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**“PRACTICAL ASPECTS OF THE EXERCISE OF FREEDOM OF
ASSEMBLY AND FREEDOM OF ASSOCIATION IN THE DIGITAL
ENVIRONMENT AND INTERNATIONAL LAW PROTECTION”**

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INTRODUCTION

Over the past decades, information technologies have been rapidly concurring their place in our lives. With about 4.66 billion of active users – which is around 59% of the global population – currently connected to the global Web,¹ innovations and development offer us brand new ways of communication, which, together with globalisation processes, make connection and networking between people living in different parts of the world stronger than they ever were.

The era of digital technologies could not but affected the scope of internationally recognised human rights. In this respect, the Human Rights Council stressed that “*the same rights that people have offline must also be protected online*”.² Among other rights, the opportunities brought by the technological development also influenced the scope of the rights to freedom of assembly and of association.³ While in the pre-Internet times the society went to the streets to express its position with respect to pressing social issues, to show solidarity or unity, formed unions or other forms of non-governmental social structures to pursue consistent and targeted activities, now it might often be done via a couple of “tweets” or reposts, by pressing a combination of buttons or joining a video call. The Internet improved connectivity and changed the way we engage with each other. However, it also brought us new threats⁴ and legal issues international law has never faced before. Those include particular dependence of effective social interactions on access, connectivity, the spread of information and appropriate limits thereon, privacy and, even more importantly, a drastically increased role of the private sector – in form of internet service providers, social media platforms or other intermediaries – in the realisation of human rights in the digital environment.

¹ Joseph Johnson, “Worldwide digital population as of January 2021”, Statista, 7 April 2021, accessed on 12 May 2021, URL: <https://www.statista.com/statistics/617136/digital-population-worldwide/>;

² United Nations Human Rights Council, Thirty-eight session, “The promotion, protection and enjoyment of human rights on the Internet”, Resolution No. 38/7 A/HRC/RES/38/7, July 17, 2018, 2, URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/215/67/PDF/G1821567.pdf?OpenElement>, p. 3, item 1;

³ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 2, para. 2;

⁴ *Ibid.*;

While the digital dimension of freedom of expression, including the rights to receive and impart information, has attracted plenty of attention from both the scholarship and international human rights bodies, the issue of expansion of freedoms of assembly and of association to the Internet is just entering the public discourse. Thus, the topic of this thesis is particularly relevant and requires due care and consideration. The pressing character of this topic is also strengthened now, in the context of the ongoing global COVID-19 pandemic and even deeper integration of communication technologies in our lives and day-to-day activities. A thorough research on the origins, specific characteristics and status of recognition of digital dimension of the rights to freedom of assembly and of association as well as an overview of existing legal standards which might apply when these freedoms and related human rights are exercised online are also needed given the increased interest in these rights from policymakers and international human rights bodies. Further exploration of and discussion around this topic is necessary for the development of effective and adequate legal framework in relation to these freedoms. The results of this and further research on the topic may also serve as guidance for businesses and governments as to the factors to consider while carrying out their respective activities, especially those in the digital environment.

Given the aforementioned, legal relations formed around the exercise by individuals and other private actors of rights to freedom of assembly and freedom of association in the digital environment constitute the *object* of this thesis. As to the *subject matter* of this thesis, it comprises a legal framework regulating organisation and operation of associations and assemblies online as well as setting out respective obligations and responsibilities of the States and intermediaries towards respect, protection and facilitation of these rights in the digital environment.

Based on the defined object and subject matter of this thesis, the *main purpose* of this research is to identify legal rules, which constitute a basis for the full and effective exercise of the rights to freedom of assembly and freedom of association in the digital dimension, and to analyse their efficiency and practical implications of non-

compliance. This purpose presupposes that the following *research tasks* must be set out and frame this thesis:

- 1) To identify distinctive features of the concepts of “assembly” and “association” under the scope of protection of the rights to freedom of assembly and freedom of association;
- 2) To apply the features identified to the digital context and to discover the forms of the exercise of the rights to freedom of assembly and of association in the digital environment;
- 3) To analyse the correlation between freedoms of assembly, association and expression in the digital environment;
- 4) To discover whether non-state actors are, in principle, bearers of legal obligations under international human rights law;
- 5) To explore and examine the role intermediaries play in the exercise of the rights to freedom of assembly and freedom of association in the digital context;
- 6) To investigate the nature of obligations to regulate content and the practical implications they cause to the exercise of the rights to freedom of assembly and freedom of association in the digital environment;
- 7) To determine the role of the right to privacy in effective and full realisation of the rights to freedom of assembly and freedom of association online;
- 8) To analyse how the introduction of different encryption and anonymisation tools facilitates the protection of the right to privacy, and to describe the existing flaws in these tools;
- 9) To examine the scope of negative obligations the States have under international human rights law with respect to the rights to freedom of assembly and freedom of association online;
- 10) To explore the compatibility of content regulation measures and internet shutdowns with the standards of international human rights law;

- 11) To assess the state surveillance and data retention measures as interferences into the exercise of the rights to freedom of assembly and freedom of association online;
- 12) To determine the status of crystallisation of the right to the Internet under the international human rights law; and
- 13) To explore and analyse the scope of positive obligations of the States towards the protection of the rights to freedom of assembly and freedom of association online.

In pursuit of the main purpose and accomplishment of the research tasks identified, the following list of general scientific and specific juridical *methods* is to be employed:

- The *axiological* method, by virtue of which the analysis of legal framework regulating the exercise of the rights to freedom of assembly and freedom of association is conducted from the point of their value and importance for a *human being* as a subject enjoying these rights;
- During the research, the *method of analysis* has been organically merged with the *method of synthesis*. The method of analysis is used for the identification of different integral parts and features of complex terms, such as “association” or “assembly”, while the method of synthesis is employed to combine these elements for the analysis of legal nature and general regulation of these concepts;
- The *comparative method* is employed in order to identify similarities and distinctions in forms in which different freedoms are exercised online and for comparison of approaches to the regulation of various legal aspects of realisation of the rights to freedom of assembly and freedom of association online;
- The *systematic method* supported the analysis of legal concepts, such as “assembly”, “association” as well as other related ones as complex and holistic concepts. The same method allowed to place the rights in question

into the legal framework, which constitutes a system of international human rights protection;

- In this respect, the *dialectical method* has also been employed, by virtue of which the links between different integral parts of these concepts are established as well as the links between these concepts themselves and between them and other elements of law, sociology and policy;
- Connections between the social relations constituting the object of this thesis and other social phenomena were studied with the application of the *general sociological* and *specific sociological methods*;
- One of the main methods used throughout the thesis is the *legalistic method*, which was used for the analysis of treaties and other normative documents related to the exercise of the rights to freedom of assembly and association and other related rights;
- Textual analysis was also conducted with the assistance of the *hermeneutic method*, which was employed to construe the legal meaning of the various texts used;
- The *methods of induction* and *deduction* have been employed with an aim of revealing the logical links between different rules and concepts as well as to draw conclusions and hypotheses.

This set of methods constitutes a sufficient methodological basis for the research on the subject matter of this thesis as well as for reaching its main purpose and accomplishment of the research tasks.

Finally, as to the sufficiency of the existing research on the topic, the researches of Michael Hamilton, Florian Wettstein, McPherson, Polina Malkova, Olga Kudinova, O. Uvarova, Edison Lanza, Manfred Nowak, Peter Swire and other distinguished authors cited or referred to in this thesis made a significant contribution to the development of the topic. At the same time, their research pays critically little attention (if any at all) to the digital dimension of the exercise of freedom of assembly and freedom of association. Therefore, this research is intended to fill this gap.

CHAPTER 1

LEGAL NATURE AND PARTICULARITIES OF THE EXERCISE OF THE RIGHTS TO FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION ONLINE

1.1 The Rights to Freedom of Assembly, Freedom of Expression and Freedom of Association: a Comparative Analysis and Search for Connections

Starting from the very beginning of the universal recognition of human rights, when the Universal Declaration of Human Rights was adopted, international instruments⁵ and national human rights acts⁶ provide for the protection of freedom of assembly and freedom of association along with freedom of expression, which also directly deals with the communication of an individual with the outside world. Given the interdependency and indivisibility of all human rights⁷ on the one hand and similarity of methods of expressing oneself online and participating in an online assembly on the other hand, the same conduct of a person in a digital reality might, in fact, be protected under different combinations of the rights at stake. Such a close interplay of these three freedoms is natural and undoubtedly beneficial for digital assemblies and associations.

⁵ “Convention for the Protection of Human Rights and Fundamental Freedoms,” opened for signature November 4, 1950, European Treaty Series no. 5, URL: https://www.echr.coe.int/documents/convention_eng.pdf, Art. 11; “African Charter on Human and Peoples’ Rights,” opened for signature June 27, 1981, United Nations Treaty Series vol. no. 1520, URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf>, Arts. 10(1), 11; “American Convention on Human Rights “Pact of San José, Costa Rica””, opened for signature November 22, 1969, United Nations Treaty Series vol. no. 1144, URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>, Arts. 15, 16(1);

⁶ Ukraine, Constitution of Ukraine, June 28, 1996 (last amended on January 1, 2020), URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>, Arts. 36, 39; Federal Republic of Germany, Basic Law, May 23, 1949 (last amended on March 28, 2019), URL: <https://www.btg-bestellservice.de/pdf/80201000.pdf>, Arts. 8, 9; The Republic of South Africa, The Constitution of the Republic of South Africa, December 4, 1996, URL: <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>, Arts. 17, 18;

⁷ United Nations General Assembly, Sixtieth session, “Human Rights Council,” Resolution No. 60/251, A/RES/60/251, April 3, 2006, URL: https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf, p. 1 (“*reaffirming further that all human rights...*”);

Nevertheless, in order to conduct a substantive analysis of the specific features of exercise of freedom of assembly and freedom of association in a digital environment, it is necessary to distinguish these freedoms from the freedom of expression as well as from one another. Since the nature, the sense and the scope of these rights differ, the mechanisms for the protection of these rights must, thus, be sensitive to such differences.

As it will be discovered, while a distinction is more or less easily identifiable in the offline context, there is less clarity when it comes to the exercise of these rights in the digital dimension. At the same time, given that the digital context only creates a specific and exceptional superstructure over the existing branch of international human rights law, the starting point for such an analysis would still be the classic understanding of the three freedoms at stake and the scope of their application.

1.1.1 Overview of the Interrelation between Freedom of Assembly and Freedom of Association

Before going into analysis of how freedoms of assembly and freedom of association are linked with freedom of expression, these two freedoms themselves should be described, the distinctive features of both should be identified and the connections they have should be discovered. Even the close placement of those two freedoms within the structure of different human rights instruments hints at their kinship, while the European Convention on Human Rights dedicates a sole article to cover both freedoms.⁸

Generally, the ambit of freedom of assembly covers “*gathering[s] by persons for specific purposes, principally expressive ones*”⁹. It is important to underline, though, that not only actual participation in a gathering is protected by freedom of assembly

⁸ “Convention for the Protection of Human Rights and Fundamental Freedoms,” opened for signature November 4, 1950, European Treaty Series no. 5, URL: https://www.echr.coe.int/documents/convention_eng.pdf, Art. 11;

⁹ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 4;

but also a set of acts linked and surrounding the assembly, including calling for a protest, planning, communication between the participants, leaving the gathering etc.¹⁰

Importantly, in order for a gathering to fall within the scope of protection of freedom of assembly, it is necessary for its participants to have a common specific purpose.¹¹ In a practical sense, it means that an assembly shall be distinguished from an ordinary crowd on the street or those commuting by bus in the morning. Finally, any assembly constitutes an *intentional* gathering,¹² meaning that its participants are *willing* to participate in it *collectively*. For this reason, for instance, a simple queue in the supermarket cannot have a status of assembly despite all of the individuals standing in such a queue share the same purpose. At the same time, the European Court of Human Rights found that a queue of people aiming to attend the court hearing, which they consider as one having a political nature, falls within the ambit of freedom of assembly due to the common purpose they shared, namely “*to express personal involvement in a matter of public importance*”.¹³

Meanwhile, freedom of association, in its narrow sense, addresses the “*right to form or be affiliated with a group or organisation pursuing particular aims*”.¹⁴ In other words, it covers the right of individuals to “*collectively express, promote, pursue and defend common interests*” through organisation with others.¹⁵

Similar to freedom of assembly, freedom of association necessarily involves an identifiable and shared purpose driving its members to organise and form a group to

¹⁰ Ibid., para. 33;

¹¹ United Nations Human Rights Council, Thirty-first session, “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,” A/HRC/31/66, February 4, 2016, URL: <https://undocs.org/A/HRC/31/66>, p. 4, para. 10; Council of Europe, European Court of Human Rights, “Guide on Article 11 of the European Convention on Human Rights, Freedom of assembly and association,” December 31, 2020, URL: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf, p. 8, para. 14;

¹² United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 24;

¹³ ECtHR, *Navalnyy v. Russia*, app. nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, Grand Chamber, Judgement, November 15, 2018, URL: <http://hudoc.echr.coe.int/eng/?i=001-187605>, paras. 110-111;

¹⁴ Council of Europe, European Court of Human Rights, “Guide on Article 11 of the European Convention on Human Rights, Freedom of assembly and association,” December 31, 2020, URL: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf, p. 23, para. 120;

¹⁵ United Nations General Assembly, Fifty-ninth session, “Human rights defenders,” Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/59/401, October 1, 2004, URL: <https://undocs.org/A/59/401>, para. 46;

foster a particular interest or idea. Therefore, freedom of association does not deal with the right of a person to share someone else's company¹⁶ or simply being a part of the broader society. It concerns only the structural formations being groups of interests and uniting their members for a particular aim.

Except for requiring a specific purpose, both freedoms share another specific feature – a collective element. In contrast to freedom of expression, as will be discussed in detail later, both freedom of association and freedom of assembly relate to actions an individual takes together with others.¹⁷ Organisation of and participation in an assembly or association is impossible without others joining it or, at least, without an expectation of others joining it. These freedoms, therefore, have a dual nature: although they are formulated as individual, personal liberties, they also, in fact, set standards for the protection of collective actions. Accordingly, the protection under these freedoms is possessed by each participant individually but also by a gathering or formation as a whole.

There is also a different aspect of inherent duality both freedoms have which lies in their civil and political nature meaning that these freedoms have both civil and political layers of protection of an individual's freedom. Manfred Novak describes this feature in the following way:

“As a civil right it grants protection against arbitrary interference by the State or private parties when [...] an individual wishes to associate with others [...]. As a political right it is indispensable for the existence and functioning of democracy, because political interests can be effectively championed only in community with others [...]”¹⁸

¹⁶ European Commission on Human Rights, *McFeeley et al. v. the United Kingdom*, app. no. 8317/78, Decision on the admissibility of the application, May 15, 1980; ECtHR, *Bollan et al. v. The United Kingdom*, app. no. 42117/98, Chamber (Third Section), Decision as to the admissibility, May 4, 2000, p. 10, para. 3;

¹⁷ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 4, 100; see also, Organisation of American States, Inter-American Commission on Human Rights, “Report on the Situation of Human Rights Defenders in the Americas,” Report, OEA/Ser.L/V/II.124, March 7, 2006, URL: <http://www.cidh.org/countryrep/defenders/defenderschap1-4.htm>, para. 33;

¹⁸ Nowak, Manfred. 2005. *U.N. Covenant On Civil And Political Rights*. 2nd ed. Kehl (Germany): N.P. Engel, p. 496, para. 2;

Indeed, both freedoms serve as foundations for civil societies and as tools for effective participation of a person in the life of the broader society,¹⁹ as well as a driver for change and development. They are also claimed to be inherent and crucial elements of democracy empowering people with possibilities to voice their ideas, opinions, engage in collective activities of a wide variety of topics, scales and forms.²⁰ This leads to the conclusion that both freedoms perform two main functions: firstly, to protect an individual's freedom from illegitimate abuses from the states or non-state actors as well as, secondly, to foster democratic development and to assist in reshaping the societal landscape.

The connection between these two freedoms also from time to time translates into a specific nexus they form. They are undoubtedly and naturally “*interdependent and mutually reinforcing*”.²¹ Freedom of assembly plays a crucial role in the operation of most associations.²² Assemblies constitute one of the types of activities many associations pursue and use in order to express their opinions, influence decision-making, attract the attention of the general public to a certain issue or to the association itself. Although the scope of freedom of association does not necessarily require such an association to deliver its ideas outside its internal network, peaceful enjoyment by its members of freedom of assemblies must not be restricted for such an association to have the ability to turn to gatherings as an operational tool at any point of its lifetime. Furthermore, peaceful gathering of members of an association without any demonstrative purpose – for example, with a purpose to discuss plans and future

¹⁹ United Nations General Assembly, Fifty-ninth session, “Human rights defenders,” Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/59/401, October 1, 2004, URL: <https://undocs.org/A/59/401>, para. 47 (regarding associations); Martín, Helena Sola. 2013. *The Right To Freedom Of Assembly In The Euro-Mediterranean Region*. Copenhagen: Euro-Mediterranean Human Rights Network, p. 6 (regarding assemblies);

²⁰ United Nations Human Rights Council, Fifteenth session, “The rights to freedom of peaceful assembly and of association,” Resolution no. 15/21, A/HRC/RES/15/21, October 6, 2010, URL: <https://undocs.org/en/A/HRC/RES/15/21>, pp. 1-2 (“*Recognizing also that...*”);

²¹ United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 24; Martín, Helena Sola. 2013. *The Right To Freedom Of Assembly In The Euro-Mediterranean Region*. Copenhagen: Euro-Mediterranean Human Rights Network, p. 20;

²² European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), p. 5, para. 5;

activities – shall also enjoy the protection of freedom of assembly for without this freedom, the association may find itself paralysed and deprived of internal communication between its members. In turn, assemblies might also have “*associational value*”²³, which means that the social links being created during assemblies between individuals and/or existing civic society elements might survive the end of the particular assembly and transform into a more formalised and stable social structure. There exist a number of examples of such transformations. For instance, the Resistance Movement against Capitulation (ukr. *Рух опору капітуляції*) in Ukraine originated from an assembly, which occurred on 10 June 2019 in front of the Office of the President of Ukraine.²⁴ The assembly gathered a number of political parties, non-governmental organisations and individuals to protest against the position of the government towards an armed conflict initiated by the Russian Federation.²⁵ Although at first, the intention was only to protest together, the temporary gathering then eventually transformed, according to their website, into a well-organised supra-organisational movement connecting different organisation in the fields where they have a common agenda.²⁶

In addition, an environment in which various associations could operate freely contributes to the effective exercise of freedom of peaceful assembly.²⁷ Given that assemblies are often planned and organised in advance,²⁸ various associations serve as organisers of assemblies at the very least. The pre-existing and well-organised structure of associations facilitates quick and thorough preparation for a gathering, sharing of ideas and information as well as encouraging people outside the association to join or just to pay attention to the contemplated assembly. Therefore, the restrictions imposed

²³ *Ibid.*, p. 5, para. 5;

²⁴ “Рух опору капітуляції,” Website, URL: <http://rok.org.ua/> (Accessed on May 12, 2021);

²⁵ *Ibid.*;

²⁶ *Ibid.*;

²⁷ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), p. 5, para. 5;

²⁸ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 14;

on the establishment of associations and their activities might impede the enjoyment of freedom of peaceful assembly,²⁹ as well as *vice versa*.

Consequently, despite being separate and distinguished rights, freedom of assembly and freedom of association are closely connected, reinforce each other and share a number of common features, including collective nature, the existence of a specific purpose and dual civil and political nature.

1.1.2 Overview of the Interrelation between Freedom of Assembly and Freedom of Expression

In its classical understanding, the freedom of expression is defined by the list of its elements, namely the right to seek, the right to collect and the right to convey the information of any kind further to others.³⁰ In fact, it covers a widespread list of forms and kinds in which the information is transmitted from one individual to another. The examples may include exposition of certain symbolic items,³¹ artistic works as well as their exhibition,³² commercial articles,³³ conduct aimed at communicating one's opinions or ideas to others as, for instance, detaching the ribbon containing the name of the public official from the wreath laid at a monument³⁴ or pouring paint on a statue of a historic figure³⁵ and so on.

²⁹ United Nations Human Rights Council, Thirty-first session, "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," A/HRC/31/66, February 4, 2016, URL: <https://undocs.org/A/HRC/31/66>, para. 7;

³⁰ United Nations General Assembly, "Universal Declaration of Human Rights," December 10, 1948, Accessed on May 12, 2021, URL: <https://www.un.org/sites/un2.un.org/files/udhr.pdf>, Article 19; "International Covenant on Civil and Political Rights," opened for signature December 16, 1966, United Nations Treaty Series vol. no. 999, URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, Article 19 (2); "Convention for the Protection of Human Rights and Fundamental Freedoms," opened for signature November 4, 1950, European Treaty Series no. 5, URL: https://www.echr.coe.int/documents/convention_eng.pdf, Article 10

³¹ ECtHR, *Tatár and Fáber v. Hungary*, app. nos. 26005/08 and 26160/08, Chamber (Second Section), Judgement, June 12, 2012, URL: <http://hudoc.echr.coe.int/eng?i=001-111421>, paras. 6, 29;

³² ECtHR, *Müller and Others v. Switzerland*, app. no. 10737/84, Chamber, Judgement, May 24, 1988, URL: <http://hudoc.echr.coe.int/eng?i=001-57487>, paras. 10-11, 27;

³³ ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, app. no. 10572/83, Court (Plenary), Judgement, November 20, 1989, para. 26

³⁴ ECtHR, *Shvydka v. Ukraine*, app. no. 17888/12, Court (Fifth Section), Judgement, October 30, 2014, URL: <http://hudoc.echr.coe.int/eng?i=001-147445>, paras. 8, 38;

³⁵ ECtHR, *Murat Vural v. Turkey*, app. no. 9540/07, Court (Second Section), Judgement, October 21, 2014, URL: <http://hudoc.echr.coe.int/eng?i=001-147284>, paras. 7, 54-56;

At the same time, along with freedom of expression, another freedom shaping the interaction of an individual with the broader society is the one of assembly. The interplay between the two freedoms has numerous times been recognised and analysed by different national and international bodies dealing with human rights issues. In its recent General Comment on the right of peaceful assembly, UN Human Rights Committee called freedom of expression an “*overlapping*” right, protection of which is a necessary prerequisite for the full protection of freedom of assembly.³⁶ Furthermore, the Committee also emphasised that mass gatherings frequently have “*expressive*” purposes and forms of realisation.³⁷

In its case law, however, the Committee does not usually address the matter explicitly. At the same time, for instance, in *Tae Hoon Park v. the Republic of Korea*, the Committee dealt with an alleged violation of freedom of expression. An author of the communication stated that he had been punished under Southern Korean criminal law for his opinions on possible reunification of Southern and Northern Korea, critics of Korean and American Governments and, specifically, for expression of those opinions at public demonstrations in the United States.³⁸ The Government referred to a law providing grounds for criminal liability for any actions which are considered as siding with anti-State association.³⁹ The Committee sided with the author and found the violation of freedom of expression⁴⁰ despite the fact that, in nature, the actions committed by the author – participation in a political assembly – are covered by freedom of assembly protected under another article of the International Covenant on Civil and Political Rights. The legal conclusion made by the Committee here implies that, in principle, expressive actions of an individual during a public assembly might be simultaneously protected by both freedom of assembly and freedom of expression.

