

# The Right of Peaceful Assembly Online: Research Pack

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## Table of Contents

<i>Foreword</i> .....	1
<i>Introduction - Executive Summary</i> .....	2
<b>1. Purpose(s) of assembly online</b> .....	7
<b>2. Public versus private</b> .....	12
The logics of online places.....	12
Precedents for thinking about private places and the right to assembly .....	14
Privately owned but publicly accessible spaces .....	14
Anonymisation and encryption.....	16
<b>3. Presence and participation</b> .....	19
What is participation? .....	19
Online participation .....	20
Further considerations .....	21
<b>4. Temporariness and permanence</b> .....	25
‘Temporary’ as a definitional element of ‘assembly’ .....	25
Temporariness and online assemblies .....	25
Permanence of online trace .....	26
Synchronicity of participation in online activity .....	26
Timeframe of assembly .....	28
<b>5. Peaceful and non-peaceful</b> .....	31
Defining peaceful in online contexts .....	31
Trolling and online assemblies .....	31
Hacktivism and online assemblies .....	32
<b>6. State obligations</b> .....	34
Internet blocking.....	34
State surveillance .....	35
State facilitation through legal, infrastructural and educational frameworks .....	37
The challenges of protecting transnational online assemblies .....	38
<b>7. Key questions</b> .....	40

## Foreword

This Research Pack, on the right of peaceful assembly online, is the outcome of an interdisciplinary collaboration between staff and students at Cambridge's Centre of Governance and Human Rights and the University of East Anglia Law School. We initially produced this research as background for an expert meeting convened in December 2019 at the University of Cambridge to inform the drafting of General Comment 37 on the Right to Peaceful Assembly.

We were delighted that this expert meeting enabled the renewal of long-standing partnerships – including with Professor Christof Heyns, a member of the UN Human Rights Committee, and the Committee's Rapporteur in drafting General Comment 37 – as well as the creation of new ones – such as with the European Center for Not-for-Profit Law. The event was organized within the framework of the 'Greater protection and standards setting: United Nations' project, managed by the European Center for Not-for-Profit Law (ECNL), in turn made possible by the International Center for Not-for-Profit Law (ICNL), and funded by the Government of Sweden.

We are equally delighted to make this research available to wider publics through publishing it as a Research Pack. We wish, in particular, to extend our thanks to the student research team, led skilfully by Eleanor Salter, who provided clear insight into a nebulous and challenging topic. The team was comprised of post-graduates across a range of diverse fields, departments and the two universities, and they admirably produced this detailed Research Pack in a matter of weeks. The interdisciplinary spirit of this project has been invaluable in distilling the many debates on the right of peaceful assembly online – be they legal, technical, political or sociological.

There are many contemporary, technology-driven challenges to traditional interpretations of human rights, and the right of peaceful assembly is no exception. This Research Pack aims to contribute to interpretations of the right of assembly by considering how new technologies and the increasingly digitally-mediated nature of interactions problematise existing understandings of the way in which individuals intentionally gather together with others. A question that runs throughout our research is the role for states and private companies in the non-interference in and facilitation of online assembly. We also disentangle some of the theoretical debates around publicly-accessible but privately-owned spaces, presence and participation, temporality and peacefulness with regard to online assemblies and provide a range of empirical evidence to inform these debates. A consideration of the right to freedom of assembly as practiced online has implications for the right to freedom of assembly face-to-face. This makes this Research Pack's contribution multi-directional, informing the right to gather in all forms.

The use of information and communication technologies can help activists and protesters coordinate peaceful assemblies, and it can provide spaces for gatherings that transcend the constraints of location and time. But technology also brings threats to the right of assembly, including denials of access, the chilling effects resulting from new and exacerbated forms of surveillance and discrimination, and interference obscured by digital mediation. We hope this Research Pack presents a useful contribution to the work of academics and human rights practitioners working to understand and support the embodied exercise of the right of assembly in the different, and often hybrid, spaces in which it occurs.

**Dr Ella McPherson and Dr Sharath Srinivasan (CGHR) and  
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## Introduction - Executive Summary

The types of assembly covered by the right of peaceful assembly have been thoroughly fleshed out in the physical realm to include static assemblies (such as public meetings and sit-ins), and moving assemblies (such as processions and marches).<sup>1</sup> While the precise boundaries of the right of assembly offline continue to be tested and to evolve, there is much less clarity regarding the essential nature of the right to peaceful assembly online.

The development of information and communication technologies (ICTs) has fundamentally changed the ways in which we interact with one another, a key dimension being the facilitation of the mediation of interpersonal interactions across time and place. The past twenty years has seen the emergence of new tools whose use support the holding of physical assemblies, an expanding terrain of networked spaces in which people come together (many of which are privately owned, but publicly accessible), and forms of gathering that might properly be regarded as the functional equivalent of offline, real-world assemblies.

The utility of online tools for planning and promoting real-world assemblies is clear<sup>2</sup>. So too, the willingness of state authorities<sup>3</sup> - often with the cooperation of relevant private actors - to respond to these technological innovations with highly restrictive measures.<sup>4 5</sup> In this regard, the revised draft of General Comment 37 provides that:

*'... States parties shall ... refrain from unduly blocking Internet connectivity in relation to demonstrations. The same applies to geo-targeted or technology-specific interference or hindering of connectivity. States parties should ensure that self-regulation by Internet service providers does not unduly affect assemblies and that the activities of those providers do not unduly infringe upon the privacy or safety of assembly participants.'*<sup>6</sup>

In contrast, the concept of *assembling online* - and of the internet as a *space* for such assemblies - is not immediately self-evident, though it has been afforded recognition by a range of human rights actors and institutions. In a joint report in 2016, for example, the UN Special Rapporteurs on freedom of assembly and of association, and on extrajudicial, summary or arbitrary executions,

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<sup>1</sup> OSCE/ODIHR - Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010) para 17.

<sup>2</sup> Gerbaudo, P., (2012), *Tweets and the Streets: Social Media and Contemporary Activism*, London: Pluto Press

<sup>3</sup> DW, (2019), *Iran: Internet shutdown slowly ends as US imposes sanctions*. Accessed at: [/www.dw.com/en/iran-internet-shutdown-slowly-ends-as-us-imposes-sanctions/a-51375660](http://www.dw.com/en/iran-internet-shutdown-slowly-ends-as-us-imposes-sanctions/a-51375660)

<sup>4</sup> A/HRC/20/27; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012, paragraph 32: *'The Special Rapporteur notes the increased use of the Internet, in particular social media, and other information and communication technology, as basic tools which enable individuals to organize peaceful assemblies. However, some States have clamped down on these tools to deter or prevent citizens from exercising their right'*, also citing A/HRC/17/27; Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue, para 79, in recommending, *inter alia*, that *'all States [should] ensure that Internet access is maintained at all times, including during times of political unrest.'*

<sup>5</sup> A/HRC/41/41, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, on the opportunities and challenges facing the rights to freedom of peaceful assembly and of association in the digital age.

<sup>6</sup> Human Rights Committee General Comment No. 37 Article 21: right of peaceful assembly, Revised draft prepared by the Rapporteur, Mr. Christof Heyns: Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019), para 38

recognised ‘that human rights protections, including for freedom of assembly, may apply to analogous interactions taking place online.’<sup>7</sup>

The revised draft of General Comment 37 itself notes that:

*‘... 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>8</sup>*

The question of what makes online activity analogous to physical assemblies offline so as to engage the right to freedom of assembly (either alone, or in combination with the right to freedom of expression and/or the right to freedom of association) is far from straightforward. This report seeks to explore the different elements of ‘peaceful assembly’ with a view to illuminating more precisely the nature of this right when it is exercised online.

The term ‘assembly’ is not defined within Article 21 of the Covenant. Instead, Manfred Nowak has noted that ‘it must 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>9</sup> Nowak further argues that ‘only intentional, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly’. With notable similarities, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association defined ‘assembly’ as ‘an intentional and temporary gathering in a private or public space for a specific purpose’.<sup>10</sup> The European Court of Human Rights recently sought ‘[t]o avert the risk of a restrictive interpretation’ by refraining ‘from formulating the notion of an assembly, which it regards as an autonomous concept, or exhaustively listing the criteria which would define it...’<sup>11</sup> Nonetheless, the Strasbourg Court has described an ‘assembly’ as ‘the gathering of an indeterminate number of persons with the identifiable intention of being part of the communicative process.’<sup>12</sup>

These different formulations point to a central dilemma that lies at the core of this report: *If* there is to be parity between the interpretation of ‘peaceful assembly’ online and offline (so as not to stretch the ordinary meaning of the term), the way in which ‘peaceful assembly’ online is conceptualised and defined will have consequences for its definition offline (and vice-versa). This report seeks to contribute to the resolution of this dilemma, premised on the need to recognise these new and dynamic forms of collective interaction and the corresponding imperative of anchoring their protection within the existing matrix of human rights protections.

The report is structured around six key dimensions of the right of peaceful assembly that have particular purchase in relation to its exercise online (in each case, taking as a starting point the relevant context and corresponding legal standards and doctrines that apply in relation to real-world assemblies, offline). The six dimensions are, respectively:

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<sup>7</sup> 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.

<sup>8</sup> Human Rights Committee General Comment No. 37 Article 21: right of peaceful assembly, Revised draft prepared by the Rapporteur, Mr. Christof Heyns: Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019), para 15.

<sup>9</sup> Nowak, M. UN Covenant on Civil and Political Rights: CCPR Commentary, p.484, para 5.

<sup>10</sup> A/HRC/20/27, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012.

<sup>11</sup> *Navalny v Russia*, Application Nos. 29580/12 and four others, [GC] judgment of 15 November 2018, para 98.

<sup>12</sup> *Tatár and Fáber v. Hungary*, 12 June 2012, app. no. 26005/08 and 26160/08, p. 38.

- 1) Purpose
- 2) Public/private
- 3) Presence and participation
- 4) Temporary and permanent
- 5) Peaceful and non-peaceful
- 6) State obligations (including those in relation to surveillance)

Each of these are summarised below, based on the more extensive analysis that follows, followed by a list of the main questions that require attention when considering whether, and if so how, to extend the right to peaceful assembly to the online realm.

**Purpose:**

The right to peaceful assembly is distinctive from the individual's right to freedom of expression and the right of individuals to freedom of association. It speaks to other dimensions of how individuals participate in society and public affairs, including to influence government policy and accountability. It attends to how individuals may come together to communicate, exchange and act to address common concerns. Arguably, this right is concerned with allowing for the expressiveness of the 'body politic' beyond individual expression and besides more formal association. From here, in an increasingly digitally mediated world, the spirit and purpose of Article 21 should necessarily extend to the communicative spaces where individuals come together to speak and act to realise their participation in the political, social and cultural life of their society. Whereas some of the parameters of the interpretation of Article 21 have their roots in physical assemblies as the dominant if not primary instantiation of the right, these parameters, such as aspects of temporality, boundaries of public, and definitions of participation, must be open to fresh interpretation or must yield way, where and when the spirit and purpose of what Article 21 protects requires this.

**Public/private:**

All assemblies must take place in a place, whether a market square, a home, a social media platform or a petition website. These places are usually but not always governed by people other than those participating in the assembly, which means that these places usually have logics or rules of their own that may or may not align with the logics of the assemblies. Because participants in a particular assembly must interact and express themselves within that assembly's place, their interactions and communications are possibly inflected by that place's logic. For example, they might only be able to gather in a place at during daylight hours or might face noise restrictions that keep their volume at a certain level.

Online assemblies, or online parts of hybrid assemblies, are like offline assemblies in this respect but with at least two related complications that are much more prevalent in online than offline places. The first relates to the mediation afforded by the use of ICTs, which in turn affects the extent and ways by which the logics of online places inflect online assembly communications. The second relates to the predominant type of logics governing these online places, which tend to be anchored in private rather than public ownership. This section will explain each in turn, focusing on how the commercial logic of private online spaces restricts the registers, distorts the transmission, and allows external parties to eavesdrop on the reception of the interactions and communications integral to assembly. The section then looks to offline precedent as well as considerations for protecting the right to peaceful assembly enacted in online places, focusing in

particular on arguments compelling private places to make spaces for online assemblies and states and corporations not to interfere with participants' abilities to protect themselves from surveillance

### **Presence and participation:**

Because of how digital communications work, the protection of the right to peaceful assembly online involves interpreting what constitutes 'participation' or 'presence' in an assembly for new empirical phenomena. 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, and whether or not there is sufficient collective purpose of assembly, appears fraught. However, starting from a focus on state obligations not to interfere appears to be more tractable. By expanding the definition of participation to include more passive actions or mere presence in an online space, the distinctiveness of the right of assembly could be lost. The risk of not doing so may be to exclude from the protective scope of the right individuals who might deserve or benefit from protection.

### **Temporary and permanent:**

The online realm of assemblies calls into question the element of temporality in (some) conventional definitions – or the received understanding – of the right to peaceful assembly. Online assemblies, with their permanent digital trace, often lack a clearly defined timeframe and are not 'temporary' in the same way as protests or marches. By extension, there may also be less contemporaneity in some online interactions (such that they are not 'gatherings' in ways that physical assemblies appear to be). If we consider that the concern with the temporary nature of physical assemblies reflects the need to distinguish them from the right to association, and that in any case, the right of assembly should not be interpreted narrowly (protest camps that might extend for months or years have also been found to fall within the definition of assemblies), then the purpose of the right should not be vitiated by the peculiarities of how time and record operate with digital communications. Nevertheless, challenges arise with the extent of protection afforded over time to online assemblies, for example with delimiting assembly for never-ending comment streams, allowing for the role of mediators and administrators in determining who participates and when, and protecting against the vulnerability of digital media to strategies to generate virality, such as bots, paid advertising/promotion etc. It is worth noting that because online and 'offline' worlds invariably merge and because permanent digital traces of recordings, commentaries and further participatory actions relating to 'temporary' physical assemblies are common, questions of temporality already arise with respect to the right to peaceful assembly in a digital age.

