

February 3, 2020

Comments on the draft Article 21: right of peaceful assembly submitted on behalf of the [International Center on Nonviolent Conflict \(ICNC\)](#).

The draft prepared by the Rapporteur, Mr. Christof Heyns on Article 21: right of peaceful assembly offers a comprehensive overview of the nature, use, limits and restrictions on the limits on the right of peaceful assembly.

We believe that the draft could still be further improved by considering and incorporating a number of recommendations listed below.

Definition of the right of peaceful assembly

Even though the definition of the right of peaceful assembly is offered in other documents that the draft refers to, it is recommended that the draft also includes an explicit definition of the right to peaceful assembly for the purpose of the writing.

This definition is even more imperative given that the draft cites at various places different examples to illustrate or reference peaceful assembly. In para 1, for example, it categorizes this right as part of the participatory governance where “change is pursued through persuasion rather than force.” A frequent reference to force throughout the draft comes with implicit assumption that the force means violence. Force however can also have a nonviolent character. Civil resistance activists and movements their represented such as Mohandas Gandhi, Lech Walesa, Vaclav Havel, Nelson Mandela, Martin Luther King, Leymah Gbowee, or Tawakkol Karman, to name just a few, believed they exercised nonviolent force more powerful than violent force. In other words, they were acutely aware of and separated through their actions nonviolent force from its violent counterpart. Thus, we recommend that in its references to force the draft qualifies it either as “**nonviolent force**” or “**violent force**” where appropriate and not use the term “force” with an implied (i.e. violent) meaning regarding its type.

Consequently, we recommend to change the sentence in para 1 to read that the right of peaceful assembly is in fact part of the “**participatory governance [.....], where change is pursued through persuasion and/or nonviolent force and not violence.**”

The draft in para 6 says that “peaceful assemblies may take many forms, including demonstrations, meetings, processions, rallies, sit-ins and flashmobs.” In para 18, it states that “Civil disobedience or direct-action campaigns are in principle covered by article 21, provided they are non-violent.”

This means that the draft, even though it does not offer an explicit definition of peaceful assembly, in fact accepts an expansive interpretation of its forms that include: 1) protest and appeal (e.g. demonstrations; marches; processions), 2) nonviolent non-cooperation (e.g. strikes; civil disobedience) and 3) nonviolent intervention (sit-ins; flashmobs; occupations). The definition of peaceful assembly could assemble all these components – currently implicit or

scattered throughout the draft – in a coherent paragraph at the beginning of the draft and make them more integral to the understanding of the right of peaceful assembly.

Our suggested and recommended definition of the right of peaceful assembly based on the information and citations available in the draft and taking into consideration the history and practice of exercising this right by nonviolent activists around the world is:

“Right of peaceful assembly is the right to plan and train for, organize, promote, and engage voluntarily in an assembly that can take different forms (in virtual or physical world or both) ranging from 1) protest and appeal (e.g. demonstrations; marches; processions), 2) non-cooperation (e.g. strikes; boycott; civil disobedience) and 3) disruptive and constructive interventions (e.g. sit-ins; flashmobs; occupations, setting up and functioning of alternative structures) without the use of violence. Right of peaceful assembly must be seen as part of an important historical practice, that of *civil resistance*¹, that ordinary people have exercised over centuries through disruptive, constructive and symbolic actions in order to win rights, freedom, and justice without the use of violence.”

