**A Few Proposals on How to Improve the Human Rights Committee Draft General Comment on Freedom of Assembly**

This contribution addresses three categories of issues related to draft General Comment No. 37 of the U.N. Human Rights Committee on the right to the freedom of assembly: (1) the scope of the right, (2) certain doctrinal issues related to State obligations, and (3) questions about the “horizontal” effect of freedom of assembly (i.e. rights and duties between private actors).

1. **Scope of the Right**
2. Expressive, deliberative and receptive assemblies

Correctly, the draft General Comment focuses on the “expressive” nature of many assemblies. The core of freedom of assembly involves the right of individuals jointly and collectively to express their views in an independently organized manner. However, the draft appears to have taken this emphasis too far (see e.g. paras. 13, 14 and 25). Its text suggests that other possible functions of assemblies would need to be subordinate to a “common expressive purpose” of the participants. This is not necessarily correct. People may convene in an organized manner simply for the purpose of receiving or observing something, such as a speech by a foreign Head of State, or even an entertainment or sporting event. If such events are commercial in nature, they do not naturally fall under the human right of freedom of assembly – but not because of the absence of an expressive purpose as is suggested in para. 14 of the draft. Rather, what matters is whether the organizer or convener is a commercial operator acting for a commercial purpose.

Perhaps more importantly, there are also deliberative assemblies where the participants do not share one political, ideological or other view and are not seeking to reach and express a common view. Rather, they convene because they wish to hear each other’s views, in order to then adjust their own views or conduct where pertinent.

Whether or not the draft intends to create this impression of the elevation of “common expressive purposes,” the draft should be revised to avoid such a conclusion.

1. Online assemblies

The Committee’s draft is unnecessarily modest in respect of the trend of online “assemblies” (see paras. 11, 15 and 38). Where communication flows in all directions and the platform is open to any member of the public, such as with a Twitter address or the more specific case of a hashtag, it is justified to speak of assemblies in the digital age. Analogously, a closed Facebook group comes closer to a modern-day equivalent of an association. From the perspective of the individual and her protected human rights, joining a discussion via Twitter or seeking membership in a closed Facebook group may be subject to similar repressive measures as governmental efforts to attack traditional assemblies or associations, and therefore in need of equivalent protections. It would be erroneous to insist that only freedom of expression is at issue. Similar to real-life associations or assemblies, Facebook groups or Twitter communications also have a life of their own, an institutional dimension, beyond the effect of suppressive measures in relation to individual expression. We find a modest opening for this line of argument in para. 15, but the wording is vague. Further, para. 38 appears to negate such a message by referring to online activities as being “associated” with assemblies rather than protected on their own as a dimension of modern-day freedom of assembly. I would encourage the Committee to do more and say more about online assemblies. If the Committee misses this opportunity to explain the protections that must be accorded online assemblies, it may cede this space to abusive government behavior and may, perhaps sooner than expected, need to return to the issue when dealing with cases under the Optional Protocol.

1. Peaceful assemblies

Where I find the Committee’s draft too liberal or generous is the stance it takes in respect of gatherings in which the participants carry weapons. According to the draft, the right of peaceful assembly means a right of non-violent assembly, and “the carrying by participants of objects that are or could be viewed as weapons is not necessarily sufficient to render the assembly violent” (para. 23). To me, it would better respect the tradition of the right of peaceful assembly to exclude armed militias from the scope of freedom of assembly. Hence, the carrying of firearms by organizers and participants should, in my view, be accepted as a legitimate reason for a State to legislate that such gatherings fall outside the scope of freedom of assembly and as basis for stating that they do not enjoy the relevant protections of Article 21 of the International Covenant on Civil and Political Rights, either. That said, I do sympathize with the reference to “local cultural practices” in the same paragraph, as far it is understood more narrowly as a reference, for instance, to peasants carrying wooden sticks when convening an assembly. Carrying of firearms should however be mentioned as *excluding* an event, or at least allowing domestic law to exclude it, from the protected scope of freedom of peaceful assembly.

1. **State Obligations**
2. The essential core of freedom of assembly

The Committee’s draft rightly points out that freedom of assembly under Article 21 does not belong to the category of non-derogable rights (Section 7). Also, it correctly addresses the framework for permissible limitations (Section 4). Where I find its approach suboptimal is that there is no discussion of one or more inviolable dimensions of freedom of assembly, i.e. an essential or absolute core of the right, not subject to lawful restrictions in normal times and perhaps not even to derogations during a state of emergency. It would be welcome to include, for instance in para. 40, a short phrase along the lines of the Committee’s [General Comment No. 27 on freedom of movement](https://www.refworld.org/docid/45139c394.html), that “the restrictions must not impair the essence of the right” (para. 13 of General Comment No, 27, drawing its inspiration from Article 5.1 of the ICCPR).

It is of course true that the Committee has not been systematic in developing a doctrine on the inviolable essential core of human rights. Besides General Comment No. 27, also [General Comment No. 29 on states of emergency](https://www.refworld.org/docid/453883fd1f.html) and ICCPR Article 5.1 nevertheless provide sufficient support for such a position which would have an important role in the assessment of permissible limitations to human rights. An essential core within those human rights that are subject to restrictions forms an important limitation to the scope left for a proportionality test: measures that breach the inviolable core components of a human right can never be accepted as proportionate. It will ultimately remain a matter of interpretation how such core components are identified and defined.

