**UN HUMAN RIGHTS COMMITTEE – CONSIDERATION OF GENERAL COMMENT No. 37 ON PEACEFUL ASSEMBLY (ART 21)**

1. I am a legal academic at the University of East Anglia in the UK, where I hold a Chair as Professor of UK Human Rights Law. I have been researching and writing about peaceful protest and public order, mainly from a UK perspective, for over twenty years, most recently “A Seven (or so) Year Hitch: How Has The Coalition’s Pledge To Restore The Right To Non-Violent Protest Fared?” (2018) 29 Kings LJ 242-274. I am the author of the UK’s leading academic monograph, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart, April 2010).
2. I was co-organiser of roundtable session with the UN Special Rapporteur on Freedom of Assembly on his country visit to UK, Jan 2013 & one of only two academics invited to follow up meetings when he returned in Feb 2016. In February 2016, I was invited to attend an Experts’ Meeting, called by the (then) Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns as he prepared his report on protecting the right to life in law enforcement, for the HRC in April 2014. In December 2019, I took part in a civil society roundtable organised again by the S/R as part of his work on this draft GC, looking at on-line protests.
3. I very much welcome the move towards a General Comment, and I am broadly very supportive of the draft GC prepared for the Committee for its July meeting, and its revisions following that meeting. Where my comments below are specific to the revised draft, I indicate where.
4. I do not in this response plan to cover protection for on-line assemblies, a matter comprehensively traversed a that December meeting.

**General Remarks**

Rationales

1. While I welcome the explicit recognition of the value of peaceful assembly, the GC could be strengthened if we added firstly, the organisational/networking abilities such brings, and without which most social movements would stagnate: they offer cheap and simple mobilisational qualities. There is also (recent) psychological evidence of the benefits of participating in protest and political activism (S Vestergren, J Drury, & E Hammar Chiriac “The biographical consequences of protest and activism: a systematic review and a new typology” (2017) 16 Social Movement Studies 203-221). The benefits of solidarity also include strengthening free speech rights – I am more likely to feel comfortable expressing myself knowing, from assembling with others, that I am not alone in holding viewpoint X.
2. Secondly, the GC might acknowledge more explicitly the wider social or vicarious value of an individual right to protest; that it is of value to more people than simply those who wish to participate in the assembly. In other words, making it clear that we all lose out where you are not able to exercise your right, by (for example) our not being witness to new information or not being persuaded to change our minds on a political issue.
3. Thirdly, and while this does come out later in the draft (para 37), I would welcome a more explicit recognition of the right to assemble as both a substantive/outcome right – being able to hold a march – and a process/organisational right that predates the substantive exercise and without which the march or demonstration might not occur. If so, then the scope of Art 21 as protecting only gatherings in a “publicly accessible place” (para 4; para 13) is too narrow. Protection must be offered to e.g. activist meetings to work out the logistics of a march. While this risks blurring rights of assembly and association, conceptually it seems to me on firmer ground to conceive of rights that are adjectival (or precursors) to an assembly actually taking place as so intrinsically bound up that legal norms should treat them as indivisible. Without wishing to render matters yet more difficult, one could maintain a distinction between organisational assemblies from which the assembly stems and other activist meetings, though I accept this seems a very fine line indeed.

**SCOPE OF THE RIGHT**

Rights-holders

1. While the draft GC notes (para 5) that children are also rights-holders, further acknowledgement of and development of the special needs that children might have in order to exercise the right to assemble.
2. I welcome too the strengthening, through explicit reference, in the revised draft (para 5) that the right is an individual right albeit one that is exercised collectively. This is an important recognition since the converse allows for the attribution of violence by one/a few to all who attend, and for the construction of the concept of an “unlawful” or “unpeaceful” assembly, the consequences of which can be the collective imposition of sanctions en masse. A recognition that the rights-holder is always an individual not only allows for but positively requires tailored sanctions based on identifiable harm rather than collective or vicarious culpability.

