

## ‘Deal with me, here I stand!’: presence, participation and the equal protection of online assemblies

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### Introduction<sup>1</sup>

‘Deal with me, here I stand!’ were words that Christof Heyns used to convey the drama inherent in many forms of assembly and protest. Central to so much of Christof’s work – including his doctoral research on civil disobedience in South Africa and his captivation with the example of Mahatma Gandhi in struggles against injustice and colonialism – was the sense of urgency, even of crisis, that such principled action can usher forth against the seeming unassailability of state power in all its forms.

Given that social action is today increasingly mediated by information and communication technologies (ICTs), this chapter reflects upon what it means to stand, or to take a stand, in a digitally mediated world. In particular, the chapter overviews some of the ideas that fed into Christof’s ground-breaking work as the United Nations (UN) Human Rights Committee’s Rapporteur in drafting General Comment 37 on the right of peaceful assembly.

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1 This chapter draws extensively on a submission made to the UN Human Rights Committee in February 2020 written collectively by the authors and Suzanne Dixon and Jennifer Young (University of East Anglia) and Eleanor Salter, Katja Achermann, Camille Barras, Allysya Czerwinsky, Bronwen Mehta and Muznah Siddiqui (Centre of Governance and Human Rights, University of Cambridge): Hamilton and others ‘The Right of Peaceful Assembly in Online Spaces: A Comment on the Revised Draft General Comment No. 37’ (2020) <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/ACADEMIA-Hamilton-Dixon-Young-McPherson-Srinivasan-Elean.docx> (accessed 7 January 2022).

Premised on a recognition of the blended and hybrid nature of online and offline activity, the General Comment ultimately recognised that the right of peaceful assembly enshrined in article 21 of the International Covenant on Civil and Political Rights (ICCPR) should not only protect gatherings in physical spaces (whether publicly or privately owned), but should also afford protection to assemblies in online, or digitally mediated, spaces.<sup>2</sup>

This chapter outlines the journey that led to this highly significant advance. It charts the model of consultation and engagement that Christof pioneered during his human rights work with the UN, and which characterised the drafting of the General Comment. It then flags two particularly salient aspects of the right of assembly in online spaces, recognising that these remain highly relevant to the future development and interpretation of the Covenant in this context – first, threshold questions relating to the notions of presence and participation, and second, challenges relating to the protection of assemblies deriving from the particular logics of online spaces and the corresponding threats that may inhibit or prevent assemblies from materialising, for some groups more than others. We turn, in closing, to one particular hallmark of Christof's enduring legacy – his indefatigable commitment to collaborative and inclusive human rights work.

## Online assemblies and the drafting of General Comment 37

In October 2018, the UN Human Rights Committee announced its decision to focus its next General Comment on the right of peaceful assembly under article 21 of the Covenant – something that had long been advocated.<sup>3</sup> Christof was appointed as the Committee's Rapporteur to lead the drafting process. Over the course of the process, there were three published iterations of the text – the first draft published in June 2019,<sup>4</sup> the revised draft later that year (as adopted by the Committee

2 UN Doc CCPR/C/GC/37 'General Comment No 37 on the right of peaceful assembly (article 21)' 17 September 2020 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=en) (accessed 7 January 2022): para 6 – 'Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof'; para 10 – 'given that emerging communications technologies offer the opportunity to assemble either wholly or partly online ...'; and para 13 – 'Although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, article 21 protection also extends to remote participation in, and organization of, assemblies, for example online.'

3 I Jaques, 'Peaceful protest: a cornerstone of democracy: how to address the challenges?' (Wilton Park Conference WP1154, 26-28 January 2012) 2, para 5.

4 'General Comment No 37 Article 21: right of peaceful assembly. Draft prepared by the Rapporteur, Christof Heyns' <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/DraftGC37.docx> (accessed 7 January 2022).

following its First Reading in November 2019),<sup>5</sup> and the final text adopted in July 2020.<sup>6</sup> Viewed in isolation, these documents belie the painstaking process through which the Comment was crafted, with every word and sentence dissected and debated.

Since global headlines are so often dominated by the violent suppression of peaceful demonstrations, it seemed somehow incongruous that the Human Rights Committee had never before attempted to elaborate upon the meaning of this foundational democratic right. Notably, this pattern of protests and their suppression continued as the Committee worked to finalise the text of the General Comment in 2020 – even against the backdrop of the COVID-19 pandemic. The Carnegie Endowment for International Peace's Global Protest Tracker, for example, counted one protest every four days in April 2020 and found that for most of the year the monthly number of protests in 2020 exceeded those in 2019. Protests burgeoned across the globe, from Lebanon, to Chile, to Hong Kong, to Iran, and addressed injustices such as those related to elections, corruption and the pandemic itself.<sup>7</sup> Another major theme of protests world-wide was police brutality. Documented instances of police violence fuelled the Black Lives Matter movement, for example, which coalesced in many and various assemblies, including those linked by the #BLM hashtag and marches on the streets.

In the years leading up to General Comment 37, manifestations of assembly in predominantly-online and hybrid physical-digital situations also multiplied. So did the challenges of assembling online, driven in part by the intensification of how assemblies were being technologically mediated across time and place, the proliferation of assemblies in privately-owned, profit-driven spaces such as social media platforms, and the permanence of digital traces with their concomitant risks for participants.<sup>8</sup> Gatherings that were either partly or wholly online risked not being recognised by states either as assemblies or as activities that were integral to assembling and thus deserving of protection under article 21. Examples of this lack of recognition included the banning of

5 'General Comment No 37 Article 21: right of peaceful assembly. Revised draft prepared by the Rapporteur, Mr Christof Heyns' as adopted on First Reading during the 127th Session of the Human Rights Committee (14 October – 8 November 2019) [https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/ENGLISH\\_GC37.docx](https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/ENGLISH_GC37.docx) (accessed 7 January 2022).

