

## THE RIGHT OF PEACEFUL ASSEMBLY – THE MEANING AND SCOPE OF ‘ASSEMBLY’ IN INTERNATIONAL HUMAN RIGHTS LAW

**Abstract** Informed by the ‘assembly’ jurisprudence of the United Nations Human Rights Committee, this article addresses elemental questions about the meaning and scope of ‘assembly’ in Article 21 of the International Covenant on Civil and Political Rights (ICCPR). In seeking to determine when the right of peaceful assembly might properly be engaged, the article explores the inter-relationship of assembly with expression and association and proposes a definition of ‘assembly’ – for the purposes of its protection – as ‘an intentional gathering by two or more people (including in private and online/virtual spaces).’ Such definitional reflection is particularly timely in light of the Human Rights Committee’s drafting of General Comment No 37 on Article 21.

**Keywords:** Article 21 ICCPR; assembly; expression; association; protest; General Comment No 37

### I. INTRODUCTION

The right of peaceful assembly, enshrined in Article 21 of the International Covenant on Civil and Political Rights (ICCPR),<sup>1</sup> is persistently under strain. Those seeking to assemble face manifest challenges – whether in Turkey, Sudan, France or Chile, or in Hong Kong, Catalonia or Kashmir. Such challenges include the arbitrary arrest of assembly participants, the disproportionate use of force to disperse assemblies designated as ‘unlawful’ and the imposition of excessive liability on assembly organizers – including through measures ostensibly introduced to fight ‘extremism’ and ‘terrorism’.<sup>2</sup> But focusing on over-zealous regulation neglects the logically prior question of the nature of protection conferred by this fundamental right – what is an ‘assembly’ and what activities does the right of peaceful assembly actually protect?

Regional bodies – in particular, the European Court of Human Rights – have been at the forefront of interpreting the scope of the right of peaceful assembly.<sup>3</sup> The Strasbourg Court’s pioneering assembly jurisprudence has repeatedly emphasized that this right (under Article 11 of the European Convention on Human Rights (ECHR)) ‘is a fundamental right in a democratic society’, ‘one of the foundations of such a society’ and ‘should not be interpreted restrictively.’<sup>4</sup> The Court has generally accepted a wide range of different types of assembly as falling within

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<sup>1</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The right of peaceful assembly is also protected in key regional human rights treaties, namely the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 11; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Art 11; and the American Convention on Human Rights (adopted 22 November 1969) (ACHR) Art 15.

<sup>2</sup> Similarly, ‘Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Hina Jilani’ (13 August 2007) UN Doc A/62/225, para 20.

<sup>3</sup> European Court of Human Rights, *Guide on Article 11 of the European Convention on Human Rights* (1<sup>st</sup> edn, 31 August 2019); European Court of Human Rights, *Guide on the case-law of the European Convention on Human Rights Mass protests* (1<sup>st</sup> edn, 29 February 2020).

<sup>4</sup> Eg *Chumak v Ukraine*, Application No 44529/09, Judgment of 6 March 2018, para 36.

the protective scope of Article 11, from vehicular ‘drive-slows’<sup>5</sup> to ‘flash mobs’<sup>6</sup> and pedestrian ‘walkabouts’<sup>7</sup> and from ‘night shift’ occupations of privately-owned buildings<sup>8</sup> to tent encampments in urban centres.<sup>9</sup>

Strikingly little academic attention, however, has been paid to the assembly jurisprudence of the UN Human Rights Committee – and more specifically, to tracing the protective scope of Article 21 ICCPR. As Manfred Nowak has noted, ‘the term “assembly” is not defined but rather presumed in the Covenant.’<sup>10</sup> Indeed, the Human Rights Committee has not attempted to define ‘assembly’ in its jurisprudence but has instead shown an openness to the different (albeit not especially diverse) forms of assembly that have so far been raised before it.<sup>11</sup> Of central importance is the Committee’s work in drafting General Comment No 37 on Article 21.<sup>12</sup> This work has catalysed debate within and beyond the Committee about the elements of a definition of assembly.

As an authoritative legal interpretation of Article 21,<sup>13</sup> a key function of the General Comment will be to ‘give some substantive content to’ this right.<sup>14</sup> While the Committee has suggested that its General Comment 34 (on freedom of expression under Article 19 of the Covenant) ‘also provides guidance with regard to elements of Article 21’,<sup>15</sup> that document neither addresses the meaning of ‘assembly’ nor elucidates its autonomous value. As such, the drafting of General Comment No 37 is long overdue.<sup>16</sup> It is an initiative that offers the Committee an opportunity to consolidate and systematize the principles established in its jurisprudence and to elaborate on aspects of law and practice about which it has expressed concern in its Concluding Observations on State reports.<sup>17</sup> General Comments must also be future-proofed insofar as possible – squarely addressing factors that are likely to shape or

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<sup>5</sup> *Barraco v France*, Application No 31684/05, Judgment of 3 March 2009.

<sup>6</sup> *Obote v Russia*, Application No 58954/09, Judgment of 19 November 2019.

<sup>7</sup> *Navalnyy v Russia*, Application No 29580/12 and four others, GC Judgment of 15 November 2018, paras 19, 107-8, 134-137.

<sup>8</sup> *Annenkov and Others v Russia*, Application 31475/10, Judgment of 25 July 2017, para 123.

<sup>9</sup> *Nosov and Others v Russia*, Application Nos 9117/04 and 10441/04, Judgment of 20 February 2014, paras 13 and 49.

<sup>10</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edn, Kehl: N.P Engel 2005) 484, para 5.

<sup>11</sup> Eg *Korol v Belarus*, Views adopted 14 July 2016, UN Doc CCPR/C/117/D/2089/2011, para 7.5.

<sup>12</sup> The Committee announced that General Comment No 37 would focus on the right of peaceful assembly at the close of its 124<sup>th</sup> session (‘Human Rights Committee closes one hundred and twenty-fourth session in Geneva’, 2 November 2018).

<sup>13</sup> See further, M O’Flaherty, ‘Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34’ (2012) 12(4) *Human Rights Law Review* 627, 646; Anja Seibert-Fohr, ‘The UN Human Rights Committee’ in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

<sup>14</sup> Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) para 11.25.

<sup>15</sup> Communication No 1790/2008, *Govsha, Syrisha and Mezyak v Belarus*, Views adopted 27 July 2012, UN Doc CCPR/C/105/D/1790/2008, para 9.4.

<sup>16</sup> The drafting of a General Comment has long for been advocated – eg I Jaques, ‘Peaceful protest: a cornerstone of democracy: How to address the challenges?’ (Wilton Park Conference WP1154, 26-28 January 2012) p 2, para 5: ‘There is broad agreement that the Committee should now do so as a priority.’

<sup>17</sup> Recognizing that Concluding Observations are themselves merely recommendatory – see, H Keller and L Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treat Bodies: Law and Legitimacy* (CUP 2012) 116 at 166.

impact on the exercise of the right for years to come.<sup>18</sup> Of particular relevance in this regard is the digital mediation of assemblies in online and virtual spaces.<sup>19</sup>

Drawing on the Committee’s jurisprudence and Concluding Observations,<sup>20</sup> this article argues that an inclusive approach to determining the meaning and scope of ‘assembly’ is needed to effectively protect individuals who seek to gather with others (Section II). It explores the interrelationship of ‘assembly’ with ‘expression’ and ‘association’ with a view to identifying its autonomous sphere (Section III). Section IV then focuses on the constitutive elements of definitions of ‘assembly’ advanced by Manfred Nowak, by the UN Human Rights Committee in the course of drafting General Comment No 37, and by the Organization for Security and Cooperation in Europe (OSCE), the UN Special Rapporteur on the Rights of Freedom of Assembly and of Association (UNSR FoAA) and the African Commission on Human and Peoples’ Rights (ACHPR). On the basis of the elements identified – numerosity, participation, intention, purpose and place – the article proposes a definition of ‘assembly’ as ‘an intentional gathering by two or more people (including in private and online/virtual spaces)’. This definition seeks to distinguish ‘assembly’ from purely happenstance gatherings (in the interests of descriptive plausibility) and jettisons the strictures of ‘temporary’, ‘common expressive purpose’ and ‘publicly accessible place’ which – if introduced prematurely at the level of definition – undermine the values that animate an effective right of peaceful assembly.

## II. TOWARDS AN INCLUSIVE DEFINITION

Elaborating the parameters and ‘ordinary meaning’<sup>21</sup> of the term ‘assembly’ is necessary to determine whether Article 21 is engaged on a given set of facts and whether an assembly-based claim is admissible *ratione materiae*. However, the interpretation of ‘assembly’ risks being unduly conditioned by three factors in particular – deference to States through the doctrine of subsidiarity, regulatory definitions of ‘assembly’ in domestic law and the positive obligations of State actors. These factors are addressed briefly in turn to underscore the importance of an inclusive definition.

The subsidiary status of supra-national human rights bodies means that they will not prescribe how specifically States ought to protect the right of peaceful assembly. However, while subsidiarity may be relevant to determining the level of deference appropriately afforded to States when scrutinizing restrictions, such considerations should not bite at the more fundamental stage of articulating the meaning and scope of the right. This was emphasized by the Human Rights Committee in General Comment 34, recalling ‘that the scope of this freedom is not to be assessed by reference to a “margin of appreciation”’<sup>22</sup> In more abstract terms, as Judith Butler has noted, freedom of assembly ‘has to precede and exceed any form of

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<sup>18</sup> The potential lifespan of a General Comment is significant. For example, General Comment 34 (12 September 2011) on Freedom of Opinion and Expression replaced General Comment 10 (1983); General Comment 36 (3 September 2019) on the right to life replaced General Comments 6 (1982) and 14 (1984).

<sup>19</sup> Text to n 227 – n 246 below. Also, M Hamilton et al, ‘The Right of Peaceful Assembly in Online Spaces: A Comment on the Revised Draft General Comment No 37 on Article 21’ (Submission to the UN Human Rights Committee February 2020).

<sup>20</sup> See the preliminary study, submitted to the UN Human Rights Committee in advance of its half-day discussion on General Comment No 37 on 20 March 2019: M Hamilton, ‘Towards General Comment No 37 on Article 21 ICCPR: The Right of Peaceful Assembly’ (ECNL, ICNL & UEA 2019). Also, M Hamilton, ‘Comments on Draft General Comment 37 on Article 21 ICCPR: The Right of Peaceful Assembly’ (21 February 2020).

<sup>21</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31.

<sup>22</sup> HRC, ‘General Comment 34: Article 19: Freedoms of opinion and expression’, para 36.

government that confers that right of assembly'.<sup>23</sup> It would fatally undermine the right of peaceful assembly if its scope was left to be determined by individual States.

Definitions of 'assembly' generally pursue one of two purposes – they are either *protective* (as in various human rights treaties) or *regulatory* (as in domestic laws governing different forms of gathering). This distinction, however, is often exploited<sup>24</sup> or obscured<sup>25</sup> and the protective scope of the right should not be predicated upon regulatory definitions in domestic law. Defining the scope of the right is an entirely different undertaking from defining either (a) the types of assembly that might legitimately be regulated (different forms of protected assembly may be regulated differently, and some properly not regulated at all)<sup>26</sup> or (b) the types of assembly that might be exempted from domestic regulation (exempted assemblies might still need protection against unwarranted interference from State actors, counter-demonstrators or other third parties).

In a similar vein, the types of assembly protected by Article 21 should not be overdetermined by the positive obligations that we think States ought to bear. Different forms of assembly give rise to different obligations, both negative and positive – State obligations are not 'one-size-fits-all'. As such, the scope of Article 21 should not be coextensive with only those assemblies that entail State intervention, even if the discharge of positive obligations is a reliable indicator of the assemblies most acutely in need of protection. Such reverse-engineering risks distorting the protective scope of the right by excluding those assemblies that ought to be protected simply by being left alone.

### III. 'ASSEMBLY' AS AN AUTONOMOUS RIGHT

The right of peaceful assembly is often cast in instrumental terms – serving either expressive or associational ends, or both. Such reasoning, however, relegates 'assembly' to second-tier status, denying its independent value and evading enquiry into its autonomous sphere. Undoubtedly, assembly, expression and association overlap – eg associations commonly organize assemblies<sup>27</sup> and transient assemblies can catalyse the establishment of more formal associations.<sup>28</sup> But there is a need to delineate the boundaries between these rights to reliably and consistently determine when each is engaged (together or alone).

Before exploring the contiguity of 'assembly' with 'protest', 'expression' and 'association' (respectively, parts A, B and C below), it is useful first to consider the *lex specialis derogat lege generali* maxim ('a special rule departs from the general rule'). This maxim is commonly invoked by the European Court of Human Rights – and has occasionally been argued before the Human Rights Committee<sup>29</sup> – where the rights of expression and assembly are potentially engaged together.<sup>30</sup> The Strasbourg Court has emphasized that 'notwithstanding its

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<sup>23</sup> J Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2015) 160; M Hardt and A Negri *Assembly* (OUP 2017) 295; Text to n 120 below.

<sup>24</sup> *Tatár and Fáber v Hungary*, Application Nos 26005/08 and 26160/08, Judgment of 12 June 2012, para 29.

<sup>25</sup> *Kivenmaa v Finland*, Views adopted 31 March 1994, UN Doc CCPR/C/50/D/412/1990. Ms Kivenmaa sought to deny that 'what took place was a public meeting' under domestic law while claiming that it was an 'assembly' protected under Article 21. Having confirmed the latter, the Committee confusingly stated (para 9.2) that such an event was not a 'demonstration'. See, the Individual opinion by Mr Kurt Herndl (dissenting), para 2.5; Nowak (n 10) 486, para 7.

