



**WRITTEN SUBMISSION BY THE ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS
(APC) ON THE REVISED DRAFT GENERAL COMMENT NO. 37 ON ARTICLE 21 (RIGHT
OF PEACEFUL ASSEMBLY) OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS (ICCPR)**

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INTRODUCTION

1. The Association for Progressive Communications (**APC**) hereby submits its written submission on the Revised Draft of General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights (**Draft General Comment**) to the United Nations Human Rights Committee (**Committee**). This written submission is in response to the Committee's invitation for civil society and other stakeholders to provide comments on the Draft General Comment.
2. At the outset, APC notes and expresses gratitude to the Committee for its commitment to a participatory drafting process. Accordingly, APC welcomes the Committee's invitation to provide its observations and comments on the Draft General Comment and takes the view that its contents are especially relevant in the current global climate. However, and in order to ensure that the Draft General Comment retains relevance, APC's submission encourages further engagement and clarity in the expanding realm of online or digital assemblies, among others, and seeks to illustrate the emerging opportunities and challenges created through the increased use of information and communications technologies (ICTs), particularly surveillance technologies. Ultimately, APC seeks to encourage equal and adequate protections for freedom of assembly online with the understanding that:

ICTs have emerged as powerful tools for social and political change. They are central today to protect diversity and empower people and groups in positions of marginalisation – such as persons with disabilities, LGBTIQ communities, and linguistic, religious and other minorities – to exercise their right to FoAA. As physical civic space is shrinking around the world, online platforms are viewed as the new places for people to associate, gather and demonstrate, where doing so physically is no longer possible. Additionally, mobilisation online is also central today for supporting and strengthening offline assemblies.¹

ABOUT APC

3. APC is an international network of civil society organisations founded in 1990, dedicated to empowering and supporting people working for peace, human rights, development and the protection of the environment, through the strategic use of ICTs, including the internet. Furthermore, APC has worked to build a world in which all have easy, equal and affordable access to the creative potential of ICTs to improve their lives and create more democratic and egalitarian societies.
4. APC has, for three decades, worked at the critical intersections of human rights and technology. It is therefore apt and squarely within APC's mission to submit comments to the Committee on the right to peaceful assembly as it relates to freedom of assembly

¹ APC. (2019). *The rights to freedom of peaceful assembly and of association in the digital age: Submission to the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association by the Association for Progressive Communications (APC)*, at page 7.

https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf

online and the impacts of ICT-enabled surveillance, among others. Additionally, while APC recognises its expertise in online issues, it remains cognisant of the fact that the realities of offline spaces impact the online realm and the overall realisation of human rights, particularly, in this context, the right to peaceful assembly.

5. In the context of the right to peaceful assembly, particularly online, APC has previously prepared the following documents, among others, which may be of use to the Committee in its drafting process:
 - 5.1. Gayathry Venkiteswaran, “Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations” (2016) Association for Progressive Communications (accessible [here](#)). This paper comprises an exploration of these concepts and recommendations informed by on-ground realities.
 - 5.2. Association for Progressive Communications, “The rights to freedom of peaceful assembly and of association in the digital age: Submission to the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association by the Association for Progressive Communications” (2019) (accessible [here](#)).

OBSERVATIONS AND COMMENTS

6. In this written submission, APC draws the Committee’s attention to the challenges of the full enjoyment of the right to peaceful assembly within digital spaces, that is, both off- and online. APC also offers commentary on overall conceptual questions in the General Comment. As the ubiquity of the internet and ICTs increases, questions on the manner in which we exercise fundamental rights within these digital spaces are beginning to abound. This Revised General Comment is therefore particularly important as it will become the leading tool for both international and national-level advocacy and, accordingly, it should reflect grassroots realities both off- and online.
7. Further, APC draws the Committee’s attention to the contemporary risks of surveillance technologies on the right to peaceful assembly. More specifically, APC draws the Committee’s attention to facial recognition surveillance technologies and the need to ensure that current technologies are compliant with international human rights standards. The risks and violations linked to surveillance technologies are brought into sharper focus when considered in conjunction with the rapid advancement and adoption of the automated decision-making capabilities of artificial intelligence.
8. Accordingly, APC has structured its submission as follows:
 - 8.1. **Online assemblies:** which includes recognition of the right to peaceful assembly online, the role of online assemblies in facilitating the exercise of the

right to peaceful assembly,² and the obligations on state and non-state actors to refrain from undue restrictions in this regard.

