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Summary record of the 3715th meeting
Held via videoconference on Monday, 6 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 wished to thank Mr. Santos Pais for his offer to serve as Deputy Special Rapporteur for follow-up to Views. The Committee had unanimously agreed to appoint him to that post.

2. 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.

3. **Mr. Heyns** (Rapporteur for the general comment) proposed that the Committee should discuss the points in paragraphs 21 and 26 on which it had yet to reach agreement before continuing its second reading of the rest of the draft general comment.

Paragraph 21 (*continued*)

4. **Mr. Heyns** said that the first sentence of paragraph 21 addressed a number of situations where the conduct of participants could be deemed to be violent although the assembly itself was not physically violent. The first such situation involved incitement to violence, as contemplated in article 20 of the Covenant. In the clause addressing that situation, he proposed deleting the word "imminent", which appeared in the revised draft as provisionally adopted on first reading, so as not to dilute the meaning of the word in other contexts where it was used to refer to something expected to happen within seconds. In order to make it clear, however, that the reference to the use of violence was not merely abstract, he proposed placing the words "and such actions are likely to cause violence" after "inciting others to the use of violence", rather than in the last sentence of the paragraph, as he had previously proposed. The second situation where the conduct of participants could be deemed to be violent was where participants had violent intentions and planned to act on them, and the third was where violence on their part was imminent. He also proposed replacing the verb "produce" with "present" in the first sentence, as suggested by Mr. Zyberi.

5. He proposed amending the second sentence to state that if one of the three situations of "deemed" violence mentioned in the first sentence was present as a general characteristic of an assembly as a whole, then that entire assembly would no longer be protected under article 21. The question was still open as to whether the text should also indicate that the assembly could be deemed violent only if such actions were likely to cause violence – repeating what had been said earlier in reference to incitement – and if the violence was deemed to be widespread and serious.

6. **Mr. Shany** said he believed that the Committee had previously applied the standard of "widespread and serious violence" to determine the point at which a peaceful assembly became a non-peaceful one. He was concerned that the introduction of the new concept of "general characteristic of the assembly" might generate confusion. He therefore proposed changing "where this is a general characteristic of the assembly" to "where this is likely to result in widespread and serious violence".

7. **Mr. Heyns**, responding to Mr. Shany's comments, said that "widespread and serious violence" was too restrictive, since it would not be applicable, for example, to an assembly that was disciplined and peaceful in its entirety but directed at inciting violence against a particular person, such as a politician or an immigrant, even though in that situation the State party would be required, under article 20 of the Covenant, to stop the conduct in question. Furthermore, the Covenant did not use the language of "widespread and serious violence". The use of the term "general characteristic" would mean that any of the three situations in which an assembly could be deemed violent might be present. If that term was unacceptable, he proposed replacing "where this is a general characteristic of the assembly" with "if such conduct is widely prevalent" or similar language. The concept of "widespread" should relate to the prevalence of the conduct rather than to the violence that was likely to result.

8. **Ms. Sancin** said that she understood both Mr. Shany's concern and the Rapporteur's logic. She was also concerned about the issue of who would assess whether a situation could be generally characterized as violent. She proposed inserting a word such as "manifestly" in the formulation chosen (for example, "this is manifestly a general characteristic" or "this is a manifestly prevalent situation") as a way to objectivize the situation and not leave the assessment to the authorities alone.

9. **Mr. Shany**, responding to the Rapporteur's comments, said that he fully agreed that an assembly that featured calls for violence in another context would be covered by article 20, but it was his understanding that the Committee had taken the position in its discussion of paragraph 22 that it would not deal with article 20 issues in defining what constituted a peaceful assembly, but would rather take them into account in the section on restrictions. While he did not disagree that an assembly calling for violence ought to be restricted, the scope of the restrictions and the measures of restriction would be covered by article 21 and, unless there was a likelihood of widespread and serious violence, it would still be protected under article 21 as a peaceful assembly, albeit one that was legitimately subject to restrictions because it conveyed a message inciting racism, hate or violence. He would not insist, however, on that point.

