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Protecting the right to peaceful assembly for today and the future

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Introduction

The last two decades have witnessed an explosion of protests and demonstrations around the world. From protests in opposition to the war in Iraq in 2003 and the 'Arab Awakening' to the anti-austerity protests across Europe and the climate change global protests, the 21st century has been marked – at least thus far – by mass protests. In this period, the number and frequency of demonstrations have continuously increased,[1] with more people taking to the streets every year to demand systemic social, political, and economic changes and challenge the status quo.[2] Even though the COVID-19 pandemic has increased the barriers and risks to holding public demonstrations, the wave of protests has not subsided. In fact, 2020 saw the largest protest recorded in history: India's workers' strike, in which an estimated 250 million protestors participated.[3]

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1   I Ortiz and others *World protests: a study of key protest issues in the 21st century* (2021) 201, page 3, https://link.springer.com/content/pdf/10.1007%2F978-3-030-88513-7.pdf. See also, S Brannen & others *The age of mass protests: understanding an escalating glbal trend* (2020) 42, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke (accessed 22 November 2021).

2   According to the Carnegie Endowment for International Peace's 'Global Protest Tracker', over 230 significant anti-government protests have taken place worldwide since 2017 (https://carnegieendowment.org/publications/interactive/protest-tracker (accessed on 20 November 2021). Also: E Chenoweth and others, 'This may be the largest wave of nonviolent mass movements in world history. what comes next?' *The Washington Post*, 16 November, 2019, https://www.washingtonpost.com/politics/2019/11/16/this-may-be-largest-wave-nonviolent-mass-movements-world-history-what-comes-next/ (accessed 22 November 2021).

3   'Shutdown across sectors, as over 25 Crore workers join one of the biggest strikes ever', *Newsclick* (India) 26 November 2020, https://www.newsclick.in/Shutdown-Across-Sectors-as-Over-25-Crore-Workers-Join-One-of-theBiggest-Strikes-Ever (accessed 22 November 2021).

The rise in the number of protests has been linked to increased access to digital technologies.[4] As recognised by the United Nations (UN) Special Rapporteur on the rights to freedom of peaceful assembly and of association, digital technologies – including the internet, social media platforms, and smartphones – have proved enormously useful for those seeking to exercise the right to peaceful assembly, vastly expanding their capacities to organise and mobilise to advance common interests, including human rights and democracy.[5] Social media platforms particularly have lessened the barriers to the formation of protest movements, by expanding the ability of individuals to connect and coordinate with others, capture media attention, and generate greater public engagement around certain issues.

These technologies not only serve as means or tools that facilitate the exercise of the rights of assembly offline, but also as virtual spaces where protests themselves can be carried out, demonstrating a critical interplay between the so called offline and online spheres.[6] This was explicitly recognised by the Human Rights Council during the COVID-19 pandemic, when it stressed that digital technologies 'create space for the holding of assemblies online and may facilitate and enhance the involvement and participation of those often marginalised as well as support the proper management of assemblies and increase transparency and accountability'.[7]

However, for all the good that digital technologies have brought to the exercise of the right to peaceful assembly, these technologies have also enabled new and more pervasive forms of repression. Along with internet shutdowns, social media is used to spread misinformation, deploy government sponsored trolling, and mobilise pro-government counterdemonstrations. Digital tools and platforms are now routinely subjected to government surveillance, allowing governments to monitor, infiltrate, and hamper protests movements on a scale and intrusiveness before unimaginable.[8]

International human rights mechanisms have made increased efforts over the last decade to ensure that the world's digital transformation does

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4   E Chenoweth and others, 'This may be the largest wave of nonviolent mass movements in world history. what comes next?' *The Washington Post*, 16 November 2019, https://www.washingtonpost.com/politics/2019/11/16/this-may-be-largest-wave-nonviolent-mass-movements-world-history-what-comes-next/ and S Brannen & others *The age of mass protests: understanding an escalating glbal trend* (2020) 42, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf?uL3KRAKjoHfmcnFENNWTXdUbf0Fk0Qke   (accessed 22 November 2021).

5   Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'The rights to freedom of peaceful assembly and of association in the digital age' 17 May 2019 (A/HRC/41/41).

6   As above.

7   Human Rights Council Res 44/20 of 23 July 2020.

8   Voule (n 5).

not hinder human rights and, rather, empowers all individuals, without discrimination, to achieve their highest potential. The most recent efforts have paid particular attention to the right to peaceful assembly, examining what governments and key stakeholders' obligations to ensure this freedom is respected, protected and fulfilled both online and offline. This essay examines the impact of digital technologies in the enjoyment of the right to peaceful assembly, drawing attention to the digital acceleration set off by the COVID-19 pandemic and the ways by which digital technologies both enabled and curtailed protest action across the world during the health crisis. The authors provide an overview of how international human rights law has responded to these challenges. In particular, it studies the protection afforded to 'online assemblies' by UN human rights mechanisms and analyses emerging threats. The aim of the article is to highlight the need for international law and mechanisms to preserve the right to peaceful assembly to ensure it is protected today and in a future of profound digital transformations.

