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Summary record of the 3727th meeting
Held via videoconference on Monday, 20 July 2020, at 4 p.m. Central European Time

Chair: Mr. Fathalla

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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) said he proposed that the Committee should discuss the points in paragraphs 79, 89, 92, 92 bis, 93 and 94 on which it had yet to reach agreement before continuing its second reading of the rest of the draft general comment. The Committee would return to the question of the order of the paragraphs at a later stage.

Paragraph 79 (*continued*)

3. **Mr. Heyns** said that, in the light of the comments and suggestions made by members, he proposed that the revised version of the paragraph should be amended to read:

> While acts of terrorism must be criminalized in conformity with international law, the definition of such crimes must not be over-broad or discriminatory and must not be applied in such a way as to curtail or discourage the exercise of the right of peaceful assembly. The mere act of organizing or participating in a peaceful assembly cannot be criminalized under anti-terrorism laws.

4. *Paragraph 79, as amended, was adopted.*

Paragraph 89 (*continued*)

5. **Mr. Heyns** said that, in the light of the comments and suggestions made by members, he proposed that his revised version of the second sentence of the paragraph should be amended to read: “They are obliged to exhaust non-violent means and to give a warning if it is absolutely necessary to use force, unless doing either would be manifestly inadequate.”

6. **Mr. Shany** said that the Committee should not use the verb “must” in the context of compliance with the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and the *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, which were soft law instruments. He proposed using language such as “should” or “should be guided by”, as had been done in the Committee’s general comment No. 36 (2018) on the right to life.

7. **Ms. Pazartzis** said she agreed with Mr. Shany that the word “must” was inappropriate in the context of compliance with soft law instruments, which were not binding on States. If the Committee wished to retain the reference to those instruments in the body of the text, it would be preferable to mirror the approach taken in the Committee’s general comment No. 36.

8. **Ms. Kran** said that it was important to recognize the value of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and the *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, both of which had a quasi-legal status.

9. **The Chair**, summarizing comments made via the online chat function, said that some members of the Committee had suggested moving the reference to those two instruments to a footnote.

10. **Mr. Heyns** said he agreed that the Committee should not conflate hard and soft law instruments. One solution would be to replace the words “including the standards found in”

with “guided by standards such as”. In his view, the reference should remain in the body of the text as opposed to being moved to a footnote.

11. **Ms. Sancin** said that she would appreciate clarification regarding the use of the word “either” in the amended version of the second sentence proposed by the Rapporteur. She wondered how it could be considered manifestly inadequate to give a warning before using force.

12. **Mr. Heyns** said that, where there was an imminent threat of serious violence, it would be manifestly inadequate to attempt to exhaust non-violent means or to give a warning. Indeed, in such circumstances, law enforcement officials would be in breach of their duty to protect if they attempted to exhaust non-violent means or give a warning before taking action to address the threat.

13. **Ms. Kran** said that the Rapporteur’s revised version of the second sentence should be reformulated in order to convey the intended message in clearer terms.

14. **The Chair** said he took it that the Rapporteur would further amend his revised version of the paragraph, in the light of the comments and suggestions made by Committee members, for consideration at a later meeting.

15. *It was so decided.*

Paragraph 92 (*continued*)

16. **Mr. Heyns** said that, in the light of comments and suggestions made by members, he had amended the revised version of paragraph 92 that he had presented at the previous meeting. In the first sentence, he had replaced the words “Wherever possible” with “In principle”. He had amended the second, third and fourth sentences to read:

> Training should sensitize officials to the particular needs or vulnerabilities of certain groups potentially participating in assemblies, such as women, children, or persons with disabilities, and to situations of vulnerability that may arise. The military should not be used to police assemblies, but if in exceptional circumstances and on a temporary basis they are deployed in support, they must have received appropriate human rights training and must comply with the same international rules and standards as law enforcement officials.

