Joint Submission of **Hong Kong NGOs**   
for consideration during a half-day general discussion in preparation for a General Comment on article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights

Hong Kong Special Administrative Region (HKSAR)

(March 2019)

1. **Introduction**
2. Introduction and methodology

Hong Kong civil society welcomes the Human Rights Committee’s initiative in drafting a general comment on freedom of assembly. This joint submission is prepared by local civil society groups with specialty in the law and implementation of the right to freedom of assembly in Hong Kong, with reference to the “Questions for Discussion” in the Rapporteur’s notes. A list of the contributors is enclosed at the end of this submission. Local laws, practices, and court judgments are cited to show the actual implementation and interpretation of the right to freedom of assembly in HK; we encourage the Rapporteur to consider the wrongful practices and provide for a guideline, and draw support for the General Comment from good practices in HK. We have also cited comments from UN experts, and provided our views. We largely endorse the recommendations made by the Special Rapporteur on the rights to freedom of peaceful assembly and of association (***SR***) at Part IV (Conclusions and recommendations) of his 2012 report (A/HRC/20/27) save some reservation as detailed in this submission.

1. Background of HK
   1. Hong Kong exercises One Country Two System (“**OCTS”**), maintaining a Common Law jurisdiction distinctive from People's Republic of China. 7 core international human rights treaties are applicable to HK, including the ICCPR. HK people’s enjoyment of rights under ICCPR is guaranteed by HK’s constitution - the Basic Law, which also provides protection for human rights. With the lack of a national human rights institution, the mode for redressing rights violation is mainly with the court by way of judicial review.
   2. Public assemblies are governed by the **Public Order Ordinance** (Cap 245)[[1]](#footnote-0) Part III to Part IV. Any public meeting of 50 or more persons requires prior authorisation from the Police by way notifying the Police and receiving from the Police a “letter of no objection”, which includes conditions. Promotion, organisation of and participation in an unauthorised assembly are criminal offences. The law also criminalises unlawful assembly and riots.

**B. Submissions**

*This Submission is organised by issues, and question number of the “Questions for Discussion” referred to are added in brackets.*

1. Definition and defining features of assembly (*Question 1 and 2)*
   1. It is noted that the SR defines an “assembly” as an “intentional and temporary gathering in a private or public space for a specific purpose”, and that international human rights law only protects assemblies that are “peaceful”, i.e. those that are not violent, and where participants have peaceful intentions, which should be presumed (A/HRC/20/27). We have several comments on this definition.
   2. First, an “assembly” should expressly cover not only an “intentional” gathering, but also a spontaneous gathering. A demonstration might well arise from a sudden political event and citizens might gather at a particular place without prior organisation or leadership. In **Leung Kwok Hung v HKSAR** (FACC 1/2005, 8 July 2005), Bokhary NPJ (in the minority) of the HK Court of Final Appeal (“**HKCFA**”) considered that the preclusion of spontaneous demonstrations would be incompatible with the due enjoyment of free assembly. We agree with this view.
   3. Secondly, the freedom of assembly ought not to be restricted to an assembly with “a specific purpose”. We agree that the right should encompass not only political gatherings, or celebrations, but also sporting events, music concerts and other such gatherings (A/HRC/31/66 at para. 10). It should not be necessary to identify a particular purpose of the assembly for it to be protected.
   4. Thirdly, it should also be made clear that, although an “assembly” by definition involves more than one person, the principles ought to be the same regardless of whether an event involves one person or more than one person. In other words, the principles of freedom of expression ought to be applicable to assemblies, vice versa: see the situation of one-man protests considered in **Novikova v Russia** (App No. 25501/07 and others, 26 April 2016); contrast the UNHRC’s jurisprudence in **Sviridov v Kazakhstan**, (Communication No 2158/2012, 5 September 2017) at para. 10.4.
   5. Fourthly, the word “peaceful” should not qualify the scope of the right. There should not be an all-or-nothing approach to fundamental rights, whereby an assembly that falls just outside the line of being “peaceful” would lose all protection. Moreover, if the scope of the right to freedom of expression is not artificially restricted to that of “peaceful” expression, equally the scope of the freedom of assembly ought not be restricted to that of “peaceful” assembly.