<sup>26</sup> *Tatár and Fáber v Hungary* (n 24) paras 38-39.

<sup>27</sup> Eg *Trofimchuk v Ukraine*, Application No 4241/03, Judgment of 28 October 2010, para 39). Also, Nowak (n 10) 485.

<sup>28</sup> Eg *Romanovsky v Belarus*, Views adopted 29 October 2015, UN Doc CCPR/C/115/D/2011/2010, para 2.1.

<sup>29</sup> *Kivenmaa* (n 25) para 7.4; *Govsha, Syritsa and Mezyak v Belarus* (n 15) para 3.4(a).

<sup>30</sup> European Court of Human Rights, *Guide on Article 11* (n 3), para 8.

autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10, *where the aim of the exercise of freedom of assembly is the expression of personal opinions.*<sup>31</sup> As this suggests, Article 10 might most commonly be regarded as *lex generalis* in relation to Article 11 as *lex specialis*<sup>32</sup> (though the Court does not always adopt this formulation).<sup>33</sup> The converse, however, is equally plausible and the Court has on several occasions found a violation of ‘Article 10 read in the light of Article 11’ (though it has never expressly designated Article 11 as *lex generalis* and Article 10 as *lex specialis*).<sup>34</sup>

While the *lex specialis* principle is often applied in respect of concurrent and overlapping rules to avoid duplication (where no direct conflict arises),<sup>35</sup> as Silvia Sorzetto rightly notes, it is not that the *lex specialis* principle then determines which provision (here, expression or assembly) applies. Rather, ‘the application of the principle depends on the *previous identification of distinct rules*’<sup>36</sup> – ie on a clear understanding of the material scope of the right of assembly. Thus, resorting to the *lex specialis* maxim properly recognizes the fact-sensitive and fluid inter-connection between assembly, expression and association (and is premised on the impossibility in many cases of achieving clear separation). However, far from resolving the parameters of Article 21, it underscores the importance of doing so.

#### A. Distinguishing ‘Assembly’ from ‘Protest’ and ‘Demonstration’

The terms ‘protest’ and ‘demonstration’ do not feature in the text of international human rights treaties.<sup>37</sup> As such, they highlight the overlapping nature of the rights of expression and assembly, but obscure rather than illuminate the distinctive value of each. The term ‘protest’ suggests a declarative element (with oppositional or transgressive connotations) absent from the more anodyne term ‘assembly’.<sup>38</sup> Arguably, ‘demonstration’ lies somewhere between ‘assembly’ and ‘protest’. Its ordinary usage places it closer to ‘protest’ since to demonstrate something necessarily entails a communicative element that (as argued in ‘B’ below) may be absent from an assembly.<sup>39</sup> One might also *demonstrate* something without doing so in protest.<sup>40</sup>

While assemblies can be a form of protest,<sup>41</sup> many assemblies are not (an assembly may, for example, be celebratory, ceremonial or commemorative). Conversely, many protests do not

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<sup>31</sup> *Kudrevičius and Others v Lithuania*, Application No 37553/05, GC Judgment of 15 October 2015, para 86 (emphasis added).

<sup>32</sup> Eg *Ezelin v France*, Application No 11800/85, Judgment of 26 April 1991, para 35.

<sup>33</sup> Eg *Berladir and Others v Russia*, Application 34202/06, Judgment of 10 July 2012, para 36.

<sup>34</sup> Eg *Women on Waves and Others v Portugal*, Application No 31276/05, Judgment of 3 February 2009, para 28; *Karademirci and Others v Turkey*, Application Nos 37096/97 and 37101/97, Judgment of 25 January 2005, para 26; *Fáber v Hungary*, Application No 40721/08, Judgment of 24 July 2012, paras 19 and 59; *Butkevich v Russia*, Application No 5865/07, Judgment of 13 February 2018, para 122.

<sup>35</sup> Silvia Sorzetto, ‘The *Lex Specialis* Principle and its Uses in Legal Argumentation: An Analytical Inquiry’ 3 *Eunomia. Revisita en Cultura de la Legalidad* (September 2012-February 2013) 63.

<sup>36</sup> *ibid* 66.

<sup>37</sup> Nonetheless, a key report from the Inter-American system is framed in the language of ‘protest’, defining this as ‘a form of individual or collective action aimed at expressing ideas, views, or values of dissent, opposition, denunciation, or vindication’ and noting that social protest is ‘protected by a constellation of rights and freedoms’: Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), *Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State* (2019), ‘Foreword’ and paras 1-16.

<sup>38</sup> D Mead, *The New Law of Peaceful Protest* (Hart 2010) 183, n 84.

<sup>39</sup> D Kretzmer, ‘Demonstrations and the Law’ (1984) 19 *Israel Law Review* 47, 50-1.

<sup>40</sup> Mead (n 38) 59 and 152-3.

<sup>41</sup> See eg *Navalnny v Russia*, Application No 29580/12 and four others, GC Judgment of 15 November 2018, para 107; Office of the Special Rapporteur for Freedom of Expression of the IACHR (n 37), para 19: ‘Freedom

take the form of an assembly (consider, for example, boycotts, petitions or acts of self-immolation). While ‘pickets’ as a form of strike action *are* a type of assembly (and deserve protection as such), industrial action and strikes involving the withholding of labour need not involve assemblies. The Human Rights Committee has considered cases involving the submission of letters of protest under Article 19<sup>42</sup> and suggested that hunger strikes could potentially engage Article 19.<sup>43</sup> Indeed, Michael O’Flaherty notes that the first draft of General Comment 34 expressly sought to include within the scope of Article 19 the ‘choice of clothing or the wearing or carrying of a religious or other symbol, and a hunger strike’.<sup>44</sup> More extensively, Strasbourg Article 10 jurisprudence is littered with protest actions, considered by the Court through the lens of freedom of expression.<sup>45</sup>

### *B. Distinguishing ‘Assembly’ from ‘Expression’*

While distinguishing ‘protest’ from ‘assembly’ might be relatively straightforward, it is much more difficult to disentangle ‘assembly’ from ‘expression’. The Human Rights Committee has emphasized the interdependence of expression and assembly<sup>46</sup> and has found concurrent violations of the right to freedom of expression (Article 19) *and* the right to freedom of peaceful assembly (Article 21) in more than 30 cases.<sup>47</sup> Assemblies are frequently expressive and an assembly might even surpass ‘mere speech’ on its own terms, providing a potent communicative tool that serves to demonstrate intensity of support.<sup>48</sup> However, while the Committee has occasionally explained why Article 19 is additionally engaged on the facts of a particular case,<sup>49</sup> there remains a need to explain both the inter-relationship between Articles 19 and 21 and the distinctive ambit of the latter.<sup>50</sup>

The seemingly umbilical attachment of ‘assembly’ to ‘speech’<sup>51</sup> was raised in the dissenting opinion of Committee member, Mr Herndl, in *Kivenmaa v Finland* (1994)<sup>52</sup> properly recognizing ‘the intimate and somewhat complex relationship between Articles 19 and 21.’ However, the dissenting opinion then cites John Humphrey (the Canadian jurist responsible for drafting the initial text of the Universal Declaration of Human Rights) to argue that: ‘[t]he right

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of assembly protects the peaceful, intentional, and temporary congregation of people in a given space for the achievement of a common goal, including protest.’

<sup>42</sup> *Kerrouche v Algeria*, Views adopted 3 November 2016, UN Doc CCPR/C/118/D/2128/2012.

<sup>43</sup> *Baban v Australia*, Views adopted 6 August 2003, UN Doc CCPR/C/78/D/1014/2001, para 6.7.

<sup>44</sup> O’Flaherty, (n 13) 648.

<sup>45</sup> Eg *Karácsony and others v Hungary*, Application Nos 42461/13 and 44357/13, GC Judgment of 17 May 2016, para 120; *Açık and Others v Turkey*, Application No 31451/03, Judgment of 13 January 2009, para 40; *Murat Vural v Turkey*, Application No 9540/07, Judgment of 21 October 2014, paras 44-56; *Sinkova v Ukraine*, Application No 39496/11, Judgment of 27 February 2018, para 100; *Steel and Others v the United Kingdom*, Application No 24838/94, Judgment of 23 September 1998, para 92.

<sup>46</sup> Eg *Praded v Belarus*, Views adopted 10 October 2014, UN Doc CCPR/C/112/D/2029/2011, paras 4, 7.3-7.4.

<sup>47</sup> Eg *Kim v Uzbekistan*, Views adopted 4 April 2018, UN Doc CCPR/C/122/D/2175/2012, paras 13.7-13.8 and in *Belyazeka v Belarus*, Views adopted 23 March 2012, UN Doc CCPR/C/104/D/1772/2008, paras 11.6 and 11.8.

<sup>48</sup> Eg *Tatár and Fáber* (n 24) para 38.

<sup>49</sup> Eg *Govsha, Syritsa and Mezyak* (n 15) para 9.4.

<sup>50</sup> In four cases where complaints under both Articles were deemed admissible, the Committee decided not to examine separately the author’s claim under Art 21: *Katsora v Belarus*, Views adopted 24 October 2012, UN Doc CCPR/C/106/D/1836/2008, paras 6.4 and 7.6; *Protsko and Tolchin v Belarus*, Views adopted 1 November 2013, UN Doc CCPR/C/109/D/1919-1920/2009, paras 6.6 and 7.9; *Pivonos v Belarus*, Views adopted 29 October 2012, UN Doc CCPR/C/106/D/1830/2008, paras 8.4 and 9.4; *Komarovsky v Belarus*, Views adopted 25 October 2013, UN Doc CCPR/C/109/D/1839/2008, paras 8.4 and 9.5.

<sup>51</sup> The word ‘speech’ is used here interchangeably with ‘expression’ (but that is not to suggest that expression necessarily involves ‘pure’ speech). Similarly, text to n 59.

<sup>52</sup> *Kivenmaa* (n 25).

of peaceful assembly would seem to be just one facet of the more general right to freedom of expression.<sup>53</sup> In a similar vein, despite emphasizing the particular democratic functions of assemblies, Manfred Nowak has suggested that for the right of assembly to be engaged, information or ideas should be ‘directed at the public’ and so the right of assembly is to be ‘understood as a *special, institutional form of freedom of expression* conditioned by its specific, democratic meaning’.<sup>54</sup>

Yet we ought to be able to explain what is unique about assembly without falling back on its purported expressiveness. It might be thought that assembly could be distinguished from expression by emphasizing either (a) the collective nature of assemblies, (b) the presence or visibility of participants, or (c) the difference between speech and action/conduct. However, as the following discussion illustrates, none of these tests yields a reliable principle of distinction (and they highlight instead further points of convergence between the two rights).

The Strasbourg Court has sought to distinguish assembly from speech on the basis that participants are not merely expressing an opinion but doing so together with others.<sup>55</sup> The presence of a multitude is certainly a necessary condition for an assembly (see further the discussion of single-person protests in section IV(A) below) – and crowd size is undoubtedly often important to those who are assembled.<sup>56</sup> As Tilly has argued, disciplined assemblies are a form of ‘WUNC’ display – aimed at signalling collective Worthiness, Unity, Numbers and Commitment.<sup>57</sup> A focus on numbers, however, serves only to underscore the interconnection between speech and assembly, casting the latter as a form of ‘speech plus’ rather than illuminating its autonomous sphere.

An emphasis on the physical presence of assemblies also fails to sufficiently distinguish assembly from speech. For one, assemblies may take place in private spaces (section IV(D) below). Moreover, speech routinely occurs in public<sup>58</sup> and speakers may also speak merely by virtue of their presence.<sup>59</sup> While it is suggested here that an assembled presence does not invariably entail speech,<sup>60</sup> as Salát notes, even in relation to meetings that do not primarily aim at expression, State intervention will generally ‘relate at least to potential expression of group identity through shared activity.’<sup>61</sup>

Efforts to distinguish speech from action have faltered similarly. Thomas Emerson, in his attempt to elucidate a ‘comprehensive and effective theory’ of the First Amendment, distinguished between ‘expression’ (deserving of full protection) and ‘action’ or ‘conduct’ (that may legitimately be abridged).<sup>62</sup> However, despite its apparent resonance with the boundary between ‘expression’ and ‘assembly’, Emerson’s expression-action dichotomy had an entirely different aim<sup>63</sup> – namely, to fully protect non-coercive (or peaceful) expression (which, on this account, *includes* nonverbal assembly) while allowing for the regulation of coercive (or non-peaceful) conduct.<sup>64</sup> Indeed, Emerson’s sweeping classification of ‘action’ includes many forms of assembly that *are* offered some level of protection in international human rights law.

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<sup>53</sup> *ibid*, Individual opinion by Mr. Kurt Herndl (dissenting), paras 3.3-3.4.

<sup>54</sup> Nowak (n 10) 485.

<sup>55</sup> *Primov and Others v Russia*, Application No 17391/06, Judgment of 12 June 2014, para 91.

<sup>56</sup> L Robertson and R Farley, ‘The Facts on Crowd Size’ (*Factcheck*, 23 January 2017).

<sup>57</sup> C Tilly, *The Politics of Collective Violence* (CUP 2003) 197; CE Baker, ‘Scope of the First Amendment Freedom of Speech’ (1978) 25 UCLA L Rev 1011, fn 129.

<sup>58</sup> *Tatár and Fáber* (n 24) para 38.