6 UN Doc CCPR/C/GC/37 (n 2).

7 B Press & T Carothers 'Worldwide protests in 2020: a year in review' Carnegie Endowment for International Peace: 21 December 2020 <https://carnegieendowment.org/2020/12/21/worldwide-protests-in-2020-year-in-review-pub-83445> (accessed 7 January 2022).

8 E McPherson and others 'Right to online assembly research pack' (Centre of Governance and Human Rights, University of Cambridge: November 2019) 26 <https://www.cghr.polis.cam.ac.uk/system/files/documents/right-to-online-assembly.pdf> (accessed 7 January 2022).

the video link to the Turkish President Erdoğan at a rally in Germany in 2016<sup>9</sup> and the fining of Singaporean activist Jolovan Wham for holding an unauthorised indoor assembly featuring a Skype call from Hong Kong activist Joshua Wong in 2016.<sup>10</sup>

In addition to the urgency of understanding these novel challenges facing assemblies, there was a need in intellectual terms to map the autonomous sphere of the right of peaceful assembly and to distinguish it from the cognate rights of expression and of association. A number of scholars had sought to impress the importance of articulating what is valuable and unique about assembly without falling back on its purported expressiveness.<sup>11</sup> In other words, the right of peaceful assembly should not merely be regarded as coextensive with, let alone be subordinated to, the rights to freedom of expression or association. The right of peaceful assembly protects a form of social action of distinctive importance to how citizens participate in society and politics. While assemblies may sometimes have an avowedly expressive purpose and inevitably involve associating with others (with varying degrees of proximity and organisation), an assembly might not aim at expression and may involve amorphous and transient gatherings (absent the characteristics of more formally constituted groups). The fluid boundaries between these interdependent rights are especially important to recognise in the context of assemblies mediated through digital means.

In terms of normative standard-setting, therefore, a General Comment on article 21 had much to offer in terms of guidance to individual complainants. Additionally, it would help bring coherence and consistency to the Committee's jurisprudence and Concluding Observations on state party reports. Finally, the General Comment would be a resource for regional and state actors of various kinds, giving them access to clear and authoritative guidance on their obligations. The likely longevity of any adopted text also meant that the General Comment, whose drafting Christof was leading, needed somehow to be reasonably future-proof. In this regard, as Manfred Nowak has noted,

9 'Turkey condemns German court for banning Erdoğan video link to rally' *The Guardian* 31 July 2016 <https://www.theguardian.com/world/2016/jul/31/erdogan-supporters-cologne-germany-turkish-rally> (accessed 7 January 2022).

10 'Singapore charges activist for holding public assemblies, including a Skype talk with Joshua Wong' *Hong Kong Free Press* 28 November 2017 <https://www.hongkongfp.com/2017/11/28/singapore-charges-activist-for-holding-public-assemblies-including-a-skype-talk-with-joshua-wong/> (accessed 7 January 2022).

11 M Hamilton 'The meaning and scope of "assembly" in international human rights law' (2020) 69 *International & Comparative Law Quarterly* 521 529-30 citing CE Baker 'Scope of the first amendment freedom of speech' (1978) 25 *UCLA Law Review* 1011 1030-1; JD Inazu 'The forgotten freedom of assembly' (2010) 84 *Tulane Law Review* 567; 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 *Washington University Law Review* 1383-84.

an evolutive interpretation of the term ‘assembly’, in keeping with the interpretative approach set out in article 31 of the Vienna Convention on the Law of Treaties, would have entailed that it ‘...be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional right’.<sup>12</sup>

In this regard, the Human Rights Committee had previously recognised the benefits of adopting an open and inclusive approach to determining the scope of rights within the Covenant. A decision, for example, was taken to not expressly include particular forms of expression in the text of General Comment 34 ‘on the understanding that the list of forms of expression must always be an open one ...’<sup>13</sup> In like manner, the European Court of Human Rights had sought to ‘avert the risk of a restrictive interpretation’ of the right to freedom of peaceful assembly, refraining ‘from formulating the notion of an assembly ... or exhaustively listing the criteria which would define it ...’<sup>14</sup>

Some commentators urged the Committee to follow this open-ended approach and to exercise caution in recognising a right to assemble online:

[F]urther thought is needed before the Committee concludes that Article 21 is the proper home for this topic, and much more work is needed before the Committee could articulate rules that govern state behavior in regulating an “assembly” that takes place entirely online ... [T]he Committee should not be afraid to adopt a General Comment that explicitly leaves an important future dimension of its subject open.<sup>15</sup>

Over the course of the drafting process – and certainly at its outset – those involved in the discussion had divergent views about whether or not digital platforms, devices and infrastructures could or should be conceived as spaces for assemblies (rather than merely as a tool for organising assemblies in physical spaces). Christof himself, in his former role as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a joint report in 2016 with Maina Kiai (then UN Special Rapporteur on the rights to freedom of peaceful assembly and of association) in which they rather guardedly suggested ‘that human rights protections, including for freedom of assembly, may apply to

12 WA Schabas *UN International Covenant on Civil and Political Rights: Nowak’s CCPR commentary* (NP Engel 2019) 484, para 5.

13 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* 627 648.

14 *Navalny v Russia* ECHR [GC] (2018) 15 November 2018, para 98.

15 G Neuman ‘The draft General Comment on freedom of assembly: might less be more?’ *Just Security* 4 February 2020 <https://www.justsecurity.org/68465/the-draft-general-comment-on-freedom-of-assembly-might-less-be-more/> (accessed 7 January 2022).

analogous interactions taking place online'.<sup>16</sup> Similar phrasing was then used in the revised draft text of General Comment 37 adopted by the Committee in the First Reading of the General Comment in November 2019:

... although the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, comparable human rights protections also apply to acts of collective expression through digital means, for example online.<sup>17</sup>

These cautious approaches reflect questions over what makes digitally mediated activity comparable or analogous to physical assemblies offline, and thus protected by the right of peaceful assembly, and indeed what the consequences of such a direct comparison might be. The answers are far from straightforward.