### **Peaceful and non-peaceful:**

Besides the content of expression, online assemblies may call into question what constitutes 'peaceful' when assemblies lead to collective action taken in the form of trolling or hacktivism, such as denial of service attacks (DoS attacks) or distributed denial of service attacks (DDoS attacks). States are obliged to protect online assemblies that fall within the definition of 'peaceful', but the diffuse nature of online assemblies raises challenges for how to protect the right, including the rights of dissenters, while placing limits on content or actions that are not 'peaceful'. Consideration may need to be given to the circumstances in which the principle of individualised restriction, distinguishing between peaceful and non-peaceful participants, can actually be implemented online (in contrast, for example, with geo-targeting and widespread interference with connectivity).

**State obligations (including those in relation to surveillance):**

In recognising the right of peaceful assembly online, states must not persuade or coerce individuals to restrict themselves only to online assemblies (as a substitute for real-world assemblies). Moreover, states may have distinctive obligations to not interfere with and to facilitate online assemblies. As regards negative obligations, non-interference would include not using technology in order to block, filter or remove content online where that would interfere with the legitimate exercise of the right. There is also a risk that states may police or surveil the internet more severely by citing the duty to preserve national security or public order. As regards positive obligations, states should create a legal framework that is conducive to individuals exercising their right to participate in online assemblies, from access to the internet to data protection and from the facilitation of electronic means of participation to appropriate oversight of surveillance measures. Practical and effective protection for the right to freedom of peaceful assembly online includes upholding the principle of 'content neutrality' (especially as regards gatherings by minority groups or assemblies that convey dissenting viewpoints). States will also have to facilitate (and not unduly interfere with) the rights of individuals participating in transnational assemblies online, or individuals participating from their jurisdiction in assemblies directed at or concerned with third party states and societies.

The following sections provide examples and further considerations for each of these issue areas. The report concludes with some key questions arising from the research and reflection we have done on these dimensions.

# 1. Purpose(s) of assembly online

Some definitions of ‘assembly’ (including the draft General Comment) articulate the purposive element of gathering as being for ‘a *common expressive* purpose’.<sup>13</sup> In contrast, both Manfred Nowak and the UN Special Rapporteur on the rights to freedom of peaceful assembly and association define the purpose of assemblies more broadly, stating that assemblies need only have a ‘*specific* purpose’.<sup>14</sup>

The Draft General Comment recognises a range of purposes that assemblies may fulfil. These include shaping societies using persuasion rather than force and advancing ideas and aspirations *publicly* (thereby helping to gauge the extent of support for the message being conveyed). In this regard, it can be seen that assemblies generally entail a *performative element*. This constitutive performative purpose concerns more than what is explicitly said or written and contributes to the visibility of marginalised groups<sup>15</sup> not least by showcasing the *number* of supporters of a cause or campaign<sup>16</sup> (whereupon ‘the medium is the message’).<sup>17</sup>

Assemblies can also create opportunities for inclusive participation and may be of particular importance to marginalised and disenfranchised members of society.<sup>18</sup> The UN Special Rapporteur has noted that ‘[a]ssemblies play a vibrant role in mobilising the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.’<sup>19</sup> Jack Balkin also emphasises that assemblies and freedom of speech are vital to ‘make state power accountable to citizens.’<sup>20</sup>

In addition, the right to participate can help shape autonomy and affirm identities. However, Nowak suggests that for the right of assembly to be engaged, such information or ideas should be ‘directed at the public’ and so the right of assembly is to be ‘understood as a *special, institutional form of freedom of expression conditioned by its specific, democratic meaning*.’<sup>21</sup> He argues therefore that ‘the specific protection of freedom of assembly aims at the *discussion or proclamation of information and ideas* within the meaning of Art.19(2) that is not dealt with or guaranteed elsewhere.’<sup>22</sup> Observing that some legal systems regard ‘community festivals, public attractions, church services or marriage, funeral or religious processions’ as assemblies, while other States

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<sup>13</sup> Human Rights Committee General Comment No. 37 Article 21: right of peaceful assembly, Revised draft prepared by the Rapporteur, Mr. Christof Heyns: Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019) para 4. Similarly, OSCE/ODIHR-Venice Commission (2010). *Guidelines on Freedom of Peaceful Assembly*. 2nd ed., para 16.

<sup>14</sup> Nowak, M., (2005), *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. Kehl: N.P Engel, p.373; A/HRC/20/21 (21 May 2012). Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Of Association, para 24.

<sup>15</sup> Butler, J., (2015), *Notes Toward a Performative Theory of Assembly*, Cambridge, MA: Harvard University Press.

<sup>16</sup> For example, the initial intention of #MeToo was to “give people a sense of the magnitude of the problem”. Alyssa Milano (15.10.2017). [Twitter] Accessed at: [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976)

<sup>17</sup> McLuhan, M., Fiore, Q., and Agel, J., (1967), *The Medium is the Massage: An Inventory of Effects*, New York: Random House.

<sup>18</sup> Human Rights Committee General Comment No. 37 Article 21: Right of Peaceful Assembly, revised draft prepared by the Rapporteur, Mr. Christof Heyns Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019)

<sup>19</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai A/HRC/20/27, 21 May 2012, para 24.

<sup>20</sup> Jack M. Balkin, Cultural Democracy and the First Amendment, 110 *Nw. U. L. Rev.* 1053 (2016). See also, A/HRC/RES/15/21, Human Rights Council 15/21, 6 October 2010 (Preamble).

<sup>21</sup> Nowak (n14) 487 para 9.

<sup>22</sup> *ibid* 485 para 6.

only afford the protection of the right for political purposes, Nowak argues that freedom of assembly serves the crucial democratic purpose of ‘informing, expressing and implementing political opinions.’<sup>23</sup> At the same time, he acknowledges that the ideas being proclaimed need not be of a party political or current events nature. In this regard, it is noteworthy that the European Court of Human Rights has acknowledged that Article 11 ECHR can be engaged for assemblies ‘of an essentially social character’.<sup>24</sup>

According to the revised draft General Comment No. 37, para. 14, ‘while commercial gatherings would not generally fall within the scope of what is protected by article 21, they are covered to the extent that they have an expressive purpose’.<sup>25</sup> In the context of offline assemblies, however, it is notoriously difficult to ascertain whether or not an event should be regarded as commercial. For example, charging entry fees to events such as the Pride in Manchester raises such issues of line-drawing.<sup>26</sup>

Yet freedom of assembly is not coextensive with freedom of expression, nor should it be subordinated to freedom of speech, as underscored by several scholars.<sup>27</sup> For example, participation in assemblies may also have an associational purpose (quite apart from any expressive or communicative function). This non-expressive dimension should, as Tabatha Abu El-Haj argues, be recognised and valued because associational activities are ‘incubators of relationships’ not just ‘incubators of ideas’.<sup>28</sup> Beyond simply asserting opinions, assemblies help build and preserve solidarity, modes of resistance<sup>29</sup> and identities.<sup>30</sup> This plays a crucial role for minorities, furthering personal development and “a pluralistic and tolerant society”.<sup>31</sup> The sense of solidarity is in turn essential to collective action.<sup>32</sup>

Having summarily mapped the various purposes of offline assemblies, the question arises as to whether these (or other) purposes can equally (or partly) be realised through analogous online interactions - either where these (a) are not already protected by Article 19 or Article 22 ICCPR, or (b) might deserve additional recognition as also falling within the protective scope of Article 21?

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<sup>23</sup> *ibid* 481 para 1.

<sup>24</sup> *Friend and Others v UK*, Appl Nos 16072/06 and 27809/08, 24 November 2009 (admissibility), para 50 and *Huseynov v Azerbaijan*, Appl No 59135/09, 7 May 2015, para 91.

<sup>25</sup> Human Rights Committee General Comment No. 37 Article 21: right of peaceful assembly, revised draft prepared by the Rapporteur, Mr. Christof Heyns: Draft as adopted on First Reading during the 127th Session (14 October – 8 November 2019), para. 14

<sup>26</sup> Parkinson, H. J. (4<sup>th</sup> February 2019) ‘Manchester Pride is charging £71 a ticket this year. That’s a bit rich’, *The Guardian*, Accessible at: <https://www.theguardian.com/commentisfree/2019/feb/04/manchester-pride-2019-ticket-prices-inclusivity>

<sup>27</sup> Salát, O., (2015), *The Right to Freedom of Assembly*, Hart; in the US context: Bhagwat, A., (2011), ‘Associational Speech’, *Yale L. J.* 120, 978; Inazu, J. D., (2016), *Confident Pluralism*, University of Chicago Press.

<sup>28</sup> El-Haj, T. A., (2014), ‘Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association’, 56 *Arizona Law Review* 73, and at 99: ‘The message of an organizations may be much less critical for determining whether it should be entitled to constitutional protection, as an *association*, than the nature of the relationships within it and the ways in which they are organized.’

<sup>29</sup> Inazu, J. D., (2016), *Confident Pluralism*, University of Chicago Press.

<sup>30</sup> OSCE/ODIHR (2010), *Guidelines on Freedom of Peaceful Assembly*. 2<sup>nd</sup> ed., p. 23. On the use of cyber-activism to express one’s identity, see also: Petray, T. L., (2011), ‘Protest 2.0: online interactions and Aboriginal activists’, *Media, Culture & Society*, 33(6), p. 932-933.

<sup>31</sup> OSCE/ODIHR (2010), *Guidelines on Freedom of Peaceful Assembly*. 2<sup>nd</sup> ed., p. 24.

<sup>32</sup> Castells, M., (2015), *Networks of outrage and hope: Social movements in the Internet age*, John Wiley & Sons.

As noted, *collective expression* is regarded by many as being one of the core definitional elements of freedom of peaceful assembly.<sup>33</sup> This clearly applies to online assemblies too – online activity is frequently undertaken for expressive purposes and even being part of an online group can of itself be interpreted as having an expressive component.<sup>34</sup>

In terms of assemblies having an associational (vs. purely expressive) purpose,<sup>35</sup> examples of how this happens online can be found in Gerbaudo's analysis of the use of social media during protests not only to 'convey abstract opinions' or organise physical assemblies, but to 'give a shape to the way in which people come together and act together.'<sup>36</sup> Similarly, Cmeciu and Coman describe how 'online communities' collective identities' were built online during both online and offline anti-fracking protests in Romania.<sup>37</sup>

Given that a virtual form of connectivity might be particularly important to those members of society who are vulnerable, marginalised and/or disenfranchised, does the ability to *assemble* online level the playing field for these citizens, enabling them to access and participate in (sometimes amorphous and transient) social groups? Smith Erkstrand believed that the internet provided opportunities for people with disabilities to participate and interconnect with the public sphere.<sup>38</sup>

Whilst accepting that merely because a form of online interaction might *substitute* for an assembly offline, it does not for that reason alone *become* an assembly, does the internet provide an alternative mechanism for some individuals to *assemble* and so by extension, form opinions and develop autonomy, when physical participation is otherwise unavailable to them? In other words, if an individual is unable (physically or mentally) to participate offline, should their right to join, or otherwise show solidarity with, the same assembly through online means be protected by Article 21?

An American report on digital inclusion noted that people with disabilities did not have the same level of social participation that able bodied people did. The study indicated that whilst 53.7 percent of able-bodied people regularly attended group meetings, only 36.8 percent of people with disabilities did the same. This included participation in political groups.<sup>39</sup>

Given the potential barriers to participation in real-world assemblies, whereby some people cannot easily communicate because of physical or mental barriers, internet platforms provide opportunities for them to associate with and participate alongside others online:

'Web tools and social media sites that connect the online voices of people with disabilities are revolutionizing how they are heard and how they assemble.

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<sup>33</sup> The OSCE *Guidelines on Freedom of Peaceful Assembly* (draft of 3<sup>rd</sup> edition) define an assembly as "the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose" (para. 18). The ACHPR *Guidelines on Freedom of Association and Assembly in Africa* use the notion of "expressive purpose" (para. 3).

<sup>34</sup> Inazu, J. D., (2013), 'Virtual Assembly', 98 *Cornell L. Rev.*, 1093, pp. 1097-8.

<sup>35</sup> Hamilton, M., (2019), *Toward General Comment 37 on Article 21 ICCPR*. ECNL/UEA.

<sup>36</sup> Analysis of the Arab spring in Egypt, indignados movement in Spain and Occupy Wall Street in the USA. Gerbaudo, P., (2012), *Tweets and the Streets*, Pluto Press, p. 5.

<sup>37</sup> Cmeciu, C. and Coman, C., (2016), 'Digital Civil Activism in Romania: Framing anti-Chevron Online Protest Community "Faces"', *Comunicar*. 47: XXIV.

<sup>38</sup> Smith Ekstrand, V., (2017), Democratic Governance, Self-Fulfilment and Disability: Web Accessibility Under the Americans With Disabilities Act and the First Amendment, *Communication Law and Policy* 22(4), p. 429.

<sup>39</sup> US National Council on Disability, (2011), *The Power of Digital Inclusion Report: Technology's Impact on Employment and Opportunities for People with Disabilities*, Accessed at: <https://ncd.gov/publications/2011/Oct042011>

Recent on-site protests by disabled activists against proposed measures in Congress to eliminate Obamacare relied on social media and hashtags like #cripthevote and #ADAPTandresist to organize and take action in real space.<sup>40</sup>

Online assembly could be instrumental in establishing a dialogue not only within civil society, but also between civil society and governmental actors.<sup>41</sup> The purpose of online peaceful assembly here could be to give a voice to those who are literally voiceless or a sense of gathering to those who could not attend a physical gathering. It might facilitate a sense of community and participation for those who otherwise may feel excluded both socially and politically, allowing them to meaningfully engage in a public domain. In a similar logic, the possibility to take part in online assemblies at slightly different points in time should also be considered in the light of the wider democratic purpose of the right to assembly. Online assemblies can widen access, both time-wise and space-wise, to the exercise of this democratic right by people who would otherwise, for whatever reason, not be able to participate, thereby circumventing shortcomings of physical assemblies imposed by the need of synchronicity *stricto sensu*.<sup>42</sup>

The performative and associational purposes of real-world assemblies can also be translated into the online sphere. For example, a digital tool called 'Thunderclap' co-ordinates a message across several social media platforms simultaneously. Supporters sign up to participate and thus virtually pursue a common expressive purpose.<sup>43</sup> The number of supporters conveys a message in itself - one that is not captured by the individual freedom of expression alone, and which provides a gauge of support. Other examples of associational value are the #MeToo movement<sup>44</sup> and in India in 2011, people rallied on social media to request the enactment of an anti-corruption law.<sup>45</sup>

The various functions of assemblies do not necessarily correspond to a clearly enunciated, explicit common expressive purpose but are instead indicative of a connection beyond expression. In this regard, the notion of *connective* action, proposed by Bennett and Segerberg in opposition to the traditional form of collective action, sheds light on some peculiarities of online assemblies. Connective actions, such as the indignados and Occupy protests, are less organised forms of actions involving the 'self-motivated' sharing of 'easily personalized' ideas on digital media. In contrast to the need for a 'common ... purpose', this form of action thus accommodates a level of diversity in the purposes pursued by individual participants in connective action.<sup>46</sup> The analysis of the hashtag #MeToo uncovers the variety of intentions of digital 'participants' to the

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<sup>40</sup> Smith Ekstrand (n38 )429.

