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UMBRELLA MOVEMENT: END POLITICALLY MOTIVATED PROSECUTIONS IN HONG KONG

AMNESTY INTERNATIONAL

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Cover photo: *Nine leaders of Occupy Central and Umbrella Movement stand outside the Eastern District Court, Hong Kong, March 2017. © Raphael Wong Ho-ming*

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1. INTRODUCTION

On 19 November 2018, the trial of nine leaders of the 2014 pro-democracy Umbrella Movement protests will start. They are facing vague and ambiguous charges, each carrying a maximum penalty of seven years' imprisonment.

Among the nine protesters standing trial are the three co-founders of the Occupy Central campaign: legal scholar Professor Benny Tai Yiu-ting, sociologist Professor Chan Kin-man and retired pastor Reverend Chu Yiu-ming. In addition to these three – dubbed by local media as the Occupy Central Trio (hereafter, "the Trio") – the six other defendants in the case include student leaders, lawmakers and political party leaders.

Amnesty International believes that the charges against the nine protesters are based on their peaceful exercise of the rights to freedom of expression and peaceful assembly, in connection to their actions in the largely peaceful protests of 2014.

This is the latest prosecution of Umbrella Movement protesters by the Hong Kong government, following the imprisonment of three student leaders in 2017.

By continuing to prosecute prominent figures of the Umbrella Movement protests after undue delays, hundreds of other protesters are left uncertain if the government is planning to pursue charges against them as well. This uncertainty, together with the use of vague and ambiguous charges and harsh sentences, is having a chilling effect on the rights to freedom of peaceful assembly and expression in Hong Kong.

Amnesty International urges the Hong Kong government to stop using politically motivated prosecutions and other legal procedures against peaceful protesters to silence critical voices and deter people from participation in the public sphere. The organization urges the Hong Kong authorities to drop the charges against the nine leaders of the Umbrella Movement as they stem solely from the peaceful exercise of their rights to freedom of expression and peaceful assembly.

2. THE OCCUPY CENTRAL CAMPAIGN

The prosecution of the Trio relates to the planning and implementation of the "Occupy Central with Love and Peace" campaign, which was a part of the Umbrella Movement protests.

Launched at a press conference in March 2013, the Occupy Central campaign advocated for the democratic election of the city's head of government in the election scheduled for 2017.

The campaign was to urge Beijing to honour its promise, as stipulated in Hong Kong's Basic Law, that Hong Kong's head of government shall be selected by universal suffrage. More than 40 sessions of discussion were held over the course of a year, during which campaigners engaged with thousands of participants from different communities to formulate several election reform proposals. In June 2014, a "civil referendum" was carried out online and offline in which almost 800,000 people took part in selecting a proposal to be submitted to the government. The "civil referendum" also gave a decision for pro-democrat lawmakers to veto any government proposal that did not meet

international standards and give people genuine choices to elect the head of government.[1]

Organizers of the campaign indicated they planned to achieve a democratic election system through dialogue and that only if these failed would they call for a civil disobedience action, later known as the Occupy Central action.[2] As part of this non-violent direct action, peaceful protesters would be called to block several roads in Hong Kong's Central District, the heart of the city's financial centre.

The preparation of the Occupy Central action involved discussions and training of hundreds of participants for over nine months. In what was seen by the protesters as a trial run of the Occupy Central action, thousands of people protested in Central after a march on 1 July 2014 and 511 of them were arrested for their peaceful participation in the demonstrations.[3]

The organizers knew that this non-violent direct action could possibly contravene local regulations on peaceful assembly. They were prepared to accept any legal penalties for their peaceful actions in order to show that Hong Kong's law and regulations on public assemblies are unfair and not in line with international human rights law and standards.

3. UMBRELLA MOVEMENT PROTESTS

The Umbrella Movement protests refer to the overwhelmingly peaceful large-scale pro-democracy protests carried out over 79 days between September and December 2014.