- 8.2. ***Surveillance technologies:*** which includes the role of surveillance technologies in inhibiting and restricting the right to peaceful assembly and the need for safeguards. More specifically, the need to prohibit the use of facial recognition technologies and their impact on the exercise of fundamental rights.
- 8.3. ***Additional comments on ICTs:*** which provides paragraph-specific references and suggested text throughout the Revised General Comment where APC suggests that reference to online assemblies and ICTs should be included.
- 8.4. ***General observations:*** which provides paragraph-specific references and suggested text on overall conceptual issues which are relevant to the full enjoyment of the right to peaceful assembly off- and online.

9. Each issue is addressed in turn below.

I. ONLINE ASSEMBLIES

The need to emphasise the role of online spaces

10. As a point of departure and over the last decade, the applicability of human rights in the digital environment has been affirmed and endorsed with the common understanding that “the same rights that people have offline must be protected online.”³ It is worth reiterating that this includes the responsibility on states to “ensure rights to freedom of expression, of peaceful assembly and of association, are also fully protected online, in accordance with human rights law.”⁴
11. The online dimensions of human rights require contemporary and evolving understandings of these rights. While the traditional notions of association and assembly in public places continue to play a vital role in the enjoyment of these rights, there is a need to ensure that these rights are also construed to include any space where people can meet, including online spaces, whether publicly or privately owned. It is now well established that “the exercise of the rights to associate and peacefully assemble occurs increasingly over the Internet.”⁵ Emerging online capabilities indeed present new opportunities and in many ways offer unique and enabling spaces for the exercise and

² Ibid. at page 6.

³ Human Rights Council, “The promotion, protection and enjoyment of human rights on the Internet”, A/HRC/RES/20/8 (16 July 2012) at para 1, available at [A/HRC/RES/20/8](#); see further “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (17 May 2019) available at [A/HRC/41/41](#)

⁴ See the resolution adopted by the General Assembly on 14 November 2018, A/RES/C.3/73/L.41 (14 November 2018) at para 4, available at [A/RES/C.3/73/L.41](#)

⁵ “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association”, A/HRC/38/34 (26 July 2018) at para 80, available at [A/HRC/38/34](#)

enjoyment of the rights to freedom of peaceful assembly, association and expression, among other rights.⁶

12. In this regard, APC submits that recognition of the right to peaceful assembly must include express acknowledgement of not only online assemblies but also the role that online spaces play in facilitating the right to peaceful assembly offline. Presently, the Revised General Comment makes limited reference to online assemblies, and only partially engages in the facilitatory and enabling role of online spaces in facilitating the right to peaceful assembly offline.⁷ At the core of this concern is that peaceful assembly can both begin offline and then move online or begin online, move offline and then return to the online realm. Several mass movements such as the Arab Spring, Me Too, and Save the Internet campaign⁸ were possible because of ICTs. We expect that going forward, ICTs will continue to play a central role in mobilisation and realisation of freedom of assembly across all frontiers.

Paragraph 11

13. APC notes and agrees that the common understanding of the right to peaceful assembly pertains to physical gathering of persons in corporeal spaces. Further, APC welcomes the acknowledgment that the understanding of the right to peaceful assembly has evolved to take cognisance of the advent of online spaces within which the right can find expression. Additionally, APC notes the inclusion of reference to the capacity for ICTs to create new spaces that may not necessarily have been envisioned at the advent of the ICCPR, and the acknowledgement that the human rights protections afforded to physical gatherings also apply to comparable gatherings online. However, APC suggests that the Revised General Comment does not go far enough and it does not fully engage with the characteristics of online assemblies or the enabling role of online spaces.
14. At paragraph 11 of the Revised General Comment, APC suggests that recognition of the interrelation between offline and online spaces should be included to properly frame the general remarks section of the Draft General Comment. It is further suggested that stronger recognition of the prevalence of online spaces for the exercise of the right to peaceful assembly be recognised in and of itself, and not solely as a means of organising or monitoring a physical gathering. In this regard, the Committee may seek to introduce language indicating that the right to peaceful assembly applies both off- and online. This may take place through the inclusion of the following definitional text:

Online assembly is the use of ICTs to exercise the right to peaceful assembly either wholly in online spaces or in conjunction with offline spaces.⁹

⁶ APC. (2019). Op. cit. at page 6.

