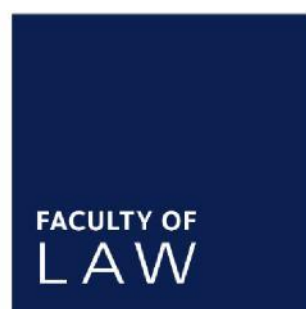


Comments on the Human Rights Committee's Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights

BONAVERO REPORT No. 2/2020

21 FEBRUARY 2020

Bonavero Institute of Human Rights



Bonavero
Institute
of Human
Rights



AUTHORS

1. Mr Gehan Gunatilleke

Doctoral Research (DPhil) Candidate in Law, University of Oxford

2. Dr Liora Lazarus

Associate Professor in Law & Head of Research, Bonavero Institute of Human Rights

3. Dr Oliver Butler

Associate Research Fellow, Bonavero Institute of Human Rights

4. Dr Richard Martin

British Academy Post-Doctoral Research Fellow, Bonavero Institute of Human Rights

5. Dr Shreya Atrey

Associate Professor in International Human Rights Law, Bonavero Institute of Human Rights

6. Dr Stefan Theil

Post-Doctoral Research Fellow, Bonavero Institute of Human Rights

7. Ms Sanya Samtani

Doctoral Research (DPhil) Candidate in Law, University of Oxford

EXECUTIVE SUMMARY

The right to peaceful assembly is under threat across the world. In light of this, the Bonavero Institute of Human Rights welcomes the Revised Draft General Comment No. 37 on Article 21, the Right of Peaceful Assembly, of the International Covenant on Civil and Political Rights ('Draft Comment'). The Draft Comment provides detailed insights into the nature, application, content and limitations of the right to peaceful assembly that are of contemporary significance. The Bonavero Institute's comments below serve to highlight relevant areas of the Draft Comment that may be improved upon in order to better protect this right. The comments are as follows:

First (**Paragraph 5**), that the interrelationship between the right to equality and the right to peaceful assembly must be clarified to guarantee that everyone has an *equal* right of peaceful assembly.

Second (**Paragraph 15**), that there must be a clear distinction between online assemblies and physical assemblies due to their differing nature.

Third (**Paragraph 16**), that the protection accorded to planned peaceful assemblies must also be extended to those peaceful assemblies that are spontaneous.

Fourth (**Paragraph 27**), that the right to choose a public site is included within the right to peaceful assembly.

Fifth (**Paragraph 85**), that the state's limitation of the fulfilment of its positive duties on basis of preventing 'collateral violence' in the vicinity of an assembly that has turned violent should be subject to strict scrutiny.

Sixth (**Paragraph 72**), that the use of automated facial recognition technology must be limited to protect the right of peaceful assembly, privacy, equality and the rule of law.

COMMENTS ON THE HUMAN RIGHTS COMMITTEE'S REVISED DRAFT GENERAL COMMENT NO. 37 ON ARTICLE 21 (RIGHT OF PEACEFUL ASSEMBLY) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS¹

I. Paragraph 5 (Shreya Atrey)

To guarantee not only the right to equality in respect of peaceful assembly, but also, importantly, an equal right of peaceful assembly.

We propose the following text to replace draft paragraph 5:

5. *Everyone has an equal right of peaceful assembly. This means two things. First, the right is equally guaranteed to all persons and without distinction on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This includes non-citizens, children, migrant workers, refugees, asylum seekers and stateless persons, who have a right of peaceful assembly without discrimination per article 26 of the International Covenant on Civil and Political Rights. Second, the right is guaranteed equally to all persons, such that the exercise and enjoyment of the right is on an equal basis with others. Differential standards in the enjoyment of the right to peaceful assembly may be in breach of the State's obligations under article 2(1) of the International Covenant on Civil and Political Rights.*

a. Justification²

The current paragraph 5 of the Draft Comment does not recognise an equal right of peaceful assembly. It only recognises equality in respect of peaceful assembly as guaranteed to everyone without distinction. This covers prohibition of discrimination under article 26 of the ICCPR. It leaves out a significant aspect of equality under article 2(1) of the ICCPR. Article 2(1) obligates the State Parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. This is an obligation to not only guarantee rights to everyone, but to do so equally. The emphasis on equal enjoyment of rights enjoins differential standards in access, implementation and enforcement of rights, including standards which may be justified as 'separate but equal'. Recent examples of regulations segregating members of peaceful assemblies on the basis of nationality may thus potentially

¹ <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

² References applying to this proposal: Ann F Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 Human Rights Quarterly 1; Hilary Charlesworth, 'Concept of Equality in International Law' in Grant Huscroft and Paul Rishworth (ed), *Litigating Rights* (Bloomsbury 2002); Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712; TA Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights' (2003) 8 European Human Rights Law Review 24.

violate equality in both these terms, by discriminating on the basis of a prohibited status (citizenship or nationality) and also in the equal enjoyment of the right as others. The suggested text reinstates the full import of equality under the provisions of the ICCPR. It also clarifies the import of paragraph 28 of the Draft Comment which recognises that: ‘Particular efforts should 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.’