³⁶ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 9;

³⁷ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para.32;

³⁸ United Nations Human Rights Committee, *Tae Hoon Park v. Republic of Korea*, CCPR/C/64/D/628/1995, Communication no. 628/19953, November 6, 1998, URL: <https://www.refworld.org/cases,HRC,3f588effe.html> (Accessed on May 12, 2021), paras. 2.4 and 3.1;

³⁹ *Ibid.*, paras. 2.1 and 4.1;

⁴⁰ *Ibid.*, para. 10.3;

The fact that the Committee avoided classification of the claimant's actions as participation in an assembly may only be explained by the fact that the Committee does not recognise a violation of freedom of assembly where the claimant does not raise this freedom in their communication.⁴¹

Another individual communication to mention here is *Kivenmaa v. Finland*. This case, despite being rather a bad example of an interpretation of what a “*public assembly*” means under Article 21 of the International Covenant on Civil and Political Rights,⁴² also shown that the Committee tends to grant protection under freedom of expression to expressive actions taken during mass gatherings, such as holding of a banner.⁴³

When the Supreme Court of Zambia was dealing with a question of whether gathering pre-authorisation procedure was compatible with Zambian Constitution, the Court highlighted that such measures create unproportionate obstacles to both freedom of expression and freedom of assembly, since freedom to take part in assemblies is an “*inherent*” element of freedom to impart and receive information.⁴⁴

African Commission also had a chance to address this interrelation. In its communication *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, the Commission recognised that the freedom of expression is so closely linked to freedoms of assembly and of association, that a violation of the latter ones always leads to indirect violation of the former one.⁴⁵

⁴¹ Michael Hamilton, “Towards General Comment 37 on Article 21 ICCPR Michael Hamilton The Right of Peaceful Assembly,” European Centre for Non-Profit Law 2019, URL: <https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/MichaelHamilton.pdf> (Accessed on May 12, 2021), pp. 14-15 (item (d));

⁴² United Nations Human Rights Committee, *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990, Communication no. 412/1990, Dissenting Opinion of Mr. Kurt Herndl, June 9, 1994, URL: <http://hrlibrary.umn.edu/undocs/html/vws412.htm> (Accessed on May 12, 2021), paras. 2.6-2.8 of the Appendix; ECtHR, *Fáber v. Hungary*, app. no. 40721/08, Court (Second Section), Judgement, Dissenting Opinion of Judge Keller, July 24, 2012, URL: <http://hudoc.echr.coe.int/fre?i=001-112446>, para. 16 (of the Dissenting Opinion);

⁴³ United Nations Human Rights Committee, *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990, Communication no. 412/1990, June 9, 1994, URL: <http://hrlibrary.umn.edu/undocs/html/vws412.htm> (Accessed on May 12, 2021), para. 9.3;

⁴⁴ Supreme Court of Zambia, *Case of Christine Mulundika and 7 others v. The People*, Judgment, February 7, 1996, 2 LCR 175 URL: <https://zambialii.org/node/2724> (Accessed on May 12, 2021), p. 3;

⁴⁵ African Commission on Human and Peoples' Rights, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, app. nos. 137/94, 139/94, 154/96 and 161/97,

Therefore, the practice of various body all over the world suggests that freedom of assembly and freedom of expression are bound together in the context of mass gathering. Among the characteristics that bind freedom of assembly and freedom of expression together, it is worth exploring a *synergy* those freedoms have when it comes to public assemblies having an expressive purpose, especially political ones.

To this extent, the European Court of Human Rights developed the most extensive and coherent practice with respect to the symbiosis of freedom of assembly and freedom of expression. Choosing between Article 10 (Freedom of Expression) and Article 11 (Freedom of Association and Assembly) of the European Convention in the context of public gatherings, the Court usually finds it difficult to separate them and considers one freedom which is more relevant to the case circumstances in light of another one.

In its landmark *Ezlin v. France* case, the European Court of Human Rights analysed investigations commenced by French authorities against a lawyer partaking in an assembly.⁴⁶ A certain number of unpeaceful demonstrators also attended the same assembly, which led to charges put against the applicant for not disapproving the actions of such unpeaceful demonstrators, not dissociating from them and for refusing to witness in court against them.⁴⁷ While deducing its judgement, the Court stated that in the circumstances of the case freedom of expression constitutes a *lex generalis* vis-à-vis freedom of assembly being a *lex specialis*.⁴⁸ However, recognising an expressive value of the assembly in question, the Court considered an interference with freedom of assembly *in light* of the standards of freedom of expression.⁴⁹ From the practical point of view, this means that the standards the Court previously applied in its analysis on freedom of expression issues are also employed *mutatis mutandis* by the Court when

October 31, 1998, URL: <https://www.refworld.org/cases,ACHPR,3ae6b6123.html> (Accessed on May 12, 2021), para. 110;

⁴⁶ ECtHR, *Ezlin v. France*, app. no. 11800/85, Court (Chamber), Judgement, April 26, 1991, URL: <http://hudoc.echr.coe.int/eng?i=001-57675>, paras. 13-16;

⁴⁷ *Ibid.*, paras. 20-21;

⁴⁸ *Ibid.*, para. 35;

⁴⁹ *Ibid.*, para. 37;

it deals with the issues of freedom of assembly.⁵⁰ This conclusion is crucial for further analysis of the ways freedom of assembly is exercised and protected online.

The expressive value of a gathering is not limited to its goal as such. In her research on freedom of assembly, Orsolya Salát summarises the European Court of Human Rights' case-law referrals to an expressive component of an assembly as follows:

“[The expressive value] can be: (i) about individual expression of the speakers; (ii) collective expression signifying (ii) (a) the quantity of support for an idea, or (ii)(b) support for the idea that the issue is worth discussing; finally, (iii) it enables exchange of ideas between supporters and dissenters.”⁵¹

For instance, in *Tatár and Fáber v. Hungary*, the Court expressly emphasised the fact that the gathering of people, especially where their number is significant, with an expressive purpose is “*an intensive expression of an idea*” as such even merely due to the actual presence of its participants.⁵² The Court also noted the way an assembly contributes to the communication of ideas from the speakers to the audience and within the audience.⁵³

Employing the logic of the Court to generalise the interrelation of the two freedoms, it seems that in the context of mass gatherings an exercise of freedom of expression often serves an integral part of exercising freedom of assembly.⁵⁴ In the view of the Court, those two freedoms are “*closely linked*”⁵⁵ and, in fact, the Court even describes the essence of a public assembly as “*free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places*”.⁵⁶

⁵⁰ ECtHR, *Primov and Others v. Russia*, app. no. 17391/06, Court (First Section), Judgement, June 12, 2014, URL: <http://hudoc.echr.coe.int/eng?i=001-144673>, para. 92;

⁵¹ Salát, Orsolya. 2015. *The Right To Freedom Of Assembly: A Comparative Study*. Oxford: Hart Publishing Ltd., p. 46

⁵² ECtHR, *Tatár and Fáber v. Hungary*, app. nos. 26005/08 and 26160/08, Chamber (Second Section), Judgement, June 12, 2012, URL: <http://hudoc.echr.coe.int/eng?i=001-111421>, para. 38;

⁵³ *Ibid.*;

⁵⁴ International Commission of Jurists, “Chapter four: Freedom of Assembly, Association and Expression,” undated, URL: <https://www.icj.org/sogi-casebook-introduction/chapter-four-freedom-of-assembly-association-and-expression/> (Accessed on May 12, 2021); see also: United Nations Human Rights Committee, “General comment No. 34 Article 19: Freedoms of opinion and expression,” CCPR/C/GC/34, September 12, 2011, URL: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>;

⁵⁵ ECtHR, *Ezelin v. France*, app. no. 11800/85, Court (Chamber), Judgement, April 26, 1991, URL: <http://hudoc.echr.coe.int/eng?i=001-57675>, para. 51;

⁵⁶ *Ibid.*, para. 52;

An assembly also serves as one of the tools for individuals to communicate their ideas and opinions in the exercise of freedom of expression. However, at the same time, an exercise of freedom of expression is often used to facilitate exercise of freedom of assembly. For instance, in *Baldassi and Others v. France*, the Court posited that a person, in fact, exercises their freedom of expression when simply calling to participate in a protest and substantiate this call with political arguments.⁵⁷ The same relates to the usage of social networks with the purpose to encourage people to take part in mass gatherings.⁵⁸

At the same time, the close bonds between these two freedoms do not and cannot be a reason for diminishing their uniqueness. A line should be drawn between them in order to ensure the adequate protection of both freedoms in the relevant circumstances. A distinction in objects these two freedoms cover may serve as a starting point in this analysis. Freedom of expression deals merely with an individual's expression itself, regardless of context, while freedom of assembly embodies relates only to the specific context of gatherings of people. At the same time, freedom of assembly has a dual nature being a collective right possessed by a whole group of people gathering for a certain purpose and every individual's right to belong to such a group.⁵⁹ In other words, while freedom of expression protects an individual right to deliver and collect information with a focus on a person delivering or collecting it, freedom of assembly protects social links created by and related to such expressions between a person and a wider group such a person interacts in a context of a public assembly.

The individual character of freedom of expression also serves as a reason for individual protestors to enjoy protection under freedom of expression rather than

⁵⁷ ECtHR, *Baldassi and Others v. France*, app. nos. 15271/16, 15280/16, 15282/16, 15286/16, 15724/16, 15842/16 and 16207/16, Court (Fifth Section), Judgement, June 11, 2020, URL: <http://hudoc.echr.coe.int/eng?i=001-202756>, paras. 63-64;

⁵⁸ ECtHR, *Elvira Dmitriyeva v. Russia*, app. nos. 60921/17 and 7202/18, Court (Third Section), Judgement, April 30, 2019, URL: <http://hudoc.echr.coe.int/eng?i=001-192771>, para. 66;

⁵⁹ Malkova, Polina, and Olga Kudinova. 2020. "Exploring The Interplay Between Freedom Of Assembly And Freedom Of Expression: The Case Of Russian Solo Pickets". *Netherlands Quarterly Of Human Rights* 38 (3): 191-205. doi:10.1177/0924051920944747, p. 3 (referring to Bernadette Rainey, *Human Rights Law. Concentrate* (Oxford University Press 2015) 141;

freedom of assembly.⁶⁰ Meanwhile, in case the individual protests appear to be a part of a series of similar and simultaneous actions, the practice is not that categorical with the Court either considering such protests as just an expression⁶¹ or reviewing them within the ambit of freedom of assembly.⁶² Still, the international practice is not particularly rich in this respect.⁶³ Being less important for an offline world, this conclusion will, in turn, be crucial for the digital dimension as it will be further demonstrated.

To sum up, there is a strong connection between freedom of assembly and freedom of expression. In the context of mass gatherings, freedom of expression covers the inherent right of an individual to express oneself, impart or receive information or ideas in a variety of forms or kinds, focusing on the link between the person and the expression as an object. In the meantime, freedom of assembly brings the expression to another level making it collective and enjoyed together with others. It shall be recognised, therefore, that the same action during the protest might be protected by both freedoms at the same time. For instance, holding a banner during a peaceful demonstration is a matter of expression of one's opinion but, as it is being done in the context of mass gathering, such an act constitutes an integral part of one's right to take part in an assembly. All of these conclusions are as relevant offline as in a digital environment as will be demonstrated below.

⁶⁰ United Nations Human Rights Committee, "General comment No. 37 (2020) on the right of peaceful assembly (article 21)," CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 13;

⁶¹ ECtHR, *Açık and Others v. Turkey*, app. no. 31451/03, Court (Second Section), Judgement, January 13, 2009, URL: <http://hudoc.echr.coe.int/eng?i=001-90596>, paras. 38, 40;

⁶² ECtHR, *Lashmankin and Others v. Russia*, app. nos. 57818/09 and 14 others, Court (Third Section), Judgement, February 07, 2017, URL: <http://hudoc.echr.coe.int/eng?i=001-170857>, paras. 380, 402-403;

⁶³ Malkova, Polina, and Olga Kudinova. 2020. "Exploring The Interplay Between Freedom Of Assembly And Freedom Of Expression: The Case Of Russian Solo Pickets". *Netherlands Quarterly Of Human Rights* 38 (3): 191-205. doi:10.1177/0924051920944747, p. 9;

1.1.3 Interrelation of Freedom of Association and Freedom of Expression

The difference between freedom of expression and freedom of association is, obviously, much easier to observe as these two freedoms rarely overlap. At the same time, they still complement each other, and such complementarity is worth exploring in order to establish how the protection of freedom of association can benefit from the standards currently laid down for the protection of freedom of expression.

As it has been already mentioned with respect to freedom of assembly, expressions lay within the very essence of a number of associations. In this respect, should freedom of expression be compromised and undermined, associations would face unbearable obstacles in attracting the public's attention to their activities, values and ideas as well as in carrying out such activities at all.⁶⁴ The same logic is also endorsed by the European Court of Human Rights in its numerous judgements on freedom of association, where the latter is viewed in light of rules shaping the scope of freedom of expression. For instance, in the *Freedom and Democracy Party (ÖZDEP) v. Turkey* case, the Court dealt with the dissolution of a political party and mentioned that given the activities of such an association take form of a “*collective exercise of freedom of expression*” gives the association a right to rely on both freedoms when there is an interference from the State endangering their existence.⁶⁵

Interdependence of freedom of association and freedom of expression is especially relevant in cases, where a State's interference is directed particularly against the association due to the opinions or ideas such an association or its members share and disseminate.⁶⁶ In *United Communist Party of Turkey and Others v. Turkey*, the

⁶⁴ Bonaventure Rutinwa, “Freedom of Association And Assembly: Unions, NGOs and Political Freedom in Sub-Saharan Africa,” ARTICLE 19: The Global Campaign for Free Expression, March 2001, URL: <https://www.article19.org/data/files/pdfs/publications/sub-saharan-africa-freedom-of-association-and-assembly.pdf>, pp. 2-3 (citing Drah, F.K., ‘The Constitutional Framework and Civil Society’ in Drah, F.K & Oquaye, M., Civil Society in Ghana (FES, Accra, 1996) 31–59, 35);

⁶⁵ ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, app. no. 23885/94, Court (Grand Chamber), Judgement, December 8, 1999, URL: <http://hudoc.echr.coe.int/eng?i=001-58372>, para. 37;

⁶⁶ ECtHR, *Primov and Others v. Russia*, app. no. 17391/06, Court (First Section), Judgement, June 12, 2014, URL: <http://hudoc.echr.coe.int/eng?i=001-144673>, para. 92;

Court found a violation of freedom of association in the ban of a political party by analysing the negative effect such a ban has on a democratic value the pluralistic dialogue and free expression of different political views and ideas have in modern society.⁶⁷

Expressive purposes associations have also lead to another conclusion, important for further analysis of digital associations: as such, entrance into and participation in an association as well constitutes an expression of one's opinion. This argument can be drawn from the rationale the Court deduced in *Young, James and Webster v. the United Kingdom*, where the Court, explicitly relying on freedom of expression, found the existence of an interference with applicants' freedom of association based on the fact that they were forced to join an association against their convictions and opinions.⁶⁸ It can be, thus, claimed that the participation of an individual in any association is a tool for them to express themselves the way they feel and think. If an act of forcing a person to join an association against such a person's opinion might be viewed as an interference with their freedom of association, then an act of associating oneself with a particular organisation or entity is, speaking reversed logic, an act of expression backed up with a person's individual thoughts and convictions.

At the same time, according to the European Court of Human Rights, the levels of protection enjoyed under freedom of association and freedom of expression are different. In the *Zehra Foundation and Others v. Turkey* case, the Court came to the conclusion that while freedom of expression protects even expressions directed against the ideas of pluralistic society and democracy as long as these expressions do not constitute an incitement to violence or a hate speech, while the same cannot be said with respect to associations.⁶⁹ The Court stressed that the States enjoy the right to

⁶⁷ ECtHR, *United Communist Party of Turkey and Others v. Turkey*, app. no. 19392/92, Court (Grand Chamber), Judgement, January 01, 1998, URL: <http://hudoc.echr.coe.int/eng?i=001-58128>;

⁶⁸ ECtHR, *Young, James and Webster v. the United Kingdom*, app. no. 7601/76 and 7806/77, Court (Plenary), Judgement, August 13, 1981, URL: <http://hudoc.echr.coe.int/eng?i=001-57608>, para. 57;

⁶⁹ ECtHR, *Zehra Foundation and Others v. Turkey*, app. no. 51595/07, Court (Second Section), Judgement, July 10, 2018, URL: <http://hudoc.echr.coe.int/eng?i=001-184491>, paras. 55-56;

restrict or prohibit such activities carried out by any association which constitute an attack on pluralistic society which is an inherent value of the European Convention.⁷⁰

Consequently, there is a clear interdependence between freedom of association and freedom of expression. It is worth mentioning though that the general standards and links described in the context of the interplay of freedom of expression and freedom of assembly are just as much applicable to freedom of association.

All the three freedoms discussed constitute a firm and solid basis for a modern democratic society. While freedom of expression backs up the realisation of freedoms of assembly and of association with its well-developed legal standards and high thresholds of protection, the three freedoms must be separated and viewed as separate elements of a complex interrelated system. It can be safely argued that the main quality differentiating freedoms of assembly and of association from freedom of expression is a collective character of the former ones. While associations and assemblies indeed often have an expressive purpose and are perceived by the broader society through the ways they express their opinions and ideas, the initial and inherent feature of those assemblies and associations is to express these ideas together with others. It is not also necessary for an individual to express themselves in any other way except for merely joining an assembly or association, since the very act of joining also constitutes an indirect expression.

While the forms of digital assemblies and digital associations vary significantly, the line between them and individual expression may sometimes totally disappear. Still, the interplay among these three freedoms shall be borne in mind when the issues of their realisation in the digital dimension come into play. This interplay serves as a key to understanding digital assemblies and associations and looking for ways to regulate them appropriately.

⁷⁰ *Ibid.*, para. 56;

1.2 Bringing Freedoms of Assemblies and of Association into a digital environment: specificities and troubles with defining the scope

Recognising the unstoppable development of information technologies, UN bodies have numerous referred to issues of realisation, protection and violations of human rights online. Over the last years, these bodies began continuously noting that freedom of assembly and freedom of association are more and more frequently exercised either with the facilitation of digital technologies or even fully online.⁷¹

Various communication technologies, social networks and other forms of virtual engagement could be of use for individuals, NGOs or other actors to organise “*effective and peaceful protests and assemblies*” offline⁷² or to “*carry out daily activities*” of offline associations.⁷³ However, this research will primarily concentrate on those assemblies and associations existing exclusively, primarily or at least initially in the digital environment only.

In the context of the exercise of freedoms of assembly and of association, the digital space and the offline world varies a lot due to a number of reasons: different forms of engagement among individuals, different prerequisites for participation (i.e. a person needs an internet connection,⁷⁴ pre-installed app or to be registered at a particular platform etc.), a different list of actors (including users, bots, social media, internet providers, software developers etc) and even different ways the state may react to the conduct of assemblies or associations. The modern international and national

⁷¹ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 4, para. 11;

⁷² United Nations Human Rights Council, Nineteenth session, “Summary of the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests prepared by the Office of the United Nations High Commissioner for Human Rights,” Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/19/40, December 19, 2011, URL: <https://undocs.org/A/HRC/19/40>, p. 4, para. 16;

⁷³ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 8, para. 28;

⁷⁴ Association for Progressive Communications, *Ending digital exclusion: Why the access divide persists and how to close it*, April 2016, URL: https://www.apc.org/en/system/files/APC_EndingDigitalExclusion.pdf (Accessed on May 12, 2021), p. 3;

regulation should thus be sensitive to the specific features information and communication technologies bring into the classic scope of these freedoms.

1.2.1 Defining Freedom of Assembly Online

In its recent General Comment No. 37 on the right of peaceful assembly, the Human Rights Committee noted that despite the fact a term “*assembly*” is usually used to describe a gathering of individuals, physically present at a single location,⁷⁵ the Committee explicitly recognises that freedom of assembly protects gatherings irrespective of a place where they are being held, including digital spaces.⁷⁶ The inclusion of this and other relevant standards into the General Comment, in fact, constituted a departure from what used to be the dominant approach in the definition of assemblies. In fact, the Committee itself underlined the evolution of this understanding in one of its Resolutions preceding the General Comment noting that ‘*an assembly has generally been understood as a physical gathering of people*’ right before recognising that “*freedom of peaceful assembly may apply to analogous interactions taking place online*”.⁷⁷

According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the term “*assembly*” refers to an “*intentional and temporary gathering which may take place in a private or public place and can be planned or spontaneous*”.⁷⁸ At the same time, as the definition provided is not totally similar to definitions other bodies operate.

Having analysed these various definitions of assembly, Michael Hamilton came to the conclusion that the following main definitive criteria are relevant when it comes to an assembly enjoying the protection of freedom of assembly in the international human rights context: number of participants; ways of one’s engagement with a

⁷⁵ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 13;

⁷⁶ *Ibid.*, para. 6;

⁷⁷ United Nations Human Rights Council, “The promotion and protection of human rights in the context of peaceful protests,” Draft Resolution, A/HRC/38/L.16, June 29, 2018, URL: <https://undocs.org/A/HRC/38/L.16>, p. 3;

⁷⁸ United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 29; see also Nowak, Manfred. 2005. *U.N. Covenant On Civil And Political Rights*. 2nd ed. Kehl (Germany): N.P. Engel, pp. 484, 486;

gathering; intentionality and aim of the gathering; and space, where the gathering occurs.⁷⁹ Another criterion, although a disputable one, is that the gatherings are usually qualified with temporality.⁸⁰ While these features have obviously been developed as a result of a history of protection of offline assemblies, it would be reasonable to assume that identifying these features in physical gatherings is, if not obvious, at least not confusing. However, when it comes to assemblies taking place in the digital dimension, these features, although remaining relevant, take modified and, sometimes, creative shapes.

1.2.1.1 Number of participants

As it was mentioned earlier, the number of participants matters as one of the features distinguishing an assembly from an act of expression. As the Human Rights Committee noted, an assembly by its notion refers to a gathering of more than one individual.⁸¹ Apparently, the numeric characteristic of an assembly is a reason for Article 21 of the ICCPR to be formulated in a different way comparing to, *inter alia*, Article 19 (freedom of opinion and expression), namely “*the right of peaceful assembly shall be recognised*”⁸² in contrast to “*everyone shall have the right to freedom of expression*”⁸³. According to the Summary Record of the meeting of the Commission on Human Rights on the Draft international covenant on human rights, the French delegate stated in respect of this choice of wording that it would be impossible to use

⁷⁹ Hamilton, Michael. 2020. "The Meaning and Scope of 'Assembly' In International Human Rights Law," *International And Comparative Law Quarterly* 69 (3): 521-556. doi:10.1017/s0020589320000160, p. 536;

⁸⁰ African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 3; see also Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), “Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State,” OEA/SER.L/V/II, CIDH/RELE/INF.22/19, September 2019, URL: <http://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf> para. 19;

⁸¹ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 13;

⁸² “International Covenant on Civil and Political Rights,” opened for signature December 16, 1966, United Nations Treaty Series vol. no. 999, URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, Article 21;

⁸³ *Ibid.*, Article 19 (2);

the same logic as implied in the formulation of freedom of expression, “*since more persons than one [are] required to form an assembly*”.⁸⁴

The era of digital technologies has created an opportunity for those who were not capable or willing to participate in peaceful assemblies offline to join their digital analogues or to distantly participate in predominantly offline activities.⁸⁵ Despite the new issue of social exclusion of those without access to stable internet connection arose,⁸⁶ a rapid increase in usage of information and communication technologies allowed online gatherings to connect people faster and easier. However, contrary to offline assemblies, where it is less difficult to observe a number of people physically gathered in relevantly close proximity from one another, it is sometimes harder to do with respect to online assemblies.