<sup>41</sup> OSCE/ODIHR (2010). *Guidelines on Freedom of Peaceful Assembly*. 2<sup>nd</sup> ed, p. 23.

<sup>42</sup> See report by the Special Rapporteur of May 2019, para 27, on the "value of technology to facilitate people's rights to public participation".

<sup>43</sup> In 2013 the Labour party and 848 supporters simultaneously tweeted: "It's time to deal with David Cameron's cost of living crisis." Let's freeze gas and electricity bills. #freezethatbill". This message appeared on the online feeds of four and a half million people. Hern, A., (11th November 2013). Labour's Thunderclap heard by 4.5 million Twitter users, *The Guardian*, Accessed at: <https://www.theguardian.com/technology/2013/nov/11/labours-thunderclap-twitter-freezethatbill-tweeted-simultaneously>.

<sup>44</sup> Snyder, C. and, Lopez, L., (13 December 2018), Tarana Burke on why she created the #MeToo movement - and where it's headed, *Business Insider*, Accessed at: <https://www.businessinsider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12?r=US&IR=T>

<sup>45</sup> Times of India, (18 December 2013), All you want to know about Lokpal Bill, *Times of India*, Accessed at: <http://www.timesofindia.indiatimes.com/india/All-you-want-to-know-about-Lokpal-Bill/articleshow/27570010.cms>

<sup>46</sup> Bennett, W. L. and Segerberg, A., (2012), "The Logic of Connective Action", *Information, Communication & Society*. 15:5, p. 754.

movement.<sup>47</sup> This example shows how the purpose can vary over time and depending on the person, and depart from the ideas of a movement's organisers or initiators. It may therefore question the need to open the definition of assembly to a multiplicity of purposes rather than being limited to 'a' (one) common expressive purpose.

Finally, just as issues of line-drawing arise in relation to the concept of 'commercial' assemblies offline, so too the commodification of personal data raises questions regarding the circumstances in which an online assembly might properly be considered to be 'commercial' in nature. On the basis of the standard articulated in the draft General Comment (that commercial assemblies are protected under Article 21 to the extent that they have an expressive purpose), it may be that no further issue arises where some expressive purpose can be demonstrated. It may nonetheless be worth considering whether there are any circumstances in which the commodification of personal data generated by, or in connection with, an online gathering might outweigh or negate any expressive purpose such a gathering may have.

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<sup>47</sup> These intentions include notably "promoting solidarity", "divulging information about personal experiences, asserting knowledge about social norms, objecting to the status quo, speaking about and/or criticizing online activism, and exploiting the buzz of the hashtag to advance other ideas". Wood, M. K, (1 November 2018). Language in digital activism: exploring the performative functions of #MeToo Tweets, *Digit Magazine*, Accessed at: <https://www.digitmagazine.com/academic-papers/language-digital-activism-exploring-performative-functions-metoo-tweets>

## 2. Public versus private

All assemblies must take place in a place, whether a market square, a home, a social media platform or a petition website. These places are usually but not always governed by people other than those participating in the assembly, which means that these places usually have logics or rules of their own that may or may not align with the logics of the assemblies.<sup>48</sup> Because participants in a particular assembly must interact and express themselves within that assembly's place, their interactions and communications are possibly inflected by that place's logic. For example, they might only be able to gather in a place at during daylight hours or might face noise restrictions that keep their volume at a certain level.

Online assemblies, or online parts of hybrid assemblies, are like offline assemblies in this respect but with at least two related complications that are much more prevalent in online than offline places. The first relates to the mediation afforded by the use of ICTs, which in turn affects the extent and ways by which the logics of online places inflect online assembly communications. The second relates to the predominant type of logics governing these online places, which tend to be anchored in private rather than public ownership. This section explains each in turn and then looks to offline precedent as well as considerations for protecting the right to peaceful assembly enacted in online places.

### The logics of online places

An interaction involves the production, transmission and reception of a communication. Because participants are often communicating face-to-face in offline assemblies, the logic of the place they are in is likely to influence the production of the communication, including who speaks, what is said and how, as well as its reception, like who hears whom. Because it is synchronous, however, the logic is unlikely to affect the communication's transmission except with respect to amplification, echoing and muffling – but these effects can relatively quickly be deciphered by participants, who can then adjust for them.

In contrast, the mediation of online interactions, which is about extending transmission across time and space, provides greater opportunities for the logic of that online place to impact transmission in a way that is much more difficult for participants to anticipate and thus adjust for.<sup>49</sup> We are talking here about the opacity of visibility algorithms, for example, and the narrowing of cues<sup>50</sup> in mediated versus face-to-face communication that make it more difficult to assess with whom you are interacting. The amplified impact, thus, of the place's logic on the online assembly urges a critical consideration of that logic which, in the case of privately-owned online assemblies, is often driven by norms of neoliberal capitalism.

Although some publicly-owned places conducive to online assemblies certainly exist, such as the UK Government's Petitions website ([petition.parliament.uk](http://petition.parliament.uk)), most of the places where we can interact with each other online are privately-owned. With almost a third of the world's population as active users, Facebook dominates, but is joined by its commercial sister companies, such as Instagram, as well as its commercial competitors, such as Twitter. Of course, not all ICTs follow a commercial logic; some, like Mastodon, are communally owned. Still, because of the 'network

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<sup>48</sup> McPherson, E., (2017), "Social Media and Human Rights Advocacy", *The Routledge Companion to Media and Human Rights*, ed. Tumber, H. and Waisbord, S., London: Routledge, 279–88.

<sup>49</sup> McPherson, E. (2018), "Risk and the Pluralism of Digital Human Rights Fact-Finding and Advocacy", *New Technologies for Human Rights Law and Practice*, ed. Land, M. K. and Aronson, J. D., Cambridge, UK: Cambridge University Press, 188–214.

<sup>50</sup> Thompson, J. B., (1995), *The Media and Modernity: A Social Theory of the Media*, Stanford, CA: Stanford University Press.

effect,' which explains the social media oligopoly via our tendency to flock to sites where our friends already are, these sites have difficulty gaining traction.

As Shoshana Zuboff argues in her bestselling book, *The Age of Surveillance Capitalism*, ICT companies such as Facebook, Amazon and Google collect such (personal) data 'in order to nudge, coax, tune and herd behaviour toward profitable outcomes.'<sup>51</sup> Predominant ways in which these companies earn profit is through commodifying personal data and selling it to third parties as well as through selling users as audiences to advertisers.<sup>52</sup> This logic of these online places can interfere with the logic of online assemblies at the stages of the production, transmission and reception of their communications, and we provide examples of these in turn.

At the production stage, the logic of profit encourages particular types of communication in order to be picked up by the algorithm that determines visibility. For example, a guide Facebook had on its website for how non-profits could reach audiences prescribed a very particular style of 'voice,' namely 'inspiring, solutions-oriented' rather than 'placing blame' – thereby recommending against one of the key registers of online assemblies that gather in the name of accountability and social change.<sup>53</sup> At the transmission stage, these algorithms determine what is visible to whom – and what is invisible. For example, activists posting important evidence of human rights violations may see it disappear because the violence it documents is seen as contravening community standards designed to keep social media platforms palatable and thus profitable.<sup>54</sup> Another way in which visibility is inflected by the logics of platforms is the visibility of one's interlocutor; the reduction of clues about this interlocutor may allow external parties to slip into the online assembly unnoticed, where they may set surveillance traps for activists or unleash armies of bots.<sup>55</sup> At the reception stage, the model of surveillance capitalism also sets the stage for easy eavesdropping by external parties, both commercial and governmental.

All of the above assumes participation, but the logic of online places also inflects who feels comfortable and thus able to participate – and goes far beyond the issue of digital divide. Safiya Umoja Noble carefully and devastatingly documents in her book, *Algorithms of Oppression*, how Google's corporate logic renders racist and sexist search results – for example, porn sites returned for a search on 'black girls'. Porn companies are very adept, both through digital literacy and through financial capital, at search engine optimisation, and this allows them to manipulate and outright pay for their placement at the top of such a search result.<sup>56</sup> Such outright hostility against

<sup>51</sup> Zuboff, S. (2019), *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, London: Profile Books

<sup>52</sup> On the issue of commodification see for instance Barbero, M. (et al), (2017), *Study on Emerging Issues of Data Ownership, Interoperability, (Re-)Usability and Access to Data, and Liability: A Study Prepared for the European Commission DG Communications Networks, Content & Technology*, Accessed at: <https://ec.europa.eu/digital-single-market/en/news/study-emerging-issues-data-ownership-interoperability-re-usability-and-access-data-and>; Datenethikkommission der Bundesregierung, Gutachten der Datenethikkommission (October 2019), Accessed at: <https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/it-digitalpolitik/gutachten-datenethikkommission.html>; cf. Elvy, S., (2018), 'Commodifying Consumer Data in the Era of the Internet of Things', 59 *BC L Rev* 423; Evans, B. J., (2011), 'Much Ado about Data Ownership', 25 *Harv L J & Tech* 69; Litman, J., (2000), 'Information Privacy/Information Property' 52 *Stan L Rev* 1283.

<sup>53</sup> McPherson, E., (2017), "Social Media and Human Rights Advocacy", *The Routledge Companion to Media and Human Rights*, ed. Tumber, H. and Waisbord, S., London: Routledge, 279–88.

<sup>54</sup> Madeleine Bair, "Navigating the Ethics of Citizen Video: The Case of a Sexual Assault in Egypt," *Arab Media & Society* 19 (2014): 1–7.

<sup>55</sup> Youmans, W. L. and York, J. C., (2012), "Social Media and the Activist Toolkit: User Agreements, Corporate Interests, and the Information Infrastructure of Modern Social Movements," *Journal of Communication* 62, no. 2: 315–29.

<sup>56</sup> Noble, S. U., (2018), *Algorithms of Oppression: How Search Engines Reinforce Racism*, New York: NYU Press.

particular groups structurally enabled by online places may well have a chilling effect on participation in online assemblies, and this is a differential effect that most impacts minorities. In a related fashion, we know that the threat of surveillance capitalism, and its enablement of state surveillance, is silencing. Again, this is not an equal opportunity silencer, but one that disproportionately impacts potential participants who, because of their identity group and the way these groups have been treated by their governments in the past and present, are most wary of being monitored.<sup>57</sup> This is exacerbated by sites requiring that users use their legal names; Facebook's policy is the following: 'The name on your profile should be the name that your friends call you in everyday life. This name should also appear on an ID or document from our ID list.'<sup>58</sup>

The question which therefore arises and requires particularly careful consideration when it comes to the exercise of any human right online on platforms provided by private ICT actors is, who can access such data and for what purposes. With regard to online assemblies, a commentary on such a right should take into account any potential effects that collection and commodification of participants' (personal) data may have on the exercise of their human rights, in particular any chilling effect private surveillance/monitoring may have on their enjoyment, the potentially (ethically/legally) offensive effect of the monetisation of human rights or discriminatory and inhibiting barriers to access assembly sites.

### **Precedents for thinking about private places and the right to assembly**

The above considerations of how the logics of private online spaces might interfere with the right to (online) assembly raise questions about how such interferences might be remedied. This occurs against the backdrop of the *UN Guiding Principles on Business and Human Rights*, which outlines how states and corporations must work together on human rights, the former in terms of protecting and the latter in terms of respecting.<sup>59</sup> We can look to existing work in this area to begin sketching out potential avenues for remedy both in terms of supporting assemblies in private places and in terms specifically of participants' abilities to protect themselves from surveillance through anonymisation and encryption.

#### Privately owned but publicly accessible spaces

In *Appleby v UK*<sup>60</sup> - a case in which the applicants had been stopped from setting up a stand and distributing leaflets in a privately-owned shopping centre - the Strasbourg court found that Article 10 ECHR (freedom of expression) does not bestow any 'freedom of forum' for its exercise. The court emphasised that 'regard ... must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No 1.'<sup>61</sup>

The Strasbourg court did, however, hold that, in certain circumstances a positive obligation could arise for the State to regulate property rights to allow public access to private space for the purpose of exercising Convention rights - namely, 'where the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the

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<sup>57</sup> *ibid.*

<sup>58</sup> Facebook, What Names are Allowed on Facebook? Accessed at: <https://www.facebook.com/help/112146705538576>.

<sup>59</sup> Human Rights Council, Guiding Principles on Businesses and Human Rights, Accessed at: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>60</sup> Application no.44306/98, judgment of 6 May 2003, para 47. In this case, the applicants were able to campaign in the old town centre and to employ alternative means of making their protest. The Court therefore found no breach of Article 10 (further stating that their Article 11 claim did not require separate consideration since no separate issues arose). See also, Fenwick and Hamilton, p.577, fn 174.

<sup>61</sup> In this regard, it is notable that the Covenant has no parallel provision that protects the peaceful enjoyment of possessions (*cf.* Article 5(d)(v) ICERD and Article 15(2) CEDAW).

essence of the right has been destroyed.' The court gave the example of 'a corporate town where the entire municipality is controlled by a private body'.<sup>62</sup>

Arguably (and with direct bearing on the concept of online assembly) there is an emergent jurisprudential recognition that ownership should not of itself be dispositive.<sup>63</sup> The US 'public forum' doctrine, for example, transcends strict questions of ownership and potentially affords greater protection to assemblies on privately-owned land so long as they can be classed as a public forum.<sup>64</sup> Of direct relevance here is the case of *Knight First Amendment Institute at Columbia University and Others v. Donald J. Trump and others*,<sup>65</sup> in which the President's blocking of critics from his Twitter Account was successfully challenged under the First Amendment. The U.S. Court of Appeals for the Second Circuit rejected the President's argument that his Twitter account was '... simply the means through which he participates in a forum and not a public forum in and of itself.'<sup>66</sup> Instead, the Appeals Court upheld a 2018 District Court ruling that the @realDonaldTrump Twitter account was a 'public forum' (and thus subject to First Amendment protection from, as in this case, viewpoint discrimination).<sup>67</sup>

It would be possible to construct an *Appleby* argument for a State obligation to facilitate access to Facebook for the purpose of assembly/expression.

