, of maintaining public order.

According to these guidelines, in managing assemblies, law enforcement agencies should protect the safety and rights of assembly participants as well as monitors and bystanders.⁵⁰ Policing of assemblies should be carried out in a way to reduce and de-escalate tension with the purpose of preventing violence while avoiding the use of force as much as possible. As ACHPR's guidelines states, "the primary role of law enforcement officials in policing assemblies is to ensure the safety of the public and to safeguard the human rights of all persons. This role should be clearly articulated in national legislative and regulatory instruments governing assemblies."⁵¹ In this regard, the authorities should keep in mind that the physical appearance of the police during an assembly should not contribute to creating or increasing existing tensions.⁵² Acts of sporadic violence or offences by some should not be attributed to others whose intentions and behavior remain peaceful in nature and authorities remain obliged to seek as much as possible to facilitate their exercise of the right to peaceful assembly.⁵³

As an internationally recognized human right, freedom of peaceful assembly enjoys protection. International law only allows for the dispersal of peaceful assemblies under exceptional conditions. For example, a peaceful assembly which advocates national, racial or religious hatred constituting incitement to discrimination, hostility or violence, may be subjected to dispersal if lesser means of managing the situation have failed. Likewise, an assembly which prevents access to essential services such as blocking an emergency entrance to a hospital or seriously interferes with traffic or the economy for a prolonged period, for example, blockage of a major highway for days, may be dispersed. However, failure to notify authorities of an assembly

Programme, Use of Force in 2015 developed useful and detailed "Guidelines for the Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials." (August 2015): https://www.amnesty.nl/content/uploads/2015/09/ainl_l_usage_de_la_force_fr.pdf?x56589. See Chapter 7 of those Guidelines, which deals specifically with the use of force in public assemblies.

⁴⁸ Maina Kiai, May 2012, para 25.

⁴⁹ ACHPR, Policing Assemblies in Africa, http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf

⁵⁰ Joint SR Report, Feb. 2016, para. 41.

⁵¹ ACHPR, Policing Assemblies in Africa, General Principles, p. 13

⁵² Amnesty International Netherlands, *Use of Force Guidelines*, September 2015, p.151.

⁵³ Joint SR report 2016 para. 20

is not a sufficient justification for dispersal.⁵⁴

Principle 13 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides clear guidance on the use of force in dispersing such assemblies: “In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”

Any resort to use force needs to have a legal basis and should respond to strict criteria of necessity and proportionality as set by the UN basic principles on the use of force and firearms by law enforcement officials⁵⁵.

The DRC does not have a specific law or policy on policing assemblies. The 2011 law on the organization and functioning of the Congolese National Police⁵⁶ incorporates basic rules on the use of force. Same with the Code of Conduct for Congolese National Police Officers.⁵⁷ Article 8 of the 2011 Police Act states: “The police shall resort to force “only when absolutely necessary and solely to achieve a legitimate objective. In any event, the use of force must observe the principle of proportionality and progressiveness.” Even then, police officers shall not use force without prior request by the authority responsible for law and order, meaning in practice the commanding officer (Article 9). On the contrary, the law allows the police officers to use stabbing weapons (*armes blanches*) without prior request, in the event of absolute necessity when, in the call of duty, they are responsible for dispersing crowds or quelling riots.” Such provision is a clear contempt to the international law and standards governing the use of force, as described above.

The *Sesanga bill* provides that law enforcement agents are only allowed to use non-lethal weapons in the handling of assemblies (Art. 21 of the bill), thus prohibiting the use of firearms – an option that, unfortunately is still considered in the law governing the National police (Article 9). It can be positively noted that the use of force is only contemplated in case of violence or attacks against law enforcement officials or third persons, and that in the use of force the principles of proportionality and progressivity must be respected (Article 22 of the bill). However, the police powers in relation to maintaining order are still formulated too broadly, allowing the dispersal of an assembly already in case of excesses (“*débordements*”), without any threshold or description what these may be. This gives extreme discretion to the police for the dispersal of an assembly, which according to international human rights law and standards should only be the last resort when all other means have failed. Furthermore, the power to use force is still defined too broadly (Article 22 of the bill) as – similar to the current National police law - it does

⁵⁴ Joint SR Report, Feb. 2016, para 62.

⁵⁵ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx. See also Amnesty International's Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: https://www.amnesty.org.uk/files/use_of_force.pdf

⁵⁶ *Organic Law n° 11/013 of 11 August 2011* on the organisation and functioning of the Congolese national Police. See <http://csrp1.org/wp-content/uploads/2017/02/Loi-organique-PNC-2011new1.pdf>

⁵⁷ Decree n°13/040 of 16 September 2013.

not contain any obligation to attempt de-escalation or non-violent means first. The types of weaponry that may be used, the threshold and criteria for their use, and the mode of how they are supposed to be used are not defined in the current Police Act, the Code of Conduct for Police Officers and in the *Sesanga bill* – again giving far too wide discretion to the police with regards to the means they may deploy. The bill does not provide for remedy in case law enforcement agencies intentionally disrupt an assembly or perpetrate other human rights violations during policing operations. The responsibility of the administrative authorities is not mentioned, in regard to the obligation to train, inform and appropriately equip the law enforcement agencies, including the police, for the purpose of policing assemblies in a rights-driven manner⁵⁸. The DRC should domesticate the principles and rules provided for by international bodies, including the ACHPR, by putting in place comprehensive laws and policies on policing assemblies and the use of force as presented in this briefing.

IV. Recommendations

DRC authorities should:

1. Withdraw the *Sesanga bill* which falls short of provisions of the DRC Constitution as well as international human rights standards, and instead initiate a fresh legal framework that complies with the international law and standards, including the ICCPR and ACHPR, concerning the enforcement of the right to freedom of peaceful assembly;
2. Ensure that key concepts such as assembly, association, public order and morality, relevant authorities, self-defense and others are defined as clearly as possible in future legislation and policies, in line with international standards and guidelines;
3. Pending the adoption of national legislation, enforce the right to freedom of peaceful assembly as provided for by the ICCPR, the ACHPR and other binding international instruments, and as laid down through international standards, including with regard to : presumption of peacefulness of peaceful assembly and association, non-discrimination, prior notification without unnecessary burdens, recognition of spontaneous assemblies and informal associations, recognition and protection of counter-protests, prohibition of criminalization of organizers of protests.
4. Adopt and implement a clear and human rights compliant legal and policy framework on policing assemblies, including about the use of force, in line with international standards. In relation to the use of force, establish a clear obligation to attempt de-escalation and resort to non-violent means first, and define clear criteria and thresholds for the different degrees of force and weapons to be used, including the setting of restrictions and prohibitions to ascertain the full respect of the principles of necessity and proportionality. In any use of force, the police must always respect human rights, including the right to life and the prohibition of torture and other ill-treatment. The risk of injury and death should therefore always be minimized. In any event, intentional lethal use of firearms may only be used when strictly unavoidable so to protect life.
5. Revise public order management procedures, manuals, training and practice in compliance with international human rights law and standards.
6. Formally lift ongoing measures prohibiting demonstrations on vague grounds of national

⁵⁸ See ACHPR, Policing Assemblies in Africa.

security and public order, and instruct administrative authorities (governors and mayors) as well as law enforcement officers accordingly;

7. Ensure adequate and regular training for law enforcement agencies and administrative authorities.