   6. If the Committee prepares to adopt a definition of assembly, a generous and liberal, not restrictive, definition should be formulated to avoid unnecessarily denying coverage and therefore protection, to some marginal situations.
   7. If the HRC decides to confine assembly to exclude situations like a single person making petition or protesting alone, it should also highlight that these individuals are still under the protection of other rights, such as freedom of expression, freedom of movement, liberty and security of person, etc.
   8. Moreover, overly harsh penalties for “violent” assemblies would have a spillover chilling effect on the exercise of “peaceful” assemblies. A good example of this is the judicial approval of harsher sentencing guidelines for taking part in an “unlawful assembly” in **Secretary for Justice v Wong Chi Fung** [2018] HKCFA 4.
   9. In **Wong Chi Fung**, the HKCFA considered that, when a person takes part in an “unlawful assembly”, he “becomes involved in violence or the threat of violence” and “crosses the line separating constitutionally protected peaceful demonstration from unlawful activity”, and therefore “a deterrent sentence may be called for and will not be objectionable on the ground that it creates a ‘chilling effect’ on the exercise of a constitutional right, since there is no right to be violent” (see para. 69). The HKCFA therefore approved a new sentencing guideline whereby immediate imprisonment will be imposed for such an offence (even though the guideline was not retrospectively applied to the defendants in that case) (see paras. 119 to 125).
   10. As civil society organizations, we have observed a serious chilling effect that these judgments have had on even peaceful assemblies, and we are concerned about the low threshold of such definition of “unlawful assembly”. Citizens have been deterred from taking part in even peaceful assemblies for fear of being caught up in situations of violence and being prosecuted for it. This demonstrates that a law that heavily deters violent assemblies would, to a certain extent, also deter peaceful assemblies.
   11. Instead, as a matter of principle, we suggest that any restriction or sanction for any assembly must be reasonable and proportionate to the specified aims, including the prevention of public disorder. If there is violence in the assembly, that should be taken into account at the stage of whether the restriction is justified, but it should not mean that the right would not apply at all (see **Protopapa v Turkey** (ECtHR, 4th Section, App No. 16084/90, 24 February 2009) at para. 109). Even then, a person who did participate in a violent assembly may be accorded a sentence that is proportionate to the need to prevent disorder arising from assemblies but no more.
2. Does the scope of the right differ depending on the context (for example, is it the same during political transitions) (*Question 1*)
   1. In **HKSAR v Ng Kung Siu**, the HKCFA cited “Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People’s Republic of China” as a reason for justifying the criminalisation of flag desecration (FACC No. 4 of 1999, 15 December 1999, para. 55-66). The conviction of two protesters for desecration of the National and Regional flags in a public demonstration were upheld.
   2. With respect, we civil society do not see it necessary or proportional to deny protestors the rights to express themselves using the flags. The very reason to adopt the OCTS principle is to ensure that human rights are legally protected in the HKSAR system. The preservation of the right in a public gathering to express oneself through any media of his choice, including the national and regional flags would not undermine the new order of HKSAR as China has chosen to accept the continual application of the ICCPR (as applied) to HK. The HK and Mainland communities at the time of the said demonstration were orderly. There was no proclamation of public emergency in HK or Mainland China nor was there any law and order or other problems threatening the HKSAR or the nation. The public emergency exception under Article 4 of the ICCPR did not apply. The perfectly sound transitional and new constitutional order of OCTS also offers no good grounds for derogation of the rights to freedom of peaceful assembly and expression. The statutory provisions creating the flag desecration offences have no sunset clauses, implying that they are not really intended to be temporary for such a transitional period. The Committee should therefore raise in its pending new General Comments on peaceful assembly express objection to similar national or regional flags (and emblems) or national anthem laws.
3. What constitutes a “peaceful” assembly? (*Question 2*)
   1. Without prejudice to the submissions above on whether “peacefulness” should qualify the scope of the right, we agree with the SR that the word “peaceful” should in any event be given a broad interpretation, and regard must be had in particular to the intentions of the participants (A/HRC/31/66 at para. 18). In particular, the use of criminal offences must be limited to occasions where participants had violent intentions.