Depending on platforms and tools used to conduct assemblies in digital environment, such assemblies vary significantly in terms of form, substance, and ways of participation (which will be further explored in the context of ways of engagement and place). For those assemblies merely replicating the physical gathering in a digital space establishing the number of participants taking part in an assembly does not seem any different. For instance, in 2020, when the COVID-19 pandemic forced the world to abstain from usual offline activities, Hong Kong protest movement found a number of other ways to continue its activities. Among such activities, the protesters used a multiplayer video game *Animal Crossing: New Horizons* by Nintendo. In particular, the players made up virtual gatherings of their characters, so that the latter were simultaneously present in one place of the gaming map and simulating the beating of digital portraits of Carrie Lam, the head of government of Hong Kong.⁸⁷ In that

⁸⁴ United Nations Commission on Human Rights, Sixth Session, Summary Record of the Two Hundredth Meeting regarding Draft international covenant on human rights: second reading, E/CN.4/SR.200, June 5, 1950, URL: http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-SR_200.pdf?null (Accessed on May 12, 2021), para. 15;

⁸⁵ 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 6;

⁸⁶ *Ibid.*, p. 3;

⁸⁷ Max Bernhard, “On lockdown, Hong Kong activists are protesting in *Animal Crossing*,” April 7, 2020, URL: <https://www.wired.co.uk/article/animal-crossing-hong-kong-protests-coronavirus> (Accessed on May 12, 2021);

situation, the number of participants of the assembly is evidently equal to the number of gamers who used their characters to make up a gathering.

However, when it comes to movements that use social networks – like Twitter or Facebook – the numeric criterion applies a bit differently. For instance, the #MeToo movement, which started in 2017 and went viral, allegedly engaged more than nineteen million users posting their own stories of sexual harassment and abuse or just showing sympathy to the movement.⁸⁸

Several observations are to be made in this respect. First of all, at first glance, each publication on social media looks to be a mere expression of individual thoughts or opinion and does not clearly imply any kind of collective gathering. However, it is the way of engagement with others via using a specific hashtag, an intention to do it as part of a mass movement and specific purpose of this movement binding all the participants together (all of which will be separately analysed further) that makes this being an exercise of freedom of assembly and not only of expression despite the undoubtful combination of both in this case.

Secondly, it can be argued that not only those using the particular hashtag become participants of an assembly but also those showing support otherwise. From the systematic analysis of the Human Rights Committee's General Comment on right to a peaceful assembly, participation is understood as an act of taking part in it with a view of "*conveying a position on a particular issue*", declare and support "*solidarity or identity*".⁸⁹ Speaking of offline gatherings, thus, a status of a participant should not only be given to those shouting slogans or holding the banners but also to those who simply show up at the assembly and, by their presence, show their position and manifest solidarity with the ideas of an assembly. The Human Rights Committee, in fact, implied the same idea condemning the persecution of persons present at a peaceful assembly.⁹⁰ Transposing it onto the online gatherings and movements such as #MeToo,

⁸⁸ United Nations Human Rights Council, Forty-first session, "Rights to freedom of peaceful assembly and of association", Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 6, para. 23;

⁸⁹ United Nations Human Rights Committee, "General comment No. 37 (2020) on the right of peaceful assembly (article 21)," CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 12;

⁹⁰ *Ibid.*, para. 33;

affirmation of solidarity and identity and support of the ideas manifested by the movement can also take the form of likes, positive reactions or commentaries. Therefore, a person explicitly supporting an online assembly with a “like” or comment may, under certain circumstances, enjoy the protection of freedom of assembly just as one just standing during an offline demonstration and not expressing themselves in any other way than by their mere presence.

Notwithstanding this allegation, a reservation needs to be made that would help to distinguish the exercise of freedom of assembly and freedom of expression in the context of social media. It would be too far-reaching to state that a mere “like” put under any publication on Facebook automatically signifies a start of an “assembly”. Engagement of such “*passive*” participants with a publication should, thus, be subject to, firstly, the actual existence of an assembly, which the other criteria, which are discussed in detail further, and, secondly, to the intent of a person to associate themselves with such an assembly and to engage with others.

1.2.1.2 Ways of individual engagement with an online assembly

As was briefly discussed in the context of numeric criterion, the ways one can participate in an online assembly are numerous and depend on the type of assembly. Generally, the exercise of freedom assembly is not limited to actions that shape its form – which constitutes “*participation*” in the narrow meaning of the word – but also entails such actions as organising or preparing,⁹¹ planning,⁹² promoting and coverage,⁹³

⁹¹ *Ibid.*, paras. 12, 33; European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), p. 17, para. 54; ECtHR, Kudrevičius and Others v. Lithuania, app. no. 37553/05, Court (Grand Chamber), Judgement, October 15, 2015, URL: <http://hudoc.echr.coe.int/eng?i=001-158200>, paras. 91, 92, 101, 112;

⁹² European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), p. 17, para. 54;

⁹³ *Ibid.*, paras. 191-198; United Nations Human Rights Committee, Berik Zhagiparov v. Kazakhstan, CCPR/C/124/D/2441/2014, November 29, 2018, URL: <https://ccprcentre.org/files/decisions/G1835165.pdf> (Accessed on May 12, 2021), paras. 13.4, 13.5; United Nations Human Rights Committee, Yan Melnikov v. Belarus, CCPR/C/120/D/2147/2012, September 04, 2017, URL: <https://ccprcentre.org/files/decisions/G1725728.pdf> (Accessed on April 04, 2021), paras. 8.2, 8.5, 8.7;

and any other activities which make the realisation of freedom of assembly “meaningful”.⁹⁴

When it comes to online gatherings, according to Gayathry Venkiteswaran, acts covered by freedom of assembly include “*coordinating, organising, gathering, planning or meeting on platforms available online such as instant messaging, voice over internet protocol, chat applications, email groups and mailing lists, among others*”.⁹⁵ Although not explicitly mentioned in this definition, usage of social media platforms like Tweeter and Facebook were also considered as possible tools for conducting assemblies⁹⁶ as well as e-petitioning,⁹⁷ virtual protests and so-called “*hacktivism*”.⁹⁸ However, given the constant development of technologies and the creation of new digital platforms with different configurations and tools, the list could never be exhaustive. It shall include the various forms of actions constituting the digital analogues of their offline predecessors or even completely unique forms satisfying the criteria posed to an assembly under current international human rights law. In other words, for international protection of freedom of assembly to keep up with the times, human rights law shall establish a basic and innovation-sensitive definition of assembly, while the ways individuals engage with future forms of digital assemblies shall remain open for analysis on a case-by-case basis.

Over the last years, the distributed denial of service (DDoS) attacks became a popular way of blocking the operation of websites, usually governmental.⁹⁹ In essence,

⁹⁴ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 33;

⁹⁵ Venkiteswaran, Gayathry. 2016. *Freedom Of Assembly And Association Online In India, Malaysia And Pakistan: Trends, Challenges And Recommendations*. Association for Progressive Communications, URL: https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf (Accessed on May 12, 2021), p. 13;

⁹⁶ *Ibid.*, p. 4;

⁹⁷ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 7, paras. 26-27;

⁹⁸ 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 7;

⁹⁹ Article 19, “The Right to Protest Principles: Background paper,” 2016, URL: https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf (Accessed on May 12, 2021), p. 25;

the aim of a DDoS attack is to make a server collapse due to the inability to process a simulated increase in demand for accessing a particular website.¹⁰⁰ For instance, in 2015, in response to the leaked intention of the Thai government to set up a single gateway, which would remain under the governmental control for the authorities to block the content they consider inappropriate, a massive DDoS attack crashed several official websites for several hours.¹⁰¹ Another frequently adduced example is the 2001 campaign against Lufthansa's cooperation with state authorities in the deportation of immigrants. Then, about thirteen thousand people conducted a pre-announced DDoS attack on Lufthansa's official website¹⁰² aiming at disrupting the company's annual shareholders meeting.¹⁰³ One of the organisers faced criminal charges but was acquitted because of the decision of the appellate court recognising the DDoS attack backed up with political ideas and directed at influencing public opinion to be a legitimate form of a virtual protest.¹⁰⁴ The DDoS attacks are claimed to constitute a virtual copy of a recognised form¹⁰⁵ of some offline assemblies, namely sit-ins¹⁰⁶ which are used to block, for instance, access to public buildings or in other way disrupt the

¹⁰⁰ Venkiteswaran, Gayathry. 2016. *Freedom Of Assembly And Association Online In India, Malaysia And Pakistan: Trends, Challenges And Recommendations*. Association for Progressive Communications, URL: https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf (Accessed on May 12, 2021), p. 25;

¹⁰¹ *Ibid.*, p. 7; Jonathan Head, "Thai government websites hit by denial-of-service attack," BBC, October 1, 2015, URL: <https://www.bbc.com/news/world-asia-34409343> (Accessed on May 12, 2021);

¹⁰² Dominguez, Ricardo. "Electronic Civil Disobedience: Inventing the Future of Online Agitprop Theater," *PMLA* 124, no. 5 (2009): 1806-812, URL: <http://www.jstor.org/stable/25614406> (Accessed on May 12, 2021), p. 4;

¹⁰³ Ralf Bendrath, "Frankfurt Appellate Court says online demonstration is not coercion," EDRI, June 7, 2006, URL: <https://edri.org/our-work/edrigramnumber4-11demonstration/> (Accessed on May 12, 2021);

¹⁰⁴ Dominguez, Ricardo. "Electronic Civil Disobedience: Inventing the Future of Online Agitprop Theater," *PMLA* 124, no. 5 (2009): 1806-812, URL: <http://www.jstor.org/stable/25614406> (Accessed on May 12, 2021), p. 4; Ralf Bendrath, "Frankfurt Appellate Court says online demonstration is not coercion," EDRI, June 7, 2006, URL: <https://edri.org/our-work/edrigramnumber4-11demonstration/> (Accessed on May 12, 2021); Cyrus Farivar, "German court convicts man of online extortion," DW, June 15, 2011, URL: <https://www.dw.com/en/german-court-convicts-man-of-online-extortion/a-15155182> (Accessed on May 12, 2021);

¹⁰⁵ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, "Guidelines on Freedom of Peaceful Assembly," Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 44; United Nations Human Rights Committee, "General comment No. 37 (2020) on the right of peaceful assembly (article 21)," CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 6; African Commission on Human Rights, "Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights," adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 3;

¹⁰⁶ Comninos, Alex. "Freedom of Peaceful Assembly and Freedom of Association and the Internet," Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 7; Article 19, "The Right to Protest Principles: Background paper," 2016, URL: https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf (Accessed on May 12, 2021), p. 25;

ordinary usage of a physical space by the mere presence of participants.¹⁰⁷ In this sense, the DDoS attacks constitute exactly the same thing but transposed into a digital world due to the similarity in mechanics: DDoS attacks, in fact, block the website by means of simultaneous access to or presence at such a website by a tremendous number of people just as the protesters block the access to a public space during a sit-in.

Another example of an innovative way of interacting with others or publicly supporting certain ideas, which has become extremely popular over the last few years, is the usage of frames in social media – digital images which a user can build into their profile picture so that the profile picture will be displayed with an additional message or visual pattern. According to the official webpage of Facebook – one of the social media platforms offering this feature to its users – “*Profile Frames are used to celebrate important moments, to cheer teams on to victory, and to show support for special causes.*”¹⁰⁸ As will be shown below, each of these aims may serve as an aim of an assembly in an offline context. Despite the installation of a frame on one’s profile picture seems to constitute a mere expression of one’s self, it is necessary to underline that in most instances through the usage of this feature a person intends to demonstrate its solidarity with a certain group, movement or campaign and contributes their virtual expression to the cluster of people doing the same. For instance, a collective campaign has been launched in Florida in support of vaccination against COVID-19 in the form of Facebook’s profile picture frames “I Got My Shot”.¹⁰⁹ The usage of such frames (or “*PicBages*”) also constituted an integral of Bersih 2.0 – an outstandingly massive public campaign for fair elections in Malaysia.¹¹⁰

¹⁰⁷ European Commission on Human Rights, *M.C. v. Federal Republic of Germany*, app. no. 13079/87, Decision on Admissibility, March 6, 1989, URL: <http://hudoc.echr.coe.int/eng?i=001-1054> (Accessed on May 12, 2021), para. 2 of the “Law” section;

¹⁰⁸ “Frame Studio: Inspire the world around you”, Facebook for Developers, URL: <https://developers.facebook.com/products/frame-studio/> (Accessed on May 12, 2021);

¹⁰⁹ Danielle Prieur, “Orange County Launches The “I Got My Shot” Campaign Aimed At Debunking Vaccine Myths, Getting More Shots in Arms,” April 14, 2021, URL: <https://www.wmfe.org/orange-county-launches-the-i-got-my-shot-campaign-aimed-at-debunking-vaccine-myths-getting-more-shots-in-arms/178549> (Accessed on May 12, 2021);

¹¹⁰ Venkiteswaran, Gayathry. 2016. *Freedom Of Assembly And Association Online In India, Malaysia And Pakistan: Trends, Challenges And Recommendations*. Association for Progressive Communications, URL: https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf (Accessed on May 12, 2021), p. 34;

At the same time, the question of whether the mere like (or other forms of supportive reaction or comment on a social media platform) might constitute participation in an online assembly remains unclear and lacks a unanimous approach.¹¹¹ In light of the increasing usage of surveillance systems and other forms of governmental intrusion into digital spaces, expansion of the term “*participation*” to include more passive forms of one’s engagement with a digital assembly seems to be a logical step for the development of human rights law. At the same time, some of the scholars express reasonable concerns that this approach entails the risk of dilution of the scope of protection of the right and thus, undermine its fundamental value.¹¹² Exploring other qualifiers, especially the ones of intentionality and aim, might suggest a solution for this problem.

1.2.1.3 Intentionality of an assembly in a digital context

It is commonly understood that participation in an assembly must be deliberate. Surprisingly, during its work on the preparation of General Comment No. 37, the Human Rights Committee decided to exclude the word “*intentional*” from the definition of a peaceful assembly enjoying the protection of Article 21 of the International Covenant on Civil and Political Rights.¹¹³ At the same time, it appears that the wordings used in the final text of General Comment No. 37 still implies a distinction to be made between accidental simultaneous presence and an assembly protected by international human rights law. For instance, it states that freedom of assembly serves as a tool for individuals to “*express themselves collectively*”¹¹⁴ and embodies an “*individual right that is exercised collectively*”.¹¹⁵ The emphasise put on

¹¹¹ McPherson, E. et al, “The Right of Peaceful Assembly Online: Research Pack,” Cambridge: University of Cambridge Centre of Governance and Human Rights, November 2019, p. 22;

¹¹² *Ibid.*, p. 21; see also Hamilton, Michael. 2020. “The Meaning and Scope of ‘Assembly’ In International Human Rights Law,” *International And Comparative Law Quarterly* 69 (3): 521-556. doi:10.1017/s0020589320000160, p. 545;

¹¹³ United Nations Web TV, ‘Second reading of draft General Comment 37, 3707th Meeting, 128th Session of Human Rights Committee 13 March 2020’, URL: <https://bit.ly/3hqS4HD> (Accessed on May 12, 2021), discussion of para 4, at 1.38:36–1.39:16; Hamilton, Michael. 2020. “The Meaning and Scope of ‘Assembly’ In International Human Rights Law,” *International And Comparative Law Quarterly* 69 (3): 521-556. doi:10.1017/s0020589320000160, p. 544;

¹¹⁴ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 1;

¹¹⁵ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 4;

the collective nature of the right suggests that an assembly naturally requires a certain psychological interpersonal link to exist between its participants. Within an assembly, an individual must emotionally and mentally perceive their actions as part of the collective action of a particular gathering and be willing to act this way. Intentionality as a criterion for defining an assembly is highlighted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association,¹¹⁶ Venice Commission and OSCE,¹¹⁷ African Commission on Human and Peoples' Rights,¹¹⁸ and is implied in the approach of the European Court of Human Rights which distinguishes an assembly from "*a random agglomeration of individuals each pursuing their own cause*".¹¹⁹

When it comes to participation in an assembly taking place in a digital environment, it is argued that the intention of an individual joiner must also be taken into account so that a mere act of joining the group or – as it was previously discussed – liking a publication forming part of a public campaign does not itself falls within the ambit of freedom of assembly.¹²⁰ Indeed, while participation in virtual gatherings such as Hong Kong protests in Animal Crossing video game does not give rise to any major issues with respect to the intention of its participants to assemble, one's behaviour in social media is much more complex. A modern social media user might put a number of "likes" every day on publications of different character and purpose. In order to distinguish this behaviour – often irrational or automatic – from the actual exercise of freedom of assembly online, an intention of an individual must serve as a decisive factor. However, one will, in fact, struggle establishing such an intention, again due to

¹¹⁶ United Nations Human Rights Council, Twentieth session, "Best practices that promote and protect the rights to freedom of peaceful assembly and of association," Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para 24;

¹¹⁷ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, "Guidelines on Freedom of Peaceful Assembly," Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para.18;

¹¹⁸ African Commission on Human Rights, "Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights," adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 3;

¹¹⁹ ECtHR, *Navalnyy v. Russia*, app. nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, Chamber, Judgement, February 2, 2017, URL: <http://hudoc.echr.coe.int/eng?i=001-170655>, para. 45, endorsed by ECtHR, *Navalnyy v. Russia*, app. nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, Grand Chamber, Judgement, November 15, 2018, URL: <http://hudoc.echr.coe.int/eng?i=001-187605>, paras. 110-111;

¹²⁰ McPherson, E. et al, "The Right of Peaceful Assembly Online: Research Pack," Cambridge: University of Cambridge Centre of Governance and Human Rights, November 2019, pp. 20, 22;

chaotic individual conduct online. Such factors as a continuance of support expressed by the individual, subscription to hashtags or public pages, regular checks for updates, different ways of sharing the information about a certain campaign (both offline and online) could arguably be considered while determining the intention. Furthermore, self-identification of a person and their own perception of their actions shall also be counted with.

1.2.1.4 Aim of an assembly in a digital context

Another qualifier that is normally applied to define an assembly is the existence of a specific purpose of a particular gathering.¹²¹ It is often a topic for an open debate on what kind of purposes a gathering must pursue to enjoy the protection of freedom of assembly. During its work on General Comment No. 37, the Human Rights Committee changed the formulation of the scope of freedom of assembly several times: the first draft stated that commercial or entertaining gatherings, generally, cannot enjoy protection under Article 21 of the International Covenant on Civil and Political Rights; the next draft clarified the wording so that to require a gathering to have an “*expressive purpose*”.¹²² The final version of General Comment No. 37 contains a compromise: it is suggested that protected assembly shall have “*specific purposes, principally expressive ones*”,¹²³ thus, acknowledging that non-expressive assemblies might also be protected. Further, the Human Rights Committee notes that, primarily, an assembly may pursue any of the following purposes: for individual participants to express themselves, for the proclamation of a position on a certain matter, fostering circulation ideas or for asserting “*group solidarity or identity*”.¹²⁴ Along with the listed – primary aims – assemblies may additionally serve for “*entertainment, cultural, religious or*

¹²¹ United Nations Human Rights Council, Thirty-first session, “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,” A/HRC/31/66, February 4, 2016, URL: <https://undocs.org/A/HRC/31/66>, para. 10; Council of Europe, European Court of Human Rights, “Guide on Article 11 of the European Convention on Human Rights, Freedom of assembly and association,” December 31, 2020, URL: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf, p. 8, para. 14;

¹²² Hamilton, Michael. 2020. “The Meaning and Scope of ‘Assembly’ In International Human Rights Law,” *International And Comparative Law Quarterly* 69 (3): 521-556. doi:10.1017/s0020589320000160, p. 548 (footnote 190);

¹²³ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 4;

¹²⁴ *Ibid.*, para. 12;

commercial” purposes. A similar approach is shared by the European Court of Human Rights, which recognised that freedom of assembly shall cover the gathering of “*essentially social character*”¹²⁵ rather than merely political ones.¹²⁶ Thus, despite the significant role assemblies play in the political process, freedom of assembly does not and must not be limited only to political rallies.

Comparing to other criteria of an assembly, the one of a specific purpose is much easier to transpose on the digital context. Digital assemblies change the means of an exercise of freedom of assembly but not its aims. During the COVID-19 pandemic, some religious communities started practising collective prayers via the Zoom-meeting app to replace traditional collective gatherings in a church.¹²⁷ Virtual conference tools are used for public discussions of city zoning documentation¹²⁸ and even music festivals have been organised via online streaming platforms with a possibility for attendees to listen to performances together in separate virtual rooms.¹²⁹ Consequently, usage of digital tools helps the widest variety of communities, movements or groups to assemble online in pursuit of the same aims as they might have pursued offline.

