Individual Submission of **Demosisto**

For consideration during the half-day general discussion for a

General Comment on article 21 of the International Covenant on Civil and Political Rights

Hong Kong Special Administrative Region

February 2019

**A. Introduction**

1. Introduction and Background of Hong Kong

In 2011, Human Rights Committee established in its General Comment No. 34 the importance of the freedom of expression the personal and societal development, after which the emblematic Umbrella Movement took place in Hong Kong in 2014. It has gone on to become a benchmark of peaceful assemblies, used in studies of peaceful mobilisation in universities around the world. The Umbrella Movement was thusly named because despite the peaceful nature of the sit-in around the government headquarters in Hong Kong, the police force utilised tear gas and pepper spray on the crowd, and even resorted to hitting protestors with their batons and brought in rubber bullets. The leaders of the Movement later faced retaliation from the government since 2015, a phenomenon which will be illustrated below.

1. Methodology  
     
   Local laws, case laws, court judgments are cited to show the effect that the article has on Hong Kong , and how it has so far been implemented by the administration. Previous UN discussions, resolutions, journalistic accounts and NGO reports are also cited to facilitate the illustration. We encourage the Rapporteur to consider the use of article 21 by the government, and note how certain terms have been used both to protect and to degrade the right to peaceful assembly.

**B. Submission**

1. On the Scope of Protection (Question 3, Question 12)
   1. Peaceful assemblies, just as its related human right the freedom of expression – are indispensable to bring about changes in society. It promotes public discourse and diversity and allows a channel for the powerless to voice their opinions. To deny them their voice through peaceful assemblies – which requires fewer resources than other means – would be to deprive them of their dignity.
   2. The first issue to address here is the scope of protection stated by the ICCPR in regards to assemblies. The freedom of assembly is both an individual right and a collective right: collective right is whereby the right is attached to the collective, and such a right would not be guaranteed to each participant of group severally; an individual right, on the other hand, would have the individual as the holder of such a right. While sit-ins, marches and other forms of protest tend to take place as a collective action, and thus the need to guarantee the right of peaceful assembly as a collective right, activists tend to be selectively and individually prosecuted, such as the student leaders of the Umbrella Movement being prosecuted for unlawful assembly in 2015, sentenced in 2016, and re-sentenced in the summer of 2017 – thus the need of protection of the right as an individual one as well.
   3. While the collective right to peaceful assembly is self-explanatory, such right as an individual right has been an area for debate. In Hong Kong, however, there is absolutely a need for peaceful assembly to be protected as an individual right. During the traditional annual march on 1st July in 2018, certain individual citizens wanted to join the rally mid-way, and were threatened by the police, who insisted that the assembly would become an illegal one since not every participant joined in at the designated departure point. We believe that not protecting the right to peaceful assembly as an individual right would gravely undermine the right to such for any citizen under this context.
   4. It is also crucial that the rights of the participants, bystanders, and journalists be protected while they observe and record. During the 2014 Umbrella Movement, at least 30 reporters were injured while three reporters were prosecuted, according to the Hong Kong Journalists Association.[[1]](#footnote-1) The interpretation of the ICCPR may include guidelines on how to police the above three groups involved in a peaceful protest in order to protect their right to peaceful protest, in addition to their freedom of expression and press freedom, all guaranteed by the Covenant.
2. Positive and Negative Duty of the State to Protect the Right to Peaceful Assembly (Question 4, Question 5)
   1. Monitoring the government is necessary for any modern, democratic society, it pushes forward the government and society itself by asking for change, it also ensures that despite the social hierarchy, all citizens get to voice out their opinions, be it through forms of submissions or protests. As stated in the Human Rights Committee’s last general comment, even public figures such as heads of government and institutions are “legitimately subject to criticism and political opposition.” [[2]](#footnote-2)
   2. In fact, when one speaks of the duty of the State to protect the right to peaceful assembly, it is not only a negative obligation in that the State and the police should not interfere or ban peaceful demonstration – one speaks also of its positive obligation. That is to say, States should help and protect said demonstrations, and in doing so actively facilitate the exercise of this right. This protection should not only exist physically during the demonstration but also online when organisers are amassing participants for the protests. In the 38th Session of the Human Rights Council, the resolution stated that the promotion and protection of human rights using peaceful protests need to be protected both online and offline[[3]](#footnote-3), marking the first time this advocacy was promoted in a UN resolution.
   3. However, while Hong Kong did not codify a ban on criticism of institutions and public figures, its lacking protection of the right to peaceful assembly, and even going as far as to utilise public order laws to retaliate on dissidents have created a chilling effect in society, effectively and severely suppressing Hong Kong citizens’ right to protest. Therefore, in spite of not specifically forbidding criticism straight out, the government utilised the Public Order Ordinance to indirectly clamp down on political criticism. As public order has been defined as a possible justification for state restriction, it has been used to prosecute leaders or participants of the Umbrella Movement in the few years after the protest itself, with ongoing procedures in 2019 against nine of the leaders.
3. On the Need to Notify in Advance (Question 3)
   1. While when necessary, States can impose restrictions regarding an assembly’s manner, time, and venue to protect national security, public order, and other areas of public interest, as suggested by the ICCPR in article 12, it is not for the State’s convenience.