   2. Disorderly acts should not qualify as violence for the purposes of the right to peaceful assembly. As an illustration, in the case of **Wong Chi Fung** (see above), one of the defendants was convicted for taking part in an “unlawful assembly” on the basis that jumping down from a fence was disorderly conduct and might reasonably cause a police officer nearby to fear that the defendant might jump onto him and cause injury to him. It was unnecessary under the law to prove that the defendant intended to cause injury or was even reckless as to whether injury might be caused. We are of the view that the *intentional* use or threat of violence must be present before criminal liability can be justified.
   3. In the interests of legal certainty and predictability, archaic terms in the law, such as a “breach of the peace”, should be discarded in favour of clearly expressed terminology, such as “causing a person of reasonable firmness present at the scene to fear for his personal safety” (see e.g. the terminology used in the **UK Public Order Act 1986** in replacement of that of “breach of the peace”).
   4. Also, the assumption of intention to use violence because protesters use protective gears should be rebutted. During the “Umbrella Movement” in 2014, police used pepper spray, tear gas, and baton indiscriminately to disperse demonstrators. At least 28 people suffered head injury due to the use of baton by police. We are of the view that any people should have the right to protect his/ her own safety. Using of gear to provide passive protection from bodily harm, for example, wearing helmet, goggles, protection pads, should not be considered as a sign of not peaceful, violence, or threatening to use forces.
4. On protesting in private place (*Question 2*)
   1. We fully agree with the recognition that the freedom of assembly applies to assemblies in a private place. In **HKSAR v Fong Kwok Shan** (FACC 2/2017, 4 October 2017), the HKCFA reasoned that the argument that the freedom of assembly is not applicable in private property “impermissibly seeks to subjugate fundamental rights to property interests” and “fails to recognise that the proposed location of a demonstration or other form of expression is an intrinsic dimension of the right” (para. 70). We agree with these reasons.

1. On responsibility for others’ violence (*Question 2, 6, 7*)
   1. We agree with the SR’s Report, para 31 that “assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others”.
   2. Section 19(1) of the Public Order Ordinance provides, “When any person taking part in an assembly which is an unlawful assembly by virtue of section 18(1) commits a breach of the peace, the assembly is a riot and the persons assembled are riotously assembled.” It unfairly criminalises persons for peaceful participation without violent intent in an unlawful assembly in which one or more persons commit a breach of the peace. The Committee should express concerns in its pending General Comments about such wide net of criminality and low threshold of unlawful assembly and riots, especially the low degree of disorder or “violence” involved, the small number of persons behaving disorderly or “violently” required, and the tiny number of persons amounting to an “unlawful assembly” and “riot”.
   3. In HK, 13 demonstrators were prosecuted for unlawful assembly for their unpeaceful acts in a demonstration in 2014. They were alleged for removing mills barriers, and prying open glass doors with bamboo sticks, iron bars, and umbrellas at the entrance of the Legislative Council Complex. They were convicted for unlawful assembly and sentenced by the Magistrate for 80-150 hours of community service. The Department of Justice applied for a review of sentence at the Court of Appeal. The Court of Appeal reviewed the case and decided to impose much heavier sentences to the 13 demonstrators for 8-13 months imprisonment (**Secretary for Justice v Leung Hiu Yeung and Others**, CAAR 3/2016). In supporting the decision to impose sentences of imprisonment, the Court of Appeal took into account the acts of other demonstrators and consequences which were not directly caused by the 13 demonstrators, including the violent acts of other demonstrators who broke a stone door at an entrance of the Legislative Council Complex, overall damages of the Legislative Council Complex, and injury of a security officer. Although the HKCFA rectified the heavy sentencing, it did not quash the sentencing principles for unlawful assembly involving violence set out by the Court of Appeal.
   4. We recommend the Committee to affirm that organisers and participants should not be considered responsible for the unlawful conduct of others. It is an important principle to protect freedom of assembly, and avoid disproportionate response or punishment to demonstration participants.
