



# International Covenant on Civil and Political Rights

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## Human Rights Committee 129th session

### Summary record of the 3721st meeting

Held via videoconference on Tuesday, 14 July 2020, at 4 p.m. Central European Time

*Chair:* Mr. Fathalla

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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)*

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*The meeting was called to order at 4.05 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 the members.

2. **Mr. Heyns** (Rapporteur for the general comment) proposed that the Committee should discuss the points in paragraphs 64, 65 and 67 on which it had yet to reach agreement before continuing its second reading of the rest of the draft general comment.

*Paragraphs 64 and 65 (continued)*

3. **Mr. Heyns**, recalling that the Committee had supported his proposal to merge paragraph 65 with paragraph 64, said that he proposed rephrasing the second sentence of the merged paragraph to read: “While rules concerning regular access to some spaces, such as buildings and parks, may also limit the right to assemble in such places, the application of such restrictions to peaceful assemblies must be justifiable in terms of article 21.”

4. **Mr. Shany** proposed, via the online chat function, that the word “regular” could be replaced with “public”.

5. *Paragraph 64, as amended, was adopted.*

*Paragraph 67 (continued)*

6. **Mr. Heyns**, recalling that paragraph 67 dealt with the extent to which restrictions could be imposed on gatherings in private spaces, said that, in the light of the Committee members’ comments on the paragraph, he proposed amending it to read:

While gatherings in private spaces fall within the scope of the right of peaceful assembly, the interests of others with rights in the property have to be given due weight. The question to what extent restrictions may be imposed on such gatherings will depend on considerations such as whether the space is routinely publicly accessible, whether those who hold rights in the property approve of such use, the nature and extent of the potential interference caused by the gathering with the rights in the property, and whether the participants have other reasonable means to achieve the purpose of the assembly, in accordance with the sight and sound principle. Access to private property may not be denied on a discriminatory basis.

He proposed deleting the final sentence of the paragraph as provisionally adopted on first reading, since he had incorporated the question of the consent of the property owner into the second sentence. The phrase “those who hold rights in the property” had been chosen in order to include persons who were renting or leasing property, as well as property owners.

7. **The Chair** said that the reference to “reasonable means” shifted the focus away from the physical location of the assembly.

8. **Mr. Heyns** said that the word “means” had been chosen to cover all possible alternatives to a gathering in a private space, including online alternatives.

9. **Mr. Ben Achour** said, via the online chat function, that he was in favour of deleting the final sentence of the paragraph as provisionally adopted on first reading.

10. **Ms. Kran** said that she too was in favour of deleting that sentence. She noted that the revised paragraph made no mention of whether persons contesting the ownership of land were entitled to exercise their right of peaceful assembly on that land.

11. **Mr. Heyns** said that the proposed wording did not exclude the possibility of the right being exercised on contested land. He invited the Committee members to make specific language proposals if they wished to refer explicitly to situations of that kind.

12. **Mr. Bulkan** said that he would prefer to retain the final sentence of the paragraph as provisionally adopted on first reading. It was important to underline that assemblies held on private property with the consent of the owners enjoyed the same protection as other assemblies, in order to avoid situations where, for example, State authorities shut down a religious assembly that was being conducted in a private home on the grounds that the organizers ought to have requested permission or to have registered as a religious organization before holding such an assembly.

13. **Mr. Santos Pais** proposed, via the online chat function, that Ms. Kran's concern could be addressed by replacing "others with rights in the property" with "others with rights or potential rights in the property" in the first sentence of the revised paragraph proposed by the Rapporteur.

14. **Mr. Shany**, supported by **Mr. Santos Pais**, said that the final sentence as provisionally adopted on first reading implied that assemblies held on private property without the consent of the owners were not protected by article 21. That message was problematic, especially in view of the trend towards the privatization of public spaces. He therefore supported the Rapporteur's proposal to delete the sentence and to incorporate the question of the owners' consent elsewhere in the paragraph.

15. **Mr. Bulkan**, acknowledging the concerns that had been raised about the final sentence, said that he was willing to go along with the majority view that it was more prudent to delete it.