17. In response to a concern expressed by Ms. Tigroudja, by email, he had included women in the list of groups whose needs should be covered in training for law enforcement officials. He recalled that his revised version of paragraph 101 addressed the duty of States parties to investigate sexual and gender-based violence perpetrated during an assembly.

18. **Ms. Tigroudja** said that, although sexual and gender-based violence was mentioned in the revised version of paragraph 101, which dealt with the duty of States parties to investigate human rights violations perpetrated by law enforcement officials, women faced a broader set of challenges that should be addressed in the context of the training provided for such officials. The Committee had recently discussed those challenges with civil society organizations. Ultimately, there was a need to transform attitudes towards women’s participation in peaceful assemblies, in particular the idea that the public space did not belong to them. In that connection, she wished to recall that the European Court of Human Rights had considered the question of women’s participation in peaceful assemblies in a case concerning violations of the rights of protesters at a Group of Eight summit in Italy.

19. **Ms. Kran** said that she wished to associate herself with Ms. Tigroudja’s comments. According to reports from non-governmental organizations (NGOs) and recent research, women were subjected to discrimination and violations of their rights in the context of peaceful assemblies. The problem was connected with the often male-dominated culture among law enforcement officials.

20. **The Chair** said he took it that the Rapporteur would finalize the paragraph in the light of the comments and suggestions made by members and submit it for adoption at a later meeting.

21. *It was so decided.*

Paragraph 92 bis (*continued*)

22. **Mr. Heyns** said that, in order to address a concern expressed by Mr. Zyberi regarding the use of less-lethal weapons after their best-used-by date, he proposed inserting the words "and fit-for-purpose" after the words "with appropriate" in the first sentence of the revised version that he had presented at the previous meeting. He further proposed replacing the word "redress" in the last sentence with "address". He recalled that the words "adequate personal" had been deleted from the first sentence and that the words "ensure officers deployed with them receive specific training" had been inserted after "independent testing" in the second.

23. *Paragraph 92 bis, as amended, was adopted.*

Paragraph 93 (*continued*)

24. **Mr. Heyns** said that, in response to comments and suggestions made by members, he proposed that a new second sentence should be added to his revised version of the paragraph, to read: "This is especially the case if detention lasts more than a few hours." He further proposed that the penultimate sentence should be amended to read: "When domestic law specifically allows detention, it may be used only in the most exceptional cases and only where the authorities have proof of the intent of the individuals involved to engage in or incite acts of violence during a particular assembly, and where other measures to prevent violence from occurring will clearly be inadequate."

25. **The Chair**, speaking as a member of the Committee, suggested that the word "intent" in the penultimate sentence should be replaced with "intention".

26. **Mr. Heyns** said that he agreed with the Chair's suggestion.

27. **Mr. Bulkan** said that, in his view, the Committee should not quantify the period of time after which detention would constitute arbitrary detention of liberty. He proposed replacing the reference to "a few hours" with a more general reference, for example to a "limited period".

28. **Mr. Muhumuza** said that a clear distinction should be drawn in the paragraph between detention for the purpose of preventing persons from exercising the right to freedom of assembly and detention for the purpose of protecting them from harm.

29. **Mr. Heyns** said he agreed with Mr. Bulkan that the period of time should not be quantified; he would instead refer to the "shortest possible period". The preventive detention to which the text alluded was clearly linked to the existence of proof of an individual's intention to engage in or incite acts of violence, not to the protection of the individual in question.

30. **The Chair** said he took it that the Rapporteur would finalize the paragraph in the light of the comments and suggestions made by members and submit it for adoption at a subsequent meeting.

31. *It was so decided.*

Paragraph 94 (*continued*)

32. **Mr. Heyns** said that he had replaced the phrase "evidence of a serious threat posed" in the first sentence with "reasonable suspicion of a serious offence".

33. **Mr. Shany** suggested that the concepts of both "offence" and "threat" should be included as alternative grounds for the exercise of "stop and search" or "stop and frisk" policies.

34. **Mr. Heyns** said that he would amend the first sentence accordingly.