1.2.1.5 Online spaces of digital assemblies

Just as any offline assembly requires a certain physical space to be held in, online assemblies also require a certain platform. In its 2019 Guidelines on Freedom of Peaceful Assembly, Venice Commission and OSCE/ODIHR mentioned that “*the possibility that assemblies may occur wholly online cannot therefore be excluded*”.¹³⁰ Such a cautious wording might be explained by the fact that no case before the

¹²⁵ ECtHR, Emin Huseynov v. Azerbaijan, app. no. 59135/09, Court (First Section), Judgement, May 7, 2015, URL: <http://hudoc.echr.coe.int/eng?i=001-154161>, para. 91;

¹²⁶ ECtHR, Friend and Others v. the United Kingdom, app. nos. 16072/06 and 27809/08, Court (Forth Section), Decision, November 24, 2009, URL: <http://hudoc.echr.coe.int/fre?i=001-96372>, para. 50;

¹²⁷ See, for instance, “Morning and Evening Prayer on Zoom”, Church of St Chand & St Mark, URL: <https://chadmark.blog/daily-prayer-on-zoom/> (Accessed on May 12, 2021);

¹²⁸ “Planning & Zoning to Maintain Digital Public Assembly on Prince Frederick City Heart Grasp Plan”, Frederick-Daily.com, URL: <https://www.frederick-daily.com/blog/2021/03/28/planning-zoning-to-maintain-digital-public-assembly-on-prince-frederick-city-heart-grasp-plan/> (accessed on May 12, 2021);

¹²⁹ “Найбільший фестиваль карантину. Як InterCity Live об’єднав організаторів з усієї країни”, Українська правда: Життя, URL: <https://life.pravda.com.ua/projects/houseofeurope/2020/10/14/242657/> (Accessed on May 12, 2021);

¹³⁰ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 45;

European Court of Human Rights concerned the alleged violation of freedom of assembly in a digital dimension. Still, the Human Rights Committee, the Human Rights Council, Committee on the Rights of the Child and Special Rapporteur on Rights to Freedom of Assembly and Association have already explicitly recognised that an assembly may be held wholly online.¹³¹ The question which requires attention, however, is whether the fact that most venues for digital gatherings are privately-owned can affect their qualification as public assemblies. Human rights bodies have already dealt with offline assemblies being held on privately-owned territories and, generally, agree that in some circumstances freedom of assembly protects such gatherings.¹³² Restrictions on access to privately-owned spaces which might make the exercise of freedom of assembly impossible shall be avoided.¹³³

Given that online assemblies in principle require the involvement of an intermediary – for instance, an owner of a server or administration of a social media platform – the need for the effective realisation of freedom of assembly presupposes the availability of access to such platforms, websites, or other digital spaces. Notably, in the *Knight First Amendment Institute at Columbia University and Others v. Donald J. Trump* case, the US court recognised @realDonaldTrump Twitter account to be a public forum and, thus, extended protection of assemblies to such a forum in a way that Mr Trump could not ban his critics from commenting on his tweets.¹³⁴ In fact, since such media platforms, in principle, serve to provide people users with the possibility to be engaged in associative activities, they remain publicly accessible even though remaining to some extent in private ownership. Consequently, irrespective of the

¹³¹ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 6, 10, 13; United Nations Human Rights Council, Twenty-first session, “The rights to freedom of peaceful assembly and of association”, Resolution No. 21/16, A/HRC/RES/21/16, October 11, 2012, URL: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/174/63/PDF/G1217463.pdf?OpenElement> (Accessed on May 12, 2021), para. 1; Committee on the Rights of the Child, “General comment No. 25 (2021) on children’s rights in relation to the digital environment,” CRC/C/GC/25, March 2, 2021, URL: <https://bit.ly/3tDoktj> (Accessed on May 12, 2021), paras. 64-65;

¹³² ECtHR, *Emin Huseynov v. Azerbaijan*, app. no. 59135/09, Court (First Section), Judgement, May 7, 2015, URL: <http://hudoc.echr.coe.int/eng?i=001-154161>, paras. 95, 98-100;

¹³³ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 64;

¹³⁴ Case 18-1691, *Knight First Amendment Institute at Columbia University et al. v. Donald J. Trump et al.*, URL: https://knightcolumbia.org/documents/a07ecc2a26/2019.07.09_ECF-141-1_Opinion.pdf (Accessed on May 12, 2021);

particularities of such digital spaces, the notion of assembly shall not be rigidly interpreted but shall allow an extension of its protected status to the online dimension.¹³⁵

1.2.2 Online Associations

Along with online assemblies analysed above and different forms of online expression, freedom of association also often comes into play in the digital environment. Analysing freedom of association, some scholars and organisations sometimes refer to two dimensions of the right, namely the one covering personal interactions – as an opposite to isolation – and the one of collective, social nature.¹³⁶ However, despite individual-to-individual interactions hold a major share of one's activity online, for the purposes of this research only the second dimension will be analysed as it relates to freedom of association in its ordinary meaning.

The development of digital technologies and the increase in connectivity online was inevitably meant to reshape the nature of interactions between individuals, including the associational ones.¹³⁷ The Internet has not just opened new possibilities for offline 'classic' associations to improve their reach, widen their audience and promote their activities, but also provided the possibility for such associations to form and exist.¹³⁸

Apart from UN Special Rapporteur on the Rights to Freedom of Assembly and of Association,¹³⁹ the possibility for individuals to form associations online or join

¹³⁵ Hamilton, Michael. 2020. "The Meaning and Scope of 'Assembly' In International Human Rights Law," *International And Comparative Law Quarterly* 69 (3): 521-556. doi:10.1017/s0020589320000160, pp. 553-556;

¹³⁶ David Souter, "Multimedia Training Kit: Freedom of Association and Freedom of Assembly Handout," March 22, 2013, URL: http://www.itrainonline.org/itrainonline/mmtk/APC_IRHRCurriculum_FOA_Handout.pdf (Accessed on May 12, 2021), p. 51;

¹³⁷ *Ibid.*, p. 5

¹³⁸ 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 (APC)," January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021, pp. 4-5, para. 19;

¹³⁹ United Nations Human Rights Council, Forty-first session, "Rights to freedom of peaceful assembly and of association", Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 28; United Nations Human Rights Council, Twentieth session, "Best practices that promote and protect the rights to freedom of peaceful assembly and of association," Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 52;

them as an exercise of freedom of association have also been expressly recognised at least by Inter-American Commission of Human Rights and its Office of the Special Rapporteur for Freedom of Expression.¹⁴⁰ However, even despite such recognition, the issue of the scope of freedom of association in the digital environment and, basically, what constitutes an online association remains unclear. Consequently, it would be beneficial to start an analysis of digital associations by applying to them the standard qualifiers posed to offline associations as this will, at least, provide some clarity as to the bare minimum of protection provided to one's activity on the internet by freedom of association.

One of the starting points could be a definition provided by UN Special Rapporteur on the Rights to Freedom of Assembly and of Associations, which understands an 'association' to constitute “[a] *group of individuals or/and legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interest*”.¹⁴¹ Basically, the definition presupposes three main criteria: (1) there shall be more than one individual; (2) individuals' actions shall pursue a common goal; and (3) individuals shall act collectively in pursuit of that aim. However, this definition appears to be too broad and unclear due to two main reasons. Firstly, just as with the issue of passive forms of participation in online assemblies, the lack of more precise conditions allows various accidental groupings of persons to fall within the scope of protection of freedom of association, which is sometimes considered as harmful to the protection of this freedom. Secondly, the definition, basically, covers even an assembly, which also possesses the named qualities. Hence, other human rights bodies adduce additional requirements for a group to constitute an association, namely

¹⁴⁰ Lanza, Edison. 2019. *Protest And Human Rights: Standards On The Rights Involved In Social Protest And The Obligations To Guide The Response Of The State*. Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression, para. 294;

¹⁴¹ United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 51;

the one of independence from the state, non-profit nature,¹⁴² internal structural organisation,¹⁴³ and a certain “stability of duration”.¹⁴⁴

There is no need to analyse the numeric criterion in detail here as the issues which are reasonably raised in the context of digital assemblies would not be so crucial here. While in case of online assemblies establishing a number of participants is sometimes a key to merging several sporadic acts into a single assembly, which is not aiming at becoming an organised group, in case of digital associations satisfaction of other criteria, such as the one of self-organisation, presupposes the participation of two or more persons. Thus, it is reasonable to only conclude that an individual user cannot be considered as an association.

As to the criterion of aim, as compared to heated arguments as to the aims which might be pursued by a protected assembly, no particular limitations are posed when it comes to freedom of association. According to Manfred Nowak, the protection offered by this freedom is broad and covers “*religious societies, political parties, commercial undertakings and trade unions*” just as it covers “*cultural or human rights organisations, soccer clubs or associations of stamp collectors*”.¹⁴⁵ This approach presupposes that whatever the purpose of an association is, it is presumably covered by freedom of association. Obviously, though, groups threatening the very foundations of a democratic society cannot benefit from freedom of associations and, as the European Court of Human Rights stated in the *Zehra and Others Foundation v. Turkey* case, “*invoke the provisions of the Convention to weaken or destroy the ideas and*

¹⁴² European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Association,” Study no. 706/2012, , CDL-AD(2014)046, December 17, 2014, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e), p. 19, para. 38; African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, p. 9, para. 1;

¹⁴³ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 706/2012, , CDL-AD(2014)046, December 17, 2014, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e), p. 19, para. 38; African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, p. 9, para. 1;

¹⁴⁴ Douglas Rutzen and Jacob Zenn, “Assembly and association in the digital age”, International Journal of Not-for-Profit Law, vol. 13, issue 4 (December 2011), p. 67; Jeremy McBride, International Law and Jurisprudence in Support of Civil Society, Enabling Civil Society: Practical Aspects of Freedom of Association, Source Book, pp. 22-81, p. 10;

¹⁴⁵ Nowak, Manfred. 2005. *U.N. Covenant On Civil And Political Rights*. 2nd ed. Kehl (Germany): N.P. Engel, pp.497-498, para. 6;

values of a democratic society".¹⁴⁶ Just as a variety of goals might be pursued in traditional offline associations, digital technologies in no way limit the scope of the aims to be pursued. Having opened Facebook, one can find and join various groups from those related to the well-being of a particular community (like the *Podolianochka* Facebook group dealing with the matters of the well-being of inhabitants of Podil district in Kyiv)¹⁴⁷ to those connecting those sharing a particular hobby (for instance, *Chess Teachers and Learners* Facebook group, where users share news about chess, or their experience and knowledge)¹⁴⁸ etc.

A feature distinguishing an association from the random gathering of people is also a certain degree of self-organisation. Generally, associations enjoy the freedom to set up their organisational structure the way they deem necessary.¹⁴⁹ At the same time, associations must possess certain temporal stability and institutional structure, to which, according to Jeremy McBride, "*the persons comprising it can really be regarded as belonging*".¹⁵⁰ This criterion does not require strict vertical governance or variety of positions one can hold: a Facebook group or a web forum with a moderator or several of those¹⁵¹ also suffice as long as this group establishes associational bonds with its members and pursue common interests. Others, however, possess more sophisticated structures like, for instance, One Million Voices Against FARC group, where some members were appointed as officers responsible for various matters of the group.¹⁵²

¹⁴⁶ ECtHR, *Zehra Foundation and Others v. Turkey*, app. no. 51595/07, Court (Second Section), Judgement, July 10, 2018, URL: <http://hudoc.echr.coe.int/eng?i=001-184491>, para. 53 (translation from French by me); to this effect, see also: European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, "Guidelines on Freedom of Association," Study no. 706/2012, , CDL-AD(2014)046, December 17, 2014, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e), p. 21, para. 47

¹⁴⁷ "Podolianochka" Facebook group, URL: <https://www.facebook.com/groups/podolianochka/?ref=share>;

¹⁴⁸ Chess Teaches and Learners, Facebook group, URL: <https://www.facebook.com/groups/ChessTeachersandLearners/?ref=share>;

¹⁴⁹ African Commission on Human Rights, "Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights," adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, p. 16, para. 36;

¹⁵⁰ Jeremy McBride, *International Law and Jurisprudence in Support of Civil Society*, Enabling Civil Society: Practical Aspects of Freedom of Association, Source Book, pp. 22-81, p. 26; see also pp. 12-13, para. 21;

¹⁵¹ Venkiteswaran, Gayathry. 2016. *Freedom Of Assembly And Association Online In India, Malaysia And Pakistan: Trends, Challenges And Recommendations*. Association for Progressive Communications, URL: https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf (Accessed on May 12, 2021), p. 13;

¹⁵² Douglas Rutzen and Jacob Zenn, "Assembly and association in the digital age", *International Journal of Not-for-Profit Law*, vol. 13, issue 4 (December 2011), p. 67;

Nevertheless, it is important that freedom of association does not require associations to hold any formal status. In fact, the operation of an association must not depend on registration or any other forms of recognition by the government.¹⁵³ Neither required are personal meetings of its members.¹⁵⁴ Both reservations are especially relevant when it comes to exercising freedom of association online and help connect existing legal regulation with the digital environment.

Although usage of the Internet by an average modern user indeed to the great extent involves “*playing game, linking to cute or funny videos, posting pictures of children and pets*”, online connections now serve an increasingly important part of the exercise of freedom of association.¹⁵⁵ In other words, the Internet made associating easier, faster, cheaper, and less dependent (or even totally independent of bureaucracy).¹⁵⁶

Furthermore, the Internet may allow anonymity and disguise, which is another reason for a lot of people to opt for online associations.¹⁵⁷ This contributes to the fact that networking online seems to be an option for those minority groups suppressed in the society – as LGBTQI+ or certain national or religious groups – to enjoy associative life.¹⁵⁸ Those discriminated can meet and discuss the issues of interest in various

¹⁵³ United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, p. 14, para. 56; Golubovic, Dragan. 2013. “Freedom Of Association In The Case Law Of The European Court Of Human Rights”. *The International Journal Of Human Rights* 17 (7-8): 758-771. doi:10.1080/13642987.2013.835307, p. 7, rows 8 -15, 29-34; Nowak, Manfred. 2005. *U.N. Covenant On Civil And Political Rights*. 2nd ed. Kehl (Germany): N.P. Engel., p. 496, p. 498, para. 6;

¹⁵⁴ African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, p. 16, para. 36(d); United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 8, para. 28

¹⁵⁵ Peter Swire, “Social Networks, Privacy, and Freedom of Association: Data Empowerment vs Data Protection”, 90 North Carolina Law Review 1371, 2012 Ohio State Public Law Working Paper 165, 47 p., Jan 21, 2012, URL: <https://bit.ly/3eFENZT>, p. 1380;

¹⁵⁶ Lanza, Edison. 2019. *Protest And Human Rights: Standards On The Rights Involved In Social Protest And The Obligations To Guide The Response Of The State*. Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression, para. 294;

¹⁵⁷ David Souter, “Multimedia Training Kit: Freedom of Association and Freedom of Assembly Handout,” March 22, 2013, URL: http://www.itrainonline.org/itrainonline/mmtk/APC_IRHRCurriculum_FOA_Handout.pdf (Accessed on May 12, 2021), p. 6;

¹⁵⁸ 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

groups, forums or apps without fearing for their physical security. Finally, no spatial limits exist for digital associations as they themselves or their individual members can reach out to anybody from all over the world instantly.¹⁵⁹ Different forms of digital associations and ways of communication by various formal and informal groups inside themselves and with the outer world – like websites, newsletters, subscriptions, blogs, forums, etc.¹⁶⁰ - help individuals establish much more social links than ever before.

While it is not normally that hard to differentiate an act of freedom of assembly from an act of freedom of association offline, drawing a line between them in digital spaces is often more challenging.¹⁶¹ However, it is suggested that in the digital dimension, these two rights require an “*integrated approach*”, which would differentiate them but recognise their interconnection.¹⁶²

One of the most recent and interesting examples of digital tool combining features of both assembly and association is the social network Clubhouse and the respective app, which became trending at the beginning of 2021. The mechanics of Clubhouse allows its users to only communicate via VoIP (Voice over Internet Protocol), meaning it is exclusively an audio-format network. Basically, Clubhouse users can start rooms and set up clubs. When in the room, the users have different statuses: a listener with no ability to talk, a speaker with such an ability and a moderator who can change the status of others. Given the findings of the previous section, such an intentional, simultaneous gathering of people in a “limited” digital space – a “room” – can easily be regarded as an assembly. The latter is especially important in terms of

association by the Association for Progressive Communications (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 5, para. 20;

¹⁵⁹ David Souter, “Multimedia Training Kit: Freedom of Association and Freedom of Assembly Handout,” March 22, 2013, URL: http://www.itrainonline.org/itrainonline/mmtk/APC_IRHRCurriculum_FOA_Handout.pdf (Accessed on May 12, 2021), p. 6;

¹⁶⁰ *Ibid.*, p. 5;

¹⁶¹ Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 9; Venkiteswaran, Gayathry. 2016. *Freedom Of Assembly And Association Online In India, Malaysia And Pakistan: Trends, Challenges And Recommendations*. Association for Progressive Communications, URL: https://www.apc.org/sites/default/files/FOAA_online_IndiaMalaysiaPakistan.pdf (Accessed on May 12, 2021), p. 13;

¹⁶² Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 9;

pro-democratic protests against repressive governments like, for instance, the Thai protest movement against monarchy which used clubhouse rooms to criticise the government and to accumulate support of Thai dissidents.¹⁶³

On the other hand, the feature of clubs resembles associations of people with similar interests. Once a user joins a club, he starts receiving notifications about any rooms being started within the club, so that it keeps users in a loop of what is on the club's agenda. As of now, a variety of clubs are available for users to join or follow from "Womxn In Business" (with more than 104 thousand members and 208 thousand followers) club "*committed to empowering diverse women (womxn) in all sectors of business*"¹⁶⁴ to "Ukrainian House"¹⁶⁵ club, (with 42 members and almost 3 thousand followers) connecting Ukrainians all over the world and hosting various discussions on Ukrainian matters. Just in line with the requirements analysed above, these clubs involve the participation of a significant number of users, pursue a certain goal, has institutional organisation – moderators, participants, and followers – and provide for a connection between a user and the club, namely the possibility to get notified about the club's events and to participate in them based on one's interest.

In the modern era of development and digital technologies, human rights expand to another dimension. Freedom of assembly and freedom of association being the freedom protecting collective action and forming a basis of a democratic society, are just coming to the attention of various human rights bodies in terms of digital applicability. Nevertheless, both the experience we received during COVID-19 global pandemic and the intense technological boost over the recent few years allow us to see how these freedoms shape the social relations today.

¹⁶³ Patpicha Tanakasempipat, "Clubhouse emerges as platform for Thai dissidents, government issues warning," Reuters, February 17, 2021, URL: <https://www.reuters.com/article/us-clubhouse-thailand-idUSKBN2AH0VR> (Accessed on May 12, 2021); SCMP Reporters, "Thai protests fade from streets but come alive on Clubhouse, Twitter apps," South China Morning Post, April 6, 2021, URL: <https://www.scmp.com/week-asia/politics/article/3128360/thai-protests-fade-streets-come-alive-clubhouse-twitter-apps> (Accessed on May 12, 2021);

¹⁶⁴ Womxn in Business, Club, Clubhouse, URL: <https://www.joinclubhouse.com/club/womxn-in-business> (Accessed on May 12, 2021);

¹⁶⁵ Ukrainian House, Club, Clubhouse, URL: <https://www.joinclubhouse.com/club/ukrainian-house> (Accessed on May 12, 2021);

Freedom of assembly and freedom of associations are interrelated and influence one another in various ways. Another important link they create with the freedom of expression, which often overlaps with them and offers the standards of protection, those freedoms yet lack, especially in the digital dimension.

Finally, the forms of digital exercise of the rights to freedom of assembly and freedom of association are not exhaustive. Given the speed of technological development, there is no need to limit the possible applicability.

CHAPTER 2

SOCIAL MEDIA AND OTHER INTERMEDIARIES AS BEARERS OF OBLIGATIONS TOWARDS ASSEMBLIES AND ASSOCIATIONS IN THE DIGITAL CONTEXT

2.1 Private Actors as Bearers of Human Rights Obligations: a general overview

Because of globalisation and the advancement of international trade, the world received a powerful boost for development but also faced new threats international law had not yet fully been adopted to. At the end of the twentieth – the beginning of the twenty-first century, private non-state actors began absorbing resources and powers so fast that they rapidly gained a place of a powerful international actor previously unknown for an international legal order.

Given corporations possess so much power and influence, it is undoubtful that business now plays a vital role in the realisation of human rights – either in a positive or in a negative way.¹⁶⁶ One of the most cited cases in the world history of gross impact of business activities on human rights is the case of Royal Dutch Shell oil-extracting company in Nigeria. Starting from the 1950s, Shell's subsidiary had been pumping oil in Ogoniland, a territory belonging to tribes of Ogoni people, which subsequently led to the deterioration of the environment, degradation of farming activities vital for Ogoni tribes, air pollution and deepened economic gap within Nigerian society.¹⁶⁷ The rise of civil unrest caused by disastrous economic activities eventually forced Shell to quit Nigeria, especially after the corporation's alleged involvement in the exhibition execution of one of the protest leaders by Nigerian military dictatorship.¹⁶⁸ Undeniably, this is just an extreme example of how individuals' lives can be affected by the

¹⁶⁶ О. О. Уварова, К.О. Буряковська, Бізнес і права людини, навчальний посібник, УДК 340.114.3 У18, Київ, 2019, стр. 8;

¹⁶⁷ Ruggie, John Gerard. n.d. *Just Business: Multinational Corporations And Human Rights*. 1st ed. New York: W. W. Norton & Company, Inc., pp. 9-10;

¹⁶⁸ Ibid., pp. 10-11; see also Florian Wettstein, "CSR and the Debate on Business and Human Rights: Bridging the Great Divide," *Business Ethics Quarterly* Vol. 22, No. 4 (October 2012), pp. 739-770 (32 pages), URL: <https://bit.ly/3uIUyov>, p. 742;

business. At the same time, lack of accountability and mechanisms to effectively prevent such situations from occurring gave rise to some complex challenges for international law.

This increase in powers and status fuelled the public debate around the issue of responsibilities that private actors must hold under international human rights law. Particularly, well-grounded concerns arise in connection with the ability of transnational corporations to act to detriment of individuals and the fact that they sometimes hold even more power than some states in which they operate in sense of the influence they have over the national and international agenda.¹⁶⁹ In this respect, a new discussion referred to as ‘business and human rights policy’ drew the attention of various scholars and human rights bodies of the world, focusing, according to David Karp, on “*whether and to what extent the full range of human rights obligations ... which have traditionally been assigned to states, can also be applied to transnational corporations and other business actors*”.¹⁷⁰

The discussion evolved, in fact, questions the traditional approach that only States can bear human rights obligations and, in turn, only States could be held liable for the violations of international human rights law. However, the concerns legitimately triggered by this approach are not central to this research. In short, those arguing against establishing normative framework dealing with the impact of business on human rights, refer to, first, nature of human rights, allegedly serving as a protection of individual from arbitrary interferences by the State,¹⁷¹ or alleged trivialisation of human rights by diluting the line between human rights violations and ordinary crimes,¹⁷² second, unique legal regime of international law, which regulates the behaviour of states only (with some exceptions related to intergovernmental

¹⁶⁹ Karp, David Jason. 2014. *Responsibility For Human Rights: Transnational Corporations In Imperfect States (Cambridge Studies In International Relations)*. Cambridge: Cambridge University Press, p. 28;

¹⁷⁰ Karp, David Jason. 2014. *Responsibility For Human Rights: Transnational Corporations In Imperfect States (Cambridge Studies In International Relations)*. Cambridge: Cambridge University Press, p. 26; see also: Florian Wettstein, “CSR and the Debate on Business and Human Rights: Bridging the Great Divide,” *Business Ethics Quarterly* Vol. 22, No. 4 (October 2012), pp. 739-770 (32 pages), URL: <https://bit.ly/3uIUyov>, pp. 742-743;

¹⁷¹ Nicolas Carrillo Santarelli, Nicolas Carrillo Santarelli, “Non-State Actors’ Human Rights Obligations and Responsibility Under International Law,” 15 *Revista Electrónica De Estudios Internacionales* (2008), p. 8

¹⁷² Clapham, Andrew. 2006. *Human Rights Obligations Of Non-State Actors*. 1st ed. New York: Oxford University Press Inc., New York, URL: <https://www.corteidh.or.cr/tablas/24296.pdf>, p. 33;

organisations or non-state armed groups),¹⁷³ and third, a risk of reduce in attention paid to State's obligations towards human rights,¹⁷⁴ and allowing States to avoid responsibility by pointing out to responsibility of businesses.

