**Joint Submission**

**on**

**the Revised Draft General Comment No. 37 on Article 21**

**(Right of Public Assembly) of the ICCPR**

Demosistō and Student Activist Mr. Sunny Cheung

February 2020

Introduction

1. This submission is jointly submitted by Demosistō and Hong Kong’s student activist Sunny Cheung. We welcome the Human Rights Committee's release of the Draft General Comment No. 37 on Article 21 on the right of public assembly. The draft provides guidelines on how individuals can exercise their rights and restrictions that can only be set under certain circumstances.
2. As an active youth movement organization and also one of the student protesters on the frontline, Demosistō and Mr. Cheung would like to provide our comments from the viewpoint of protesters under the authoritarian regime of China and unchecked police brutality of Hong Kong. These comments could be useful when applying the guidelines and restrictions to civil rights movements in the context of non-democratic states.
3. Demosistō is a pro-democracy youth activist group in Hong Kong. As the Beijing government refuses to fulfil its promise of universal suffrage to the city, we advocate democratic reforms, progressive values and self-consciousness of Hongkongers through street politics, civil society empowerment and international delegations. In our fight for equality, justice and democracy, we aim at turning Hong Kong into a pluralist city.
4. Mr. Sunny Cheung is the former spokesperson of the Hong Kong Higher Education International Affairs Delegation (HKIAD). In 2019, He has testified on police violence and human rights abuses of the city at a Congressional-Executive Commission on China (CECC) hearing on Capitol Hill, along with Joshua Wong from Demosistō. Both Demosistō and Mr. Cheung believe that the right of assemblies of all forms, including flash mobs, strikes and occupations, carries vital meanings to human rights defenders, especially those who living in despotic regimes.
5. Just like other non-democratic states worldwide, Hong Kong lacks the institutional mechanisms to reflect people's demands and grief in the actual policymaking process. Most of the policies are imposed by the Beijing-handpicked city leader and orchestrated by pro-Beijing forces and Beijing's representatives in the city. Worse still, although half of the seats in our legislature is directly elected, the Beijing authority intentionally marginalizes pro-democracy powers.
6. As a result, the street politics has become the important tool to press for political changes within the Establishment. Measures to protect the rights of public assemblies also play an indispensable role in safeguarding people's democratic freedoms, including freedom of expression and freedom of speech.
7. However, unlike other democratic states, all street politics in hybrid or authoritarian regimes have to face the bloody suppression from the state. Over the past 8 months, Hong Kong protesters have suffered from the police brutality, state terrorism and censorship from the regime. In order to protect the people's freedom of assembly not just in general, it is inevitably important that all relevant discussions have to be put in the context, especially into the power relations where the state processes the overwhelming power over the civil society.

General remarks

1. Para 7 reads "peaceful assemblies are sometimes used to pursue ideas or goals that are somehow contentious, and their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. They may be intended to have these consequences, without necessarily calling into question the protection such assemblies should enjoy." Para 62 reads "Peaceful assemblies are generally by their nature temporary … ."
2. Based on our observation in Hong Kong, civil groups in the hybrid and authoritarian regimes merely have long-term occupations (as in the Umbrella Movement) or frequent and recurrent disruptions (as in the Be Water movement) in their toolkits to exert political pressures on the government, who needs not seek mandates of the public through elections. As such tools are essential and indispensable for human rights defenders in such political contexts, we recommend that the definition of peaceful assemblies should not impose rigid definitions on the temporality and frequencies of assemblies. When assemblies or occupation last long, it will definitely be viewed as causing sustained disruptions. However, the experience of the Umbrella Movement demonstrates that the state may play a waiting game. It may remain unanswerable to public demands, make the protests last for a long time and exclude them out of the protection of article 21. Therefore, we recommend the sentence can be added to the definition of the right of peaceful assembly as follows:
3. **"Depending on the nature of demands and the government's responsiveness to the demands, peaceful assemblies can be temporary (including gatherings and flashmobs) and long-term (including demonstrations, strikes, sit-ins and occupations). So long as the assemblies act on public interests, the non-violent character of peaceful assemblies include actions with disruptions, obstructions and impediments."**