This essay focuses on state actions and obligations under international human rights law. However, the authors recognise that in the digital era, the right to peaceful assembly is also impacted by the services provided by tech giants. Their impact goes far beyond their role as 'gatekeepers' and determining who can connect and communicate on their platforms. The products, algorithms and policies of these companies, which continue to be largely unregulated, are undermining some of the basic tenets of our democracies, deeply affecting civic space. The authors hope that by laying out states' international human rights law obligations in this field, this article contributes to discussions regarding how to best regulate and make companies accountable.

The power of the 'digitally mediated' protest

In the 21st century, protest and digital technologies have become inseparable. Certainly, these technologies have made it easier, more accessible and affordable to organise and mobilise people in peaceful assemblies for various interests. Online social media platforms and their various capabilities have become essential tools for coordinating and publicising demonstrations, especially for decentralised and leaderless movements. Their role in modern revolutions and social movements, helping participants amplify their narratives and gather domestic and international support, has been largely acknowledged.

The smartphone, as well as photo and livestreaming capabilities, in particular, have enabled individuals to document human rights abuses and government wrongdoings and quickly spark spontaneous and large-scale demonstrations. Some digital tools have also provided important spaces in which civil society can build and strengthen their

networks and connect with like-minded people, a prerequisite for the formation of protest movements.[9] Other recognised capabilities include improved security of messaging and social networking platforms that use encryption technology. End-to-end encryption 'enhances the security of civil society groups' digital communication, while also providing tools specifically geared to network organising at the grass-roots level'.[10] As indicated by Turkish American sociologist Zeynep Tufecki:[11]

> Digital technologies are so integral to today's social movements that many protests are referred to by their hashtags – the Twitter convention for marking a topic: #jan25 for the Tahrir uprising in January 25, 2011, #VemPraRua ('Come to the streets') in Brazil, #direngezi for Gezi Park protests in Istanbul, Turkey, and #occupywallstreet. Activists can act as their own media, conduct publicity campaigns, circumvent censorship, and coordinate nimbly.

The Armenian #velvet revolution of 2018 that led to the resignation of the Prime Minister Sargsyan and the election of Nikol Pashinyan is a clear example of the potential of digitally mediated protests to achieve political reform and advance democratic values. During his visit to Armenia in 2018, the Special Rapporteur of the rights to freedom of peaceful assembly and of association heard multiple accounts of how social media platforms, live-streaming tools and communication apps had played a key role in the revolution.[12] On 31 March 2018, Pashingyan, then Member of Parliament, initiated a campaign in opposition of the nomination of then Prime Minister Sargsyan, who had been in power since 2007 and had removed constitutional limits to prime minister's terms. Pashinyan announced on Facebook that he would walk 200 km to Armenia's capital Yerevan to protest Sargsyan's nomination and called others to join the movement #mystep (#Im Kayl). He posted daily updates and livestreamed the march and was soon joined by hundreds of people. After the movement reached the capital, more demonstrations took place, and the movement grew quickly. Protestors across the country turned to Telegram to communicate and coordinate demonstrations, stressing the importance of ensuring a peaceful movement. According to one account,

> the movement communicated mainly information on time, forms and places of action. It enabled protestors to simultaneously protest in diverse places instead of all meeting in a single spot, making it difficult for the police

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9   Office of the Hight Commissioner of Human Rights, 'Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests' 24 June 2020 (HRC/44/24) (OHCHR), paras 7 & 8.

10   OHCHR (n 9) para 8.

11   Z Tufecky *Twitter and tear gas: the power and fragility of the networked protest* (2017) 360.

12   Voule (n 5) para 22; Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'Vist to Armenia' 13 May 2019 (A/HRC/41/41/Add.4), para 65.

to stop protests. Information was also shared on behavior that was not acceptable or which should be avoided. Mantras like 'revolution of love and tolerance' were repeated daily.[13]

Using hashtags such as #velvetrevolution or #rejectserzh, protesters livestreamed demonstrations, including instances of police repression or other critical moments. Pashinyan's release on 23 April 2018, after a weekend detention, was livestreamed increasing social media engagement and sparking street demonstrations. Hours after, Sargsyan resigned. Pashinyan was appointed the new Prime Minister of Armenia on 8 May.[14]

Some of the most visible social movements over the last few years – the #Black Lives Matter movement, #NiunaMenos, the #MeToo movement, and #FridaysForFuture – have reached millions of supporters globally mostly with the support of social media tools. While beginning in the US, the #BlackLivesMatter protest movement for racial equality spread in many countries around the world, including Nigeria, France, and Indonesia, following the murder of George Floyd by a Minneapolis police officer on 25 May 2020. The murder was filmed and posted on social media by a bystander, ensuing large-scale and transnational protests in 4,446 cities and towns across the world.[15]

Digital technologies' capabilities are constantly advancing, allowing protesters to continually innovate and shape their tactics to achieve impact.[16] The spread and impact of the protest performance 'Un violador en tu camino' (A rapist in your path) by Chilean feminist collective 'Las Tesis' would have been impossible or at least much harder to accomplish without the availability of social media and its video and virality capabilities.[17] This was a deliberate effort by *Las Tesis*, whose mission is to make feminist theory available to wider audiences:[18]

The original performance in Chile and its subsequent enactments went viral on social media, and also succeeded in attracting significant attention

13   J Lindner 'Armenia's #VelvetRevolution: towards freedom and future' 13 February 2019 https://wpmu.mah.se/nmict191group4/2019/02/13/armenias-velvetrevolution-towards-freedom-and-future/ (accessed 20 November 2021).