In 2005, then-UN High Commissioner for Human Rights, Ms Louise Arbour, welcomed the “*growing recognition*” of responsibilities to respect human rights born by businesses, noting that “*means of holding non-State actors accountable for their actions in relation to human rights are still wanting*” though.¹⁷⁵ Later, UN Commission on Human Rights introduced the position of Special Representative of the Secretary-General “*on the issue of human rights and transnational corporations and other business enterprises*”.¹⁷⁶ In 2008, the Human Rights Council endorsed a framework proposed by the Special Representative, which was based on three pillars: obligation of the State to protect human rights from violations arising from business activities, the responsibility of business to respect human rights and the necessity to provide for remedies for those, who suffered from violations of their rights by corporations or other businesses.¹⁷⁷ This framework, which further served as a basis for all the other developments in business and human rights debate, explicitly recognises a duty – of whatever nature – of business to *respect* human rights, meaning that the business shall at least avoid violating human rights in carrying out its activities. At the same time, the usage of the word “*responsibility*” as was later explained by the Special Representative, Mr John Ruggie, himself was intended to avoid asserting its legal nature – rather to

¹⁷³ Clapham, Andrew. 2006. *Human Rights Obligations Of Non-State Actors*. 1st ed. New York: Oxford University Press Inc., New York, URL: <https://www.corteidh.or.cr/tablas/24296.pdf>, pp. 35-36;

¹⁷⁴ Clapham, Andrew, “Human Rights Obligations for Non-State Actors: Where are We Now?,” 18 p., August 12, 2015, URL: <https://bit.ly/3uJFjyn> (Accessed on May 12, 2021), p. 6;

¹⁷⁵ Louise Arbour, “Keynote address to the International Conference Organized by the World Organisation against Torture,” October 4, 2005, URL: <https://bit.ly/3bgRlor>;

¹⁷⁶ United Nations Human Rights Council, Seventeenth session, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, March 21, 2011, URL: <https://undocs.org/en/A/HRC/17/31>, para. 3;

¹⁷⁷ United Nations Human Rights Council, Twenty-eighth meeting, “Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises,” Resolution 8/7, June 18, 2008, URL: https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf;

reveal another normative basis for this responsibility, namely in “*social norms*”, which “*exist independently of states’ abilities or willingness to fulfil their own duties*”.¹⁷⁸

The abovementioned framework further led to preparation by the Special Representative of 2011 Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, which were endorsed by the Human Rights Council.¹⁷⁹ The Guiding Principles define the responsibility of business to respect human rights as requiring private actors to “*avoid causing or contributing to adverse human rights impacts*” and to “*seek to prevent or mitigate adverse human rights impacts*” of their business operations.¹⁸⁰ They provide for a general direction on how business entities ought to act in order to not breaching human rights. In particular, the Guiding Principles require the businesses to procure a “*policy commitment to meet their responsibility to respect human rights*”, to conduct human rights due diligence and to establish procedures allowing those adversely affected by business activities to seek an effective remedy.¹⁸¹

Surprisingly, the official commentary to the Guiding Principles itself killed in its infancy the idea of binding nature of obligations of business to at least respect human rights. The commentary stated that responsibility to respect is “*distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions*”.¹⁸² By this interpretation, the Special Representative reaffirmed the traditional approach towards imposing the legal obligations with respect to human rights solely on the States. Accordingly, international human rights law provides only for legal obligations of States to create a legal framework for businesses to comply with and does not address businesses

¹⁷⁸ Ruggie, John Gerard. n.d. *Just Business: Multinational Corporations And Human Rights*. 1st ed. New York: W. W. Norton & Company, Inc., pp. 91-92;

¹⁷⁹ United Nations Human Rights Council, Seventeenth session, “Human rights and transnational corporations and other business enterprises,” Resolution 17/4, A/HRC/RES/17/4, July 6, 2011, URL: <https://undocs.org/en/A/HRC/RES/17/4>, para. 1;

¹⁸⁰ United Nations Human Rights Council, Seventeenth session, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, March 21, 2011, URL: <https://undocs.org/en/A/HRC/17/31>, Principle No. 13, p. 14, para. 13;

¹⁸¹ *Ibid.*, Principle No. 15, p. 15, para. 15;

¹⁸² *Ibid.*, Commentary to Principle No. 12, pp. 13-14;

directly. Notably, later Mr Ruggie also described the abovementioned situation around Shell's activities in Nigeria by reference to "*social licence*", which was lost by the corporation as a result of its devastating activities.¹⁸³ In this sense, it appears that the Special Representative considers responsibility to respect as a bench of social norms, violation of which could only lead to loss of social licence, i.e. credibility in the public's eye every business allegedly needs in order to operate.

This approach has been criticised a lot by more radical scholars advocating for *legal* obligations of business flowing directly from international human rights law. In the view of those authors, the mere existence of the State's obligation to protect human rights from violations by third parties (including non-state actors) implies that such non-state actors, though indirectly, bear certain legal obligations towards human rights, which should be enforced by the States.¹⁸⁴ Furthermore, an argument in support of the applicability of international human rights law to private actors can be found even in sources of international human rights law and interpretations of regional human rights bodies. For instance, the wordings employed in the preamble to the Universal Declaration of Human Rights, in particular the reference to "*every individual and every organ of society*", who, "*keeping this Declaration constantly in mind*", shall promote universal respect for human rights and "*to secure their universal and effective recognition and observance*" suggests that the standards set out therein are addressed not only to the States but also to private actors.¹⁸⁵ Moreover, Article 30 of the Declaration envisages that the content of the Declaration cannot be understood as conferring on "*any State, group or person*" rights to act in detriment of "*any of the rights and freedoms set forth*" therein.¹⁸⁶ The similar wordings also form parts of various other human rights instruments.¹⁸⁷ Despite some scholars argues that the

¹⁸³ Ruggie, John Gerard. n.d. *Just Business: Multinational Corporations And Human Rights*. 1st ed. New York: W. W. Norton & Company, Inc., pp. 10-11;

¹⁸⁴ Deva, Surya, and David Bilchitz. 2014. *Human Rights Obligations Of Business*. 1st ed. Cambridge, England: Cambridge University press, p. 112;

¹⁸⁵ United Nations General Assembly, "Universal Declaration of Human Rights," December 10, 1948, Accessed on May 12, 2021, URL: <https://www.un.org/sites/un2.un.org/files/udhr.pdf>, preamble,

¹⁸⁶ *Ibid.*, Article 30;

¹⁸⁷ "International Covenant on Civil and Political Rights," opened for signature December 16, 1966, United Nations Treaty Series vol. no. 999, URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, Article 5(1);

inclusion of such provisions extends the application of these instruments to private actors,¹⁸⁸ this may be quite a far-reaching argument given that the wordings employed in other provisions of the said instrument are explicitly or implicitly addressed to the States.

Other branches of international law which may assist in establishing legal obligations in future include international investment and international contract law,¹⁸⁹ which provide for the contractual basis of ensuring the credibility of the counterparty, inter alia, by requesting warranties that due respect to human rights being paid. Furthermore, the development of individual criminal liability under international criminal law also suggests that individuals can be held accountable for grave human rights violations (covered by notions of “crimes against humanity”, “war crimes” or “genocide”)¹⁹⁰ beyond national jurisdictions. In fact, the Malabo Protocol adopted in 2014 by the African Union Member States will, if ratified, explicitly provide for corporate criminal liability for such actions as well as other related crimes.¹⁹¹

Notably, the Human Rights Committee has also modified its approach in the course of active discussion of corporate obligations towards human rights. In its 2004 General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the Committee stated that the general obligations to “*respect and to ensure*” rights under the International Covenant on Civil and Political Rights, envisaged under Article 2 thereof, bind only the Parties to the Covenant and “*do not*,

“International Covenant on Economic, Social and Cultural Rights,” opened for signature December 16, 1966, United Nations Treaty Series vol. no. 993, URL: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, Article 5(1); “Convention for the Protection of Human Rights and Fundamental Freedoms,” opened for signature November 4, 1950, European Treaty Series no. 5, URL: https://www.echr.coe.int/documents/convention_eng.pdf, Article 17; “American Convention on Human Rights “Pact of San José, Costa Rica””, opened for signature November 22, 1969, United Nations Treaty Series vol. no. 1144, URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>, Article 29 (a);

¹⁸⁸ See, for instance, Brown, Gordon (Editor). 2016. *The Universal Declaration Of Human Rights In The 21St Century: A Living Document In A Changing World*. 1st ed. Open Book Publishers, p. 71;

¹⁸⁹ Clapham, Andrew, “Human Rights Obligations for Non-State Actors: Where are We Now?,” 18 p., August 12, 2015, URL: <https://bit.ly/3uJFjvn> (Accessed on May 12, 2021), p. 12;

¹⁹⁰ “Rome Statute of the International Criminal Court,” opened for signatures July 17, 1998, United Nations Treaty Series vol. no. 2187, URL: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, Arts. 5- 8bis;

¹⁹¹ African Union, “Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,” opened for signature June 27, 2014, URL: <https://bit.ly/3hkVcET>, Art. 46 (C);

as such, have direct horizontal effect".¹⁹² The Committee implied that the obligations of business may and, in some cases, must be established under national law, so that the obligation of the State to *protect* is duly fulfilled.¹⁹³ At the same time, the recently published General Comment No. 37 demonstrates a deviation from the initial approach: while the Committee once again named the States as primary bearers of responsibility for the effective exercise of freedom of assembly, it also explicitly recognised that businesses have their own obligations "*to respect human rights, including the right of peaceful assembly*".¹⁹⁴ The same was confirmed by the UN Committee on the Elimination of Discrimination against Women, stating that "*both international humanitarian law and human rights law have recognised the direct obligations of non-State actors ... in specific circumstances*", although primarily concentrating on armed groups.¹⁹⁵

Still, putting aside the debates as to legal nature and appropriateness of imposing human rights obligations on private actors, the fact is that over the recent years a body of law pointing out to human rights responsibilities born by private actors has significantly expanded. This requires at least a brief overall examination before turning to specific obligations social media and other intermediaries have with respect to freedom of assembly and freedom of association.

As was described above, UN Framework along with the Guidelines limit human rights obligations of the business to obligation to respect, meaning to refrain from illegal interference. This indeed constitutes a basic obligation to be born,¹⁹⁶ which now seems to be commonly applicable to businesses. Of particular interest, is a duty to

¹⁹² United Nations Human Rights Committee, "General comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," CCPR/C/21/Rev.1/Add. 1326 May 2004, March 29, 2004, URL: <https://bit.ly/2R5Rg04>, para. 8;

¹⁹³ *Ibid.*, para. 8;

¹⁹⁴ United Nations Human Rights Committee, "General comment No. 37 (2020) on the right of peaceful assembly (article 21)," CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 31;

¹⁹⁵ United Nations Committee on the Elimination of Discrimination Against Women, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19," URL: <https://bit.ly/3fgK4Gn>, at para 25;

¹⁹⁶ Organisation of American States, Inter-American Commission on Human Rights, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights REDESCA "Business and Human Rights: Inter-American Standards," Report, OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19, November 1, 2019, URL: http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf, pp. 18-19;

conduct human rights due diligence referred to in Principle No. 15(b) of the Guiding Principles.¹⁹⁷ This duty requires the businesses to carefully consider any influence their activities have or might have or even “*contribute to through its own activities*” and otherwise related to such businesses’ operations.¹⁹⁸ When any actual or potential negative impact is discovered, the entities are required to take actions to cease or prevent such impact from occurring.¹⁹⁹ However, the same is expected even when it is not the actions of the company resulting in human rights breaches but even when such breaches are merely linked with business operations. In cases activities of the company only contribute to negative human rights impact, the Commentary to the Guiding Principles opines that such an entity is also required to act accordingly to cease or prevent such contribution and to “*use its leverage to mitigate any remaining impact to the greatest extent possible*”.²⁰⁰ It appears that it is the same logic laying under the obligations of intermediaries being discussed further below.

Consequently, irrespective of its legal nature, private actors bear certain obligations towards human rights. These may flow from international human rights law directly, from other adjacent branches of law or just from an obligation of the States to ensure effective realisation of human rights and, hence, its protection against abuses from third parties. Lastly, it worth noting that the UN is currently moving towards the adoption of a legally binding instrument governing the issue, which might put an end to the arguments concerning the legal nature of businesses’ human rights responsibilities. The second revised draft of this legal instrument published in August 2020, reinforces principles set out in the Guiding Principles in detail and even suggests a special committee to be established within the UN Human Rights system, which would deal with business abuses of human rights.²⁰¹

¹⁹⁷ United Nations Human Rights Council, Seventeenth session, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, March 21, 2011, URL: <https://undocs.org/en/A/HRC/17/31>, Principle 15 (b);

¹⁹⁸ *Ibid.*, Principles 17-19;

¹⁹⁹ *Ibid.*, Principle 19;

²⁰⁰ *Ibid.*, Commentary to General Principle 19;

²⁰¹ United Nations OEIGWG Chairmanship, “Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises,” Second Revised draft, August 6, 2020, URL: <https://bit.ly/33D4h3S>;

2.2 Intermediaries and the Exercise of Freedom of Assembly and Freedom of Association Online

The discussion about obligations of business towards human rights and the impact business activities may have on the realisation of human rights is particularly relevant for the digital sphere, where intermediaries provide services to connect users and monitor their activities.

2.2.1. Role of Intermediaries in the exercise of Freedom of Assembly and of Association

As it was described in Chapter 1, the notion of assembly presupposes the existence of a certain space, where individuals have a possibility to gather, – whether physical or digital. In the latter case, the exercise of freedom of assembly requires a certain digital platform for various individual users to have access to in order to get engaged in collective action. As to the digital associations, such platforms are also necessary, though in a bit different way: they provide means for communication between the members of such an association or, in other words, they serve as an associative element for individuals to connect.

In most cases, for the exercise of these two freedoms along with freedom of expression and other human rights the platform or a way of communication are privately owned, which means that exercise of these rights online necessarily involves a third party – an ‘*intermediary*’. According to OECD definition, intermediaries “*give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties*”²⁰² This broad catch-all definition brings upon this umbrella term, among others, “*web hosting*

²⁰² Organisation for Economic Co-operation and Development, “The Economic and Social Role of Internet Intermediaries,” DSTI/ICCP(2009)9/FINAL, April 2, 2010, URL: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP\(2009\)9/FINAL&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2009)9/FINAL&doclanguage=en), p. 9;

companies, internet service providers, search engines and social media platforms”.²⁰³

Therefore, any company providing services by means of which an individual can reach out to others becomes involved in process of exercise of human rights in the digital dimension, including freedom of assembly and freedom of association.

The Special Rapporteur on the rights to Freedom of Assembly and of Association emphasised that intermediaries through its internal policies, algorithms, modes of business and technical solutions have a substantial influence on the exercise of freedoms to assemble and associate.²⁰⁴ From the outset it worth mentioning that the operation of these companies, in principle, makes the participation of individuals in social life in the online space possible, which is nothing but commendable. Internet service providers are those to be grateful to for the access we have to the global web and, further, to social media, websites, blogs and other interactive platforms, while the latter shape the way we communicate online.²⁰⁵ Social media platforms tremendously contribute to communication and global transmission of information by way of offering a forum for the widest possible variety of discussions being constantly held.²⁰⁶ These forums allow the flow of information to never stop, eliminate the influence of any possible physical obstacles like borders, distance or even police violence. Therefore, these platforms and digital space overall, to put in the words of Ms Hillary Clinton, constitute “*the public square of the 21st century*”.²⁰⁷ Consequently, intermediaries shall be perceived and regulated from viewpoint of regulation “*public resources*”²⁰⁸ regardless of ownership, since they serve for public functions and public communication.

²⁰³ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 2-3;

²⁰⁴ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 5, para. 17;

²⁰⁵ Ibid., p. 3; Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, preamble, para. 4;

²⁰⁶ Nathalie Maréchal et al., “Human Rights: Our Best Toolbox for Platform Accountability,” Getting to the Source of Infodemics: It’s the Business Model, New America (2020), p. 22;

²⁰⁷ “Remarks at the Civil Society Meet and Greet,” Hillary Rodham Clinton. Tolerance Center, Vilnius, Lithuania. December 6, 2011. URL: <http://www.state.gov/secretary/rm/2011/12/178313.htm> (accessed on May 12, 2021);

²⁰⁸ Organisation of American States, Inter-American Commission on Human Rights, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights REDESCA “Business and Human Rights: Inter-American Standards,” Report, OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19, November 1, 2019, URL: http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf, p. 151, para. 273;

These considerations place intermediaries in the line of fire. On the one hand, intermediaries are expected to abstain to the greatest extent possible from intrusion into their users' affairs but, at the same time, are requested by the government to cooperate against certain users or types of content.²⁰⁹ Despite often aiming at protection from governmental suppression, including censorship and surveillance,²¹⁰ intermediaries sometimes have no other choice but to follow governmental requests. In doing so, they become “*tools for targeting and surveilling civil society actors*” in order to retain the ability to provide its services in the respective states.²¹¹

Facing pressure from the governments, intermediaries are forced to look for solutions to respect the human rights of their customers and not abiding by requests from the states. Thus, willingly or unwillingly, intermediaries gain the “*de facto status of regulators*”.²¹² In this respect, the UN Special Rapporteur on freedom of opinion and expression noted the creation by intermediaries of a “*kind of platform law*” though criticising it for lack of transparency and effectiveness.²¹³ Having so much power and influence on the exercise of fundamental human rights, this set of internal rules of conduct shall be guided by international human rights standards in order to create a safe environment for its users.

Still, the mentioned governmental pressure requires intermediaries to limit freedom on the Internet by taking down or filtering “*dangerous*” – whether as per the

²⁰⁹ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 15, para. 58;

²¹⁰ Nathalie Maréchal et al., “Human Rights: Our Best Toolbox for Platform Accountability,” Getting to the Source of Infodemics: It’s the Business Model, New America (2020), p. 22; see also United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 5, para. 17;

²¹¹ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 15, para. 58; Association for Progressive Communications, “Content regulation in the digital age, Submission to the United Nations Special Rapporteur on the right to freedom of opinion and expression,” APC, March 2018, URL: https://www.apc.org/sites/default/files/APC_submission_Content_regulation_in_the_digital_age_FINAL.pdf, p. 8;

²¹² Kari Karppinen, “Four Discourses of Digital Rights: Promises and Problems of Rights-Based Politics,” *Journal of Information Policy* Vol. 10 (2020), pp. 304-328 (25 pages), URL: https://www.jstor.org/stable/10.5325/jinfopoli.10.2020.0304#metadata_info_tab_contents, p. 319;

²¹³ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 1

understanding of the government or of the intermediary itself – content, blocking users, intervening in their privacy or otherwise imposing limitations on the exercise of human rights online. Furthermore, many of those actions may be ordered by the company’s own business model. In terms of freedom of assembly and freedom of association, this poses significant threats, since such actions can corrupt free expression of one’s ideas, block the ways of transmitting these ideas to others, show solidarity or associate as well as distort actual public discourse.

2.2.2. Regulation of Content and Freedoms of Assembly and of Association

Offline assemblies might become meaningless when inappropriate restrictions are imposed on their place and manner, which prevents them from reaching their target audience.²¹⁴ This is even more relevant to digital aspects of the mentioned freedoms. Freedom of assembly and freedom of association online critically depend on the capability of individuals, campaigns, civil society groups or other social actors to communicate and to reach their audience or targets.

However, among various threats existing in the digital environment to the safe and full realisation of these freedoms, one of particular importance and interest is regulation of content. This may include the “*filtering and blocking of access to online content, as well as particular services and protocols*”²¹⁵ or precluding in any other way certain content from reaching out to its targeted audience.

Requests for taking down content in the first place indeed intended to fight illicit or harmful content. Such types of content may take different forms and include, inter alia, content excluded from the protection of international human rights law or even prohibited thereunder, for instance, violence against women or other discriminated

²¹⁴ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 22, 26, 53, 55;

²¹⁵ Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 4.

groups, child abuse, misinformation, incitement to violence etc.²¹⁶ The requirement of intermediaries to react may stem from their human rights obligations. That involves their responsibility to respect human rights and to ensure that the digital environment they operate within is a safe space where human rights standards are complied with.²¹⁷

At the same time, filtering and blocking of content might be used by the States to intentionally disrupt communication between various groups, especially those criticising the governments. The examples include requests of Malaysian authorities for intermediaries to block website hosting a public campaign for fair elections²¹⁸ or those of Russian authorities to take down the content commending the Ukrainian army from YouTube motivated by the alleged “*fight against extremism*”.²¹⁹ While offline “*history is filled with examples of regimes that apply criminal provisions to quash dissent and criticism*”, States often aim for the same online using different tools, including imposing national content regulation requirements upon intermediaries. The intermediaries might, thus, be obliged under various national law to remove or block certain content which violates some national laws.²²⁰ This is reflected in terms of service adopted by various intermediaries.²²¹

²¹⁶ Content Regulation in the Digital Age, Global Partners Digital Response to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’s consultation, on content regulation in the digital age, 2017, p. 5, part 6;

²¹⁷ Organisation of American States, Inter-American Commission on Human Rights, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights REDESCA “Business and Human Rights: Inter-American Standards,” Report, OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19, November 1, 2019, URL: http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf, p. 15, para. 273; United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 63;

²¹⁸ 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 16;

²¹⁹ “Роскомнагляд вимагає заблокувати на YouTube-каналі програму про військовослужбовців Дніпровської філії НСТУ,” Суспільне ТБ, 01 листопада 2017 року, URL: https://stv.detector.media/reformuvannya/regional_movnyky/roskomnaglyad_vimagae_zablokuvati_na_youtubekanal_i_programu_pro_vyskovosluzhbovtsiv_dniprovskoi_filii_nstu/

²²⁰ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 22;

²²¹ Facebook, Terms of Service, October 2020, section 3.2; Twitter, Terms of Service, section 3.3; YouTube, Terms of Service, Section “Your Content and Conduct”; see also Baidu, Terms of Service, section 3.1;

However, not only the governmental requests or national laws may lead to limitations being put on the content shared on the Internet. In order to protect themselves from potential liability, intermediaries act with particular pre-caution adopting their own internal terms of services.²²² In this respect, human rights law does not forbid private companies to regulate spaces of their own design as long as such regulation follows human rights standards, is transparent and consistent as well as provides for accountability mechanisms.²²³

While current standards on content regulation do not yet include considerations of the impact of such activities on freedom of assembly and freedom of association,²²⁴ rules and regulations which are rooted in the protection of freedom of expression online might be used as a starting point.²²⁵ Given particular links freedoms of assembly and freedom of association have with freedom of expression, when it comes to the digital dimension, the protection granted by the latter against online censorship simultaneously protects the ability of associations to communicate or convey their message to their audience as well as the ability of digital assemblies to carry out their collective action without inappropriate interruptions.

The ways intermediaries approach regulation of content primarily depend on a model of their liability for content generated by third parties (i.e. users) set out in the

²²² 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 20;

²²³ Nathalie Maréchal et al., “Human Rights: Our Best Toolbox for Platform Accountability”, Getting to the Source of Infodemics: It’s the Business Model, New America (2020), p. 24;

²²⁴ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 62;

²²⁵ 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 21; United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 64;

state they operate. Three main models of intermediaries' liability include models of strict liability, safe harbour, and broad immunity.²²⁶

The strict liability model invokes the responsibility of the intermediary for any content created, shared or otherwise generated using the services provided by such an intermediary.²²⁷ This model is, for instance, enshrined in Chinese and Thai legislations.²²⁸ Such a model of liability appears to require the intermediaries to prevent publication or generation of content that might be later recognised unlawful by state authorities. In terms of freedom of assembly and freedom of association, this invokes serious concerns, as such configuration, in fact, requires intermediaries to review and censor any content before it is being published. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed a firm position in this respect, stating that states should not in principle oblige intermediaries conduct “*proactive’ monitoring or filtering of content*” due to privacy-related concerns and its likeness with “*pre-publication censorship*”.²²⁹ Furthermore, in terms of digital assemblies and associations, this mode of liability pre-supposes that some sort of approval from an intermediary needs to be obtained before the underlying rights are exercised. Effectively, this equals to authorisation procedures, which are not in general compatible with freedom of assembly,²³⁰ and mandatory registration of associations running contrary to standards of freedom of association.²³¹ Consequently, the strict liability model of intermediaries' liability shall be generally avoided.