10. **Mr. Heyns**, responding to Mr. Shany's comments, said that it was his view that, with reference to incitement to hostility, discrimination or violence under article 20, it was only in the case of hostility and discrimination that the issue of restrictions under article 21 would be applicable. The right under article 21 was a right of peaceful assembly; violence was therefore, by definition, not protected under the article. Violence and "deemed" violence were issues that related to the scope of the right rather than to restrictions on the right.

11. He agreed with Ms. Sancin's proposal and would draft a revised version of the second sentence on that basis.

12. *Paragraph 21, as amended, was adopted on that understanding.*

Paragraph 26 (*continued*)

13. **Mr. Heyns** said that he proposed deleting the words "before, during or after the assembly" in paragraph 27, which dealt only with positive duties of the authorities, and inserting the words "before, during and after assemblies" at the end of the first sentence of paragraph 26, which dealt with both positive and negative duties, to avoid giving the impression that only the positive duties of authorities applied before, during and after assemblies.

14. *Paragraph 26, as amended, was adopted with minor drafting changes.*

Paragraph 27 (*continued*)

15. **Mr. Heyns** said that it was clear from the language used by the Committee and other bodies, including the Organization for Security and Cooperation in Europe, that there was in general wide acceptance for the idea that States had both negative and positive duties. States parties had a positive duty to protect participants in an assembly against, for example, bystanders or members of a counter-assembly wanting to attack them. However, the word "facilitate" in the first sentence of the paragraph sought to express the fact that their positive duty could entail something more than protection against physical violence. The Committee's jurisprudence showed that a State's obligation could also include the duty of ensuring an institutional framework within which the right of peaceful assembly could be exercised. Paragraph 27 provided examples of specific interventions that might be required of authorities, such as blocking off streets, to make sure that a safe space existed within which people could actually participate in assemblies. The duty to take such action went beyond the negative obligation not to interfere.

16. In order to reflect concerns expressed at the previous meeting, he had changed "the positive duty" to "certain positive duties" in the first sentence, so as to indicate that States had only certain positive duties and not an endless list of them. Other changes included the deletion of the word "legitimate" before "objectives" in the first sentence; in addition to the points that had been made earlier, it would be difficult to determine who would decide what was legitimate. The words "without discrimination" had been inserted in the second

sentence, at the end of the first clause, and the full sentence referring to “discriminatory barriers”, which he had proposed at the previous meeting, had been deleted to make the paragraph shorter. Discrimination was also addressed in paragraphs 8 and 28. As indicated in the discussion on paragraph 26, the words “before, during or after the assembly” had been deleted from the second sentence of paragraph 27.

17. **Mr. Zyberi** said that he wished to know why the sentence referring to “discriminatory barriers”, which touched on the State’s duty regarding participation of persons with disabilities, had been deleted.

18. **Mr. Heyns** said that the issue of discrimination would be more fully addressed in paragraph 28.

19. **Ms. Pazartzis** said that she questioned the need to include the words “to facilitate peaceful assemblies”. With respect to the “possible abuses by non-State actors” referred to in the last sentence, she would appreciate clarification as to the relationship between the non-State actors and the “other members of the public or counter-demonstrators” also mentioned. Were the members of the public and counter-demonstrators non-State actors, or was an additional element being added to the sentence?

20. **Mr. Ben Achour** said that he favoured either deleting the expression “to facilitate peaceful assemblies” or replacing “facilitate” with “protect”, “guarantee” or a similar verb. A document circulated by the Rapporteur that morning demonstrated convincingly that the verb “facilitate” was used by the Committee and other entities in the context of positive duties. However, he would prefer not to use it in paragraph 27 because it suggested that States should make available to organizers the means to successfully hold assemblies, even though their duty was not results-based but means-based.

21. **The Chair** said that Mr. Shany had, in writing, proposed using the verb “ensure” instead of “facilitate”.

22. **Mr. Heyns** said that the assertion that States parties had the duty to facilitate peaceful assemblies should not be understood to mean that they were required in any way to fund demonstrators. It simply meant that they were required, for example, to provide security, much as they would for a marathon or other such event. In any case, a footnote could be inserted to clarify what was meant by “facilitate”, a word that the Committee had often used with the sense in which it was used in paragraph 27.

23. **Ms. Pazartzis**, supported by **Ms. Tigroudja**, said that the footnote could include references to relevant uses of the word “facilitate” in the Committee’s jurisprudence.