14   Freedom House *Freedom of the net 2018 Armenia country report* https://freedomhouse.org/country/armenia/freedom-net/2018 (accessed 22 November 2021).

15   https://www.creosotemaps.com/blm2020/ (accessed 22 November 2021).

16   E Mitchelstein & others 'la protesta hoy: los cuerpos, las calles y los medios digitales' *INFOBAE* 19 May 2020 https://www.infobae.com/america/opinion/2020/05/19/la-protesta-hoy-los-cuerpos-las-calles-y-los-medios-digitales/ (accessed 22 November 2021).

17   G Hinsliff 'The rapist is you!: why a Chilean chant is being sung around the world' *The Guardian*, 3 February 2020, available at https://www.theguardian.com/society/2020/feb/03/the-rapist-is-you-chilean-protest-song-chanted-around-the-world-un-iolador-en-tu-camino (accessed 22 November 2022)

18   P Serafini, 'A rapist in your path: transnational feminist protest and why (and how) performance matters' *European Journal of Cultural Studies* 20 April 2020 https://journals.sagepub.com/doi/full/10.1177/1367549420912748 (accessed 22 November 2021).

from major media outputs. This can in part be attributed to the spectacular value of the performance – large groups of women singing and dancing in unison at landmark locations across the world. But the spectacular quality of the action must not be considered as detrimental or contradictory to its prefigurative value. Rather, this performance action could be thought of as a case of 'ethical spectacle' (Boyd and Duncombe, 2004), in which artists and activists appropriate the communication tools of an intensely mediated society while maintaining processes and values that allow the action itself to be participatory, contextualised and emancipatory.

Online protests and the COVID-19 pandemic

Digital technologies have not only facilitated street demonstrations or in-person gatherings. An 'assembly' has been defined by the mandate of the Special Rapporteur on the rights to peaceful assembly and of association as an intentional and temporary gathering in a private or public space for a specific purpose.[19] An assembly occurs when individuals 'come together and collectively express, promote, pursue and defend common interests'. Digital technologies have allowed for these assemblies to happen in online or among people who are not physically near, in ways before impossible.

Just as street demonstrations, online assemblies have taken multiple forms, depending on protestors' capacity to innovate and harness the capabilities afforded by digital technologies. On social media platforms such as Facebook or Twitter individuals come together to show and promote support for a cause through features such as 'hashtag'. Over a short period of time, these social media conversations can create large networks of communities that would be quite unlikely to occur anywhere offline at that scale. Network maps or hashtags visualisations give us an idea of the size and scale of these online gatherings, much like the photograph of a crowd take by a drone. For example, the #Metoo movement sparked online assemblies of users sharing personal stories of harassment and discussing the entertainment business. A network graph created by social media researcher Erin Gallagher shows how #Metoo tweets on 16 October 2017 reached 24,722 and created 10,709 communities.[20]

Some online protests predate social media. The first online blackout as a form of protest was organised on 8 and 9 February 1996 in opposition to the Communication Decadency Act (CDA) in the United

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19   Special Rapporteur on the rights to freedom of peaceful assembly and of association, M Kiai, 'Best practices related to the rights to freedom of peaceful assembly and of association' 21 May 2012 (HRC/20/27), para 24.

20   24,722 #MeToo tweets – 16 October 16 to 18 October 2017, https://erin-gallagher. medium.com/metoo-hashtag-network-visualization-960dd5a97cdf   (accessed 22 November 2021).

States, which was later found unconstitutional.[21] The 'Turn the Web Black' or the 'Great Web Blackout', as the protest was called, was organised by a coalition of free speech advocates and was joined by approximately 1,500 websites who altered their webpages to white text on a black background calling on users to help stop the Act. The blackout also included major online platforms at the time, such as Netscape and Yahoo!, who prevented access to their usual content and replaced it with a black screen and information about how to oppose the CDA.[22] 'Website blackouts' as a form of protest took place again on January 2012 against two major bills in the United States: Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA).[23] Approximately 10,000 online platforms and websites participated in the SOPA/PIPA protests.