²²⁶ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7; Emily B. Laidlaw, “Mapping Current and Emerging Models of Intermediary Liability,” Paper prepared for the Broadcasting and Telecommunications Legislative Review Panel, June 2019, p. 14;

²²⁷ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7; Emily B. Laidlaw, “Mapping Current and Emerging Models of Intermediary Liability,” Paper prepared for the Broadcasting and Telecommunications Legislative Review Panel, June 2019, p. 15; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 14;

²²⁸ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7;

²²⁹ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 67;

²³⁰ See, for instance, United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 73; African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 71;.

²³¹ In general, see Section 1.2.2 of this Thesis regarding informal associations; see also, African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 13;

In contrast, broad immunity liability exempts intermediaries from liability for content generated by their users.²³² If this model is employed, the intermediary is perceived as a “*messenger*” not responsible for what it is transmitting.²³³ This model is embodied in the legislation of Singapore and the USA.²³⁴ While this system undoubtedly quashes concerns related to pre-publication filtering, it still poses some threats, which need to be addressed. Among many other concerns, those advocating for regulated internet mention hate speech, including one based on racism or xenophobia,²³⁵ incitement to violence and harassment.²³⁶ These concerns, as well as, for instance, distribution of private data of users on the Internet by other users, all have a detrimental effect on the exercise of freedom of assembly and freedom of association in online space. Members of marginalised groups, including ethnic minorities or LGBTQI+ communities, may face bullying and harassment discouraging them from participating in associations. Chaotic distribution of personal data may also serve for intimidation of activists, thus, is capable of preventing them from carrying out their activities at full scale. For instance, Ukrainian-language Telegram-channel “Volier” regularly disseminate personal data of various individuals belonging to or supporting Ukrainian left-wing, feminist or LGBT movements as well as detailed instruction on how to assault or even murder them.²³⁷ Such actions, especially in states where persecution of activists and members of suppressed groups is widespread, result in a forceful reduction in activities of the relevant association and in the conduct of respective assemblies or at least in their visibility and scale.

²³² Emily B. Laidlaw, “Mapping Current and Emerging Models of Intermediary Liability,” Paper prepared for the Broadcasting and Telecommunications Legislative Review Panel, June 2019, p. 15; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7;

²³³ Emily B. Laidlaw, “Mapping Current and Emerging Models of Intermediary Liability,” Paper prepared for the Broadcasting and Telecommunications Legislative Review Panel, June 2019, p. 15; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7;

²³⁴ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7 citing the national law of Singapore;

²³⁵ “European Commission and IT Companies announce Code of Conduct on illegal online hate speech,” Press release, 31 May 2016, Brussels, URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1937;

²³⁶ Cross-Border Content Restrictions,” Input Document for Workstream II of the second Global Internet and Jurisdiction Conference, Content&Jurisdiction Policy Options, URL: <https://www.internetjurisdiction.net/uploads/pdfs/Papers/Content-Jurisdiction-Policy-Options-Document.pdf>, p. 4;

²³⁷ Leonid Ragozin and Yuliana Skibitskaya, “Telegram has a Nazi problem,” Rest of World, 9 January 2021, URL: <https://restofworld.org/2021/terror-on-telegram/> (Accessed on 3 May 2021);

These considerations require a search for a perfect balance, the one which the third model of liability seeks to establish. This model – which is also called the “*safe harbour model*” – also does not make intermediaries liable for the content published by third parties but only if the intermediaries comply with certain rules with respect to content regulation.²³⁸ Usually, such rules are limited to expeditious deletion of unlawful content once the intermediary obtains “*actual knowledge*” about this content.²³⁹ At this stage, internal policies and terms of service come into play listing the codes of conduct against which the content published is further assessed. The methods of identification of such content, however, is usually determined by the intermediary at its own discretion.²⁴⁰ Intermediaries usually rely on “*notice and take down*” mechanisms²⁴¹ due to the vast amount of data being constantly uploaded to the Internet and limited resources for its processing and assessment. Such a mechanism requires the intermediary to review and assess the content when such content is being reported for violation of certain community standards.²⁴²

At the same time, despite having been designed to be balanced and moderate, the safe harbour model, in practice, still have a negative impact on the exercise of various rights on the internet,²⁴³ including rights to freedom of assembly and freedom of association. This is because of the over-regulation or “*over-compliance*”²⁴⁴. While the intermediaries are required to remove the content in the least intrusive manner, only to the extent, where such measures are absolutely essential, and to refrain from

²³⁸ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7;

²³⁹ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7; see also Emily B. Laidlaw, “Mapping Current and Emerging Models of Intermediary Liability,” Paper prepared for the Broadcasting and Telecommunications Legislative Review Panel, June 2019, p. 15;

²⁴⁰ Тетяна Авдєєва, “Історія Одного Блокування”, Центр Демократії та Верховенства Права, 25 січня 2021, accessed on 3 May 2021, access: <https://cedem.org.ua/analytics/blokuvannya-sotsmerezhi/>

²⁴¹ Тетяна Авдєєва, “Історія Одного Блокування”, Центр Демократії та Верховенства Права, 25 січня 2021, accessed on 3 May 2021, access: <https://cedem.org.ua/analytics/blokuvannya-sotsmerezhi/>; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 7;

²⁴² Aleksandra Kuczerawy, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression, The Oxford Handbook of Intermediary Liability Online, 2019, Section 3.1;

²⁴³ Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 11;

²⁴⁴ Aleksandra Kuczerawy, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression, The Oxford Handbook of Intermediary Liability Online, 2019, Section 2;

unnecessary removal of legal content,²⁴⁵ platforms tend to remove content without diligently assessing and balancing rights at stake.²⁴⁶ This may also be caused by vague formulation of the rules – both ones embodied in national laws and ones prescribed directly under the intermediary’s terms of service.²⁴⁷

Finally, another important concern arising with respect to, in fact, any content-moderation strategies employed by intermediaries, including “*notice and take down*” mechanisms, is that the role of intermediaries in regulating the exercise of human rights dangerously increases. The intermediaries are thus required to play the role of the judiciary by balancing different rights exercised in digital space, interpreting the law and deciding on applicable restriction to be imposed.²⁴⁸

In the context of freedom of assembly or freedom of association, any inappropriate intrusions into the exercise of these freedoms might totally undermine their value. Dependence of an assembly on a particular time or method of delivering the idea means that any delay caused by removal or temporal limitation of access is capable of making such an assembly meaningless. The Human Rights Committee notes that, if the restriction on freedom of assembly is at all necessary, the least restrictive measures shall be taken, meaning that a careful consideration shall be made with an aim to allow the gathering to occur while the prohibition of an assembly shall only be applied when no other measures are available.²⁴⁹ At the same time, intermediaries rarely demonstrate such diligence being afraid of facing liability for the content they

²⁴⁵ Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, para. 2.3.2;

²⁴⁶ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 42;

²⁴⁷ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 59; United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 26;

²⁴⁸ Aleksandra Kuczerawy, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression, The Oxford Handbook of Intermediary Liability Online, 2019, Section 2; Association for Progressive Communications, “Content regulation in the digital age, Submission to the United Nations Special Rapporteur on the right to freedom of opinion and expression,” APC, March 2018, URL: https://www.apc.org/sites/default/files/APC_submission_Content_regulation_in_the_digital_age_FINAL.pdf, p. 4; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 11;

²⁴⁹ Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 37;

have not removed. This turns the approach towards measures taken against the assemblies upside down, as take-down of content, that constitutes a core of a given assembly, equals to prohibition of an online assembly in terms of its effects but still remains a prioritised strategy.

2.2.3. Intermediaries, Privacy and Data Security Online

A person's exposure to the public in the digital space usually increases: when offline, individuals normally share their personal information selectively while online users tend to share more on their social-network pages.²⁵⁰ Despite such over-sharing, threats to privacy online also stem from sources and causes which are out of the user's control and often even out of his or her knowledge.

Considering privacy as a foundation of trust and other social relationships, Charles Fried noticed that privacy shall not be understood as a mere lack of information about a given individual but rather as "*the control we have over information about ourselves*".²⁵¹ This possession of control, according to James Rachels, is closely tied to "*our ability to create and maintain different sorts of social relationships*".²⁵² Both associations and assemblies, as was discussed in Chapter 1 above, may serve for the expression of solidarity, creation of social bonds and collective action, which are all based on trust and relationships one builds with others. Applying the logic of Rachels and Fried, therefore, respect for privacy is a key for associations and assemblies to be enjoyed to the fullest extent. Even when a particular association does not carry out its activities secretly or when participants of an assembly do not conceal their identities, it is important that they are confident in the control they have over what is disclosed and who has access to it.

The Human Rights Committee emphasised the importance of privacy of those participating in digital assemblies, which would be protected from interferences by

²⁵⁰ Comninos, Alex. "Freedom of Peaceful Assembly and Freedom of Association and the Internet," Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 3;

²⁵¹ Charles Fried, *Privacy*, 77 YALE L.J. (1968), p. 482;

²⁵² Rachels, James. "Why Privacy Is Important." *Philosophy & Public Affairs* 4, no. 4 (1975): 323-33, p. 326;

states, intermediaries or other third parties.²⁵³ The same is relevant to digital associations as well.²⁵⁴

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also stipulated that monitoring and collection of personal data could breach privacy rights which might hinder the “*free flow of information and ideas online*”.²⁵⁵ This has particular relevance for digital assemblies and associations in two material dimensions.

First, the Internet is often seen as a space for individuals to dissent and criticise their governments which would be impossible or too risky activities offline. The Internet plays this role, inter alia, because of providing the possibility not to reveal a user’s real self (e.g. allowing pseudonyms)²⁵⁶ and thus, not to expose oneself to the government or other third parties unsatisfied with the respective activity. Introduction by some social networks of requirements to use real names and verify oneself when online faced criticism and protest of various human rights and privacy protection organisations and bodies. For example, an international NGO Access Now described several instances when the suspension of users’ accounts on Facebook and subsequent requirement of the social network to verify their accounts subsequently led to the disclosure of their real names and put them into imminent danger due to the nature of their activities.²⁵⁷ Because of such demands, a popular blogger in Honduras writing

²⁵³ General Comment No. 37, para. 34; see also, Human Rights Council, Resolution No. 38/7, The promotion, protection and enjoyment of human rights on the Internet, A/HRC/RES/38/7, p. 2, preamble;

²⁵⁴ African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>; para. 35; Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State (2019), para. 299-300; United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 7, para. 24; Human Rights Council, Resolution No. 38/7, The promotion, protection and enjoyment of human rights on the Internet, A/HRC/RES/38/7, p. 2, preamble;

²⁵⁵ United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), para. 30;

²⁵⁶ United Nations General Assembly, Seventeenth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” Report, A/HRC/17/27, May 16, 2011, URL: <https://undocs.org/en/A/HRC/17/27> (Accessed on May 12, 2021), para. 53;

²⁵⁷ Access Now, Respecting human rights in content regulation in the digital age, January 2018, Submission to Special Rapporteur on the promotion and protection for the right to freedom of opinion and expression for the “Study on Content Regulation in the Digital Age”, p. 11;

about drug trafficking faced a dilemma of whether to put her life and wellbeing at risk by revealing her identity or to lose a channel of communication.²⁵⁸ Other examples may include a change by Facebook of Indian anti-caste activist Preetha publicly visible name to her official full name without her consent, despite her refusal to register using her caste name was crucial for the campaign she was carrying out.²⁵⁹ As a result, the Special Rapporteur recognised that as the safety of users often depends on a significant level of anonymity, “*human rights principles default to the protection of anonymity, subject only to limitations that would protect [such users’] identities*”.²⁶⁰

Although the focus of this study and subsequent Special Rapporteur’s report was primarily on aspects of realisation of freedom of expression online, the same conclusions might logically and legitimately be extended on freedom of assembly and freedom of association online. In this respect, the deanonymisation may discourage those worrying about threats their activities provoke from taking part in assemblies or associations in digital spaces, which, at first, seemed to be safe harbours for those unable to do the same offline.

Secondly, even without political connotation, online assemblies and association often involve the participation of marginalised and suppressed groups, which are even more interested in the privacy and security of their communications.²⁶¹ Using pseudonyms or fake identities indeed may help discriminated communities enjoy their social life, which would otherwise seem unreachable to them. Intermediaries and their technical solutions play a significant role for such communities. For instance, the Special Rapporteur on the rights to freedom of peaceful assembly and of association commended the steps taken by Grindr, a dating app and social network for the LGBTQI+ community, towards the protection of its users against breaches of privacy

²⁵⁸ *Ibid.*;

²⁵⁹ Nameless Coalition, “Appendix to Nameless Coalition’s Open Letter to Facebook,” October 5, 2015, URL: <https://www.eff.org/document/appendix-october-5-2015-coalition-letter-facebook> (Accessed on May 12, 2021), p. 3;

²⁶⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 30;

²⁶¹ AccessNow, “Defending peaceful assembly and association in the digital age: takedowns, shutdowns, and surveillance”, July 2020, URL: <https://www.accessnow.org/cms/assets/uploads/2020/07/Defending-Peaceful-Assembly-Association-Digital-Age.pdf#page25>, p. 23; See also Comninou, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninou_pdf.pdf (Accessed on May 12, 2021), p. 6;

and subsequent persecution in Lebanon, Egypt and Iran by law enforcement and private parties.²⁶² For these countries, the app, in particular, allowed anonymisation of accounts, which is unusual for dating apps, introduced tools helping to hide its icon on the home panel of users' smartphone as well as stopped displaying the actual distance to other users nearby.²⁶³

Using pseudonyms online might not be enough for a user to secure themselves on the Internet as long as their Internet Protocol (or “**IP**”) addresses – “*unique numeric code[s] that identif[y] all computers or other devices connected to the Internet*”²⁶⁴ – are not hidden and, thus, remain traceable.²⁶⁵ Certain intermediaries offer for participants of digital assemblies or online association some anonymising technologies, including, for instance, virtual private networks (or “**VPNs**”). To make it simple, VPNs connect a user's device to another device connected to the Web (which, in such a configuration, becomes a “*server*”) and allows using that latter device's internet connection to go online.²⁶⁶ Using these means, a user can hide their IP address as it would appear that an internet connection is established from the IP address of another device. A similar scheme, called The Onion Router (or “**Tor**”), connects “*more than 6,000 decentralized computer servers around the world*”.²⁶⁷ By using Tor, one can access the Internet through combination of a several chained proxies, each of them processing encrypted connection to the next one, thus, only being aware of the relevant incoming and outgoing part of the connection path.²⁶⁸ A mechanism of anonymisation proposed by

²⁶² United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, p. 16, para. 61;

²⁶³ Russell Brandom, “Designing for the crackdown”, The Verge, 25 April 2018, accessed on 7 May 2021 <https://www.theverge.com/2018/4/25/17279270/lgbtq-dating-apps-egypt-illegal-human-rights>;

²⁶⁴ United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), footnote 45;

²⁶⁵ United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), para. 66;

²⁶⁶ Chris Hoffman, “What Is a VPN, and Why Would I Need One?”, How-to-geek, 15 October 2020, accessed on 8 May 2021;

²⁶⁷ United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 9;

²⁶⁸ Schulz, Wolfgang, and Joris van Hoboken. 2016. Human Rights and Encryption. Paris: UNESCO, p. 22;

Tor is commendable,²⁶⁹ and allows to access platforms otherwise blocked by the government in a particular state and reach out to the targeted audience or colleagues as well as to protect activists or marginalised groups from threats arising from their online activities.

Importantly, the same anonymity offered by intermediaries might be used to detriment of assemblies and associations. One of the examples is “*astroturfing*” – a practice of lobbying a certain, usually political, interest by faking increased public interest and creating “*the impression that it is spur-of-the-moment grassroots behaviour*”.²⁷⁰ Such a traditional method of lobbyism has found a particular place in digital communications due to of anonymity combined with easiness in creating false identities, its cheapness and efficiency.²⁷¹ Astroturfing online is capable of posing threat to assemblies and associations²⁷² on multiple levels: from direct abuses and imitation of “disagreement” with public campaigns or movements to acts aimed at discrediting real online campaigns and stimulating the governments and intermediaries to de-anonymize its users. Another threat stemming from anonymity is that it is being abused by criminal elements, thus, requiring governments to find ways to tackle anonymous criminal activities, which might have the exercise of fundamental freedoms restricted as collateral damage.

Along with the expectation of anonymity, digital assemblies and associations necessitate secure communications and networking.²⁷³ Such security, as was

²⁶⁹ United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 9;

²⁷⁰ Zellner, Jonathan C., “Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures Note,” Connecticut Law Review, 2010, URL: https://opencommons.uconn.edu/law_review/90, pp. 361-362;

²⁷¹ Zhang, J. & Carpenter, Darrell & Ko, M.. (2013). Online astroturfing: A theoretical perspective. 19th Americas Conference on Information Systems, AMCIS 2013 - Hyperconnected World: Anything, Anywhere, Anytime. 4. 2559-2565, pp. 2-3;

²⁷² Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 10;

²⁷³ Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 10; AccessNow, “Defending peaceful assembly and association in the digital age: takedowns, shutdowns, and surveillance”, July 2020, URL: <https://www.accessnow.org/cms/assets/uploads/2020/07/Defending-Peaceful-Assembly-Association-Digital-Age.pdf#page25>, p. 24;

emphasised by the Human Rights Council, in particular, relies on encryption, which is often essential for the exercise of rights to freedom of assembly and freedom of association.²⁷⁴ According to OECD, encryption is understood as “*transformation of data by the use of cryptography to produce unintelligible data (encrypted data) to ensure its confidentiality*”.²⁷⁵ In other words, encryption allows data, including, for instance, the content of messages, to be converted into a certain coded form, which would make revealing of such information by a third party more difficult or impossible,²⁷⁶ depending on the type of encryption used. It is noteworthy that anonymity and encryption complement each other: while encryption can secure communications between Internet users, their metadata – including the abovementioned IP addresses, which allows user’s identification – remains accessible unless they employ certain anonymity tools (usually more serious than the usage of pseudonyms on social media).²⁷⁷

UN human rights bodies, in general, consider encryption technologies to be tools for facilitating the exercise of human rights online, encourage intermediaries to implement newer technologies allowing encryption to become stronger²⁷⁸ and criticise them for failing to do so²⁷⁹. Forms of encryption differ in the level of protection being afforded. The standard of encryption which is normally advocated by privacy

²⁷⁴ Human Rights Council, Resolution No. 38/7, The promotion, protection and enjoyment of human rights on the Internet, A/HRC/RES/38/7, p. 2, preamble;

²⁷⁵ OECD, Recommendation of the Council concerning Guidelines for Cryptography Policy, 27 March 1997, Annex, Section III (“Definitions”);

²⁷⁶ Melis Jakob, History of Encryption, SANS Institute, Information Security Reading Room, 2001, p. 1; See also, United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 7;

²⁷⁷ United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 9;

²⁷⁸ Human Rights Council, Resolution No. 38/7, The promotion, protection and enjoyment of human rights on the Internet, United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 63;

²⁷⁹ United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), para. 75;

activists²⁸⁰ and Special Rapporteurs²⁸¹ is an end-to-end (or “**E2E**”) encryption. The E2E encryption allows messages between different users to be encrypted and decrypted by unique encryption codes pertaining to these user’s devices.²⁸² The most common version of E2E encryption is “*public key encryption*” which lies in the process whereby the sending device encrypts the content of the message with a publicly available encryption key of the recipient, which then requires only the private key of the recipient to decrypt it.²⁸³

E2E encryption is different from transport encryption, such as Transport Layer Security (or “**TLS**”) or Secure Sockets Layer (or “**SSL**”) security protocols, which protect the transmission of content between the user and, for instance, the website.²⁸⁴ Such security protocols are used on various websites using Hyper Text Transfer Protocol Secure protocol (or “**HTTPS**”, an abbreviation we usually observe at the beginning of an address bar).²⁸⁵ However, the content of the communication is decrypted by the server,²⁸⁶ which leaves a loophole in the security of transmission of messages between users.

Technologies of encryption may also vary significantly depending on the networking protocols they can be applied to. While strong E2E encryption can be easily used when users communicate directly via email protocol, it becomes less easy for

²⁸⁰ AccessNow, “Defending peaceful assembly and association in the digital age: takedowns, shutdowns, and surveillance”, July 2020, URL: <https://www.accessnow.org/cms/assets/uploads/2020/07/Defending-Peaceful-Assembly-Association-Digital-Age.pdf#page25>, p. 24;

²⁸¹ United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 62; see also Schulz, Wolfgang, and Joris van Hoboken. 2016. Human Rights And Encryption. Paris: UNESCO, p. 62, para. 15;

²⁸² United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 7;

²⁸³ *Ibid.*; see also “How Does Public Key Encryption Work? Public Key Cryptography and SSL”, Article, Cloudflare, <https://www.cloudflare.com/learning/ssl/how-does-public-key-encryption-work/>

²⁸⁴ Josh Fruhlinger, “What is SSL, TLS? And how this encryption protocol works”, CSO, 4 December 2018, URL: <https://www.csoonline.com/article/3246212/what-is-ssl-tls-and-how-this-encryption-protocol-works.html> (Accessed on May 12, 2021);;

²⁸⁵ Amnesty International, “Encryption: A Matter of Human Rights,” POL 40/3682/2016, March 2016, URL: https://www.amnesty.nl/content/uploads/2016/03/160322_encryption_-_a_matter_of_human_rights_-_def.pdf?x45368, p. 7;

²⁸⁶ Amnesty International, “Encryption: A Matter of Human Rights,” POL 40/3682/2016, March 2016, URL: https://www.amnesty.nl/content/uploads/2016/03/160322_encryption_-_a_matter_of_human_rights_-_def.pdf?x45368, p. 7;

group communications with a number of users involved, starting even from mailing lists,²⁸⁷ which might have adverse effects on the exercise of freedom of association. Some older protocols like Internet Relay Chat (or “**IRC**”) protocols, being used for different chat communications, allow different transport encryption techniques to be used when the message is being transmitted between the user and server or *vice versa*, while still not totally removing security issues due to involvement of the server, which has access to the content of messages. On the other hand, newer communication applications employ advanced E2E encryption protocols, meaning that even if the communications are intercepted, there is no possibility to read them – they would appear to be a random combination of symbols.²⁸⁸ For example, a popular messaging app Signal – widely used for organisation of protests and public campaigns, such as the widely known “Black Lives Matter” movement²⁸⁹ – not only uses E2E public key encryption but also integrate additional security features into its protocol: the combination of public and private keys is generated for each and every message, meaning that even when one’s device is stolen or hacked, physical access to the private keys will not help to decrypt the history of communication.²⁹⁰ Furthermore, Signal does not store information about communications and most of the information about its users on its servers, which was proved in 2016, when the platform was subpoenaed to provide data about its users and could only provide for users’ registration dates and times of last activities.²⁹¹ Another app popular among activists, Telegram, also supports E2E encryption though the user should manually enable it for a particular conversation.²⁹²

²⁸⁷ N. ten Oever, et al., Freedom of Association on the Internet, Human Rights Protocol Considerations Research Group, 16 April 2021, URL: <https://tools.ietf.org/pdf/draft-irtf-hrhc-association-08.pdf>, p. 18, section 6.3.2;

²⁸⁸ Amnesty International, “Encryption: A Matter of Human Rights,” POL 40/3682/2016, March 2016, URL: https://www.amnesty.nl/content/uploads/2016/03/160322_encryption_-_a_matter_of_human_rights_-_def.pdf?x45368, p. 6;

²⁸⁹ Amelia Nierenberg, “Signal is the Messaging App of the Protests”, New York Times, June 11, 2020, URL: <https://www.nytimes.com/2020/06/11/style/signal-messaging-app-encryption-protests.html> (Accessed on May 12, 2021);

²⁹⁰ Andy Greenberg, “Hacker Lexicon: What Is the Signal Encryption Protocol?”, Wired, 29 November 2020, URL: <https://www.wired.com/story/signal-encryption-protocol-hacker-lexicon/> (Accessed on May 12, 2021);

²⁹¹ “Grand jury subpoena for Signal user data, Eastern District of Virginia,” Signal, October 4, 2016, URL: <https://signal.org/bigbrother/eastern-virginia-grand-jury/> (Accessed on May 12, 2021);

²⁹² Alina Georgiana Petu, “Is Telegram Secure? What You Need to Know Before Downloading the App”, Heimdal Security, October 28, 2020, URL: <https://heimdalsecurity.com/blog/is-telegram-secure/> (Accessed on May 12, 2021);

Both anonymity and security protocols along with data protection are necessary prerequisites for the exercise of freedoms of assembly and freedom of association online. Surveillance online – whether carried out by the governments or private actors – undermines trust in and security of communicative elements of both freedoms. It risks having an unacceptable chilling effect on the realisation of both freedoms,²⁹³ which would make individuals reluctant to participate in collective actions and activism online. The role of intermediaries dictated by public demand is thus, to ensure security and confidentiality to the greatest extent possible, in particular through the employment of appropriate encryption protocols and offering tools for anonymisation.