⁷ Ibid. See also Venkiteswaran, G. (2016). *Freedom of assembly and association online in India, Malaysia and Pakistan: Trends, challenges and recommendations*. Association for Progressive Communications. https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf.

⁸ <https://savetheinternet.info/>

⁹ APC. (2019). Op. cit. and Venkiteswaran, G. (2016). Op. cit.

15. Additionally, paragraph 11 should make reference to the significant impacts digital technologies have in mobilising and providing visibility to assemblies. This should include express reference to **“marginalised groups that are not physically able to participate in offline gatherings, particularly disabled persons.”**¹⁰

Paragraph 15

16. At paragraph 15 of the Revised General Comment, APC suggests that a description of peaceful assembly online and express reference to its existence should be included. Presently, the Draft General Comment refers only to “collective expression through digital means”, which diminishes the role of peaceful assembly online. APC encourages the Committee to explicitly acknowledge, in addition to the above definition, that the right to peaceful assembly online may take place in two distinct but interrelated instances:

16.1. **Where ICTs are used to “support, enable, enhance and facilitate” the exercise of peaceful assembly offline.**¹¹ This includes, but is not limited to, the inception of the idea to assemble and associate, the mobilisation of people through online posts to gather in offline or online spaces, the coordination of the practicalities of organising the physical or virtual gathering of persons, and monitoring events both during and after an assembly.¹²

16.2. **Where peaceful assembly is carried out wholly online.**¹³ This includes, but is not limited to, online petitions, community groups, group chats, online activism and boycotts, digital activism campaigns, virtual protests, “slacktivism”¹⁴ and “hacktivism”.¹⁵ While also engaging the right to freedom of expression, these online actions similarly meet the definitional elements of the right to peaceful assembly and should be included in the Draft General Comment to ensure its future relevance.

Paragraph 67

17. APC welcomes the statement that the privatisation of public spaces may require the extension of the right to peaceful assembly into such spaces, especially when they are generally open to the public. APC submits that this is especially true regarding online

¹⁰ APC. (2019). Op. cit. at page 7.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Lodewijckx, I. (2019, 10 June). ‘Slacktivism’: Legitimate Action or Just Lazy Liking? *Citizen Lab*. <https://www.citizenlab.co/blog/civic-engagement/slacktivism/>

¹⁵ Ibid. According to ARTICLE 19, “hacktivism” is defined as “a collective action of technologically-skilled individuals through the use of digital technologies to protest without gathering in person.” Most acts in this category are considered a form of “electronic” civil disobedience due to related violation of the law. ARTICLE19 argues that international law allows for consideration of these actions as forms of freedom of expression and assembly. See ARTICLE 19 for their background paper on the right to protest, available at: <https://right-to-protest.org/wp-content/uploads/2015/06/Right-to-Protest-Background-paper-EN.pdf>

assemblies. Accordingly, **APC recommends that paragraph 67 be amended to make reference to online assemblies** as detailed more fully below. Equally, APC is of the view that protesting in private spaces may implicate businesses and their responsibility to respect human rights and states' obligation to hold them accountable for this in line with international norms and standards.¹⁶

18. APC notes that the statement providing that assemblies on private property, with the consent of the owner, enjoy the same protection as other assemblies does not take into consideration the nature of online assemblies. Online assemblies often – and presently, to a large degree – occur on private property (i.e. on social media platforms) but there is often no express consent from the owners of the online space. These spaces are generally publicly accessible to anyone who seeks to freely register as a user of the online service, unlike traditional private offline spaces. Clarification and the inclusion of online private spaces and how they relate to online assemblies in paragraph 67 will be welcomed.