<sup>59</sup> *Aleksandrov v Belarus*, Views adopted 24 July 2014, UN Doc CCPR/C/111/D/1933/2010, para 2.4.

<sup>60</sup> cf JD Inazu, *Liberty’s Refuge* (Yale University Press 2012) 50; Butler (n 23) 156.

<sup>61</sup> O Salát, *The Right to Freedom of Assembly: A Comparative Study* (Hart 2015) 7.

<sup>62</sup> TI Emerson, *The System of Freedom of Expression* (Random House, New York 1970) 16-17.

<sup>63</sup> Emerson himself critiques the US Supreme Court’s ‘confusing and destructive’ distinction between ‘pure speech’ and ‘conduct’ invoked in numerous assembly cases, *ibid*, 294-8.

<sup>64</sup> Emerson (n 62) 293. See further, Baker (n 57) 1040.

On his view, ‘action’ included sit-ins, lie-ins, and chain-ins ‘in which the physical occupation of territory is used as a form of pressure’, ‘the obstruction of traffic, or obstruction of ingress or egress, when undertaken for the purpose of physical interference’, ‘[d]isruption of a meeting by moving about or making noise’ and the ‘wearing of masks or uniforms under circumstances implying the use of force or violence’.<sup>65</sup> So notwithstanding the initial appeal of Emerson’s theory, we must look elsewhere to delineate the boundary between assembly and expression.

It has been argued that numerosity, presence and action each fail to yield a defensible distinction between speech and assembly. Instead, the point of departure involves gatherings that neither entail any locutionary act nor have any perlocutionary effect,<sup>66</sup> or at least, where any expressive component is entirely incidental to the gathering itself. In this regard, the right of peaceful assembly protects a range of relational interests quite apart from those deriving from speech. This is not a novel position: writing more than forty years ago, C. Edwin Baker articulated the same argument:

‘... the constitutional language that specifies “the right of the people peaceably to assemble” hardly suggests that their central purpose of the assembly must be speech. It certainly does not suggest that their purpose must be to disseminate or debate ideas. People combine, assemble to do things; they assemble for a wide variety of purposes: for celebrations, for entertainment, for work, for generating or expressing power. ... One cannot reasonably narrow the constitutional protection of assemblies to protection merely of an adjunct to speech or some marketplace of ideas.’<sup>67</sup>

More recently, Inazu has argued that ‘something is lost when assembly is dichotomously construed as either a moment of expression (when it is viewed as speech) or an expressionless group (when it is viewed as association).’<sup>68</sup> Similarly, Bhagwat has critiqued ‘the pernicious idea that groups deserve protection only to the extent that they are expressive.’<sup>69</sup> The key insight is that the communicative function of an assembly (if indeed there is one) may be secondary to its social and relational value – and it is here that the autonomous sphere of assembly begins to come into view. Just as it does so, however, the very same underlying value attests to the interconnection between assembly and association.

### *C. Distinguishing ‘Assembly’ from ‘Association’*

At a conceptual level, as with expression, there is an evanescent boundary between the rights of assembly and of association, depending in part on organizational form and structure (or lack thereof).<sup>70</sup> While associations can be expressive,<sup>71</sup> as Tabatha Abu El-Haj notes, the essential characteristic of an association meriting protection is less its message than ‘the nature of the

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<sup>65</sup> Emerson, *ibid*, 293-4.

<sup>66</sup> J L Austin, *How to Do Things with Words. The William James Lectures Delivered at Harvard University in 1955* (2<sup>nd</sup> edn, Clarendon Press 1975) 94-5 and 101-3.

<sup>67</sup> Baker (n 57) 1030-1.

<sup>68</sup> JD Inazu, ‘The Forgotten Freedom of Assembly’ (2010) 84 *Tulane Law Review* 567.

<sup>69</sup> A Bhagwat, ‘Assembly Resurrected’ (2012) 91 *Texas Law Review* 364; A Bhagwat, ‘Liberty’s Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly’ (2012) 89 *Wash U L Rev* 1383–84.

<sup>70</sup> The two rights are combined in Art 11 ECHR but are treated separately in Arts 21 and 22 ICCPR; Arts 15 and 16 ACHR; Arts 10 and 11 ACHPR. Note too, the combined mandate of the UN Special Rapporteur, UNHRC ‘The rights to freedom of peaceful assembly and of association’, 6 October 2010, UN Doc A/HRC/RES/15/21.

<sup>71</sup> Eg *Kungurov v Uzbekistan*, Views adopted 20 July 2011, UN Doc CCPR/C/102/D/1478/2006 para 8.9.



relationships within it and the ways in which they are organized.’<sup>72</sup> Associations protect the antecedent relations and structures that make political participation possible – valuing ‘participation as conduct, not just as voice’,<sup>73</sup> and associations as ‘incubators of relationships’ not just ‘incubators of ideas’.<sup>74</sup> What separates assembly from expression may in turn be precisely what links assembly with association.

The right of association in international human rights law has generally centred on the right to form a voluntary association<sup>75</sup> – ‘establishing a legal entity in order to act collectively in a field of mutual interest’<sup>76</sup> such as Trade Unions,<sup>77</sup> political parties or associations formed for other purposes.<sup>78</sup> The association jurisprudence focuses on barriers to such activity – onerous conditions of registration, refusals to register an association (and related consequences),<sup>79</sup> and transparency requirements pertaining to funding and expenditure.<sup>80</sup> One might be tempted to think of association as the passive, and assembly as the active, component of group activity – but this overstates the link between the two since many assemblies have no formal associational impetus or effect.

The rights of assembly and association together underpin the interactions crucial to stimulating and affirming nascent group identities.<sup>81</sup> Both rights are essential to civil society, enabling individuals to integrate and pursue common objectives,<sup>82</sup> potentially also facilitating pre-figurative practices that envision new forms of political morality.<sup>83</sup> Like assembly, the right of association has been recognized as a prerequisite for dissenting groups,<sup>84</sup> and associations are, as Judith Butler has said of assembly, ‘a precondition of politics itself’.<sup>85</sup>

However, having sought to cut the cord between assembly and speech, the risk is that we instead tether assembly to association. Making the conjoined case most starkly, C Edwin Baker has argued that ‘[i]n essence, *an association is merely an assembly dispersed over time and space*’, adding that:

‘The key aspect of both is that they are combinations, not mere aggregations, of people; and as combinations, they are a source of power. Both form relations between people that enable the group to do things – often to do things beyond merely reasoning together. People come together in assemblies or associations in order to pursue or fulfil their goals.’<sup>86</sup>

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<sup>72</sup> TA El-Haj, ‘Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association’ (2014) 56 *Arizona Law Review* 99.

<sup>73</sup> *ibid*, 62.

<sup>74</sup> *ibid*, 73.

<sup>75</sup> *Young, James and Webster v the UK*, Application Nos 7601/76 and 7806/77, Commission Report of 14 December 1979, para 167.

<sup>76</sup> *Gorzelik and Others v Poland*, Application No 44158/98, GC Judgment of 17 February 2004, para 88.

<sup>77</sup> Notwithstanding the express reference in Art 21 ICCPR and Art 11 ECHR only to forming Trade Unions, the right has wider reach: *Sidiropoulos and Others v Greece*, Application No 26695/95, Judgment of 10 July 1998, para 40.

<sup>78</sup> *Gorzelik* (n 76) para 92.

<sup>79</sup> Eg *Romanovsky* (n 28).

<sup>80</sup> Eg *Cumhuriyet Halk Partisi v Turkey*, Application No 19920/13, Judgment of 26 April 2016.

<sup>81</sup> Inazu, (n 60) 5, 152; TA El-Haj, ‘All Assemble – Order and Disorder in Law, Politics, and Culture’ (2014) 16 *U Pa J Const L* 954; G Kateb, ‘The Value of Association’ in Amy Gutmann (ed) *Freedom of Association* (Princeton University Press 1998) 37 and 49.

<sup>82</sup> Eg *Gorzelik* (n 76) para 92.

<sup>83</sup> G Hayes, ‘Regimes of austerity’ (2017) 16(1) *Social Movement Studies* 21; JW Müller, ‘What Spaces Does Democracy Need?’ (2019) 102(2-3) *Soundings: An Interdisciplinary Journal* 208.

<sup>84</sup> Eg *Romanovsky* (n 28) para 7.2; Inazu (n 60) 153.

<sup>85</sup> Butler (n 23) 160. That said, Butler appears to overlook Article 21 ICCPR (157-8 and 227, n 1); Similarly, Hardt and Negri (n 23) 293-4.

<sup>86</sup> Baker (n 57) 1031-2 (emphasis added).

Baker (like other US scholars) was writing in the specific context of a constitutional framework containing no textual guarantee of the right of association.<sup>87</sup> When viewed from this perspective (given the precarious protection for group activity), Baker's emphasis on the interconnection between assembly and association is unsurprising – it underpins his broader argument that the right of assembly in the First Amendment provides 'the logical basis of the right of association'. However, it clearly draws us further still from identifying the autonomous sphere of assembly.

In considering Baker's reference to the extended temporal span of associations ('dispersed over time') versus the generally short-term nature of assemblies, it is worth considering whether assembly could plausibly be distinguished from association by defining assembly as 'temporary'.<sup>88</sup> However, the notion of temporariness is inherently imprecise. More insidiously, the reference to 'temporary' has provided governments with the pretext for premature intervention, raising questions of whether protracted sit-ins or semi-permanent encampments actually fall within the protective scope of Article 21.<sup>89</sup> Long-term assemblies ought to be afforded protection in principle – the relative permanence of a protest camp has, for example, been argued to be a 'constant reminder to those in power'.<sup>90</sup> Given too that associations can be short-lived and assemblies can last for years,<sup>91</sup> it is suggested that 'temporariness' should not be regarded as a distinctive (still less, definitive) characteristic of 'assembly'.<sup>92</sup> Despite the fact that assemblies may often be temporary and associations more long-term, measures of duration fail to reliably separate assembly from association.

Alternatively, we might conceive of the right of peaceful 'assembly' as relating to the holding of *spatially bounded events* and 'association' as pertaining more generally to the *organizational activities of groups*.<sup>93</sup> This flags a further parallel between the two rights: the organization of assemblies often involves decisions to include or exclude particular participants, similar to the decisions that characterize the right of association.<sup>94</sup> In this regard, the Human Rights Committee has stated that '[t]he organizers of an assembly generally have the right to choose whom they wish to invite to participate ...',<sup>95</sup> an assertion that broadly echoes the US Supreme Court judgment in *Hurley and South Boston Allied War Veterans Council v Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>96</sup> However, the court

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<sup>87</sup> Brennan J in *Roberts v United States Jaycees* 468 US 609, 618 (1984) distinguishing 'intimate association' from 'expressive association' – a bifurcation widely criticized for failing to protect associations that are neither 'intimate' nor 'expressive'. See, Inazu, 'Virtual Assembly' (2013) 98 Cornell Law Review 1116-18; El-Haj (n 72) 69.

<sup>88</sup> Salát (n 61) 4 relies on such a distinction. So too does Nowak (n 10) 484.

<sup>89</sup> The ACHPR, *Guidelines on Freedom of Association and Assembly in Africa* (2017) paras 3 and 88 expressly resist any such limitation: 'Assembly refers to an act of intentionally gathering ... for an extended duration'.

<sup>90</sup> *R (on the application of Gallastegui) v Westminster City Council and Others* [2013] EWCA Civ 28, para 13. Also, WJT Mitchell, 'Image, Space, Revolution: The Arts of Occupation', 39(1) *Critical Inquiry* (Autumn 2012) 14 describing the occupations of Tahrir Square and Zuccotti Park as 'manifestations of a long-term resolve.'

<sup>91</sup> Consider, for example, the Womens' Peace Camp at Greenham Common in England which lasted for 19 years (from 1981 to 2000); *Cissé v France*, Application No 51346/99, Judgment of 9 April 2002; *Razvozhayev v Russia and Ukraine and Udaltsov v Russia*, Application Nos 75734/12, 2695/15 and 55325/15, 19 November 2019, paras 285 and 292.

<sup>92</sup> See text to n 115 – n 116 below.

<sup>93</sup> Focusing exclusively on what occurs *during* an event might unduly circumscribe the scope of Article 21 – but not everything protected by Article 21 *is* an assembly but rather attracts protection because of its *importance to* assembling. Similarly, Inazu, (n 87) 1122.

<sup>94</sup> Inazu (n 87) 1098-99.

<sup>95</sup> *Giménez v Paraguay*, Views adopted 25 July 2018, UN Doc CCPR/C/123/D/2372/2014, para 8.3.