One could certainly begin to draw out the analogy in terms of particular facets of an assembly, but not without challenges. For example, the conceptualisation of 'peacefulness' or the lack thereof in the context of online spaces may implicate different modes and forms of behaviour (including trolling, hacktivism, DoS/DDoS attacks and other acts of service disruption that target – for example – corporate, government or military websites). Some such activities might normally fall outside the protective scope of either expression or assembly, but, to the extent that they involve intentional gatherings, may on occasion be viewed as analogous to sit-ins and occupations. As such, it might be argued that the attendant disruption of internet traffic (whether this is to flows of information, data or finance) ought to be afforded some level of toleration and should not be equated with non-peacefulness (such as would exclude it from the scope of the right).<sup>18</sup>

Despite this cautious approach to comparison in academic and policy circles, we often hear from politicians, as Jan-Werner Müller has observed, that 'social media platforms are increasingly serving as today's town squares'.<sup>19</sup> These rather tenuous assertions of normative equivalency between offline and online domains lack persuasive force – a point recently well-made by Dafna Dror-Shpoliansky and Yuval Shany.<sup>20</sup> Although online assemblies share many characteristics of face-

16 UN Doc A/HRC/31/66, 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, para 10 (our emphasis).

17 General Comment 37, Revised draft (n 5) para 15.

18 A Calabrese 'Virtual nonviolence? Civil disobedience and political violence in the information age' (2004) 6(5) *Info* 326.

19 JW Müller 'What spaces does democracy need?' (2019) 102 (2-3) *Soundings: An Interdisciplinary Journal* 203 204.

20 D Dror-Shpoliansky & Y Shany 'It's the end of the (offline) world as we know it: from human rights to digital human rights – a proposed typology' (2020) *Hebrew University of Jerusalem Legal Research Paper*.

to-face assemblies, these may be altered by digital mediation across place and time. For example, digital mediation may afford more and/or different distortions, forms of surveillance, discrimination and chilling effects; less and/or different cues to support the interpretation of communication within the assembly; and more and/or different external logics that inflect the nature of the assembly in question, particularly commercial logics governing the often privately-owned spaces of online assemblies. Unsupported assertions of equivalency can operate to obscure distinctive attributes and particular forms of interference and thus dilute protections for both.

A more analytical approach – one that doesn't start from a position of assumed equivalency – takes as fact that assemblies can occur online and then asks to what extent, if at all, do the definitions, doctrines and duties that apply in respect of face-to-face assemblies translate to forms of assembly online? Such an approach recognises that to insist upon the 'analogous' or 'comparable' nature of online and offline assemblies risks a dangerous fungibility of these different kinds of interaction and may unduly suggest that one can easily function as a substitute for the other. This could serve to encourage a pernicious extension of 'alternative channels' reasoning by state authorities or courts whereby restrictions on an in-person demonstration could conceivably pass constitutional muster if the authorities were able to point to an 'equivalent', 'analogous' space online (an alternative channel) where the assembly could be directed to take place instead.<sup>21</sup>

With risks such as these in mind, several human rights actors, institutions and civil society organisations advocated for stronger recognition of a right of peaceful assembly online – a point raised in many of the submissions to the Committee in response to the revised draft text of the General Comment.<sup>22</sup> Moreover, the global events of 2020 brought dramatic developments in both the context and the content of assemblies, and abruptly made the recognition of assemblies

21 Wording to this effect had been included in the Revised Draft of General Comment 37 (n 5) para 15: '... the fact that people can communicate online should not be used as a ground for restrictions on in-person assemblies.' Ultimately, this wording was omitted from the final adopted text (para 13).

22 For example, the submissions <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx> (accessed 7 January 2022) by: Article 19: 'the scope of the right of peaceful assembly should not be unnecessarily tethered to limited understandings of physical, public space'; the International Center for Not-for-Profit Law (ICNL): 'use of the word "comparable" suggests that gatherings through digital means are not protected by art. 21, and furthermore are not protected to the same extent as physical gatherings, without clarifying the source and scope of any applicable protections.'; and Amnesty International: 'we caution against referring to the protection of such digital assemblies as "comparable human rights protections." ... [W]e fear the present form of words ... could be interpreted to mean that comparable protection is provided by other rights standards, and not by article 21. We take the view that in order to be "future proof", the General Comment should be clear that digital assemblies may be protected by the right to freedom of peaceful assembly itself.'

in online or digitally mediated spaces more critical than ever before. The COVID-19 pandemic forcibly limited so many usual opportunities for in-person assembly, whether through stay-at-home orders, restrictions on the number of people that could gather together or closures of physical places. For so many of us, if we wished to assemble, it had to be online – or face the new risks of physical assemblies arising from disease and emergency regulations. Such arguments were also obtaining traction in other quarters of the Human Rights Council.<sup>23</sup> There was thus a historic opportunity, and palpable necessity, for General Comment 37 to chart a course for addressing the right of peaceful assembly online. The manner in which Christof took this task on, exemplifying his ethical commitments and professional approach to normative human rights work, deserves further elaboration.

### *A model drafting process*

In the drafting of any normative text addressing complex matters of global significance, the task of capturing this complexity whilst also rendering the document intelligible (and within UN word count limitations) is hugely challenging. Particularly difficult are the imperatives of inclusively representing diverse stakeholders, including civil society actors, and the need to take seriously the views of state parties (whose conduct would inevitably be implicated by the terms of the General Comment).