The need to ensure stricter standards in relation business enterprises

Paragraph 35

19. While APC fully agrees that “[b]usiness enterprises have a responsibility to respect human rights, including the right of peaceful assembly,” it is respectfully submitted that greater clarity is required on the obligations on businesses in this respect. It is acknowledged that “[o]nline platforms and social media companies, in particular, wield significant power over how both the right to freedom of peaceful assembly and the right to freedom of association are enjoyed and exercised.”¹⁷ **APC submits that given the indispensable role that business enterprises and non-state actors play, particularly in the digital environment, human rights-based standards need to be made clear to guide the governance, actions (and omissions) of these enterprises.** Additionally, there is a need to ensure that there are adequate safeguards against the targeting and surveillance of individuals, communities and civil society actors, which platforms and social media companies have the capability of doing and which is dealt with in further detail below. Companies have a responsibility regarding internet access disruptions and shutdowns, since they should preserve the integrity of access to the whole internet, all the time.
20. APC submits that in terms of the Guiding Principles on Business and Human Rights¹⁸ (**Guiding Principles**), business enterprises should refrain from infringing on human rights and take measures to address adverse human rights impacts resulting from their business models, policies, practices, and the services they provide.¹⁹ Accordingly, the

¹⁶ See note 18 below.

¹⁷ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at para 17.

¹⁸ United Nations Office of the High Commissioner for Human Rights. (2011). *Guiding Principles on Business and Human Rights*. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

¹⁹ Ibid.

Draft General Comment should mirror and, where possible, expand on the sentiments of the recent Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (FoAA) which, in citing the Guiding Principles, states:

In order to fulfil this obligation, business enterprises should have in place human rights policies and processes – including a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate, and account for how they address their human rights impacts; and processes to enable the remediation of any adverse human rights impacts that they cause or to which they contribute.²⁰

21. In addition to the above, paragraph 35 should make mention of the requirement of transparency in terms of contracts between states and business enterprises and the need for human rights impact assessments (HRIAs) of policies or practices that may have the effect of restricting human rights, particularly the right to peaceful assembly online. In setting the appropriate tone for business enterprises, it is necessary to reiterate that states have a responsibility to regulate business enterprises and ensure that they respect human rights.²¹ An inclusion to this effect is necessary to ensure compliance with international human rights standards.

The impact of online restrictions

Paragraph 38

Explicit recognition of online spaces

22. While APC welcomes the acknowledgement in the Draft General Comment that ancillary activities associated with the exercise of the right to peaceful assembly are protected under Article 21 of the ICCPR, **it is respectfully submitted that the express obligation on states to protect online assemblies should be included in paragraph 38.** In this regard, APC submits that the suggested inclusion should speak to the obligation on states to refrain from any and all manipulations or suppressions of online assembly and expression which constitute a violation of international law. This should equally include a clear obligation on states to refrain from restricting or impeding online assemblies and where restrictions are applied, such restrictions must meet the tests of legality, necessity and proportionality.²² Elaboration on these principles in the Draft General Comment, in line with the 2019 Special Rapporteur Report, is encouraged.²³

²⁰ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at para 18.

²¹ Ibid at para 20. See further “Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises”, A/HRC/17/31 (21 March 2011), available at [A/HRC/17/31](#).

²² See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at paras 31-57 for a detailed analysis of the analytical tests set out in Articles 21 and 22 of the ICCPR.

²³ Ibid.

Acknowledging the need for meaningful access to the internet

23. Importantly, **the Revised General Comment should acknowledge that access to the internet is a necessary precondition for the exercise of peaceful assembly online.** There exist multiple digital divides with disparities in “meaningful access to the internet” determined by factors such as age, disabilities, sexualities, gender identities and expressions, among others.²⁴ In this regard, states are in a position not only to protect but to promote the right to peaceful assembly online, but also to promote meaningful access to the internet.²⁵ Practically, this may take place not only in terms of promoting online assemblies themselves but also for the purpose of assembly procedures, such as notification systems, if they exist, which traditionally can take place offline but, increasingly, take place online.

