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Summary record of the 3718th meeting
Held via videoconference on Thursday, 9 July 2020, at 12.30 p.m. Central European Time

Chair: Mr. Fathalla

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The meeting was called to order at 12.35 p.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 37 on article 21 of the Covenant (Right of peaceful assembly) (*continued*) (CCPR/C/GC/R.37)

1. **The Chair** said that he invited the Committee to resume its second reading of draft general comment No. 37 on article 21 of the Covenant (Right of peaceful assembly). The text of the paragraphs to be considered at the current meeting had been distributed to members.

Paragraph 40 (*continued*)

2. **Mr. Heyns** said that he had prepared a new version of paragraph 40 in light of comments made by Committee members at the previous meeting. As the Committee had been unable to find a suitable alternative to the wording "presumption against restrictions" that appeared in the version of the paragraph provisionally adopted on first reading, he proposed that the first sentence should instead focus on the fact that the onus was on the authorities to justify any restrictions.

3. The version of the paragraph that was now before the Committee read:

> While the right of peaceful assembly may in certain cases be limited, the onus is on the authorities to justify any restrictions. Authorities must be able to show that any restrictions meet the requirement of legality, and are also both necessary for and proportionate to at least one of the permissible grounds for restrictions enumerated in article 21, as discussed below. Where this onus is not met, article 21 is violated. The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it. Restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies, or causing a chilling effect.

4. **The Chair** said he took it that the Committee members wished to adopt the paragraph, as revised by the Rapporteur.

5. *Paragraph 40, as amended, was adopted*.

Paragraph 41 (*continued*)

6. **Mr. Heyns** said that, in light of the Committee's discussion at its previous meeting, he had replaced "contemplated" with "deemed necessary" and "intermediate or partial restrictions" with "less-intrusive measures" in the second sentence.

7. As had been noted at the previous meeting, the paragraph had a three-part structure, stating first that prohibition was a measure of last resort, then that less intrusive measures must be considered and, finally, that measures should be decided upon after an assembly had taken place. In order to take account of some members' concerns that the formulation of the third element in the revised draft as provisionally adopted on first reading was too weak, he proposed that, in the third sentence, "It is, moreover, often preferable" should be changed to "More broadly, States should consider".

8. The proposed text of paragraph 41 did not entirely address the concern expressed by Amnesty International that arrests made during an assembly for minor transgressions might have a chilling effect on the entire assembly and should therefore be deferred until after the assembly. In his view, that concern had merit. The Committee could either address the issue when it discussed the policing of assemblies in later paragraphs or it could add a fourth element to paragraph 41, stating that minor transgressions should generally not be dealt with while an assembly was ongoing.

9. **Mr. Shany** said that the wording "consider less-intrusive measures" was not sufficiently precise, as the words "more" and "less" always stood in comparison to something else. He proposed using a formulation such as "select less rather than more intrusive measures" in order to more precisely convey the idea of a gradation.

10. **Mr. Heyns** said that the "less-intrusive measures" stood in comparison to the prohibition mentioned in the first sentence; they were less intrusive than a full prohibition. However, he did not object to using the language proposed by Mr. Shany and would amend the second sentence accordingly.

11. **Ms. Pazartzis** said, via the online chat function, that she would like to know why the words "more broadly" had been included in the last sentence. She proposed beginning the sentence directly with the words "States should consider".

12. **Mr. Heyns** said that the words "more broadly" had been intended to signal that what followed was in addition to the obligation set out in the second sentence. To make it clear that the third sentence addressed a separate issue, he proposed inserting the word "also" before "consider".

13. **Ms. Pazartzis** said, via the online chat function, that she agreed with the Rapporteur's proposal.

14. **Mr. Zyberi** said that there was an inconsistency in the terminology proposed for paragraphs 41 and 45. While the latest draft of paragraph 41 prepared by the Rapporteur referred to "less-intrusive measures", the version of paragraph 45 as provisionally adopted on first reading referred to "least intrusive" measures. Concerned that this inconsistency could give rise to confusion, he asked the Rapporteur to consider the two terms again before the Committee decided which one to use. Furthermore, there might be subjective differences in how individuals understood "less-intrusive" and "least intrusive".