In late 2017, the European Center for Not-for-Profit Law (ECNL) designed an advocacy strategy with the goal of persuading the Human Rights Committee to draft a General Comment on the right of peaceful assembly.<sup>24</sup> This work involved analysing the Committee's jurisprudence and Concluding Observations where these touched upon the right of peaceful assembly, mapping key principles that were already well-established as well as important tensions and gaps in the Committee's prior consideration of this right.<sup>25</sup> With the support of the Office of the High Commissioner for Human Rights, ECNL convened a meeting in Geneva with Committee members, its Civic Space Initiative partners and the UN Special Rapporteur on freedom of assembly and association

23 Eg UN Doc A/HRC/44/24 'Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests: Report of the United Nations High Commissioner for Human Rights' 24 June 2020, paras 13 and 51. See more generally the UN Resource Hub for Human Rights and Digital Technology: <https://www.digitalhub.ohchr.org/> (accessed 7 January 2022).

24 European Center For Not-For-Profit Law (ECNL) 'The path towards General Comment No 37 on article 21, ICCPR (right of peaceful assembly): A role model for the future' <https://ecnl.org/sites/default/files/2020-09/briefer-and-chronology.pdf> (accessed 7 January 2022).

25 M Hamilton 'Towards General Comment 37 on article 21 ICCPR' (2019) <https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/MichaelHamilton.pdf> (accessed 7 January 2022).



at which it presented a draft of its advocacy report, seeking to evidence the important contribution that a General Comment on article 21 of the ICCPR could make.

Perhaps the Human Rights Committee had already decided, perhaps such advocacy helped the Committee reach its decision – but the Committee ultimately agreed that it was time to draft a General Comment on article 21 and, moreover, that Christof should be at the helm. ECNL offered to provide whatever logistical support Christof felt he could utilise without compromising in any way the integrity and autonomy of the Committee’s drafting process. Christof deployed his own tested methodology to do this. One might say – as Christof’s longstanding collaborator throughout his work with the UN, Thomas Probert, has said – that this methodology was itself an assembly of sorts. The authors were fortunate to be involved in this process with ECNL – focusing in particular on how best a General Comment might address the question of digitally mediated assemblies. A student group (with students from Cambridge University and the University of East Anglia) was formed and the work coalesced around an expert workshop that we collaboratively convened at the University of Cambridge in December 2019. Here we wish to make special mention of the student group which exemplified the inclusive way that Christof assembled views and experiences around the topic of the freedom of assembly online.

### ***Involvement of the student group***

During his time as Special Rapporteur on extrajudicial, summary or arbitrary executions and as a member of the UN’s Human Rights Committee, Christof engaged the student group model, made up of student researchers led by academics, on a number of occasions. Christof would first liaise with lead academics, who would then put out a call for student volunteers – the more disciplines and backgrounds represented, the better. The group would meet regularly with the aim of producing a research pack as a backgrounder for an expert meeting. In the case of the right of peaceful assembly online, the three of us were delighted to work with our excellent student research group, who provided clear insights into a nebulous and challenging topic. The team was composed of postgraduates across a range of diverse fields, departments and our two universities. Led skillfully by Eleanor Salter (Sociology, Cambridge), the team comprised Katja Achermann (Law, Cambridge), Camille Barras (POLIS, Cambridge), Allysa Czerwinsky (Criminology, Cambridge), Bronwen Mehta (POLIS, Cambridge), Muznah Siddiqui (POLIS, Cambridge), Suzanne Dixon (Law, University of East Anglia) and Jennifer Young (Law, University of East Anglia). We convened the expert workshop across Cambridge’s Centre of Governance

and Human Rights, the University of East Anglia Law School and the European Center for Not-for-Profit Law.

Meeting often and working together closely, the student research group produced a detailed Research Pack in a matter of weeks. The interdisciplinary spirit of the students' collaboration with us was invaluable in distilling the many debates on the right of peaceful assembly online – be they legal, technical, political or sociological. For all of us, this research was something special, as we knew it was going to feed into a formative policy-making process that would shape how the right of assembly is understood and protected globally for the foreseeable future. It is not often that members of the academy, whether scholars or students, can so directly connect their work to processes supporting justice and social change. We marveled often at our inclusion in this project; yet, while it was unique for us, it was not at all unusual for Christof but rather typical of his generosity and inclusivity. As our student leader, Eleanor, put it so well in her remembrance of Christof:

In the brief time that I spent with Christof at the workshop last year, I found him to be an incredibly kind man. Although we had assembled a high-level meeting to discuss freedom of assembly online with experts across the field, he treated all of us alike – whether old friend, professional specialist or student. The equal worth he attributed to each of us was accompanied by a consideration of all ideas put before him, an openness that is rare and highly valuable.<sup>26</sup>

To Eleanor's point, Christof's inclusive spirit meant that it was a real pleasure to work with him, both in the thought-provoking sense and in the fun sense. It also fueled his work, in that his thinking and ideas – on General Comment 37 as on so many of his projects – were all the better for his wide and egalitarian consultation and his consideration and incorporation of the experiences and views of others. Our student group's work on online assemblies benefited from this methodology of assembly as well, and we distilled the research pack into our own comment on General Comment 37, which formed part of the larger Human Rights Committee consultation and from which several ideas in this text are drawn.<sup>27</sup>

Across the wider group working on the right of assembly online, thinking developed in relation to these new and dynamic forms of collective action and the corresponding imperative of anchoring their protection within the existing matrix of human rights protections. Indeed, Christof himself, with characteristic humility, recalled just shortly after the adoption of the General Comment in July 2020:

26 Centre of Governance and Human Rights 'In memory of Professor Christof Heyns (1959-2021)' 31 March 2021 <https://www.cghr.polis.cam.ac.uk/news/memory-professor-christof-heyns-1959-2021> (accessed 9 January 2022).