While the COVID-19 pandemic did not stop people from taking to the streets to protest, the health crisis did accelerate the world's use of digital tools to carry out essential life activities online, including protests.[24] Video conference apps such as Zoom, Skype and Facebook Live provided critical space for work, education and democratic participation and protesters have embraced them to express their demands. In Israel, for example, more than 500,000 people joined a Facebook Live protest against Prime Minister Benjamin Netanyahu's decision to adjourn the parliament, which was seen as preventing effective oversight over the government's management of the coronavirus crisis.[25] Similarly, in the United States the Poor People's Campaign organised a full scale virtual rally to protest racism, poverty and inequality in America on June 2020, complete with speakers and live music broadcast.[26] In Hong Kong, activists joined the popular online multiplayer game 'Animal

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21 https://en.wikipedia.org/wiki/Black_World_Wide_Web_protest (accessed 22 November 2021)

22 NI Kozak 'Fighting for the Internet: online blackout protests and Internet legislation in the United States, 1996-2018' (2018) 21(3) *Media/Culture Journal* https://doi.org/10.5204/mcj.1415 (accessed 22 November 2021).

23 Wired 'A SOPA/PIPA Blackout Explainer' 18 January 2012, https://www.wired.com/2012/01/websites-dark-in-revolt/ (accessed 22 November 2021).

24 E Chenoweth & others 'The global pandemic has spawned new forms of activism – and they're flourishing' *The Guardian* 20 April 2020 available at https://www.theguardian.com/commentisfree/2020/apr/20/the-global-pandemic-has-spawned-new-forms-of-activism-and-theyre-flourishing, Amnesty International 'Activism in times of Covid-19' 29 May 2020, available at https://www.amnesty.org/en/latest/campaigns/2020/05/activism-in-times-of-covid-19/; https://www.usip.org/publications/2020/03/nonviolent-action-time-coronavirus (accessed 22 November 2021).

25 J Judah 'Israelis take protests online for a digital demonstration against Knesset adjournment' *The Jewish Chronicle* 22 March 2020, https://www.thejc.com/news/israel/israelis-take-protests-online-for-a-digital-demonstration-against-knesset-adjournment-1.498343 (accessed 22 November 2021).

26 C-Span 'Poor people's campaign holds a nationwide virtual rally' 20 June 2020, https://www.c-span.org/video/?473188-1/poor-peoples-campaign-holds-nationwide-virtual-rally (accessed 22 November 2021).

Crossing' to join together and express their demands for democracy. In Indonesia, organisers of the Kamisan protest, a silent human rights and social justice demonstration held weekly in front of the presidential palace, conducted gatherings on social media, including livestreaming events on Instagram.[27]

The global climate movement, who had been very active on the streets during 2018 and 2019, also moved online during the first months of isolation and strict social distance requirements.[28] Every Friday, the strikers post photos of themselves holding a sign with a message about the climate crisis along with #DigitalStrike or #ClimateStrikeOnline, and they congregate in large Zoom calls, often with more than 100 people. Activists are also using the digital strikes to create Twitter storms, bombarding companies and people in power with tweets at a set time.[29]

The opportunities discussed above, however, rely on the ability to access and use the necessary digital tools and platforms. Effective exercise of the rights to peaceful assembly in the digital era requires States to ensure accessibility in terms of affordable, secure, reliable, and ongoing access to internet services and various platforms, to counter the digital divide.[30]

States around the world have made continuous progress to ensure global internet accessibility and use. In developing countries, for example, internet usage has grown from 7.7 per cent in 2005 to 44 per cent at the end of 2019. The International Telecommunication Union (IUT) estimates that at the end of 2020, only 51 per cent of the global population were using the Internet, but this proportion increases to over 69 per cent among youth (aged 15-24 years).[31] Despite these rapid improvements, digital divides persist. The gap reflects gender

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27   T Oktavianti 'Online Kamisan: activism goes digital during COVID-19 pandemic' *Jakarta Post* 23 April 2020, https://www.thejakartapost.com/news/2020/04/23/ online-kamisan-activism-goes-digital-during-covid-19-pandemic.html   (accessed 22 November 2021).

28   R Vinter 'Climate protesters gather in person and online for Fridays for future' *The Guardian* 19 March 2021, https://www.theguardian.com/environment/2021/ mar/19/climate-protesters-gather-in-person-and-online-for-fridays-for-the-future (accessed 22 November 2021) and J Murray 'Climate strikes continue online: "we want to keep the momentum going"' *The Guardian* 22 April 2020, https://www. theguardian.com/environment/2020/apr/22/climate-strikes-continue-online-we-want-to-keep-the-momentum-going (accessed 22 November 2021).

29   Murray (n 28).

30   This is reflected in the Agenda 2030 for Sustainable Development, which is committed to 'significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020' (SDG 9.c) and 'enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women' (SDG 5.b).

31   International Telecommunications Union *Fact and Figures 2020*, https://www. itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2020.pdf   (accessed 22 November 2021).

inequalities, and disparities between and within countries, with Africa remaining the region with the lowest rate of internet use. The consequence is that many individuals and communities are excluded from the opportunities brought by digital technologies in ways that help them exercise the right to peaceful assembly, which – in an increasingly digital future – threatens their ability to defend other human rights and uphold the effective functioning of participatory democracy.

