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Summary record of the 3713th meeting

Held via videoconference on Friday, 3 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 consideration of draft general comment No. 37 on article 21 of the Covenant (Right of peaceful assembly), starting with paragraph 15. The text of the paragraphs to be considered at the current meeting had been distributed to members and would be displayed on screen.

Paragraph 15

2. **Mr. Heyns** (Rapporteur for the general comment) said that he had drafted a revised version of paragraph 15 in the light of the various issues that had been raised at the previous meeting. The revised paragraph read:

While the notion of an assembly implies that there will be more than one participant in the gathering, a single protester enjoys comparable protections under the Covenant, for example under article 19. Although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, article 21 protection also extends to remote participation in and organization of assemblies, for example online.

3. The last sentence of the revised draft paragraph as provisionally adopted on first reading, which highlighted the possibility of online communication being used as a ground for restrictions on in-person assemblies, would be moved to the section of the draft general comment that dealt with limitations on the right of peaceful assembly.

4. *Paragraph 15, as amended, was adopted.*

Paragraph 16

5. **Mr. Heyns** said that a number of stakeholders and non-governmental organizations had commented that the wording of paragraph 16, concerning spontaneous assemblies and counter-assemblies, seemed to suggest a preference for organized assemblies. Furthermore, the Special Rapporteur on the rights to freedom of peaceful assembly and of association had commented that the paragraph implied that spontaneous assemblies were less common than organized assemblies, which was not the case. The Special Rapporteur had also mentioned that spontaneous assemblies were not always a direct response to current events; they could also arise in response to a continuing state of affairs. Lawyers Rights Watch Canada had commented that the phrase “do not allow enough time to provide such notification” included in the version of the paragraph provisionally adopted on first reading could be interpreted as placing an undue burden of proof on organizers.

6. In the light of those comments, he proposed amending the second sentence of paragraph 16 to read: “However, spontaneous assemblies, which are typically direct responses to current events, whether coordinated or not, are equally protected by article 21.” He also suggested deleting the word “well” in the first paragraph.

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

Paragraph 17

8. **Mr. Heyns**, recalling that paragraph 17 concerned the definition of peaceful assembly, said that the Special Rapporteur on the rights to freedom of peaceful assembly and of association had commented that, for the purposes of the general comment, violence should be clearly defined as violence “inflicted on others”. In the stakeholders’ submissions, David Mead, Professor of UK Human Rights Law at the University of East Anglia, had suggested that “violence” should be defined as entailing the use by participants of physical force likely to result in “serious” injury; however, introducing such a change would set the threshold for violence too high, since it would mean that only “serious” violence would be excluded from

article 21 protection. A need for clarification that pushing and shoving should not be considered a form of violence had also been highlighted. Amnesty International had suggested that the text should explicitly state that the definition of violence set out in the general comment pertained only to the application of article 21. Edison Lanza, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, had commented that crimes against property did not necessarily include violence. However, because adopting that stance would mean departing drastically from the Committee's position, he proposed that the references to violence against property should be retained, supported by a footnote to the relevant part of the Organization for Security and Cooperation in Europe (OSCE) Guidelines on Freedom of Peaceful Assembly. The International Network of Civil Liberties Organizations had recommended that the Committee should avoid suggesting that entire assemblies, rather than individual participants, could become violent.

9. On the basis of those comments and suggestions, he had drafted a revised version of the paragraph, which read:

A "peaceful" assembly stands in contradistinction to one that is characterized by [widespread and serious] violence. The terms "peaceful" and "non-violent" are thus used interchangeably in this context. The right of peaceful assembly may by definition not be exercised in a violent way. "Violence", in the context of article 21, typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property. Pushing and shoving and mere disruption of vehicular or pedestrian movement or daily activities do not amount to violence.

10. He proposed that the language in square brackets, which had been lifted from paragraph 19, should be retained, but he was unsure whether the third sentence was needed. He had removed the phrase "or is deemed to be violent, because of the incitement or intention of violence, or because violence is imminent", which had appeared in the version of the draft paragraph provisionally adopted on first reading, because many stakeholders had stated that it was unclear and the issue was addressed more thoroughly in a later paragraph.

11. **Mr. Shany** said that he was in favour of retaining the language in square brackets and removing the phrase "or is deemed to be violent, because of the incitement or intention of violence, or because violence is imminent". He was also in favour of retaining the third sentence, as it highlighted an important distinction: whereas the first sentence concerned the characterization of entire assemblies, the third sentence referred to the obligations of individuals participating in assemblies, making it clear that the threshold was lower for individuals, and that they did not have a right to engage in violence against others when exercising the right of peaceful assembly.