2. Whether the right to freedom of assembly cover actions prior to the assembly (*Question 3*)
   1. We are of the view that the protection of actions prior to the assembly is important for effective exercising of the right of public assembly. A successful public assembly requires a lot of effort to prepare the plan and logistics of the assembly, and to promote public participation. The right to promote a public assembly is highly relevant to freedom of expression, freedom of information, and the right to participate in public affairs. State parties should not impose restriction or sanction for planning, organising, advertising or publicising a peaceful assembly, regardless whether the assembly is notified to the Authority. The Committee should note that it is an offence under section 17A(1)(d), **Public Order Ordinance**[[2]](#footnote-1) that if a person advertises or publicizes a public meeting or a public procession without notifying the Commissioner of Police, or the public meeting or a public procession are prohibited or objected by the Commissioner of Police. The offender is liable to a fine of HK$10,000 (~US$1282) and to imprisonment for 12 months.
3. Governments’ duty to facilitate peaceful assembly (*Question 4*)
   1. Facilitating protests within sight and hearing of targets: It has been observed in HK that the Police would forbid protests in the proximity of important figures by setting up “core security zone” and restricting protesters to “public activity areas” out of sight and hearing of their targets. Such security measures are without legal basis; moreover, there has been no report of security threats to the important figures. The general comment should reiterate the test for lawful restriction of the right to freedom of assembly, and to state that disproportionate security measures for protest targets defeat the purpose of the demonstrations and can be a violation of the right.
   2. See further in para 10 for requirement of notification
   3. See further in Question 9, para 14 on protesting at specific spots with special meaning or significance
4. On the requirement to apply for authorisation, and procedure of authorisation and imposing limitation (*Questions 4, 6 and 8*)
   1. *Questions 4 and 8*: authorisation or notification for assembly
      1. HK’s Public Order Ordinance requires prior authorisation for certain size of assembly, except spontaneous ones. We agree with the SR that the exercise of the right to peaceful assembly should be subject to - at most - a system of prior notification, and **not** a system of prior authorization: see A/HRC/20/27, para 28.
      2. In that connection we note that it is the substance of the system, not the form, that should be examined. For instance, HK’s **Public Order Ordinance**[[3]](#footnote-2) purports to require prior “notification” for any assembly of 50 or more persons in a public place to take place. However, in reality, the substance of the scheme in the Ordinance is one of prior *authorization*: such a meeting may only take place if the Commissioner of Police does not prohibit it.[[4]](#footnote-3)
      3. We also agree with the Special Rapporteur that no notification or authorization requirement should apply in the case of spontaneous assemblies, where organizers are unable to comply with such requirements or where there may not even be any identifiable organizers. A/HRC/20/27, para 29 referred. (Also see para 3.2 above)
   2. Imposition of conditions:
      1. We share the SR’s concern that States Parties are increasingly restricting civic space, creating “a complex legal environment with burdensome requirements” designed to restrict the exercise of, *inter alia*, the right to peaceful assembly: see A/HRC/38/34, paras 27, 37-38.
      2. We are especially concerned by the imposition of onerous conditions that are impossible, as a practical matter, to comply with. Such restrictions should be viewed as instances of “constructive prohibition”: see A/HRC/38/34, paras 37-38.
   3. Criminal liability on organising or participating in unauthorised protests:
      1. We agree with the SR and the Secretary-General that right to freedom of peaceful assembly does not require the issuance of a permit to hold an assembly. See A/HRC/20/27 para. 29 and A/68/299 para. 24.
      2. However, the **Public Order Ordinance** restricts the rights to peaceful assembly and gives power to the police to criminalise protesters. A person who took part in an assembly of more than 50 participants or a procession of more than 30 participants without prior notification, committed an offence “unauthorized assembly” under the Public Order Ordinance of HK. Punishment of the offence for a conviction on indictment can be up to imprisonment for 5 years, and to a fine at HK$5,000 (~US$641)s and to imprisonment for 3 years for a summary conviction. “Unauthorized assembly” is a common reason for the HK police to dismiss peaceful assembly and make arrest, which posed disproportionate restriction on the exercising of the right of freedom of assembly. For example, police dismissed a peaceful assembly in July 2014 and 511 people were arrested for taking part in an unauthorized assembly.