This was made strikingly evident during the COVID-19 pandemic, when physical gatherings were severely restricted and access to and use of the internet became indispensable.[32] The digital divides also increased inequality in the education during COVID-19 as children coming from poor families with no internet facilities had very limited access to online courses, demonstrating that the internet is a prerequisite for enjoyment of human rights today.

Persistent and new forms of repression

Unsurprisingly, these past decades also featured some of the fiercest brutality against peaceful protests. Because these movements can be so powerful and persistent, governments are responding with ongoing violent crackdowns and protest criminalisation efforts. And it is precisely because digital technologies have been so successful in motivating people to be engaged politically and join protests that governments are increasing restrictions against them.

Indeed, many protest movements have been met with increased state repression. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has documented several trends in violation of human rights of individuals seeking to organise and join peaceful protests offline and online. The most immediate threat continues to be violence and attacks. The use of excessive and arbitrary use of force by security forces, including live ammunition, during peaceful protests is all too common. Security forces from across the world are responsible for killing hundreds and seriously injuring thousands of protestors every year. For many of these protests, the government deployed the military to disperse protesters, increasing the risk of human rights abuses. In Sudan, for example, human rights experts estimate that security forces killed dozens of people during the June 2019 protests.[33] In Iran, credible reports indicate that as many as

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32   Special Rapporteur on the rights to freedoms of peaceful assembly and of association, CN Voule 'States responses to COVID-19 threat should not halt freedoms of assembly and association' April 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E   (accessed 22 November 2021).

33   https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24689&LangID=E (accessed 22 November 2021).

304 people were killed in November 2019, yet unconfirmed reports totaled the deaths to 1,500 people. The violent crackdown against the protests in Myanmar during 2020 resulted in over 500 people killed by security forces.[34] Accountability for these atrocities has been either slow or non-existent. When not using live ammunition, protestors face risks of being severely injured by the indiscriminate use of less lethal weapons, with reports of protestors and journalists losing sight when impacted with rubber bullets in countries such as Brazil, the United States and Chile.[35] Mass arrests without charge and mistreatment, including rape, are sadly a frequent police tactic to intimidate people and communities into silence. Chillingly, security forces are not the only actors promoting state violence. Paramilitaries forces or counter protestors that act with state support also engage in attacks against demonstrators, further obscuring accountability.

States have for long resorted to criminal law and censorship to suppress dissent, adapting to new contexts and technological innovation to exert control over the free flow of information. In the digital era, these efforts are directed at curtailing the access and use of internet and digital technologies. For example, during the last decade we have seen more and more laws restricting the access and use of digital tools -social media platforms and messaging apps in particular – being adopted and used globally. These laws are often drafted in vague and ill-defined terms, risking arbitrary or discretionary application. They also impose heavy penalties, including prison sentences. Cybercrimes laws in particular, have been invoked to open investigations against demonstrators for allegedly spreading false propaganda or hate speech online.

Internet shutdowns – or the intentional disruption of digital communications rendering them inaccessible to people and communities living in a particular area – are also growing globally, becoming one of the major threats to peaceful protests in the digital era. The #KeepItOn Coalition has recorded at least 768 government-ordered internet disruptions in about 63 countries since 2016, with a total of about 242 internet shutdowns directed at suppressing peaceful assemblies and elections.[36] But it is not only the growth in the number of internet shutdowns during demonstrations that is a concern. Shutdowns are

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34 Special Rapporteur on the rights to freedom of peaceful assembly and of association, CN Voule, 'Ending Internet shutdowns: a path forward' 15 June 2021 (A/HRC/47/24/Add.2), para 35.

35 B McDonald 'A bullet to the eye is the price of protesting in Chile' *The New York Times* 19 November 2019 https://www.nytimes.com/2019/11/19/world/americas /chile-protests-eye-injuries.html (accessed 22 November 2021); M Kelly & others 'Partially blinded by police' *The Washington Post* 14 July 2020 https://www. washingtonpost.com/investigations/2020/07/14/george-floyd-protests-police-blinding/ (accessed 22 November 2021).

36 Voule (n 34) para 23.

also increasing in length, scale, and sophistication. The year 2020, for example, saw the longest shutdowns ever registered, with Bangladesh adopting a mobile internet blackout for 355 days in the Cox's bazar refugee camps, in retaliation against Rohingya refugees for staging a peaceful demonstration commemorating the anniversary of the Myanmar military's ethnic cleansing campaign in Rakhine State. More and more governments are implementing harder to detect and targeted network disruptions, such as bandwidth throttling, which deliberately reduces Internet speeds, making the internet effectively unusable for protest activity, preventing the circulation of photos and videos.[37]