15. **Mr. Heyns** said that the intended purpose of paragraph 41 was to indicate that States should avoid harsh actions, as well as to highlight that allowing or banning an assembly were not the only two choices available to them; they also had a range of intermediate options that would be less intrusive than prohibition. Paragraph 45 went on to say that, among those intermediate measures, the State must use the least intrusive one. Thus, an idea first introduced in paragraph 41 was further developed in paragraph 45.

16. *Paragraph 41, as amended, was adopted*.

Paragraph 45 (*continued*)

Paragraph 46

17. **Mr. Heyns** said that paragraphs 45 and 46 of the revised draft dealt with necessity and proportionality, respectively. The Committee's jurisprudence reflected two approaches to those concepts. At times they were seen as separate terms, each of which had a separate definition but which built on each other, and at times necessity was defined, partly, in terms of proportionality. He would first discuss the two approaches and then present a solution that could accommodate both of them.

18. When the terms were treated separately, as was often the approach used in cases addressing the use of force, necessity was seen as the first hurdle. From the range of means available to it, the State was required to select the least intrusive one, which involved a factual assessment. Once that hurdle was cleared, the State was then required to show that its actions and the restrictions on the right involved were proportionate. That entailed a value judgment. The interference with the right would be weighed against the benefit the State obtained in terms of the grounds for interfering. The requirement of proportionality served as a ceiling on the range of means that could be used because, even if the chosen means passed the test of necessity, if it did not also pass the test of proportionality, it would not be allowed. For example, in a situation involving use of force issues, if a demonstrator was about to set fire to a building and, to prevent that action, the only police officer on duty, who was some distance away, shot and killed the demonstrator, the officer's actions might pass the test of necessity if they constituted the least intrusive means available, but they would not pass the test of proportionality.

19. When the two requirements were combined, necessity was considered with reference to proportionality. Under that approach, in order for a restriction to be justifiable, it must, first, be appropriate for achieving its protective function, also defined in terms of the ground for restriction; second, be the least intrusive (what he had referred to earlier as the

requirement of necessity); and third, be proportionate. That was a different, and narrower, understanding of "proportionate".

20. In order to combine the two approaches, he proposed merging paragraphs 45 and 46 into one paragraph that would read:

> Article 21 provides that any restrictions must be "necessary in a democratic society". Any restrictions must therefore be *necessary* and *proportionate* in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to being merely reasonable or expedient. Restrictions must be appropriate responses to a pressing social need, related to one of the permissible grounds recognised by article 21. They must also be [necessary in the sense that they are] the least intrusive among the measures that might serve the relevant protective function. Moreover, they have to be shown to be proportionate, which requires a value assessment, weighing the nature and the extent of the interference against the benefit obtained related to one of the grounds for interfering. If the former outweighs the latter, the restriction is disproportionate and thus not permissible.

21. At the previous meeting, some Committee members had expressed concerns about the use of the word "imperative" in the fourth sentence of paragraph 45 as provisionally adopted on first reading; he had therefore not included that word in the second sentence of the merged paragraph. The third sentence of that paragraph set out the first substantive requirement. The Committee could discuss whether to include or delete the language that appeared in square brackets in the fourth sentence. If a restriction met all three requirements, it would be considered necessary and proportionate, but no strict definitions of those two terms were given. A distinction between proportionate in its broad and narrow senses would be too technical for a general comment. He had, in the proposed new paragraph, approached necessity and proportionality as a combined concept but retained the three criteria used by the Committee over time.

22. **Mr. Ben Achour** said that, as necessity and proportionality were concepts that were both independent and interdependent, he supported the Rapporteur's proposal to combine paragraphs 45 and 46 so as to highlight the relationship between them. The paragraph was in line with the spirit of the Covenant. He proposed deleting the language in square brackets in the fourth sentence and requested clarification of the meaning of the last sentence.