24. **Mr. Heyns** said that he would revise the first sentence in order to leave no margin for misinterpretation of what was meant by a positive duty to facilitate peaceful assemblies. The word “intervention”, in the third sentence of the paragraph, would be changed to “measures”.

25. *Paragraph 27, as amended, was adopted on that understanding.*

Paragraph 28

26. **Mr. Heyns** said that paragraph 28 dealt with discrimination in the context of article 21. It included a list of the grounds on which discrimination in respect of the right of peaceful assembly was expressly forbidden. As always, the issue was whether to list all the possible grounds or only a select few. Either choice had its drawbacks. His approach had been to list the grounds that appeared in the Covenant and a number of others, in particular those that the Committee had found particularly important.

27. Many stakeholders had submitted comments on the text of the paragraph as provisionally adopted on first reading. He agreed with the suggestion made by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to replace “should be made” with “must be made” in the second sentence. He also agreed with Markus Schefer that persons with disabilities should be included in the list of grounds, and with Amnesty International, which had recommended making specific reference to children and indigenous peoples. Responding to the recommendation of Equal Rights Trust that the paragraph should be revised to focus on the positive duty to ensure enjoyment of the right without discrimination, he said that, in his opinion, problematic conduct by States could be more effectively addressed by stating what should not be done.

Human Rights Centre “Memorial” and OVD-Info had made the interesting point that discrimination was often based not on the participants’ membership of a certain group but rather on the subject of the assembly.

28. In the light of the submissions received from stakeholders, he had prepared a revised version of the paragraph, which read:

> States must ensure that neither laws nor the way in which they are enforced result in discrimination in the enjoyment of the right of peaceful assembly, for example on the basis of race, colour, ethnicity, age, sex, language, religion, political or other opinion, national or social origin, property, birth, belief, minority or indigenous status, disability, sexual orientation or gender identity. Particular efforts must be made to ensure equal and effective protection of the right of peaceful assembly of individuals who are members of groups who are or have been subjected to discrimination, or who may face particular challenges in participating in an assembly. [States moreover have a duty to protect participants from all forms of discriminatory attacks[, including homophobic, sexual or gender-based attacks].]

29. The final sentence of the proposed paragraph could be included as it was presented or without the list of possible attacks. It could also be omitted altogether.

30. **Mr. Ben Achour** said that the sentence containing the list of grounds on which discrimination in respect of the right of peaceful assembly was expressly forbidden struck him as much too long.

31. **Mr. Shany** proposed that the word “enforced” in the first sentence should be changed to “interpreted and applied”.

32. **Ms. Pazartzis** said that the Committee could perhaps refer only to the grounds mentioned in articles 2 and 26 of the Covenant. After all, the Rapporteur’s use of the words “for example” suggested that the listed grounds were not the only grounds on which discrimination was forbidden.

33. **Mr. Heyns** said that he would change “enforced” to “interpreted and applied”. He proposed referring to “abuse and attacks” in the final sentence of the paragraph rather than to “attacks” alone. The words “abuse and attacks” could also be used in the final sentence of paragraph 27.

34. It was difficult to use only the language of the Covenant, as a number of other issues had come to the fore since 1966, when it had been adopted. The Committee’s jurisprudence had lengthened the list of grounds on which discrimination was expressly forbidden. The Committee could not go back to the language of nearly fifty-five years earlier.

35. **Ms. Pazartzis** said that the draft general comment addressed the right of peaceful assembly, not the issue of discrimination. Grounds other than those listed in the Covenant could appear in a footnote.

36. **Mr. Heyns** said that he would draw up a new list of grounds on which discrimination was forbidden. He proposed that all the grounds mentioned, including those not in the Covenant, should be retained in the main body of the paragraph; however, he would insert footnotes referring to the Committee’s jurisprudence, where appropriate.

37. **The Chair** said he took it that the Committee wished to adopt the paragraph, subject to the additional amendments proposed by the Rapporteur.