Some states have also harnessed digital technologies themselves as tools for curtailing peaceful protests. A discernible trend is the targeting of activists and protest leaders with increasingly sophisticated surveillance tools or spyware capable of hacking into and watching in real-time their communications, location and activities. Detection and attribution of responsibility for this kind digital surveillance is extremely difficult. Thus, the extent of their use by governments around the world is still largely unknown. Well-documented reports by civil society and media, for example, have shed light on states' use of Pegasus spyware suite to place activists under surveillance.[38] The Pegasus spyware suite has been linked to operations against human rights defenders in countries such as Azerbaijan, Bahrain, Hungary, India, Kazakhstan, Mexico, Morocco, Rwanda, Saudi Arabia, Togo and the United Arab Emirates (UAE).[39]

Documented trends in state surveillance also involve the targeting of congregations or movements of people in public spaces, including demonstrations. Uses of biometric and face recognition technology in public spaces is suspected to be increasing in many countries, yet the public is often unaware. By using these technologies, states treat all individuals moving in public spaces as potential suspects, subverting principles by which prior authorisation on specific targets is needed before surveillance.[40] Some governments have extended these surveillance programs on the guise of controlling the pandemic's spread, giving the world a glimpse of what the future might entail if the design, sale and use of these technologies by states are left unregulated.[41]

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37   Voule (n 34) paras 25 & 34.
38   https://www.amnesty.org/en/latest/press-release/2021/07/the-pegasus-project/ (accessed 22 November 2021).
39   B Marczak & others (The Citizen Lab) 'Hide and seek: tracking NSO Group's Pegasus Spyware to Operations in 45 countries' 18 September 2018 https://citizenlab.ca/2018/09/hide-and-seek-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/ (accessed 22 November 2021).
40   Voule (n 5) para 56.
41   ICNL, *COVID-19: the surveillance pandemic* https://www.icnl.org/post/analysis/covid-19-the-surveillance-pandemic (accessed 22 November 2021).

International norms and standards

The increased role played by digital technologies in peaceful protests and the rise of state measures limiting the access and use of these technologies by protestors have raised many questions about the extent to which the right of peaceful assembly (article 21 of the International Covenant on Civil and Political Rights (ICCPR)) applies in the digital space. Does the right to peaceful assembly protect 'online assemblies'? Does it protect the use of digital technologies for planning, organising and advertising assemblies or the use of mobile phones and other devices to record assemblies? If so, what distinguishes that protection from that afforded by other related rights such as freedom of expression? What are the state's obligations when it comes to protecting these activities? Do states have an obligation to facilitate 'online assemblies' and access to the internet for assembly purposes? Can states impose restrictions on access to and use of digital technologies to prevent violence during protests? Do participants in peaceful assemblies (online and offline) maintain their right to privacy? What kinds of surveillance might be allowed? Can law enforcement use face recognition surveillance systems during demonstrations? What is the role of private companies that develop, sell or own the technologies being used?

   In recent years, international human rights law has strived to provide guidance to governments and other key stakeholders in answering these questions. The following section explores these developments.

A right to online assembly?

Since 2012, the Human Rights Council has repeatedly underscored that the same rights that people have offline must also be protected online.[42] Most importantly, in 2013 the Council explicitly recognised that 'States' obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, apply online as well as offline'.[43] The Council emphasised 'the important role of new information and communications technologies in enabling and facilitating the enjoyment of the rights to freedom of peaceful assembly and of association, and the importance for all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries'.[44]

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42   See Human Rights Council resolution 20/8 of 5 July 2012 and resolutions 32/13 of 18 July 2016, and 38/7 of 17 July 2018.
43   Human Rights Council resolution 24/5 of 8 October 2013.
44   As above.

Yet, it was not until 2018, in a resolution on the promotion and protection of human rights in the context of peaceful protests,[45] that the Council acknowledged that traditional conceptions of what constitutes an 'assembly' were being transformed by the realities of the digital age. The Council recognised that,

> although an assembly has generally been understood as a physical gathering of people, human rights protections, including for the rights to freedom of peaceful assembly, of expression and of association, *may apply to analogous interactions taking place online*.[46]

This recognition by the Council was the result of years of advocacy efforts by digital rights activists, human rights experts, individuals from marginalised and at-risk communities and the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, which in previous reports stressed that information and communications technology 'is both a *means* to facilitate fundamental rights offline and a *virtual space* where the rights themselves can be actively exercised'.[47] For many, however, questions still remained: Can gatherings that take place online qualify as an 'assembly' under article 21 of the ICCPR? Or do such activities find better protection under related rights, such as freedom of expression? Does it matter if the space where the gathering occurs is privately owned?