16. **The Chair** suggested that the Rapporteur should prepare an amended version of the paragraph, taking into account the point raised by Ms. Kran, for consideration at the next meeting.

17. *It was so decided.*

#### *Paragraph 68*

18. **Mr. Heyns** said that paragraph 68 dealt with restrictions on the manner in which peaceful assemblies were held. A number of stakeholders had submitted comments on the paragraph. Michael Hamilton, Associate Professor of Public Protest Law, University of East Anglia, United Kingdom, had argued that temporariness should not be elevated to an essential or intrinsic characteristic of an assembly. Human Rights Centre "Memorial" and OVD-Info had proposed removing the word "generally" from the opening sentence. The European Center for Not-for-Profit Law had suggested inserting "or other technical means" after the words "equipment such as posters or megaphones or musical instruments".

19. In the light of the comments received from stakeholders, he proposed amending the paragraph to read:

As far as restrictions on the *manner* of peaceful assemblies are concerned: participants should be left to determine whether they want to use equipment such as posters or megaphones or musical instruments or other technical means to convey their message. Assemblies may entail the temporary erection of structures, including the setting up of sound systems, to reach their audience or otherwise achieve their purpose.

The phrase "or otherwise achieve their purpose" was intended to cover assemblies that were not aimed at an audience.

20. **Mr. Shany** proposed mentioning online streaming facilities as an example of a technical means that participants might wish to use to convey their message, since there had been cases where authorities had blocked access to the Internet in order to prevent an assembly from being streamed online.

21. **Mr. Heyns** said that he would amend the first sentence to take account of Mr. Shany's proposal.

22. *Paragraph 68, as amended, was adopted on that understanding.*

*Paragraph 69*

23. **Mr. Heyns** said that paragraph 69, which dealt with restrictions on the number of participants in assemblies, had not elicited any comments from stakeholders. He proposed inserting “or where public health considerations dictate physical distancing” at the end of the paragraph as provisionally adopted on first reading, in view of the issues raised by the ongoing coronavirus disease (COVID-19) pandemic.

24. *Paragraph 69, as amended, was adopted.*

*Paragraph 70*

25. **Mr. Heyns** said that paragraph 70 dealt with the issue of face coverings and anonymous participation in assemblies. The stakeholders that had commented on the paragraph had expressed a range of views on the approach that should be taken to the wearing of face coverings and the threshold that must be met in order for restrictions to be imposed. The paragraph as provisionally adopted on first reading set a relatively high threshold, as it stated that assembly participants should not be prohibited from wearing face coverings unless there was demonstrable evidence of imminent violence and probable cause for arrest.

26. With regard to the submissions received from stakeholders, several States had commented on the circumstances in which restrictions could be imposed on the wearing of face coverings or other disguises by the participants in a public assembly. Germany had compared the approach taken in the paragraph with that taken by the Organization for Security and Cooperation in Europe (OSCE) in the *Guidelines on Freedom of Peaceful Assembly*, concluding that the Committee’s requirement of “demonstrable evidence of imminent violence” set an excessively high standard. Norway had noted that, in accordance with the jurisprudence of the European Court of Human Rights, blanket bans on face coverings were justified in order to ensure the functioning of a democratic society. The Committee had encountered similar language in the context of the wearing of headscarves.

27. The OSCE Office for Democratic Institutions and Human Rights, which had provided an explanation of the approach taken by OSCE in the most recent edition of its *Guidelines on Freedom of Peaceful Assembly*, had recommended the deletion of the last sentence of the paragraph, arguing that blanket bans on the wearing of face coverings or other disguises were intrinsically disproportionate. He recalled that the expressions “demonstrable evidence of imminent violence” and “probable cause for arrest”, which appeared in the second sentence of the paragraph, mirrored the language of the OSCE *Guidelines*. The Special Rapporteur on the rights to freedom of peaceful assembly and of association and a consortium of Latin American non-governmental organizations (NGOs) had also called for the deletion of the final sentence.

28. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had noted that, according to the Inter-American Commission on Human Rights, the wearing of face coverings and other disguises could not be considered a sufficient indicator of a threat of violence. The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights had made a similar point, suggesting the reinstatement of the language used in the Rapporteur’s original draft, as presented to the Committee on first reading in 2019.

29. Greenpeace USA and the National Lawyers Guild had drawn attention to the problem of symbols associated with advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence, as prohibited under article 20 of the Covenant, for example the hoods associated with the Ku Klux Klan. Although the Association for Progressive Communications had noted that the Committee might wish to address the issue of facial recognition technologies in the paragraph, that issue was dealt with elsewhere in the draft.

30. In the light of those and other submissions, he wished to propose inserting the words “or taking other steps to participate anonymously” after the words “hoods or masks” in the

first sentence, replacing the word “also” in the same sentence with “especially” and inserting the words “or taking steps to participate anonymously” after the words “face coverings” in the second sentence. He suggested that the last sentence should be deleted, in view of the comments made by several stakeholders regarding blanket bans. In addition, in order to address the concerns expressed regarding symbols associated with incitement to discrimination, hostility and violence, he proposed that a new footnote should be added to the paragraph, to read: “With respect to symbolic face coverings, c.f. para. 57 bis above.” The corresponding footnote marker should be inserted at the end of the first sentence.

31. **Mr. Ben Achour** said that, as he had explained during the first reading, he objected to the approach taken in the paragraph. As a general rule, citizens in a democratic society should seek to be transparent in their interactions with one another in the public sphere. In the context of public assemblies, exceptions to that general principle could be made for festivals such as Halloween or sporting events in which protective head coverings were necessary. However, those exceptions should not be elevated into a general principle, as had been proposed. Despite that objection, he was prepared to go along with the majority view in the Committee.

32. **Mr. Shany** said he agreed with Mr. Furuya’s comment, via the chat function, that States should have compelling reasons for any restrictions placed on the freedom of the participants in an assembly to dress as they wished. In his view, the first sentence was well balanced. He proposed that the words “especially in the context of new surveillance technologies” should be moved to the end of that sentence, as they related to efforts both to counter reprisals and to protect privacy. He supported the Rapporteur’s suggestion to delete the last sentence of the paragraph, as the issue of blanket bans raised a number of difficulties.

33. As for the footnote containing the cross reference to paragraph 57 bis, which concerned the use of symbols associated with incitement to discrimination, hostility or violence, it should be borne in mind that article 20 of the Covenant was also applicable to the second sentence. It would be difficult to formulate an exhaustive list of grounds on which the wearing of face coverings or disguises could be restricted. In his view, the wearing of hoods by members of the Ku Klux Klan in the context of an assembly that was perceived as inciting discrimination, hostility or violence would not be covered under the paragraph as currently drafted. He therefore proposed that a reference to “other similarly compelling reasons” should be inserted at the end of the second sentence in order to make clear that, while the threshold for prohibiting the participants in a public assembly from wearing face coverings or other disguises was very high, the grounds mentioned in that sentence were not exhaustive.

34. **Mr. Heyns** said that he agreed with Mr. Shany’s proposal to move the words “especially in the context of new surveillance technologies” to the end of the first sentence and his proposal to mention “other compelling reasons” in the second. He proposed that the text of the footnote containing the cross reference to paragraph 57 bis should be merged into the second footnote attached to the paragraph, for which the footnote marker was placed at the end of the second sentence, in order to make clear that any assemblies in which the participants used symbols associated with incitement to discrimination, hostility or violence fell outside the scope of article 21.

35. With regard to the concern expressed by Mr. Ben Achour, it was true that, for some philosophers, transparency was fundamental to morality. While he accepted the argument that, in an ideal society, citizens should have nothing to hide, the Committee was concerned about societies that were not democratic and in which human rights were not respected. In addition, the Committee did not usually prescribe rules for the conduct of citizens in an ideal society. However, if the Committee so wished, it would be possible to include a statement of the general principle that, in an ideal society, face coverings or other disguises should not be worn. The issue of such coverings as headscarves should not be addressed in the paragraph.

