

21 February 2020

Michael Hamilton
Associate Professor of Public Protest Law
University of East Anglia

COMMENTS ON DRAFT GENERAL COMMENT 37 ON ARTICLE 21 ICCPR: THE RIGHT OF PEACEFUL ASSEMBLY

1. The current draft of the General Comment, as finalized in November 2019 following the Committee's First Reading, captures many critically important principles and standards of protection. The comments here are submitted in the hope that they might assist the Committee in further strengthening the protection of the right of peaceful assembly during the process of the Second Reading of the text.
2. This submission builds upon the analysis of the Committee's jurisprudence and Concluding Observations in ['Towards a General Comment on Article 21 ICCPR'](#), submitted in advance of the Committee's half-day discussion on the General Comment in March 2019. I have explored the meaning and scope of 'assembly' in greater detail in a journal article currently under review and would be happy to submit a copy of this to the Committee once it has been accepted for publication.

Structural separation of 'scope' and 'restrictions'

3. The right of peaceful assembly protects the multiform ways in which people seek to gather, join, come together and congregate with others. 'Assembly' is not limited to 'protest' or traditional forms of demonstration (parades, rallies and occupations etc), but also protects more quotidian gatherings (such as private meetings in houses and hostelryes). In many countries, such gatherings are simply taken for granted because they are (properly) not subject to State regulation.
4. This initial observation highlights a crucial point – the protective scope of Article 21 is significantly wider than (and should not be coextensive with) the types of assembly that might legitimately be subject to some form of regulation. All assemblies deemed to fall within the protective scope of the right may ultimately still be subject to lawful, necessary and proportionate regulation. However, the integrity of the General Comment depends on maintaining a strict structural separation between 'scope' and 'restrictions'. The draft does so for the most part – aside from its consideration of 'commercial gatherings' (**paragraph 14**) and the bracketed text (in **paragraph 22**) concerning assemblies involving advocacy of hatred falling within the terms of Article 20(2) ICCPR – both of which are discussed below. Ultimately, any elision of scope with grounds for restriction stands to diminish what the right protects and paves the way for regulatory creep.

Assembly as an 'intentional gathering'

5. 'Assembly' should be conceived in inclusive terms – finding value in assemblies not only when they seek to communicate a message and not only when they avowedly address

matters of public interest. Only an inclusive definition is capable of fully recognizing and affording due protection to the individual and social gains enabled by purposely gathering with others.

6. In definitional terms, the phrase ‘common expressive purpose’ (**paragraph 4** of the draft General Comment) clouds rather than clarifies the scope of the right. Indeed, it fails to draw the definitional boundary that is presumably intended – namely, to exclude from the scope ‘non-expressive’ incidental or happenstance gatherings such as a bus stop queue (or, in the words of the European Court of Human Rights, ‘[random agglomerations](#)’).
7. To assume a uniformity of purpose belies the diversity of motivations, priorities and views that individual participants are likely to have. Moreover, while assemblies will of-course often be expressive, it is not immediately clear why they need be so to qualify for protection. A number of US constitutional law scholars have critiqued making expression a *sine qua non* of assembly – Ashutosh Bhagwat, for example, has sought to [counter](#) ‘the pernicious idea that groups deserve protection only to the extent that they are expressive.’
8. It is also unclear whether ‘expressive purpose’ is intended only to embrace communication directed at an external audience or whether it could also include gatherings involving only internal deliberation amongst participants. If such a purpose could potentially also be *inferred* by virtue of the very presence of a gathering (in which case, many, if not all, ‘random agglomerations’ might also be regarded as having some such purpose), the utility of this definitional element is further called into question.
9. It is suggested therefore that the notion of a ‘common expressive purpose’ should be rejected as a definitional mainstay. In its place, the Committee might consider a more straightforward definition of ‘assembly’, one that does not relegate assembly to a subset of expression but instead recognizes its autonomous standing. An ‘assembly’ could be defined simply as an ‘[intentional gathering](#).’ On this formulation, it is the intention to gather (irrespective of the individual purposes in doing so) that differentiates a protected assembly from a ‘random agglomeration’.

Purported exclusion of ‘commercial’, and heightened protection for ‘political’, assemblies

10. This suggestion to jettison ‘common expressive purpose’ from **paragraph 4** of the draft General Comment has implications elsewhere in the text where the purported expressiveness of an assembly is also emphasized (principally, **paragraphs 14 and 36**, and with minor revisions also needed to **paragraphs 25 and 112**).