A similar argument was made in the US case of *Packingham v. North Carolina*<sup>68</sup> where the Supreme Court struck down a law banning sex offenders from social media sites used by children, because of the restriction of freedom of expression.

'By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and

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<sup>62</sup> See further, Fenwick H. and Hamilton, M., (2017), 'Freedom of Protest and Assembly', Chapter 9 in *Fenwick on Civil Liberties and Human Rights*, 5th edn, London: Routledge

<sup>63</sup> See, for example, the judgment of German Federal Constitutional Court, finding a general ban on demonstrations in Frankfurt airport (which resulted in the termination in March 2003 of a protest by members of the 'Initiative against Deportations') to be disproportionate. The Court held that the 'direct binding force of the fundamental rights does not only apply to enterprises which are completely in public ownership, but also to enterprises owned both by private shareholders and the state over which the state has a controlling influence.' BVerfG, 1 BvR 699/06 of 22.2.2011, para.49-60. See also para 83: 'Decisions that restrict freedom of assembly which a public or publicly controlled enterprise bases solely on private law cannot, however, extend the powers of encroachment of state authorities in respect of assemblies or even justify them. If the authorities competent for assemblies make decisions relating to an assembly in the airport area or the police intervene to enforce rights, they must in principle involve the operator of the airport as the affected party and, where applicable, take account of its assessments ...' Accessed at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222\\_1bvr069906en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvr069906en.html)

<sup>64</sup> Note, for example, Judge Pinto de Albuquerque's dissenting opinion in the Strasbourg case of *Mouvement Raëlien Suisse v Switzerland* [GC], Appl No 16354/06, 13 July 2012, in which he urges his fellow judges to draw on the US doctrine and distinguish between traditional public forums, limited public forums and non-public forums. Similarly, his concurring opinion in *Krupko and Others v Russia*, no. 26587/07, 26 June 2014, para 8.

<sup>65</sup> July 9, 2019, No. 18-1691-cv (2d Cir. Jul. 9, 2019) [https://knightcolumbia.org/documents/a07ecc2a26/2019.07.09\\_ECF-141-1\\_Opinion.pdf](https://knightcolumbia.org/documents/a07ecc2a26/2019.07.09_ECF-141-1_Opinion.pdf)

<sup>66</sup> *ibid* p.16, lines 4-6.

<sup>67</sup> 17 Civ. 5205 (SDNY, 23 May 2018), at pp.61-2. The District Court noted that the 'account is generally accessible to the public at large without regard to political affiliation or any other limiting criteria.' Noting relevant 'public forum' jurisprudence, it emphasised the 'interactivity of Twitter' and emphasised governmental control rather than complete governmental ownership (holding also that 'a space can be "a forum more in a metaphysical than in a spatial or geographic sense," ... and may "lack a physical situs," ... in which case traditional conceptions of "ownership" may fit less well.')

<sup>68</sup> 137 S. Ct. 1730 (2017) [https://www.supremecourt.gov/opinions/16pdf/15-1194\\_0811.pdf](https://www.supremecourt.gov/opinions/16pdf/15-1194_0811.pdf)

otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.’

However, if States were required to facilitate access to Facebook, this would provide Facebook with an enormous advantage over competitors (those not large enough to be viewed as a ‘public square’) and would be likely to hamper new entrants to the market.

It could be argued that a better way to protect these rights would be to allow the establishment of a platform which is a public utility<sup>69</sup> – perhaps funded by taxing Facebook, Google and some of the other main players – rather than protecting Facebook’s dominant status as a space for assembly and expression. Given the network effects mentioned above, however, this is a difficult proposition.

### Anonymisation and encryption

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>70</sup> It accordingly emphasised 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 [...] to freedom of peaceful assembly and association.’<sup>71</sup> States are therefore called upon ‘not to interfere with the use of such technical solutions, with any restrictions thereon complying with States’ obligations under international human rights law.’<sup>72</sup> Similarly, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has argued that freedom of association and assembly ‘often require private meetings and communications to allow people to organise in the face of Governments or other powerful actors.’<sup>73</sup> In the United States, for instance, police infiltrated an activist group planning an anti-Trump protest, interfering with the right to freedom of peaceful assembly according to a spokesperson of the American Civil Liberties Union.<sup>74</sup> Accordingly, blanket requirements of real name registration imposed by state legislation, much like law enforcement efforts to collect identification without reasonable suspicion and a judicial warrant, do not meet the requirement that restrictions to rights be both necessary and proportionate in a democratic society.<sup>75</sup> Rather, 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>76</sup>

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<sup>69</sup> Pickard, V., (2019), “Public Investment for Global News” *Centre for International Governance Innovation*, Accessed at: <https://www.cigionline.org/articles/public-investments-global-news>

<sup>70</sup> Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet, UN Doc. A/HRC/38/L.10/Rev.1 (4 July 2018), preamble; cf. Rona, G. and Aarons, L., (2016), ‘State Responsibility to Respect, Protect, and Fulfil Human Rights Obligations in Cyberspace’ 8 *Journal of National Security Law & Policy* 503, 514.

<sup>71</sup> *ibid*

<sup>72</sup> *ibid* para 9.

<sup>73</sup> Human Rights Council, Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/13/37 (28 December 2009), para. 36.

<sup>74</sup> Levine, S., (2019), ‘Los Angeles police spied on anti-Trump protesters’, *The Guardian*.

<sup>75</sup> PoKempner, D. (2013), ‘Cyberspace and State Obligations in the Area of Human Rights’ in Katharina Ziolkowski (ed), *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy*, NATO OCCD COE Publication: Tallinn, 256.

<sup>76</sup> Rona, G. and Aarons, L., (2016), ‘State Responsibility to Respect, Protect, and Fulfil Human Rights Obligations in Cyberspace’ 8 *Journal of National Security Law & Policy*, 503, 513.

## Further considerations

In a rapidly shifting landscape, the predominance of private places as sites for assemblies is uncertain, not only because of new corporate actors and new state regulation, but also because the existing behemoths are morphing. For example, Facebook CEO Mark Zuckerberg announced earlier this year that Facebook would shift its focus away from a 'town square' model and more towards a 'living room' model – i.e. from a more public online place to a more private one.<sup>77</sup> What is certain, however, is that assemblies, whether online or offline, will almost always be subject to the logics of external actors through their uses of place to assemble, and that these may often be commercial logics and private spaces. With regard to online assemblies, a commentary on such a right take into account any potential effects such a collection and commodification of participants' (personal) data may have on the exercise of their human rights, in particular any chilling effect private surveillance/monitoring may have on their enjoyment, the potentially (ethically/legally) offensive effect of the monetisation of human rights or discriminatory and inhibiting barriers to access assembly sites. This raises several points worth further consideration:

1. Protection may conflict with anti-trust/competition law that seeks to limit or reduce the dominance of some of the main online platforms. In seeking to protect the *users* of online platforms, care must be taken not to unduly benefit particular platforms.
2. The business model of platforms such as Facebook creates a cost to online presence in terms of personal data.
3. The monetisation of content on platforms such as YouTube means the aim of some contributors is to increase traffic to their site, using provocative or extreme content which will provoke a response. They are not interested in the quality of the debate – only in the amount of traffic on their site.
4. The business model of Facebook has increased the volume of fake news, as another consequence of the desire to increase traffic to certain sites. This has a detrimental effect on democracy.
5. Several campaigns exist to persuade the major social media platforms to remove, not just illegal, but also harmful content<sup>78</sup> – such as material relating to self-harm on Instagram. Protection of the right to assemble on those platforms may make these outcomes more difficult to achieve.
6. Should there be a right to exclude participants from online assemblies (noting that this question has arisen in relation to offline assemblies)?<sup>79</sup> There are those in positions that can control the common purpose of assemblies online and can restrict who can join a group. This is pertinent to Facebook Groups, for example where Administrators or Moderators can choose to have control over who is admitted as a member and what can be expressed on that page. In this regard, one might question whether the public/private nature of the (online) *space* in which an assembly occurs ought to be regarded as the sole

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<sup>77</sup> Zuckerberg, M., (2019), A Privacy-Focused Vision for Social Networking, Facebook, Accessed at: <https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>

<sup>78</sup> Digital Trends, (2019), "Instagram expands ban on content relating to self-harm and suicide" Digital Trends, Accessed at: <https://www.digitaltrends.com/social-media/instagram-expands-ban-on-content-related-to-self-harm-and-suicide/>

<sup>79</sup> See, in particular, *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). "Specifically, the Court held that to force the parade organizer, the South Boston Allied War Veterans Council ("Council"), to include a gay and lesbian group in the parade violated the organizer's First Amendment right of free speech in that it compelled speech the Council did not choose to make." [...] Thus, the Supreme Court's protection of the Council's First Amendment rights ignores the shift in the focus of the First Amendment which is now intended to protect subordinated groups such as the gay and lesbian association in this case." See also, Buske, S. (1995), 'Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston', 6 *DePaul-LCA J Art & Ent*, L 125

determinant of whether the *assembly* itself is regarded as a private event (with concomitant powers to control purpose and message) or a public/civic event (in contrast, engaging obligations relating to equality and non-discrimination protections).<sup>80</sup>

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<sup>80</sup> Stychin, C., (1998), 'Celebration and Consolidation: National Rituals and the Legal Construction of American Identities', 18 *Oxford Journal of Legal Studies*, 265

### 3. Presence and participation

#### What is participation?

In most elaborations of the right to peaceful assembly, the individuals that are protected are referred to as ‘participants’, however the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association reports fail to provide clear definitions of ‘participants’ and ‘participation’<sup>81</sup>. While there has been clarification that children, as well as migrants, asylum seekers and other foreign nationals and stateless peoples can be considered participants<sup>82</sup>, under what conditions an individual becomes a ‘participant’ remains ambiguous. This lack of clarity has serious implications, both online and offline, for understanding which actions and thus, which individuals carrying out those actions, are protected, and which are not.

Furthermore, an assembly requires the presence of ‘a number of individuals’.<sup>83</sup> This collective aspect is inherent to the right of freedom to assembly,<sup>84</sup> and distinguishes it from (the aggregation of) individual expressions.<sup>85</sup> The actual number of demonstration participants is a frequent object of contention between organisers/supporters and, among others, government entities or media, which illustrates the significance of numbers in assemblies. Because the mere gathering of people conveys a message, assemblies have a performative effect per se; another way they do so is for example by contributing to the visibility of marginalised groups<sup>86</sup> (in line with the idea that ‘the medium is the message’<sup>87</sup>).

Significant attention has been placed on determining what constitutes an offline assembly, with the UN Human Rights Committee explicitly including static assemblies such as public meetings and sit-ins, alongside moving assemblies such as processions and marches.<sup>88</sup> These examples of legitimate offline assemblies have since been upheld by various bodies, including the OSCE and the African Commission on Human and Peoples’ Rights.<sup>89</sup> In many of these contexts, there are forms of participation that clearly fall within the protections, for example, marching in a protest or joining a sit-in. However, as raised by Inazu, even within the physical realm, the lines for what constitutes actual participation itself are problematic.<sup>90</sup>

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<sup>81</sup> Human Rights Council (2019), Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41.

<sup>82</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21(Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 5.

<sup>83</sup> OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly*. (2<sup>nd</sup> edition, 2010) para 1.2.

<sup>84</sup> General comment No. 31 (2004)

<sup>85</sup> See Communication No 1478/2006, *Kungurov v Uzbekistan*, Views adopted 20 July 2011, CCPR/C/102/D/1478/2006: ‘some communication efforts are much more effective, and much more correspond to the rightful wishes of the communicators, when they are done as a group rather than individually’ (para. 3.17).

<sup>86</sup> Butler, J., (2015), *Notes Toward a Performative Theory of Assembly*, Harvard.

<sup>87</sup> McLuhan, M., and Fiore, Q., with Agel, J., (1967), *The Medium is the Massage: An Inventory of Effects*, New York: Random House.

<sup>88</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21(Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 6.

<sup>89</sup> Guidelines on Freedom of Peaceful Assembly (2017), OSCE Office for Democratic Institutions and Human Rights (ODIHR), p30. See also African Commission on Human and Peoples Rights’, *Guidelines on Freedom of Association and Assembly in Africa*, para 3.

<sup>90</sup> Inazu, J. D., (2013), Virtual Assembly, 98 *Cornell L. Rev*, 1093, p1101.

Using the various official definitions of the right to assembly as a starting point<sup>91 92</sup>, it is evident that *intention* and *purpose* are necessary components of participation in an assembly, thus implying that merely being present at an event, or in the online equivalent, 'liking' an online page or being a non-active member of an online group with no intention of being involved in the assembly's purpose does not constitute participation. This therefore suggests that there is a minimum bar for action that differentiates participation from mere presence in a space.

### Online participation

Where exactly the minimum bar for participation should be drawn in the online sphere remains very much up for debate. While digital technologies have generated new spaces and means of participation, often enabling greater accessibility and ease of action,<sup>93</sup> this, according to Petray, has simultaneously facilitated a rise in 'push-button activism', low-intensity actions or 'slacktivism'<sup>94</sup>, which may or may not reach the minimum bar of action to constitute participation in an assembly.