36. **Mr. Santos Pais** said that, in order to address Mr. Ben Achour’s concern, it could be stated in a new sentence at the beginning of the paragraph that, as a general rule, the participants in a peaceful assembly held in a free and democratic society should not wear

face coverings or other disguises. With regard to the words “where there is no demonstrable evidence of imminent violence on their part and probable cause for arrest” in the second sentence, he would appreciate clarification regarding the decision to use the word “and” as opposed to “or”. He supported the Rapporteur’s suggestion to delete the last sentence.

37. **The Chair** said that, judging by the comments that members had made via the chat function, the Committee remained divided as to how to resolve the questions raised in relation to the first sentence.

38. **Mr. Heyns** said that, as the participants in an assembly could be arrested for reasons other than the existence of demonstrable evidence of imminent violence, he proposed that the word “and” in the second sentence should be replaced with “or”. With regard to the first sentence, the challenge was to address Mr. Ben Achour’s concern while making clear that, in a democratic society, citizens should be free to express themselves through their clothing.

39. **Mr. Zyberi** said he proposed that a new sentence should be added to the beginning of the paragraph, to read: “Generally, participation in a peaceful assembly would take place without the need for face coverings.” He supported the Rapporteur’s suggestion to delete the last sentence.

40. **Mr. Quezada Cabrera** said that, in his view, the paragraph was well balanced. There was no need to begin with an affirmation of the general principle of the need for transparency in a democratic society, which was in any case the implicit starting point for the paragraph as currently drafted.

41. With regard to the second sentence, the expression “probable cause for arrest” struck him as unclear. He proposed that the paragraph should mirror the use of that expression in the OSCE *Guidelines*, where reference was made to situations in which the conduct of an individual created probable cause for arrest.

42. **Ms. Kran** said that the Committee should focus on conveying the central message of the paragraph, namely that the right of peaceful assembly could not be exercised if the would-be participants feared retaliation, rather than attempting to prescribe rules for the conduct of the participants in an assembly held in an ideal society. With regard to the second sentence, the expression “probable cause for arrest” seemed overly broad in scope.

43. **Ms. Tigroudja** said that she supported the Rapporteur’s revised version of the paragraph and many of the amendments proposed by members. With regard to the proposals made to address the concern expressed by Mr. Ben Achour, however, the Committee should tread very carefully. It would be preferable not to broach the question of what constituted an ideal democratic society. Indeed, she was not convinced that transparency in the sense of not wearing face coverings or other disguises at peaceful assemblies was an essential element of such a society. Moreover, the wearing of a face covering or other disguise by a participant in a peaceful assembly did not necessarily indicate opposition to a pluralist or democratic society.

44. **Mr. Santos Pais** proposed that, in order to reconcile the conflicting views that had been expressed in the Committee, a new sentence should be inserted at the beginning of the paragraph, to read: “Participation in an assembly is done according to the participants’ wishes, for instance regarding their attire, outfits or face coverings.”

45. **Mr. Heyns** said that he would prepare a new version of the paragraph for later discussion, taking into account Committee members’ comments and proposals. While remaining succinct, the text could perhaps include a few words outlining a general principle, for example at the beginning of the first sentence.

46. **Ms. Pazartzis** said that the first sentence combined the concepts of the expressive element of peaceful assembly with other considerations, such as ways to counter reprisals and to protect privacy, which did not correspond with the point of the paragraph. It might thus be advisable to remove the sentence. The proposal by Mr. Santos Pais would simplify the message so that it would make the obvious point that people should be able to wear what they wanted, even in public assemblies. She would send the Rapporteur some comments in writing to try to help find more appropriate wording.

47. **The Chair** said that it was his understanding that the Committee wished to leave the Rapporteur some time to work on the paragraph and subsequently submit it for adoption at a later meeting.