On 31 August 2014, the Standing Committee of the National People's Congress in Beijing announced the decision on how "universal suffrage" would be implemented in Hong Kong. It imposed restrictions and procedures that the pro-democracy camp considered barriers for people with different political views to run for election of the government head.[4] In late September 2014, two youth-led organizations, the Hong Kong Federation of Students and Scholarism, organized a sit-in outside of the government headquarters to protest Beijing's decision.

On 26 September 2014, a group of protesters climbed into the fenced-off forecourt of the government headquarters, known as "Civic Square". Police responded disproportionately, using pepper spray on the protesters and arresting student leaders. On the following days, even more people joined the protests in response to the police reaction.[5]

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[1] Occupy Central with Love and Peace, "Nearly 800 thousand Hong Kong people voted against non-genuine universal suffrage", 30 June 2014, oclp.hk/index.php?route=occupy/eng_detail&eng_id=15

[2] Occupy Central with Love and Peace, "Official statement of OCLP in response to the decision of the National People's Congress Standing Committee on Hong Kong's constitutional reform", 31 August 2014, oclp.hk/index.php?route=occupy/eng_detail&eng_id=20

[3] Amnesty International, "Hong Kong: Mass arrest a disturbing sign for peaceful protest", 2 July 2014, www.amnesty.org/en/latest/news/2014/07/hong-kong-mass-arrests-disturbing-sign-peaceful-protest

[4] "NPC decision on Hong Kong's constitutional development", 31 August 2014, www.fmcoprc.gov.hk/eng/syzx/tyflsw/t944943.htm.

[5] M. Au, "I have not seen anything like this in decades", 1 October 2014, www.amnesty.org/en/latest/news/2014/10/i-have-not-seen-anything-like-this-in-decades

The Trio joined the student-organized protest and announced, in the early morning of 28 September 2014, that the civil disobedience action known as Occupy Central had begun at the area outside of the government headquarters in the Admiralty district.[6]

People continued to gather, occupying several roads around the government headquarters. On the afternoon of 28 September 2014, police deployed tear gas in an attempt to disperse the peaceful protesters.

This excessive use of force against peaceful protesters triggered an influx of even more people to join the protests that would become known as the Umbrella Movement. Over the next 11 weeks, members of the public gathered in main roads in different districts of the city until police cleared the protest sites in December 2014.

4. CRIMINALIZATION OF "UNAUTHORIZED ASSEMBLY"

Under Hong Kong's Public Order Ordinance, those wishing to organize a protest are required to obtain "a notice of no objection" from the police before an assembly may proceed.[7] Police have the power to prohibit public gatherings or impose requirements or conditions on public gatherings where the police "reasonably consider it necessary in the interest of national security or public safety, public order or for the protection of the rights and freedom of others".[8]

However, "national security" is defined in Article 2 of the Public Order Ordinance simply as the "safeguarding of the territorial integrity and the independence of the People's Republic of China". This vague definition has allowed the police to place excessive restrictions on assemblies in Hong Kong.

Under international human rights law, anyone who wishes to hold a demonstration should be able to do so without requiring permission or authorization from the authorities. States may require prior notice of assemblies, but such notification regimes should not be unduly bureaucratic and should only serve the purpose of allowing the authorities to facilitate the conduct of assemblies and enabling them to take measures to protect public safety and the rights of others.[9]

In cases where prior notification is required, failure to comply should not be subject to criminal or administrative sanctions that result in fines or imprisonment. The mere fact that prior notice is not provided should not render an assembly unlawful, and consequently should not be used as a basis for dispersing the assembly.[10]

In Hong Kong, holding or participating in an assembly without a "notice of no objection" or that contravenes the restrictions imposed by the police is considered a breach of the

[6] Occupy Central with Love and Peace, "Occupy Central has formally begun", 28 September 2014, oclp.hk/index.php?route=occupy/eng_detail&eng_id=30
[7] Article 14 of the Public Order Ordinance.
[8] Article 15 of the Public Order Ordinance.
[9] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27, 21 May 2012, para 28.
[10] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, 4 February 2016, para. 23.

prohibition against "unauthorized assembly" and can result in penalties of up to five years' imprisonment.