23. **The Chair** said that some other members also supported deleting the language in square brackets.

24. **Mr. Shany** said that he agreed with the approach taken by the Rapporteur and supported deleting the language in square brackets. Although, in general comments No. 34 (2011) and No. 27 (1999), the Committee had advocated following the principle of proportionality to identify the least intrusive measure, he would not insist on that approach being followed in the new merged paragraph. It was problematic that the concept of proportionality was mentioned in the sentence following the one addressing least intrusive measures, as that suggested that only a necessity test was needed to determine what the least intrusive measure was, and not a test of proportionality. He therefore proposed that, in the penultimate sentence, the word "proportionate" should be changed to "proportionate in the narrow sense". The proposed change, although it was based on a fine point of legal doctrine that would not affect the guidance being offered to States, would help maintain consistency between the text under consideration and the previous general comments.

25. Also with respect to the penultimate sentence, there seemed to be a disconnect in the comparison between the "nature and extent of the interference" and the "benefit obtained related to one of the grounds for interfering", as one side was phrased in terms of cost-benefit analysis and the other was more abstract. He proposed changing the first formulation to read "the nature and the extent of the harm caused by the interference" in order to clarify that "harm" was being weighed against "benefit" to assess the proportionality.

26. **Mr. Heyns** said that he would take out the language in square brackets. Based on Mr. Shany's proposal to add "the harm caused by" in the penultimate sentence, he proposed

replacing “If the former outweighs the latter” with “If the harm outweighs the benefit”, which would address the point raised by Mr. Ben Achour regarding the last sentence.

27. He noted that Mr. Shany had said he would not insist on his proposal to insert the phrase “in the narrow sense” after “proportionate” in the penultimate sentence. The change proposed would make the paragraph difficult for readers to understand because they would encounter the word “proportionate” in the first sentence, where it appears without qualification or explanation, and then be told that it could be understood in a narrow sense. Furthermore, in the new proposed text, the question of whether the element of “least intrusive” related to necessity or to proportionality was left open since the words “necessary” and “proportionate” both appeared at the beginning of the paragraph.

28. **Mr. Zyberi** said that he generally supported Mr. Shany’s proposals; however, he considered that the use of the word “harm” might be problematic, as it would refer to harm caused by the State.

29. **Mr. Heyns** said that he would prepare a new version of the penultimate sentence, taking into account Committee members’ comments and proposals. The draft of the new merged paragraph would be finalized and adopted at the Committee’s next meeting.

30. *It was so decided*.

Paragraph 47

31. **Mr. Heyns** said that he had not proposed any changes to paragraph 47, on which there had been no comments from States parties, civil society or other stakeholders.

32. *Paragraph 47 was adopted*.

Paragraph 48

33. **Mr. Heyns** said that a number of comments had been received from stakeholders on paragraph 48, which concerned the degree to which restrictions on the right of peaceful assembly were justified in the interests of national security. The Russian Federation had argued that the contention that restrictions should “only exceptionally” be based upon national security was not supported by the Covenant. In contrast, the consortium of Latin American non-governmental organizations had suggested that the second sentence should be revised to make it clear that the threshold for “interests of national security” to serve as a ground for restrictions would never be met by assemblies that could be described as peaceful. The wording of paragraph 48 therefore represented middle ground between those two approaches. The Association for Progressive Communications had recommended that the Committee should explicitly state that expressing opinions online or through digital media that were against the State or State policies, including calls for self-determination or regime change, could not be prohibited on the grounds of national security. He proposed addressing that issue in a later paragraph. As recommended by the International Network of Civil Liberties Organizations, he proposed making some slight amendments to the last sentence of the paragraph in a bid to clarify it. He also proposed that the word “credible” should be inserted before “threat” in the first sentence. The body of the paragraph would thus read:

> The “interests of national security” may serve as a ground for restrictions if such restrictions are necessary to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force. This threshold will only exceptionally be met by assemblies that can be described as “peaceful”. Moreover, where the very reason that national security has deteriorated is the suppression of human rights, such deterioration cannot be used to justify further restrictions, including of the right of peaceful assembly.