48. *It was so decided.*

#### *Paragraph 71*

49. **Mr. Heyns** said that the paragraph addressed the collection of information by the authorities on participants in peaceful assemblies. Several stakeholders had mentioned that the text should refer to the possibility of a chilling effect on participation. Two stakeholders had suggested that reference should be made to the “facilitation” of assemblies rather than their “management”. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had suggested that the text should emphasize that States should refrain from using surveillance tools to track or persecute persons taking part in assemblies. The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights and the consortium of Latin American NGOs had called for the paragraph to be recast so as to better reflect the exceptional basis of the use of such information gathering measures or technologies. The United Nations Children’s Fund (UNICEF) had noted that data on children should enjoy greater protection. David Mead, Professor of United Kingdom Human Rights Law, University of East Anglia, had mentioned that the text should refer not only to decision-making in relation to data, but also to the collection and collation of information and to data-sharing, data-interrogation and database creation. Greenpeace USA and the National Lawyers Guild had expressed concern that if data collection was allowed, it could easily be abused; they had thus called upon the Committee to simply oppose all such collection. A few stakeholders had said that the Committee should consider establishing a threshold or laying out rules establishing when the gathering of information could be justifiable, while the International Center for Not-for-Profit Law had suggested that the text should emphasize that data collection by authorities, including through the operation of notification and authorization requirements, must be justified. Article 19: International Centre against Censorship had stated that the Committee should make clear the obligation of States to protect, and not interfere with, strong standards for encryption and to address violations of the right to privacy occurring as a result of the use of privately developed surveillance technologies.

50. In the light of those and other submissions received from stakeholders, he was proposing some changes to the first and second sentences of the paragraph as provisionally adopted on first reading. The revised version of the paragraph would read:

While the collection of relevant information and data by authorities may under certain circumstances assist the facilitation of assemblies, improve public accountability and constitute part of a proactive approach to preventing violations and abuses of rights from occurring, this must not be aimed at suppressing rights or creating a chilling effect. Any information-gathering, whether by public or private entities, including through surveillance or the interception of communications, as well as the way in which data are retained and accessed, must strictly conform to the applicable international standards, including on the right to privacy, and may never be aimed at intimidating or harassing (would-be) participants in assemblies. Such practices should be regulated by appropriate and publicly accessible domestic legal frameworks compatible with international standards and subject to scrutiny by the courts.

51. **Mr. Shany** said that the reference in the second sentence to the way in which data were retained and accessed should also include the words “collected and shared”. He considered it problematic that the first sentence apparently encouraged States to collect information on assemblies. Such wording might send the wrong message, in a context where a significant number of Governments were monitoring people, for example using facial recognition techniques, and then applying reprisals against participants in peaceful assemblies. It might be advisable to remove the first sentence altogether and possibly to merge the rest of the paragraph with paragraph 72.

52. **Mr. Santos Pais** said that it might be preferable to move the first sentence to the end and to make it clear that such data collection must take place within a robust framework and must not have a chilling effect on participation.

53. **Mr. Heyns** said that he agreed that the words “collected and shared” should be added to the second sentence. Like Mr. Shany and Mr. Santos Pais, many of the stakeholders had noted that there was a risk that the first sentence could be interpreted as encouraging data collection. However, instead of moving or deleting the first sentence, he proposed instead tempering its message by deleting “improve public accountability and constitute part of a proactive approach to preventing violations and abuses of rights from occurring”. It would be difficult to combine the last two sentences of paragraph 71 with paragraph 72.

54. *Paragraph 71, as amended, was adopted.*

#### *Paragraph 72*

55. **Mr. Heyns** said that a large number of comments had been received from stakeholders regarding paragraph 72, which dealt specifically with privacy. The Netherlands had indicated that the reason for the obligation of oversight should be further explained. The United States of America had proposed that the text should specify that lawful surveillance for legitimate law enforcement or national security purposes was not an infringement of article 17, and had suggested that the fact that individuals appeared in public spaces diminished their reasonable expectations of privacy. The Bonavero Institute of Human Rights had pointed out that information technology, and facial recognition technology in particular, often resulted in false positives. In that regard, he proposed adding to the paragraph a footnote referring to the recent report of the Office of the United Nations High Commissioner for Human Rights ([A/HRC/44/24](#), para. 32), which mentioned the discriminatory effect of such technologies. The International Center for Not-for-Profit Law had proposed recasting the first sentence to make it more comprehensible, and he had done so in the proposed new draft. Access Now had suggested that the text should refer not only to monitoring of social media, but also to hacking techniques such as doxing or malware-based phishing attacks, and Privacy International had proposed the inclusion of language underlining that there should be a presumption against the use of privacy-intrusive surveillance technologies in assemblies. However, that presumption was already reflected earlier in the draft general comment, which placed the onus for justifying restrictions on the authorities.