11. The purported 'expressive purpose' of an assembly is invoked in **paragraphs 14 and 36** of the draft General Comment to differentiate between two types (or categories) of assembly – 'political' and (non-expressive) 'commercial' assemblies – and to justify affording them different levels of protection.
12. The draft General Comment (**paragraph 14**) excludes non-expressive commercial assemblies from the scope of Article 21:

'While commercial gatherings would not generally fall within the scope of what is protected by article 21, they are covered to the extent that they have an expressive purpose.'

13. In the absence of further clarification, it is entirely unclear what might constitute a non-expressive 'commercial gathering'. Assemblies will often involve a range of different goals and there is no reason to wholly exclude from protection events with a commercial rationale. Being primarily profit-oriented might perhaps be a factor that legitimately moderates the degree to which State authorities should be expected to fully resource the facilitation of such an assembly – albeit not so as to undercut the important general statement of principle in **paragraph 74** (that costs 'as a rule' should be covered by public funds).
14. The draft text (in **paragraph 36**) affords heightened protection to assemblies with a political message:

'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.'

15. As with 'commercial' assemblies, the boundaries of the 'political' are both porous and amorphous and **paragraph 36** implies a content-based hierarchy that risks (indeed, justifies) the under-protection of non-political or pre-political gatherings (perhaps those that are primarily artistic, cultural or recreational and which are also deserving of strong protection in their own right).
16. Given that such bright-line distinctions are often impossible to draw (or simply do not exist), one possibility might be to reword paragraph 14 by combining it with current para 7, along the following lines:

14. Assemblies may serve a range of goals. These include communicative purposes (such as conveying a collective position on a particular issue) and associative purposes (such as asserting group solidarity or identity). Assemblies may, for example, be political, religious, cultural, commemorative, celebratory,

recreational, sporting or commercial (or a combination of these). Straightforward classification is often impossible and individual participants may have different motivations and priorities. All such purposes, however, fall within the protective scope of article 21.

'By their nature temporary'? (Or including assemblies 'for an extended duration')

17. It is noteworthy that the scope of 'assembly' is not confined (in **paragraphs 4 and 13** of the draft General Comment) to 'temporary' gatherings. This much is to be welcomed – temporariness is an inherently imprecise measure, one that immediately places the right of assembly on the backfoot (calling into question whether protracted sit-ins or encampments qualify for protection) and serving only to create a dangerous pretext for State intervention.
18. However, notwithstanding the absence of any reference to 'temporariness' in paragraphs 4 or 13 of the draft General Comment, **paragraph 62** of the draft (in the section on 'Restrictions') provides that: '*[p]eaceful assemblies are generally by their nature temporary*'. **Paragraph 68** similarly limits the erection of structures at assemblies '*given the temporary nature of assemblies*'.
19. Long-term and quasi-permanent assemblies ought to be afforded protection – the relative permanence of a protest camp has, for example, been [argued to be a 'constant reminder to those in power'](#) (para 13). In like manner, the [ACHPR, Guidelines on Freedom of Association and Assembly in Africa](#) (2017) (paras 3 and 88) expressly resist such temporal limitations at the level of definition: 'Assembly refers to an act of intentionally gathering ... for an extended duration'.
20. That, of-course, is not to suggest that necessary and proportionate restrictions on duration cannot be imposed. Rather, it is simply to emphasize that temporariness should not be elevated to an essential or intrinsic characteristic of assembly (but should instead be one factor amongst many that is weighed when deciding on the necessity and proportionality of restriction). As such, **paragraphs 62 and 68** might be revised so as not to suggest that temporariness defines the 'nature' of an assembly.

The spatial dimensions of the right of assembly

21. The question of *protection* for assemblies on privately owned property (see (a) below) should be addressed separately from questions of *access to* privately owned property (see (b) below). In particular, the General Comment could do more to distinguish when it is addressing questions of *access* and when it is addressing the general principle that the right of peaceful assembly *protects* assemblies in both public and private spaces. By way of example, the wording at the beginning of paragraph 64 – '*As for any restriction on the*

element of place’ – lacks clarity in this regard (the paragraph seems primarily to address questions pertaining to access). In addition, the General Comment could go further to acknowledge the possibility of assemblies in online spaces (an argument that is addressed in a separate submission).