   2. The Hong Kong Police Force demands that organiser file for a letter of no objection seven days in advance to the assembly itself – however, examples in Germany and in the USA show that there is the necessity in informing the police more than 48 hours before the protest. While restrictions on the time, place, and manner of assemblies are supposed to be a measure to ensure public safety, the Hong Kong government and police use the three factors as an excuse to impose censorship.
   3. One such example was the traditional 1st January protest in 2019, when the organiser Civil Human Rights Front filed for a letter of no objection 17 days in advance as instructed, but the police did not issue the letter of no objection until two days before the actual protest, and forbade political parties and hosting organisations to put up stations in Great George Street as part of the demonstration.
   4. Demosisto organised a spontaneous occupation of the Golden Bauhinia statue in Wanchai with two political parties, which resulted in arrests due to the action being allegedly unauthorised.
   5. The common practice by the police regarding restrictions on time and place of protests include imposing prior restraints by not approving protests on politically sensitive dates and placing dissidents far from their targets of protest instead of in the venues that they have applied for.
4. On State Restrictions on Assemblies (Question 6)
   1. Although the ICCPR has very reasonably set criteria for restrictions which may be imposed by the state on protestors in Article 21, such criteria have been abused and misused by the Hong Kong government to prosecute and silence dissidents, especially after the major protests of 2014 in the form of legal retaliation. Due to the nature of public order laws, there are no victims and it is impossible to prosecute every participant; the government has also refrained from prosecuting pro-government protestors - the result is selective prosecution. Using colonial-era laws like the Public Order Ordinance and unlawful assembly.
   2. One of the most prominent cases relating to this would be the imprisonment of Joshua Wong, Nathan Law, and Alex Chow in 2017.[[4]](#footnote-4) Upon being found guilty in 2016 by the Magistrate Court - Wong and Chow of unlawful assembly, and Law of increment of unlawful assembly - they were sentenced to community service. Wong and Law had already completed their sentences when the Department of Justice filed for an appeal for these sentences. The Department of Justice claimed that the appeal was necessary due to the gravity of the offence. Since the government already planned on prosecuting more activist leaders then in the name of public order, it felt the need for the Court to set guidelines relating to these cases. The trio was eventually subjected to six to eight months in jail.
   3. More ridiculous yet is the current ongoing prosecution of the nine leaders of Occupy Central – a campaign which is considered part of the Umbrella Movement. They were charged with “conspiracy to cause public nuisance”, “incitement of public nuisance”, and “incitement to incite public nuisance.” The trial is awaiting sentencing, which is said to likely be in April 2019.
   4. Regarding restrictions on the manner of protest, in 2017, Hong Kong District Councillor Christine Fong Kwok-shan filed for leave to appeal in the Court of Final Appeal regarding her protest in the Legislative Council public gallery.[[5]](#footnote-5) Fong bore a banner and wore a T-shirt with a slogan on it in protest, and was deemed to have violated the Administrative Instructions for Regulating Admittance and Conduct of Persons, which state “Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order” and “No person shall, in a press or public gallery, display any sign, message or banner.”[[6]](#footnote-6) Given that it is a legislation, the Court has no choice but to rule Fong as guilty.
   5. Although the judgment passed down by the Court of Final Appeal persisted that Fong is guilty of offending the two articles of Instructions, the Court also maintained that while the Legislative Council has the right to refuse entry to public persons to the public gallery, the practice should not be used to deteriorate the freedom of speech. The Court does not normally interfere with internal affairs of the Legislative Council, but just judgment showed that this would exclude the issues of the admittance of non-Legislative Council staff and the restrictions on their behaviour.
   6. It is clear that while there is a need for governmental restriction when there is an issue with public order, such as protestors turning violent and resort to behavior of that nature such as burning cars and robbing shops – but it has also become a justification for governments like that of Hong Kong to repress and to retaliate.
5. Public Order Ordinance and Political Prosecutions (Question 11)
   1. One of the tools used to suppress dissidents through state retaliation is the Public Order Ordinance, as it renders the task of framing activists as criminals possible for the government through charging them with crimes like unlawful assembly and rioting. Given that rights to peaceful protest guaranteed by the ICCPR, Demosisto thinks that it is unreasonable to claim that the Umbrella Movement is an unlawful assembly. The Ordinance has also been used in 2018 to prosecute 51 protestors, with the government having defined the social unrest as a riot, despite much more severe precedents as riots.
   2. The 51 protestors involving in the Mong Kok Unrest in February 2016. The prosecutors sought for jail sentences which would last between three to ten years so that they would have a deterring effect. The longest sentence insofar was seven years, and notably Edward Leung, leader of the localist movement in Hong Kong, received six years in prison.
   3. In the United Nations Human Rights Committee’s Concluding Observations on the Hong Kong Special Administrative Region in 1999[[7]](#footnote-7) and the Committee’s Concluding Observations on the 3rd Periodic Report of Hong Kong, China in 2013[[8]](#footnote-8), the Committee continuously expressed concern that the Public Order Ordinance may “facilitate excessive restriction to the Covenant Rights”, and that the Ordinance could “be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the Covenant.” Five years after the last report to mention the vulnerability of the Public Order Ordinance, the United Nation’s fear has become a reality – that it has become a tool of authoritarian political repression.
   4. Ordinance such as this one easily becomes an apparatus of coercion. Since prosecution is selective, it is more about political convenience for the government rather than a necessity to reinstall peace and order in society.