In the case of the sit-in that developed into the Umbrella Movement, the police only authorized an assembly to be held in an avenue outside the government headquarters and notified organizers that it had to be ended by 28 September 2014.[11] However, as the protests grew naturally out of the area that was initially demarcated by the authorities and extended until December 2014, the authorities have considered them to be illegal under Hong Kong law and many protesters were arrested for offences related to "unauthorized assembly".

5. PROSECUTED ON "PUBLIC NUISANCE" RELATED CHARGES

When the Trio handed themselves over to the police on 3 December 2014, they admitted taking part in a possibly unauthorized assembly. The police did not arrest or charge them at that time; instead, they waited until January 2015 to arrest them for taking part in, organizing and inciting others to take part in an "unauthorized assembly". They were released that same day.

In March 2017, the initial charges against the Trio and six other leaders of the protests were changed to offences related to "public nuisance", including "conspiracy to commit public nuisance", "incitement to commit public nuisance" and "incitement to incite public nuisance".

However, instead of imposing the charges of "public nuisance" under statutory law, which carries a maximum penalty of three months' imprisonment and a fine, the government took the relatively rare step of charging them under common law, which carries a maximum penalty of seven years' imprisonment and a fine. Since common law crimes are determined by precedent, they are often relatively ambiguous and abstract compared to statutory law, which defines offences more clearly.

The charge of "conspiracy to commit public nuisance" is based on the Trio's introduction and preparation of the civil disobedience action to block roads in the Central District, together with volunteers and participants of the campaign, and the deployment of teams of pickets, volunteers and material to support the Umbrella Movement protests.

The Trio, together with student leaders Tommy Cheung Sau-yin and Eason Chung Yiu-wa, lawmakers Tanya Chan and Shiu Ka-chun, and political leaders Raphael Wong Ho-ming and Lee Wing-tat, are also being prosecuted on "incitement to commit public nuisance" and "incitement to incite public nuisance".

Tommy Cheung, Eason Chung, Tanya Chan and Shiu Ka-chun are being prosecuted for mobilizing protesters on 27–28 September 2014, when they were hosting the protest. They urged protesters, through loudspeakers, phone calls and text messages, to stay in the sit-ins to prevent police clearance of the site and asked them to call up more people to gather in different roads around the government headquarters.

[11] Occupy Central with Love and Peace, "Assembling at main government centres lawful. Police must rescind untrue statement", 27 September 2014, oclp.hk/index.php?route=occupy/eng_detail&eng_id=57

Raphael Wong Ho-ming, the vice chairperson of political party League of Social Democrats, and Lee Wing-tat, former chair of the Democratic Party, are being prosecuted for facilitating the protest on the afternoon of 28 September 2014, hours before the police fired tear gas against the demonstrators. They were directing those arriving to the protest to surrounding streets after police cordoned off different points of access to the protest area outside the government headquarters, thereby substantially extending the protest area.

The prosecution is using videos as a primary source of evidence against the protesters. Some were already available in the public domain, such as videos of the Trio's press conference to initiate the Occupy Central campaign and a subsequent discussion with hundreds of participants about the plan, as well as a radio interview and speeches after the 1 July 2014 protest.

The main evidence to support the charges of "inciting others to commit public nuisance" and "incitement to incite public nuisance" are videos taken by the police during the protests of 27–28 September 2014. These include the Trio's announcement of joining the student protesters and starting the Occupy Central protest; the announcement of the deployment of pickets, volunteers and resources to support the Umbrella Movement; and organizers using loudspeakers to mobilize protesters.

6. THE CHILLING EFFECT OF POLITICALLY MOTIVATED PROSECUTIONS

By seeking lengthy prison sentences against peaceful protesters, the prosecution of participants in the Umbrella Movement is having a chilling effect on the rights to freedom of expression and peaceful assembly in Hong Kong. This effect is especially felt by those taking on issues deemed sensitive by the authorities, such as Hong Kong's autonomy or the promotion of democracy.