<sup>96</sup> 515 US 557 (1995). More recently, see eg R Salerno, 'Has Pride sold out by inviting Toronto police back to the parade?' (*NowToronto*, 29 November 2018); P Greenfield, 'Pride organisers say sorry after anti-trans group leads march' (*The Guardian*, 8 July 2018). Civic events, perhaps in receipt of public funding, suggest that the blunt presumption of exclusive control established in *Hurley* deserves much more nuanced analysis. For critical

in *Hurley* overlooked a critical dimension of what it means to be excluded from an ‘assembly’<sup>97</sup> – one which also helps more clearly draw a line between assembly and association – namely, the profound role of space and place in the construction of identity.<sup>98</sup>

Just as places ‘are laden with meanings that tend to create and reinforce relations of domination and subordination’,<sup>99</sup> so too their regulation serves to spatially reproduce relations of power. As Timothy Zick has noted, ‘[w]hen connections to place are severed or restricted, people may experience the condition or state of “placelessness”.’<sup>100</sup> The fundamentally spatial nature of assemblies renders them at once a tool of entrenchment and resistance – capable of both inscribing territorial boundaries that reify given social relations<sup>101</sup> and mobilizing transgressive demands that challenge exclusive claims of possession, access and use.<sup>102</sup>

To summarize the argument thus far, the right of assembly protects relational bonds quite apart from any communicative purpose that an assembly may (or may not) have, and the inherently spatial nature of gatherings helps sharpen the line between assembly and association. This argument evinces a degree of circularity, coming close to suggesting that the *associational* dimensions of ‘assembly’ are what distinguishes ‘assembly’ from ‘expression’, while the (often profoundly *expressive*) spatial boundedness of assemblies helps differentiate ‘assembly’ from ‘association’. Recognizing, however, that the right of peaceful assembly will often be shadowed by the rights of expression and association does not preclude the definition of ‘assembly’ for the purposes of delineating its protective scope. The remainder of this article therefore turns to explore how the convergence of these relational and spatial dimensions might best be reflected in a protective definition of ‘assembly’.

#### IV. ELEMENTS OF A PROTECTIVE DEFINITION

Manfred Nowak, in his seminal interpretation of the ICCPR, suggested that ‘only *intentional, temporary gatherings of several persons for a specific purpose* are afforded the protection of freedom of assembly.’<sup>103</sup> This final section scrutinizes the elements highlighted – and those omitted – in this and other definitions of ‘assembly’.

A number of scholarly definitions of ‘assembly’ place emphasis on the co-ordinated nature of assemblies, the temporally contemporaneous and synchronistic nature of gathering and the spatial proximity and density of participants. Orsolya Salát, for example, considers an assembly to be ‘the contemporaneous common presence of at least two persons in a common space’.<sup>104</sup> Judith Butler identifies a range of relevant factors that ‘constitute essential dimensions of assembly and demonstration’ – namely: ‘temporal seriality and coordination, bodily proximity, auditory range, coordinated vocalization’.<sup>105</sup> And Paulo Gerbaudo argues that ‘[t]he act of

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discussion, see C Stychin, ‘Celebration and Consolidation: National Rituals and the Legal Construction of American Identities’ (1998) 18(2) *OJLS* 265; M Sunder, ‘Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*’ (1996) 49 *Stanford Law Review* 143.

<sup>97</sup> SA Marston, ‘Space, culture, state: uneven developments in political geography’ (2004) 23(1) *Political Geography* 9.

<sup>98</sup> M Goodwin, ‘Citizenship and Governance’, in P Cloke, P Crang, and M Goodwin (eds) *Introducing Human Geographies* (3<sup>rd</sup> edn, Routledge 2014) 569; Stychin (n 96) 266.

<sup>99</sup> T Cresswell, ‘Place’ in Cloke, Crang, and Goodwin, *ibid.*, 250-1.

<sup>100</sup> T Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (CUP 2009) 10.

<sup>101</sup> Doreen Massey argues that the concept of ‘territoriality’ connotes an imagined and nostalgic sense of spatial fixity and rootedness, of space as naturally divided and bounded. D Massey, *For Space* (Sage 2005) 64-5.

<sup>102</sup> Goodwin (n 98) 572.

<sup>103</sup> Nowak (n 10) 484, para 5.

<sup>104</sup> Salát (n 61) 7.

<sup>105</sup> Butler (n 23) 178.

bodily assembling ... revolves around the construction of a situation of bodily density dominated by face-to-face communication.’<sup>106</sup>

Factors such as temporal synchronicity, spatial proximity or organizational co-ordination are not, however, expressly reflected in Nowak’s definition or the definitions of the international human rights actors working at the forefront of assembly protection – principally, the UN Human Rights Committee (in drafting General Comment No 37), the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (UNSR), the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) and the African Commission on Human and Peoples’ Rights (ACHPR). Moreover, there is significant definitional divergence between even these leading definitions, as the following overview reveals.

The UN Special Rapporteur has defined an ‘assembly’ as ‘*an intentional and temporary gathering in a private or public space for a specific purpose*’.<sup>107</sup> The definition proposed by the OSCE/ODIHR is ‘*the intentional gathering of a number of individuals in a publicly accessible place for a common expressive purpose*’.<sup>108</sup> The ACHPR describes assembly as referring to ‘*an act of intentionally gathering, in private or in public, for an expressive purpose and for an extended duration*’.<sup>109</sup> Notably, the definition adopted by the UN Human Rights Committee in the course of drafting General Comment No 37 has undergone several revisions. The initial draft of the General Comment (June 2019) defined ‘assembly’ as a ‘*gathering of a number of people in a publicly accessible place with a common expressive purpose*’. Following the first reading by the Committee, a revised draft text published in November 2019 proposed an amended definition – namely, a ‘*gathering of persons with a common expressive purpose in [a publicly accessible / the same] place*’.<sup>110</sup> Then, at the outset of the second reading of the General Comment during the Committee’s 128<sup>th</sup> Session (having considered a wide range of stakeholder submissions), the Committee’s Rapporteur proposed that assembly be defined as an ‘*intentional gathering by persons, principally with an expressive purpose*’.<sup>111</sup> Following some further deliberation,<sup>112</sup> the Committee revised the text again so as to define an ‘assembly’ as a ‘*gathering by persons for a specific purpose, primarily with an expressive goal*’.<sup>113</sup> Article 21 was also stated to protect peaceful assemblies ‘*wherever they may take place: outdoors, indoors and online, and in public and private spaces, or in a combination of these*’.<sup>114</sup>

Notably, *contra* Nowak and the UN Special Rapporteur, neither the OSCE/ODIHR nor ACHPR describe an assembly as ‘temporary’ (though previous editions of the OSCE/ODIHR – Venice Commission *Guidelines* did do so).<sup>115</sup> While the revised draft of General Comment 37 does not define an assembly as temporary per se, later paragraphs hint that temporariness might properly be considered as an intrinsic definitional element.<sup>116</sup> Building upon the

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<sup>106</sup> P Gerbaudo, *Tweets and the Streets: Social Media and Contemporary Activism* (Pluto 2012) 39.

<sup>107</sup> UNSR FoAA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012) UN Doc A/HRC/20/27, para 24.

<sup>108</sup> Draft OSCE/ODIHR – Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (3<sup>rd</sup> edition, forthcoming).

<sup>109</sup> ACHPR (n 89) para 3.

<sup>110</sup> Revised draft of General Comment No 37 (November 2019). The text in parenthesis ‘[ ]’ indicates language on which consensus was not reached during the first reading.

<sup>111</sup> UN Web TV, ‘Second reading of draft General Comment 37, 3707th Meeting, 128th Session of Human Rights Committee 13 March 2020’, discussion of para 4, at 1.14:00-1.16:40.

<sup>112</sup> *ibid* at 1:06:40-1:39:10.

<sup>113</sup> *ibid* at 1:38:55.

<sup>114</sup> *ibid*, regarding para 6 of the draft General Comment (discussion from 1:53:45 and adopted text at 2:16:40).

<sup>115</sup> Note text to n 88 – n 92 above, emphasizing the redundancy and risk of any such qualification.

<sup>116</sup> Despite the absence of any reference to ‘temporariness’ in paras 4 or 13 of the revised draft General Comment (November 2019), para 62 of the draft (in the section on ‘Restrictions’) provides that: ‘[p]eaceful

relational and spatial characteristics of assembly discussed in Section III, five definitional elements – (A) numerosity; (B) participation; (C) intentionality; (D) purpose and (E) space and place – deserve further consideration, and this final section explores each in turn. A preliminary note of caution, however. Recalling the vital distinction between regulatory and protective definitions (see Section II above), it is imperative that the protective definitions discussed here are not interpreted by States as justifying regulation. Furthermore, in General Comment 34 on the right to freedom of expression, the Human Rights Committee opted not to expressly include particular forms of expression in the text ‘on the understanding that the list of forms of expression must always be an open one’.<sup>117</sup> In a similar vein, while the European Court of Human Rights has, for example, emphasized that both stationary and moving assemblies are protected,<sup>118</sup> the Court has also sought ‘[t]o avert the risk of a restrictive interpretation’ by refraining ‘from formulating the notion of an assembly, which it regards as an autonomous concept, or exhaustively listing the criteria which would define it ...’<sup>119</sup> The perils of definition – principally, inflexibility and the potential for arbitrary exclusion – are worth keeping in mind.

#### A. Numerosity and Single-person Protests

Article 21 does not follow the conventional formulation (found in both Articles 19(2) and 22 ICCPR, and indeed, the assembly right under Article 20 UDHR) that ‘[e]veryone shall have the right to freedom of [X]’. Instead, Article 21 asserts that ‘[t]he right of peaceful assembly shall be recognized’ – wording that appears originally to have been proposed on natural law grounds (on the basis that the role of States parties was merely to recognize rather than confer this inalienable right).<sup>120</sup> Nowak notes that René Cassin, the French delegate to the Human Rights Commission, further argued that the phrasing ‘Everyone shall have the right ...’ could not be used because more than one person is needed for an assembly.<sup>121</sup> As draft General Comment No 37 properly emphasizes, however, ‘the right of peaceful assembly constitutes an individual right that is exercised collectively.’<sup>122</sup>

In order for a gathering to be recognized and thus protected as an assembly, we might ask whether a straightforward numerical threshold (such as ‘more than one’ or ‘two or more’ individuals) would suffice to determine whether the right of peaceful assembly is engaged. The definitions of both the ACHPR and the UN Special Rapporteur omit any reference to ‘persons’ (Human Rights Committee), ‘several persons’ (Nowak) or ‘number of individuals’ (OSCE/ODIHR) – perhaps on the basis that this is tautologous, already captured by the word ‘gathering’ – but such additional emphasis might helpfully underscore the distinction between ‘assembly’ and single-person protests.

In this regard, State authorities have sometimes argued that a lone protester, or even the conjoined actions of a small number of protesters, necessarily constitute a notifiable assembly (thereby rendering them potentially liable for failure to follow the requisite procedure).<sup>123</sup>

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assemblies are generally by their nature temporary’ and para 68 similarly limits the erection of structures at assemblies to ‘non-permanent constructions’ on account of ‘the temporary nature of assemblies.’

<sup>117</sup> O’Flaherty (n 13) 648.

<sup>118</sup> Eg *Christians Against Racism and Fascism (CARAF) v UK* (1980), Application No 8440/78, Decision of 16 July 1980, 147, para 4.

<sup>119</sup> *Navalny v Russia*, Application Nos 29580/12 and four others, GC Judgment of 15 November 2018, para 98.

<sup>120</sup> Nowak (n 10) 483-4 (observing that the delegates failed to explain why this argument applied to freedom of assembly in particular); MJ Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987) 415-16; UNGA, ‘Draft International Covenants on Human Rights’ (1 July 1955) UN Doc A/2929, paras 139-40.

<sup>121</sup> *ibid* Nowak, 484 n 12.

<sup>122</sup> Revised draft of General Comment No 37 (November 2019), para 4.

<sup>123</sup> *Tatár and Fáber* (n 13).

While the Strasbourg Court has examined solo-demonstrations under Article 10 ECHR (expression), taking into account the general principles established in the context of Article 11 (assembly),<sup>124</sup> the approach of the UN Human Rights Committee has not been so consistent. The Committee has distinguished from an assembly the act of a single individual peacefully conveying a message,<sup>125</sup> and in seven cases, assembly claims under Article 21 ICCPR have been declared inadmissible on the basis that only a single individual was involved.<sup>126</sup> However, in two single-person-protest cases, Article 21 claims were deemed admissible, only for the Committee then to decide not to examine them further (in light of the finding of a violation of article 19).<sup>127</sup> More critically, in three further cases,<sup>128</sup> the Committee found a violation of Article 21 in relation to single-person pickets.<sup>128</sup>

It is argued here that single-person protests should be considered under Article 19 ICCPR, taking into account any relevant principles deriving from Article 21. However, this seemingly straightforward position becomes more difficult to implement where a lone protester is joined by others. Questions then arise as to the circumstances in which two (or more) individuals should be counted as the sum of their actions – as a ‘combination’ rather than ‘mere aggregation’<sup>129</sup> – so as primarily to engage Article 21. Two responses to this conundrum are suggested.

First, we can quickly dispense of any argument that an assembly might be constituted (or the numerical threshold met) by virtue of a gathered *audience*.<sup>130</sup> On this point, the European Court of Human Rights has rightly stated, ‘a solo demonstration should not be classified as an assembly merely because it attracted attention from the public.’<sup>131</sup>

Second, in deciding whether or not the right of peaceful assembly is engaged, each gathering must be assessed on its own facts. Here, a range of factors may be relevant – including the spatial proximity of participants, temporal synchronicity of individual actions, unity of purpose, degree of logistical co-ordination and participants’ intention to gather with others (on which, see further C below). As such, while multiple lone and uncoordinated protests addressing disparate issues might still conceivably be considered as separate acts of expression, other combinations of individuals – whether spontaneous or planned – ought to obtain protection as assemblies under the aegis of Article 21. This argument holds even if the form of assembly is deliberately chosen to circumvent domestic notification requirements or laws prohibiting small gatherings<sup>132</sup> or to swamp the authorities with individual notifications.<sup>133</sup> On this basis, gatherings such as the silent stand protests in Egypt in 2010<sup>134</sup> and the ‘standing man’ protests in Turkey in June 2013 would qualify as assemblies despite their framing as spontaneous individual ‘stands’ against police violence.<sup>135</sup> So too would collective hand-

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<sup>124</sup> Section II above. Also, *Novikova and Others v Russia*, Application Nos 25501/07 and four others, Judgment of 26 April 2016, para 91; Mead (n 38) 66.

