**COMMENTS OF THE HONG KONG BAR ASSOCIATION**

**ON DRAFT GENERAL COMMENT 37**

**(ARTICLE 21 – RIGHT OF PEACEFUL ASSEMBLY)**

**Introduction**

1. The Hong Kong Bar Association (“**HKBA**”) welcomes the work of the United Nations Human Rights Committee, and of Special Rapporteur Mr Christof Hynes, on draft General Comment 37 (“**the Draft Comment**”). This is a particularly timely and relevant project, as recent events in Hong Kong and elsewhere show.
2. HKBA sets out its comments on the Draft Comment below. References to paragraph numbers are to those in the Draft Comment.

**1. General remarks**

1. In paragraph 1 of the Draft Comment, HKBA supports the inclusion of the bracketed text – *“the rule of law”*.

**2. Scope of the Right of Peaceful Assembly**

1. The second sentence of paragraph 13 of the Draft Comment reads: *“Assemblies can be held on publicly or privately-owned property [provided the property is publicly accessible].”* The HKBA agrees that Article 21 applies to peaceful assemblies that occur on private property. It is suggested that the words in brackets should be omitted. In principle, the application of Article 21 to a peaceful assembly occurring on private property should not depend on the property being publicly accessible. For example, a peaceful religious gathering taking place on private premises should not cease to enjoy protection under Article 21 just because it is open to a limited class of persons, not the public at large. Moreover, a peaceful gathering of participants in an industrial action taking place on the employer’s private premises should in principle fall within the scope of Article 21, as should a gathering or meeting of residents within a housing estate – notwithstanding that the public at large may not have a right to access these areas.
2. Paragraph 22 presents two options concerning assemblies involving dissemination of propaganda for war, or of and advocacy of national, racial or religious hatred that constitutes incitement to discrimination or hostility or violence. The HKBA suggests Option 2 is the more coherent approach. The content of the collective expression at an assembly should be taken into account when assessing whether any restriction imposed on it is proportionate, not at the stage of categorising whether a given event constitutes a peaceful assembly or something else.
3. In paragraph 31, the HKBA favours the formulation that: *“The State is obliged to take all possible measures to protect the participants and as far as possible to allow the assembly to take place in an uninterrupted manner”,* as opposed to the suggested alternative (*“all appropriate measures”*). The word *“appropriate”* in this context could be read as suggesting a subjective standard, effectively leaving States parties to decide how far they will go in protecting the safety of participants in an assembly. In a case in which authorities have failed to keep participants at a peaceful assembly safe, it should not be imagined that it is sufficient for States parties to assert that the measures taken were judged to be appropriate at the time. This approach is consistent with the statement in paragraph 58 that: *“in the exceptional case where the State is* ***manifestly unable*** *to protect the participants from such threat, restrictions on the assembly may be imposed.”*
4. In relation to the first sentence of paragraph 34, it is suggested that this should conclude *“under article 21 and other provisions of the Covenant”*. This reflects the fact that, while the freedom of the press is primarily protected under other provisions of the Covenant, the guarantee of the right of peaceful assembly under Article 21 itself presupposes and requires that the press, and others such as human rights monitors, have unimpeded access.
5. The final sentence of paragraph 44 has been the subject of valuable judicial guidance from the Hong Kong Court of Final Appeal. In ***Leung Kwok Hung v HKSAR*** [(2005) 8 HKCFAR 229](https://www.hklii.hk/eng/hk/cases/hkcfa/2005/41.html), the relevant statutory scheme required that any public procession be notified in advance to the Commissioner of Police, who might issue a letter of no consent (thereby rendering the assembly unauthorised) *“if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedom of others.”* The Court held that this provision represented an unconstitutional restriction on the freedom of assembly because it was not prescribed by law. A mere recitation of the general criteria listed in Article 21 was too broad to give an adequate indication of the scope of the discretion to restrict an assembly.

Hong Kong Bar Association

21 February 2020