35. *Paragraph 94, as amended, was adopted on that understanding.*

Paragraph 96 (continued)

36. **Mr. Heyns** said that, based on comments made at the previous meeting he had further revised the wording of the second sentence to read: "Dispersal may be resorted to if

the assembly as such is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be reasonably addressed by more proportionate measures such as targeted arrests, but in all cases the rules on the use of force in law enforcement must be strictly followed." He also proposed changing "high-ranking official" to "high-level official", in the hope that it would be more easily understandable.

37. **Mr. Bulkan** said that in his opinion the replacement of "high-ranking" with "high-level" was insufficient to remove the ambiguity. He also had some reservations about the idea that an appropriate judicial authority could authorize the dispersal of an assembly. In practical terms, when would such action by a judicial authority be feasible? To provide greater clarity, he wondered whether it should be specified that established procedures for dispersing an assembly should be followed.

38. **Mr. Heyns** said that a judicial authority could conceivably authorize the dispersal of an ongoing or repetitive assembly. The aim was to build in a safeguard for cases in which it would be impossible to obtain authorization from a judicial authority. The sentence could perhaps be reworded to state that any person ordering dispersal in such cases must have the necessary authority in terms of procedure to do so.

39. **Mr. Quezada Cabrera** said that he agreed with Mr. Bulkan that the text should refer to the need for procedures in relation to the dispersal of assemblies. At the beginning of the paragraph, it might be advisable to state that the act of dispersal must respect the right to life and the personal security and other rights of participants and others.

40. **Mr. Heyns** proposed rewording the fourth sentence to state that the conditions for ordering the dispersal of an assembly must be set out in domestic law, and that the order must be issued only by a duly authorized official.

41. **The Chair** said he took it that the Rapporteur would finalize the paragraph in the light of the comments and suggestions made by members and submit it for adoption at a subsequent meeting.

42. *It was so decided.*

Paragraph 97

43. **Mr. Heyns** said that the proposal was to split paragraph 97, as provisionally adopted on first reading, into two paragraphs, 97 and 97 bis, which would set out the Committee's position regarding the use of force once the threshold established in paragraph 96 had been met. Paragraph 97 would address the use of force in general terms, while paragraph 97 bis would describe limitations on the kinds of weapons that could be used.

44. Paragraph 97 would cover, inter alia, the requirement for legitimate grounds to exist for any use of force; for force to be used, if possible, only following a verbal order; and for it to be directed only against those engaged in or threatening violence. Among the stakeholder submissions, Israel had noted that terms such as "area weapons" and "indiscriminate effects" derived from the context of armed conflict and were unsuitable for use in the general comment. On that point, he wished to point out that such terms were also used in the field of law enforcement. The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE) had suggested specifying that dispersal should be announced in order to give participants the opportunity to leave voluntarily. It had also noted that a particularly high threshold – for example, such widespread violence that it would not be possible for the authorities to deal with violent individuals alone – was required in order to diminish the risk of injury to individuals. The Special Rapporteur on the rights to freedom of peaceful assembly and of association had suggested adding language from paragraph 63 of the joint report contained in document A/HRC/31/66 to specify that "only governmental authorities, or high-ranking officers with sufficient and accurate information of the situation unfolding on the ground should have the authority to order dispersal". That suggestion would be taken into account in the reworked version of paragraph 96. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had suggested amending the beginning of the third sentence of the paragraph as provisionally adopted on first reading to read, "as far as possible, any force used must be directed ...". The Special Rapporteur for Freedom of

Expression of the Inter-American Commission on Human Rights had noted that tear gas should not be used in closed spaces or against people who had no way to disperse or evacuate.

45. On the basis of those comments, he had drawn up a new draft, which read:

> Where a decision is taken lawfully and on legitimate grounds to disperse an assembly, force should be avoided. In many instances it will only be justifiable for a verbal order of dispersal to be given, without the use of any force. Where that is not possible in the circumstances, only the minimum force necessary should be used. As far as possible, any force used must be directed against a specific individual or group that are engaged in or threatening violence. Force likely to cause more than negligible injury should not be used against individuals or groups who are passively resisting.