Common expressive purpose

1. Much is made throughout the draft GC of the need for individuals to have come together for a “common expressive purpose” (e.g. para 4). Of course much here might depend on the width given to “expressive” in that phrase, and accepting that the broad thrust of both ECHR and ICCPR jurisprudence assumes an expressive purpose, why should gatherings of citizens that are not for such purposes lose all protection? If, for argument’s sake, they stand to be protected under an associative right, then why should a gathering of people for an expressive purpose not be so protected associatively…in which case, what value is assembly? If contrariwise they are not, then they lose all protection since a fortiori they are not expressing themselves either and thus stand outwith Art 19. Might consideration be given to a sliding scale of protection, similar to that developed by the Strasbourg Court under Art 10, conferring greater discretion on state authorities for restrictions on commercial speech than for political?
2. That general point being made, let me turn to specifics. Presumably too, the expressive purpose that needs to be in common is the broad one of expressing oneself? Each of the members of an assembly do not need to share the same discreet expressive purpose – so if 20 wanted to persuade by chanting, and 20 more to intimidate by shouting and 20 more to express solidarity in silence, all 60 would have a common expressive purpose? In short, how much commonality does there need to be – specific or general, or perhaps (better?) is the commonality of purpose as to the outcome or means? My preferred reading of para 14 militates in favour of the former, but clarity here might be an idea?
3. To develop that, and while this might sound tendentious, the common expressive purpose is presumably one shared with (enough? one more?) others rather than shared in common with all? That latter would mean perhaps counter-intuitively that the larger the assembly, the less likely is the expressive purpose uniformly held and (perhaps the same point) the presence of a single disruptive counter-protester in the midst of an otherwise collective throng would mean everyone losing the right – their expressive purpose would be to silence the speaker not to listen.
4. Subject to my point above (at 10.), I welcome the change in revised draft (para 14) that excludes from the definition of assembly only those for a commercial purpose such that (I assume) assemblies for social entertainment purposes would now fall under the protective scope of Art 21? This would seem to protect – to take three examples – sports fans congregating in a city centre “FanZone” to watch a World Cup match (as well as, obviously, those in the stadium); a group of friends watching some live comedy or at the cinema; subcultural groups congregating in public spaces such as (in the UK context) mods meeting in seaside towns on Bank Holiday weekends (c.f. *Anderson v UK*, App 33689/96 EComHR inadmissibility decision 17 October 1997 though there was no evidence there of a specific group identity other than all being young, black, and British-Caribbean).