27 McPherson and others (n 8); Hamilton and others (n 1).

People came to Cambridge, and we then addressed the question whether peaceful assemblies should also cover online assemblies as well ... I can say for myself, initially, I was skeptical about it. But as we went further, I became more and more convinced that many of the interactions that previously were held in person, now take place online. And one would be missing a very large part if one does not recognize that peaceful assemblies can take place online as well.<sup>28</sup>

In conducting research on the question of whether the right of peaceful assembly should apply to online and digitally mediated spaces, the research team organised its work and outputs around a number of key questions. Two of the most important questions are given focus in the remainder of this chapter: First, in the section immediately below, we consider how notions of presence and participation apply in online spaces. Second, in section 4, we explore what kinds of protections of the right are implied by the logics of assemblies in often-privatised online spaces and how these logics impact groups unequally. Before proceeding, it is worth simply noting several of the other questions also addressed by the research: How do online spaces relate to the distinct purpose of what this right protects – namely, ‘an individual right that is exercised collectively’, distinct from expression and association? How do assumptions around temporariness and the contemporaneousness of assembly relate to online spaces where communications are often asynchronous yet also leave permanent digital traces? And how does the conceptualisation of ‘peacefulness’ translate in the context of online spaces? Detailed discussion of all the questions is contained in the research pack produced by the student team, while, in this chapter, we turn to presence and participation next.<sup>29</sup>

## Presence and participation in assemblies online

Digital technologies have generated new spaces and ways of taking a stand, often enabling greater accessibility and ease of action.<sup>30</sup> The range of information and communication technologies is evolving rapidly, so any consideration of these is best informed not by what these technologies are in terms of specific characteristics, but what they do, broadly understood as digital mediation across place and time, as well as the effects that this mediation has and the uses people make of these technologies.

28 ‘Interview with Christof Heyns by Elizabeth ‘Betsy’ Andersen, Executive Director of the World Justice Project, *Just Security* (29 July 2020): <https://www.justsecurity.org/71736/interview-with-christof-heyns-unhrc-general-comment-37-on-the-right-of-peaceful-assembly/> (accessed 7 January 2021).

29 McPherson and others (n 8).

30 WL Bennett & A Segerberg ‘The logic of connective action’ (2012) 15 *Information, Communication & Society* 5.

Intuitively, presence is a necessary and vital practice of assembling. An assembly requires the presence of ‘a number of individuals’.<sup>31</sup> That said, presence is not the same as participation, and the distinction is important. In most elaborations of the right to peaceful assembly, the protected individuals are referred to as participants. However, the terms ‘participant’ and ‘participation’ lack clarity<sup>32</sup> and allow for different degrees of involvement, activity and commitment. This undoubtedly has implications for understanding what actions are protected both online and in-person, and indeed, in terms of distinguishing between whether the rights of assembly and/or expression are engaged on the particular facts of a case.

For example, a journalist, observer or bystander may be present at an assembly without being a participant in it. In this light (and see further the discussion of Christof’s individual opinion in the case of *Tikhonov v Kazakhstan* below) participation can be regarded as the *sine qua non* for the engagement of the right of peaceful assembly (whereas presence is not). But even if it is inconclusive as to the constitution of an assembly, presence is nonetheless a vital precursor to participation – it constitutes the material act of taking a stand.

Digital mediation obfuscates whether an individual is actively present and if so, whether they might be considered to be participating. Given, however, that the protection afforded to face-to-face gatherings is not contingent on the level of commitment that individual participants may demonstrate, it would be difficult to establish a higher threshold for participation in an assembly online.

Questions arise as to whether participation is constituted by, for example, the use of hashtags, registering for or joining online gatherings or meetings (which may or may not convey a message to an external audience), liking an online page or being a non-active member of an online group. The right to freedom of expression is evidently in play, but should the definition of participation in an assembly be expanded to include, for example, Facebook page likes or adopting profile badges or hashtags? Defining thresholds on what constitutes participation appears fraught.

Due to the affordances of digital technologies, participants are distributed across time and space, leading to difficulty in determining both the duration and the synchronicity of participation (with further implications for our understanding of presence). For example, participants can post to a social media platform in seconds, and it is not possible, from the perspective of a viewer of the posts (though it may

31 OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly* (2nd edition, 2010) 15, paras 1.2 and 29.

32 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule (17 May 2019), A/HRC/41/41.

well be possible from inside the social media company), to be sure that more than one person is ever present in a social media thread at the same time. From the individual's perspective, however, the intention to assemble in a proximate temporality, in a proximate place and with a proximate purpose may nevertheless be strong.

Given these context-specific idiosyncrasies, where exactly the minimum bar for participation should be drawn could not have been conclusively resolved in a document such as General Comment 37. Participation in assemblies is likely to take new and different forms using digital means, requiring an expansive interpretation of individual acts amounting to participation. But setting aside these threshold questions of presence and participation, the crucial point is this. Many of the words we use to describe online assemblies misleadingly connote a dichotomy between online and offline spaces, rather than the hybridity in which these spaces are inhabited and used. These words, such as virtual and cyberspace, also connote a disembodiment of the assembly that can have harmful effects through disassociating it from the bodies and materials involved in the assembly. This connotation of immateriality can obscure the very real physical risks to those participating in online assemblies, as well as the ways in which assemblies might be interfered with, such as through the blocking or destruction of internet infrastructure. Julie Cohen, for example, has argued that to regard cyberspace as somehow existing apart from real space 'denies the embodied spatiality of cyberspace users, who are situated in both spaces at once'. Such false dichotomies also overlook 'the complex interplay between real-space geographies of power and their cyberspace equivalents'.<sup>33</sup> Cohen's emphasis on embodied experiences online suggests alignment with Judith Butler's performative theory of assembly since Butler similarly recognises that 'the body is not isolated from all those conditions, technologies, and life processes that make it possible'.<sup>34</sup> In this regard, Butler emphasises the performative value of assemblies – casting the right as a 'right to appear, one that asserts and instates the body in the midst of the political field, and ... delivers a bodily demand for a more liveable set of economic, social, and political conditions'.<sup>35</sup>