      3. Moreover, with political motivation, the HK Government increasingly seeks heavier sentences against protesters who protest against the HK Government or Central Government of China. In recent years, protestors have been charged with crimes such as “public nuisance”, “participation in an unlawful assembly”, “inciting others to participate in an unlawful assembly”, “conspiracy to commit public nuisance”, “inciting others to commit public nuisance”, and even “incitement to incite others to commit public nuisance”. Prosecuting citizens for “incitement to incite others to commit public nuisance” has been held unconstitutional in the High Court of Australia. The Common Law offence of public nuisance is also archaic and very rarely used.
      4. The Committee is recommended to reiterate in the general comment that an assembly should not be dissolved automatically because the organizers did not notify the authorities, and the organizers and participants taking part in a peaceful assembly should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment.
   4. Police handling of “unauthorised protests”
      1. When HK Police claims that a public gathering is unlawful, it often causes or escalates conflicts. Police often obstruct protesters in peaceful assemblies for failure to give advance notifications. It is speculated that the cause of Mongkok Unrest was the police’s confrontational attitude towards protestors who were peaceful at that time; many came to the site to support protesters after watching live news of police’s suppression of the protest.
   5. *Question 6*:
      1. Further to para 2.2 above, the HK Police are empowered to reject the application of a protest, or approve with conditions imposed. Organisers can appeal against the rejection or conditions to the Appeal Board on Public Meetings and Processions pursuant to the **Public Order Ordinance**[[5]](#footnote-4) (sections 16, 44, 44A). While disagreement with the Appeal Board’s decisions can and has been brought to courts by way of judicial review, timely remedy is not available as the judicial review hearing would take place long after the subject assembly has taken place under the problematic restrictions.
5. “To what extent does the State have an obligation to protect those engaged in peaceful assembly from interference by other members of the public? And should counter-demonstrations be protected to the same extent?” (*Question 5*)
   1. A case law in HK accepted an old English Common Law principle that a peaceful demonstrator could be held criminally liable by refusing to assist the police in suppressing the violent counter-demonstrator.
   2. In **Chan Hau Man Christina v Commissioner of Police** (HCAL 139/2008, 21 Aug 2009), initially the police took measures to protect the safety of the demonstrators from the growing number of hostile counter-demonstrators. Apprehending an imminent breach of the peace, the police eventually decided to remove the demonstrators from the scene. The demonstrators were later taken to a police station and allowed to leave after an hour. One of the demonstrators so removed subsequently sought judicial review of the decision to remove them, criticizing that as a move interfering with their freedom of speech and demonstration. The judicial review was rejected and the court was of the view that the police’s measure was justified.
   3. **Chan Hau Man** (para 24) stated that the power and duty to prevent breach of the peace falls on the police as well as the citizens; where necessary, a police officer is entitled to call upon a citizen for his or her active assistance in suppressing a breach of the peace. If, without any lawful excuse, he or she refuses to give it, the citizen is guilty of an offence. Such duty on a citizen was later affirmed by another similar case **Wong Chi Fung v Secretary of Justice** (HCSA 29/2018, 16 Oct 2018, para 36) which also involved removal of a demonstrator as a result of the hostile behaviour of counter-demonstrators, including gangsters.
   4. We are troubled by the existence and inheritance of such a duty and the potential criminal liability attached to it. A peaceful demonstrator could be punished because of the disorderly manner of a counter-demonstrator. This is unfair.
   5. We are also afraid that the potential criminal liability would have substantial chilling effect to peaceful demonstrators. They may simply leave the scene whenever there is any disorderly counter-demonstration to avoid criminal liability. Such a duty is a disturbing inroad into freedom of peaceful assembly.
   6. Again, we agree with the SR’s report, para 31, that “assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others”.
6. On organisers’ accountability (*Question 7*),
   1. We agree with SR’s report that organisers should not be made liable for maintaining public order or actions of participants, and costs of public services.
   2. We have seen government department in HK requesting organiser to pay the extra cleaning cost for the annual June 4th candle-light vigils held in a park; The HK Police Force have once attempted to ask the Civil Human Rights Front, organiser of the annual 1 July march, to cover cost of crowd control barricades although the demand was eventually dropped. The annual 1 July march had for a while been facing uncertainty as the organisers encountered difficulties, presumably due to political consideration, in getting any insurance firm to conclude an insurance policy to cover the participants and the public affected. An organiser of the Umbrella Movement, Benny Tai, has been sued by a number of persons who claimed to be operators of taxi, minibus and eateries, at Small Claims Tribunal for damages caused by the obstruction of highways during the Movement. The plaintiffs dropped their cases as the defendant requested the case to be heard at the District Court and the legal costs would be quite substantial to the plaintiffs. Had the plaintiffs succeeded in making the claims, organisers or even participants might be overwhelmed by litigations and held liable for various claims by say bus companies, etc.
