

Comments on the Human Rights Committee’s Draft General Comment No. 37 on Article 21: Right of Peaceful Assembly

February 2020

I. Introduction

Justice Centre Hong Kong (Justice Centre) appreciates this opportunity to provide feedback to the Human Rights Committee’s draft general comment no. 37 on the right of peaceful assembly under Article 21 of the International Covenant on Civil and Political Rights (ICCPR). Our comments to the draft general comment are based on challenges in actualising the right of peaceful assembly as observed in Hong Kong.

II. Riot

Justice Centre recommends that the Human Rights Committee do not include the phrase “and is sometimes referred to as a riot” in paragraph 19 (“A violent assembly is one that is characterized by [widespread and serious] violence [, and is sometimes referred to as a riot]”) in the general comment, as the purpose of this phrase is unclear.

Further, the term “riot” can be politically charged and has been used by states as a label to suppress the freedom of expression, peaceful assembly and political opposition. For example, the 1989 Tiananmen Square demonstrations in China, which ended with a bloody crackdown, were referred to as “counter-revolutionary riots” by the Chinese government¹.

III. Isolated acts of violence by some participants in an assembly

At paragraph 19 of the general comment, it is noted that: “isolated acts of violence by some participants should not be attributed to other participants”. There are concerns in Hong Kong that the existing statutory definition of “riot” is wide enough to implicate participants in isolated acts of violence committed by other participants in an assembly. As such, Justice Centre asks that the Human Rights Committee provide more guidance on what constitutes *isolated* acts of violence.

Under Hong Kong law, section 19 of the Public Order Ordinance, Cap. 245² defines “riot” as follows:

¹ Michael Martina, Tony Munroe, “Li Peng, hardline Chinese leader in Tiananmen crackdown, dies at 90”, *Reuters* (23 July 2019). Available at: <https://www.reuters.com/article/us-china-lipeng/li-peng-hardline-chinese-leader-in-tiananmen-crackdown-dies-at-90-idUSKCN1UI19Y>

² The Public Order Ordinance is available at: <https://www.elegislation.gov.hk/hk/cap245>

“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”.

The maximum penalty for riot is imprisonment for 10 years³.

The existing definition leaves prosecutors with a wide discretion to define an act as a riot. Multiple commentators have raised concerns about potential abuse of the provision⁴. For example, the Human Rights Committee expressed concerns in their 2013 Concluding Observations on Hong Kong that terms such as “unlawful assembly” in the Public Order Ordinance, which forms part of the definition of “riot” under the same ordinance, may facilitate excessive restriction to rights under the ICCPR⁵.

In one case concerning rioting, the District Court of Hong Kong held that an act that breached the peace committed by one person is sufficient to transform an unlawful assembly into a riot⁶. Once an assembly becomes a riot, a person who takes part in acts that breached the peace will be committing the offence of taking part in a riot. The court noted, for example, that an individual who is at the scene of the riot and supports or encourages others to participate in a riot may be considered to be committing the offence of taking part in a riot⁷. Alarming,ly, this interpretation of “riot” appears to be wide enough to attribute acts of violence committed by some participants of an assembly to the others.

We invite the Human Rights Committee to consider providing more guidance on this issue. For example, whether:

- Domestic law that sanctions violent behaviour in assemblies should provide a clear and precise definition of violent behaviour;

³ Section 19(2), Public Order Ordinance.

⁴ See for example, Holmes Chan, “Ex-governor Chris Patten calls Public Order Ordinance ‘vague,’ ‘open to abuse’ following Edward Leung riot sentencing”, *Hong Kong Free Press* (11 June 2018). Available at: <https://www.hongkongfp.com/2018/06/11/ex-governor-chris-patten-calls-public-order-ordinance-vague-open-abuse-following-edward-leung-sentencing/> and Jeffie Lam, “Edward Leung riot sentence: too harsh, or necessary as deterrent? Legal scholars, politicians split over jail term for Hong Kong independence activist”, *South China Morning Post* (11 June 2018). Available at: <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2150280/edward-leung-riot-sentence-too-harsh-or>

⁵ Human Rights Committee, “Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)” (29 April 2013) UN Doc. CCPR/C/CHN-HKG/CO/3 at paragraph [10]. Available at: <https://undocs.org/en/CCPR/C/CHN-HKG/CO/3>

⁶ 香港特別行政區訴莫嘉濤及另八人, Case No. DCCC 901/2016 at paragraph [104]. Available at:

<https://www.hklii.org/cgi-bin/sinodisp/chi/hk/cases/hkdc/2018/225.html?stem=&synonyms=&query=DCCC%20901/2016> (in Chinese).

⁷ 香港特別行政區訴莫嘉濤及另八人 at paragraph [111].

- Domestic law should not sanction individual participants who themselves do not commit any violent act, even if others in the assembly do so⁸.

IV. Notification and authorization regimes

Justice Centre invites the Human Rights Committee to elaborate on how appeal processes and/or other remedies within notification or authorization regimes should comply with Article 21.