12. **Mr. Bulkan** said that he was unsure whether the reference to paragraphs 26 and 27 of the OSCE Guidelines on Freedom of Peaceful Assembly in the footnote to the phrase "serious damage to property" was appropriate, as those paragraphs did not mention serious damage to property.

13. **Mr. Shany** said that there were circumstances in which pushing and shoving could be very violent. Moreover, the final sentence could be interpreted to mean that the Committee's general position was that pushing and shoving was not a form of violence whereas it actually meant that pushing and shoving did not amount to violence in the context of article 21. He suggested that, to make the meaning clearer, the penultimate and final sentences could be combined to read: "Violence, in the context of article 21, typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property, but does not include mere pushing and shoving and disruption of vehicular or pedestrian movement or daily activities."

14. **Mr. Heyns** said that Mr. Bulkan was correct to point out that the footnote to "serious damage to property" needed to be amended. The third edition of the OSCE Guidelines on Freedom of Peaceful Assembly did state that violence included inciting others to use "physical force that inflicts, or is intended to inflict, injury or serious property damage" but its publication status was currently unclear.

15. **Mr. Zyberi** said he agreed with Mr. Shany that pushing and shoving could lead to serious injuries. However, he was against combining the final two sentences. The penultimate sentence provided a definition of violence for the purposes of the general comment, while the final sentence clarified what was not included in that definition. It would therefore be clearer for the reader to keep the two sentences separate.

16. **Mr. Santos Pais** said that he too agreed with Mr. Shany's point regarding pushing and shoving, which could be considered an act of violence if carried out in the presence of certain groups, such as children or persons with disabilities. He was likewise in favour of keeping the final two sentences separate. He would also like to suggest adding the word "necessarily" to the final phrase so that it read "do not necessarily amount to violence".

17. **Mr. Quezada Cabrera** said that the reference to pushing and shoving in the last sentence was unnecessary: not only was it inconsistent with the subject matter of the rest of that sentence but the preceding sentence provided a sufficiently clear indication of the forms of violent action contemplated.

18. **The Chair** said that the Rapporteur should rework the last two sentences of the paragraph on the basis of the Committee's discussions and should present the revised versions to the Committee the next working day.

19. *Paragraph 17, as amended, was adopted on that understanding.*

Paragraph 18

20. **Mr. Heyns**, recalling that paragraph 18 addressed the consequences of a failure to observe domestic legal requirements on the part of assembly participants, said that he agreed with the observation made by the United States of America, which had stated that any protection for unlawful activities, including civil disobedience, that article 21 might afford would not shield the individuals concerned from arrest or detention for breaches of law. Noting that NGO Monitor had also indicated that protestors who engaged in harassment, destruction of property or other violations of the law should be held accountable for those violations, he invited Committee members to provide input as to how that point might be reflected in the text.

21. He agreed with the position of the OSCE Office for Democratic Institutions and Human Rights that the words "in principle" should be removed from the final sentence of the revised draft as provisionally adopted on first reading. On the other hand, the issue made by Equal Rights Trust, which had submitted that article 21 could also protect individuals who had violated domestic legal requirements, in those cases where the requirements themselves were incompatible with the provisions of the Covenant, was difficult to incorporate, since such a position might necessitate an assessment of the causes of the protest and, hence, a shift away from content neutrality.

22. He proposed adding the words "the conduct of participants in" at the start of the first sentence of the paragraph and, in the interests of readability, adding the word "certain" to the second half of the same sentence, so that the sentence as a whole read: "If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to the assembly have not been met by the organisers or participants does not, on its own, place the participants outside the scope of the protection of to 21." In the second sentence, he proposed prefacing "civil disobedience" with the qualifier "collective", to indicate that individual acts were not contemplated, and replacing the words "are in principle" with "can be". He also proposed moving the existing footnote 17 to the end of the first sentence.

23. *Paragraph 18, as amended, was adopted.*

Paragraph 19

24. **Mr. Heyns** said that the first sentence of paragraph 19 of the revised draft, which dealt with the question of whether violence by certain assembly participants could be attributed to others, should be deleted. The first part of the sentence, up to and including the word "violence", had been incorporated into paragraph 17, and, as noted by Michael Hamilton, Associate Professor of Public Protest Law at the University of East Anglia, and by Amnesty

International and Justice Centre Hong Kong, the second clause, which used the term “riot”, could be open to abusive application: in the absence of a clear definition of that term in many States’ domestic legislation, it could be used to justify police intervention.