(a) The protection of assemblies in privately-owned spaces

22. The draft General Comment (**paragraphs 4 and 13**) includes possible text in parenthesis suggesting that assemblies on privately-owned property (a) are *protected* only if that property is publicly accessible (**paragraph 4**), or (b) can only be *held* on privately-owned property if that property is publicly accessible (**paragraph 13**):

Paragraph 4: ‘The right of peaceful assembly protects the non-violent gathering of persons with a common expressive purpose in **[a publicly accessible / the same]** place.’

Paragraph 13: ‘... Assemblies can be held on publicly or privately-owned property **[provided the property is publicly accessible].**’

23. The emboldened (bracketed) text in these extracts should not be included. It is imperative that the General Comment unequivocally recognizes that assemblies that take place in privately owned places fall within the protective scope of Article 21. Such a recognition does not confer any right of access but simply recognizes (as stated in the last sentence of **paragraph 67**) that ‘[a]ssemblies held on privately owned property with the consent of the owners enjoy the same protection as other assemblies.’ The bracketed wordings (in **paragraphs 4 and 13**) if incorporated, would undermine the assurance given in **paragraph 67** (which itself deserves greater prominence in the section relating to the scope of the right).
24. It might be worth re-thinking the degree of overlap between **paragraphs 4 and 13**, noting that paragraph 4 is in the introductory ‘General remarks’ section while **paragraph 13** is where the ‘scope’ of the right is elaborated (and thus ought to be the more definitive).
25. For the sake of making it clear that the scope of the right of peaceful assembly *protects* assemblies in privately-owned property (irrespective of whether it is publicly accessible), **paragraph 13** might be reworded to read – perhaps adding here an iterative reference to online spaces:

‘To qualify as an “assembly”, there must be an intentional gathering of [two or more] persons. Assemblies can be held in publicly or privately-owned spaces (including online spaces).’

26. In addition, **paragraphs 4 and 5** could potentially be combined so as to read:

‘Everyone, including children,¹ can exercise the right of peaceful assembly. It is an individual right that is exercised collectively. In addition to its exercise by citizens, the right may also be exercised by, for example, foreign nationals,¹ including migrant workers,¹ asylum seekers and refugees,¹ as well as stateless persons.’

(b) Access for assemblies to privately-owned spaces

27. In **paragraph 64**, the use of the permissive ‘may ... be’ suggests that this sentence is addressing questions of access (rather than protection more broadly).

Paragraph 64: ‘... peaceful assemblies may in principle be conducted in all places **to which the public has access or should have access**, such as public squares and streets.

28. It is in relation to questions of *access to* privately-owned property that the concept of ‘public accessibility’ might be regarded as favourable to assembly rights – extending the scope of the right beyond public places and offering at least some foothold for assembly rights on privately-owned places (those that are ordinarily accessible). This is set against the backdrop of the Committee’s Article 19 holding that the right to freedom of expression does not confer an unfettered freedom of forum ([Zündel v Canada](#), para 8.5).

29. The question arises as to whether ‘public accessibility’ establishes a sufficiently protective threshold – whether it achieves the correct balance between the right of peaceful assembly and rights of property ownership, access and use. Three points can be made in this regard:

- i) One criticism of ‘public accessibility’ is that it merely defers to the status quo – to established rights of access, however won. Paragraph 64 seeks to confront this criticism by adding the words ‘or should have access’. However, the text here provides no further steer as to when the public should or should not have access (beyond the cited example ‘of public squares and streets’ – which, for the most part, are not privately owned).
- ii) The draft General Comment also makes reference to the increased private ownership of public spaces (**paragraphs 11 and 67**). However, it is not only because of the privatization of public spaces that ‘assembly rights may require some recognition on private property ...’ – and again, it is not *only* on private property ‘... that is open to the public’ (**paragraph 67**). Assembly rights may more generally require some recognition on private property on account of the ‘sight and sound’ principle (**paragraphs 25, 30 and 61**). This places a thumb on the scale of assembly rights (and indeed, is properly reflected in the reference in **paragraph 67** to ‘conveying their message to their target audience’).
- iii) **Paragraph 67** emphasizes that ‘[t]he interests of private owners have to be given due weight but may have to be limited if the participants have no other

reasonable way to convey their message to their target audience’ (emphasis added). This errs close to the dangerously high threshold in relation to access to privately owned property established by the European Court of Human Rights in [Appleby v UK](#) (namely, that only where ‘the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed’).