A footnote to the paragraph contained the first of several references to the Siracusa Principles on the Limitation and Derogation of Provisions in the Covenant.

34. **Mr. Shany** said that it would be preferable if the first sentence of the paragraph reproduced the wording of Article 2 (4) of the Charter of the United Nations, in which the word “threat” was used without the qualifier “credible”. In addition, the bar for justified

restrictions on the right of peaceful assembly was set unrealistically high – restrictions on the right could be legitimate even if the exercise of the right did not, strictly speaking, pose a threat to the existence of the State. Most States, for instance, would not allow demonstrations on military bases.

35. Lastly, with regard to the final sentence of the paragraph, it seemed unlikely that a State would ever acknowledge that its suppression of human rights had led to a deterioration of the security situation. It was much more common for States to make the opposite argument, namely, that restrictions were being placed on the exercise of human rights because of a worsening security situation.

36. **Mr. Heyns** said that, while the word "credible" did not appear in Article 4 (2) of the Charter, it was, in his view, appropriate to use it in the context of restrictions on assemblies, since States should not respond to a threat unless it was credible. He agreed with Mr. Shany that a State should be able to impose restrictions on the exercise of the right of peaceful assembly even when the danger it faced was somewhat less severe than a threat to its existence. He would therefore add language to indicate that restrictions must be necessary "to preserve the State's capacity" to protect the existence of the nation.

37. **The Chair** suggested that the Rapporteur should prepare a revised version of paragraph 48 for consideration at the next meeting.

38. *It was so decided*.

Paragraph 49

39. **Mr. Heyns** said that, among the few comments received from stakeholders on paragraph 49, Corporación OPCIÓN had suggested that the paragraph should specify more precisely the parameters for determining that an assembly involved a "significant and immediate risk". That point had been addressed in paragraph 42. He recalled that the paragraph, as provisionally adopted on first reading, read: "For the protection of 'public safety' to be invoked as a ground for restrictions on the right of peaceful assembly, it must be established that the assembly creates a significant and immediate risk of danger to the safety of persons (to their life or physical integrity) or a similar risk of serious damage to property."

40. **Mr. Shany** said that the risk of danger to the safety of persons should be described as "significant and real" rather than as "significant and immediate". There could be significant risks that were not immediate.

41. **Mr. Ben Achour** said that the words in parentheses could be omitted, as risks to life or physical integrity were not the only threats to a person's safety.

42. **Mr. Heyns** said that replacing the word "immediate" with "real" would mean exchanging a notion of time for a notion of probability. The notion of the probability of risk, or the likelihood of harm, had been covered in an earlier paragraph. The notion of the safety of persons should not be understood too broadly. A disturbance of the peace, for example, did not necessarily pose a danger to anyone's personal safety, and the likelihood of such a disturbance was not a legitimate ground for restricting the exercise of the right of peaceful assembly.

43. **The Chair** suggested that the Rapporteur should prepare a revised version of paragraph 49, taking into account Committee members' comments and proposals, for consideration at the next meeting.

44. *It was so decided*.

Paragraph 50

45. **Mr. Heyns** said that several stakeholders had made suggestions regarding the wording of the paragraph as provisionally adopted on first reading. Article 19: International Centre against Censorship had suggested that the paragraph should contain an acknowledgement that assemblies could be intentionally disruptive. He had therefore added the word "deliberately" before "disruptive" in the penultimate sentence. He also proposed

adding the word “proper” before “functioning of society” in the first sentence. The paragraph would now read:

> “Public order” refers to the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly. States parties should not rely on some vague notion of “public order” as a ground to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies are in some cases inherently or deliberately disruptive. “Public order” and “law and order” are not synonyms, and the prohibition of “public disorder” in domestic law should not be used to impose undue restrictions on peaceful assemblies.