Para 7 stresses that “scale or nature [of peaceful assemblies] can cause disruption. They may be intended to have these consequences, without necessarily calling into question the protection such assemblies should enjoy.” Para 50 states that “Peaceful assemblies are in some cases inherently disruptive.” Para 62 also adds that “Peaceful assemblies are generally by their nature temporary”

We recommend that these references are consolidated and inserted immediately after the definition of the right of peaceful assembly in order to address its constructive and disruptive nonviolent nature that our suggested definition brings up in addition to the issue of temporariness of peaceful assembly. The recommended sentence to be added after the definition the right of peaceful assembly is thus:

“Peaceful assemblies can have constructive (e.g. parallel citizen structures that run peoples’ assemblies such as the ones on the [Tahrir square in Egypt in 2011](#) or in [Baghdad, Iraq in 2019](#))

¹ Mohandas Gandhi was the first to adopt “civil resistance” arguing that this term described most appropriately the nature and substance of his nonviolent struggle for freedom. In Gandhi’s 1935 letter “Servants of Indian Society” he wrote the following:

“The statement that I had derived my idea of civil disobedience from the writings of Thoreau is wrong. The resistance to authority in South Africa was well advanced before I got the essay of Thoreau on civil disobedience. But the movement was then known as passive resistance. As it was incomplete, I had coined the word satyagraha for the Gujarati readers. When I saw the title of Thoreau’s great essay, I began the use of his phrase to explain our struggle to the English readers. But I found that even civil disobedience failed to convey the full meaning of the struggle. I therefore adopted the phrase *civil resistance*. [emphasis added]” See Mahatma Gandhi. “Servants of Indian Society.” Received by P.K. Rao, 10 Sept. 1935.

and disruptive nature (e.g. Solidary-led shipyard strikes in communist Poland that shut down the industry and disrupted economy) or both (e.g. a march that disrupts the traffic to deliver a petition to the authorities with specific policy solutions). Thus, nonviolent character of peaceful assemblies also encompasses actions that can create obstructions, impediments, and disruptions as long as they advance a specific or general public interest and/or do not infringe in an acutely disproportionate manner on the rights of others. Peaceful assemblies can be temporary or, in fact, long-term; can reoccur and be regularly-held depending on the nature of the demands or responsiveness to these demands by a target.”

Relevant Para 96 states “An assembly that remains peaceful but which nevertheless causes a high level of disruption, such as the extended blocking of traffic, may be dispersed, as a rule, only if the disruption is “serious and sustained.”

We would argue that the seriousness and duration of disruption should be assessed against seriousness of the emergency that a peaceful assembly wants to address or focus on. If, for example, serious and sustainable disruption is the result of a climate change emergency protest or a demonstration focused on immediate health emergency due to a climate change then such a disruption by a peaceful assembly should be assessed through a mitigating prism of the emergencies or a magnitude of the issue at stake before any decision about the assembly dispersal is undertaken.

Other comments to specific paragraphs

Para 10 states that “Where gatherings do not fall within the scope of “peaceful assemblies”, for example, if they become violent, they are no longer protected by article 21....”

It could be added that

“Article 21 thus sees nonviolent discipline as of utmost importance for extending its protection over peaceful assemblies.”

Para 21 says “Isolated instances where this is the case will not suffice to taint an entire assembly as no longer peaceful, but where the incitement or intention of violence is widespread...”

This raises the issue which could be brought up in the first few paragraphs of the current draft of what makes assembly peaceful. A negative definition is lack of violence. A positive definition is based on the actions of participants that make assembly nonviolent, including pre-gathering training and drills in how to remain nonviolent in spite of violent force that can be used against them; post-assembly debriefings about what went right and what went wrong with regard to remaining nonviolent; deploying assembly marshals (referred to in para 75) or security teams trained in de-escalation and maintaining nonviolent discipline during assembly gathering; organizers communicating with the law enforcement agencies prior to the assembly and during the assembly (indirectly referred to in para 86); isolating and extracting agent provocateurs (para 103 refers to AP though not in that particular context); creating buffers between

assembly participants and law enforcement agents; issuing and popularizing codes of conduct that emphasize and describe the type of nonviolent behavior expected and required of participants. We would like to encourage the Rapporteur to revise his draft so as to incorporate more explicit recognition of how organizers make assembly peaceful beyond a general notion that such assemblies eschew violence.