30. It is suggested here that **paragraph 67** could be reworded along the following lines so as to strengthen the protection of assembly rights in the face of exclusionary proprietary claims, recognizing that the right of assembly will not always prevail:

‘Access for assemblies to privately-owned property might properly be granted to give effect to the ‘sight and sound’ principle, EITHER particularly where the impact on property rights is not significant OR taking account of the extent of the likely interference with relevant property rights. In such cases, the interests of property owners must be given due weight.’

31. In this regard, domestic courts in different countries have reached nuanced judgments that offer a level of access for assemblies against exclusionary assertions of absolute property rights. Consider, for example, the German Federal Constitutional Court decision in the [‘Bierdosen \(Beer Can\) Flashmob for Freedom’](#) case. This concerned the *de facto* prohibition of a flash-mob protest against a ban on alcohol consumption in a privately-owned square in Passau (during which participants planned to open a can of beer and drink it as quickly as possible). The court overturned the restrictions on the basis of the particular facts of the case – the short duration of the assembly, its communicative purpose, the centrality of the particular place to that message, the relatively limited publicity the event had received, the small estimated number of participants (based on a Facebook count of registered interest), the organizer’s pledge to clean up any litter, the severe impact of a total ban on the right of assembly *and the relatively slight impairment of property rights that the assembly would cause*.
32. In a similar vein, the Amsterdam District Court in the case of [Shell Netherlands v Greenpeace](#) permitted protests to be held on privately owned property (garage forecourts) even where these disrupted the commercial activity of the garages (by blocking access to the petrol pumps) (for a summary news report in English see [here](#)). The Court noted that ‘[a] company such as Shell, which performs or wishes to perform activities that are controversial in society, and to which many people object, can and must expect that action will be taken to try to persuade it to change its views.’ While the Court did impose a number of stringent conditions on the protests, Shell’s proprietary interests were not viewed as an automatic bar on protest activity. Holding that ‘the action must not last longer than necessary for achieving the intended effect’ and that Shell must be informed in writing of the objective, method and intended duration at the start of any action (so as to avoid *substantial* damage to its interests), the court imposed time

limitations on the duration of the protest actions (rather than an outright prohibition). This more permissive stance was counter-balanced by the Court's holding that Greenpeace would be liable to pay a significant financial penalty should future protest actions breach these conditions.

33. Consideration of the impact of an assembly on property rights should ultimately be no different from consideration of its impact on other rights and freedoms – the degree to which they are impinged is not 'all or nothing' and property rights (including those relating to private property that is not ordinarily accessible) should not be elevated to the extent that assemblies on private property are presumptively excluded from the protective scope of Article 21.

'Peacefulness' and incitement to discrimination or hostility under Article 20(2) ICCPR

34. **Paragraph 22** of the draft General Comment contains two alternative options, the first of which is that:

'The scope of article 21 is further determined by article 20 of the Covenant, which requires States parties to prohibit propaganda for war (art. 20 (1)) and advocacy of national, racial or religious hatred that constitutes incitement to discrimination or hostility, in addition to violence (art. 20 (2)). Participation in assemblies where the expressive purpose is covered by article 20 does not fall within the scope of, and is not protected by, article 21. Such assemblies must be prohibited.'

35. A similar argument reappears in **paragraph 57 of** the draft General Comment – that '[a]ssemblies which [**in their entirety**] fall within the scope of article 20 must be prohibited'.
36. A key problem here is that it is not sufficiently clear (based on current jurisprudence) what assemblies 'fall within the scope of article 20' (let alone what the phrase 'in their entirety' connotes). As such, both **paragraph 57** and **Option 1 in paragraph 22** risk legitimizing widely framed domestic categorizations of assemblies falling within any strand of Article 20(2) – and, in turn, their prohibition.
37. As noted at the outset of this submission (at paras 2 and 3 above), robust protection of the right of peaceful assembly relies on a clear separation between 'scope' and 'restriction', recognizing that assemblies falling within the protective scope of the right may yet be subject to lawful, necessary and proportionate restriction. As such, I would strongly support **Option 2**. Furthermore, the last sentence of **paragraph 57** contains the principle that ought to be the general rule and should therefore be accorded much greater prominence – that 'action should be taken in such cases against the individual perpetrators, rather than against the assembly as a whole.' Indeed, the footnoted

reference to the principle articulated in para 50 of [General Comment 34](#) (that limitations justified on the basis of article 20 must also comply with Article 19(3)) similarly deserves greater prominence.