In his 2019 report to the Council, the current Special Rapporteur on the rights to freedom of peaceful assembly and of association (and co-author of this article), Clément Voule, rejected a restrictive interpretation of an 'assembly' as only those that take place in-person or in a physical space. Rather than focusing on complex theoretical discussions like how to define an online gathering, the report looked at practices on the ground and the capabilities being afforded by digital technologies to people seeking to gather. The goal of the report is to provide evidence of how people were innovating and using digital technologies as a space to gather together for specific purposes, including expressing solidarity and protest, thus engaging the right to peaceful assembly. The report concluded that,

> by serving both as tools through which these rights can be exercised 'offline' and as spaces where individuals can actively form online assemblies and associations, digital technologies have vastly expanded the capacities of individuals and civil society groups to organize and mobilize, to advance

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45   Human Rights Council Res 38/11 of 16 July 2018.
46   As above, emphasis added.
47   Special Rapporteur on the rights to freedom of peaceful assembly and of association, M Kiai – Addendum – Mission to Oman (A/HRC/29/25/Add.1), para 53 (emphasis added).

human rights and to innovate for social change.[48]

The advantage of focusing on how rights are being exercised in practice rather than on conceptual dilemmas is especially obvious in the context of rapid and unprecedented digital transformation. The digital revolution just began, and its implications on our lives and human rights might not be immediately clear. Thus, it is more useful to look at the dynamic nature of assemblies and recognise the different locations – whether that space is public or private, and physical or virtual – and forms that they take, depending on the levels of internet connectivity in the country, the capabilities of the technology being used and the participants' innovation and tactics. The report recognises that our interpretation of the right to peaceful assembly should be capable of evolving with the historic change under way, in order to ensure the right is protected today and for future generations. As affirmed in the report, 'international law protects the rights of freedom of peaceful assembly and of association, whether exercised in person, or through the technologies of today, or through technologies that will be invented in the future'.[49]

A year later, the COVID-19 pandemic and its accompanying digital acceleration settled any remaining doubts about how to understand 'online assemblies'. Just months after the pandemic was declared by the World Health Organization, the UN unequivocally recognised that the right to peaceful protests covers its 'online' versions. The Human Rights Council 2020 resolution on the promotion and protection of human rights in the context of peaceful protests explicitly acknowledged that digital technologies 'create space for the holding of assemblies online',[50] and the Human Rights Committee's landmark General Comment 37, on the right to peaceful assembly extended protection to 'online assemblies'. Of course, this breakthrough was ably steered by Christof Heyns, who led the drafting of the General Comment.

The Committee provided clear standards protecting this fundamental freedom for years to come. First, that the right of peaceful assembly 'is more than just a manifestation of freedom of expression'.[51] It constitutes an individual right that is exercised collectively, with both associative and expressive elements.[52] Second, the Committee clarifies that 'online assemblies' are protected under 21 of the ICCPR on the right to peaceful assembly: '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

48   Voule (n 5).
49   As above.
50   Human Rights Council Res 44/20.
51   Human Rights Committee General Comment 37, para 99.
52   As above.

organisation of, assemblies, for example online.'[53] Third, that article 21 also protects associated activities of an assembly that happens online or otherwise relies upon digital services. These associated activities include

> actions such as participants' or organizers' mobilization of resources; planning; dissemination of information about an upcoming event; preparation for and travelling to the event; communication between participants leading up to and during the assembly; broadcasting of or from the assembly; and leaving the assembly afterwards.[54]

Fourth, that understandings of the legal framework under article 21 must evolve over time to ensure effective and long-lasting protection of the right to peaceful assembly. As explained by the Committee,

> the way in which assemblies are conducted and their context changes over time. This may in turn affect how they are approached by the authorities. For example, given that emerging communications technologies offer the opportunity to assemble either wholly or partly online and often play an integral role in organizing, participating in and monitoring physical gatherings, interference with such communications can impede assemblies. While surveillance technologies can be used to detect threats of violence and thus to protect the public, they can also infringe on the right to privacy and other rights of participants and bystanders and have a chilling effect. Moreover, there is increased private ownership and other forms of control of publicly accessible spaces and communication platforms. Considerations such as these need to inform a contemporary understanding of the legal framework that article 21 requires.[55]

Finally, that gatherings in private spaces, including privately owned digital platforms, fall within the scope of the right of peaceful assembly. According to the Committee: [56]

> The extent to which restrictions may be imposed on such a gathering depends on considerations such as whether the space is routinely publicly accessible, the nature and extent of the potential interference caused by the gathering with the interests of others with rights in the property, whether those holding rights in the property approve of such use, whether the ownership of the space is contested through the gathering and whether participants have other reasonable means to achieve the purpose of the assembly, in accordance with the sight and sound principle.

53   General Comment 37 (n 51) para 13.
54   General Comment 37 (n 51) para 30.
55   General Comment 37 (n 51) para 10.
56   General Comment 37 (n 51) para 57.