In Hong Kong, the Public Order Ordinance provides for a statutory notification regime and its appeal process. Under the regime, the Commissioner of Police has discretion to object or impose conditions to a public meeting or procession being held⁹. Applicants are entitled to an appeal process¹⁰. Members of the Appeal Board are appointed by the Chief Executive, and the Chairman of the Appeal Board must be a retired judge or magistrate. Each appeal hearing is presided by four members¹¹. The Appeal Board should determine the appeal “with the greatest expedition possible” so as to not frustrate a public meeting due to delays in the appeal process. Civil society actors have questioned the impartiality of the Appeal Board, given members are appointed by the Chief Executive and it is reported that most members are affiliated with the pro-government camp¹².

Although the Commissioner of Police’s decision is subject to judicial review, the court is unlikely to be able to process the application before the date on which the public meeting is proposed to be held.

Having regard to the issues discussed above, we invite the Human Rights Committee to provide guidance on how appeal process and/or other remedies within notification or authorization regimes should comply with Article 21. For example, whether:

⁸ See, for example, the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly* (Second Edition), (2010) at paragraph [111] .

⁹ See Part III, Public Order Ordinance.

¹⁰ Section 16, Public Order Ordinance.

¹¹ Section 43, Public Order Ordinance

¹² Lam Yu-wah, “過半委員親建制 遊行上訴委員會近 5 年駁回逾半上訴” (Half of the public assembly Appeal Board members belong to the Pro-establishment Camp. The Appeal Board rejected more than half of the appeals heard in the last 5 years), *HK01*, (1 August 2016). Available at: <https://www.hk01.com/%E7%AA%81%E7%99%BC/34620/%E9%81%8E%E5%8D%8A%E5%A7%94%E5%93%A1%E8%A6%AA%E5%BB%BA%E5%88%B6-%E9%81%8A%E8%A1%8C%E4%B8%8A%E8%A8%B4%E5%A7%94%E5%93%A1%E6%9C%83%E8%BF%915%E5%B9%B4%E9%A7%81%E5%9B%9E%E9%80%BE%E5%8D%8A%E4%B8%8A%E8%A8%B4> (in Chinese) and Cheng Kai-yuen, “反佔中政協入遊行上訴委員會” (Anti-occupy movement member of the Chinese People's Political Consultative Conference appointed to public assembly appeal board), *Apple Daily*, (11 November 2017). Available at: <https://hk.news.appledaily.com/local/daily/article/20171111/20210895> (in Chinese).

- The appeal process should be independent and impartial;
- Members of the appeal board should have a track record in human rights;
- The appeal process should be efficient and accessible given the time-sensitive nature of public assemblies.

V. Police training protocols

Justice Centre asks that the Human Rights Committee provide more guidance on how police training protocols should comply with Article 21.

In Hong Kong, the Police General Orders is a set of administrative guidelines and internal orders written for use by police officers¹³. Not all chapters of the Police General Orders are available to the public. Among the classified Chapters are Chapter 16 on Police Arms and Ammunition and Chapter 29 on the Use of Force and Firearms. The police force cites concerns over its operations to justify the non-disclosure¹⁴.

The Committee against Torture and the Human Rights Committee have expressed concerns over police powers in their Concluding Observations on Hong Kong, and recommended Hong Kong to bring the Police General Orders and related guidelines in conformity with international standards and publicise these guidelines¹⁵.

Justice Centre asks that the Human Rights Committee explain in the draft general comment that police training protocols must be in conformity with international law and standards, including protection for human rights guaranteed under the ICCPR, and recommend that police training protocols be publicised.

VI. Weapons

Justice Centre invites the Human Rights Committee to elaborate on how the use of less-lethal weapons during policing of assemblies should comply with Article 21.

At paragraph 92 of the draft general comment, it is noted that “State parties should ensure that all weapons, including less-lethal weapons, are subject to strict independent testing and should evaluate and monitor their impact on the rights to life and bodily integrity and the mental well-being of those affected”.

¹³ Hong Kong Police Force, “Public Access to Police General Orders” LC Paper No. CB(2)235/02-03(05) (October 2002) at paragraph [4]. Available at: <https://www.legco.gov.hk/yr02-03/english/panels/se/papers/se1107cb2-235-5e.pdf>

¹⁴ Hong Kong Police Force, “Public Access to Police General Orders” at paragraph [7].

¹⁵ Committee against Torture, “Concluding observations on the fifth periodic report of China with respect to Hong Kong, China” (3 February 2016), UN Doc. CAT/C/CHN-HKG/CO/5, at paragraph [15 (d)]; Human Rights Committee, “Concluding observations on Hong Kong” (29 April 2013) at paragraph [10].