46. **Mr. Furuya** said that the French for “public order” should be included in parentheses, as in article 21 of the Covenant. He was uncomfortable with the second sentence of the paragraph, as article 21 stated clearly that restrictions could be placed on the exercise of the right of peaceful assembly in the interests of public order. The sentence should be reworded or deleted.

47. **Mr. Shany** said that the penultimate sentence was merely descriptive and should be revised to include a prescriptive component. In other words, the disruptiveness of assemblies might be said to require a considerable degree of toleration.

48. **Mr. Heyns** said that the words “*ordre public*”, the French for the term “public order”, already appeared in paragraph 47. In response to the concern expressed by Mr. Furuya, he proposed using the words a “vague definition of ‘public order’” rather than a “vague notion of ‘public order’”. In response to Mr. Shany’s proposal, he would add the phrase “and require a significant degree of toleration” at the end of the penultimate sentence.

49. *Paragraph 50, as amended, was adopted on that understanding*.

Paragraph 51

50. **Mr. Heyns**, recalling that paragraph 51 addressed restrictions imposed for the protection of public health, said that the non-governmental organization MINBYUN: Lawyers for a Democratic Society had recommended that the paragraph should provide a more specific explanation on the meaning of “substantial health risk”, because that the phrase might be interpreted in bad faith due to its vagueness, and that specific examples of substantial health risks should be provided for the sake of clarity. However, in the absence of any further suggestions from Committee members, he did not propose making any substantive changes to the text as provisionally adopted on first reading.

51. *Paragraph 51 was adopted with minor drafting changes*.

Paragraph 52

52. **Mr. Heyns** said that paragraph 52 addressed restrictions imposed for the protection of morals. A significant number of stakeholders had submitted comments on the paragraph. The Russian Federation had argued that the contention that restrictions should only “exceptionally” be imposed for the protection of public morals was not supported by the Covenant. However, while the concept of “exceptionally” was not found in article 21, it was supported by the Committee’s jurisprudence. The Organization for Security and Cooperation in Europe had suggested that it would be helpful to offer some examples of potential instances where morality might be invoked as a ground for restriction, and that in the event that no appropriate examples could be identified, the paragraph should state that in practice morality should not be invoked as a ground for restriction. The national human rights institution of the Philippines, the consortium of Latin American non-governmental organizations and Amalia Gamio Ríos, a member of the Committee on the Rights of Persons with Disabilities, had suggested that the paragraph should be deleted; the consortium of Latin American non-governmental organizations, for example, had argued that the only valid reasons for restricting an assembly for the protection of morals were found in article 20 of the Covenant and covered elsewhere in the general comment.

Amnesty International had recommended that a non-exhaustive list of protected characteristics regularly used as a basis for discriminatory restrictions should be provided. The International Center for Not-For-Profit Law had suggested that the final sentence should be amended to read "expressions of or advocacy regarding sexual orientation". The non-governmental organization Article 19: International Centre against Censorship had submitted that the word "parochial" was judgmental and had recommended against its use.

53. In light of the comments received, he proposed amending the final sentence of the paragraph to read: "Restrictions based on this ground may not for instance be imposed because of opposition to expressions of or advocacy regarding sexual orientation."

54. **The Chair**, speaking in his capacity as a Committee member, said that the final sentence of the paragraph should be deleted. It was already clear from previous paragraphs, and from the footnote to the penultimate sentence, what was meant by the "principle of non-discrimination". No further examples were needed.

55. **Mr. Shany** said that he was in favour of keeping the final sentence. While it was an elaboration on the penultimate sentence, the Committee had dealt with a number of cases in which a State party had attempted to restrict assemblies on the specific basis of its opposition to expressions of sexual orientation. Some guidance in that regard would therefore be useful. He did not support the addition of the phrase "advocacy regarding", however. The term "advocacy" was too open-ended and raised a number of complicated issues. He supported retaining the text as provisionally adopted on first reading.

56. **Ms. Tigroudja** said that the word "pluralism" should be inserted after "the universality of human rights" in the second sentence. The idea was that States parties should accept understandings of morality that did not correspond to the views held by the majority of the population. The final sentence should be retained but it was too restrictive; it should mention expressions of gender identity as well as expressions of sexual orientation.