<sup>125</sup> *Sviridov v Kazakhstan*, Views adopted 13 July 2017, UN Doc CCPR/C/120/D/2158/2012, para 10.4.

<sup>126</sup> Eg *Coleman v Australia*, Views adopted 17 July 2006, UN Doc CCPR/C/87D/1157/2003, para 6.4; *Levinov v Belarus*, Views adopted 19 July 2018, UN Doc CCPR/C/123/D/2235/2013, para 5.7.

<sup>127</sup> *Katsora* (n 50); *Protsko and Tolchin* (n 50).

<sup>128</sup> *Poplavny v Belarus*, Views adopted 5 November 2015, UN Doc CCPR/C/115/D/2019/2010; *Sudalenko v Belarus*, Views adopted 5 November 2015, UN Doc CCPR/C/115/D/2016/2010; and *MT v Uzbekistan*, Views adopted 23 July 2015, UN Doc CCPR/C/114/D/2234/2013.

<sup>129</sup> Baker, text to n 86.

<sup>130</sup> cf the State party’s argument in *Coleman* (n 129) paras 4.2 and 4.6.

<sup>131</sup> *Novikova* (n 127) paras 204-5.

<sup>132</sup> Eg M Abdellah and E Blair, ‘Online protest on Egyptian’s death draws hundreds’ (Reuters, 9 July 2010).

<sup>133</sup> Eg A Mostrous, ‘Comedian calls for “mass lone demonstration”’ (The Guardian, 24 August 2006).

<sup>134</sup> Gerbaudo (n 106) 60; Z Tufekci and C Wilson, ‘Social media and the decision to participate in political protest: Observations from Tahrir Square’ (2012) 62 *Journal of Communication* 363.

<sup>135</sup> Both actions had some measure of coordination – in Egypt, via the Facebook group, ‘We Are All Khaled Said’, and in Turkey, adopting the hashtag, ‘#durandam’.

clapping from either door-steps or balconies in support of health workers during the COVID-19 pandemic (and notwithstanding regulations to enforce physical distancing).

### *B. Participation and Non-participation*

Questions about the nature of individual participation in a collective enterprise – *who* may participate, and *how* they do so – are highly relevant to mapping the scope of the right of peaceful assembly (and thus, to determining whether, on the facts of a given case, the right is engaged).

It is worth noting that the Human Rights Committee in its Concluding Observations has repeatedly emphasized that the right to freedom of peaceful assembly can be exercised not only by ‘citizens’,<sup>136</sup> but also by non-citizens (including migrant workers,<sup>137</sup> and refugees and asylum-seekers).<sup>138</sup> This goes some way also to recognizing that freedom of assembly is often of critical importance to groups most at risk.<sup>139</sup> The Convention on the Rights of the Child additionally makes clear that ‘States Parties should recognize’ the right of the child to freedom of peaceful assembly.<sup>140</sup>

In addition to the question of *who* may participate, there are a range of roles – undertaken by both assembly participants and non-participants – that might properly fall within the scope of ‘assembly’ and thus engage Article 21. As Nowak argues, the Article 21 right also ‘covers both the preparing and conducting of an assembly by its organizers and the right to participate in it.’<sup>141</sup> Particular consideration here is given to those who have a role in (1) organizing and planning, (2) publicizing and promoting, and (3) monitoring, observing or reporting on assemblies, as well as (4) prior or subsequent activities that are intrinsic to assembling. These questions may be particularly important in determining the admissibility of claims to be a victim of a violation under Article 1 of the Optional Protocol to the Covenant.

#### *1. Organizing and planning*

Many States have enacted legal provisions that define an assembly ‘organizer’ for regulatory purposes – requiring, for example, that there be some kind of organizing committee, that the organizer (or their representative) be present at an assembly, or reserving for organizers particularly serious penalties for either violence that occurs or deviation from the permitted schedule or route. It is important, however, to consider from a protective (rather than regulatory) perspective the organizational roles that might engage the right of peaceful assembly.

The first point to note is that Article 21 ICCPR confers certain rights on assembly organizers. Aside from possible rights of exclusion,<sup>142</sup> the right has also been held to include ‘the right to choose a location within sight and sound of their target audience’<sup>143</sup> – or, in the

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<sup>136</sup> Eg Human Rights Committee, ‘Concluding Observations on the third periodic report of Kuwait’ (11 August 2016) UN Doc CCPR/C/KWT/CO/3, para 42.

<sup>137</sup> Eg Human Rights Committee, ‘Concluding Observations on the sixth periodic report of the Dominican Republic’ (27 November 2017) UN Doc CCPR/C/DOM/CO/6, para 31.

<sup>138</sup> Eg Human Rights Committee, ‘Concluding Observations on the second periodic report of Nepal’ (15 April 2014) UN Doc CCPR/C/NPL/CO/2, para 14.

<sup>139</sup> UNSR FoAA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (14 April 2014) UN Doc A/HRC/26/29.

<sup>140</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by UN GA Res 44/25 of 20 November 1989; entry into force, 2 September 1990, Art 15.

<sup>141</sup> Nowak (n 10) 483.

<sup>142</sup> Text to n 94 – n 98 above.

<sup>143</sup> Eg *Turchenyak v Belarus*, Views adopted 24 July 2013, UN Doc CCPR/C/108/D/1948/2010, para 7.4.

words of the European Court of Human Rights, ‘to choose the time, place and modalities of the assembly ...’<sup>144</sup>

Second, there is no specific organizational structure that is intrinsic to the concept of ‘assembly’. There are different views as to whether assemblies are ever mobilized through purely non-hierarchical ‘horizontal networks’ without organizers or leaders, or whether instead they depend on more diffuse forms of (‘leaderful’) organization with multiple leaders performing different, but nonetheless, crucial roles.<sup>145</sup> Paulo Gerbaudo, for example, is sceptical of ‘pure spontaneity’ and ‘the ideology of structurelessness’, arguing that this can become ‘an astute way of side-stepping the question of leadership, and allows the *de facto* leaders to remain unaccountable because invisible’.<sup>146</sup> He suggests instead that the act of assembling is ‘underscored by complex communicative and organisational practices, allowing for groups which are spatially dispersed but united by the same interests.’<sup>147</sup> The point here, however, is that Article 21 must be interpreted in such a way as to recognize this diversity of organizational and choreographic activities.<sup>148</sup>

Such an approach might arguably open the door to spurious claims by those who have had relatively minor logistical or leadership roles. However, since Article 21 protections generally also extend to participation (aside from any particular role that an individual might have played), this is unlikely to make a substantial difference in practice. Moreover, it seems reasonable to expect that protection should keep pace with potential liability – and in this regard, it is notable that several States have attempted to cast the organizational net widely in order to impose sanctions – particularly in relation to those who publicize or promote an assembly (as considered below).<sup>149</sup>

## 2. *Publicizing and promoting*

A number of individual communications considered by the Human Rights Committee have involved the imposition of penalties on assembly organizers or others for announcing or publicizing an upcoming assembly prior to official authorization being granted.<sup>150</sup> Online communication platforms increase not only the ease of sharing such information, but also the likelihood that it will be shared by a wide range of individuals beyond the primary organizers.<sup>151</sup>

The Committee’s stated view – that the circulation of publicity for an upcoming assembly cannot legitimately be penalized in the absence of a ‘specific indication of what dangers would have been created by the early distribution of the information’<sup>152</sup> – is directed primarily at the justification of limitations, but it also implicitly accepts that such activities are protected under the Covenant. Such promotional activities inevitably involve acts of communication

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<sup>144</sup> *Sáska v Hungary*, Application No 58050/08, Judgment of 27 November 2012, para 21; *Women on Waves v Portugal*, Application No 31276/05, Judgment of 3 February 2009 (French only), paras 30 and 38-39.

<sup>145</sup> Eg P Ruiz, *Articulating Dissent: Protest and the Public Sphere* (Pluto Press 2014) 123-4; KD Opp, *Theories of Political Protest and Social Movements: A Multidisciplinary Introduction, Critique and Synthesis* (Routledge 2009) 82.

<sup>146</sup> Gerbaudo (n 106) 19, 25 and 43; Hardt and Negri (n 23) xiv (reclaiming the concept of ‘entrepreneurship’).

<sup>147</sup> Gerbaudo (n 106) 39-40.

<sup>148</sup> *ibid.*, 12-13.

<sup>149</sup> In at least three cases, the Committee has noted (but not further addressed) the author’s claim not to have been an assembly organizer – *Belyazeka* (n 47) paras 2.7 and 5.3; *Kim v Uzbekistan* (n 47), paras 7.2 and 13.5; *Kovalenko v Belarus*, Views adopted 17 July 2013, UN Doc CCPR/C/108/D1808/2008, para 5.3.

<sup>150</sup> Eg *Zhagiparov v Kazakhstan*, Views adopted 25 October 2018, CCPR/124/D/2441/2014; *Sviridov* (n 128) para 2.1.

<sup>151</sup> ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Voule’, 26 July 2018, UN Doc A/HRC/38/34, para 82.

<sup>152</sup> *Tulzhenkova v Belarus*, Views adopted 26 October 2011, UN Doc CCPR/C/103/D/1838/2008, para. 9.3.



implicating the right to freedom of expression under Article 19(2). In addition, however, they are also of critical importance to an effective right of peaceful assembly. The Committee has considered some ‘publicity’ cases under Article 19(2) alone – generally, where the author has raised a complaint only under this provision.<sup>153</sup> Where claims have been raised under both Articles 19(2) and 21, the Article 21 complaint has been deemed admissible but not considered further in two cases,<sup>154</sup> whereas in three other cases, the Committee found violations of both Article 19(2) and 21 together.<sup>155</sup> It is suggested here that restrictions on publicizing and promoting an assembly should engage Article 21 as a matter of course (or at a minimum, Article 19 in the light of Article 21).<sup>156</sup> Here, the revised draft text of General Comment No 37 helpfully emphasizes that ‘dissemination of information about an upcoming event’ is covered by Article 21. Moreover, ‘publicity for an upcoming assembly before notification has taken place cannot be penalized in the absence of a specific indication of what dangers would have been created by the early distribution of the information.’<sup>157</sup>

### 3. *Non-participants – monitors, observers and journalists*

The obligation to protect both journalists covering demonstrations and the varied work of assembly monitors and observers arises from the need to create an enabling environment for the right of peaceful assembly. As such, where journalists, monitors or observers claim there to have been undue interferences with their work relating to an assembly, and despite the fact that they themselves are avowedly non-participants, it is argued here that Article 21 ought still to be engaged.<sup>158</sup> Such work is essential to the full and effective realization of the right of peaceful assembly.

While the European Court of Human Rights has so far viewed such activities primarily through the prism of freedom of expression (recognizing Article 11 as *lex generalis*),<sup>159</sup> the Human Rights Committee, in *Zhagiparov v Kazakhstan*,<sup>160</sup> found that the arrest and prosecution of a *journalist* by the Kazakh authorities for *participating* in an unsanctioned public gathering in Astana (resulting in 15 days administrative arrest) not only violated his right to freedom of expression, but also his right to freedom of peaceful assembly under Article 21.<sup>161</sup> This latter conclusion is perhaps surprising since the journalist’s alleged ‘participation’ in the assembly was itself at the heart of the legal challenge: the violation of the right of assembly was premised not on his *participation* in the demonstration but precisely on his denial that he was participating at all. In this light, the Committee properly affirmed that actual participation is not a *sine qua non* for Article 21 to be engaged.

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<sup>153</sup> Eg *Olechkevitch v Belarus*, Views adopted 18 March 2013, CCPR/C/107/D/1785/2008.

<sup>154</sup> *Katsora* (n 50) paras 6.4 and 7.6; *Protsko and Tolchin v Belarus* (n 50) paras 6.6 and 7.9.

<sup>155</sup> *Govsha, Syritya and Mezyak* (n 15); *Zhagiparov v Kazakhstan* (n 153); *Melnikov v Belarus*, Views adopted 14 July 2017, UN Doc CCPR/C/120/D/2147/2012.

<sup>156</sup> Similarly, Concurring Opinion of Committee members, Mr Fabián Salvioli, Mr Yuval Shany and Mr Víctor Rodríguez Rescia in *Olechkevitch* (n 156) paras 2, 8 and 9.

<sup>157</sup> Revised draft of General Comment No 37 (November 2019) para 37.

<sup>158</sup> The question of whether such protection ought to be grounded in Article 21 specifically (or the Covenant more generally) is, at the time of writing, unresolved in the revised draft text of General Comment No 37. Consensus on the language was not reached during the first reading of the text of para 34 (as signalled by the inclusion of ‘Article 21’ in parenthesis): ‘The role of journalists, human rights defenders and others involved in monitoring ... are entitled to protection under [Article 21 of] the Covenant.’ The first draft of the General Comment stated that: ‘The role of journalists and other monitors ... is protected under Article 21 and its related rights.’

<sup>159</sup> *Najafli v Azerbaijan*, Application No 2594/07, Judgment of 2 October 2012, para 66; *Butkevich* (n 34) para 122.

<sup>160</sup> *Zhagiparov* (n 153).

<sup>161</sup> *ibid*, para 13.5.