General Comment 37, because of Christof's leadership, implicitly recognises the value of these material aspects of being present, of occupying space, of taking a stand irrespective of whether the places in which we assemble are online or offline and increasingly likely to be

33 J Cohen 'Cyberspace as/and space' (2007) 107 *Columbia Law Rev* 215; Z Papacharissi 'Affective publics and structures of storytelling sentiment events and mediality' (2016) 19(3) *Information, Communication & Society* 308 310; JD Inazu 'Virtual assembly' (2013) 98 *Cornell Law Review* 1093 1112.

34 J Butler *Notes toward a performative theory of assembly* (Harvard University Press 2015) 129, 131-2.

35 Butler (n 34) 11.

both. Indeed, the places in which we assemble (by choice or otherwise) reveal something about the relationship between these spaces and the kinds of assembly they elicit and make possible. In the next section we therefore turn to consider the particular logics that characterise these online spaces.

### **The challenges of protection given the particular logics of online spaces**

All spaces are imbued with particular logics that reflect and give effect to functional priorities (such as flow and passage, quietude or commercial profitability). Such logics also often operate to exclude unruly or undesirable uses (vagrancy, revelry, protest etc) and to incentivise narrowly 'beneficial' purposes (consumption, movement, recreation, education, debate etc.).<sup>36</sup> The regulation of assemblies cannot afford merely to reinforce these inherent logics, particularly where they might undermine the right to assemble. Moreover, the future interpretation of article 21 in respect of online assemblies ought to take account of these particular logics, including the opportunities that digitally-mediated spaces allow for the entrance of state logics such as surveillance as well as – crucially – commercial, profit-driven logics that shape many privately-owned digital technologies.

In digitally mediated spaces, these logics can interfere with the nature and modalities of assembly, including at the stages of the production, transmission and reception of any communicative elements (whether expression or interaction). For example, at the production stage, the profit logic rewards particular types of communication with algorithmically-determined or paid-for visibility, and some of these communications create a context hostile to particular groups.<sup>37</sup> At the transmission stage, social media newsfeed algorithms determine what is visible to whom – and who and what are invisible. At the reception stage, the model of surveillance capitalism also sets the stage for easy eavesdropping by external parties, both commercial and governmental.<sup>38</sup> Consequently, profit and state logics can distort or inhibit online assemblies in at least two ways: restrictions on access and chilling effects on potential participants, experienced unequally.

36 H Fenwick & M Hamilton 'Freedom of protest and assembly' in H Fenwick & R Edwards (eds) *Fenwick on civil liberties* (Routledge 2017) 554 at 601.

37 SU Noble, *Algorithms of oppression* (NYU Press 2018).

38 S Zuboff *Surveillance capitalism* (Profile Books 2019).

### **Online assemblies face particular restrictions on access**

Access to affordable and independent internet services is not only important for the exercise of the right of peaceful assembly online, but also considerably facilitates the exercise of this right offline. As Frank La Rue, the former UN Special Rapporteur on the right to freedom of expression, has observed, the internet has become ‘an indispensable tool for full participation in political, cultural, social and economic life’.<sup>39</sup> And while the Rapporteur’s call for internet access to be maintained even in times of political unrest was made with respect to freedom of expression, it is thus arguably equally pertinent with regard to the right of peaceful assembly.<sup>40</sup> In past instances, states have restricted access to online spaces through various mechanisms, and the logics and design of privately-owned commercial technologies have sometimes facilitated this.

One example is the use of internet switch-offs, such as in Egypt, Libya and Syria in 2011<sup>41</sup> and, more recently, in Sudan in 2021 and Kazakhstan in early 2022.<sup>42</sup> It has been argued that ‘using communications “kill switches” (that is, shutting down entire parts of communication systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law’.<sup>43</sup> Other examples include the blocking of websites or of some social media platforms in favour of others that can be more easily controlled by the state, such as China’s state-licensed and censored platforms.<sup>44</sup>

39 UNGA Doc A/66/290 ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (10 August 2011), para 63; the UN Human Rights Council since adopted a non-binding resolution condemning the states that intentionally disrupt citizens’ access to the internet: UN Doc A/HRC/32/L.20 Human Rights Council, ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet’ (27 June 2016); see also D PoKempner (2013) ‘Cyberspace and State Obligations in the Area of Human Rights’ in K Ziolkowski (ed) *Peacetime regime for state activities in cyberspace: international law, international relations and diplomacy* (NATO OCCD COE: Tallinn: 2013) who argues that access to information online is a necessary condition for the fulfilment of many human rights and should thus itself be considered a human right.

40 UNGA Doc A/HRC/17/27 ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (16 May 2011) paras 78-9.

41 See A McLaughlin ‘Egypt’s big internet disconnect’ *The Guardian* 31 January 2011 <https://www.theguardian.com/commentisfree/2011/jan/31/egypt-internet-uncensored-cutoff-disconnect>; P Beaumont ‘The truth about Twitter, Facebook and the uprisings in the Arab world’ *The Guardian* 25 February 2011 <http://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya> (accessed 7 January 2022).

42 <https://twitter.com/netblocks/status/1478694849440358400> (accessed 7 January 2022).

43 UN Special Rapporteur on freedom of opinion and expression et al ‘Joint Declaration on Freedom of Expression and Access to Information’ (1 June 2011) <https://www.osce.org/fom/78309?download=true> (accessed 7 January 2022).