Section 2: Scope of the right of peaceful assembly

1. Para 20 reads "The question of whether an assembly ceases to be peaceful must be answered with reference to the violence that originates or is deemed to originate from the participants. Violence by the authorities against participants in a peaceful assembly does not in itself render the assembly violent." Para 21 reads "Participants’ conduct may be deemed violent if, before or during the event, the participants are inciting others to the use of unlawful force, the participants have violent intentions and plan to act on them … "
2. Although the draft emphasizes that the violence by authorities or members of the public against participants of the assemblies does not render the assembly violent, it does not mention whether the assemblies are still considered as peaceful assemblies if participants act in self-defence or defence of others against the threat of death or series injury during the incident. Para 21 implies that once the participants strike back in self-defence, the whole assemblies will be excluded from the protection of article 21.
3. In the authoritarian regime, it is common for participants to be attacked by police officers, pro-government supporters and mobsters. During the anti-extradition protests, it was reported that Hong Kong's police officers targeted and beat journalists and protesters with batons. Police also provoked public sentiments by dehumanising participants as "cockroaches". In some occasions, soon after the police fired tear gas, they use unnecessary force to attack everyone on site, which made some demonstrators strike back to protect the senior or young participants that left behind. As the draft had not addressed the matter of self-defence, it may be abused by the regime to disperse any assemblies with the help of gangsters and unchecked police that is commonly found in China and Hong Kong. **We encourage the Rapporteur to revise para 20 to incorporate the recognition of self-defence or defence of others in the imminent threat of deaths and severe injuries.**
4. Para 23 reads "The carrying by participants of objects that are or could be viewed as weapons is not necessarily sufficient to render the assembly violent."
5. In the case of Hong Kong, since it is commonly expected that all assemblies will end up with rounds of tear gas, people often carry protective gears like gas masks and goggles when attending assemblies. However, they were arrested by police for possessing protective gears with the intent to commit violence. As the gears are used to reduce the risk of tear gas exposure, we recommend the first sentence of para 23 can be amended as follows:
6. **"The carrying by participants of objects that are or could be viewed as weapons or protective gears (including but not limited to gas masks and goggles), is not necessarily sufficient to render the assembly violent. … "'**

Section 4: Restrictions on the right of peaceful assembly

1. Para 48 reads "The “interests of national security” may serve as a ground for restrictions if such restrictions are necessary to protect the existence of the nation, its territorial integrity or political independence against force or a real threat of force."
2. We think the whole paragraph has high risks of being misused by the authoritarian regimes. In recent years, China has sprawled its definition of national security to education, online expression and even political reforms. During the Umbrella Movement in 2014, the Beijing and Hong Kong government had criticized the movement of challenging the national security and threatening the territorial integrity. In the eyes of authoritarian rulers, all democratic assemblies will, by nature, be treated as a challenge to its "national security." Therefore, **we recommend para 48 should be crossed out**.
3. Para 70 reads "Assembly participants should not be prohibited from wearing face coverings where there is no demonstrable evidence of imminent violence on their part and probable cause for arrest. As such, blanket bans can only be justified on an exceptional basis."
4. We would like to point out the restrictions on face-covering in the authoritarian society are highly controversial, especially when participation in assemblies without the government's authorization can be criminalized. Furthermore, the cases in Hong Kong also demonstrate that the police will suspend and declare an authorized assembly as unlawful. Besides, even if the assemblies are lawful and orderly, participants in non-democratic states or employees from special industries may face political persecution after the event. In Hong Kong, employees from Cathay Pacific Airways were fired for going on strikes or expressing their political stances on social media, as it is reported that the company has to maintain a business relationship with China. Therefore, we recommend that the second half of para 70 can be amended as follows:
5. **"Assembly participants should not be prohibited from wearing face coverings, especially for places where assembly organizers need to seek authorization from the law enforcement agency."**

Section 5: Notification and authorization regimes

1. Para 81 A failure to notify the authorities of an assembly [should not render participation in the assembly unlawful, and] should not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or the imposition of undue sanctions such as charging them with criminal offences.
2. The notification system is often misused to curb assemblies in the authoritarian regimes. According to Hong Kong's public order ordinance, all assemblies with more than 30 people have to obtain permission from the police; otherwise, they are regarded as unlawful assemblies and participants will be arrested. Throughout the Hong Kong's arrangements, such arrangements were misused to stifle peaceful assemblies by refusing to grant permission or even issuing opposition letters to organizers. Even after assemblies have been permitted, organizers can still be arrested for not fulfilling the terms and conditions of the permission. Therefore, we recommend the bracket in the first paragraph can be kept and amended as follows:
3. **"Failures to notify the authorities of an assembly or to meet part of the conditions should not render participation in the assembly unlawful, and should not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or the imposition of undue sanctions such as charging them with criminal offences. … "**
4. Para 84 reads "Authorization regimes, where those wishing to assemble have to apply for permission (or a permit) from the authorities to do so, undercut the idea that peaceful assembly is a basic right. Where such requirements persist, they must in practice function as a system of notification, with authorization being granted as a matter of course ... "
5. Based on the experience of Hong Kong's permission system, the authorization regime is often misused to put an end to assemblies, with which the government is uncomfortable. Assemblies supporting democracy or civic rights held in the authoritarian states may face more challenges. Even for the city's largest civic group Civil Human Rights Front, the police had declined to issue the permission letter, and the organizers were forced to call off the demonstration in August last year. It is clear that once the authorization regime is adopted, the mechanism is probably misused. Therefore, we recommend the following amendment:
6. **"Authorization regimes, where those wishing to assemble have to apply for permission (or a permit) from the authorities to do so, undercut the idea that peaceful assembly is a basic right. Countries should replace the current authorization regimes with notification regimes. Notification regimes, for their part, must not in practice function as authorization systems."**