The Hong Kong government has arrested and prosecuted many peaceful protesters since the Umbrella Movement, usually on vague charges related to "unlawful assembly", "unauthorized assembly" and "public disorder". These charges are based on the Public Order Ordinance, the provisions and application of which have been repeatedly criticized by the UN Human Rights Committee for failing to fully meet international human rights law and standards on the right of peaceful assembly.[12]

In July 2016, three student leaders were convicted after climbing into "Civic Square" during the protest of 26 September 2014. Joshua Wong and Alex Chow were found guilty of "taking part in an unlawful assembly" and Nathan Law of "inciting others to take part in an unlawful assembly".[13]

The court originally ordered non-custodial sentences against the three student leaders, but prosecutors appealed to seek harsher penalties. In August 2017, they were handed

[12] Concluding observations of UN Human Rights Committee: Hong Kong, UN Doc. CCPR/C/CHN-HKG/CO/3 (2013), para.10; Concluding observations of UN Human Rights Committee: Hong Kong. UN Doc. CCPR/C/79/Add.117 (1999), para. 19.
[13] Amnesty International, "Hong Kong: Guilty verdicts against student leaders latest blow for freedom of expression", 21 July 2016, www.amnesty.org/en/latest/news/2016/07/hong-kong-guilty-verdicts-studentleaders-latest-blow-for-freedom-of-expression

jail terms of six to eight months and were imprisoned before being released on bail in October and November 2017 pending an appeal. On February 2018, the Court of Final Appeal overturned the jail sentences.[14]

After the conviction of the three student protesters in 2017 for "unlawful assembly", civil society organizations became more cautious about whether to stage protests that could be charged under the Public Order Ordinance. Young activists have said that because of their limited human and financial resources they are cautiously thinking through whether to organize peaceful protests or not, as they could not bear to divert their energy and limited resources to defend themselves in court if they were to stand trial.[15]

The impact of a potential conviction of the nine protest leaders of the Umbrella Movement can be felt more widely, as the government could then refer to the sentence to present charges of "conspiracy" and "incitement" to further prosecute other Umbrella Movement protesters. The pickets, volunteers and participants of the Occupy Central campaign could be considered as conspirators of the Trio and be prosecuted with the same charge of "conspiracy to commit public nuisance". Protesters who responded to the calls and called others by phone or social media to block the roads around the government headquarters could be charged with "incitement to commit public nuisance".

By the end of the protests, the government had arrested 955 people who had taken part in the Umbrella Movement protests over the course of the 79 days and another 48 after the protests had ended.[16] Many were soon released, but according to the protesters, police notified them that criminal investigations were still ongoing and they would be re-arrested and charged should there be sufficient evidence to prosecute them. A pattern of long intervals between initial arrests and the decision to prosecute has meant that only a small proportion of the protesters that were arrested have faced trial.

According to a letter from the government in reply to Amnesty International, as of 31 August 2017, 225 people who were arrested during or after the Umbrella Movement either had had or were undergoing judicial proceedings. More than four years on from the start of the Umbrella Movement protests, scores of the protesters remain in legal limbo, uncertain if the police will proceed with the charges against them.

7. INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND EXPRESSION

The right to peaceful assembly is protected under Article 21 of the International Covenant on Civil and Political Rights (ICCPR), to which Hong Kong is bound, as well as under Article 39 of the Hong Kong Basic Law, which states that the provisions of the ICCPR as applied to Hong Kong shall remain in force.

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[14] Amnesty International, "Hong Kong: 'Vindictive' jail terms for pro-democracy leaders", 17 August 2017, www.amnesty.org/en/latest/news/2017/08/hong-kong-vindictive-jail-terms-for-pro-democracy-leaders

[15] Now News, "13+3", 26 August 2017, news.now.com/home/local/player?newsId=233732

[16] The Government of the Hong Kong Special Administrative Region, "Prosecution work relating to 'Occupy Movement'", 8 February 2017, www.info.gov.hk/gia/general/201702/08/P2017020800526.htm

States have an obligation to respect, protect and fulfil the right to peaceful assembly without discrimination of any kind and have a positive obligation to facilitate in law and practice the right to peaceful assembly.