The Committee's finding in *Zhagiparov* aligns with the views of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association who has similarly emphasized that 'the right of peaceful assembly covers not only the right to hold and to participate in a peaceful assembly but also ... further protects those monitoring peaceful assemblies.'<sup>162</sup> In like manner, the OSCE Representative on Freedom of the Media has argued that 'uninhibited reporting on demonstrations is as much a part of the right to free assembly as the demonstrations are themselves the exercise of the right to free speech.'<sup>163</sup>

#### 4. *Prior or subsequent activities intrinsic to an assembly*

It is clear from the foregoing that the right of peaceful assembly extends not only to the duration of an assembly as an 'event' but also covers activities occurring within a much wider temporal span – not because they constitute an assembly but because they are essential to the exercise of the right. John Inazu argues that 'just as freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling – it protects a group's autonomy, composition, and existence.'<sup>164</sup>

The Human Rights Committee has recognized this dimension of the Article 21 right, finding a violation of Articles 19 and 21 in a case where the authors were detained on their way to the venue of a demonstration due to take place:

'The prevention of the authors to hold a demonstration, their subsequent apprehension and sentencing ... merely for walking in a group of individuals holding photographs and posters clearly constitutes a violation of their rights guaranteed under articles 19 and 21 ...'<sup>165</sup>

While there have been few cases focused exclusively on alleged interferences in the immediate aftermath of an assembly,<sup>166</sup> it is argued here that Article 21 should apply equally in such circumstances, such as when participants are dispersing or using public transport to make their way home. Such activities are integral to the act of assembling and should not fall outside its protective reach. In this regard, the draft text of General Comment No 37 properly recognizes that '[a]ctivities conducted outside the immediate scope of the gathering but that are integral to making the exercise meaningful are also covered' including (amongst other acts) both travelling to and leaving an assembly.<sup>167</sup>

#### C. *From Incidental to Intentional and from Political to Recreational and Commercial*

It was argued in Sections III and IV(A) that the collective nature of an assembly is a necessary, but of itself, insufficient constituent element of a definition of 'assembly'. As such, some additional purposive requirement might additionally be required to draw a definitional threshold.

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<sup>162</sup> UNSR FoAA (n 107) 'Summary'.

<sup>163</sup> OSCE Representative on the Freedom of the Media, 'Special Report: Handling of the media during political demonstrations – Observations and Recommendations' (21 June 2007). Though note the arguments in Section 3B above (text to n 46- n 69).

<sup>164</sup> Inazu (n 60) 152.

<sup>165</sup> Eg *Evrezov, Nepomnyaschikh, Polyakov and Rybchenko v Belarus*, Views adopted 10 October 2014, UN Doc CCPR/C/112/D/1999/2010, paras 2.1 and 8.5-8.6. The question is less one of temporal proximity to the assembly, but whether the antecedent or subsequent activities are intrinsic to it.

<sup>166</sup> Eg *Navalnyy and Yashin v Russia*, Application No 76204/11, Judgment of 4 December 2014, especially the Concurring Opinion of Judge Pinto de Albuquerque at para 12.

<sup>167</sup> Revised draft of General Comment No 37 (November 2019) para 37.

Like Nowak, the definitions of the UNSR, OSCE/ODIHR and ACHPR all emphasize intentionality *in addition to* requiring a further purposive element (respectively, a ‘specific purpose’, a ‘common expressive purpose’ and an ‘expressive purpose’).<sup>168</sup> However, notwithstanding an initial proposal by the Human Rights Committee’s Rapporteur (Mr Christof Heyns) during the second reading of General Comment No 37 to define assembly as ‘an intentional gathering ... principally with an expressive purpose’,<sup>169</sup> five members of the Committee expressed reservations about the invocation of ‘intentionality’.<sup>170</sup> Following this relatively truncated debate, the Committee decided to excise the word ‘intentional’ from the adopted definition, opting instead to define an assembly simply as a ‘gathering ... for a specific purpose, primarily with an expressive goal’.<sup>171</sup>

It is worth highlighting the implications of the Committee’s rejection of ‘intentional’ (particularly, if this formulation survives the second reading stage). At its core, the question raised is whether every happenstance gathering of individuals is, *ipso facto* an ‘assembly’ – a question that can usefully be interrogated using the heuristic of the proverbial bus stop queue. Such a queue satisfies several elements of Manfred Nowak’s definition: it is a gathering of several persons for a specific purpose (ie waiting for a bus). As noted, however, Nowak and others have argued that an assembly must also be *intentional*: while a bus queue participant might intend *to wait for a bus* (and this would satisfy the ‘specific purpose’ element) she or he might be entirely agnostic as to whether others join (and so have no intention *to assemble*). While a bus stop queue would certainly also falter at the more exacting requirement in some definitions of having an ‘expressive’ or ‘common expressive’ purpose, such formulations are problematic, as suggested in section III(B) above, because they unduly tether assembly to expression.<sup>172</sup>

In its own Guide to Article 11 ECHR, the European Court of Human Rights emphatically excludes queues from the scope of the term ‘assembly’, characterizing a queue to enter a public building as a ‘random agglomeration of individuals each pursuing their own cause’.<sup>173</sup> Instead, the Court argues that ‘[a]ssembly is defined, in particular, by a common purpose of its participants.’<sup>174</sup> In like manner, Judge Pinto de Albuquerque, in his concurring opinion in *Navalnyy and Yashin v Russia*, specifically argued that ‘[t]he incidental meeting of a group of people is not an assembly, even if these people interact for a certain period of time’.<sup>175</sup> He suggested instead that an assembly requires ‘the shared intent of its members to pursue a common aim through a common action.’<sup>176</sup>

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<sup>168</sup> Text to n 107 – n 114 above.

<sup>169</sup> Advanced by the Human Rights Committee’s Rapporteur for the General Comment (Mr Christof Heyns): UN Web TV, n 111 above, 1:14:00-1:16:40. Two Committee members (Mr Zimmermann and Mr Santos Pais) also spoke in favour of retaining ‘intention’ as an element of the definition.

<sup>170</sup> UN Web TV, n 111, 1:16:45-1:39:10. The reservations variously expressed by Committee members regarding ‘intentionality’ were that (1) it complicates the definition and may curtail spontaneous assemblies; (2) it is unclear whose intention is being referred to; (3) the notion of an ‘intentional assembly’ is somewhat tautologous; (4) ‘intention’ has criminal law connotations and might operate to exclude bystanders from protection; and (5) intention adds little to the definition and unhelpfully incorporates a subjective element that might then need to be proven.

<sup>171</sup> UN Web TV, n 111, 1:38:55.

<sup>172</sup> Importantly, the Committee’s revised formulation (‘*primarily with an expressive goal*’) leaves the door open to non-expressive assemblies. For further critique of a ‘common expressive purpose’ requirement, see M Scheinin, ‘How to Improve the Human Rights Committee Draft General Comment on Freedom of Assembly’ (Just Security, 13 February 2020).

<sup>173</sup> European Court of Human Rights (2019) (n 3) para 14.

<sup>174</sup> *ibid.*

<sup>175</sup> Application No 76204/11, Judgment of 4 December 2014, Concurring Opinion, para 8.

<sup>176</sup> *ibid.*

That said, there are at least three reasons why one might intuitively favour a definition that extends to entirely coincidental gatherings and each is briefly examined here in turn. It is suggested, however, that none withstands closer scrutiny and so even an inclusive and protective definition of ‘assembly’ (as favoured here) should be more narrowly cabined by insisting on a specific intention to gather.

First, one might query whether there is ultimately any real harm in adopting an all-inclusive protective definition of assembly, one that would comfortably absorb a bus stop queue. After all, there is neither a finite well of protection nor reason to presumptively reject a rights-based claim simply because it falls at the definitional periphery and might be asserted infrequently. The strongest rebuttal of this pragmatic ‘benign absorption’ argument is that it ultimately yields a definition of assembly devoid of descriptive plausibility and might trivialize what has been recognized as a fundamental right:<sup>177</sup> By embracing *all* kinds of incidental group, the substance of the right might lose its normative edge and its key protections be taken less seriously by States. While the principle of *de minimis non curat lex* (the law does not concern itself with trifles) could provide something of a corrective by precluding judicial consideration of trivial allegations falling below a minimum level of severity – a *de minimus* threshold fails to rescue the definitional principle at stake (and indeed, fails to provide any guidance as to where precisely the line between trivial and non-trivial assemblies ought to be drawn).

Second, it might appear rather suspect if protection falls short of the very activities vulnerable to undue interference, regulatory or otherwise. Conceivably, those standing at a bus stop might encounter third-party violence or State restriction. Consider, for example, Public Spaces Protection Orders (PSPOs) in the UK, several of which have expressly prohibited loitering at bus stops.<sup>178</sup> If individuals gathering at a bus stop (irrespective of intention or any interaction that may have occurred) were to face criminal penalty for breaching such an Order, they may well wish to invoke the protections afforded by Article 21. However, neither the risk of violence nor the possibility of State regulation are sufficient to convert an incidental gathering at a bus stop (or elsewhere) into an ‘assembly’. While the right of peaceful assembly should protect against undue regulation *of assemblies*, the term ‘assembly’ need not itself be defined mimetically by every interference capable of touching a coincidental gathering of individuals. As such, there is no necessary contradiction in recognizing the unfathomable risks posed by third parties to queue participants, or the deleterious breadth of widely framed regulatory powers, while simultaneously adopting a more narrow protective definition of ‘assembly’.

If the potential disjuncture between an activity’s susceptibility to interference and the scope of protection *as an assembly* can be rejected as a reason to embrace entirely coincidental gatherings within its fold, we might instead be drawn to a third reason favouring the inclusion of bus stop queues and the like – one that more vividly conveys a sense of the value of ‘assembly’. This third reason emphasizes the capacity of assemblies to enable what Michel de Certeau termed the ‘politics of stimulation’, reliant on the possibility of spontaneous interaction.<sup>179</sup> As de Certeau himself remarked, such chance encounters, deserving of protection, might occur ‘... at bus stops, in lines in front of administration windows, before the array of goods at market stands ... at the exits of schools ... at the laundromat or in the café, in all of these familiar and public places that are neither yours or mine, that are made for passing

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<sup>177</sup> Eg *Turchenyak* (n 146) para. 7.4; *Praded* (n 46) para. 7.4; *Korol* (n 11) para 7.5; *Kim* (n 47) para 13.4.

<sup>178</sup> Anti-Social Behaviour, Crime and Policing Act 2014, s 59. Within the first two years of the Act coming into force, 12 of the 130 PSPOs imposed (across 79 local authority areas) restricted congregating or loitering in groups

<<https://democracy.walthamforest.gov.uk/documents/s66446/3a%20-%20Appendix%201%20PSPO%20Executive%20Decision%20report.pdf>> at 4.

<sup>179</sup> M de Certeau, *The Capture of Speech and Other Political Writings* (University of Minnesota Press 1997) 96.

through ...<sup>180</sup> This rationale resonates with Orsolya Salát's argument that 'standing in a queue as such is not an assembly, but it can easily turn into one, for instance if people outraged by the waiting time start discussing how to handle it or start protesting against it.'<sup>181</sup>

Salát's position has intuitive appeal – but we need to be more precise about what turns a non-assembly queue into an assembly. On Salát's own account, it is not the mere presence of two or more people – rather, the common presence element of her definition implies 'some *link* with each other beyond the mere coincidence of being at the same place at the same time'<sup>182</sup> and that 'the link might be some shared activity, emotion, opinion or the like'.<sup>183</sup> Yet the point at which non-verbal activity might elevate a queue (or particular queue participants) into an 'assembly' remains elusive. Salát's argument implies that *any* conversation (or even shared non-verbal reaction) could serve to convert a happenstance gathering into a protected 'assembly'. Such a conclusion has implications that we may be reluctant to accept – its logic implies that any kind of solidarity (however signaled) could be constitutive of an 'assembly'.

To resolve the bus stop queue conundrum, it is suggested that instead of mere 'presence', a credible definition of 'assembly' under Article 21 should exclude entirely coincidental gatherings and require that a gathering be 'intentional' (in the sense that participants have a specific intention to gather with others).<sup>184</sup> This approach does not deny the importance of de Certeau's politics of stimulation but stops short of classifying every such stimulating interaction as an assembly. Moreover, bus stop queues might sometimes qualify as assemblies. Consider, for example, if bus stops became the last refuge for dissenters in a country where public gatherings involving more than two people were prohibited.<sup>185</sup> Where dissenters *intentionally* congregate at a particular place, they are not merely waiting for a bus (indeed, they might not be waiting for a bus at all), but instead intend to gather. This argument also holds for types of gathering that might ordinarily be coincidental but come to be imbued with meaning (or are deliberately subverted to convey a particular point) when other forms of assembly (demonstrations and marches) are suppressed. Examples might include 'peace prayers' in the former German Democratic Republic,<sup>186</sup> hand-clapping protests in Belarus,<sup>187</sup> walk-to-work protests in Uganda<sup>188</sup> and a Saturday 'stroll' in Moscow.<sup>189</sup>

#### *D. Purpose: from Political to Recreational and Commercial Assemblies*

The UN Special Rapporteur's definition of 'assembly' follows Nowak in using the broad term 'specific purpose' (as distinct from the OSCE/ODIHR's preference for 'common expressive purpose'). Indeed, it is noteworthy that none of the key definitions of noted above attempt to limit 'assembly' to political or non-commercial events. That said, the November 2019 draft of General Comment No 37 suggested that 'commercial gatherings would not generally fall

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<sup>180</sup> *ibid.*, 98-99.

<sup>181</sup> Salát (n 61) 4.