56. On the basis of those submissions he had drawn up a revised version of the paragraph, which read:

The mere fact that assemblies take place in public does not mean that participants’ privacy is not protected. The right to privacy may be infringed, for example, by facial recognition and other technologies that can identify individual participants in a crowd. The same applies to the monitoring or hacking of social media to glean information about participation in peaceful assemblies. Independent and transparent scrutiny and oversight must be exercised over both the decision to collect personal information and data of those engaged in peaceful assemblies and its retention.

He proposed moving the text of the footnote: “Moreover, there are concerns about the potentially discriminatory effect of partially-effective facial recognition technologies, or biased implementation” to the third sentence.

57. **Mr. Shany** said that he proposed adding “with a view to ensuring the compatibility of such activities with the Covenant” at the end of the last sentence. He had some doubts as to whether monitoring and hacking should be mentioned together, as the word “hacking” implied a breach of trust. The concern raised by the NGO that had proposed using that term was probably related more to the collection of information through impersonation or infiltration in social media groups, which was more akin to spying. That was quite different from the use of facial recognition technology and the monitoring of open-source social media. He was unsure whether the footnote describing concerns about biased implementation was applicable in its current wording. In most circumstances, defects in facial recognition technology resulted in discrimination against minorities.



58. **Mr. Santos Pais** said that he too was uncomfortable with the reference to “hacking of social media”. Noting that the first sentence addressed assemblies that took place in public, he asked whether the text was intended to imply that assemblies held in private locations were not subject to the same protection. In his view, they too should be protected. In the last sentence, reference should be made to the “sharing” of information and data, as well as to its “retention”.

59. **Mr. Heyns**, addressing the point raised by Mr. Santos Pais, said that the word “many” should be inserted before “assemblies” in the first sentence. While it was important for the general comment to emphasize the potentially discriminatory effect of facial recognition technologies, that point could perhaps be made more appropriately in a subsequent paragraph on non-discrimination rather than in paragraph 72, which dealt with privacy. He proposed redrafting the text accordingly, possibly by moving the footnote in question. In light of the comments made by Mr. Shany and Mr. Santos Pais, he agreed that the word “hacking” should be removed from the paragraph and that “collection, sharing and” could be added to the last sentence, before “retention”.

60. **The Chair** said that it was his understanding that the Rapporteur would reformulate the paragraph and submit it for adoption at a later meeting.

61. *It was so decided.*

*Paragraphs 48 and 55 (continued)*

62. **Mr. Zyberi** said that he wished to draw the attention of the Committee to a possible contradiction between the adopted text of paragraphs 48 and 55. Paragraph 48 addressed national security, and referred to territorial integrity and political independence as grounds for the restriction of the right of peaceful assembly. Paragraph 55, for its part, included a phrase relating to the “pursuit of self-determination”, which might be in contradiction with the text in paragraph 48. He proposed either deleting the reference to the pursuit of self-determination or specifying it more clearly, by adding “pursuit of the right of peoples to self-determination”. The Rapporteur might wish to include a reference to United Nations General Assembly resolution 2625 (XXV), containing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

63. **Mr. Heyns** said that he did not consider the paragraphs to be in contradiction with each other. Paragraph 48 merely set out the grounds for restrictions on peaceful assemblies, while paragraph 55 specified some of the types of issues that could be taken up by people engaged in such assemblies. Moreover, self-determination was a broad concept that went beyond the right of peoples to self-determination. He was comfortable leaving the text as adopted.

*The meeting rose at 6 p.m.*