25. On the basis of comments made by Denmark and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, he proposed adding the words “the organizers, or to the assembly as such” at the end of the penultimate sentence. Footnote 18 of the revised draft, which referred to the case of *Lashmankin and others v. Russia* heard before the European Court of Human Rights, should be deleted, since, as the Russian Federation had correctly noted, it was unrelated to the point made. In footnote 19, on the other hand, he proposed adding a reference to the decision of the Inter-American Court of Human Rights in the case of *Women Victims of Sexual Torture in Atenco v. Mexico*.

26. Although Poland had suggested that the word “isolated” should be either clarified or changed to “sporadic”, he found “isolated” to be more accurate and recommended that it be retained. Switzerland had suggested that the general comment should apply the definition of “violent assembly” used by the European Court of Human Rights. However, the Committee did not normally use the language of that definition, although some of its elements, such as violent intentions and incitement to violence, did appear in the text.

27. **Mr. Shany** said that, as there was potential for confusion between a violent assembly and an assembly that involved isolated acts of violence, the second sentence of the revised draft should be further revised to read “assemblies that are peaceful and those that are not”.

28. **Mr. Santos Pais** said that it might be preferable to merge the last two sentences of the paragraph since, read independently, the last sentence could be interpreted to mean that, even in an entirely violence-free assembly, some participants might be excluded from the protection of article 21.

29. **Mr. Heyns** said that he agreed with Mr. Shany’s proposal but that, in his view, the change proposed by Mr. Santos Pais would not alter the meaning of the last sentence in the manner suggested.

30. **The Chair** said that the word “thus” in the last sentence provided the necessary link between the penultimate and the final sentences.

31. *Paragraph 19, as amended, was adopted.*

Paragraph 20

32. **Mr. Heyns** said that, in relation to paragraph 20, which highlighted the importance of identifying the originators of acts of violence when deciding whether the acts in question tainted an assembly to such an extent that it fell outside the scope of article 21, Demosistō and Sunny Cheung, a student activist, had suggested that the issue of self-defence should be expressly addressed. A need to clarify that unlawful violence led to exclusion from article 21 protection only when the demonstrators themselves were responsible had also been highlighted.

33. In the first sentence of the revised draft, he proposed changing the words “ceases to be” to “is not”, in order to encompass assemblies that were not peaceful from the outset, and deleting the words “or is deemed to originate”, which were redundant, so that the sentence read: “The question of whether an assembly is not peaceful must be answered with reference to violence that originates from the participants.” In the second sentence, he proposed adding the words “or by *agents provocateurs*” after “peaceful assembly” and, as suggested by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, deleting the words “in itself”, so that the revised version read: “Violence by the authorities against participants in a peaceful assembly or by *agents provocateurs* does not render the assembly violent.”

34. **The Chair** said that he was in favour of the first two changes proposed because the general formulation “is not” could also cover the situation described by “ceases to be” and the phrase “violence that originates” was broad enough to cover all forms of violence originating or deemed to originate from the participants.

35. **Ms. Pazartzis** said that she would appreciate clarification as to the meaning of *agent provocateur*. Did the term refer solely to individuals acting on behalf of the authorities or did it also encompass individuals working for other parties?
36. **Mr. Shany** said that to define *agents provocateurs* as including agents not acting on behalf of the authorities could be problematic. The authorities would be unable to ascertain the origin of the violence in such situations and the Committee could not expect States parties to do what was not possible.
37. He wished to propose changing the word “violent” in the second sentence to “not peaceful”, for the reasons he had cited in the discussion of paragraph 19.
38. **The Chair** said that he considered *agents provocateurs* to be agents of the authorities.
39. **Mr. Heyns** said that he agreed with the proposal to replace the word “violent” with “non-peaceful”. With respect to the term *agents provocateurs*, his intention was that it should refer only to agents acting on the instigation of the authorities. It was important to clarify that point in order to prevent a situation whereby no assembly could be considered violent owing to the possibility of infiltration from the outside. He proposed inserting the word “their” before “*agents provocateurs*” to prevent that interpretation.
40. **Mr. Zyberi** said he believed that *agents provocateurs* generally infiltrated assemblies on behalf of the authorities, their aim being to change the nature of the protest and/or to make them violent. In paragraph 20, he would prefer to see a reference to persons acting on behalf of a third party – be that the State or some other party – who infiltrated assemblies in an attempt to fuel violence and delegitimize the underlying cause.
41. **Mr. Heyns** said that the Cambridge Dictionary defined an *agent provocateur* as “a person who intentionally encourages people to do something illegal so that they can be caught”, without specifying whether State involvement was required.
42. **The Chair** said that, as Mr. Shany had suggested, the words “operating on their behalf” could be added after “*agents provocateurs*” and that the Rapporteur should submit a further revised draft of the second sentence, reflecting the changes discussed and others proposed by Committee members in writing, at a subsequent meeting.
43. *Paragraph 20, as amended, was adopted on that understanding.*