Self-regulation of ISPs

24. APC welcomes the statements advanced in the Draft General Comment in respect of state obligations to ensure that internet service providers (ISPs), in their attempts to self-regulate, do not “unduly” infringe on rights. However, APC notes that the issue is not self-regulation, in and of itself; the problem, as alluded to above, relates to the lack of compliance with, and respect for, human rights standards by business enterprises. **Self-regulation alone is therefore wholly insufficient given that there is an obligation on states to take positive measures to “prevent actions by non-state actors, including businesses, that could unduly interfere with the rights to freedom of peaceful assembly and of association.”**²⁶ **This should be reflected in the Revised General Comment.** Furthermore, the Human Rights Council has called on states to “ensure effective remedies for human rights violations, including those related to the Internet, in accordance with their international obligations.”²⁷ Accordingly, APC submits that self-regulation alone is not an effective remedy, and reference to the obligation on states to ensure that there are effective remedies for human rights violations by ISPs should also be included in the Draft General Comment. Additionally, and as a minor point of reference, **the word “unduly” should be removed throughout paragraph 38** as it does not constitute an appropriate legal threshold for restrictions on the right to peaceful assembly.

²⁴ “Meaningful internet access should be construed as pervasive, affordable connection (of sufficient quality and speed) to the internet in a manner that enables individuals to benefit from internet use including to participate in the public sphere, exercise human rights, access and create relevant content, engage with people and information for development and well-being; irrespective of the means of such access.” Internet Governance Forum. (2016). *IGF Best Practice Forum on Gender and Access: Overcoming Barriers to Enable Women’s Meaningful Internet Access*, at page 4. http://www.intgovforum.org/multilingual/index.php?q=filedepot_download/3406/437.

²⁵ APC. (2019). Op. cit. at page 14.

²⁶ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at page 14.

²⁷ “The promotion, protection and enjoyment of human rights on the Internet”, A/HRC/RES/38/7 (17 July 2018) at para 6, accessible at <A/HRC/RES/38/7>.

“Information dissemination systems”

25. **APC submits that the term “information dissemination systems” is vague and subject to multiple meanings.** More specific terminology, similar to that used in the 2017 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, should be contemplated.²⁸ This may include, for example, express reference to ICTs, generally, and internet infrastructure, including internet exchange points, and content delivery networks more specifically.

Internet shutdowns

26. Restricting access to content online has become a common means for states to stifle opposition and disarm dissent. It can include deliberate disruption of the internet or ICTs, limiting access to content, censorship, blocking and filtering, or the criminalisation of assembly and expression online. Restricting access to the internet in the context of online assemblies is akin to placing barbed wire or physical restrictions around the area where a physical assembly is set to take place.
27. While the “digital age has opened new space for the enjoyment of the rights to freedom of peaceful assembly and of association,”²⁹ the “rights to freedom of assembly and of association in the digital sphere are increasingly the subject of restrictive laws and policies.”³⁰ There is a growing trend of state reliance on “technology to silence, surveil and harass dissidents, political opposition, human rights defenders, activists and protesters, and to manipulate public opinion.”³¹ The Human Rights Council has noted its concern regarding “the emerging trend of disinformation and of undue restrictions preventing Internet users from having access to or disseminating information at key political moments, with an impact on the ability to organise and conduct assemblies.”³² Importantly, in 2019, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that internet shutdowns are “clearly inconsistent” with article 19(3) of the International Covenant on Civil and Political Rights.³³ In 2019, the Special Rapporteur on the rights to freedom of peaceful assembly and of association stated that “network shutdowns are in clear violation of international law and cannot be justified in any circumstances.”³⁴

²⁸ “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, A/HRC/35/22 (30 March 2017) at page 10 onwards, available at [A/HRC/35/22](#).

²⁹ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at para 65.

³⁰ “Rights to freedom of peaceful assembly and of association”, A/72/135 (14 July 2017) at para 49, available at [A/72/135](#).

³¹ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41 (op. cit.) at para 3.

³² Human Rights Council, “The promotion and protection of human rights in the context of peaceful protests” A/HRC/38/L.16 (29 June 2018) at page 2, available at [A/HRC/RES/38/11](#).

³³ “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, A/74/486 (9 October 2019), available at [A/74/486](#). See also United Nations General Assembly, resolution on “Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association”, A/RES/73/173 (17 December 2018), accessible at [A/RES/73/173](#).

³⁴ See “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association” A/HRC/41/41. (Op. cit.)