Section 3 lists obligation of states parties regarding right of peaceful assembly. We recommend that the issue of agent provocateurs that is brought up at the end of the draft (para 103) is explicitly mentioned in Section 3. Far too often, states want peaceful assemblies to become violent by deploying their agents or their non-state proxies into the assemblies as provocateurs. They would then stir tensions and violence and, thus, would provide the law enforcement agencies with the justification to use violent force against assembly with the intention to disperse it without incurring public backlash.

Para 35 says that “Business enterprises have a responsibility to respect human rights, including the right of peaceful assembly.” We would recommend to add: **“Business enterprises must not discourage directly or indirectly their employees or employees’ families from participating in peaceful assemblies or threaten with or undertake any type of administrative actions against their employees who participate in a peaceful assembly even if that assembly might cause some level of disruption to the business.”**

Para 37 talks about obligations of state parties to protect peaceful assemblies that also extent to actions that “are integral to making the exercise meaningful.”

It then lists those actions. We would like to recommend to add explicitly actions such as: **“training, workshops and other educational events that are part of the planning activities to hold peaceful assemblies.”**

Para 50 states that “States parties should not rely on some vague notion of “public order” as a ground to justify overbroad restrictions on the right of peaceful assembly.”

In this context and perhaps as an extension of the definition of a peaceful assembly, the text can point that peaceful assemblies are entities that in some degree can constitute an alternative, parallel or extra-institutional *civic order* organized around the principles of accountability, transparency, equality, non-discrimination, non-repression, non-exploitation, and nonviolent discipline. That civic order can enhance and prefigure participatory and responsive public order with eventual goal of disrupting and eventually substituting an existing unjust public order. Vaclav Havel wrote earlier about communist societies as having peaceful order (there was no war) but that order was in fact an unjust peace that had to be disrupted by the organized civil society to create a just peace.

Para 58 reads: “However, in the exceptional case where the State is manifestly unable to protect the participants from such threat, restrictions on the assembly may be imposed.” We recommend raising the bar for imposition of restrictions by changing this sentence: “However,

in the exceptional case where the State is manifestly unable to protect the participants from **direct and imminent danger**, restrictions on the assembly may be imposed.”

Para. 60 list some of the tools such as flags, uniforms, signs and banners that peaceful assemblies can use even if they are reminders of a painful past.

We recommend adding a new paragraph that would explicitly acknowledge that peaceful assemblies can use various tools and technologies, including holograms, projections or remotely controlled drones/devices that help prepare for, organize, facilitate and document the conduct of a peaceful assembly and that do not infringe in a disproportionate manner on the rights of others.

Para 63 reads that “... it should be recognized that the timing of assemblies can affect their impact and may warrant restrictions. For example, assemblies held at night in residential areas might have an undue impact on the lives of those who live nearby.”

We think this should be balanced with acknowledging who is the target of the peaceful assembly. If this is a home of the alleged perpetrator of crimes against humanity or a residency of an important public official, the permissible level of disturbances to others living nearby might need to be adjusted in favor of the peaceful assembly given the public significance of the target.

Para 64 states that “General restrictions on access to some spaces, such as buildings and parks, may limit the right to assemble in such places.” We recommend adding: **“but should not impede it altogether, particularly if a peaceful assembly is integrally connected to its specific location, for example, a peaceful sit-in inside the parliament to impact parliamentary deliberations on a controversial and public matter.”**

Finally, the section 6 on duties and powers of law enforcement agencies.

We recommend adding to para 86: **“In communication with the assembly organizers, law enforcement agencies should explain their specific rules of engagement and conduct vis-à-vis planned or ongoing assembly, including being explicit and public about what will NOT make them use violent force and what will possibly make them use violent force, including specific limits they plan to impose on their agents’ use of such violent force.”**

Thank you.

Maciej Bartkowski, Ph.D.

[Senior Director for Education and Research](#)



1775 Pennsylvania Avenue, suite 1200

Washington, D.C. 20006

Tel. 202 416 4720

Fax 202 466 5918