Paragraph 21

44. **Mr. Heyns** said that a number of comments had been received in relation to paragraph 21, which dealt with the circumstances in which the conduct of assembly participants might be deemed violent. As a result, he had amended the revised text to read:
- Participants’ conduct may be deemed violent if authorities can produce evidence that, before or during the event, the participants are inciting others to the [imminent] use of violence, the participants have violent intentions and plan to act on them, or violence is imminent. Isolated instances where this is the case will not suffice to taint an entire assembly as no longer peaceful, but where the incitement or intention of violence is widespread, or if the leaders or organizers of the assembly themselves convey this message, and if such actions are likely to cause violence, participation in the gathering as such is no longer protected under article 21.
45. The word “imminent” was placed within square brackets because there were diverging views about its relevance. A reference to the Rabat Plan of Action, which incorporated the notion of imminence of harm, was included as a footnote.
46. **The Chair** asked whether Committee members agreed with the proposed addition of the words “authorities can produce evidence that” in the first sentence.
47. **Mr. Zyberi** said that since any evidence of incitement to violence produced by the authorities could be fabricated, the paragraph should refer to “credible” evidence, rather than just to evidence alone.
48. **Mr. Shany** said that, since imminent use of violence was not a concept touched on in the Covenant, he wondered why the notion of imminence should be included in the general

comment and whether the Rapporteur might consider rewording paragraph 21 to remove the reference. Even in the Rabat Plan of Action, the notion of “imminence” was no more than a subsidiary criterion for determining whether a restriction on freedom of expression was justified.

49. **Mr. Heyns** said that leaving the word “imminent” out of the paragraph would give the authorities considerable leeway to characterize a broad range of forms of expression as incitement to violence. On the other hand, he agreed that the authorities should be asked to produce “credible evidence” of incitement to violence.

50. After an exchange of views in which **Ms. Pazartzis, Mr. Santos Pais, Mr. Shany** and **Mr. Heyns** took part, **the Chair** suggested that the paragraph should undergo another revision and should be resubmitted to the Committee, if possible at its next meeting later that day.

51. *It was so decided.*

Paragraph 22

52. **Mr. Heyns** said that there were two possible options for paragraph 22. The first option was risky as it could lead to the prohibition of legitimate assemblies: if the scope of article 21 of the Covenant was considered to be limited by article 20, States parties would be required to prohibit, among other things, advocacy of national, racial or religious hatred that constituted incitement to discrimination or hostility. A preference for the second of the two options – namely, to remove the paragraph and deal with the implications of article 20 in the section of the general comment that dealt with restrictions placed on the exercise of the right of peaceful assembly – had been expressed by the vast majority of those who had submitted comments. He therefore proposed that the paragraph should be deleted.

53. **The Chair** said he took it that Committee members wished to delete the paragraph.

54. *Paragraph 22 was deleted.*

Paragraph 23

55. **Mr. Heyns** said that there had been a number of submissions concerning paragraph 23, which dealt with the question of whether the fact that participants were carrying objects that could be viewed as weapons automatically rendered an assembly violent. The thrust of a number of the submissions was that the paragraph should be deleted. However, other submissions highlighted that persons who assembled while carrying objects that could be viewed as evidence of intent to engage in violence – goggles or gas masks, for example – should not for that reason be denied their right of peaceful assembly. For example, *Derechos en Acción*, an association of Bolivian lawyers, had noted that, in the Plurinational State of Bolivia, demonstrating miners traditionally carried sticks of dynamite, a practice that the Bolivian Government had tried to ban. Martin Sheinin, Professor of International Law and Human Rights at the European University Institute, had stated that the text should expressly address the carrying of firearms.

56. His proposal was therefore to retain the paragraph, but to amend it to read:

Neither the carrying by participants of objects that are or could be viewed as weapons nor the carrying of protective equipment such as gas masks or helmets is necessarily sufficient to deem those participants’ conduct violent. That has to be determined on a case-by-case basis, dependent on, among other considerations, domestic regulation on the carrying of weapons (especially firearms), local cultural practices, whether there is an indication of violent intent and the risk of violence presented by the presence of such objects.

57. **The Chair** said that the Committee would resume its reading and discussion of paragraph 23 of the revised draft at its next meeting later that day.

The meeting rose at 2.30 p.m.