28. Resultantly, the Draft General Comment should expressly recognise that internet shutdowns and partial disruptions of internet access, including localised or temporal restrictions, by states and/or non-state actors, are clearly inconsistent with the right to peaceful assembly off- and online, among other rights.³⁵
29. In this regard, the relevant sentence in paragraph 38 should, at a minimum, read:

States parties should not impose network shutdowns as they are in clear violation of international law and cannot be justified in any circumstances. Shutdowns fail to meet the established test for restrictions on the right to peaceful assembly found in article 21.

II. SURVEILLANCE TECHNOLOGIES

Facial recognition surveillance technologies, IMSI-catchers and SOCMINT

30. It is undeniable that surveillance by states and non-state actors is rampant across the world and there is a notable increase in the “use of digital surveillance and online harassment against civil society actors, human rights defenders, opposition political leaders and those who plan to stage peaceful public assemblies.”³⁶ Resultantly, APC is of the view that, in general terms, the Draft General Comment should pay fuller attention to this contemporary concern. Additionally, **the Revised General Comment should expressly acknowledge the role that ICTs play in protecting diversity and empowering people and groups in positions of marginalisation – such as women, persons with disabilities, LGBTIQ communities, and linguistic, religious and other minorities.**³⁷ Equally, the Revised General Comment must acknowledge the chilling effects that surveillance, particularly mass or indiscriminate surveillance, has on the full enjoyment of the right to peaceful assembly, especially for groups in positions of marginalisation. More specific comments are detailed below.

Paragraph 29

31. APC welcomes the indication that states should take precautionary measures to avoid fundamental rights violations, including the right to privacy. However, the inclusion of examples of precautionary measures that a state may take, even if not a closed list, will be a valuable addition to this paragraph. These may include, among others, precautionary measures in relation to surveillance, namely: a moratorium on the use of facial recognition surveillance technologies, drones to surveil assembly participants, international mobile subscriber identity-catchers (IMSI-catchers) or “stingrays”, social

³⁵ Ibid.

³⁶ Ibid. at para 29. See further “The right to privacy in the digital age”, A/C.3/71/L.39/Rev.1 (16 November 2016) at page 2, accessible at [A/C.3/71/L.39/Rev.1](#) which acknowledges that the “rapid pace of technological development enables individuals all over the world to use information and communications technology and, at the same time, enhances the capacity of Governments, business enterprises and individuals to undertake surveillance, interception and data collection, which may violate or abuse human rights.”

³⁷ APC. (2019). Op. cit. at page 7.

media intelligence (SMI or SOCMINT), and other forms of surveillance during off- or online assemblies, pending the outcome of HRIAs and only once adequate safeguards can be guaranteed.³⁸

Paragraph 70

32. APC welcomes the statement permitting assembly participants to wear face coverings as an expressive element of a peaceful assembly and also as a result of new surveillance technologies, but suggests that this may be an appropriate paragraph, in addition to paragraph 72, to expressly recognise “facial recognition technologies”, which are highly unlikely to fall within the “demonstrable evidence of imminent violence” threshold. Additionally, APC notes the recognition that surveillance in the context of peaceful assemblies may violate privacy rights in paragraph 71 but persists in its submission that express reference to these “new surveillance technologies”, including facial recognition surveillance technologies, should be detailed.

Data collection, retention and access

Paragraph 71

33. APC notes the Committee’s position that the collection, retention and access of surveillance data, if collected at all, must strictly conform to international standards and take cognisance of the right to privacy, but suggests that the word “**lawful**” be used to caveat the first sentence in paragraph 71. Equally, the word “**stored**” must be included in the second sentence. In addition, APC is concerned that an appropriate legal threshold is not set by the Draft General Comment in relation to the requirements to engage in surveillance activities in the first place, which is of utmost importance. In this regard, APC strongly urges the Committee to seek guidance from the African Commission on Human and Peoples’ Rights, which provides in the *Guidelines on Freedom of Association and Assembly in Africa* that:

Surveillance may only be pursued in cases where reasonable suspicion of an infraction of the law has led to a court-issued warrant authorizing such. Associations and individuals who have their rights to freedom of association and privacy violated through illegitimate surveillance shall be afforded appropriate redress.³⁹

34. Based on the foregoing, the Committee should consider introducing the above threshold either in paragraph 71 or as a new paragraph 72. Alternatively, the Committee may consider a threshold posed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression which provides that, at a minimum, “[s]tates should ensure that surveillance is authorized by an independent,

³⁸ Ibid at page 17.