Peacefulness

1. While it might be an obvious corollary of imposing on the state the duty justify limitations (para 40), a clear statement in the GC that it must be for the state to prove the violence would be welcome.
2. Next, some definitional issues: para 17 defines violence as physical force that is likely to result in injury, death or serious damage to property. I would suggest that in both cases (injury and property damage) this should be to others, and in the case of injury it should, as with property, be serious. It is important that such distinctions be drawn, and maintained, since the effect of a participant being or becoming violent is that they forfeit all protection; the state does not need to justify imposing any restrictions. It is logically consistent to assert both (i) that minor injuries or serious damage to one’s own property do not render an assemblant violent and (ii) that such actions might allow a state to impose resrictions provided that is a proportionate response. If any violence – whether to persons or property – were outwith the scope of protection as not being peaceful, then the question of limitations never arises.
3. There might be an unwitting contraction of protection on the same basis earlier in para 17 since violence can be deemed (by whom?) simply as a result of intention or imminence. Again, it is one thing to permit states to impose proportionate restrictions on such a basis, for such reasons – given they bear the duty to justify – and quite another to remove all protection ab initio.
4. In contrast, I welcome the clear explanation in paras 17 and 18 that mere disruption does not constitute violence and neither does a failure to comply with domestic legal requirements though greater clarity around the distinction between unlawfulness and lack of peacefulness would assist. The implication of para 18 is that it is referring only to, for example, administrative requirements relating to the holding of the assembly such as notification whereas (using a UK example) participants in an assembly that unlawfully obstructs the highway without reasonable excuse (s.137 Highways Act 1980) might well have committed an offence but have not been violent. While the last line of para 17 about mere disruption should be taken to ensure cover extends to such people, one can easily imagine a state putting forward an argument that that only applied to lawful/non-criminalised disruption.
5. Presumably para 20 is trying to convey the idea that protester violence prompted by or as a direct result of violence perpetrated by the authorities does not remove protection on grounds of lack of peacefulness? If so, that might be made clearer, and of that it not what is being conveyed, I would suggest that it should – or else state authorities can (unlawfully) attack and wait for retaliation and then step in again only lawfully.
6. Not all violence is unlawful – a boxing match is violent but as both parties are deemed to have consented, no law is broken, so should paras 17-23 be qualified by unlawful – and (further) that having a free-standing definition (somehow!), to prevent states defining out through domestic law? I note here that para 21 refers to “unlawful force”
7. I think it creates both evidential and conceptual difficulties (para 21) for all participants to lose protection (and, again, to repeat this is a scoping matter not a justification matter) on the basis of widespread incitement or intention of violence. Firstly, this goes ahead the principle of an individual right exercised collectively. Second, it expands the scope considerably to talk of violent intentions or violent incitement rather than widespread violence per se. Third, there is a logical flaw in that widespread incitement seems to remove protection en masse including from Y, who is remaining avowedly peaceful, whereas violence by X (unless perhaps it is widespread; para 21 is not clear on this?) or even by a few does not deprive Y of her rights. Fourth, how widespread does widespread have to be? Last, the draft is silent on what the position is, and should be, if there is (widespread) incitement that does not eventuate in (unlawful/serious) violence – who if anyone should be deprived of the protection of Art 21 as being outside its scope?

**OBLIGATIONS OF STATES PARTIES**

1. While a recognition of the positive duty to facilitate/promote (para 27) – and what that might cover, at street-level, is very welcome. There is a risk of it leading unwittingly to this regressive chain: positive duty – duty to facilitate – dialogue model – control of those protesters who do not comply. In short, curtailing of rights under the guise of more expansive protection. While it might be only a single example, from the UK, the following extract is instructive:

Those organising demonstrations, “as actors in the democratic process”, should respect the rules governing conduct of demonstrations by complying with the regulations in force. A failure to do so demonstrates a disregard of the rights and freedoms of others and of the need to manage those competing rights sensibly if they are to be enjoyed to the greatest extent possible. Of course, the Convention imposes obligations on contracting states not individuals, but if the individual does not play his part a greater latitude must be allowed to the state in the way it responds. Mr Barda says he objects as a matter of principle to seeking permission to demonstrate; his objection is wholly misplaced. The Convention principles on which he seeks to rely do not operate in a vacuum.

It is taken from *R (Barda) v Mayor of London* [2015] EWHC 3584 (Admin) at [107], a challenge to the fencing off of Parliament Square, and is quoted in C. Werren *This is what democracy looks like: Police, Visibility and the Right to Protest* (Unpublished PhD, Kings College London, 2018) which discusses that possibly regressive chain in more depth. To that extent, the change in the revised draft (para 86) recognising that engagement with the police cannot be required of participants and organisers is welcome.

1. I welcome to the express acknowledgement (paras 32-33) that effective protections requires the provision of remedies as well as what seems to be change in the revised draft that extends the guarantee to *ex ante* (judicial) remedies as well as ex post oversight. There is little point in citizens knowing in advance what their rights are (para 32) if they cannot exercise them as and when they choose. For the avoidance of doubt, therefore, I think para 33 needs to refer to both alleged and potential violations. There might be some revision needed to para 77 too.
2. I wonder if a hard-line can be drawn any longer between journalists – which the draft GC does not seek to define, so far as I can see – monitors/observers and, further, between those two on one hand – given the especial protection (para 34) – and nyone else such as “citizen journalists” or simply public-spirited citizens recording an assembly.
3. The recognition in para 37 of the process elements to an assembly (see my comment above at 6.) is very welcome.
4. Given that the right extends to all collective expressive activities, another welcome recognition is that collective political expression in the form of an assembly – march, rally, sit-in etc etc – demands greater or heightened protection (para 36).