1. The formulation of the proportionality test

The draft properly emphasizes legality, legitimate aim, necessity and proportionality as cumulative requirements in assessing the permissibility of restrictions on the freedom of assembly (para. 43). Here, the current formulation of the proportionality test is, however, suboptimal when the draft suggests “balancing the nature and the extent of the interference against the *reason* for interfering” (para. 46). This formulation sounds like comparing between an apple and the color red. The interference is referred to in concrete, even measurable, terms while the reason for interfering is presented in the abstract. It would be more in line with the cumulative nature of the conditions for the permissibility of restrictions to require comparing the “nature and extent of the interference” against “the *benefit obtained* through the interference towards a legitimate aim.”

With this kind of reformulation the Committee would move from comparing between an apple and the color red to a comparison between two concrete and measurable factors: the degree of the intrusion and the benefits obtained by it. As an actual orange may be either smaller or larger than an apple, a certain intrusion into a human right can weigh less or more than the benefit obtained in service of a pressing social need such as public order. If proportionality is assessed between one concrete factor (the intrusion) and an abstract one (the rationale of public order as such), there is a grave risk that the abstract collective good always wins, even if the actual benefits obtained through the intrusion were negligible. This is a lesson that has been demonstrated above all in the practice and discourse of counterterrorism measures**.**

1. **Horizontal Effect**

The draft General Comment focuses on the obligations of States parties to the ICCPR. This is of course natural, as both the text of the Covenant and the monitoring mechanisms at the disposal of the Committee focus on States. That said, as freedom of assembly is a so-called political right usually exercised in the public sphere and serving a public function, it raises important questions about possible horizontal effects of the right, i.e. questions about the duties or responsibilities of various private actors in these situations. A strictly vertical approach to human rights would address such horizontal effects through the positive obligations of States to legislate and otherwise see to it that conduct by private actors does not result in the denial of freedom of assembly. A trend can, however, be identified toward accepting that human rights also have direct horizontal effects in relations between private parties, even if international law in that field remains relatively “soft” for the time being. Below, three different situations of horizontal effect are discussed with respect to freedom of assembly.

1. Obligations of the owner of a venue

The Committee’s draft is unnecessarily modest with regard to property owners’ responsibility in principle to allow the use of public indoor or outdoor space for demonstrations or other gatherings. The inclusion here of the words “in principle” already demonstrates that I am not advocating for a general and unconditional right to demonstrate on any private premises or on any private lands at any time. Rather, the pertinent questions are about availability and accessibility of spaces suitable for gatherings and about the proportionality of denying their use or subjecting their use to conditions imposed by the owner.

On this issue, the draft includes a passing observation that public spaces are increasingly held in private ownership (para. 11) and one short paragraph (para. 67) which contains three modestly normative statements, namely that that “assembly rights may require some recognition on private property that is open to the public,” that even if the interests of private owners have to be given due weight, they “may have to be limited if the participants have no other reasonable way to convey their message to their target audience,” and that assemblies “held on privately owned property with the consent of the owners enjoy the same protection as other assemblies.” Clearly, these formulations indicate that the State has some positive obligations to secure the availability of some space – public or private – toward a right to freedom of assembly that is real and effective in nature.

Without any legal or conceptual difficulty, the Committee should be able to say at least two more things. First, the Comment can easily say that private owners may be and shall be prohibited from denying the use of their indoor premises or outdoor space on discriminatory grounds. Second, it can easily say there is a category of private premises or spaces that has without caveats and without consent by the owner officially, often through zoning decisions, been defined as open to the public, which in a democratic society must include for purposes of demonstrations or other gatherings. If a city adopts a zoning plan where an open central plaza is located on private land, perhaps in the interest of the landowner whose shops are on various sides of the plaza, then this open space must be available for the common good as any publicly owned plaza is, without a right of veto by the landowner.

1. Obligations of the convener

The Committee draft is silent about the obligations of the organizer or convener of a demonstration or other gathering. This is surprising as existing human rights treaty law would provide clear guidance on such obligations. Under Article 5(ix) of the [Convention for the Elimination of All Forms of Racial Discrimination](https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx), States have an obligation to guarantee the enjoyment of the right to freedom of peaceful assembly without discrimination. Accordingly, States must legislate against discriminatory practices by organizers of public gatherings. Articles 2 and 7 of the [Convention for the Elimination of Discrimination against Women](https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx) support this position. Further, Article 29(b) and (i) of the [Convention on Rights of Persons with Disabilities](https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf) requires that conveners must secure the accessibility of meetings and other gatherings related to public affairs to persons with disabilities.

Particularly in respect of demonstrations it can also be inferred from the text of ICCPR Article 21 that the organizer has obligations to participate in the maintenance of public order. Therefore, I find erroneous the formulation in the draft General Comment that while it is “good practice” for assembly organizers to appoint marshals where necessary, “such an obligation must not be imposed” (para. 75). In my view, the text of Article 21 allows States to impose upon organizers of demonstrations or public gatherings a legal obligation to appoint a sufficient number of adequately trained marshals to secure the maintenance of public order during the event.

1. Obligations of counter-demonstrators

Freedom of assembly belongs to counter-demonstrators or counter-gatherings. This position is explicitly included in the Committee’s draft General Comment. Therefore, it is again surprising that the draft does not adequately address the duty of such counter-demonstrators to respect the freedom of assembly of the conveners and participants of the original event. The simple rule of neutrality included in the draft (para. 16) is insufficient and should be complemented by a statement that while counter-demonstrators are entitled to the right of peaceful assembly, actions that have the purpose or effect of nullifying the enjoyment of the same right by the organizers and participants of the original demonstration or other event, may be prevented or stopped pursuant to Articles 21 and 5 of the Covenant.

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