46. **Ms. Pazartzis** said that much of the text had been changed since the first reading and a large number of issues had been brought together in the paragraph. She wondered why the draft had changed so much and undergone so many additions.

47. **Mr. Furuya** said that, in the first sentence, "lawfully" might be interpreted as relating to international law, and should be replaced with "taken in conformity with domestic law".

48. **Mr. Heyns** said that many of the changes to the draft had been made at the suggestion of NGOs or other stakeholders, in order to better define the conditions under which force could be used; however, those changes did not fundamentally alter the approach reflected in the draft as provisionally adopted on first reading. He agreed with Mr. Furuya's proposal to replace "lawfully" with "in conformity with domestic law". He also proposed inserting the word "only" after "directed", in the fourth sentence.

49. *Paragraph 97, as amended, was adopted.*

Paragraph 97 bis

50. **Mr. Heyns** said that paragraph 97 bis sought to address the types of weapons that could be used to disperse an assembly and to highlight problems arising from their use. Particular attention was paid to questions related to tear gas, given its widespread use throughout the world and the fact that it could be lethal. The paragraph, as currently drafted, read:

> Area weapons such as chemical irritants dispersed at a distance (tear gas) and water cannon tend to have indiscriminate effects. When such weapons are used, all reasonable efforts should be undertaken to limit risks such as causing harm to bystanders or causing a stampede. Tear gas should not be used in confined spaces. Such weapons should only be used following a verbal warning, with adequate opportunity given for assembly participants to disperse.

51. **Mr. Shany** said that "as a measure of last resort" should be inserted before "following a verbal warning" and that it would be less ambiguous for the text to refer to "less lethal weapons covering an area" than to "area weapons", which was used not only in law enforcement but also to describe lethal weapons in contexts of armed conflict. It would not therefore be advisable to use that term in the general comment.

52. **Mr. Heyns** said that he proposed replacing "area weapons" with "less-lethal weapons". He also agreed with the insertion of "as a measure of last resort", as proposed by Mr. Shany.

53. *Paragraph 97 bis, as amended, was adopted.*

Paragraph 98

54. **Mr. Heyns** said that the basic point of the paragraph was that firearms must not be used simply to disperse an assembly. The order of the sentences had been slightly modified. Among the stakeholder submissions, Pakistan had proposed adding language to state that kinetic impact projectiles should not be fired in automatic mode. He agreed with that

proposal, as the use of a firearm in automatic mode precluded an assessment of necessity and proportionality for each affected person. Pakistan had also suggested that the text should specify that kinetic impact projectiles should not be targeted against certain parts of the body. Amnesty International and the OSCE Office for Democratic Institutions and Human Rights had suggested adapting the text to avoid confusion between the use of rubber bullets and rubber-coated metal bullets, which should be subject to the same standards as bullets from firearms. Amnesty International had also called for the general comment to explicitly prohibit all less-lethal projectiles that were inaccurate or could not target an individual. The Special Rapporteur on the rights to freedom of peaceful assembly and of association had noted that firearms aimed at even non-vital parts of the human body constituted a lethal force and that the threshold for their use should be maintained at the point where there was an imminent threat to life. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had recommended that the general comment should borrow language from general comment No. 34 (2011) on the freedoms of opinion and expression, and emphasize that indiscriminate firing into a crowd was never compatible with the Covenant.

55. On the basis of those and other submissions, he proposed revising the paragraph, as provisionally adopted on first reading, to read:

> Firearms are not an appropriate tool for the policing of assemblies. They must never be used simply to disperse an assembly. It is never lawful to fire indiscriminately into a crowd. The deployment of fully automatic weapons is always unlawful. In order to comply with international law, any use of firearms by law enforcement officials must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat of death or serious injury, or in truly exceptional circumstances, a grave and proximate threat to life. Given the threat such weapons pose to life, this minimum threshold should also be applied to the firing of rubber-coated metal bullets. Where law enforcement officials are prepared for the use of force, or violence is considered likely, the authorities must also ensure adequate medical facilities.