**LIMITATIONS ON THE RIGHT**

1. Might consideration be given to tightening up of para 41, rendering it a presumption – to be departed from only if the state provides justificatory evidence – that assemblies should generally be allowed to take place i.e. a presumption against any form of prior restraint?
2. A few minor drafting points on the legitimate grounds
3. para 49: “danger to the safety of identifiable persons” or, stronger, identified. This removes from the authorities the space to argue in general terms – many assemblies might create risks to safety that will not eventuate as harms to anyone one person or group of people.
4. There is an inherent danger in allowing claims based on protecting morals (para 52): it risks veering closely towards a majoritarian defence, anathema to a scheme of rights-protection, though I do note the tightening of the language in the revised draft.
5. While the principle of assembling within sight and sound of the target audience (para 61) speaks to values such as the collective expressive rationale – of, say, persuading others – it speaks too, and on this the draft GC is silent, to values of individual autonomy. If I wish to protest at location X at time Y, I should be allowed to do, as to frustrate that defeats my moral agency. A fuller recognition of the wider values at play would be welcome.

Places

1. While it is true (para 66) that courts, parliaments and other official buildings are public spaces, it is not solely for that reason that the exercise of Art 21 rights should rarely (never?) be denied. It is because these are quintessentially political institutions and thus most obviously the targets of collectively expressed viewpoints in an assembly (though of course not all assemblies are political in nature, and there are other rationales for assemblies too). While I welcome in the revised draft the fact that parliament and courts are no longer elided with hospitals, might the wording be tightened to recognise a presumption of permitting assemblies outside or at such locations as courts, parliaments and official buildings?
2. As to the privatisation of public spaces (para 67), the draft GC might benefit from greater explanation of protests at private property that is open to the public. While that latter criteria sensibly and appropriately discounts private residential owners from exercise by third parties of the right on their property, to coalesce all other privately held land and subject it to a uniform test might not achieve effective and instrumental protection for the right. That does not set an especially high bar. I wrote about this myself in my 2010 book (p.130-1)

The unqualified nature of absolute legal title means that individual university lecturers cannot be required to allow an environmental group to enter their back gardens to protest about their poor personal recycling record if they don’t want them to. That much might be obvious and, one might hope, uncontentious but should it automatically be the case that that same group should be unable to stand in the car park of a multi-national conglomerate highlighting for its employees, suppliers and customers that company’s unenviable record on pollution? The problem that we need to confront and that is implicit in these two scenarios is that land comes in different packages and can be classified or considered in several ways. It might not necessarily be appropriate to have a ‘one size fits all’ approach to regulating peaceful protest on private land.

Conceptually, we can distinguish private landholdings in one of several ways. We might first differentiate between different sizes of privately-owned land: the backyard of a residential house is obviously markedly different to hundreds of acres of land used to grow GM foods. Alternatively, we might reflect on the size of the private holding relative to any publicly-owned land in the area to see whether there is an adequate supply of land that is available for protest. That, though, assumes that citizens can force the state’s hand to require access to protest, which may not be the case as we have seen. Next, we might categorise private land according to the power or impact that that holding has: we might contrast here a large country house, having acres of gardens used solely as a private residence, with an arms factory or fast-food outlet of a fraction of its size. Last, we might separate private land that has always been held privately from land which has been transferred by and from the contracting state into private hands under the guise of one of the various political measures undertaken in recent times. Normatively speaking, those different typologies may justify imposing a regulatory regime under which different—perhaps graduated—obligations to permit protests or meetings are imposed on what appear all to be ‘private’ landowners.