State obligations to facilitate online assemblies

While the right to peaceful assembly is not absolute, restrictions imposed must be provided by law and be necessary 'in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.[57] The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it. If imposed, states must ensure that administrative or judicial review that is prompt, competent, independent and impartial are available.[58]

Internet shutdowns, for example, fail to meet these requirements. They have been found to be in clear violation of international law and cannot be justified in any circumstances.[59] In this regard, the Human Rights Committee indicated that States must not 'block or hinder Internet connectivity in relation to peaceful assemblies.'[60] Restrictions to privacy or the use of encryption or security technologies must also comply with the above-mentioned requirements. The Committee stressed that the participants of an assembly do not lose their right to privacy because the assemblies are carried out in public, and recognised that the right to privacy may be infringed by the use of surveillance technologies.[61] The Human Rights Council affirmed that

> technical solutions to 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 the rights to privacy, to freedom of expression and to freedom of peaceful assembly and association.[62]

States not only have a negative obligation to abstain from unduly interfering with the right of peaceful assembly but also have a positive obligation to facilitate and protect this freedom in accordance with international human rights standards. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association has stressed that this positive obligation includes efforts to ensure connectivity and 'to bridge the digital divides, including the gender digital divide, and to enhance the use of information and communications technology, in order to promote the full enjoyment of human rights for all'.[63]

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57   Voule (n 5).
58   HRC Res 44/20.
59   Voule (n 34).
60   General Comment 37 (n 51) para 34.
61   General Comment 37 (n 51) para 62.
62   Human Rights Council Res 38/18.
63   As above.

The obligation to protect also requires that positive measures be taken to prevent actions by non-state actors, including businesses, that could unduly interfere with the rights. The Human Rights Committee affirmed, for example, as follows: 'States should ensure that the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants.'[64] If their right to peaceful assembly online is infringed, the victims should be able to exercise their rights to an effective remedy and obtain redress. In this respect, the Human Rights Council has called on states to 'ensure effective remedies for human rights violations, including those related to the Internet, in accordance with their international obligations'.[65]

Way forward

The challenge ahead is to ensure that the human rights norms and standards for the protection of the right to peaceful assembly online are respected, including by digital technology companies, and to bring to account those responsible for their violation. In these efforts, the Special Rapporteur on the rights to peaceful assembly and of association has placed emphasis on the following: First, he emphasised that closing the digital divides and ensuring universal access to internet goals should be met within the 2030 Agenda. States should promote and facilitate access to digital technologies, and should not put restrictions on their use for the exercise of the rights to freedom of peaceful assembly and of association. Policies and practices should address equal access to the Internet and digital technologies, the affordability, and participation in the digital age for all, so as to bridge the digital divide.

Second, the Special Rapporteur drew attention to the importance of ensuring access to internet and mobile services are maintained at all times, including during times of civil unrest, elections and peaceful protests. This includes both refraining from shutting down, throttling, or blocking the internet, and repealing any laws and policies that allow for internet shutdowns, while enacting legislation prohibiting and punishing these measures.[66] Notable decisions in this regard are those of the ECOWAS Court of Justice regarding the 2017 shutdowns in Togo[67] and the Indian Supreme Court,[68] while addressing the months'

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64   General Comment 37 (n 51) para 34.
65   HRC Res 44/20 (n 58).
66   Voule (n 34).
67   ECOWAS Court of Justice *Amnesty International Togo, L'Institut des Medias pour la Democratie et les Droit de L'Homme, la Lantere, Action des Crechretiens L'Abolition de la Torture, Association des Victim De Tortut Au Togo, Ligue des Cosnommateurs de Togo, L'Association Togolaise pour l'Education aux Droits de l'Homme et la Democratie, Houefa Akpeda Kouassi v The Togolese Republic* (25 June 2020).
68   *Anuradha Bhasin v Union of India*, WP (C) 1031/2019 (Supreme Court of India,

long internet shutdown in Kashmir. The Supreme Court of India, for example, held that the indefinite imposition of internet shutdowns is unconstitutional and that internet shutdowns cannot be ordered to suppress dissent.

Third, another of his priorities is ending the securitisation of the internet as the main driver shaping regulation of the digital technologies. This includes revising and amending cybercrime and antiterrorism laws and bringing them into compliance with international human rights norms and standards and promoting and protecting strong encryption. State should also ensure that any new regulation place human rights front and center.

Fourth, he dealt with reigning in the surveillance industry. This includes establishing clear and transparent rules for the development, sale and use of surveillance technologies, including spyware and biometric surveillance technologies. In the meantime, states have to move forward with an immediate moratorium on the export, sale, transfer and use of surveillance technology. An important development in this is field is the decision of the US government to add Pegasus spyware maker NSO Group to the entity list of Malicious Spyware, recognising that the company 'developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers'.[69]

Fifth, the Special Rapporteur placed emphasis on establishing mandatory due diligence requirements. States have to move decisively to **a**dopting and enforce laws and policies creating mandatory requirements for digital technology companies to exercise due diligence in addressing any human rights impacts, including on the right to peaceful assembly, of their business services and products.

Last, it is of particular importance to the Special Rapporteur that those responsible be held accountable. National and international judicial mechanisms must hold states and private sector accountable for violations of human rights online, including the right to peaceful assembly online.

2020).

69   US Department of Commerce 'Commerce adds NSO group and other foreign companies to entity list for malicious cyber activities' 3 November 2021 https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list (accessed 22 November 2021).