Further points arising in the draft text of General Comment 37

38. **Paragraph 19:** I would urge deletion of the bracketed phrase ‘**and is sometimes referred to as a riot**’ since this might be read to confer legitimacy on domestic law formulations of the offence of ‘riot’. These offences can be highly problematic. Like ‘unlawful assembly’ (which is sometimes the predicate offence for ‘riot’), categorization as a riot tends to treat an assembly *en bloc* and is too often used to round up participants who are present at an assembly at which violence occurs, rendering them potentially liable to lengthy terms of imprisonment.
39. **Paragraph 25 (and also paragraph 61):** the principles of ‘content neutrality’ and ‘sight and sound’ might usefully be set out in separate paragraphs so as to give equal prominence to each.
40. **Paragraph 29 improperly endorses ‘precautionary measures’** (notwithstanding the qualification that these should be ‘aimed at preventing violations and abuses of the different rights at stake’ and ‘cannot serve as a justification for measures that violate human rights’): This is a deeply problematic term, too easily interpreted to justify sweeping prior restrictions on the right of peaceful assembly and also potentially justifying excessive (and/or disingenuous) risk-aversion on the part of State authorities.
41. The use of the term ‘managing’ or ‘management of’ assemblies (**paragraphs 32, 33 and 71**) improperly characterizes the obligations and role of State authorities. The role of the State – as emphasized elsewhere in the draft text – is to ‘respect and ensure’ and ‘to facilitate the exercise of the right and to protect the participants’ (e.g. **paragraphs 8, 24, and 26-27**). ‘Management’ is more closely aligned with ‘control’ and if given prominence in the General Comment may unduly reinforce policing practices (and a police ‘ego-image’) that affords insufficient protection to the essence of the right of peaceful assembly.
42. **Paragraphs 34 and 85** could expressly articulate the duty of State authorities to distinguish monitors and observers from assembly participants. Third party assembly monitors and observers are often highly vulnerable, falling between established protections in international human rights law (including those for journalists). In particular, law enforcement officers in many countries routinely fail to distinguish monitors and observers from assembly participants, treating them instead *as* participants or as so closely associated with participants that no differentiation is made. There are abundant reported examples of non-differentiation – from the [UK](#) (also [here](#)), [France](#), [Belarus](#), and the [US](#) (at p.100, ‘(i) Legal Teams’). In a similar vein, the General Comment could additionally emphasize the obligation of States to distinguish medical personnel

involved in treating injured assembly participants (for some reported examples, see [Hong Kong](#), [Turkey](#), [Bahrain](#), [Nicaragua](#) and [Sudan](#)).

43. **Paragraph 37:** this paragraph contains welcome protection for activities relating to the holding of and participation in assemblies. The wording of the final sentence (regarding penalties for publicizing an upcoming assembly) could perhaps be further strengthened by replacing the words ‘a specific indication’ with ‘[compelling evidence](#)’.
44. **Paragraph 63** uses rather loose wording that is potentially too welcoming of restrictions (specifically, ‘raise *concerns* about their compatibility with’; ‘may warrant restrictions’, and ‘undue impact’).
45. **Paragraph 75:** The sentence, ‘If this is done, responsibility must be limited to what they could have foreseen and prevented with reasonable efforts’, imposes an unjustifiable form of strict liability on assembly organizers (reflecting the problematic judgment of the South African Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others*). This has the effect of unduly reducing the State’s obligation to protect peaceful participants from violence beyond their control (but which they may well have foreseen).
46. **Paragraph 78** relating to pledges not to participate in future assemblies could be further expanded (since it is not only ‘pledges from individuals’ that are an issue, but the imposition of binding future prohibitions). In this regard, see, for example, para 223 of the [draft 3rd edition](#) of the OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly*:

‘**Restrictions on participation in future assemblies.** Future participation in peaceful assemblies should not be restricted (for example, through the imposition of bail conditions) unless there is incontrovertible evidence that the person intends to violate the law during specific future assemblies. Where any such restrictions are imposed on future participation, there must be an opportunity to challenge their necessity and proportionality in court.’

Paragraphs 78-79 might then also be combined with **paragraph 76** so that these too are read subject to the review procedures outlined in **paragraph 77**.

47. **Paragraph 80 (Notification)** of the draft General Comment is welcome in that it considers notification ‘like other interferences with the right of assembly’ which must be justified with reference to the grounds listed in article 21. This is in contrast to the problematic approach of the European Court of Human Rights which has repeatedly stated that ‘notification, and even authorisation procedures, for a public event do not normally encroach upon the essence of the right’ (see, for example, [Berladir v Russia](#)). This starting premise means that the Strasbourg Court does not scrutinize what are often highly cumbersome, intrusive and bureaucratic ‘notification’ procedures (often more closely

resembling authorization procedures) or indeed procedures that unjustifiably trigger some form of ‘negotiation’ between assembly organizers and the authorities (with inadequate safeguards to protect core aspects of the right that should not be subject to negotiation).