56. **Mr. Shany** said that 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 (A/HRC/31/66), referenced in the footnote to the fourth sentence, used the term “automatic firearms” rather than “automatic weapons”. It would be preferable to use the same terminology in the general comment. In the fourth sentence, he was unclear as to the difference between “a grave and proximate threat to life” and “an imminent threat of death or serious injury”. The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* referred to grave threats in the context of crime prevention. However, there was a risk that the use of such a term in the general comment might be seen as an endorsement of the use of weapons in certain circumstances. In general comment No. 36 (2018) on the right to life, the Committee had used only the term “imminent threat of death or serious injury”.

57. **Mr. Heyns** said that he agreed with Mr. Shany’s proposal to replace the term “automatic weapons” with “automatic firearms”. In addition, he proposed replacing “deployment” with “use” in the third sentence. The fourth sentence mirrored the language used in principle 9 of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, which referred to both defence against the imminent threat of death and the prevention of particularly serious crimes involving grave threat to life. However, he was willing to consider aligning it with the wording used in general comment No. 36.

58. **Mr. Shany** said that principle 9 of the *Basic Principles* referred to specific scenarios, whereas the fourth sentence had been formulated in more general terms. As a result, the distinction between “an imminent threat of death” and “a grave and proximate threat to life” was not clear. He proposed aligning the sentence more closely with the wording of principle 9. On a separate note, he wondered whether it was appropriate to use the verb “must” in that context, given that the *Basic Principles* had the status of guidance.

59. **Mr. Heyns** said that, in order to avoid confusion, he proposed referring specifically to the use of firearms in the context of peaceful assemblies and removing the last part of the fourth sentence altogether. He was comfortable with using "must" in connection with the *Basic Principles*, since that text was widely used and had become custom.

60. **The Chair** said he took it that the Rapporteur would prepare a revised version of the paragraph, taking into account the proposals made by Committee members, for consideration at the next meeting.

61. *It was so decided.*

Paragraph 99

62. **Mr. Heyns** said that paragraph 99 established that the use of unnecessary or disproportionate force in the context of a peaceful assembly could breach several articles of the Covenant and might even constitute a crime against humanity.

63. The Committee had received a number of comments from stakeholders on the paragraph. Israel had pointed out that the definition of a crime against humanity, as set out in article 7 of the Rome Statute of the International Criminal Court, comprised several elements and that the widespread or systematic use of force alone did not constitute such a crime. The Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights had proposed that the paragraph should take into account recent events in Latin America where the use of non-lethal force had resulted in protesters losing their eyesight, their limbs or even their lives. Amnesty International had argued that the paragraph should state unequivocally that the use of unnecessary or disproportionate force resulting in death would constitute a violation of article 6.

64. In the light of those comments, he proposed replacing "may" with "is likely to" in the first sentence and replacing "may constitute" with "may also constitute" in the second sentence.

65. **Ms. Pazartzis**, noting that a crime against humanity was defined as a widespread or systematic attack, said that she was unsure whether an attack on an assembly could constitute such a crime. In any case, it would be more appropriate to address the issue in the final section of the draft, on the relationship between article 21 and other legal regimes, since crimes against humanity fell within the scope of international criminal law.

66. **The Chair** proposed replacing "may violate article 6" with "is a violation of article 6", since, in cases where death had occurred, there could be no doubt that such a violation had been committed.

67. **Mr. Shany** said that he was in favour of keeping the reference to crimes against humanity, as there was at least one case before the International Criminal Court that related to an assembly and, generally speaking, it was important to link the Committee's work to other areas of international law. However, it might be prudent to add "if all relevant legal criteria are met" to the second sentence, in order to acknowledge that the definition of a crime against humanity comprised several elements. Furthermore, as pointed out by Ms. Sancin via the online chat function, the use of lethal force was not a sine qua non, for the use of non-lethal force could constitute such a crime, provided the relevant criteria had been met.