To date, international human rights law treated responsibility for human rights of private actors with a particular caution. Still, the developments of the recent years as well as the work towards creation of the binding legal instrument to this effect suggest that it might change in the near future.

The responsibility of businesses is an important topic in case of digital assemblies and digital associations, since their exercise presupposes existence of a their party – an intermediary. Intermediaries, playing the important role in connectivity and provision of platforms for cooperation, also pose significant threats to anonymity and data security of their users. However, the development of technologies also offers creative solutions, including encryption protocols and anonymising tools.

Another threat to freedoms of assembly and association online is the content regulation. In order to avoid sanctions under the national law, the intermediaries often resort to over-regulation, which limits the possibilities of assemblies and associations to reach out to their target audiences.

²⁹³ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 56; Murray, Daragh, and Pete Fussey. 2019. "Bulk Surveillance In The Digital Age: Rethinking The Human Rights Law Approach To Bulk Monitoring Of Communications Data". *Israel Law Review* 52 (1): 31-60. doi:10.1017/s0021223718000304, pp. 43 – 47;

CHAPTER 3

ASSEMBLIES AND ASSOCIATIONS IN THE DIGITAL ENVIRONMENT AND THE STATES

3.1 Governmental Backfire: Restricting Freedom of Assembly and Freedom of Associations in the Digital Context

As was already discussed above, the exercise of freedom of assembly and freedom of association does not always take place in a safe environment. Not only private parties, but also the States themselves attack or limit these freedoms in a grave and brutal manner. This is especially the case when assemblies or associations pursue political purposes and engage criticism of the government.

Introducing the theme of his report on the realisation of these freedoms in the digital age, the Special Rapporteur on the rights to freedom of assembly and of association expressed concerns with a variety of threats and obstacles coming from the States, including surveillance, internet shutdowns, silencing, disinformation and persecution of activists.²⁹⁴ While human rights are, or at least initially were, designed to protect individuals from arbitrary interference by state authorities, a body of international human rights law sets out plenty of standards and limits on States' approach to peaceful assemblies and associations.

3.1.1 General Characteristic of Negative Obligations of the States to Respect Freedoms of Assembly and Freedom of Association Online

The Human Rights Council affirmed that the same rights that people have offline must also be protected online.²⁹⁵ Therefore, it follows that the general regulation pertaining to freedoms in question must also extend to the digital dimension, at least to

²⁹⁴ United Nations Human Rights Council, Forty-first session, "Rights to freedom of peaceful assembly and of association", Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 3;

²⁹⁵ United Nations Human Rights Council, Thirty-second session, "The promotion, protection and enjoyment of human rights on the Internet," Resolution 32/13, A/HRC/RES/32/13, July 18, 2016, URL: <https://undocs.org/A/HRC/RES/32/13> (Accessed on May 12, 2021), p. 3, item 1;

the extent or form possible. The first and utmost obligation of a State under international human rights law is an obligation to respect – an obligation to refrain from any arbitrary interference.²⁹⁶ Clarifying the scope of this obligation in the context of peaceful assemblies, the HRC stated that obligation to respect requires the States “*not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organisers without legitimate cause*”.²⁹⁷ Basically, this obligation precludes the State from unduly restricting – directly or indirectly – the right of the participants to organise and participate in the assembly of their own design, form and purpose.

Freedom of assembly together with other related rights, including freedom of association, play a vital role in the life of a democratic society and the possibility of an individual to take part in it.²⁹⁸ By not duly respecting these rights, the States risk resorting to repression and authoritative ruling.²⁹⁹ Compliance of a State with the obligation to respect this right, hence, constitutes a benchmark of this very State’s democratic foundation. In his renowned statement in the address of the fourth annual Freedom Online Coalition Conference, the UN Secretary-General Ban Ki-moon expressed concerns with respect to efforts of many states to intrude into the digital environment and their calls to restrict internet freedoms and concluded: “*Some argue that they need to curtail freedoms to preserve order. I say they need to protect freedom or they will undermine order [emphasis added].*”³⁰⁰

²⁹⁶ United Nations Human Rights Committee, “General comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” CCPR/C/21/Rev.1/Add. 1326 May 2004, March 29, 2004, URL: <https://bit.ly/2R5Rg04>, paras. 3, 6; See also, for instance, Inter-American Court of Human Rights, Case of Kawas-Fernández v. Honduras, Judgment of April 3, 2009, (Merits, Reparations and Costs), para. 143 (with respect to freedom of association);

²⁹⁷ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 23;

²⁹⁸ *Ibid.*, para. 1; United Nations General Assembly, Fifty-ninth session, “Human rights defenders,” Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/59/401, October 1, 2004, URL: <https://undocs.org/A/59/401>, para. 47;

²⁹⁹ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 2;

³⁰⁰ UN Secretary-General, “Curtailling Freedom Does Not Preserve Order, but Undermines It, Secretary-General Tells Conference on Internet Security Forum”, Department of Public Information, News and Media Division, New York, SG/SM/15808-PI/2088, 29 April 2014, URL: <https://www.un.org/press/en/2014/sgsm15808.doc.htm> (Accessed on May 12, 2021);

In the era of digital technologies, States' obligations to respect and protect shall be reinforced due to the fundamental value Internet plays in the functioning of modern society. In response to the narrative about the need for a proactive approach of the governments to tackle dangers brought by unlimited Internet, Daniel Joyce noted that there is a need to preserve the Internet free of authoritarian control in order to find a way to redefine and reshape the scope and understanding of fundamental freedoms when those are transposed into the digital dimension.³⁰¹

Taking into account the value of freedoms of assembly and of association as well as the increased role of internet and digital technologies, the States are required to only interfere with the exercise of these freedoms online when it is absolutely necessary and not to provide blanket restrictions discouraging individuals from these forms of social interaction. Not only such an interference must be exceptional,³⁰² but it shall also comply with the general requirements of being prescribed under the law, in pursuit of a legitimate aim, and necessary and proportionate to such aim.³⁰³ There must be a strong presumption in favour of an assembly, meaning that any restrictions thereof must be clearly prescribed and substantiated.³⁰⁴ The latter also relates to the

³⁰¹ Joyce, Daniel. 2015. "Internet Freedom And Human Rights". *European Journal Of International Law* 26 (2): 493-514. doi:10.1093/ejil/chv021, pp. 495, 513-514;

³⁰² United Nations Human Rights Council, Forty-first session, "Rights to freedom of peaceful assembly and of association", Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 12; United Nations Human Rights Council, Twentieth session, "Best practices that promote and protect the rights to freedom of peaceful assembly and of association," Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 39;

³⁰³ "International Covenant on Civil and Political Rights," opened for signature December 16, 1966, United Nations Treaty Series vol. no. 999, URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, Article 21, Article 22(2); "Convention for the Protection of Human Rights and Fundamental Freedoms," opened for signature November 4, 1950, European Treaty Series no. 5, URL: https://www.echr.coe.int/documents/convention_eng.pdf, Article 11 (2); "American Convention on Human Rights "Pact of San José, Costa Rica"", opened for signature November 22, 1969, United Nations Treaty Series vol. no. 1144, URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>, Article 15, Article 16(2);

³⁰⁴ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, "Guidelines on Freedom of Peaceful Assembly," Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 76; United Nations Human Rights Council, Twentieth session, "Best practices that promote and protect the rights to freedom of peaceful assembly and of association," Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 26;

establishment and operation of associations.³⁰⁵ Finally, with respect to both assemblies³⁰⁶ and associations,³⁰⁷ the state approach towards their regulation must be impartial as to their content. In principle, the time, place and manner of an assembly shall be decided by its participants,³⁰⁸ and the associations shall enjoy significant freedom in types of activities pursued³⁰⁹.

Despite the lack of official documents, jurisprudence or other sources of law, which would clearly and in detail transpose these obligations to the exercise of freedoms of assembly and of association in the digital environment, the general recognition of their expansion into the digital dimension should be interpreted as if these principles are, *mutatis mutandis*, applicable to digital assemblies and digital associations. Regulation content or internet shutdowns, in practice, act to the detriment of digital freedoms just the same way as the restrictions on access of a gathering to a certain space or limitations of aims pursued or means employed by the assemblies and associations offline.

Furthermore, as the freedoms of assembly and of association online have just started crystalising within rather rigid and used to the traditional offline world system of international human rights protection, analysis of the proportionality of State

³⁰⁵ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Association,” Study no. 706/2012, , CDL-AD(2014)046, December 17, 2014, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e), para. 20 (with respect to clarity of the rules regulating associations);

³⁰⁶ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 22, 26, 53; African Commission on Human Rights, “Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights,” adopted at 60th Ordinary Session, URL: <https://bit.ly/2RfGPqH>, para. 77-79;

³⁰⁷ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Association,” Study no. 706/2012, , CDL-AD(2014)046, December 17, 2014, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e), para. 21; African Commission on Human and Peoples’ Rights, *Aminu v. Nigeria*, app. no. 205/97, May 11, 200, URL: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2000/15> (Accessed on May 12, 2021, paras. 22-23 (with respect to persecution for political belief);

³⁰⁸ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 22, 53-58;

³⁰⁹ United Nations Human Rights Council, Twentieth session, “Best practices that promote and protect the rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012, URL: <https://undocs.org/A/HRC/20/27>, para. 64; OSCE, ODIHR, Note Outlining Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, URL: <https://bit.ly/3o8gxCP> (Accessed on May 12, 2021), para. 21; United Nations General Assembly, Sixty-eighth session, “Rights to freedom of peaceful assembly and of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/59/401, August 7, 2013, URL: <https://undocs.org/en/A/68/299> (Accessed on May 12, 2021), para. 43;

activities on the Internet is either absent to date or provided on the level of soft law and scholarship interpretation. What might suggest useful guidance, though, is a rather developed body of law related to freedom of expression online. This logic is implicitly confirmed by the references in the context of restrictions made by UN Special Rapporteur on the rights to freedom of assembly and of association as well as the Human Rights Council to reports and recommendations of another UN Special Rapporteur dealing with rights to freedom of expression and of opinion.³¹⁰ At the same time, as was discussed in Chapter 1, freedoms of assembly, association and expression online are different – despite also interconnected and often combined – and thus, shall take into account their distinctive features.

3.1.2 Internet Shutdowns and Content Regulation as Obstacles to the Exercise of Freedom of Assembly and Freedom of Association Online

Restrictions on the exercise of freedoms of assembly and of association by the government might take different forms. The first group of such restrictions, which requires particular attention, is the one comprising of obstacles directly preventing those intending to participate in a collective action or association from connecting with others or with their target audience. Most importantly, these restrictions include interference with internet connection and efforts to regulate content.

As the Internet is essential for the exercise of any rights in the digital environment, including freedoms of assembly and of association,³¹¹ blanket blocks of internet access constitute the most effective and rough way to deprive individuals of these rights. According to the report of #KeepItOn, an international campaign fighting

³¹⁰ For instance, United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, paras. 58, 64; United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 34;

³¹¹ Council of Europe, Report by the Committee of experts on cross-border flow of Internet traffic and Internet freedom, MSI-INT (2014)08 rev6, December 10, 2015, URL: <https://www.icnl.org/wp-content/uploads/COE-report-on-FOAA-rights-on-the-internet-pdf>, para. 39;

against Internet blocking, in 2020, at least 155 internet shutdowns – of various duration and scale – were documented in 29 States.³¹² Under the term “*internet shutdown*”, the experts understand “*intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information*”.³¹³

Interestingly, not only authoritarian states resort to internet shutdown. Human rights activists also adduce a notorious example of the Bay Area Rapid Transit Authority (BART) in San Francisco.³¹⁴ Then, BART police shut down access to the Internet and cell service for several hours³¹⁵ in order to hinder communication between activists organising a mass protest against police brutality after BART police had killed an unarmed homeless man.³¹⁶ More recent events in Belarus also called the attention of various civil society groups advocating for free Internet access. Belarusian authorities started restricting access to a list of intermediaries, including WhatsApp, Telegram and Viber messengers, YouTube and some social media platforms, VPNs, Tor and even app stores on 9 August 2020, the date of presidential elections.³¹⁷ Further, from 9 to 12 August 2020, a total of 61 hours, the access to the Internet was almost totally blocked.³¹⁸ In February 2021, 6 leading international expert organisations submitted their joint observations on the situation in Belarus to UN Special Rapporteur on the human rights situation in Belarus, recognising the internet shutdowns to be a

³¹² Berhan Taye, “Shattered Dreams and Lost Opportunities, A year in the fight to #KeepItOn”, #KeepItOn, Report, March 2021, URL: https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf (Accessed on May 12, 2021), p. 2;

³¹³ *Ibid.*, footnote 1;

³¹⁴ Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 5;

³¹⁵ Elinor Mills, “S.F. subway muzzles cell service during protest”, Cnet, August 12, 2011, URL: <https://www.cnet.com/news/s-f-subway-muzzles-cell-service-during-protest/> (Accessed on May 10, 2021); Wiebe, Brandon (2012) “BART’s Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship,” *University of San Francisco Law Review*, [Vol. 47 Summer 2012], p. 195;

³¹⁶ Wiebe, Brandon (2012) “BART’s Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship,” *University of San Francisco Law Review*, [Vol. 47 Summer 2012], pp. 195-196;

³¹⁷ Berhan Taye, “Shattered Dreams and Lost Opportunities, A year in the fight to #KeepItOn”, #KeepItOn, Report, March 2021, URL: https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf (Accessed on May 12, 2021), p. 22;

³¹⁸ “Belarus: Internet Disruptions, Online Censorship”, News Release, Human Rights Watch, August 28, 2020, URL: <https://www.hrw.org/news/2020/08/28/belarus-internet-disruptions-online-censorship> (Accessed on May 12, 2021);

violation of rights to freedom of expression and of assembly and highlighting “*the impermissibility of internet shutdowns to suppress*” these rights.³¹⁹

Internet shutdowns have numerous been condemned as violating freedoms of assembly and of association or other human rights by the UN bodies, including the General Assembly,³²⁰ Human Rights Council,³²¹ Human Rights Committee,³²² and Special Rapporteurs.³²³ The Joint Declaration on Freedom of Expression and Responses to Conflict Situations of the UN and regional human rights bodies states that “*shutting down entire parts of communications systems*” constitute a measure “*which can never be justified under human rights law*”.³²⁴ Apart from the restriction of a free flow of information within the society, which is necessary for assemblies and associations to self-organise and operate, total or partial internet blocking takes away the possibility to take part in public governance, especially in the States, where the exercise of the discussed rights entails significant physical danger.

³¹⁹ “United Nations Special Rapporteur on the Human Rights Situation in Belarus Call for Inputs Pursuant to UN Human Rights Council Resolution 44/19,” Submission of Access Now, Agora, Article 19, Human Constanta, International Media Support, and Internet Protection Society, February 19, 2021, URL: <https://www.accessnow.org/cms/assets/uploads/2021/02/Access-Now-UNSP-Belarus.pdf> (Accessed on May 10, 2021);

³²⁰ United Nations General Assembly, Seventy-third session, “Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association,” Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,” Resolution 73/173, A/RES/73/173, January 8, 2019, URL: <https://undocs.org/en/A/RES/73/173> (Accessed on May 12, 2021), para. 4;

³²¹ United Nations Human Rights Council, Thirty-eight session, “The promotion, protection and enjoyment of human rights on the Internet”, Resolution No. 38/7, A/HRC/RES/38/7, July 17, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/215/67/PDF/G1821567.pdf?OpenElement>, paras. 13-14;

³²² United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 34;

³²³ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 52; United Nations General Assembly, Thirty-fifth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” Report, A/RES/35/22, March 30, 2017, URL: <https://undocs.org/en/A/HRC/35/22> (Accessed on May 12, 2021), paras. 14, 77;

³²⁴ UN, OSCE, OAS, ACHPR, Joint Declaration on Freedom of Expression and Responses to Conflict Situations, The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, URL: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>, section 4 (c); See also, “Digital Space and the Protection of Freedoms of Association and Peaceful Assembly in Africa”, Key Issues and Recommendations, Civil Society Reference Group, Collaboration on International ICT Policy for East and Southern Africa, International Center for Not-for-Profit Law, URL: https://cipesa.org/?wpfb_dl=295, Section D, Recommendation to States, Internet Intermediaries and Telcos No 1;

Along with a total blocking of Internet access, the governments often resort to blocking or filtering a particular content they deem illicit or inappropriate. This is usually procured through demands requiring intermediaries – such as internet service providers, social media or search engine – to delete certain content or to block access of the users to it.³²⁵ For instance, in 2020, Google received around 44 thousand governmental requests from all over the world to take down or block certain content (predominantly, one in breach of copyright or posing threat to national security).³²⁶ There is a growing concern that the states use filtering and blocking technologies to introduce censorship and restrain the activity of pro-democracy and pro-human rights activists online, for example, in the States where the so-called Arab spring took place.³²⁷ Among the “leaders” of internet censorship is also China, which, by ensuring that Chinese network is only connected to the global Web through a limited number of gateways, restricts access to a number of websites and pages posting content about democracy or human rights or containing related keywords.³²⁸ Malaysian Bersih movement faced strong countermeasures from the government, which included blocking of any “*websites promoting, spreading information and encouraging people to join Bersih 4*”.³²⁹ Governmental censorship of the content has already been

³²⁵ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, para. 58; Article 19, Internet Intermediaries: Dilemma of Liability, Report, 2013, p. 3;

³²⁶ Government requests to remove content, Google, Accessed on May 12, 2021, URL: <https://transparencyreport.google.com/government-removals/overview>;

³²⁷ United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), para. 45; European Parliament, Directorate-General for External Policies, Policy Department, After the Arab Spring: New Paths for Human Rights and the Internet in European Foreign Policy (2012), pp. 4-5, 8-12, 14;

³²⁸ MacKinnon, R., 2012. Consent of the networked: the worldwide struggle for Internet freedom. New York: Basic Books, pp. 46-47;

³²⁹ “Gov’t to block websites promoting Bersih 4”, MalaysiaKini, 27 August 2015, URL: <https://www.malaysiakini.com/news/310119> (Accessed on May 12, 2021);

condemned by various bodies, including European Parliament,³³⁰ Human Rights Committee,³³¹ and others³³².

Regulation of content might as well be procured by intermediaries by their own motion, as was discussed in Chapter 2, without a direct request from the state but just in order to comply with national legislation. In this context, the States play the role of general regulators, setting out legal restrictions on the content disseminated via the Internet and imposing sanctions for its dissemination. In this respect, particular concerns are being raised by the Special Rapporteur on the rights to freedom of assembly and of association as to the vagueness of the wording of the legislation that governs such content regulation.³³³ For instance, Brazilian national legislation against terrorism defines terroristic activities as those, *inter alia*, causing “*serious social disturbance*”, a broad and subjective term raising concerns as to the chilling effect it may have on those partaking in assemblies or activities of associations,³³⁴ including those in the digital environment. An opposition leader in Venezuela has been persecuted and detained for tweeting calls for protest,³³⁵ which the national courts considered constituting “*instigation to not recognise legitimate authorities*”.³³⁶

³³⁰ European Union, European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet (2008/2160 (INI)), URL: <https://op.europa.eu/en/publication-detail/-/publication/87dd5005-64be-40b3-80f2-653eea01637c/language-en> (Accessed on May 12, 2021), clause 1(v);

³³¹ United Nations Human Rights Committee, “General comment No. 34 Article 19: Freedoms of opinion and expression,” CCPR/C/GC/34, September 12, 2011, URL: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, paras. 34, 43;

³³² See, for instance, European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 70;

³³³ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, paras. 32-34, 36-37;

³³⁴ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Communication BRA 8/2015, URL: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=14139>, pp. 4-5; “Brazil anti-terrorism law too broad, UN experts warn,” News, URL: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16709&LangID=E> (Accessed on May 12, 2021)

³³⁵ Daniel Wallis, “Police seek Venezuela opposition leader as he tweets defiance”, Reuters, 16 February 2014, URL: <https://www.reuters.com/article/us-venezuela-protests-idUSBREA1F0GJ20140216> (Accessed on 10 May 2021)

³³⁶ 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 (APC),” January 2019, URL:

Even when blocking of content might pursue a legitimate aim, due to either technical difficulties or authorities' incompetence, such blocking is procured disproportionately, with unnecessary collateral damage. For instance, in the *Ahmet Yildirim v. Turkey* case, the European Court of Human Rights dealt with an issue of total blocking of access to Google Sites, a platform hosting various websites created by users.³³⁷ Despite eventually limiting its review to the question of legality of such measures,³³⁸ the Court still noted that the blocking of the whole platform “*by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect*”³³⁹.