38. *Paragraph 28, as amended, was adopted on that understanding.*

Paragraph 29

39. **Mr. Heyns** said that the Committee had not received many comments on paragraph 29. He was nonetheless proposing some changes in response to concerns that the paragraph could be used to justify sweeping prior restrictions on the right of peaceful assembly. The paragraph, as revised, would thus read:

> In protecting and facilitating assemblies, States parties must take measures aimed at preventing violations and abuses of the different rights at stake. At the same time, the potential chilling effect of such measures must be considered, and the

need to take such precautionary measures cannot serve as a justification for measures that violate human rights, such as the right to privacy.

40. **Ms. Pazartzis** said that she wished to state for the record that she had reservations about the use of the word "facilitating".

41. **Mr. Shany** said that "the need to take such precautionary measures cannot serve as a justification for measures that violate human rights, such as the right to privacy" was too broad a statement. If the law enforcement authorities of a State party suspected that a particular person was planning to attack a demonstration, it would be permissible to place that person under surveillance to prevent the attack. Such surveillance might be considered to be a violation of the right to privacy of the individual but was necessary to protect the right of freedom of assembly. There were some situations in which a delicate balance must be struck between the right to freedom of peaceful assembly and other protected rights. He therefore proposed that the word "violate" should be replaced with the words "unduly infringe on".

42. **Mr. Zyberi** said that he supported Mr. Shany's proposal. He wondered whether the term "precautionary measures" should be replaced with the term "preventive measures" to align the second sentence with the first sentence. Alternatively, the phrase "the need to take such precautionary measures" could be replaced with "the need to take such precautions".

43. **Mr. Heyns** said that he agreed with Mr. Shany's proposal to replace "violate" with "unduly infringe on". He also agreed with Mr. Zyberi's proposal to replace "such precautionary measures" with "such precautions", since "precaution" was a technical term linked to the principle of precaution.

44. *Paragraph 29, as amended, was adopted.*

Paragraph 30

45. **Mr. Heyns** said that paragraph 30 dealt with the issue of challenges to peaceful assemblies. Various stakeholders, including Lithuania, the International Center for Not-For-Profit Law and the non-governmental organization Article 19: International Centre against Censorship had recommended that the Committee should find wording that more strongly emphasized the importance of taking a content-neutral approach to counter-assemblies. The Russian Federation had recommended that paragraph 30 should be deleted because its practical implementation might be conducive to open conflict between participants in competing events. However, the position of the Committee as expressed through the general comment was that all assemblies should be accommodated; later paragraphs recommended that if a State did not have the capacity to prevent conflict between opposing assembles, it could take steps to reschedule or restrict the assemblies. The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe had suggested the use of the words "as far as possible" instead of "where possible". In the light of the comments received, he wished to propose that the final sentence of the paragraph should be amended to read: "States must take a content-neutral approach to counter-assemblies, which must be allowed to take place, as far as possible, within sight and sound of the assemblies against which they are directed."

46. **Mr. Shany** said that, in paragraph 25 of the draft general comment, the Committee stated that the approach of the authorities to peaceful assemblies and any restrictions "must […] in principle be 'content-neutral'". He proposed that that language should be replicated in paragraph 30.

47. **Mr. Heyns** said that he agreed with the amendment proposed by Mr. Shany.

48. *Paragraph 30, as amended, was adopted.*

Paragraph 31

49. **Mr. Heyns** said that paragraph 31 dealt with the issue of adverse or violent reactions to peaceful assemblies from members of the public. One of the questions raised on first reading had been whether to use the wording "all possible measures" or "all appropriate measures" when describing the measures that States must take to protect participants. The problem with the wording "all possible measures" was that some States parties could interpret such measures as including, for example, bringing in the military to control a

situation where law enforcement authorities had proved incapable of preventing conflict between an assembly and a counter-assembly. A number of comments received from various stakeholders expressed a preference for one or the other phrase, or for alternative wording. Amnesty International favoured the phrase "all reasonable measures", for example. Equal Rights Trust had suggested that the words "in and of itself" in the first sentence should be removed. The International Center for Not-For-Profit Law had recommended adding "or negative" after the word "violent" in the first sentence. In the light of the comments received, he had drafted a revised version of the paragraph, which currently read: "The possibility that a peaceful assembly may provoke adverse or violent reactions from some members of the public is not sufficient grounds to prohibit or restrict the assembly. The State is obliged to take all reasonable measures that do not impose disproportionate burdens on them to protect all participants and to allow the assembly to take place in an uninterrupted manner."