48. **Paragraph 81 (Consequences of a failure to notify):** the bracketed text, ‘should not render *participation* in the assembly unlawful’, should be retained. This recognizes that individualized protection properly attaches to peaceful participation (separately from what an organizer may or may not have done) and that any (proportionate) liability in such circumstances should be placed on the organizer. Moreover, retention of the bracketed text does not entail the denial of the technical unlawfulness of the assembly. Rather, it properly emphasizes the importance of continuing to protect peaceful participants (who generally have little or no awareness of or involvement in the modalities of an assembly’s organization). The bracketed text does depart somewhat from the Strasbourg Court’s admissibility decision in [Ziliberg v Moldova](#) – but I would argue that such a departure is warranted. In *Ziliberg*, the Court held that ‘since States have the right to require authorisation, they must be able to apply sanctions *to those who participate* in demonstrations that do not comply with the requirement’ (emphasis added). The Court continued, ‘[t]he impossibility to impose such sanctions would render illusory the power of the State to require authorisation.’ It is suggested here that the power to require notification is not rendered illusory if liability can still be attached to assembly *organizers*. The Strasbourg Court has since gone some way to recognizing the need to protect individual participants, having noted in a number of judgments that: ‘[a]n unlawful situation, such as the staging of a demonstration without prior authorisation, does not necessarily justify an interference with a person’s right to freedom of assembly’ (see [Kudrevičius v Lithuania](#), para 150, and more recently, in a case where criminal liability was imposed on an organizer of a flashmob, [Obote v Russia](#), paras 41-44).
49. **Paragraph 103** (regarding the deployment of undercover officers) could be substantially strengthened. In particular, the low threshold of ‘*reasonably necessary*’ fails to recognize that such deployments should be exceptional and justified only when ‘strictly necessary’. Given, for example, protesters’ experiences of undercover policing in the UK (and the ongoing [Undercover Policing Inquiry](#)), any such undercover deployments should be exceptional, strictly regulated by law, for the purpose of investigating specific criminal acts and subject to independent (perhaps judicial) oversight. By way of example, the wording of para 173 of the [draft 3rd edition](#) of the OSCE/ODIHR – Venice Commission *Guidelines on Freedom of Peaceful Assembly*, provides that:

‘The deployment of undercover police must be exceptional and strictly regulated by law. In some countries, law enforcement officers have, in the past, infiltrated assemblies and pretended to be participants. The use of undercover police officers, however, is only ever permissible (and only exceptionally so) if the

purpose of collecting information during an assembly is to investigate specific criminal acts. In all cases, such practices must be subject to continuous and strict independent oversight and scrutiny. Collecting information on assembly participants in the absence of a concrete criminal investigation constitutes an interference with the participants' rights to freedom of assembly and privacy. As such, the exceptional circumstances in which undercover law enforcement officials may be deployed (either before, during or after assemblies) should be fully and clearly regulated in law, following a published policy that is compatible with international human rights standards. Any such legislation and policy should specify the permissible methods of gathering information, the purposes for which any information gathered may be used, the specific law enforcement agencies/personnel that may obtain access, and for how long the data obtained may be stored.'

Conclusion

50. General Comment 37 stands to provide a much needed, long overdue and authoritative interpretation of the right of peaceful assembly under Article 21 ICCPR. There is some scope to further strengthen the draft text, in particular by embracing a more inclusive definition of 'assembly'. In this regard, the Committee should not be hostage to previous definitions, even where these appear to have become established reference points – such as Manfred Nowak's seminal commentary on the ICCPR (now in its [3rd edition](#)), or the definition proposed by the [UN Special Rapporteur on the rights to freedom of peaceful assembly and of association](#) (para 24), or that used to describe the primary focus of the [OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly](#) (p.15, para 1.2 and p.29).
51. Recognizing such an inclusive definition simply shifts attention to appropriate scrutiny of any restrictions imposed and avoids 'double-dip' restriction: Factors relating to the justification of restrictions – including, as discussed above, the property rights of others that might be engaged, or the impact on the rights of others caused by conduct which might incite hostility or discrimination – should not be collapsed into the definitional parameters of the right.

Michael Hamilton
UEA Law School
21 February 2020