   3. The pending General Comments should show objections to any attempts by the public authorities and private bodies putting these financial burdens on persons involved in peaceful assemblies, whether notified or not.
7. On concealment of faces (*Question 7*)
   1. State should respect anonymity in participating in peaceful assembly and freedom of expression, as long as no violent act is involved. HK’s experience is that participating in political activities can cause embarrassment or even reprisal at work place, justifying the concealment of faces. Also, masks were commonly used to protect one from pepper spray / tear gas. (Also relates to Question 2, demonstrators wearing protective gears per se shouldn’t be deemed as planning to use violence)
   2. We are of the view that wearing of a mask for expressive purposes or for the purpose of preventing identification at a peaceful assembly should not be prohibited, so long as the conduct of the person wearing mask or costume did not create probable cause for arrest or create a clear and present danger of imminent unlawful conduct. We suggest the Committee to recognize and respect the right to remain anonymous in expressing ideas even at public places, especially of those vulnerable or marginal in the society.
8. On prohibition of assemblies in particular places (*Question 9*)
   1. Stock JA has pointed out that "As one so often sees in newscasts from around the world, pavements or plazas outside government buildings or embassies are regularly used for protests, and the reason for the choice of site is clear, namely, that they are the natural or most obvious sites for demonstrations, precisely because demonstrating ‘down the road’ is less likely to bring home the intended message either to government or embassy officials or to passers-by." He is of the opinion that it is “obvious” that “to require the demonstrators to move from in front of [the building of the demonstration target to a place nearby] was a requirement that, if successful, would deprive the demonstrators of ‘their most visible demonstration position’.” (Per Stock JA at paras. 99-100 in **HKSAR v Yeung May Wan and others** (HCMA 949/2002)).
   2. The Appeal Board on Public Meetings and Processions in HK has once allowed an appeal from the Civil Human Rights Front to assemble in the open space immediately outside the then Government Headquarters in Central District because of the site’s political significance.
   3. Therefore, the fencing off of the Civic Square immediately in front of the new Government Headquarters since 2014 has deprived the public a most visible and meaningful site of political significance to hold public assemblies targeting at the HKSAR Government. Even though the Square is now open for limited hours but protest organisers are now required to apply for prior approval of the Director of Administration for holding protesting at the Square. The Director of Administration requires applicants to abide by the laws of HK and does not allow any acts or speeches inconsistent with the OCTS principle. Peaceful speeches and placards calling for independence of HK in the Square are perfectly legitimate but were seen as unlawful (for their “inconsistent with the OCTS principles” in the Basic Law) and not allowed by the Director of Administration. Failure of any organisers of demonstrations of the Square to stop such speeches and placards by participants would be warned by the Director that such failures would be taken into consideration in the processing of future applications from such applicants for accessing the Square.
   4. The pending General Comments should highlight the need for the authority to allow the use of such public places of political significance to make public demonstrations to be most natural, obvious and meaningful. No restrictions should be imposed to hinder the free access and uses of such venues for demonstrations.
   5. The court has ruled the Permission Scheme and Decision (to refuse application to use the Forecourt) unconstitutional (HCAL136/2014).