44 J Zeng, C Chan & K Fu ‘How social media construct “truth” around crisis events:

Another example relates to hashtag activism, which has alternatively been understood as a manifestation of the freedom of expression or the freedom of assembly. Interference with hashtag activism might include flooding a hashtag with tweets generated by bots – which may (or may not) have happened in the 2014 trending of the #YaMeCansé hashtag in Mexico. This bot interference makes it difficult for participants to sustain interactions with each other. It may also trigger the hashtag's automatic suppression – not, as intended, to the detriment of the bot deployers but rather to the detriment of those expressing or assembling via the hashtag.<sup>45</sup>

A more recent example of how logics of online spaces shape access to assembly arises in Facebook's vision of the future of online interaction. In 2021, Facebook CEO Mark Zuckerberg made the headline-grabbing announcement that the company was rebranding as Meta. Meta's vision is focused on the 'next evolution of social connection', which the company refers to as the 'metaverse'. The metaverse is made up of virtual reality- and augmented reality-enabled '3D spaces [... that] will let you socialize, learn, collaborate and play in ways that go beyond what we can imagine'.<sup>46</sup> As Zuckerberg introduced his company's conceptualisation of the metaverse, he talked about how its 'defining quality' would be:

... a feeling of presence – like you are right there with another person or in another place. Feeling truly present with another person is the ultimate dream of social technology.<sup>47</sup>

The extensive video introduction to Meta sidesteps politics in its enumeration of the metaverse's utilities, focusing instead on almost anything but, or what it calls 'almost anything you can imagine – get together with friends and family, work, learn, play, shop, create'.<sup>48</sup> The questions the metaverse raises, however, for the right to assemble peacefully, which is so often exercised in the name of politics, are apparent. Beyond what it means to be present at an assembly in the metaverse, we have to wonder about who will govern the metaverse, according to what standards, and when so much of it is private rather than public. The emphasis on private rather than public, and commerce rather than the commons, is apparent down to the places that can be

Weibo's rumor management strategies after the 2015 Tianjin blasts' 9(3) *Policy & Internet* 297.

45 L Daniel 'Rise of the peñabots' *Data & Society: Points* 25 February 2016 <https://points.datasociety.net/rise-of-the-penabots-d35f9fe12d67> (accessed 7 January 2022).

46 Meta 'Welcome to Meta' 28 October 2021 <https://about.facebook.com/meta> (accessed 7 January 2022).

47 M Zuckerberg, 'Founder's Letter, 2021' *Meta* (blog) 28 October 2021. <https://about.fb.com/news/2021/10/founders-letter/> (accessed 7 January 2022).

48 *Meta* (n 46).



created within the metaverse, which, according to the launch materials, seem to currently centre on private spaces for consuming and working: 'Horizon Home' and 'Horizon Workrooms'; spaces that are more public and non-profit, available through 'Horizon Worlds', are, at the time of writing, limited to gatherings of 20 people or less and only available in the US and Canada.<sup>49</sup> As mentioned above, an assembly is made up of both participants and place, and these brief examples demonstrate how much access to assembly can be curtailed by the logics of state and corporate actors who govern these spaces.

### *Chilling effects, experienced unequally*

While much of the preceding section has been with reference to individuals who are participating or trying to participate in online assemblies, thought must also be given to those who do not feel comfortable participating because of the logic of the place in which they are assembling. For example, the commercial logics of mainstream digital platforms may create hostile contexts that disproportionately affect minorities or marginalised groups, as demonstrated in Safiya Noble's finding that racist search results are a direct outcome of search engines' advertising structures.<sup>50</sup> In another example, Amnesty International found that a cohort of 778 female journalists and politicians in the UK and US received one abusive or problematic tweet every 30 seconds, and that Black women received 84 per cent more of these tweets than white women.<sup>51</sup> Individuals who restrict their participation in assemblies because of toxic online environments are denied their right to assemble at a much earlier stage – that of the decision about whether or not to participate in the first place.

The threat of surveillance capitalism<sup>52</sup> and its enablement of state surveillance is also silencing due to the risk that one will be identified and tracked, with subsequent consequences.<sup>53</sup> The UN Human Rights Council has recognised that 'privacy online is important for the realisation of the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association'.<sup>54</sup> It accordingly emphasised that 'technical solutions to

49 *Meta* (n 46); A Heath 'Meta opens up access to its VR social platform horizon worlds' *The Verge*, December 9, 2021 <https://www.theverge.com/2021/12/9/22825139/meta-horizon-worlds-access-open-metaverse> (accessed 7 January 2022).

50 Noble (n 37).

51 Amnesty International, *Troll Patrol*, available at: <https://decoders.amnesty.org/projects/troll-patrol/findings> (accessed 7 January 2022).

52 Zuboff (n 38).

53 E McPherson 'Risk and the pluralism of digital human rights fact-finding and advocacy' in MK Land & JD Aronson (eds) *New technologies for human rights law and practice* (2018) 188.

54 UN Doc A/HRC/38/L10/Rev1 Human Rights Council 'The promotion, protection and enjoyment of human rights on the internet' (4 July 2018) preamble; cf.

secure and protect the confidentiality of digital communications, including measures for encryption and anonymity, can be important to ensure the enjoyment of human rights, in particular ... to freedom of peaceful assembly and association'.<sup>55</sup> The ability to communicate and associate with others without identifying oneself is a necessary requirement to exercise one's freedom of assembly, speech and privacy.<sup>56</sup> Like online discrimination, surveillance is not an equal opportunity silencer, but one that disproportionately impacts potential participants who, because of their identities and the way these identity groups have been treated by their governments or dominant social groups in the past and present, are most wary of being monitored.<sup>57</sup>

## Conclusion: Reverberating Legacies

Examining the substantive debates around and model of work behind General Comment 37 on the right of peaceful assembly and the Comment's recognition of the right's extension to online spaces, this chapter looks through the lens of a significant and recent example of Christof's inspirational contributions to international human rights to recognise his unique legacies. In conclusion, we reflect on the early reception of General Comment 37 and its relevance to contemporary developments in assembly and protest around the world, as well as (in 5.2) on how Christof's unique model for collaborative human rights work, exemplified in our experience with General Comment 37, should be of wide and lasting significance.