In order to address these concerns, there are some empirical and theoretical instances where appeals to the right to assembly have been cited that we can use as reference. In her study for IMPACT (India, Malaysia, Pakistan Advocacy for Change through Technology) media expert Gayathri Venkiteswaran suggests that the right to online assembly includes the following actions: 'coordinating, organising, gathering, planning or meeting on platforms available online'.<sup>95</sup> More specifically, the UN Special Rapporteur has explicitly stated that the use of online petitions is evidence of online assembly,<sup>96</sup> something also stated by the Council of Europe's 2014 Explanatory Memorandum,<sup>97</sup> logically implying that petition-signing comes under the umbrella of protected participation. The sharing of information related to a group's plans and identity has also been considered a protected action by the UN Special Rapporteur.<sup>98</sup> In her analysis of online assembly in Central and Eastern Asia, Venkiteswaran suggests that the use of specific PicBadges, virtual ornaments placed over Facebook profile pictures, could also constitute an assembly, as widespread use of the same PicBadge has been used as a form of identity construction or protest, specifically in the case of the Bersih 2.0 protests in Malaysia.<sup>99</sup>

Although not all online assemblies require organisers, with some in fact outright dismissing official hierarchies in favour of a more egalitarian model<sup>100</sup>, the UN Special Rapporteur and the UN Human Rights Committee explicitly state that any forms of organisation prior to an assembly come under the protected actions of assembly. Actions protected under this requirement include:

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<sup>91</sup> Human Rights Council report (June 2012), A/HRC/20/27, p7.

<sup>92</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21(Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 4.

<sup>93</sup> Bennett W. L., and Segerberg, A., (2012), "The Logic of Connective Action", *Information, Communication & Society* (15:5, 2012), p. 754

<sup>94</sup> Petray, T. L., (2011), "'Protest 2.0: online interactions and Aboriginal activists', *Media, Culture & Society* 33(6), p923-940.

<sup>95</sup> Venkiteswaran, G., (2016), Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations, *APC IMPACT*, p13.

<sup>96</sup> Human Rights Council (2019), Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, p7.

<sup>97</sup> Council of Europe Steering Committee on Media and Information Society (2014) b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum.

<sup>98</sup> A/HRC/41/41, p6.

<sup>99</sup> Venkiteswaran, G., (2016), Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations, *APC IMPACT*, p34.

<sup>100</sup> Bennett, W.L. & Segerberg, A., "The Logic of Connective Action", p.754.

[the] dissemination of information about an upcoming event;<sup>101</sup> travelling to the event;<sup>102</sup> communication between participants leading up to and during the assembly; conveying information about the assembly to the outside world; and leaving the assembly afterwards.<sup>103</sup> While some of these actions apply more appropriately to offline assemblies, the explicit reference to communication between participants prior and during an assembly can evidently be applied to online assemblies.

### **Further considerations**

From the above examples, it is evident that a wide array of actions are protected under the right to assembly, however these examples leave a lot of contested space for effectively defining participation, with the most contentious being outlined below.

#### Passive participation

Through possibly excluding more passive forms of participation, an understanding of the freedom of online assembly predicated on intention and purpose could be problematic, especially when considering who may need to be protected by this right in the face of broad surveilling efforts by governments.

The UN Special Rapporteur Clément Nyaletsossi Voule has implicitly provided an argument for the expansion of the definition of participation to include more passive forms of action, by recognising that governmental tools are ‘used to identify and surveil all individuals who participate in a particular event *or are present* in a certain public space. These forms of identification and data collection violate the individual’s anonymity in public spaces’<sup>104</sup>. A widening of the definition to protect those present in a space has also been implied by the UNHRC draft Comment 37, which stated that, ‘No one should be harassed or penalised as a result of their attendance at demonstrations<sup>105</sup>’, which suggests that merely attending a demonstration is protected under the right to assembly, without it necessarily being predicated on support for the assembly’s cause. Physical attendance in its offline form, it could be argued, would be the equivalent of passive membership in an online group or liking a page, meaning that the protections of the right to assembly could be applied even if more active forms of participation were not carried out.

By recognising that the risk to individuals from surveillance is not just related to their direct action, but also their mere presence in an online space in the above passages, the UN Special Rapporteur and the UNHRC have offered the potential for more passive forms of participation to also be protected by the right to online assembly, despite it not being explicitly included within the right to assembly definitions.

However, while widening protections may be seen in a largely positive light, through expanding the definition too far, participation in an assembly could be left with having no meaningful distinction from merely existing within a public space, thus undermining the strength and usefulness of the right.

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<sup>101</sup> *Tulzhenkova v. Belarus* (2008) (CCPR/C/103/D/1838/2008), para 9.3.

<sup>102</sup> *Evrezov and others v. Belarus* (2010), (CCPR/C/112/D/1999/2010 and Corr.1), para. 8.5.

<sup>103</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 37.

<sup>104</sup> A/HRC/41/41, p14.

<sup>105</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 34. See also CCPR/C/MRT/CO/1, para. 22. See also General Assembly resolution 66/164, operative para.

### Unclear motives

The use of coordinated hashtags has also been widely accepted as a form of participation in online assembly, with Venkiteswaran likening their usage to creating online meetings where people are essentially coming together to discuss issues much like in a physical meeting<sup>106</sup>. However, defining hashtags as participation can be problematic as their usage does not necessarily imply intended support for an assembly. This can be seen in the #MeToo movement, whereby the hashtag was also mobilised by movement opponents to contest the claims made by the movement<sup>107</sup>. Similar commentary can be made regarding liking a page, or joining a group, as it does not necessarily indicate a desire to gather for a common purpose. Therefore, the blanket acceptance of the use of a hashtag or the liking of a page as a legitimate form of participation in an assembly, could expand the protections to those that do not identify with an assembly, or even outright oppose it, whether or not this takes place in a counter-assembly.

### Deployment of bots and fake accounts

Another debated area in the discussion of legitimate participation in online assembly, is the deployment of bots and the use of human-operated fake accounts. Just as the guidelines surrounding the right to peaceful assembly have not adequately established whether paid/incentivised participation is protected within offline assemblies<sup>108</sup>, the issue of incentivised and non-authentic participation raises its head in the virtual world.

Although private companies, such as Facebook, have been pressured to clamp down on the use of fake accounts and bots in the wake of scandals such as the Russian interference in the 2016 elections, and the deployment of volunteers and manufactured bots in the Philippines in 2015, whether or not these constitute legitimate forms of participation in online assembly remains controversial<sup>109</sup>. The legitimacy of the use of bot deployment has also been raised in relation to online assembly in cases of Distributed Denial of Service (DDoS) attacks, with the anarchic body Anonymous claiming that it is a form of legitimate protest comparable to sit-ins and Thai actors using it to reveal weaknesses in governmental encryption systems<sup>110</sup>, while others have cited examples in Myanmar, Malaysia and Hong Kong whereby governments have used artificially-generated DDoS attacks to shut down independent media and protestor communication platforms<sup>111</sup>.

In relation to the use of fake accounts and bots, the UN Special Rapporteur on freedom of association and expression for his part has condemned the case of Omani authorities hijacking accounts and flooding social media in order to dilute genuine protests<sup>112</sup>, including this incident

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<sup>106</sup> Venkiteswaran, G., (2016), Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations, *APC IMPACT*, p31.

<sup>107</sup> Wood, M. K., (2018), "Language in digital activism: exploring the performative functions of #MeToo Tweets", *Digit Magazine*. Accessed at: <https://www.digitmagazine.com/academic-papers/language-digital-activism-exploring-performative-functions-metoo-tweets>

<sup>108</sup> Hamilton, M., (2019), Towards General Comment 37 on Article 21 ICCPR: The Right of Peaceful Assembly, p13.

<sup>109</sup> Vaidhyanathan, S., (2018), *Anti-social media: How Facebook Disconnects Us and Undermines Democracy*, Oxford University Press.

<sup>110</sup> Sombatpoonsiri, J., (2017), Growing Cyber Activism in Thailand, Carnegie's Civic Activism Network.

<sup>111</sup> Venkiteswaran, G., (2016), Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations, *APC IMPACT*, p33. See also, Tsui, L., (2015), The coming colonization of Hong Kong cyberspace: government responses to the use of new technologies by the umbrella movement, *Chinese Journal of Communication* 8:4.

<sup>112</sup> A/HRC/41/41, p12.

among the broader issue of ‘trolls [being] instructed to disseminate propaganda, isolate or drown out critical views, and inhibit anti-government movements, while amplifying the messages of government officials and boosting follower numbers’<sup>113</sup>. While the right to assembly equally protects oppositional protests, including those in support of the government, the UN Special Rapporteur’s statement against Oman and the wider use of trolls, suggests that there are limits to this right when it directly impinges on the ability of others’ right to online assembly, or corollary rights such as expression. These comments therefore suggest that there are cases in which bot and fake account deployment is not considered participation protected under the right to assembly, however, in what contexts this is the case, remains unclear.

### Parallel motives

By including ‘journalists, human rights defenders and others involved in monitoring, including documenting or reporting on assemblies’<sup>114</sup>, the UNHRC has expanded the protections of the right to assembly to specific motives which do not necessarily align with the purpose of the assembly. With the nature of journalism having significantly shifted with the invention of the internet and 24-hour media cycles, and fake news and the spread of misinformation from publications that claim journalistic credibility, what constitutes legitimate monitoring, documentation and reporting is also an area that requires clarification.

### Virtual participation in an offline assembly

A further complication arises when determining how to classify an assembly and thus the nature of the participation. As highlighted by Inazu, the distinction between online and offline assemblies is frequently blurred<sup>115</sup>, which may problematise how forms of participation are understood in a specific context. In recent years, several high-profile cases have highlighted this crossover, including the banning of an Erdoğan video link to rally in Germany in 2016<sup>116</sup>; and the fining of Singaporean activist Jolovan Wham for holding an unpermitted assembly that featured a Skype call from Hong Kong activist Joshua Wong in 2016<sup>117</sup>. These instances raise questions as to whether cases including online speakers should be considered examples of online assembly, or whether, due to the audience being primarily offline, these are examples of offline assembly featuring virtual participation.

On a practical basis, the question of who qualifies as a participant is essential when issues of liability arise, for example in the case of non-peaceful assembly.<sup>118</sup> While this is an issue also

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<sup>113</sup> *ibid* para 45.

<sup>114</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 34.

<sup>115</sup> Inazu, J. D., (2013), Virtual Assembly, 98 *Cornell L. Rev.*, 1093, p.1112.

<sup>116</sup> The Guardian, (2016), Turkey condemns German court for banning Erdoğan video link to rally, Accessed at: <https://www.theguardian.com/world/2016/jul/31/erdogan-supporters-cologne-germany-turkish-rally>

<sup>117</sup> Hong Kong Free Press, (2017). Singapore charges activist for holding public assemblies, including a Skype talk with Joshua Wong, Accessed at: <https://www.hongkongfp.com/2017/11/28/singapore-charges-activist-for-holding-public-assemblies-including-a-skype-talk-with-joshua-wong/>

<sup>118</sup> See Jarman, N. (2012), Freedom of Assembly and the Internet, unpublished, p. 7: “This may raise some questions that may need to be considered in relation to the organising of an assembly and in terms of the state holding ‘organisers’ to account for failure to notify, for ignoring restrictions or prohibitions, or for disrupting public order. It raises the question that if there are no ‘official’ organisers might some authorities decide to hold any or all participants liable for ‘organising’ an assembly?”

related to offline assemblies, it could become of higher import in online assemblies, as many lack an official structure or organiser.<sup>119</sup>

On a human rights basis, it is essential to acknowledge that the current guidelines relating to the right to assembly may fail to protect those who, on the one hand may be at risk of being deemed as participants by authorities, while on the other hand have not reached the minimum bar for action necessary for them to be afforded the protections of the right to assembly. In the recent arrests linked to social media usage in Egypt in the wake of the viral Mohamed Ali videos, physical phone confiscations were conducted, with checks not just of user posts, but also of group membership and the usage of oppositional hashtags such as #كفاية\_بقي\_ياسيسي. The broad framing of the justifications for the arrests for online activity, including of children, such as ‘disseminating false information’, and more problematically ‘misusing social media’ and ‘membership in a terrorist group’<sup>120</sup>, suggests that a broader definition of participation in assembly may be required in order to ensure that even those that don’t necessarily actively engage with group activities remain protected under the right to peaceful assembly.

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<sup>119</sup> See the analysis of Bennett and Segerberg on connective actions, as opposed to traditional forms of collective action with higher level or organisation resources. Connective actions, such as the Occupy and indignados protests, are “based on personalized content sharing across media networks”; these networks replace the organisational structures. Bennett, W.L, and Segerberg, A. (2012), “The Logic of Connective Action”, *Information, Communication & Society*, p. 754

<sup>120</sup> Amnesty International, (2019), Egypt: unprecedented mass arrests designed to send message that protests will be crushed, Accessed at: <https://www.amnesty.org.uk/press-releases/egypt-unprecedented-mass-arrests-designed-send-message-protests-will-be-crushed>

## 4. Temporariness and permanence

### ‘Temporary’ as a definitional element of ‘assembly’

As noted in section 1 (‘Purpose’) above, Manfred Nowak says that ‘only intentional, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly.’<sup>121</sup> In 2012 the Special Rapporteur defined assembly as ‘an intentional and temporary gathering in a private or public space for a specific purpose.’<sup>122</sup> The use of temporary in the definition of ‘assembly’ may, in part, have been to separate freedom of assembly from more formalised group activity, protected under freedom of association.

However, longer protests such as those of the Occupy movement have raised issues with the requirement that an assembly be temporary. It is unclear what temporary means and at what point an assembly becomes permanent. For example, the Greenham Common Peace Camp was active for 19 years. Given this interpretative uncertainty, the invocation of the term ‘temporary’ potentially creates an opening for state interference with an assembly, based solely on its duration.

In the current draft of General Comment 37 ‘temporary’ does not feature in the definition of an assembly in paragraph 4, which is ‘a non-violent gathering of persons with a common expressive purpose in [a publicly accessible/the same] place.’<sup>123</sup> However, paragraph 62, which addresses restrictions on the *time* of assemblies, makes several comments relevant to the duration of an assembly: -

‘While there are no fixed rules about restrictions on the duration of peaceful assemblies, participants must have sufficient opportunity to effectively manifest their views. Peaceful assemblies are generally by their nature temporary and should be left to end by themselves.... The duration and frequency of a demonstration may play a central role in conveying its message to its target audience.’<sup>124</sup>

This conceptual ambiguity as regards temporariness meets a structural ambiguity with online assembly given that, due to the affordances of ICTs, participants are distributed across time and place.