9. How should accountability for violations or abuses of rights by all parties concerned during assemblies be approached? (*Question 13*)
   1. Echoing SR’s Report, paras 77-81 and the Special Rapporteurs in their joint report on the proper management of assemblies (A/HRC/31/66) (***Joint SRs Report***), paras 89-96, the starting point should be that States Parties have an obligation to provide an “adequate, effective and prompt remedy determined by a competent authority having the power to enforce remedies”: paragraph 89 of A/HRC/31/66. We say that this encompasses the following:
      1. The prompt, independent, and thorough investigation of allegations of violations in order to hold those responsible accountable: paragraph 77 of A/HRC/20/27 and paragraph 90 of A/HRC/31/66;
      2. Criminal, civil, and/or disciplinary sanctions against individuals responsible for violations: paragraph 78 of A/HRC/20/27 and paragraph 91 of A/HRC/31/66. Officers with command control should be held responsible for the conduct of their subordinates where they have failed to exercise effective command and control, or where they knew or should have known of their subordinates’ excessive or arbitrary use of force and did not take all measures in their power to prevent, suppress, or report such use: paragraph 91 of A/HRC/31/66;
      3. Both prosecutors and judges involved in the prosecution of public officials should perform their functions impartially: paragraph 93 of A/HRC/31/66;
      4. Judicial processes should be supplemented by non-judicial oversight of law enforcement, including “an effective internal investigations process and an independent oversight body” (paragraph 94 of A/HRC/31/66), journalists, human rights monitors from NGOs and human rights investigators (paragraph 45 of CCPR/C/GC/34; Principle 19, Johannesburg Principles)
      5. Civil remedies for victims, including “fair and adequate compensation”: paragraph 81 of A/HRC/20/27 and paragraph 95 of A/HRC/31/66; and
      6. Victims should have access to relevant information about violations and reparation mechanisms: paragraphs 89 and 95 of A/HRC/31/66.
      7. Law-enforcement agent should identify themselves in the discharge of duty in the course of a public assembly
10. Private actor’s role to facilitate peaceful assemblies (*Question 14*)
    1. We share the concern expressed in the Joint SRs Report, paragraph 86 regarding the use of strategic lawsuits against public participation by business entities. In particular, we are concerned that States Parties may use “straw plaintiffs” to bring such lawsuits, in order to disguise their involvement in suppressing assemblies. For instance, in the case of the three applications for injunctions brought against Umbrella Movement demonstrators in 2014:
       1. One of the applications was brought by a subsidiary of CITIC, a politically connected PRC State-owned enterprise;[[6]](#footnote-5)
       2. The minibus and taxi operators who were the plaintiffs in the two other applications met privately with the then-Secretary for Justice in connection with their applications;[[7]](#footnote-6)
       3. In the circumstances, it appears that some or all of the plaintiffs were “straw plaintiffs” for the HK and/or Beijing Governments.
    2. Where a State Party uses “straw plaintiffs” to suppress assemblies, we agree with the Special Rapporteurs that the State Party should be held responsible for its approval, support, or acquiescence in the conduct of non-State actors: see paragraph 87 of the Joint SRs Report. Alternatively, we suggest that the State may be held responsible on the basis that the conduct of the straw plaintiffs may be imputed to the State Party directly.
11. On recording assemblies (*Question 19*)
    1. We suggest that law-enforcement agents should not take photograph and video recording in public assembly unless they have a legitimate purpose and in a least privacy invasive manner, for example, collecting evidence in an assembly which is not peaceful. Law-enforcement agencies should set out guidelines and principle of recording public assembly on video or picture, including the retention, access, application, management and destruction of the data collected. Records without useful value should be securely deleted within a reasonable period. Law-enforcement agents should identify themselves when recording a public assembly. It was found in several instances that HK police were taking video on peaceful demonstrators continuously for hours during demonstration. The act of video recording was without a clear purpose. There were no arrest or intervention to the targeted demonstrators during or after the demonstration. The manner of continuously taking video was intimidating and harassing which had a chilling effect and threatened the demonstrators in the exercising of their rights to freedom of assembly, association and expression. In addition, police officers were founded to take video of assembly in a covert manner.

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1. Public Order Ordinance (Cap 245), available at https://www.elegislation.gov.hk/hk/cap245 [↑](#footnote-ref-0)
2. Above 1. [↑](#footnote-ref-1)
3. Above 1. [↑](#footnote-ref-2)
4. Public Order Ordinance ss 7(1) and 9 [↑](#footnote-ref-3)
5. Above 1. [↑](#footnote-ref-4)
6. See https://www.theguardian.com/world/2014/nov/18/hong-kong-bailiffs-clear-protest-sites [↑](#footnote-ref-5)
7. https://www.scmp.com/news/hong-kong/article/1663358/justice-secretary-rimsky-yuen-rejects-criticism-he-indulged [↑](#footnote-ref-6)