### *The legacy of General Comment 37*

It is still too early to ascertain the lasting legacy of General Comment 37 on human rights thought and practice, but the initial signs are very positive. Many have recognised it as ground-breaking, and the process of how it was adopted has been considered a model for the future. As one commentator noted after praising General Comment 37, Christof's approach 'is a model of intellectual and professional engagement that other drafters, across the UN treaty bodies, would be well-advised to emulate'.<sup>58</sup>

G Rona & L Aarons 'State responsibility to respect, protect, and fulfil human rights obligations in cyberspace' (2016) 8 *Journal of National Security Law & Policy* 503 513.

55 Human Rights Council (n 54).

56 As above.

57 Noble (n 37).

58 M Scheinin 'UN Human Rights Committee General Comment No 37 on freedom of assembly: an excellent and timely contribution' 30 July 2020 <https://www.justsecurity.org/71754/u-n-human-rights-committee-general-comment-no-37-on-freedom-of-assembly-an-excellent-and-timely-contribution/> (accessed 7 January 2022).

Substantively, the Human Rights Committee's recognition in the Comment that the right of peaceful assembly extends to online spaces is considered to have settled this important matter. This is a major breakthrough. The UN Special Rapporteur on the rights to freedom of peaceful assembly and association, Clément Voule, praised the Comment for its 'truly landmark affirmation that protection of the right to peaceful assembly extends to remote participation, including online assemblies'.<sup>59</sup> Voule added: 'By focusing extensively on the intersection of digital technologies and the right to peaceful assembly, General Comment 37 sets out a clear framework to protect this fundamental right in the digital era.' Voule noted the timeliness of the General Comment in this regard in the context of the COVID-19 pandemic, when so much activity had moved online. Indeed, in the context of lockdowns and constraints on physical movement and gathering, meeting online, including to manifest forms of assembly, became a 'new normal' of sorts. And yet, from Black Lives Matter to Kazakhstan and Sudan, recent years have also seen growing street protests worldwide, despite the pandemic. In this time of emergency, and the exceptional constraints on liberties and freedoms that often accompany emergency, General Comment 37 is a precious resource for activists and human rights defenders globally.

An important intellectual legacy of General Comment 37 is its elaboration of the constitutive elements of the distinctive protection of the right of peaceful assembly, as contrasted with cognate rights concerning expression and association. Christof emphasised what was unique about assembly, including its collective expression, its audience (within 'sight and sound'), and its political power. Assembly, then, is concerned with allowing for the expressiveness of the body politic beyond individual expression and besides more formal association. In turn, we should take care not to extend the right of peaceful assembly in ways that dilute this unique importance.

A particularly notable (post-General Comment 37) example of the risk of dilution is the case of *Tikhonov v Kazakhstan*.<sup>60</sup> In this case, a journalist had been requested by a newspaper editor to report on a spontaneous demonstration. He was subsequently prosecuted and fined for violating the Law on the Organization and Conduct of Peaceful Assemblies. The Human Rights Committee found violations of both article 19(2) and article 21 ICCPR, but, in his individual opinion, Christof challenged what he viewed as the problematic elision of assembly and expression. What, on the facts, would engage article

59 'UN expert welcomes landmark protection for online assembly' 29 July 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26134&LangID=E> (accessed 7 January 2022).

60 CCPR/C/130/D/2551/2015 (views adopted 5 November 2020).

21? The journalist's presence at an assembly? The importance of media coverage to an effective right of peaceful assembly? The author's claim that the interference was a violation of article 21? The state party's treatment of him as a participant in the assembly? Christof argued that the scope of article 21 extends only to 'participants' (pointing to the deliberate and carefully chosen wording of General Comment 37 which, at paragraph 30, states that journalists 'are entitled to protection under the Covenant' (but not specifically under article 21)). The more we value what article 21 uniquely protects, the more we bring it out from under the shadows of expression and association to be given distinctive attention – and the more we must also take care to not apply it where its constitutive elements are not evidently present. As regards the extension of the right to online spaces, it is precisely this risk that is yet to be fully navigated.

### *A model for collaborative and inclusive human rights work*

Our work with Christof during the consultation and drafting of General Comment 37 is a dear memory alongside many other fond recollections, yet reminiscence must not and will not be enough. The model of work that became Christof's signature in human rights circles must endure and should be embodied in the work of all of us who took inspiration from Christof, and many others besides. For this model, crucially, lives the values it seeks to protect and advance in the world: Integrity, inclusivity, patience, pluralism, respect and determination. Christof's model of work has good cause to be his greatest legacy.

The inclusiveness of the drafting process for General Comment 37 came naturally to Christof and was borne of a commitment to intellectual struggle and a refusal to settle for easy assertions or lazy reasoning. Solidarity is a noun that requires hard work. The fundamentally social and relational interests that underlie the right of peaceful assembly were integral to the way in which Christof approached scholarship and praxis.

The General Comment does not pretend to be the last word on the matter. Much still needs to be done. Christof said repeatedly that he sought to 'futureproof' the General Comment, but by this he meant that it must be resilient in providing guidance in times yet to come, not firmly and dogmatically fixed. The interpretation and reinterpretation of specific aspects of article 21 as contexts and circumstances evolve is anticipated as not merely necessary but precisely what shall strengthen its relevance and value to protecting peaceful assemblies of the future.