57. **The Chair** said that he supported Ms. Tigroudja's proposal to insert the word "pluralism" in the second sentence.

58. **Ms. Pazartzis** said that she also agreed with Ms. Tigroudja's proposal regarding the addition of "pluralism". She was uncomfortable with the phrase "parochial understandings of morality", and in particular the use of the word "parochial", which was unclear and open to varying interpretations. That part of the second sentence should be deleted. She was unsure whether it was necessary to retain the final sentence, since it merely gave a specific example of one prohibited ground for restriction. If the sentence was retained, she would not be in favour of keeping the language on "advocacy".

59. **Mr. Bulkan** said that he agreed that the word "parochial" could be perceived as judgmental. The focus should be on understandings of morality that were imposed on minorities and vulnerable groups, whatever they might be. Perhaps language relating to "majoritarian beliefs" could be found. Alternatively, a word such as "traditional" or "narrow" could be used instead of "parochial". With regard to the final sentence, it was not only lesbian, gay, bisexual, transgender and intersex persons whose right to freedom of peaceful assembly was often restricted for reasons relating to the protection of morals; other groups also faced similar obstacles. He was in favour of the deletion of that sentence.

60. **Mr. Quezada Cabrera** said that he would appreciate clarification from the Rapporteur as to why paragraph 52 referred to "morals" in general, while article 21 referred specifically to "public morals". He agreed that the final sentence could be considered too restrictive. It would be useful to include further examples, for example, restrictions based on opposition to expressions of gender identity.

61. **Mr. Heyns** said that one of the definitions of "parochial" was "narrow in scope". However, he agreed that it could be interpreted as judgmental. "Traditional" was not a viable alternative, since traditions could be perceived positively or negatively. To say that "traditional understandings" should be avoided would be to indicate that tradition as such had no place in understandings of morality. He was in favour of using the word "narrow", which made sense in contrast to the concept of the "universality" of human rights. With regard to the final sentence, a compromise would be to retain the sentence, without the reference to "advocacy", and to add, as a further example, restrictions based on opposition

to expressions of gender identity. As for the point raised by Mr. Quezada Cabrera, he understood the word “public” in the phrase “public health and morals” in article 21 to refer only to “health”.

62. **Mr. Shany** said that one of the purposes of the general comment was to codify the Committee’s jurisprudence. The specific example of expressions of sexual orientation had been used in the final sentence because the Committee had jurisprudence relating to that example.

63. **Mr. Heyns** said that he would redraft the paragraph in light of the current discussion and present a revised version in due course.

64. *It was so decided*.

Paragraph 53

65. **Mr. Heyns** said that paragraph 53 included two pieces of text in square brackets. The question was whether the rights and freedoms of others that might potentially justify restrictions should be qualified as including Covenant and other “fundamental” rights, and whether “property rights” should be included in a more specific, non-exhaustive list of those rights. A number of non-governmental organizations, such as the Netherlands Helsinki Committee, had expressed a preference for retaining “fundamental”, while Turkey had expressed a preference for removing it. Switzerland had suggested the use of the term “human rights” instead of “fundamental rights”. NGO Monitor had supported retaining “property rights”, while various stakeholders, including the Special Rapporteur on the rights to freedom of peaceful assembly and of association, had opposed it. Amnesty International had expressed concern that a crucial opportunity was missed in paragraph 53 to provide further guidance on the principle established in paragraph 2 that assemblies were a legitimate use of public space even when they entailed significant disruption. On the basis of those comments, he had drafted a revised text, which read:

> Restrictions imposed for the protection of the “rights and freedoms of others” may relate to the protection of Covenant or other human rights of people not participating in the assembly. At the same time, assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption to ordinary life, such disruptions have to be accommodated, unless they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions.

66. **The Chair** said that the Committee would resume its discussion of paragraph 53 at its subsequent meeting.

The meeting rose at 2.30 p.m.