While the right to peaceful assembly is not absolute, restrictions may only be placed if they are provided by law and if they are necessary and proportionate to a legitimate aim, which is limited to the protection of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Even when a restriction is considered to be pursuing a legitimate aim, the actual restriction imposed must be the least intrusive and proportionate to the specific threat being addressed.

Public protests, by their own nature, involve a certain level of disruption to daily life, including disruption of traffic. The UN Special Rapporteur on the rights to peaceful assembly and of association has stated that peaceful assemblies should be regarded as an equally legitimate use of public space as the more routine purposes for which public space is used, such as commercial activity or for pedestrian and vehicular traffic. Even laws that appear to be neutral – for example, those barring obstruction of traffic or commerce – may result in unlawful restrictions to the right to peaceful assembly if applied without exception to peaceful protests.

The authorities must ensure that the use of force by law enforcement during protests is avoided and only used in exceptional circumstances when strictly necessary and proportionate to a legitimate aim. Acts of sporadic violence should not be used by the authorities as a pretext to disperse a protest and impede peaceful protesters to continue the demonstration.

Under international human rights law and standards, a peaceful assembly does not lose its peaceful character due to sporadic violence or unlawful behaviour by some individuals. While Amnesty International acknowledges there were isolated incidents of small-scale violence in the Umbrella Movement protests, the protests were overwhelmingly peaceful.

The presence of smaller groups of people who engage in violence during a public assembly is not a sufficient reason for the police to restrict, prohibit or disperse the whole assembly. In such cases, police should use the least restrictive means to target the specific individuals who are engaging in violent acts and allow the rest to continue demonstrating peacefully.

8. CONCLUSION AND RECOMMENDATIONS

Amnesty International believes that the charges against the nine leaders of the Umbrella Movement protests stem solely from their non-violent direct actions in largely peaceful protests that are protected under international human rights law. Even if the protests caused a certain level of disruption to daily life, including to traffic and commerce, this should not be a justification for the government to punish peaceful protesters.

This is not the first time that the government of Hong Kong has prosecuted prominent figures of the pro-democracy Umbrella Movement, applying vague and ambiguous

charges. Based on the information available to Amnesty International, it appears that the Trio and the other six key protesters facing trial are being prosecuted under the disguise of a neutral law simply for mobilizing people to join the protest peacefully and that is intended as a pretext to deter peaceful protests, especially those related to sensitive issues such as Hong Kong's autonomy or the promotion of democracy.

Amnesty International believes that the use of videos of the Trio's press conferences, radio interviews and public speeches about the Occupy Central campaign as the major evidence against them clearly shows that the prosecutions are solely based on their peaceful exercise of their rights to freedom of expression and peaceful assembly protected by the ICCPR, Hong Kong's Basic Law and Bill of Rights Ordinance.

Amnesty International therefore urges the Hong Kong government to:

- Drop the charges against the nine leaders of the Umbrella Movement as they stem solely from the peaceful exercise of their rights to freedom of expression and peaceful assembly; and
- Stop using politically motivated prosecutions and other legal procedures against peaceful protesters to silence critical voices and deter people from participation in the public sphere.

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CONTACT US


info@amnesty.org


+44 (0)20 7413 5500

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Nine leaders of the 2014 pro-democracy Umbrella Movement protests in Hong Kong will stand trial on 19 November 2018. The vague and ambiguous charges, each carrying a maximum penalty of seven years' imprisonment, stem solely from their non-violent direct actions in largely peaceful protests that are protected under international human rights law. It appears that these prosecutions are intended as a pretext to deter peaceful protests, especially those related to sensitive issues such as Hong Kong's autonomy or the promotion of democracy. Amnesty International urges the Hong Kong government to drop the charges against the nine protesters, as they stem solely from the peaceful exercise of their rights to freedom of expression and peaceful assembly, and to stop using politically motivated prosecutions and other legal procedures against peaceful protesters to silence critical voices and deter people from participation in the public sphere.

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