II. Paragraph 15 (Stefan Theil)

We doubt whether the rules that delimit and protect physical assemblies apply equally to online assemblies given the distinctive features and risks associated with physical assemblies. Crucially, there are no equivalent threats to the enumerated public interests that would justify comparable restrictions. With respect to online conduct, Article 21 ICCPR therefore generally operates as *lex generalis* to the more specific protections available under Articles 19 and 22 ICCPR.

We propose the following text to replace the above draft sentence in paragraph 15:

15. *Whether purely online conduct not associated with a physical assembly is covered by Article 21 ICCPR is unclear. Online ‘assemblies’ lack many of the distinctive features and risks that justify restrictions placed on physical assemblies: most online conduct consists primarily of individual expression and association with groups, and often lacks the concurrent temporal and physical manifestation of a common purpose. Crucially, online ‘assemblies’ cannot be violent (in the sense of physical violence against people and property damage) and there are no equivalent threats to the enumerated public interests that would justify comparable restrictions, for instance on time, manner and place.³ Therefore, with respect to the primarily expressive online conduct, Article 21 generally operates as *lex generalis* to the specialised protections under Articles 19 and 22 ICCPR.⁴*

a. Justification

The General Comment should be cautious to accept that Article 21 ICCPR applies to purely online ‘assemblies’ without further critical reflection. Online ‘assemblies’ often consist of individual exercises of freedom of expression and association, with varying, as well as temporally and physically disconnected participants and audiences. This raises concerns over

³ Violence or a credible threat of violence of an assembly is a crucial ground to deny protection under Article 21, see *Draft General comment No. 37 (2020) on Article 21 of the International Covenant on Civil and Political Rights, on the Right of Peaceful Assembly* (2020) [17] and [19] – [23]; *Alekseyev v Russia* App no 4916/07 (ECtHR, 21 October 2010) [80]; *Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 October 2008) [45].

⁴ *Tatar and Faber v Hungary* App nos 26005/08; 26160/08 (ECtHR, 12 June 2012) [29] and [36] – [41]; *Schwabe and MG v Germany* App nos 8080/08; 8577/08 (ECtHR, 11 December 2011) [99] – [101]; *Yilamz and Kilic v Turkey* App no 68514/01 (ECtHR, 17 July 2008) [33] and [67]; *Karademirci and others v Turkey* App nos 37096/07; 37101/97 (ECtHR, 25 January 2005) [26] and [42] – [44].

whether the common expressive purpose and associative element required can readily arise in online environments.⁵

Even if online ‘assemblies’ are protected, the legitimate restrictions of Article 21 ICCPR appear too broad. These are based on threat scenarios that often have no sensible online equivalent. For instance, online ‘assemblies’ are not capable of being violent (in the sense of physical violence and serious damage to property) and due to an absence of a physical and temporally constant manifestation do not threaten national security, public safety, order, health and morals, or the rights and freedoms of others in a comparable manner. There is accordingly little justification for restricting the time, manner and place of an online ‘assembly’.⁶

Therefore, we propose that the right to peaceful assembly should be treated as *lex generalis* to the more specific protections under Articles 19 and 22 ICCPR. This approach has its basis in the doctrine of the European Court of Human Rights, which gives preference to Article 10 ECHR where measures are primarily directed against expression, the collective element required for a peaceful assembly is less salient, or where the gathering is not significant enough to warrant the more extensive restrictive measures permissible for assemblies.⁷ Article 21 therefore only applies to cases where freedom of expression and association do not adequately protect the online conduct in question.

III. Paragraph 16 (Gehan Gunatilleke)

Peaceful assemblies are often organized well in advance, allowing enough time for the organisers to notify the authorities to make the necessary preparations. However, spontaneous assemblies, as direct responses to current events that do not allow enough time to provide such notification, whether coordinated or not, are also protected by article 21. Counter-assemblies occur when one peaceful assembly takes place to express opposition to another peaceful assembly. Both of these assemblies fall within the scope of the protection of article 21.