68. **Ms. Tigroudja** pointed out that the wording of the first sentence was more restrictive than paragraph 7 of general comment No. 36, which stated that States parties could be in violation of article 6 even if there had been no loss of life.

69. **Mr. Muhumuza** said that, in cases where unnecessary or disproportionate force had been used, there could be no doubt that articles 7 and 9 of the Covenant had been violated. Likewise, in cases where death had resulted, there had clearly been a breach of article 6. He therefore proposed avoiding the use of "may" and "is likely to" in the first sentence.

70. **Mr. Zimmermann** said that he was in favour of retaining the reference to crimes against humanity, as there had been cases where, for example, military authorities had used force against an assembly and had caused hundreds of deaths. The qualifiers that had been

used in the second sentence indicated that the relevant criteria must be met in order for an act to be classed as such a crime.

71. **Mr. Bulkan**, agreeing with Ms. Pazartzis, said that the Committee might unwittingly restrict the application of the term "crime against humanity" by introducing so many variables. He had reservations about the first sentence as well: the Committee could not use stronger wording, because there were several factors that determined whether or not the articles in question had been violated, but the existing wording simply stated the obvious.

72. **Mr. Quezada Cabrera** said that he would prefer to retain the reference to crimes against humanity, which served to remind law enforcement officials that their actions could amount to such a crime. He proposed clarifying, in line with article 7 of the Rome Statute, that it was the acts resulting from the widespread or systematic use of lethal force that could constitute a crime against humanity, rather than the use of lethal force itself.

73. **Mr. Heyns** said that he proposed addressing some of the concerns that had been raised by amending the first sentence to read: "The use of unnecessary or disproportionate force may breach articles 6, 7 and 9 of the Covenant." He accepted the proposals to remove the word "lethal" from the second sentence and to align the wording of that sentence with article 7 of the Rome Statute. In his view, it was important to mention crimes against humanity, for there had been cases of extreme violence against assemblies in countries around the world. He recognized, however, that it might be better to move the whole paragraph to the final section of the draft.

74. **The Chair** said he took it that the Rapporteur would prepare a revised version of the paragraph, taking into account the proposals made by Committee members, for consideration at a later meeting.

75. *It was so decided.*

Paragraph 100

76. **Mr. Heyns** said that paragraph 100 established that States were responsible for the actions and omissions of their law enforcement officials. Various stakeholders had commented on the paragraph. The United States of America had noted that, under its domestic accountability structure, the State did not always assume liability for the misconduct of law enforcement officials. The Special Rapporteur on the rights to freedom of peaceful assembly and of association had argued that, beyond merely promoting a culture of accountability, States must ensure and guarantee accountability for law enforcement officials during assemblies. Amnesty International had recommended that the paragraph should establish the need for each officer to display a visible unique identifier.

77. Based on the comments received from stakeholders, he proposed amending the paragraph to read:

> The State is responsible under international law for the actions and omissions of its law enforcement agencies. With a view to preventing violations, States should consistently promote a culture of accountability for law enforcement officials during assemblies. To enhance effective accountability, uniformed law enforcement officers should always display an easily-identifiable form of identification during assemblies, such as their name or an ID number unique to them.

It should be noted that, according to the *Code of Conduct for Law Enforcement Officials*, in countries where police powers were exercised by military authorities, the definition of law enforcement officials should be regarded as including officers of such authorities.

78. **Mr. Muhumuza** asked, via the online chat function, whether non-uniformed officers had been taken into account.

79. **Mr. Heyns** said that the third sentence referred specifically to uniformed officers because it would not make sense to require non-uniformed officers who were working undercover to wear clear identification.

80. *Paragraph 100, as amended, was adopted.*

The meeting rose at 6 p.m.