1. A linked point is the underplaying in the draft of the ways in which and extent to which private (usually corporate) actors can interfere with the exercise of the right. The underlying assumption of the draft GC is state/public interference with the exercise of the right. This is understandable: see for example the whole section 6 on duties and powers of law enforcement agencies. The only real acknowledgement is (para 27) that the state must protect against abuses by non-state agents, the discussion of access to private land (para 67) and the use of private security for law enforcement (para 104). A major omission in scope is therefore acknowledgement of the increasing use by private, target companies of private law pre-emptive remedies – such as injunctions to prevent harassment or SLAPPs – and indeed of suing for damages. This shift to a parallel system privatised enforcement raises serious concerns, some of which could usefully be addressed here, as would consideration of the (often) close collaboration (collusion?) state bodies and corporate concerns. There have been well documented, verified claims of the police in the UK furnishing (say) fracking or arms companies with activists’ addresses (obtained on arrest) for the purpose of serving court proceedings for injunctions.
2. Para 74 contains a welcome statement on who should bear the costs of protests and assemblies.

Surveillance

1. While there has been some expansion in the revised draft (para 71-72) on the role of and proper limits to surveillance, might I suggest that if we view both assemblies and surveillance as processes, rather than events then the possibilities for intersection – and thus for increased vigilance against incursion – become more readily apparent. Refining the draft to accommodate a more granular approach, covering e.g. collection, collation, data sharing, data interrogation and database creation (as well as the initial decision-making) would create a more responsive framework, as would more clearly and more specifically establishing the principle of minimum necessary impairment as to achieve the objective. If data are obtained (and kept) in order better to manage assemblies in future, then the required data is numbers, and duration – not identifiable faces and/or personal details.
2. All of that is aside from legitimate worries from many activist groups (in the UK at least) about the use of surveillance as a free-standing technique of repression and disruption, and of overt surveillance as a means of intimidation, of both individuals seeking to exercise their rights, and harming organisational and mobilisational capacity: on this see, V Aston *Conceptualising surveillance harms in the context of political protest: privacy, autonomy and freedom of assembly* (unpublished PhD thesis, University of East Anglia, 2018).

**NOTIFICATION**

1. Implicit in any system of notification (and of authorisation) is that there is an organiser. While some/many/most assemblies adhere to that traditional top-down approach, the evidence of the past few years is of more diffuse, less hierarchical forms of organising. The draft GC is silent on state practice – such as e.g. Malaysian Public Order Act s.19 – of attributing organiser status, whether or not any individual has assumed it. A drafting change here would be welcome.
2. Welcome too is the recognition (para 80) that notification requirements are a form of interference needing justification, rather than taking the view (as does the European Court) that subjecting “public assemblies to an authorisation or notification procedure does not normally encroach upon the essence of the right as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering, be it political, cultural or of another nature” (*Kutznetsov v Russia* app 10877/04 23 October 2008 at [42]). The result of such a ruling is that there is no means by which the proportionality or necessity of the notification or authorisation itself can be tested, unless e.g. the protester is arrested for failing to give notice.

**DUTIES AND POWERS OF LAW ENFORCEMENT AGENCIES**

1. In paras 93 and 95 (and perhaps elsewhere?) given my comments above about peacefulness, should acts of serious and imminent, and identifiable violence be the trigger for preventive detention? Perhaps clarity that containment cannot be used in order to elicit personal details as a condition of release? See in the UK context, *Mengesha v Commissioner of Police for the Metropolis* [2013] EWHC 1695 (Admin).
2. If all non-violent i.e. all peaceful protesters enjoy the right to assemble, then dispersal by force of an “ongoing assembly that is no longer peaceful” (para 96) is fraught with difficulty, and risks imbuing individuals with collective or vicarious wrongdoing.
3. All uses of force by means of weapons but especially use of area weapons (para 97) should not be simply minimum necessary but should be an absolute last resort.