Since the beginning of the extradition bill protest in June 2019, the Hong Kong police force has used various weapons in policing the protests, including tear gas and water cannon trucks that can eject water laced with chemicals¹⁶

The frequent use of tear gas has sparked public health concerns¹⁷. The Hong Kong Government initially refused to disclose information about the tear gas, including manufacturing details and chemical composition¹⁸. After repeated calls, the Government provided limited information on the tear gas' chemical composition and treatment methods¹⁹. Further, the police have also admitted to using expired tear gas, which may degrade into toxic chemicals²⁰. A reporter who frequently reports from protests frontlines was diagnosed with chloracne, a symptom of dioxin exposure²¹.

Similarly, the use of water cannon trucks that can eject a blue liquid which causes severe skin irritation has sparked concerns. The police have insisted that the blue liquid was non-toxic and refused to disclose the chemical composition of the liquid²².

In light of paragraph 92 of the general comments and the experience in Hong Kong, we invite the Human Rights Committee to provide more guidance on the use of less-lethal weapons. For instance, whether:

¹⁶ Kris Cheng, "Hong Kong police used crowd control weapons 30,000 times since June; over 6,000 arrested", *Hong Kong Free Press*, (10 December 2019). Available at: <https://www.hongkongfp.com/2019/12/10/hong-kong-police-used-crowd-control-weapons-30000-times-since-june-6000-arrests/> ; Holmes Chan, "Greenpeace questions Hong Kong police claim that blue dye from water cannon is 'harmless'", *Hong Kong Free Press*, (25 October 2019). Available at: <https://www.hongkongfp.com/2019/10/25/greenpeace-questions-hong-kong-police-claim-blue-dye-water-cannon-harmless/>

¹⁷ Verna Yu, "Dead birds and rashes: Hong Kong residents fear teargas poisoning", *The Guardian* (4 December 2019). Available at: <https://www.theguardian.com/world/2019/dec/04/nowhere-is-safe-hong-kong-residents-fearful-of-teargas-poisoning>

¹⁸ "Cops keep teargas chemicals a secret", *The Standard* (20 November 2019). Available at: <https://www.thestandard.com.hk/breaking-news/section/3/137340/Cops-keep-teargas-chemicals-a-secret>

¹⁹ See for example, "Chemical composition of the teargas used in the protest this year", *Freedom of Information request made by Scott Edmunds to the Hong Kong Police Force Operations Wing* (29 November 2019). Available at: https://accessinfo.hk/zh_HK/request/chemical_composition_of_the_tear#incoming-1228 ; and "Air Quality Reports for Dioxin", *Freedom of Information request made by Scott Edmunds to the Environmental Protection Department* (29 November 2019). Available at: https://accessinfo.hk/zh_HK/request/air_quality_reports_for_dioxin#incoming-1221

²⁰ Kevin K.C. Hung, Emily Y.Y. Chan and Colin A. Graham, "The Hong Kong government must come clean about tear gas", *Nikkei Asian Review* (20 November 2019). Available at: <https://asia.nikkei.com/Opinion/The-Hong-Kong-government-must-come-clean-about-tear-gas>

²¹ "Hong Kong reporter diagnosed with chloracne after tear gas exposure, prompting public health concerns", *Hong Kong Free Press* (14 November 2019). Available at: <https://www.hongkongfp.com/2019/11/14/hong-kong-reporter-diagnosed-chloracne-tear-gas-exposure-prompting-public-health-concerns/>

²² Holmes Chan, "Greenpeace questions Hong Kong police claim that blue dye from water cannon is 'harmless'", *Hong Kong Free Press*, (25 October 2019). Available at: <https://www.hongkongfp.com/2019/10/25/greenpeace-questions-hong-kong-police-claim-blue-dye-water-cannon-harmless/>

- The relevant authorities must disclose all relevant information about such weapons, including their chemical composition and manufacturing details, such as the source company, the production location, testing results, expiry date and instruction manuals; and
- The relevant authorities must provide information on effective medical treatment for injuries inflicted by the weapons.

VII. Preventive detention

Justice Centre is concerned about the discussion on the use of “preventive detention” of targeted individuals to keep them from participating in assemblies at paragraph 93 of the draft general comment. As far as we are aware, “preventive detention” is not a concept that exists in common law jurisdictions. We recommend the Human Rights Committee do not use this term in its discussion to avoid confusion.

Please contact Rachel Li (rachel@justicecentre.org.hk), Research and Policy Officer at Justice Centre Hong Kong, with any questions regarding these comments.

About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit organisation focused on the promotion of human rights through our legal, psychosocial, research, policy and advocacy work. We are committed to driving change for a just and fair society. Founded in 2007 as The Hong Kong Refugee Advice Centre, over seven years we helped over 2,000 men, women and children on the road to a new life. Building on our expertise in refugee issues, in 2014 we identified a clear need for an increased response to tackling forced labour and human trafficking in Hong Kong, and expanded our remit to fill this gap and rebranded as Justice Centre Hong Kong. We now help around 300 people each year through our direct services and aim to benefit many more through our research, policy and advocacy work.