### Temporariness and online assemblies

Where online activity takes the form of a meeting (similar to an online classroom) where participants join by logging in and are then able to contribute to a group discussion for the duration of the meeting, there is no issue with temporariness. The meeting has a fixed start time and participation ends when the user logs out or the meeting is shut down by the administrator.<sup>125</sup>

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<sup>121</sup> Nowak, M., (2005), *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Ed. Kehl: N.P Engel, p.373.

<sup>122</sup> A/HRC/20/21 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 21st May 2012, para 24.

<sup>123</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 4

<sup>124</sup> *ibid* para 62

<sup>125</sup> For example, Alcoholics Anonymous hold online meetings, via Skype or Zoom, for those who are unwilling or unable to attend offline meetings. They have a fixed start time and a log-in procedure to join. Some are closed (only for those with an alcohol problem) but others are open to the public. Accessed at: <https://alcoholics-anonymous.eu/online-meetings/> <https://www.alcoholics-anonymous.org.uk/AA-Meetings/About-AA-Meetings>

However, online protest action often takes the form of users making posts in the location of their choice. Ostensibly such posts fall squarely within the sphere of freedom of expression. However, there may be elements – such as contemporaneous numerosity or the use of online technology to link individual posts into a collective expression – which make it arguable that the action of those users also engages the right to freedom of assembly.

The term ‘temporary’ creates a range of problems for online assemblies that are distributed over time and place. These include (a) permanence of the trace of possible online assemblies, (b) synchronicity of participation – particularly where the online activity is spontaneous rather than organised; and (c) time frame of online assemblies (when do they start and end?).

Three questions arise with linked online activity such as posting with a hashtag or commenting below an online news article, Facebook post or tweet. Does lack of contemporaneity (or evidence thereof) prevent it being a gathering? Does lack of a timeframe prevent it from being temporary? Is there anything about this activity which engages Article 21 protections, in addition to those of Article 19?

### **Permanence of online trace**

The permanent footprint or trace of online interactions could be considered as a record or evidence of an assembly of people who are gathering or have gathered online. This record should not preclude any such assembly from being considered temporary, just as the television recording of an offline assembly does not stop it from being temporary. However, although arguable in the era of proliferating cameras, traces of online assemblies are perhaps more permanent than traces of offline assemblies. These digital traces remain visible unless they are removed either by the author or the administrator of the site where they are posted, and even then may live on in personal archives, facilitated by screenshot tools, and in public archives such as the Wayback Machine.

The permanence of posts made in online assemblies creates a risk to participants of future adverse consequences. Imprisonment, police brutality and government-mandated shutting down of the internet, have been some of the consequences to the authors of permanent posts.<sup>126</sup> Surveillance is a more complex issue online and is elaborated on below. Posts are publicly accessible by anyone when posted on a public forum and many participants are identifiable by their publicly accessible online profiles. In addition, the state’s use of technology to reveal identities obscured by privacy settings anonymity tools, as well as the deployment of punitive counter-measures against participants based on their past connection to collective online expression could be considered a violation of Article 21.

### **Synchronicity of participation in online activity**

The situation where the temporary action of a series of users is evidenced by a permanent online trace raises temporal issues that do not exist offline. Posting can be done in seconds, and it is not possible, from the perspective of a viewer of the posts (though it may well be possible from inside the companies whose technology it is), to be sure that more than one person is ever present at the same time. Users may be posting contemporaneously or remaining online to read the posts of other users at the same location or leaving before another user posts. So, how can they be said to have gathered at all? Where there may be an element of synchronicity to the posts – where they are made in the same online location, for the same purpose, in response and proximate in time to a particular event or organisational activity – can it be argued that they do not need to take place

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<sup>126</sup> Africa News, (2019), Zimbabwe Protest: #thisflag pastor arrested on final day of protests, Accessed at: <https://www.africanews.com/2019/01/16/zimbabwe-protests-have-the-authorities-shut-down-the-internet/>

at exactly the same time? If so, then when does the online assembly start and end – particularly where the online space in question is being used for a variety of different purposes?<sup>127</sup>

Article 19, in its submission to the UN Human Rights Committee concerning GC37, suggested that assembly should be defined broadly to ‘reflect the increasingly creative ways in which people collectively exercise their rights to freedom of expression, in particular online in the digital age.’<sup>128</sup> They suggested it ‘should mean any collective act of expression between two or more people with proximate unity of purpose, time, and place.’<sup>129</sup> When addressing unity of time, they argued that ‘an assembly implies multiple expressive acts taking place close in time, though not necessarily with exact contemporaneity. A group of individuals engaging in a series of expressions which closely follow each other may still be considered an assembly, for example.’<sup>130</sup>

This definition of assembly could encompass the situation where a number of people make a series of temporally proximate posts, provided they also have proximate unity of place and purpose. Just as participants in an offline assembly choose a physical space in which to hold their assembly and interact, so do those in an online assembly, and this may range from a chat thread to a hashtag on Twitter shows the users’ intention to link their tweets to a series of other tweets. A hashtag provides greater specificity to the ‘online address’ of the activity and evidences the users’ intention to make a collective act of expression.

In 2019 the UN Special Rapporteur’s report stated that ‘Technology serves both as a means to facilitate the exercise of the rights of assembly and association offline, and as virtual spaces where the rights themselves can be actively exercised.’<sup>131</sup> It could be argued that the use of technology (such as linking by hashtag) which enables more proximate unity of place, engages the right to freedom of assembly.

There are advantages to adopting Article 19’s definition of assembly. First, it would seem absurd for Article 21 protection to turn on the happenstance of two posts being made at the same time. Second, there may be users ‘present’ at the online space, reading, liking or sharing the posts and there may be no easily accessible evidence of this presence. Third, requiring contemporaneity would unduly advantage coordinated activity, organised by those with greater online followings, who already have a more powerful voice.<sup>132</sup> Similar contemporaneity would be less likely to occur

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<sup>127</sup> For example, “Me too” and #metoo have been used in a variety of ways and for a variety of purposes since 2006. The greatest collective use was in response to the Harvey Weinstein allegations in 2017, but posts (some of which are hostile to the movement) continue to be made today.

The Washington Post, (2017). The woman behind ‘Me Too’ knew the power of the phrase when she created it — 10 years ago, Accessed at: <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> and; #KOT (Kenya on Twitter) has been used for several years for purposes including asserting group identity, social and commercial information sharing and mobilising (on and off-line) in response to particular issues. BBC News, (2015). BBC Pop Up Kenya: Why #KOT is a force for change and comedy, Accessed at: <https://www.bbc.co.uk/news/av/magazine-33629021/bbc-pop-up-kenya-why-kot-is-a-force-for-change-and-comedy>

<sup>128</sup> Article 19 *Submission to General Comment 37 on Article 21 (the right to freedom of assembly)* para 20 Accessed at: <http://www.ohchr.org/Documents/HRBodies/CCPR/GC37/ARTICLE19.docx>

<sup>129</sup> *ibid* para 20

<sup>130</sup> *ibid* para 24

<sup>131</sup> A/HRC/41/41 (17th May 2019) Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, para 11

<sup>132</sup> For example, Alyssa Milano, who coordinated #stateofthedream postings as counterprogramming to President Trump’s state of the nation address on 31<sup>st</sup> January 2018, has 3.7 million followers on Twitter. She was able to ask them to post, using #stateofthedream, at the same time The Next Web, (2018), Alyssa Milano plans online protest for Trump’s State of the Union. Accessed at: <https://thenextweb.com/politics/2018/01/27/alyssa-milano-plans-online-protest-for-trumps-state-of-the-union/>

where the online activity results from an unplanned incident; however, it may still be intentional, purposeful, connected online activity.

However, there are also disadvantages. First, it is unclear what is meant by proximate unity of time – same hour, same day, same week? Second, whilst Article 19 acknowledges an assembly can be ‘two or more people’, the phrases ‘multiple expressive acts’ and ‘series of expressions’ suggest that it would only apply to more numerous acts of expression – so how many would be enough and would more than one suffice? Third, it would only be possible to know if there were multiple acts of expression, with proximate unity of purpose, time and place, by reading the posts, after (or at least part way into) the event. Not all activity using the same hashtag (for example) would qualify. What advance protection of, for example, the operation of a hashtag would be appropriate?

A possible answer to the last question is found in the revised draft of General Comment 37, paragraph 38, which says:

‘States parties shall, for example, refrain from unduly blocking Internet connectivity in relation to demonstrations. The same applies to geo-targeted or technology-specific interference or hindering of connectivity.’<sup>133</sup>

Technology-specific interference or hindering of connectivity could include blocking the linking operation of a hashtag, thus preventing an assembly from taking place. This might also include flooding a hashtag with tweets generated by bots, thus making it hard for participants to sustain interactions with each other - and possibly triggering the social media platform algorithms that limit the visibility of hashtags artificially pumped up through the use of bot farms.<sup>134</sup>

A further issue is that, as well as applying to a series of posts on a non-personal space (such as a hashtag), Article 19’s definition could also encompass streams of comments on a more personal space (such as a Facebook page or tweet). This might conflict with the ability of the ‘owner’ of the space to block individuals from commenting or remove the original post (or indeed the whole page or profile). Although the court in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), found that President Trump’s Twitter account was a public forum and therefore blocking comments breached the First Amendment, this would not be the case for the vast majority of other social media accounts. Where the page is monetised (e.g., aiming to attract advertising revenue) it may also encourage the production of fake news or extreme content designed to increase the activity on that site.

### **Timeframe of assembly**

The revised draft of General Comment 37, paragraph 37, recognises that Article 21 protection extends beyond the immediate time frame of the offline assembly to protect associated activities, including dissemination of information and communication between participants leading up to and during the assembly. It goes on to say, in paragraph 38, that these associated activities may happen online, presumably for both online and offline assemblies. There is scope to explore further what such antecedent or subsequent activities might be in an online setting.

In addition, and in contrast with a more formalised online meeting, it may not be possible to say exactly when a collective interaction, manifesting as a series of linked online posts, started and ended. However, this should not necessarily stop it being regarded as temporary. Collective

<sup>133</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21(Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 38

<sup>134</sup> Daniel, L., (25th February 2016), Rise of the Peñabots, Accessed at: <https://points.datasociety.net/rise-of-the-penabots-d35f9fe12d67>

interactions may start as a response to an event and will naturally end when people have had an opportunity to express themselves. There may be similar uncertainty around the exact time frame of a spontaneous offline assembly, which again, should not stop it being regarded as being protected under Article 21.

### **An example of online assembly: #thisflag in Zimbabwe**

There is little doubt that temporary protest activity can take place online using the linking operation of a hashtag. The more important question is whether this activity engages the right to freedom of assembly, through elements which take it beyond the realm of expression.

For example, #thisflag<sup>135</sup> was used by those responding to a video posted by Pastor Evan Mawarire on 22<sup>nd</sup> April 2016, to his personal Facebook page and other social media accounts, using the hashtag #thisflag. The video (viewed and shared thousands of times) used the Zimbabwean flag to illustrate problems caused to him, as a Zimbabwean citizen, by the government. Many other Zimbabweans, including members of diasporic communities, made videos or posts describing their own similar experiences, which they linked, both to the original post and other similar posts, using #thisflag.

The synchronicity of this response was comparable to a spontaneous assembly. Users located their posts intentionally at the same online address, via #thisflag. The users' purpose in doing so was to support the initial post by asserting group solidarity and strengthen the impact of the protest, by an act of collective expression. Whilst freedom of expression protected the users' right to make the individual posts exactly as they did, it may not have prevented the government from employing 'technology-specific interference,'<sup>136</sup> blocking the operation of the hashtag and preventing the greater impact of a linked series of posts, viewable together through searching #thisflag.

The linked posts, which form the record of users' online activity, were also the means by which the protestors attracted Government and media attention, and other followers to their cause - numerous linked posts being more impactful/news-worthy than individual posts. One of the responses of the Zimbabwean government was to criminalise action using the national flag.<sup>137</sup> As the flag was the element being used online to link the individual expressions of grievance by Zimbabwean citizens, is this arguably an interference with their right to freedom of assembly as well as their right to freedom of expression?

Interference by the Zimbabwean government with freedoms of assembly and association offline (which persists today<sup>138</sup>) would have made it more difficult for Zimbabwean protesters to have found each other, without the linking function of #thisflag.

These initial posts are still viewable through a search of "#thisflag" on Twitter. However, this initial spontaneous response to Pastor Mawarire's video has ended. It was replaced, first by an organised online protest in May 2016 (again using #thisflag) and then by offline protests, which

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<sup>135</sup> Gukurume, S., (2017), #thisflag and #thisgown cyber protests in Zimbabwe : reclaiming political space. 38(2) *African Journalism Studies* 49

<sup>136</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21(Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 38

<sup>137</sup> NPR, (2016), Can hashtags and pop-up protests topple a leader?, Accessed at: <https://www.npr.org/sections/goatsandsoda/2016/10/21/498401510/can-hashtags-and-pop-up-protests-topple-a-leader>

<sup>138</sup> End of Mission Statement of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Clément Nyaletsossi Voule, on his visit to Zimbabwe (17-27 September 2019) Accessed at: <http://zw.one.un.org/newsroom/news/end-mission-statement-united-nations-special-rapporteur-rights-freedom-peaceful>

were coordinated using #thisflag (use of online activity as a tool for offline assemblies already being recognised as a protected activity). The #thisflag continues to be used for, amongst other things, news relating to the imprisonment of protesters, posts evidencing police brutality and posts criticising the #thisflag movement.

## 5. Peaceful and non-peaceful

### Defining peaceful in online contexts

Of central importance to formulating the right to peaceful assembly online is the conceptualisation of ‘peaceful’ in an online space. The draft 3rd edition of the OSCE/ODIHR - Venice Commission *Guidelines on the Right to Freedom of Peaceful Assembly* defines the term ‘peaceful’ as including:

‘conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote. It also includes conduct that temporarily hinders, impedes, or instructs the activities of third parties, for example by temporarily blocking traffic. As such, an assembly can be entirely ‘peaceful’ even if it is ‘unlawful’ under domestic law. The peaceful intentions of the organizers and participants in an assembly should be presumed, unless there is convincing evidence of intent to use or incite violence.’<sup>139</sup>

While the OSCE-Venice Commission’s definition of peaceful was intended primarily for offline demonstrations invoking a right to peaceful assembly, it can also be applied to conceptualising peaceful online assemblies as well. A key part of this definition is that a peaceful assembly can include conduct that annoys or offends others, allowing for the protection of diverse and controversial messages under the right of peaceful assembly. However, this definition raises essential questions around the protection of harmful or violent speech, particularly hateful speech. To what extent is hateful speech (sexism, racism, transphobia, anti-Semitism) protected under this definition of a peaceful online assembly?

