Joint Submission of Hong Kong NGOs

on the Revised draft of the General Comment No. 37 (right to peaceful assembly) of the International Covenant on Civil and Political Rights prepared by the Rapporteur, Mr. Christof Heyns

**Hong Kong Special Administrative Region (HKSAR)**

**(February 2020)**

**1. Introduction**

1. We thank the Rapporteur, Mr. Christof Heyns for his drafts.
2. This submission is prepared and submitted jointly by several Hong Kong human rights NGOs, led by Hong Kong Human Rights Monitor and Civil Rights Observer, whose representatives participated in the regional consultation of the draft general comment in Bangkok, February 2020, organised by Article 19. The same NGOs also made a joint submission to the Committee in March 2019.

**2. Key suggestions based on Hong Kong’s experience**

*Paragraph 1*

1. We suggest to reiterate the positive obligation of the state parties to respond to the protests as a sign of respect for assemblies.

*Paragraph 5*

1. Foreign nationals: The Hong Kong Government has revoked or refused to renew visas for expatriates and migrant domestic workers after they spoke out against the Hong Kong or Chinese government; and refused entry to foreign activists who come to Hong Kong to protest or give speeches. The government takes advantage of the fact that constitutional rights often do not cover non-citizens. Suggested change: to add "Domestic laws and administrative measures, including immigration ones, to be compatible with States' duty to protect non-citizens' exercise of the right of peaceful assembly (and expression)."
2. Furthermore, in order to respect the rights of children, persons with disabilities, ethnic minorities and other vulnerable groups, the General Comment should reiterate the States' positive duty to facilitate their exercise of rights; moreover, not to deter them from participating.

*Paragraph 10*

1. We disagree with the clear-cut non-applicability of article 21.
2. See our previous submission paragraph 3.5, "…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… "
3. When acts in gatherings are or become beyond the scope of "peaceful assemblies", for example if they become violent, before disregarding the obligation under article 21, the authorities should take steps to intervene proportionately to facilitate the resumption of a peaceful assembly; in the meantime, the individuals involved continue to retain their other rights under the Covenant.
4. In considering sentencing of a person for his or her convicted act of violence in public assemblies, the violent act committed in a "political demonstration" should be distinguished from the act of "mindless violence" (English court: R v Al Dahi [2013] EWCA Crim 1267; R v Smith [2016] EWCA Crim 2080). Disproportionate penalties against a person who got convicted for his or her act in relation to public assembly could be consider as a violation of the right to freedom of assembly (Gülcü v. Turkey, App No. 17526/10 para 116, 117).

*Paragraph 13*

1. “provided that the property is publicly accessible”: accessibility by the public should not be a necessary condition in defining an assembly, the nature of the private space should be considered.
2. In addition, denial of access to a privately-owned property for the purpose of assembly must be legitimate and proportional. In *HKSAR v Fong Kwok Shan Christine* (FACC 2/2017, 4 October 2017), the Hong Kong Court of Final Appeal stated that excluding the freedom of assembly from any 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”, and further “the proper approach is to focus on the right instead of on property interests, and to examine the validity of any restrictions imposed on its exercise by applying the principle of proportionality” (para. 70). We agree with these reasons and urge the Committee to make corresponding amendments and adopt these principles.

*Paragraph 19*

1. “widespread and serious” must be kept for characterizing the violence
2. “and is sometimes referred to as riot” should be removed. It is because riot has various legal definitions in different countries. For instance, the legal definition of riot is notoriously vague, ambiguous and with low threshold in Hong Kong. (see further in para 30 below)

*Paragraph 23*

1. Add that bringing and wearing non-offensive protective gears, such as helmets, pads, and gas masks or respirators to or in an assembly should not render the relevant individual violent participant, nor the assembly not peaceful, especially when there's valid concern of bodily harm from the police, counter, etc.