We propose the following text to replace draft paragraph 16 (specific revisions and additions are italicised):

16. Peaceful assemblies are often organized well in advance, allowing enough time for the organisers to notify the authorities to make the necessary preparations. However, spontaneous assemblies *that do not involve such prior notification*, whether coordinated or not, are also protected by article 21. Counter-assemblies occur when one peaceful assembly takes place to express opposition to another peaceful assembly. Both of these assemblies fall within the scope of the protection of article 21. *The right to choose a public site to conduct peaceful assemblies is protected by article 21. Any official designation of a specific public site to conduct peaceful*

⁵ Draft General comment No. 37 (2020) on Article 21 of the International Covenant on Civil and Political Rights, on the Right of Peaceful Assembly [4] and [15].

⁶ Ibid [25].

⁷ See reference in note 4.

assemblies, to the exclusion of other public sites, shall constitute a restriction on the right of peaceful assembly, and must be justified in terms of article 21.

a. Justification

It is important not to limit the scope of article 21 to situations where a spontaneous peaceful assembly is responding to ‘current events’. On occasion, organisers of peaceful assemblies may tactically choose not to inform the authorities of a peaceful assembly, particularly where the state has previously been hostile to such peaceful assemblies, or where state-sponsored counter assemblies (often violent) are organised when prior notice is given. The same concern applies to the selection of a public site to conduct a peaceful assembly. On occasion, the organisers need to be able to select a public site without prior notification.

IV. Paragraph 27 (Gehan Gunatilleke)

States parties moreover have the positive duty to facilitate peaceful assemblies, and to make it possible for participants to achieve their legitimate objectives. States must thus promote an enabling environment for the exercise of the right of peaceful assembly and put into place a legal and institutional framework within which the right can be exercised effectively. In some cases, specific intervention may be required on the part of the authorities. For example, they may need to block off streets, redirect traffic, provide security, or identify an alternative site where the assembly may be conducted. Where needed, States must also protect participants against possible abuses by non-State actors, such as interference or violence by other members of the public, counter-demonstrators [and private security providers].

We propose the following text to replace draft paragraph 16 (specific additions are italicised):

27. States parties moreover have the positive duty to facilitate peaceful assemblies, and to make it possible for participants to achieve their legitimate objectives. States must thus promote an enabling environment for the exercise of the right of peaceful assembly and put into place a legal and institutional framework within which the right can be exercised effectively. In some cases, specific intervention may be required on the part of the authorities. For example, they may need to block off streets, redirect traffic, provide security, or identify an alternative site where the assembly may be conducted. *States must not designate any particular public site as the only site at which a peaceful assembly may be conducted. Such designations amount to a restriction on the right to peaceful assembly and must be justified in terms of article 21.* Where needed, States must also protect participants against possible abuses by non-State actors, such as interference or violence by other members of the public, counter-demonstrators [and private security providers].

a. Justification

In practice, states adopt certain measures to restrict the ability of individuals and groups to select a public site to conduct a peaceful assembly. Such measures are often adopted under the

guise of facilitating the right to peaceful assembly. For instance, the designation of a specific site to conduct peaceful assemblies may be touted as a measure to facilitate the right. However, such measures must be viewed as constituting a restriction on the right to peaceful assembly. Such measures must therefore be related to one of the specific limitation grounds listed in article 21, and be necessary in a democratic society, and proportionate. Such measures must also be evaluated in their proper context, and with consideration for the historical relationship between the state concerned and those conducting peaceful assemblies within that state's jurisdiction. In contexts where peaceful assemblies have been routinely suppressed by state authorities, including through violent means, the use of designated sites must be understood as placing individuals and groups under undue risk of violent reprisals and surveillance. For example, in Sri Lanka, the government has recently designated an 'agitation site' in front of the president's office. The measure has been portrayed as a means of facilitating the right to peaceful assembly and preventing public disturbance to other civilians. However, state authorities are reportedly preventing any demonstrations in other public sites, and are compelling demonstrators to use the 'agitation site' through intimidation and the threat of violence.⁸

V. Paragraph 85 (Richard Martin)

In circumstances where the state limits its fulfilment of positive duties to protect individuals in the immediate vicinity of violent assemblies due to the risk of 'collateral violence' in the wider community, this justification should be subject to strict scrutiny.

I propose inserting the following paragraph after draft paragraph 85:

86. Where an assembly falls outside of the protections of the right to peaceful assembly because it has become violent, positive obligations arise that require the state to take proportionate steps to protect the human rights of individuals affected by the violence of third parties, including the right to freedom from inhumane and degrading treatment and the right to private and family life. What amounts to proportionate steps can take account of the state's assessment that intervention to protect the rights of those in the immediate vicinity of the violent assembly risks provoking more serious violence or disorder in the wider community. Where the scope of the positive duty reflects such a risk, this must withstand strict scrutiny. An unspecified risk of violence or disorder in the wider community, or the mere possibility that authorities will not have the capacity to prevent or neutralize it is not enough; the State must be able to show, based on a concrete assessment, it would not be able to contain a violent situation elsewhere in a locality without risk to life or serious injury.