³⁹ ACHPR. (2017). *Guidelines on Freedom of Association and Assembly in Africa*, at para 35. <https://www.achpr.org/legalinstruments/detail?id=5>

impartial and competent judicial authority certifying that the request is necessary and proportionate to protect a legitimate aim.”⁴⁰

Paragraph 72

35. In line with the above submissions, APC submits that a firmer stance is required in respect of the independent scrutiny and oversight of the “lawful” collection of *necessary* personal information in the context of peaceful assemblies, whether off- or online. As a result of the highly invasive nature of facial recognition technologies, APC is of the view that such technologies require stricter safeguards regarding their use. As discussed above, APC submits that HRIAs must be undertaken before such technologies are deployed in the context of peaceful assemblies. Further, **there should be an immediate “moratorium on the export, sale, transfer, use or servicing of privately developed surveillance tools, [including facial recognition technologies,] until a human rights-compliant safeguards regime is in place.”**⁴¹

Paragraph 112

36. While APC welcomes the Committee’s noting that surveillance in the context of peaceful assemblies may violate privacy rights, it is submitted that the term “data-gathering” be rephrased to avoid ambiguity. In this regard, the phrase “and other means of lawfully collecting data” may be more apposite.

Recording peaceful assemblies

Paragraph 105

37. APC notes that “[t]he use of recording devices by law enforcement officials during assemblies, including through body-worn cameras, may play an important role in securing accountability.” In addition, APC encourages the Committee to include reference to the right of participants, observers, monitors and journalists, among others, to record peaceful assemblies and to “record back” or film law enforcement officers who are filming them. If repressive practices do occur, the recording provides an independent portrayal of events and promotes accountability and transparency. According to the Human Rights Council, the right to peaceful assembly encompasses “organizing, participating, observing, monitoring and recording assemblies.”⁴² APC notes further, with concern, that mass surveillance through the use of recording devices by law enforcement officials during assemblies, despite clear and publicly available guidelines, may have more than a “chilling effect” on participation in assemblies and may be used particularly against groups in positions of marginalisation.

⁴⁰ See “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, A/74/486 (op. cit.) at para 78.

⁴¹ “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, A/HRC/41/35 (28 May 2019) at para 66(a), accessible at [A/HRC/41/35](#).

⁴² See Human Rights Council, “The promotion and protection of human rights in the context of peaceful protests” A/HRC/38/L.16 (op. cit.) at page 3.

III. ADDITIONAL COMMENTS ON ICTs

38. **At para 1:** APC takes the view that this paragraph should be revised to expressly refer to a working definition of peaceful assemblies in order to frame the Revised General Comment. In this regard, the Committee may consider the definition by the Special Rapporteur on the rights to freedom of peaceful assembly and of association that characterises an assembly as “an intentional and temporary gathering in a private or public space for a specific purposes”.⁴³ It may also be helpful to recognise the nature of assemblies, who organises them and how assembly organisation has undergone substantial change over time, including through the use of decentralised digital tools. This is particularly so as traditional organising centres such as unions, civil society organisations and political parties are no longer the only actors of change. Increasingly, individuals, community organisations and social movements are able to leverage decentralised digital tools to call for, mobilise and sustain assemblies. Additionally, it will be useful to recognise the historical role of assemblies in being pivotal means through which decolonisation, self-determination, women’s rights and LGBTIQA struggles, among others, have been realised. This is particularly important for groups in positions of marginalisation.
39. **At para 62:** APC submits that the use of the word “temporary” should be caveated by the phrase “but can be for extended periods of time, particularly in online spaces”.
40. **At para 75:** APC submits that assembly organisers should not be held accountable for conduct of others and remain responsible for themselves in both “off- and online spaces”.
41. **At para 85:** APC suggests that the first line of this paragraph should include express recognition to the obligation on law enforcement agencies and officers to enable and facilitate both off- and online assemblies.
42. **At paragraph 94:** APC notes the references to “stop and search” or “stop and frisk” procedures and encourages the Committee to include a higher legal threshold, such as “reasonable suspicion of the commission of an offence” before such procedures may be authorised. Equally, APC encourages the Committee to make reference to the searching of electronic devices and equipment, which should be subject to a reasonable suspicion, sufficient evidence *and* only on receipt of a warrant from an independent judicial authority.