Finally, the States often restore to policing and sanctioning of those disseminating content they disapprove of, including the one which relates to freedom of association and assembly online. One of the movements connected to Bersih in Malaysia, which outburst in 2015 after the leakage of the alleged involvement of Malaysian Prime-Minister into corruption and embezzlement of public funds, was subject to severe governmental content filtering, blocking of any intermediary platforms sharing the mentioned information as well as detentions and arrests resulting from internet activities.³⁴⁰ In India, the authorities arrested and detained a WhatsApp group moderator for a picture allegedly offending the Indian Prime Minister.³⁴¹ In Indonesia, as part of the government operation against queer culture, a couple was arrested for managing an LGBTQI+ thematic website.³⁴²

https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 15;

³³⁷ ECtHR, *Ahmet Yildirim v. Turkey*, app. no. [3111/10](https://hudoc.echr.coe.int/eng?i=001-115705), Court (Second Section), Judgement, December 18, 2012, URL: <http://hudoc.echr.coe.int/eng?i=001-115705>, paras. 8-10;

³³⁸ *Ibid.*, para. 70;

³³⁹ *Ibid.*, para. 66;

³⁴⁰ Jun, T., 2016. *Freedom of Assembly and Association Online in Malaysia*. Kuala Lumpur: Control Print Sdn Bhd, p. 25;

³⁴¹ “Karnataka: WhatsApp group admin in jail over PM Narendra Modi post”, Express News Service, The Indian Express, 3 May 2017, accessed on 10 May 2021, url: <https://indianexpress.com/article/india/karnataka-whatsapp-group-admin-in-jail-over-pm-narendra-modi-post-4638071/>

³⁴² 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 (APC),” January 2019, URL: https://www.apc.org/sites/default/files/APCSubmissionFoAADigital_AgeJanuary2019.pdf (Accessed on May 12, 2021), p. 16;

Both internet shutdowns – of whatever form – and regulation or filtering of content online constitute severe obstacles to the exercise of rights to freedom of assembly and of association online. When there is no access to the Internet, neither the associations can operate online, nor the assemblies to gather.³⁴³ In the meantime, regulation of content can either prevent gatherings or associational activities from occurring, to limit their reach or to create a chilling effect discouraging users to participate in such sorts of activities online.

3.1.3 Surveillance and Interception of Communications as Threats to Freedom of Assembly and Freedom of Association

Julian Assange, the founder of the renowned Wikileaks website, noted that apart from the possibilities and improvements the Internet brings, “[it] *is also the greatest spying machine the world has ever seen*”.³⁴⁴ The role of privacy and security of online communication in ensuring human rights on the Internet in general and rights to freedom of assembly and of association has already been discussed in detail in Chapter 2 in the context of various security protocols employed by internet intermediaries and threats stemming from the private sector. At the same time, governments themselves also become intruders into private life. The States use various technologies, including so-called “*spyware*” in order to conduct continuous surveillance over the activities of human-rights or pro-democratic activists or just persons with dissenting views.³⁴⁵ Human rights NGOs stress that any surveillance of communication constitutes a “*highly intrusive act that interferes with human rights*”

³⁴³ Comninos, Alex. “Freedom of Peaceful Assembly and Freedom of Association and the Internet,” Association for Progressive Communications, 2012, URL: https://www.apc.org/sites/default/files/cyr_english_alex_comninos_pdf.pdf (Accessed on May 12, 2021), p. 10

³⁴⁴ Patrick Kingsley, “Julian Assange tells students that the web is the greatest spying machine ever”, The Guardian, 15 March 2011, URL: <https://www.theguardian.com/media/2011/mar/15/web-spying-machine-julian-assange> (Accessed on 11 May 2021);

³⁴⁵ Bill Marczak, John Scott-Railton, Sarah McKune, Bahr Abdul Razzak, and Ron Deibert. “Hide and Seek: Tracking NSO Group’s Pegasus Spyware to Operations in 45 Countries,” Citizen Lab Research Report No. 113, University of Toronto, September 2018, p. 10;

threatening the foundations of a democratic society”.³⁴⁶ This calls for additional scrutiny and a meticulous approach whenever the decision to commence surveillance is taken.

The aims of such intrusions may vary. Indeed, in some contexts, the control and collection of certain amounts of data are dictated by the need of the States to combat cybercrime and terrorism or to discharge their other positive obligations.³⁴⁷ However, even in such instances, the intrusion shall strictly comply with international human rights standards, including the scope of permissible restriction on the right to privacy.³⁴⁸ For instance, according to the OSCE and Venice Commission joint report on freedom of assembly, when the States resort to surveillance measures, they must ensure that such measures are limited in time, strictly narrow and are not employed for silencing dissenting opinions or critics.³⁴⁹

The mentioned scrutiny also implies that surveillance needs to be targeted and well-motivated. In this respect, according to the UN bodies, bulk (or mass, total) surveillance, in principle, should to be prohibited, as it causes a chilling effect on the exercise of rights to, *inter alia*, freedom of assembly and of association and is ultimately disproportionate.³⁵⁰ The UN General Assembly in its latest resolution on the right to privacy in the digital age emphasised that intrusion in communications and collection of personal data can amount to an interference with freedoms of assembly

³⁴⁶ “International Principles on the Application of Human Rights to Communications Surveillance,” Access Now, Article 19, Association for Progressive Communications and others, May 2014, URL: https://necessaryandproportionate.org/files/en_principles_2014.pdf, Principle 4; See also, United Nations Human Rights Council, Thirty-fourth session, “The right to privacy in the digital age”, Resolution No. 38/7, A/HRC/RES/34/7, April 7, 2017, URL: <https://undocs.org/A/HRC/RES/34/7>, preamble, p. 3;

³⁴⁷ See, for instance, United Nations Human Rights Council, Twenty-third session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” A/HRC//23/40, April 17, 2013, URL: <https://undocs.org/en/A/HRC/23/40> (Accessed on May 12, 2021), para. 3;

³⁴⁸ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, paras. 10, 33, 61;

³⁴⁹ European Commission for Democracy Through Law, OSCE Office For Democratic Institutions And Human Rights, “Guidelines on Freedom of Peaceful Assembly,” Study no. 769/2014, 3rd version, CDL-AD(2019)017rev, July 15, 2020, URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e), para. 72;

³⁵⁰ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, paras. 56-57; Human Rights Council United Nations Human Rights Council, Thirty-fourth session, “The right to privacy in the digital age”, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/RES/27/37, June 30, 2014, URL: <https://undocs.org/A/HRC/RES/27/37>, para. 25;

and of association, and “*may contradict the tenets of a democratic society*”, especially when applied outside the national borders or “*on a mass scale*”.³⁵¹ Not every state agrees with this approach. For instance, UK security and intelligence agencies in their “Operational Case for Bulk Powers” report emphasised the utmost importance of bulk surveillance for the exercise of their functions reassuring, however, that “*strict safeguards and robust oversight*” are guaranteed.³⁵²

Interestingly, in its 2018 Chamber judgement – and first on mass surveillance after the Snowden scandal³⁵³ - the European Court of Human Rights took a less radical approach to mass surveillance than it was expected to. While noting that the surveillance and interception – both bulk and targeted – has often proved to be abused by the state authorities,³⁵⁴ the Court noted that bulk interception regimes are not automatically incompatible with the Convention standards.³⁵⁵ The Court went on recognising that the threats the States are aiming to tackle (i.e. terrorism, child sexual abuse etc.) might, under certain circumstances justify a decision to introduce mass surveillance “*in order to identify hitherto unknown threats to national security*”.³⁵⁶ Finally, the Court even acknowledged that such a system could be introduced without prior judicial authorisation.³⁵⁷ The Court ignored the issue of extraterritorial effect such surveillance may have but, eventually, found violations of the right to respect for private life and right to freedom of expression upon review of the safeguards British system suggested.³⁵⁸ Currently, the case awaits Grand Chamber judgement.

However, this radical distinction in approaches between the European and the UN systems of human rights protection is noteworthy and, at the same time, worrying.

³⁵¹ United Nations General Assembly, Seventy-fifth session, “The right to privacy in the digital age,” Resolution 75/176, A/RES/75/176, December 28, 2020, URL: <https://undocs.org/en/A/RES/75/176> (Accessed on May 12, 2021), p. 4;

³⁵² UK Government, “Operational Case for Bulk Powers,” Home Office, UK, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504187/Operational_Case_for_Bulk_Powers.pdf, para. 1.7;

³⁵³ Marko Milanovic, “ECtHR Judgment in Big Brother Watch v. UK,” EJIL: Talk!, 17 September 2018, URL: <https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/>;

³⁵⁴ ECtHR, Big Brother Watch and Others v. the United Kingdom, app. nos. 58170/13, 62322/14 and 24960/15, Court (First Section), Judgement, September 13, 2018, URL: <http://hudoc.echr.coe.int/eng?i=001-186048>, para. 314;

³⁵⁵ *Ibid.*, para. 315;

³⁵⁶ *Ibid.*, para. 314;

³⁵⁷ *Ibid.*, paras. 318-320;

³⁵⁸ Marko Milanovic, ECtHR Judgment in Big Brother Watch v. UK, EJIL: Talk!, 17 September 2018, URL: <https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/>;

The underlying conflict is particularly crucial given the universal nature of the Web: if the European system allows for bulk surveillance in the digital age, this effectively means that European security and intelligence agencies would be able to collect and intercept data far beyond their States' national borders. Since freedoms of assembly and of association online are less (if at all) dependent on physical proximity of individuals involved, the described restriction on privacy should also be analysed in the context of effects it may have on these freedoms.

Another problem with data security is the retention of personal data. Last year a number of international NGOs expressed concerns with respect to the Brazilian bill having passed the first voting, which would require mandatory retention of personal data, including the content of private messages communication with an aim for communications to become easily traceable.³⁵⁹ In this respect, Access Now NGO noted that in case it is adopted, this measure “*would endanger any group of users who communicate to organize peacefully or engage in political participation*”.³⁶⁰ Although not explicitly recognising a violation, the Court of Justice of the European Union also expressed concerns as to the compatibility of a request to retain traffic data to ensure its traceability and freedom of expression.³⁶¹

Finally, in pursuit of either effective means to combat illegal activities or suppress dissenting opinions, some governments also attack encryption and anonymity. For instance, in 2011, Pakistani authorities banned all the types of encryption used on the Internet in order to grant law enforcement the possibility to intercept and trace any

³⁵⁹ Access Now, “Coalition letter: Brazilian disinformation bill threatens freedom of expression and privacy online,” 24 June 2020, URL: <https://www.accessnow.org/coalition-letter-brazilian-disinformation-bill-threatens-freedom-of-expression-and-privacy-online/>

³⁶⁰ Access Now, “Respecting human rights in content regulation in the digital age,” January 2018, Submission to Special Rapporteur on the promotion and protection for the right to freedom of opinion and expression for the “Study on Content Regulation in the Digital Age”, p. 29;

³⁶¹ CJEU, Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Postoch telestyrelsen and Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis*, Judgment of the Court (Grand Chamber), 21 December 2016, paras. 92-93;

message or call anytime.³⁶² States like India, China or Senegal also partially or totally ban encryption for different types of communication platforms for the users.³⁶³

The measures involving surveillance, data retention or mandatory traceability are often suggested as solutions for cybersecurity and combatting terrorism or other serious crimes. At the same time, legitimate concerns arise as to the possibility of governmental abuse, absence of transparency and lack of appropriate safeguards. Another issue to be considered is an extraterritorial effect the decisions on surveillance and data security may have, since such decisions may require technical solutions, which would affect international operations of various intermediaries.

3.2 Governmental Support: Scope of the States' Obligations to Ensure and Fulfil Rights to Freedom of Assembly and Freedom of Association Online

Apart from negative obligations, which constitute core obligations under the human rights legal regime, positive obligations of the States become a new standard under international human rights law.³⁶⁴ In the context of protection offered by the International Covenant on Civil and Political Rights, this stems from the wording of Article 2(1), which requires the States not only to respect but also to *ensure* the rights enshrined therein.³⁶⁵ At the same time, there is little attention paid to the positive obligations of the States with respect to the rights to freedom of assembly and of association online.

3.2.1. Right to the Internet

³⁶² Article 19, "Right to Online Anonymity," Policy Brief, June 2015, URL: https://www.article19.org/data/files/medialibrary/38006/Anonymity_and_encryption_report_A5_final-web.pdf, p. 41, endnote 68;

³⁶³ Article 19, Right to Online Anonymity, Policy Brief, June 2015, URL: https://www.article19.org/data/files/medialibrary/38006/Anonymity_and_encryption_report_A5_final-web.pdf, pp. 29, 40-41, endnotes 64-67;

³⁶⁴ Shaw, M., 2008. *International law*. 6th ed. Cambridge, UK: Cambridge University Press, p. 276; See, for instance, ECtHR, Öllinger v. Austria, app. no. 76900/01, Court (First Section), Judgement, June 29, 2006, URL: <http://hudoc.echr.coe.int/eng?i=001-76098>, para. 35;

³⁶⁵ "International Covenant on Civil and Political Rights," opened for signature December 16, 1966, United Nations Treaty Series vol. no. 999, URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, Article 2(1);

Dependence of the possibility to exercise fundamental human rights online on availability of the Internet connection necessarily invokes the question of whether the States have any duty to provide such access. As Sir Tim Berners-Lee noted “*discussions about the digital world must be anchored not only in technical issues but in human rights and justice*” and called to recognise the right to the Internet.³⁶⁶ However, the discussions around the existence and legal nature of the so-called “*right to the Internet*” are still ongoing. Supporters of its existence usually argue among themselves on whether the right to Internet constitutes a newly coined human right or just an extension of the existent body of international human rights law into the digital dimension.³⁶⁷

First, a notice should be given to the recommendation Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression addressed to the States in his 2011 report, where he underlines the fundamental value of the Internet in the context of the exercise of various human rights and calls the States to ensure “*universal access to the Internet*” as a matter of “*priority for all States*”.³⁶⁸ The approach was also mirrored in OSCE’s report on freedom of expression and the Internet, where it was stated that “[e]veryone should have a right to participate in the information society” as well as recognised that “*states have a responsibility to ensure citizens’ access to the Internet is guaranteed*”.³⁶⁹ In 2020, the UN General Assembly adopted another resolution on the right to privacy in the digital age, where it called the

³⁶⁶ Sir Tim Berners-Lee, “It’s time to recognise internet access as a human right”, Remarks, European Parliament’s “Ideas for a new world” dialogue, 28 October 2020, URL: <https://webfoundation.org/2020/10/its-time-to-recognise-internet-access-as-a-human-right/>;

³⁶⁷ Pollicino, O. (2020). “The Right to Internet Access,” *The Cambridge Handbook of New Human Rights*, 263–275. doi:10.1017/9781108676106.021, pp. 263-264; Joyce, Daniel. 2015. “Internet Freedom And Human Rights”. *European Journal Of International Law* 26 (2): 493-514. doi:10.1093/ejil/chv021, pp. 506-507;

³⁶⁸ United Nations General Assembly, Seventeenth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” Report, A/HRC/17/27, May 16, 2011, URL: <https://undocs.org/en/A/HRC/17/27> (Accessed on May 12, 2021), para. 85;

³⁶⁹ Akdeniz, Yaman, and Ženet Mujić. 2012. *Freedom Of Expression On The Internet*. Vienna: The Representative on Freedom of the Media, p. 15;

States to “promote an open, secure, stable, accessible and peaceful information and communications technology environment”.³⁷⁰

At the same time, it is important to understand that none of these documents as well as no other reports and observations of UN human rights bodies have any binding or mandatory value.³⁷¹ The recommendations contained in such documents are usually strictly connected to issues with respect to freedoms a particular body holds a mandate for. Moreover, the wordings used in these documents, namely the words “should”, “calls”, “encourages”, “to promote” and “responsibility” rather than “obligation”, also indicate that the legal obligation to ensure access to the Internet has not yet fully crystallised.

Interestingly, that several constitutions in the world have been amended or initially included the right to the internet. For instance, Article 5A of the Greek Constitution protects the right to “*participate in the Information Society*” and prescribes an obligation of the State to “[facilitate] *access to electronically transmitted information, as well as of the production, exchange and diffusion thereof*”.³⁷² The Constitution of Ecuador constitutes an even more interesting example as it not only proclaiming the right to “*universal access to information and communication technologies*”³⁷³ but even recognising the right of “*all persons, individually or collectively,... to become part of participation spaces ... in the field of communication*”.³⁷⁴ This wording, thus, explicitly refers to online assemblies and associations as forms of collective activities in the digital environment as well as guarantees their constitutional protection.

Irrespective of whether the right to Internet has been coined yet as a separate right under the international human rights law, the exercise of fundamental human

³⁷⁰ United Nations General Assembly, Seventy-fifth session, “The right to privacy in the digital age,” Resolution 75/176, A/RES/75/176, December 28, 2020, URL: <https://undocs.org/en/A/RES/75/176> (Accessed on May 12, 2021), p. 5;

³⁷¹ Akdeniz, Yaman, and Ženet Mujić. 2012. *Freedom Of Expression On The Internet*. Vienna: The Representative on Freedom of the Media, pp. 49-50;

³⁷² Greece, Constitution, May 27, 2008, URL: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>, Article 5A (2);

³⁷³ The Republic of Ecuador, Constitution, October 20, 2008, URL: <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>, Article 16(2);

³⁷⁴ *Ibid.*, Article 16(5);

rights, such as freedom of association and freedom of assembly, on the Internet is now becoming a part of international agenda. The right to the Internet, however, if recognised, might help bring a universal and comprehensive approach to individual's behaviour online due to the complexity of the issue existing on the edge of technology and human rights.

3.2.2. Other State Obligations on Protection of Freedoms of Assembly and Freedom of Association Online

The main positive obligation of the State with respect to freedoms of assembly and of association lies in an obligation to protect the rights of individuals from potential illegal interferences by third parties.³⁷⁵ In the case of freedom of assembly and freedom of association online, these obligations are particularly relevant as participation of third parties – intermediaries – in the exercise of these rights in the digital dimension is almost always a necessary prerequisite. In this respect, the States are called to create an appropriate legal framework requiring intermediaries to carry out “*due diligence to identify, prevent, mitigate, and account for how they address, human rights impacts*” of their activities, including with respect to the rights to freedom of assembly and of association.³⁷⁶ States also have the responsibility to prevent unproportionate restrictions of the rights to assembly online by intermediaries, including by internet service providers.³⁷⁷ Particularly, this should apply to cases of self-regulation by intermediaries and deletion, blocking or filtering of questionable content. By virtue of mentioned positive obligations and requirement to ensure that any restrictions on

³⁷⁵ United Nations Human Rights Committee, “General comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” CCPR/C/21/Rev.1/Add. 1326 May 2004, March 29, 2004, URL: <https://bit.ly/2R5Rg04>, para. 8; See also, United Nations Human Rights Council, Seventeenth session, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, March 21, 2011, URL: <https://undocs.org/en/A/HRC/17/31>, Guiding Principle No. 1;

³⁷⁶ United Nations Human Rights Council, Forty-first session, “Rights to freedom of peaceful assembly and of association”, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, May 17, 2019, URL: <https://undocs.org/A/HRC/41/41>, paras. 63, 80;

³⁷⁷ United Nations Human Rights Committee, “General comment No. 37 (2020) on the right of peaceful assembly (article 21),” CCPR/C/GC/37, September 17, 2020, URL: <https://bit.ly/3famZVR>, para. 34;

online assemblies must be permissible under the standards of freedom of expression,³⁷⁸ the States are called to provide for necessary oversight over the activities of intermediaries in limitation of individual's rights to impart and receive information related to assemblies or associational activities online.

The positive obligation of the States offline include an obligation to ensure the safety and security of participants of an assembly.³⁷⁹ Despite threats posed to assemblies online are distinct, the States must still facilitate assembly and protect its participant. Recently, the European Court of Human Rights has decided on a case, which might be of particular importance for shaping the scope of the States' positive obligations online. In the *Berkman v. Russia* case, the Court found a violation of the right to freedom of assembly based on an ignorance of law enforcement agents with respect to “*verbal attacks and physical pressure*” coming from counterdemonstrators opposing the LGBTQI+ demonstration.³⁸⁰ On the Internet, verbal attacks constitute the main form of violence that could be incurred by both members of an online association (for instance, a Facebook Group) and participants of an online rally (for instance, #MeTooMovement). Where appropriate, it should be, thus, an obligation of the State to prevent unlawful intrusion into the free exercise of freedoms of assembly and of association by means of psychological violence or hate speech.

Yet another bench of preventive measures which are expected from the States relate to protection of privacy of those exercising freedoms of assembly and of association online. According to the Special Rapporteur on the promotion and protection of the right to freedom of expression and of opinion, these obligations include the responsibility to enact an appropriate legal framework forbidding “*unlawful and arbitrary interference and attacks on privacy*” from both state authorities and third parties as well as to provide appropriate remedies for those whose rights have been

³⁷⁸ *Ibid.*, para. 34;

³⁷⁹ *Ibid.*, para. 24; ECtHR, Kudrevičius and Others v. Lithuania, app. no. 37553/05, Court (Grand Chamber), Judgement, October 15, 2015, URL: <http://hudoc.echr.coe.int/eng?i=001-158200>, para. 159

³⁸⁰ ECtHR, Berkman v. Russia, app. no. 46712/15, Court (Third Section), Judgement December 1, 2020, URL: <http://hudoc.echr.coe.int/eng?i=001-206266>, paras. 56-58;

breached.³⁸¹ Despite the rapid development of new technologies, the states should in principle adjust to the changing reality and take all the necessary steps to address the current and pressing challenges to privacy.³⁸²

States play important mission for the exercise of freedoms of assembly and of association online. While the international law is equipped with a set of negative obligations the States have towards respect of these freedoms, the States still often resort to such measures as content blocking or filtering, internet shutdowns, censorship, surveillance and persecution of activists online.

Despite international human rights law does not provide for clear legal obligations towards the respect for freedoms of assembly and of association in the digital dimension, these obligations stem from the general obligations of the state to respect for these freedoms in the offline world.

Furthermore, the States bear positive obligations to protect individuals in exercise of freedoms of association and of assembly online. However, these obligation rather constitute obligation of means and are usually encouraging, yet hardly effective.

³⁸¹ United Nations General Assembly, Twenty-ninth session, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,” Report, A/HRC/29/32, May 22, 2015, URL: <https://www.undocs.org/A/HRC/29/32> (Accessed on May 12, 2021), para. 18; see also, in general, United Nations Human Rights Committee, “General comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” CCPR/C/21/Rev.1/Add. 1326 May 2004, March 29, 2004, URL: <https://bit.ly/2R5Rg04>, para. 8;

³⁸² Keith Goldstein, Ohad Shem Tov, Dan Prazeres, “The Right to Privacy in the Digital Age,” 9 April 2018, URL: <https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/PiratePartiesInternational.pdf>, p. 4, part (b);

CONCLUSIONS

The development of digital technologies poses serious questions before international human rights bodies and national policy-makers as to the regulation of the digital environment. While such fundamental human rights as the right to privacy and the right to freedom of expression have already draw a lot of attention with respect to the new digital context, the rights to freedom of assembly and freedom of association have just come into spotlight.

In this thesis, the key characteristics of an assembly and an association as autonomous concepts of international human rights law were identified and applied to the digital dimension of the exercise of the mentioned freedoms.

The freedoms of assembly and of associations, despite closely connected, especially in the digital context, need to be treated with respect to their differences. The same should be done with respect to close relationship between these freedoms and the right to freedom of expression as sometimes they tend to overlap.

Intermediaries – private actors providing services for Internet users – now play a vital role for realisation of human rights on the Internet. This calls for an extensive regulation of their activities online, since the intermediaries often pose threat to free flow of information and ideas – which are the basic requirements for the exercise of freedom of assembly and of association. While the international human rights law, to date, lacks sufficient basis for binding obligations on business entities, the intermediaries often replace the governmental bodies and regulate the activities of their users, which has serious implications for human rights.

By using encryption techniques and anonymisation tools, the users are able to avoid surveillance and repression, however, the governments all over the world fight these technologies, including with help of private companies.

Finally, the states must ensure the effective legislative framework, which would both protect the exercise of freedoms of assembly and of association online and regulate the activities of intermediaries. Furthermore, the states themselves need to refrain from any actions which might impede the rights to freedom of assembly and freedom of association, including surveillance or internet shutdowns.

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