⁸ Saman Gunadasa, 'Police crackdown on sacked workers after Sri Lankan president's "Independence Day" speech', *World Socialist Website*, 10 February 2020, at <https://www.wsws.org/en/articles/2020/02/10/sril-f10.html> [last accessed 11 February 2020].

a. Justification

In situations where an assembly moves outside the protections of Article 21, manifesting in violence or disorder, the state faces a predicament. It owes positive duties to those in the immediate vicinity of the violent assembly (bystanders, residents, business owners) to do what is proportionate in all the circumstances to protect them from a real and immediate risk of harm posed by the perpetrators of the violence. However, in using force to fulfil this duty, police intervention may risk enflaming the situation, provoking more serious or sustained violence in the wider community. This has been described as the risk of ‘collateral violence’. The Appellate Committee of the House of Lords (UK)⁹ and the European Court of Human Rights¹⁰ have accepted that the risk of forceful intervention sparking more serious violence to unspecified persons in the wider community is a relevant factor in determining whether the state has fulfilled its positive duty to individuals in the immediate vicinity. In other words, whether the state’s response is proportionate in all the circumstances can take account of concerns about serious ‘collateral violence’ to unspecified people in the wider community. The additional paragraph proposed explicitly acknowledges this justification but emphasizes the need for any circumscription of positive duties in such circumstances to be grounded in evidence capable of withstanding strict scrutiny.

VI. Paragraph 72 (Richard Martin and Oliver Butler)

To explicitly recognise the safeguards that ought to accompany the use of automated facial recognition technology when deployed in the policing of public assemblies.

I propose inserting the following paragraph after draft paragraph 72:

73. The use of automated facial recognition technology, applied to those who participate in assemblies, or are about to do so, risks unwarranted interference with the right to privacy. The technology entails the extraction of unique information and identifiers about an individual allowing their identification. Facial recognition technologies also often have significant false positive rates and discriminate, especially on the ground of race. Poor quality training datasets and algorithmic design contribute to these features of facial recognition technology. Adequate safeguards should include effective oversight of the design, training, testing and deployment of facial recognition technologies to ensure their lawful and proportionate use. A person should not be included on a watchlist, with the subsequent processing of their personal data, without sufficient reason. The technology should be accompanied with clear and publicly available guidelines to ensure its design and deployment is consistent international standards of privacy and does not have a chilling effect on participation in assemblies. This technology should not be used in a discriminatory manner.’

⁹ *Re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66. See, in particular, Lord Carswell at [58]-[59].

¹⁰ *PF and EF v the United Kingdom* - 28326/09 [2010] ECHR 201.

a. Justification

The development and deployment of automated facial recognition technology is an emerging police tactic for detecting persons of interest involved in public assemblies.¹¹ Automated facial recognition technology uses ‘digital information to isolate pictures of individual faces, extract information about facial features from those pictures, compare that information with the watchlist information, and indicate matches between faces captured through the CCTV recording and those held on the watchlist.’¹² If used in compliance with sufficient safeguards, this technology can serve the legitimate aims of protecting national security, public safety and public order. However, its deployment in the policing of peaceful assemblies raises serious issues regarding the collection and retention of persons’ highly sensitive biometric data. So too does it risk creating a chilling effect on those exercising their right to peaceful assembly, especially women and ethnic minority groups.¹³ Facial recognition technologies have poor accuracy rates, which result in a high level of false positive identifications. False positive identification rates are higher for some racial groups. This is likely because the recognition algorithms were trained on datasets which were not sufficiently diverse. Different facial recognition systems have different strengths and weaknesses in this regard depending on the underlying training dataset and the algorithm itself. The design and training of facial recognition algorithms and the choice of which algorithm to deploy all have a bearing on the proportionality of their use. It is artificial to distinguish between the processing of personal data to train the algorithm and the processing of biometric data to match it against a watchlist database. The entire process is an interference with privacy and adequate safeguards should prevent unnecessary interference across all stages of their design, training, testing and implementation.

The additional paragraph proposed recognises the need to ensure concerns over privacy rights, non-discrimination and quality of law standards are explicitly recognised and adequately addressed by states availing of this emerging technology.

¹¹ Fussey, P and Murray, D. ‘Independent Report on the London Metropolitan Police Service’s Trial of Live Facial Recognition technology’ July 2019, Human Rights Centre, University of Essex.

¹² *R (Bridges) v The Chief Constable of South Wales Police* [2019] EWHC 2341 at [25].

¹³ London Policing Ethics Panel, Final Report on Live Facial Recognition, May 2019, see in particular pp24 -25.