IV. GENERAL OBSERVATIONS

43. **At para 10:** APC suggests that the Committee reconsider its position that merely because an assembly turns violent it is no longer protected by Article 21. The Committee should expressly recognise that the right to peaceful assembly is held by individuals and

⁴³ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (21May 2012) at para 24, accessible at [A/HRC/20/27](#)

not the assembly as a whole. Accordingly, only violent “individuals” should not be subject to the protection of Article 21.

44. **At para 12:** APC recommends that the last sentence of this paragraph relating to restrictions on the exercise of the right to peaceful assembly should include reference to the parameters for restrictions, and should expressly state that the limitations must not frustrate the very exercise of the right in and of itself.
45. **At para 21:** APC is of the view that the position in paragraph 21 relating to the protection of an assembly or participation in deemed violent assemblies should be rephrased to include the term “active participation in violent activities by individual participants in an assembly”. Individual participants may not always know when an assembly has been deemed violent.
46. **At para 22:** APC submits that the Committee should be cautious to tread into Article 20 restrictions and suggests that **this paragraph be deleted in its entirety**. Alternatively, if Article 20 is going to be used as a basis for limiting Article 21, the Revised General Comment should explain the context of the provision, recognise that it does not include gender, and indicate how this provision is lawfully and appropriately applied. Similarly, Paragraph 57 of the Revised General Comment needs to be aligned with the above suggestions.
47. **At para 45:** APC suggests that this paragraph should expressly include a sentence stating that **“a rights-based approach should be adopted when regulating, restricting or limiting assemblies off- and online.”**
48. **At para 48:** APC recommends that the Committee explicitly state that expressing opinion online or through digital media that is against the state or state policies including calls for self-determination or regime change cannot be prohibited on the grounds on national security.
49. **At para 55:** APC urges the Committee to state that criticism in online spaces and expressed through digital media against heads of state, institutions and religious figures constitutes protected speech and a legitimate target of an assembly. This is particularly so in relation to assemblies and expression directed at religious figures which is restricted or criminalised through blasphemy laws, particularly in Asia. Further, it should be clarified that the prospect of spreading misinformation should not count as a legitimate grounds for limiting assemblies.
50. **At para 74:** APC is of the view that the word “generally” should be removed from this paragraph.
51. **At para 93:** APC does not support, in any way, the current phrasing of the Revised General Comment which seeks to permit the use of “preventive detention”. Resultantly, APC is of the view that **reference to “preventive detention” should be removed, in its entirety, from the Revised General Comment.**

52. **At para 113:** APC strongly urges the Committee to substantially redraft or remove paragraph 113 which might be misinterpreted, causing harm to the full enjoyment and recognition of the right to peaceful assembly. This paragraph has the effect of placing the right to peaceful assembly on a subordinate level to other human rights and substantially diminishes the empowering and significant role that the right plays in holding both public and private power to account.

CONCLUSION

53. It goes without saying that the internet and other ICTs can be a powerful tool for social mobilisation, resistance to injustices and expression of difference and creativity, particularly for groups in positions of marginalisation. As illustrated throughout history, new frontiers are the most hotly contested spaces. Resultantly, express acknowledgement and full recognition of the applicability of international human rights standards in online spaces is urgently required. The Revised General Comment can play a significant role in this regard. Given this context, it is incumbent upon the Committee to consider providing more direction to states and other stakeholders on the right to peaceful assembly in online spaces and the potential risks of surveillance and restrictions to internet access in unduly curtailing the right to peaceful assembly.
54. APC makes itself available to file further written submissions at the request of the Committee and requests the opportunity to make oral submissions during the stakeholder meeting on **9 March 2020**.
55. In sum, APC is thankful for the opportunity to contribute towards this important work and urges the Committee to take heed of the call for greater clarity and emphasis on the role of online assemblies and the need for express restrictions on surveillance technologies.

ENDS.