*Paragraph 34*

1. Reiterate that the rights of human rights observers to conduct their work is established under Articles 19 and 21 of the Covenant and a number of international human rights standards.
2. Other than unlawful or dispersed assembly, the right to monitor continues when an assembly is no longer peaceful. From the experience of Hong Kong, the police would claim that an assembly is violent and demand everyone to leave, including journalists and human rights observers, sometimes claiming that it is unsafe, sometimes claiming that they obstruct police operation.
3. Equipment of observers: Give examples of the equipment that must not be confiscated or damaged: notes, storage media, protective gears, vehicles, uniform and identity documents. Add that their rights to use their equipment during and after police operations, including recording the police’s interaction with them, should also be protected, irrespective of whether the assembly is peaceful or not, lawful or not, dispersed or not, or ended or not. Confiscation and/or damaging or destruction of notes, storage media and visual or audio recording equipment, vehicles of the observers by the police should be prohibited and punished.
4. Missing in this draft General Comment is recognition and protection of humanitarian workers and human rights defenders other than those involved in monitoring protests. Such as social workers (defending children and vulnerable individuals’ rights during arrests), first aiders and medical professionals (defending the rights to health and life, especially in face of police brutality), and lawyers. They should be accorded the same protection as journalists and human rights observers, not to be obstructed from carrying out their works, and not to be harassed or penalized as a result of their assistance to participants of unlawful assemblies or of their attendance at demonstrations.

*Paragraph 35*

1. Business enterprises’ responsibility to respect human rights: employers should not victimise an employee for exercising the right to peaceful assembly. States’ positive duty under article 21 entails having laws to protect employees from unfair treatment or dismissal by their employer in such circumstances, and providing remedies.

*Paragraph 37*

1. Add “recruiting resources for organizing the assembly” to the examples of actions that States should protect. Resources can be in the forms of financial support, manpower, hardware facilities, and insurance policy, etc.

*Paragraph 62*

1. Replace “However, the cumulated impact of sustained...rights of others” with “However, the cumulated impact of sustained gatherings should not unreasonably impact the rights of others, but bearing in mind that the authorities have to give serious accommodation of such assembly and the positive duty to mitigate the impacts of the assembly”.

*Paragraph 64*

1. Add that the duty to facilitate peaceful assemblies includes the duty to ensure that there is space to protest within the sight and sound of the targeted audience.
2. For example in Hong Kong, the only protest space within the sight and sound of the Liaison Office of the Central People's Government is a 9-meter-wide pathway outside its entrance. In 2002, to prevent Falun Gong practitioners from practising and protesting outside the Liaison Office, the Hong Kong Government decided to put a flower bed in the pathway in the name of greening, reducing the width of the pathway to 3 meters. While demonstrations can still be held outside the Liaison Office, participants in an assembly are often required by the police to keep moving because of the limited space.

*Paragraph 73*

1. Add “and civil servants” after “State officials”.

*Paragraph 74*

1. Add organizers on top of participants.

*Paragraph 75*

1. Remove “If this is done, responsibility must be limited to what they could have foreseen and prevented with reasonable efforts”.
2. It is because it could be contradictory to the draft General Comment’s paragraph 50 (peaceful assemblies are in some cases inherently disruptive) and paragraph 18 (non-violent civil disobedience or direct-action campaigns are in principle covered by article 21). Our previous submission (paragraph 12.2) includes an example of an organiser being unjustly held accountable for foreseeable (because it’s intended) inconvenience caused by the assembly – “

An organiser of the Umbrella Movement [2014], [Professor] 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… 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.

*Paragraph 76*

1. We propose the Committee to reiterate in the paragraph that organizers and participants should be not subject to civil or criminal sanctions because of organizing and participating peaceful assemblies. Excessive sanctions would have chilling effects to the exercise of the freedom of rights to assembly.

*Paragraph 79*

1. Add ", riot," after terrorism.
2. The Hong Kong law on riot is vague but carries a maximum penalty of 10 years imprisonment as explained in our previous submission para 7.2:

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.

*Paragraph 103*

1. We suggest to further elaborate the obligation of plainclothes officers to identify themselves and give explicit warnings before they exercise police powers such as using force, stopping and searching, and making arrest.
2. It is important to stress the positive duty of state parties to effectively monitor and ensure that police offices do not incite violence when they exercising power.

*Paragraph 105*

1. After "does not have a chilling", add "or provoking".
2. Authorities recording public assemblies does not only have a chilling effect. As observed in Hong Kong, the Police recording the assemblies may do so in an intimidating and harassing manner, as a way of threatening participants, and have been seen to provoke or escalate conflicts.

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