Related definitions of harm, inciting violence and intimidation are also pertinent to conceptualising ‘peace’ in online assemblies. The OSCE-Venice Commission Guidelines make clear that the peaceful intention of those assembling should always be presumed, ‘*unless there is convincing evidence of intent to use or incite violence.*’<sup>140</sup> The concept of intimidation is also relevant to this discussion. Drawing on US case law, intimidation can be conceptualised as a true threat, where a speaker ‘directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm.’<sup>141</sup> In online contexts, determining whether a user or group intends to harm or intimidate another or incite violence is further complicated by the landscape of the internet that allows for anonymity and trolling. As such, it can be difficult to determine the intent behind online communications, or definitively determine whether certain speech intends to cause harm or threat to others. A central aspect of defining peaceful online assemblies is defining the associated concepts of harm, intimidation and inciting violence in online spaces.

### Trolling and online assemblies

Central to the conversation of peaceful online assemblies – and to online communication more generally – is the concept of trolling. Trolling involves a spectrum of behaviours that range from aggressive and hostile verbal attacks that meet the legal threshold of harassment to more innocuous forms that include mischievous activities not meant to cause distress to the target, such as culture-jamming through defacing images of corporate logos and ads to incite public ridicule

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<sup>139</sup> Venice Commission/OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly* (Second edition, 2010), p. 9. Accessed at: <https://www.osce.org/odihr/73405?download=true>.

<sup>140</sup> *ibid.*

<sup>141</sup> *Virginia v. Black*, 538 U.S. 343 (2003), para. 18.

and criticism<sup>142 143</sup>. While culture jamming is a more benign form of trolling, it nonetheless is an important part of modern online activism and should be considered in discussions of whether trolling will be protected under a proposed right to peaceful online assemblies. In 2012, a Maryland-based feminist group called FORCE: Upsetting Rape Culture created a website to spoof Victoria's Secret's PINK line of underwear that included phrases such as 'unwrap me' and 'sure thing', which the organisation viewed as promoting access to women's bodies without consent<sup>144</sup>. The website, pinklovesconsent.com (which is still currently active and bears striking semblance to the company's official site), involves a variety of models outfitted in underwear with slogans such as 'no means no', 'let's talk about sex', and 'ask first'<sup>145</sup>. As FORCE's culture-jamming falls under the conceptualisation of a peaceful online assembly, it is paramount that more harmless instances of culture-jamming and trolling be considered when drafting the right to peaceful online assemblies.

Other instances of trolling can also revolve around political ideologies, as is the case with r/TheDonald. r/TheDonald is a subreddit where political trolls who support Donald Trump have built their own online community around supporting him while also engaging in tactics that strategically spread misinformation and generated content to disrupt others, some of which incorporates hateful speech<sup>146</sup>. Political trolls like users of r/TheDonald further complicate the issue of protection under a proposed right to peaceful online assembly. While the group clearly fits the definition of an online assembly, they engage in trolling tactics that use hateful speech against others, casting doubt on whether their assembly falls under definitions of peace. To what extent can political trolls be protected under the right to peaceful online assembly?

### Hactivism and online assemblies

Similar questions arise about the role of hactivism and whether this falls under the protection of the right to peaceful online assembly. Hactivism, much like trolling, involves a spectrum of computer-mediated behaviours that attempt to call attention to particular social and political issues.<sup>147</sup> On extreme ends, hactivism can involve spreading viruses, breaking into high-security servers, defacing government and corporate websites, and threatening public health and safety.<sup>148</sup> In addition, hactivism can sometimes include denial of service attacks (DoS attacks) or distributed denial of service attacks (DDoS attacks) on corporate, government, and military web sites wherein hactivists obstruct access to these websites for other users. For instance, Thai activists relied on DDoS attacks in 2015 to shut down several government websites, including the Ministry of Information, Technology, and Communications and the main Thai government portal to protest against the government's decision to limit access to websites deemed inappropriate.<sup>149</sup>

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<sup>142</sup> Phillips, W., (2015), *This is why we can't have nice things: Mapping the relationship between online trolling and mainstream culture*, Cambridge: MIT Press.

<sup>143</sup> Calabrese, A., (2004), "Virtual nonviolence? Civil disobedience and political violence in the information age". *info*, 6(5), 326-338.

<sup>144</sup> Madden, S. et al., (2018), 'Who loves consent? Social media and the culture jamming of Victoria's Secret', *Public Relations Inquiry*, 7(2), pp. 171-186.

<sup>145</sup> PinkLovesConsent.com, (2019), Accessed at: <http://pinklovesconsent.com/pink/www.victoriasssecret.com/pink/newstyles.html>

<sup>146</sup> Flores-Saviaga, C. I., Keegan, B. C. and Savage, S., (2018), Mobilizing the trump train: Understanding collective action in a political trolling community. In *Twelfth International AAAI Conference on Web and Social Media*.

<sup>147</sup> Newman, L. H., (2019), "Hactivists are on the rise – but less effective than ever", Accessed at: <https://www.wired.com/story/hactivism-sudan-ddos-protest/#>.

<sup>148</sup> Calabrese, A., (2004), "Virtual nonviolence? Civil disobedience and political violence in the information age". *info*, 6(5), 326-338.

<sup>149</sup> BBC News, (2015), Thai Government websites hit by denial-of-service attack. Accessed at: <https://www.bbc.co.uk/news/world-asia-34409343>.

<sup>150</sup> The 2015 SaveTheInternet.in campaign also used hacktivism to fight for internet neutrality, flooding India's telecom regulator with emails in protest.<sup>151</sup> In a sense, DoS attacks can be conceptualised as a virtual sit-in, wherein activists occupy a virtual space by disrupting its web traffic. Similarly, DoS attacks can be likened to offline occupy movements where activists take up physical spaces and refuse to move so that others may pass through.<sup>152</sup>

In defining a comprehensive right to peaceful assembly online, it is paramount that the right addresses key questions around trolls and hacktivists. Currently, the Human Rights Organisation Article 19 argues that hacktivism, as a form of collective action used to protest, can be considered for protection under freedom of expression and assembly<sup>153</sup>, which lays the groundwork for extended protection of hacktivism under the right to peaceful online assembly. However, states must make clear whether the actions of trolls and hacktivists are protected under this right, and what the parameters of these protections will be.

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<sup>150</sup> Leyden, J., (2015), Hand-cranked 'DDoS' floors Thai government website amid protests, Accessed at: [https://www.theregister.co.uk/2015/10/02/hand\\_cranked\\_ddos\\_floors\\_thai\\_gov\\_sites/](https://www.theregister.co.uk/2015/10/02/hand_cranked_ddos_floors_thai_gov_sites/).

<sup>151</sup> BBC News, (2015), Why 'Save the Internet' is trending in India. Accessed at: <https://www.bbc.co.uk/news/blogs-trending-32287811>.

<sup>152</sup> Calabrese, A., (2004), "Virtual nonviolence? Civil disobedience and political violence in the information age". *info*, 6(5), 326-338.

<sup>153</sup> Article 19, (2015), The Right to Protest. Accessed at: <https://right-to-protest.org/wp-content/uploads/2015/06/Right-to-Protest-Background-paper-EN.pdf>.

## 6. State obligations

Under the existing application of Article 21, state obligations have been characterised in both negative and positive terms. With regards to the former, a negative obligation entails the principle of non-interference and requires the State to practice tolerance and restraint, particularly in cases where legal procedures or administrative policies have not been followed. Even in the case of an illegal assembly, so long as it satisfies the conditions of being peaceful in nature and purpose, the State is obliged to protect the right to freedom of peaceful assembly, as has been noted by the European Court of Human Rights. Conversely, the doctrine of positive obligations imbues the State with the responsibility and duty to act in order to facilitate and allow the effective exercise of the right to peaceful assembly.

The implications of translating the application of this right to *online* assemblies are manifold. The distinctive characteristics and properties of online assemblies (such as the absence of an organiser, spontaneity, speed of development or an unlimited number of participants<sup>154</sup>) stretches the boundaries of existing State obligations with regards to Article 21. Given the transnational nature of the internet and digital platforms, there is also a need to clarify and identify the extent and type of state jurisdiction and obligations within the particular context of online assemblies.

Furthermore, the variety of purposes served and facilitated by digital platforms and the internet in general underscores the need to formulate state obligations in relation to online assemblies, given the heightened link between the right to peaceful assembly online with other rights such as freedom of association, expression, non-discrimination and privacy. State actions which compromise one of these rights in a digital and online setting necessarily affect other rights as well, hence underscoring the need and urgency to increase the scope of Article 21 to include rights enjoyed online.

There are a variety of ways in which states can interfere with the freedom of online assembly, including internet blocking and the silencing effects of surveillance.

### Internet blocking

In the past, states have employed the use of cyber technology in order to violate human rights and interfere with or curtail the enjoyment of these rights in cyberspace.<sup>155</sup> In his report of 2011, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted and expressed reservations on ‘the emerging trend of timed (or ‘just-in-time’) blocking to prevent users from accessing or disseminating information at key political moments, such as elections, times of social unrest, or anniversaries of politically or historically significant events’.<sup>156</sup> As previously noted, the overlap of various rights in a digital platform means that by interference with one particular right such as a citizen’s freedom of expression online has ramifications for other rights, in particular the right to assembly. The blocking of websites and social networking platforms prevents citizens from participating in intentional gatherings created for a specific purpose online.

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<sup>154</sup> Committee of experts on cross-border flow of Internet traffic and Internet freedom (MSI-INT), (2015), *Draft report on freedom of assembly and association on the Internet*, Accessed at: <https://rm.coe.int/1680496a0b> p.10

<sup>155</sup> Rona, G. and Aarons, L., (2016), ‘State Responsibility to Respect, Protect, and Fulfil Human Rights Obligations in Cyberspace’ 8 *Journal of National Security Law & Policy* 503, 510.

<sup>156</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (A/HRC/17/27), p. 30.

It has similarly been argued that ‘using communications ‘kill switches’ (i.e. 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>157</sup> Examples of such instances include switch-offs in Egypt, Libya and Syria in 2011.<sup>158</sup> Such methods may also be used in order to interfere with the right to peacefully assemble online or the organisation of physical assemblies by digital means. In this regard, the NGO *Article 19* observes that measures such as blocking, filtering, or removal of online content should be prohibited as they are ‘almost always likely to be disproportionate, as there is a significant danger of over-blocking.’<sup>159</sup> Therefore, the state’s obligation to non-interference under Article 21 should be extended to include its misuse of cyber technology.

### State surveillance

State surveillance serves as a contentious point with regards to the balancing of the aims of state security with the protection and preservation of human rights. Surveillance might, for example, be claimed as a justified interference with Article 21 under the interest of promoting national security. In his analysis of social media policing, Trottier claims that group affiliations and friend networks are among the types of information that police have legal channels to obtain about citizens from social media platforms, with many countries such as Austria and Canada passing legislation to reduce the threshold or completely remove the need for obtaining warrants to access this data.<sup>160 161</sup>

The Human Rights, Big Data and Technology Project has highlighted that active participation is not necessarily a prerequisite for being a target of anti-assembly surveillance, with surveillance being used by governments to ‘identify and target particular individuals on the basis of their known or inferred associations’.<sup>162</sup> Thus, the mere joining of an online forum or group or interacting with a page or event, regardless of intention or identification with the purpose of the assembly could be action enough for an individual to become a surveillance target. While Facebook allegedly closed the loopholes for private group membership lists to be publicly accessible in 2018 and disabled the old Social Graph search systems, many states and private surveillance companies are still collecting these forms of data through a number of different mechanisms.

The uncertainty over whether and by whom one’s communications will be monitored or accessed may have a chilling effect on one’s willingness to participate in and to exercise one’s right to peaceful assembly online. For example, ‘a recent poll in the United Kingdom found that one third of individuals were disinclined to participate in protests because of concern about their privacy’.<sup>163</sup>

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<sup>157</sup> OSCE, ‘Joint Declaration on Freedom of Expression and Access to Information’ (1 June 2011) Accessed at: <https://www.osce.org/fom/78309?download=true>

<sup>158</sup> See, *The Guardian*, (2011), “Egypt’s big internet disconnect”, Accessed at: <http://www.theguardian.com/commentisfree/2011/jan/31/egypt-internet-uncensored-cutoff-disconnect>; *The Guardian*, (2011), “The truth about Twitter, Facebook and the uprisings in the Arab world”, Accessed at: <http://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya>

<sup>159</sup> Article 19, ‘The Right to Protest Principles: Background Paper’ (2016), Accessed at: <https://www.article19.org/data/files/medialibrary/38581/Protest-Background-paper-Final-April-2016.pdf>

<sup>160</sup> Trottier, D., (2012), Policing Social Media, *Canadian Review of Sociology*, 49(4).

<sup>161</sup> Fuchs, C., (2009), *Social Networking Sites and the Surveillance Society: A Critical Case Study of the Usage of studiVZ, Facebook, and MySpace by Students in Salzburg in the Context of Electronic Surveillance*, p27.

<sup>162</sup> The Human Rights, Big Data and Technology Project, (2018), “The Universal Declaration of Human Rights at 70: putting human rights at the heart of the design, development and deployment of artificial intelligence”, p31.

<sup>163</sup> A/HRC/13/37, p. 36.

Consequently, any surveillance measures undertaken by a state, whether in cooperation with internet intermediaries or not, 'should be targeted, precisely defined, subject to effective external oversight' in addition to complying with the general requirements for lawful derogation.<sup>164</sup> This includes conducting an 'independent authorisation of surveillance measures'<sup>165</sup> and 'independent ex-post reviews'.<sup>166</sup>

Echoing the Declaration of the Committee of Ministers of the Council of Europe (23 May 2003), states therefore have an obligation to 'ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identities.'<sup>167</sup> This is especially important in cases where 'persons may be associated online without their express consent and not of their own volition. Such involuntary associations or memberships should not lead to legal consequences for the persons concerned.'<sup>168</sup> A state may not evade this responsibility under international human rights law by facilitating unlawful or arbitrary surveillance on the part of another state with a view towards benefiting from information gained through what amounts to unlawful searches and seizures.<sup>169</sup> It may neither directly or indirectly impose a general obligation on intermediaries to monitor content which they merely give access to, or which they transmit or store, be it by automated means or not.<sup>170</sup> States must in particular refrain from exerting any kind of pressure on internet intermediaries through non-legal means.