Section 6: Duties and powers of law enforcement agencies

1. Para 96 reads 'An assembly that remains peaceful but which nevertheless causes a high level of disruption, such as the extended blocking of traffic, may be dispersed, as a rule, only if the disruption is “serious and sustained”.'
2. We doubt whether the severity of disruption should be used to determine the nature of peaceful assemblies. We think it rather a chicken-or-the-egg question as the extended blocking of traffic can be sparked by widespread public anger, which is little to do with the nature of assemblies. Hong Kong's occupy movement took 79 days in the pursuit of universal suffrage, while over one-fourth of the city's population took part in the anti-extradition demonstration. Both of them caused severe disruptions to the traffic with many roads blocked. We recommend para 96 can be amended as follows:
3. **"An assembly that causes a high level of disruption cannot solely serve as a justification for dispersion or classifying the assembly as violent."**
4. Para 99 reads "The use of unnecessary or disproportionate force may breach articles 7 and 9 of the Covenant and, where death results, may violate article 6."
5. We recommend an independent body with all necessary powers and resource which can monitor and investigate the use of force by police agents during assemblies. Hong Kong's case well demonstrates that para 99 will probably become hollow promises if there is no third-party, powerful watchdog to monitor the implementation. Hong Kong's police watchdog Independent Police Complaints Council, whose members are appointed by the executive, lacks investigatory powers to subpoena documents and summon witnesses. That is part of the reasons why the city's police brutality is completely unchecked. Therefore, we recommend that the following sentence can be added after the first sentence of para 99:
6. **"The State should set up an independent committee which has all necessary legal powers to monitor the necessity and proportionality of the use of police force. Those powers include the powers to subpoena documents and summon witnesses. Criminal and disciplinary sanctions should be imposed on those who involve in disproportionate use of force in assemblies."**
7. Para 102 reads "All use of force by law enforcement officials should be recorded and reflected in a transparent report. Where injury occurs, the report should contain sufficient information to establish whether the use of force was necessary and proportionate …"
8. We recommend that those reports have been accessible to the public and media workers. In the case of Hong Kong, police officers often refused the number of crowd control weapons and the reasons for the use of those weapons. In some occasions, the accounts that police has provided were discovered not compatible with the facts. While the police claimed protesters refused to disperse, footages showed that police officers did not allow assembly participants to leave. We believe that opening the access of those reports to the public is the only way to promote "a culture of accountability for law enforcement officials during assemblies" mentioned in para 100, we, therefore, recommend the sentence can be amended as follows:
9. **"All use of force by law enforcement officials should be recorded and reflected in a transparent and detailed report. No matter whether injury occurs, the report should be compiled shortly after the concerned assembly has ended, and should be fully accessible to the public. The report should contain sufficient information to establish whether the use of force was necessary and proportionate, and set out the details of the incident ... and the consequences. Independent mechanisms should be set up to handle complaints and appeals concerning the factuality of the reports and the appropriateness of the police's decisions."**
10. Para 103 reads "Any deployment of plainclothes officers in assemblies must be reasonably necessary in the circumstances and such officers (or other State agents) must never incite violence … "
11. We think para 103 opens a dangerous opportunity as it grants the police the power to deploy plainclothes to assemblies which may put participants' right in peril. In the authoritarian regime, plainclothes is commonly deployed to the crowd and are often found deliberately provoking people's sentiments. Local media reported that Hong Kong police deployed plainclothes who ordered participants to attack patrol cars or caused chaos among the crowd. Some even disguised as reporters to take pictures of every participant in the assemblies. In some occasions, the police even deployed more than 50 plainclothes who attacked other participants with batons or unlawfully arrested participants after the end of the assembly. In the eye of the authoritarian regime, all deployment of plainclothes to civil society would be considered as "reasonably necessary." We suggest the whole paragraph should be crossed out and add the following sentence:
12. **"Officers (or other State agents) who incite violence or cause chaos in the assemblies should face criminal charges for their misconducts, just like ordinary citizens. Local legal systems should enable citizens to file charges against the concerned officers and state agents in courts. The police authority should provide all necessary information and details concerning the deployment."**

Kind regards,

Demosistō

info@demosisto.hk

Mr. Sunny Cheung

sunnycheung0303@gmail.com