<sup>182</sup> *ibid.*

<sup>183</sup> *ibid.*

<sup>184</sup> This broadly aligns with Inazu's definition of a group as requiring there to be some shared enterprise. Inazu (n 87) 1094, n 2.

<sup>185</sup> Eg 'Thai army bans groups of more than five people from gathering' (Reuters, 22 May 2014).

<sup>186</sup> L Peter, 'East Germany 1989 – the march that KO'd communism' (BBC News, 14 October 2019).

<sup>187</sup> J Motlagh, 'In Belarus, Clapping Can Be Subversive' (The Atlantic, 21 July 2011).

<sup>188</sup> 'Uganda: Police tear gas 'walk-to-work' protesters' (BBC News, 14 April 2011).

<sup>189</sup> S Rainsford, 'Russia protests: Hundreds detained during unauthorised demonstration' (BBC News, 3 August 2019)

within the scope of what is protected by Article 21’ and that such gatherings would be protected ‘only to the extent that they have an expressive purpose’.<sup>190</sup>

Assemblies are often valued on account of their contribution to political life. Tabatha Abu El-Haj, for example, argues that assemblies are ‘by definition, political experiences’, offering a unique, distinctive form of political participation which ‘strengthen the likelihood of future civic and political engagement’.<sup>191</sup> ‘Assembling’ she writes ‘is a critically important form of politics because it provides opportunities to strengthen, even create, personal relationships that are likely to encourage additional civic and political participation.’<sup>192</sup>

The political role of assemblies should not be underplayed – not merely as an adjunct to representative politics, but as an alternative form of participation: As Eric Barendt has argued, ‘put most radically’, the right of assembly is valuable for active citizens who ‘are unwilling to participate in conventional party politics’. Assemblies serve precisely to challenge ‘the exclusivity of conventional modes of civic activity’.<sup>193</sup> Nonetheless, a narrow and exclusively political conception of assembly not only overlooks gatherings that might be regarded as either pre-political or wholly apolitical, but forecloses the agonistic space, always in the making, within and through which new political constellations may emerge.<sup>194</sup> It is not merely that non-political and quotidian gatherings somehow precede the political,<sup>195</sup> but that they are valuable in their own right.<sup>196</sup> They exist, in Jack Balkin’s words, as the ‘infrastructure or substrate’ for political democracy.<sup>197</sup> This argument is further strengthened if we accept John Dewey’s contention that democracy ‘is more than a form of government; it is primarily a form of associated living, a conjoint communicated experience.’<sup>198</sup> On this basis, we ought to resist any straightforward hierarchy that purports to afford heightened protection to ‘political assemblies’ (however construed).<sup>199</sup>

This point has been recognized by the European Court of Human Rights. While the Court has, on the one hand, emphasized that ‘very strong reasons’ must be advanced to justify restrictions on political speech or serious matters of public interest’ and that the same principle applies to assemblies under Article 11 ECHR – ‘public events related to political life in the country or at the local level must enjoy strong protection’<sup>200</sup> – the Court has also noted that it would ‘be an unacceptably narrow interpretation of [Article 11] to confine it only to that kind of assembly.’<sup>201</sup> The Court has therefore acknowledged that the right of peaceful assembly

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<sup>190</sup> Revised draft General Comment No 37 (November 2019) at para 14 (under the heading, ‘Scope of the right of peaceful assembly’). By way of comparison, the first draft of the General Comment, at para 15, stated that: ‘Gatherings that primarily have a commercial or social entertainment purpose would not generally fall within the core of what is protected under Article 21, although they may also be otherwise protected.’

<sup>191</sup> El-Haj (n 81) 1031.

<sup>192</sup> *ibid* 1031-2.

<sup>193</sup> E Barendt, ‘Freedom of Assembly’ in J Beatson and Y Cripps, *Freedom of Expression and Freedom of Information* (OUP 2000) 168.

<sup>194</sup> N Fraser ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ (1990) 25-26 *Social Text* 71; Similarly, Butler (n 23) 205-6.

<sup>195</sup> Inazu (n 60) 5.

<sup>196</sup> R Post, ‘Participatory Democracy and Free Speech’ (2011) 97 *Va L Rev* 486.

<sup>197</sup> JM Balkin, ‘Cultural Democracy and the First Amendment’ (2016) 110 *Northwestern U L Rev* 1060.

<sup>198</sup> J Dewey, *Democracy and Education: An Introduction to the Philosophy of Education*. (Collier-Macmillan 1966) 87.

<sup>199</sup> cf the revised (November 2019) draft of General Comment No 37 which, at para 36 stated: ‘Given that peaceful assemblies have an expressive function, and political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should likewise enjoy a heightened level of accommodation and protection.’ Importantly, this paragraph relates to the *obligations* of States parties rather than the *scope* of the right (and so arguably is of less concern in conceptual terms).

<sup>200</sup> *Primov* (n 55) paras 134-5.

<sup>201</sup> *Friend and Others v UK*, Application Nos 16072/06 and 27809/08, 24 November 2009 (admissibility), para 50.

‘may extend to the protection of an assembly of an essentially social character’.<sup>202</sup> This recognition chimes with an early draft text of the Universal Declaration on Human Rights which provided that ‘[t]here shall be freedom of peaceful assembly and of association for political, religious, cultural, scientific, professional *and other purposes*.’<sup>203</sup> It is noteworthy too that the UN Committee on the Elimination of Racial Discrimination, in its General Recommendation No.35 (on Combating racist hate speech) expressly covers ‘behaviour at public gatherings *including sporting events*’.<sup>204</sup>

The inevitable corollary of a prioritization of the political is the relegation of non-political assemblies. In particular, this is to the detriment of gatherings that might be considered ‘recreational’<sup>205</sup> or ‘commercial’.<sup>206</sup> Recreational and commercially oriented gatherings will often have political dimensions too. Consider, for example, the profoundly political nature of the Olympic Games<sup>207</sup> or collective actions inspired by the ‘take a knee’ protest begun by American footballer Colin Kaepernick.<sup>208</sup> Consider too the commodification of the Berlin Love parade,<sup>209</sup> or the ways in which Pride events often combine celebration, political advocacy and commercial enterprise (with floats advertising LGBT+ friendly clubs or ticketed headline events).<sup>210</sup> In short, any attempt to create hermetic categories of non-political gathering is fraught with definitional pitfalls.

Ultimately, considerations regarding the political significance of an event may have some purchase when it comes to ascertaining the extent of State obligations or assessing the necessity and proportionality of restrictions. As such, for example, there may legitimately be some defraying of costs to an organizer where an assembly is partly or principally for-profit (such redistribution constituting a restriction that must survive proportionality-based scrutiny). Similarly, with avowedly political assemblies, there might properly be ‘a thumb on the scale’ of such an assembly when weighed against arguments to protect other competing rights – but this is not an argument that is fundamentally about the meaning and scope of ‘assembly’. As noted previously, not all types of assembly entail the discharge of the same state obligations.

### *E. Space and Place*

The final definitional element that must be considered is the question of space and place. The uniquely spatial dimensions of assembly were discussed (in section III) to help distinguish assembly from association. Noting the absence of any mention of space or place in Nowak’s definition,<sup>211</sup> it is important to consider whether the intrinsic spatial characteristics of

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<sup>202</sup> *ibid*; *Huseynov v Azerbaijan*, Application No 59135/09, 7 May 2015, para 91; European Court of Human Rights (n 3), para 116.

<sup>203</sup> ‘Report of the Drafting Committee on an International Bill of Human Rights’ UN Doc E/CN.4/21, 78 (Annex F): Article 23 (emphasis added).

<sup>204</sup> UN Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation No 35: Combating racist hate speech’, 26 September 2013, UN Doc CERD/C/GC/35, para 7.

<sup>205</sup> G Abernathy, *The Right of Assembly and Association* (University of South Carolina Press 1961) 109. Also, Mead (n 38) 137 and 152 (albeit in relation to *protest*).

<sup>206</sup> Inazu (n 60) 168.

<sup>207</sup> D Zirin, ‘John Carlos Responds to the New Olympics Ban on Political Protest’ (The Nation, 14 January 2020).

<sup>208</sup> C Mindock ‘Taking a knee: Why are NFL players protesting and when did they start to kneel?’ (The Independent, 4 February 2019).

<sup>209</sup> J Borneman and S Senders, ‘Politics without a Head: Is the “Love Parade” a New Form of Political Identification’ (2000) 15(2) Cultural Anthropology 294.

<sup>210</sup> In 2019, tickets for Manchester Pride, headlined by Ariana Grande, cost £71: ‘That’s a bit rich’ (The Guardian, 4 February 2019).

<sup>211</sup> Text to n 103 above.

‘assembly’ need be expressly articulated (and if so, how best to capture this dimension).<sup>212</sup> To this end, it is worth recalling the different definitional formulations of ‘assembly’ that have already been highlighted – ‘*private or public space*’ in the UN Special Rapporteur’s definition, ‘*in private or in public*’ in the ACHPR’s *Guidelines*, ‘*publicly accessible place*’ in the OSCE/ODIHR – Venice Commission *Guidelines*, and the (welcome) inclusive formulation in General Comment No 37 (adopted during the course of its second reading): ‘*wherever they may take place: outdoors, indoors and online, and in public and private spaces, or in a combination of these.*’<sup>213</sup>

Importantly, the UN Human Rights Committee has already recognized that the right of peaceful assembly ‘... entails the possibility of organizing and participating in peaceful assemblies ... including in enclosed premises, open areas or public or private spaces ...’<sup>214</sup> The Article 21 right has been interpreted to confer protection ‘in a public location’,<sup>215</sup> assemblies inside buildings,<sup>216</sup> privately-owned venues,<sup>217</sup> and in places that the State has argued are not intended for assemblies.<sup>218</sup> The Committee has also emphasized in its Concluding Observations that States should make sufficient spaces available for assemblies.<sup>219</sup> These expansive protections are premised on the fact that everything falling within the protective scope of Article 21 may in any case be subject to necessary and proportionate restriction.

Beyond reiterating these already clear statements regarding the scope of Article 21 (particularly, the principle that the right of peaceful assembly extends to private spaces), it is perhaps unclear what gains may accrue from expressly defining the spatial dimensions of assembly. In this regard, at least two further questions are worth addressing briefly in turn: (1) is it beneficial to couch the spatial scope of ‘assembly’ in terms of *access* rather than *ownership* – in other words, invoking the phrase ‘publicly accessible’ rather than ‘public and private’ spaces? and (2) should the right of peaceful assembly under Article 21 confer protection upon forms of gathering that occur in *online* spaces or in the virtual world (rather than merely upon physical, real-world gatherings)?

Some of the definitions of ‘assembly’ previously noted frame the spatial entitlements of those wishing to assemble in terms of property access rather than ownership.<sup>220</sup> The difference is important – privately-owned places may to all intents and purposes be public and publicly-owned spaces may not be accessible to the public all of the time (think, for example, of an office in a town hall). Invoking the idea of ‘public accessibility’ thus seeks to recognize legitimate barriers to publicly-owned property not ordinarily accessible while not presumptively excluding assemblies from privately-owned property to which access is routinely granted (including, for example, town centres and garage forecourts).

Decentring questions of ownership in this way may be well-intentioned, but the notion of ‘public accessibility’ fundamentally under-protects the right of peaceful assembly when it purports to define its scope. It implicitly qualifies the more expansive assertion that the right

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<sup>212</sup> Recalling *Tatár and Fáber* (n 24), para 38.

<sup>213</sup> Text to n 114 above.

<sup>214</sup> *Turchenyak* (n 146) para 7.4; *Giménez* (n 95) para 8.3.

<sup>215</sup> Eg *Popova v The Russian Federation*, Views adopted 6 April 2018, UN Doc CCPR/C/122/D/2217/2012, para 7.3.

<sup>216</sup> Eg *Bakur v Belarus*, Views adopted 15 July 2015 CCPR/C/114/D/1902/2009.

<sup>217</sup> Eg Human Rights Committee, ‘Concluding observations on the fourth periodic report of Algeria’ (17 August 2018) UN Doc CCPR/C/DZA/CO/4, para 45; Human Rights Committee, ‘List of issues to be taken up in connection with the consideration of the second report of Armenia (22 November 2011) UN Doc CCPR/C/ARM/Q/2, para 24.

<sup>218</sup> Such as parking lots or motorways eg *Belyazeka* (n 47) paras 6.2 and 7.2.

<sup>219</sup> Eg ‘Concluding observations on the second periodic report of Turkmenistan’ (20 April 2017) UN Doc CCPR/C/TKM/CO/2, paras 44-5.

<sup>220</sup> This was true also of the revised draft text of General Comment 37 published in November 2019 – text to n 110 above.



extends to assemblies in all privately-owned spaces (subject to necessary and proportionate restriction) implying instead that it extends only to privately-owned spaces that are ordinarily accessible. Indeed, it prematurely seeks to resolve questions of access that should instead be addressed on a case-by-case basis when scrutinizing the necessity and proportionality of restrictions. In this regard, a number of nuanced domestic court judgments illustrate well how assembly rights could be protected against absolutist and exclusionary assertions of property rights.<sup>221</sup> Moreover, the notion of ‘public accessibility’ defers to and reinforces existing patterns of access and use, offering no normative steer as to what ought to be accessible.<sup>222</sup> On this basis, a definition of assembly that leaves open the possibility that assemblies may take place in private spaces is preferable to one that more ambitiously attempts to resolve rights of access at the level of definition.