**C. Conclusion**

It is therefore submitted to the Committee that there is a necessity to re-iterate its stance on the current Public Order Ordinance as being excessive restrictions to Covenant rights, such as the right to peaceful assembly.

Furthermore, the Committee is encouraged to reconsider its suggestion in the past ICCPR cycle on Hong Kong to establish guidelines on video-recording devices so as to protect the interests of both the police force and the protestors during the assemblies and the enforcement of restrictions[[9]](#footnote-9), it is evident that such practices would not protect protestors. In fact, Demosisto’s Nathan Law was protesting against then-Chairman of the Standing Committee of the National People’s Congress Zhang Dejiang, and was violently pressed onto the ground by the police, despite videos being taken, and the impact resulted in an injury. It is evident that guidelines on video-taping by the police would not be an effective measure to protect citizens’ right to peaceful assembly.

The Committee may also consider an interpretation of article 12 of the government to condemn usage of the restrictions as listed out in the article, including but not limited to “national security” and “public order”, as a form of political suppression.

1. Information provided by the Hong Kong Journalists Association at its press conference on 27th March 2015. [↑](#footnote-ref-1)
2. See A/HRC/WGAD/2017/20. [↑](#footnote-ref-2)
3. See HRC Res 38/11. [↑](#footnote-ref-3)
4. See Secretary for Justice v Wong Chi Fung and Others [2017] [↑](#footnote-ref-4)
5. See HKSAR v Fong Kwok Shan Christine [2017] [↑](#footnote-ref-5)
6. See Articles 11 and 12(1) of the Administrative Instructions for Regulating Admittance and Conduct of Persons of Hong Kong Special Administrative Region. [↑](#footnote-ref-6)
7. See CCPR/C/79/Add.117. [↑](#footnote-ref-7)
8. See CCPR/C/CHN-HKG/CO/3. [↑](#footnote-ref-8)
9. See CCPR/C/CHN-HKG/CO/3. [↑](#footnote-ref-9)