The Committee of Ministers to the Council of Europe also recommends that states should make publicly available comprehensive information on the number, nature and legal basis of content restrictions or disclosures of personal data. Similarly, states should require intermediaries to disclose and make easily accessible meaningful information on any kind of state interference in the exercise of their users' rights and freedoms.<sup>171</sup> State authorities should, moreover, be obliged to obtain 'an order by a judicial authority or other independent administrative authority, whose decisions are subject to judicial review, when demanding intermediaries to restrict access to content.'<sup>172</sup> While these recommendations were made with regard to the freedom of expression, they could arguably be extended to the freedom of peaceful assembly. Not only would such an obligation be mandated by the data protection principle of transparency as mentioned above, but it would also allow individuals participating in peaceful online assemblies to assess to judicially

<sup>164</sup> Council of Europe Committee of Ministers, (2018), 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries', Appendix, para. 1.4.4.

<sup>165</sup> Council of Europe Committee of Experts on Cross-border Flow of Internet traffic and Internet freedom (MSI-INT), (2015), *Draft report on freedom of assembly and association on the Internet*, Accessed at: <https://rm.coe.int/1680496a0b>, citing, *Kennedy v. the United Kingdom*, 18 May 2010, app. no. 26839/05, p. 167; *Dumitru Popescu v. Romania*, 26 April 2007, app. no 71525/01, p. 72, 73.

<sup>166</sup> *ibid* citing *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*, 28 June 2007, app. no. 62540/0085, p. 87.

<sup>167</sup> Council of Europe, Committee of Ministers, *Declaration on Freedom of Communication on the Internet* (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies)

<sup>168</sup> Venice Commission and OSCE/ODIHR, *Guidelines on Freedom of Association*, 2015, para. 261.

<sup>169</sup> See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Articles 16 and 17.

<sup>170</sup> Council of Europe Committee of Ministers, (2018), 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries', Appendix, para. 1.3.5.

<sup>171</sup> *ibid* para. 1.1.2. The Estonian legislation (Personal Data Protection Act) sets clear limits in this regard, as the collection and use of personal information by public authorities is subject to the individual's consent (Freedom House, "Estonia: Country Profile" (Freedom on the Net 2017), Accessed at: <https://freedomhouse.org/report/freedom-net/2017/estonia>

<sup>172</sup> *ibid* para. 1.3.4.

challenge any kind of monitoring or interference if deemed excessive analogously to offline physical assemblies.

### **State facilitation through legal, infrastructural and educational frameworks**

States are not only obliged to respect and protect the right to peaceful assembly online. As underscored by the Inter-American Court of Human Rights and the European Court of Human Rights, states also have a positive obligation to facilitate the exercise of this right by promoting the formation of peaceful assemblies and ensuring its ability to carry out the purpose for which it was created. This can be conducted through the creation of an enabling legal framework. For example, in *Kawas-Fernandez v Honduras*, the IACTHR noted that ‘the free and full exercise of this right [to freedom of association] imposes upon the State the duty to create the legal and factual conditions for them to be able to freely perform their task.’<sup>173</sup> Whilst this legal ruling was made in relation to the right of association, it can also be transposed to the right of peaceful online assembly.

The ‘factual’ conditions in this instant can relate to ensuring both access to, and the independence of, the Internet. The Committee of Ministers to Member States of the Council of Europe in its Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries accordingly observed that ‘access to the internet is a precondition for the exercise of Convention rights and freedoms online’.<sup>174</sup> In addition to promoting the accessibility of the internet, States are also obliged to ensure that internet connectivity is ‘affordable, secure, reliable and ongoing’.<sup>175</sup> The last characteristic is particularly important in relation to online assemblies, as they can be distinctively spontaneous in nature, and thus require an ongoing connection in order to enable citizens to effectively participate.

However, access to affordable and independent Internet services is not only important for the exercise of the right to peaceful assembly online. Rather, it is also an instrument which considerably facilitates the exercise of this right offline. As UN Special Rapporteur Frank La Rue observes the Internet has become ‘an *indispensable tool for full participation in political, cultural, social and economic life*’.<sup>176</sup> And while the UN Special 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 to peaceful assembly.<sup>177</sup>

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<sup>173</sup> Merits, Reparations and Costs, Judgment of April 3, 2009. Series C No. 196, para 146. Accessed at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_196\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_196_ing.pdf)

<sup>174</sup> Council of Europe Committee of Ministers, (2018), ‘Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries’.

<sup>175</sup> Recommendation CM/Rec (2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet.

<sup>176</sup> Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (UN GA Doc. A/66/290, 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, see Human Rights Council, ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet’ (UN Doc. A/HRC/32/L.20, 27 June 2016); cf. PoKempner, D., (2013), ‘Cyberspace and State Obligations in the Area of Human Rights’ in Katharina Ziolkowski (ed), *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy*, NATO OCCD COE Publication: Tallinn, 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.

<sup>177</sup> Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (UNGA, Human Rights Council 17<sup>th</sup> Session, UNGA Doc. A HRC/17/27, 16 May 2011), para. 78, 79.

Additionally, state obligations may be extended towards the provision of digital literacy and targeted digital access, in order to enable inclusivity and equality for citizens to be able to access and participate in online assemblies. This applies across all ages, and is critical in order that citizens ‘understand the structures and syntax of the digital world’.<sup>178</sup> Digital spaces have indeed important potential for widening participation opportunities for individuals usually excluded or marginalised from physical, traditional forms of assemblies<sup>179</sup>, such as religious and political minorities, women or LGBT persons.<sup>180</sup> One can therefore argue that states are to pay special attention (e.g., proactive, targeted measures) to facilitate access to digital technologies for specific categories of the population, with the aim to help realising political rights, including the right to assembly. This is specifically important with regard to the disabled, as for example in the UK ‘20% of people with registered disabilities have never been online’<sup>181</sup>, and have thus not been able to participate in meaningful online engagement and assembly.

Furthermore, States have a positive obligation ‘to protect human rights and to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb the State official or any sector of the population’.<sup>182</sup> In particular, States must refrain from creating ‘insurmountable barriers’ by preventing the access of information and criminalising online expression.<sup>183</sup>

### **The challenges of protecting transnational online assemblies**

As human rights responsibilities are primarily territorial, the potential transnational dimension of online assemblies raises manifold questions with regard to the obligations of states to respect, protect and fulfil human rights online.<sup>184</sup> The exercise of a human right such as the freedom to peaceful assembly online may be affected either by extraterritorial conduct of foreign state organs or by the extraterritorial effect of the assembly itself as a domestic act. Questions therefore arise with regard to the relationship between classical public international law principles such as sovereignty and non-intervention and the protection of human rights in cyberspace. Concerning the exercise of jurisdiction over online assemblies, which in traditional human rights law would require either control over territory or over person, the commentary should address how these concepts play out in the online realm.<sup>185</sup>

The question of jurisdiction is particularly significant when considering forms of transnational digital assemblies, such as #MeToo as addressed below. After all, an interference with or a

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<sup>178</sup> House of Lords Select Committee on Communications, 2nd Report of Session 2017–19, *Regulating in a digital world*

<sup>179</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 May 2019, §11, referring to A/HRC/35/28

<sup>180</sup> Venkiteswaran, G., (2016), *Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations*. APC Impact, Advocacy for Change through Technology, p. 33. Accessed at: <https://www.apc.org/en/pubs/freedom-assembly-and-association-online-india-mala>

<sup>181</sup> Office for National Statistics, ‘*Internet users, UK: 2018 Internet use in the UK annual estimates by age, sex, disability and geographical location*.’ Accessed at: <https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2018>

<sup>182</sup> *ibid* preambular para. 6.

<sup>183</sup> Rona, G. and Aarons, L., (2016), ‘State Responsibility to Respect, Protect, and Fulfil Human Rights Obligations in Cyberspace’ 8 *Journal of National Security Law & Policy*, 503, 511.

<sup>184</sup> See Altwickler, T., (2018), ‘Transnationalising Rights: International Human Rights Law in Cross-Border Contexts’, 29(2), *European Journal of International Law*, 581-606.

<sup>185</sup> See for instance Altwickler, T., (2018), ‘Transnationalising Rights: International Human Rights Law in Cross-Border Contexts’, 29(2), *European Journal of International Law*, 581-606 and Berkes, A. (2019), ‘Human Rights Obligations of the Territorial state in Cyberspace of Areas Outside Its Effective Control’, 52(2), *Israel Law Review*, 197-231; further more generally Schmitt, M. N. (2017), *Tallinn Manual 2.0 on the Law Applicable to Cyber Operations*, 2nd ed, Cambridge: Cambridge University Press

violation of a human right can only be claimed if jurisdiction, and therefore the applicability of human rights law has been established.<sup>186</sup> The commentary, in addition to reviewing the expansion of Article 21 to the online context, should thus also address a possible expansion of Article 2, which limits the ICCPR's scope of application to all individuals within a state's territory or subject to its jurisdiction. In order to ensure state compliance with the obligations detailed above, the scope of Article 2 should be expanded to include the provision of international assistance and cooperation, in addition to individual state obligations. Notwithstanding the sovereignty and non-interference issues potentially raised by the extraterritorial application of provisions implemented to protect human rights, the ECJ's recent judgment in *Eva Glawischnig-Piesczek v Facebook Ireland Limited*<sup>187</sup> exemplified how this protection can produce effects worldwide.

Far from being confined to the boundaries of a single state, assemblies can indeed entail a transnational dimension, which is amplified by possibilities of the digital age. Firstly, this is the case if assemblies aim at addressing an issue of global nature.<sup>188</sup> Secondly, the assembly *locus* itself can extend across borders<sup>189</sup>, with various levels of interconnectedness between different events. For example, the #MeToo movement, which provided women with an online platform articulated around a common expressive purpose and arguably met definitional criteria of an online assembly (see Section 6 in this regard), reached a global scale, even though the hashtag was renamed in some countries.

Aside from addressing issues, transnational assemblages on digital platforms may be used as an incentive and space to create imagined communities such as diasporas (for example Palestinians and Tamils). Structuring and mobilising around a human rights discourse, these hyperlinked communities are simultaneously local and transnational through their ability to assemble in a cohesive online space, and separately in physical assemblies.<sup>190</sup>

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<sup>186</sup> Altwicker, T., (2018), 'Transnationalising Rights: International Human Rights Law in Cross-Border Contexts', 29(2), *European Journal of International Law*, 581, 596.

<sup>187</sup> ECJ, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, C-18/18 (3.10.2019).

<sup>188</sup> Council of Europe, *Assembly, Association and Participation*, Accessed at:

<https://www.coe.int/en/web/freedom-expression/assembly-association-and-participation>

<sup>189</sup> See 2019 Report by Special Rapporteur on the rights to freedom of peaceful assembly and of association, § 23; Venkiteswaran, G., (2016), Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations, *APC IMPACT*, Accessed at:

<https://www.apc.org/en/pubs/freedom-assembly-and-association-online-india-mala>

<sup>190</sup> Rerouting the Narrative: Mapping the Online Identity Politics of the Tamil and Palestinian Diaspora  
Priya Kumar

## 7. Key questions

The review of the purpose and nature of online assemblies presented in this report, along with consideration of the key issue areas of public versus private online assembly places, digital presence and participation, temporariness and permanence online, what might count as peaceable versus non-peaceful online assemblies, and state obligations has raised some key questions that the expert meeting may want to consider as participants move towards informing the work of the UN Human Rights Committee in drafting General Comment 37 on the right of peaceful assembly.

1. Need there be definitional parity between ‘peaceful assembly’ offline and online?
2. Can online interactions serve purposes that are not already protected by Article 19 and/or Article 22 ICCPR, or which might deserve additional recognition so as to also fall within the protective scope of Article 21?
3. Given the potential for individual ‘re-appropriation’ of the purpose of an online assembly, should a (single) common expressive purpose still be a definitional criterion or should the definition allow for a multiplicity of purposes?
4. What is the appropriate threshold for recognising an online platform as constituting either a ‘public forum’ or ‘publicly accessible place’ whereby restrictions on access might properly engage the protection of Article 21 ICCPR?
5. What constitutes ‘participation’ in an online assembly? What is the minimum bar of action required to qualify as participation? For example, can using hashtags or joining groups constitute participation, or is there a need to also elaborate a more specific intention/motive?
6. Does the deployment of bots or fake accounts (including in cases of DDoS attacks) constitute participation in an online assembly?
7. How should virtual presence in an otherwise offline assembly be understood?
8. Given that draft General Comment 37 recognises a wider array of activities – beyond the temporal span of an assembly event itself – as falling within the protective scope of Article 21,<sup>191</sup> what would such prior- or post- assembly activities potentially encompass in the online context?
9. Does the lack of a clear time-frame (start and end points) prevent online interactions from being classed as an ‘assembly’?
10. Is contemporaneous/synchronous activity necessary for online interaction to be considered as ‘assembly’?
11. Would a permanent online trace ever prevent an assembly from being temporary?
12. How should ‘peaceful’ be interpreted in the context of online assemblies?
13. Can the principle that the authorities must distinguish between peaceful and non-peaceful participants be straightforwardly applied online? What types of online restriction can be individualised (or is there a tendency towards blanket regulation with collateral effect)?
14. Does the right to peaceful online assembly extend to groups or organisations that use hateful speech, trolling, or hacktivism? What thresholds (eg. ‘intimidation’; ‘coercion’) might appropriately demarcate the boundaries of ‘peacefulness’ in the context of online assemblies?
15. Do DoS/DDoS attacks fall within the scope of a peaceful online assembly, and if so, to what extent are they protected? At what point do online acts of service disruption become non-peaceful?
16. How can the transnational nature of online assemblies be effectively addressed through state obligations?

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<sup>191</sup> Human Rights Committee (2019), Revised Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, para 37.