One could therefore be forgiven for following Nowak and simply saying nothing at all about the intrinsic spatial dimension of assembly. However, there is normative advantage to emphasizing, within any definitional formulation, its broad spatial scope. Doing so provides both clarity and iterative weight – and this may be especially important in relation to both private spaces (as above) and the question of whether ‘assembly’ extends to gatherings in online spaces – to which discussion now turns.

The UN Human Rights Council, in two successive resolutions in 2012 and 2013, emphasized the obligation of States ‘to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline.’<sup>223</sup> Subsequently, the UN Special Rapporteurs on freedom of assembly and of association, and on extrajudicial, summary or arbitrary executions, stated in a joint report in 2016 that ‘it has been recognized that human rights protections, including for freedom of assembly, may apply to analogous interactions taking place online’<sup>224</sup> – phrasing that was echoed in a further UN Human Rights Council Resolution in 2018.<sup>225</sup> It is generally accepted that cyberspace contains many forums rather than being a single undifferentiated whole.<sup>226</sup> Some such online spaces may be private (with access granted only on request or invitation) while others may be privately-owned but publicly

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<sup>221</sup> Eg German Federal Constitutional Court, Order of 18 July 2015 (‘Beer Can Flashmob for Freedom decision’), 1 BvQ 25/15; Judgment of the Amsterdam District Court in *Shell Netherlands v Greenpeace*, Case No 525686/KG ZA 12-1250. See, ‘Dutch court rejects Shell protest ban’ (BBC News, 5 October 2012).

<sup>222</sup> As Massey (n 101) 152 reminds us, the notion of ‘public space’ is often romanticized as an unencumbered ‘emptiness’ freely open to all, whereas it is ‘produced’ through ongoing contestation (and legislation).

<sup>223</sup> UNHRC, ‘Resolution 21/16 on the rights to freedom of peaceful assembly and of association’ (11 October 2012) UN Doc A/HRC/RES/21/16, para 1; UNHRC ‘Resolution 24/5 on the rights to freedom of peaceful assembly and of association’ (8 October 2013) UN Doc A/HRC/RES/24/5, para 2; UNHRC, ‘Resolution 26/13 on the promotion, protection and enjoyment of human rights on the internet’ (14 July 2014) UN Doc A/HRC/RES/26/13, para 1. No similar statement appeared in either UNHRC, ‘Resolution 25/38 on the promotion and protection of human rights in the context of peaceful protests’ (11 April 2014) UN Doc A/HRC/Res/25/38 or in UNHRC, ‘Resolution 31/37 on the promotion and protection of human rights in the context of peaceful protests’ (12 April 2016) UN Doc A/HRC/Res/31/37.

<sup>224</sup> ‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ (4 February 2016) UN Doc A/HRC/31/66, para 10.

<sup>225</sup> UNHRC, Resolution L.16 on ‘The promotion and protection of human rights in the context of peaceful protests’ (29 June 2018) UN Doc A/HRC/38/L.16: ‘although an assembly has generally been understood as a physical gathering of people, human rights protections, including for the rights to freedom of peaceful assembly, of expression and of association, may apply to analogous interactions taking place online.’ For an overview of oral interventions by Council members relating to the Resolution, see ‘Human Rights Council adopts six resolutions, including on Syria, extends mandates on Belarus and on Eritrea’ (*OHCHR*, 6 July 2018).

<sup>226</sup> D Hunter, ‘Cyberspace as Place and the Tragedy of the Digital Anticommons (2003) 91 *California Law Review* 490 and n 331; S Graham, ‘Conceptualizing space, place and information technology’ (1998) 22(2) *Progress in Human Geography* 178.

accessible.<sup>227</sup> Still others might combine an element of public accessibility with built-in (nested) capacity for private exchanges. Online access is also clearly contingent on privately-owned internet infrastructure and a host of encumbrances mediate and distort the online user experience (from advertising algorithms to interventions by site moderators, and from platform specific rules to the tracking and harvesting of user data). Nonetheless, if we are accustomed to thinking of assemblies rigidly in terms of street demonstrations and parades, conjuring an image of ‘analogous interactions’ online – let alone ‘online assemblies’ – might involve quite an imaginative leap. However, if one accepts the elements of the definition of ‘assembly’ arrived at thus far – ‘an intentional gathering by two or more people (including in private spaces)’ – conceiving of assemblies online is not such a stretch. People intentionally gather with others online all the time (and such practices have been accentuated by the lockdown restrictions introduced in response to the COVID-19 pandemic). Obvious examples include video-conferencing, chat-rooms and multiplayer online gaming.<sup>228</sup> These activities all involve intentional, synchronous coming together (though admittedly, a range of complex questions arise regarding the nature and threshold of participation).

We can sift out many forms of online interaction that are essentially forms of expression. Any collective online activity that primarily involves publishing, disseminating or sharing information might be regarded as primarily expressive. The linking of messages by hashtag is also fundamentally expressive – even if, as Zizi Papacharissi argues, hashtags ‘serve as framing devices that allow crowds to be rendered into publics ....’<sup>229</sup> But, as has been argued, the rights of assembly and expression are not mutually exclusive. The critical task is to identify when ‘assembly’ might additionally or alternatively be engaged – when people intend primarily to gather – to be present – with others, and when any speech is incidental or secondary to such gathering.<sup>230</sup>

It might be countered that it is precisely the act of ‘gathering’ that cannot be achieved online. In other words, whatever it is that people may do in common online, the physical dislocation of online interaction remains the antithesis of ‘gathering’. The weight attached in Paulo Gerbaudo’s work to bodily ‘density’,<sup>231</sup> in Timothy Zick’s conceptualization of ‘expressive topography’ to the proximity, tactility and physicality of assembling in material public places,<sup>232</sup> and in Judith Butler’s performative theory of assembly of ‘bodily proximity’ might appear to support such scepticism. However, reflecting more closely on the nature of online space and its interconnection with the physical world suggests that online assemblies (‘by people’ rather than ‘of people’)<sup>233</sup> should also be regarded as embodied gatherings.

Most significantly, our personal, social and professional lives are constituted through and configured by the intersection of the offline and online, physical and virtual. The emergence of a scholarly consensus (bridging the fields of geography, sociology, and law and technology) suggests that such spaces should not be seen as detached from one another, but as

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<sup>227</sup> Eg *Knight First Amendment Institute at Columbia University and Others v Donald J Trump and others* No 18-1691-cv (2d Cir Jul 9, 2019) 16, lines 4-6.

<sup>228</sup> For examples, see Inazu (n 87) 1105, n 47.

<sup>229</sup> Z Papacharissi, ‘Affective publics and structures of storytelling sentiment events and mediality’ (2016) 19(3) *Information, Communication & Society* 308.

<sup>230</sup> Consider, for example, a 2018 Nigerian ‘e-Pride event’ hosted on Twitter which people ‘could join from the comfort and security of their homes’. See, V Desmond, ‘How the internet is helping queer Nigerian youth push for Pride’ (*Dazed*, 28 June 2019).

<sup>231</sup> Gerbaudo (n 106) 160 but acknowledging that ‘... Democracia Real Ya and other groups have some of their meetings online, and the Occupy groups use video and voice conferencing services like Mumble to engage in forms of interaction which transcend the limits of location.’

<sup>232</sup> Zick (n 100) 3.

<sup>233</sup> ICNL, ‘Submission to the UN Human Rights Committee on Draft General Comment No 37 (Right of Peaceful Assembly)’ (February 2020).

fundamentally interwoven. Actions and relations in one orient actions and relations in the other, and this inter-connection is not linear or serial but sporadic and parallel. As such, virtual spaces inhere within the physical world. Julie Cohen, for example, rejects understandings of cyberspace as separate space – defined in relation to real space, but existing apart from it – arguing that such a perspective both ‘denies the embodied spatiality of cyberspace users, who are situated in both spaces at once’ and ‘overlooks the complex interplay between real-space geographies of power and their cyberspace equivalents.’<sup>234</sup> This emphasis on embodied experiences online suggests a point of alignment with Judith Butler’s performative theory of assembly for Butler similarly recognizes that ‘the body is not isolated from all those conditions, technologies, and life processes that make it possible’.<sup>235</sup>

Given our doctrinal concern with the meaning and scope of the term ‘assembly’, the emphasis in this scholarship on the profoundly blended nature of offline and online spaces might lead us to question whether it is even appropriate to insist on ‘analogous’ interactions (for doing so implies a separation). Nonetheless, we can still ask whether gatherings that involve no corporeal presence ought to constitute an ‘assembly’ for the purposes of Article 21. Significantly, this involves a much more modest enquiry than, for example, Gerbaudo’s concern about whether online interactions can effectively sustain long-term social movements, or Zick’s concern that the emotive quality of assembling in material spaces may simply not be replicable in virtual places.<sup>236</sup> One can, without contradiction, admit online assemblies into the Article 21 fold even if sympathetic to Müller’s conclusion that ‘assembly in physical space fulfills functions for democracy that online activity, however permanent or passionate, simply cannot’.<sup>237</sup>

The argument in favour of such an inclusive approach to the meaning of ‘assembly’ is further strengthened by the example of hologram protests.<sup>238</sup> In particular, these actions suggest how digital and technological developments might further blur the line between disembodied and embodied gatherings. We might initially think of hologram protests as disembodied simulations, little different from protest ‘installations’ such as the 2012 toy protest staged in Barnaul, Siberia,<sup>239</sup> or the 11,000 pairs of shoes placed in the vicinity of the 2015 UN Climate Change Conference (COP21) in Paris.<sup>240</sup> These of course were not assemblies but acts of expression in lieu of an assembly. Furthermore, it might seem ironic (or self-defeating) to suggest that such hologram protests should be considered as assemblies – in both Madrid and Seoul the point was precisely that these were *not* real assemblies by real people, but ‘ghost protests’ whose participants lacked rights (including the right to assemble).

Hologram protests, however, defy straightforward categorization – indeed, they occupy a *virtual* space that is not *online*.<sup>241</sup> The digital renderings in Madrid and Seoul were created using professionally recorded (physical) participants in combination with thousands of crowdsourced slogans, photos and videos from around the world.<sup>242</sup> While we might still side with the view that these are disembodied actions (falling within the ambit of expression but not

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<sup>234</sup> J Cohen, ‘Cyberspace as/and Space’ 107 *Colum L Rev* 215. Also, Papacharissi (n 233) 310; Inazu (n 87) 1112; Massey (n 101) 96-7.

<sup>235</sup> Butler (n 23) 129, 131-2; Hardt and Negri (n 23) 107, 109-110.

<sup>236</sup> Zick (n 100) 4.

<sup>237</sup> JW Müller, ‘Why Freedom of Assembly Still Matters’ (November 2018) *Project Syndicate* 13.

<sup>238</sup> J Blitzer, ‘Protest by Hologram’ (*The New Yorker*, 20 April 2015); T Rainey Smith, ‘Ghosts Assemble for Freedom in South Korea’ (Amnesty International, 13 March 2016).

<sup>239</sup> K O’Flynn, ‘Toys cannot hold protest because they are not citizens of Russia, officials rule’ (*The Guardian*, 15 February 2012).

<sup>240</sup> E Peltier, ‘With Marches Banned, Shoes Carry a Message’ (*The New York Times*, 29 November 2015).

<sup>241</sup> The distinction is worth considering further. Inazu (n 87) appears to use the terms ‘virtual’ and ‘online’ interchangeably (1096, n 10, and 1113-4).

<sup>242</sup> See further: <<https://docubase.mit.edu/project/holograms-for-freedom/>>

assembly), as holographic technologies develop, becoming less costly and more widely available, real time holographic protests could realize a shift from the disembodied screening of prior recordings to embodied live projections.

A definition of assembly need not attempt to instantiate a particular vision of what such online assemblies might look like in the future, but any definition should not foreclose the possibility that the parameters of Article 21 might thus be extended, and there is normative purchase in expressly recognizing in any definition that assemblies may also occur online.

## V. CONCLUSION

The enquiry into what constitutes an ‘assembly’ in international human rights law is both more important and more complicated than it first appears. Given in particular the need to coherently explain when the right of peaceful assembly is actually engaged (either alone or in combination with other rights) – to ascertain, in other words, what activities fall within the protective scope of Article 21 – it is vital to consider the different elements that might comprise a definition.

Attempts to compartmentalize activities either as expression, association or assembly often run aground in light of the substantive overlap between these rights. Nonetheless, this article has sought to develop an inclusive approach to the meaning of ‘assembly’, ultimately suggesting that an ‘assembly’ might best be defined as ‘an intentional gathering by two or more people (including in private and online/virtual spaces).’

It has been argued that the scope of Article 21 should extend beyond political gatherings – given in particular the impossibility of determining what precisely the ‘political’ might embrace, the value of avowedly non-political events to a politics of stimulation, and the ready possibility of weighing such considerations when scrutinizing the necessity and proportionality of restrictions. In consequence, there should be no assumed – let alone expressly stated – hierarchy of protection.

Finally, it has been argued that in spatial terms a definition of ‘assembly’ does not require anything beyond an openness to gatherings in private and online spaces – and that the particularities of access should be resolved on a case-by-case basis rather than at the level of definition. Crucially, an inclusive approach to determining the meaning and scope of ‘assembly’ does not weaken the hand of State authorities – nothing in the argument precludes the legitimate restriction of assemblies (where such restrictions are necessary and proportionate). Rather, it simply ensures that any restrictions on an ‘assembly’ must survive appropriate scrutiny. The shift by the UN Human Rights Committee towards an inclusive definition of ‘assembly’ in the text of General Comment No 37 (in particular, during its second reading) is welcome. This landmark document will provide the normative scaffolding for all who seek to gather for many years to come.