50. **Mr. Furuya** said that it unclear to whom the pronoun "them" referred in the phrase "that do not impose disproportionate burdens on them".

51. **Mr. Heyns** said that "them" referred to the State authorities. He would amend the text to clarify that point.

52. *Paragraph 31, as amended, was adopted on that understanding.*

Paragraph 32

53. **Mr. Heyns** said that paragraph 32 dealt with the central role of legal and decision-making systems in respecting and ensuring peaceful assemblies. Michael Hamilton, Associate Professor of Public Protest Law, University of East Anglia, United Kingdom, had commented that the use of the term "managing" in relation to assemblies improperly characterized the obligations and role of State authorities and was closely aligned with the concept of "control"; he argued that its use in the general comment could unduly reinforce policing practices that afforded insufficient protection to the right of peaceful assembly. Mr. Hamilton's comments reflected a shift away from use of the words "control" and "management" towards "facilitation" in the work of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. Open Society Justice Initiative had suggested stating in the paragraph that public authorities should proactively publish, and supply upon request free of charge, the laws, regulations, and other legally binding documents, as well as training manuals, standard operating procedures, police disciplinary codes and other guidance documents, that could be used to facilitate or limit assemblies. He agreed that public access to such information was important. Furthermore, he had come to realize that nowhere in the general comment was it stated that domestic law must recognize the right of peaceful assembly. Paragraph 32 seemed to him to be the most appropriate place to do so. In the light of that consideration and the comments received, he had drafted a revised paragraph, which read:

> A functioning and transparent legal and decision-making system lies at the core of the duty to respect and ensure peaceful assemblies. Domestic law must recognize the right of peaceful assembly and clearly set out the duties and responsibilities of all functionaries involved, be aligned with the relevant international standards and be publicly accessible. States must ensure public awareness about the law and relevant regulations, including what, if any, procedures should be followed by those wishing to exercise the right; who the responsible authorities are; the rules applicable to those officials; and the remedies available in the case of alleged violations of rights.

54. *Paragraph 32, as amended, was adopted.*

Paragraph 33

55. **Mr. Heyns** said that paragraph 33 dealt with the topic of oversight. One of the issues raised on first reading was whether the Committee should recommend that oversight bodies should address all "alleged" violations or all "potential" violations of the right of peaceful assembly. Various stakeholders had expressed a preference for one of the two options, for both or for neither. The national human rights institution of Kenya had suggested that the Committee should consider mentioning the role of national human rights institutions in promoting and protecting the right of peaceful assembly. Amnesty

International had recommended that it should be made clear that violations of the right to peaceful assembly could occur before, during and after an assembly. In the light of the comments received, he had drafted a revised paragraph, which currently read: "States parties must moreover ensure independent and transparent oversight of all bodies involved with peaceful assemblies, including through timely access to national human rights institutions as well as judicial remedies with a view to upholding the right before, during and after an assembly."

56. **Mr. Shany** proposed that the words "judicial remedies" should be replaced with "effective remedies, including judicial remedies".

57. **Mr. Zyberi** said that he supported Mr. Shany's proposal. He wished to point out that in some countries the role of national human rights institutions was fulfilled by bodies such as ombudspersons' offices. Perhaps the language should be made more inclusive. In addition, some bodies did not have the competence to deal with individual complaints of violations of the right of peaceful assembly.

58. **Mr. Santos Pais** said that it was unclear what was meant by "timely access to national human rights institutions".

59. **Mr. Heyns** said that the term "national human rights institution" was generic and widely used. He agreed with Mr. Shany's proposal. Perhaps the order of ideas in the sentence could be swapped such that it read: "States parties must moreover ensure independent and transparent oversight of all bodies involved with peaceful assemblies, including through timely access to effective remedies, including judicial remedies, and to national human rights institutions." With regard to the issue raised by Mr. Santos Pais, in a number of countries the public had recourse to national human rights institutions in the event that an assembly was prohibited or excessive force was used during an assembly.

60. **The Chair** suggested that the Rapporteur should prepare a new version of paragraph 33, taking into account the Committee members' comments and proposals, for consideration at the next meeting.

61. *It was so decided.*

The meeting rose at 2.35 p.m.