

# Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them

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Friday, June 28, 2019

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Dear Chief Executive Lam and Secretary of Justice Cheng;

## **Re: Unlawful use of force by police on 12 June 2019**

Lawyers' Rights Watch Canada (LRWC)<sup>1</sup> writes to object to: a/ the 12 June 2019 use of force by Hong Kong police in contravention of the applicable international law; b/ the characterization of the 12 June 2019 protest as a 'riot;' and, c/ the detention and threatened prosecution of protesters for offences related to inciting, counseling or participating in a riot. This letter provides a summary of Hong Kong's international law obligations to enable protests and ensure protection of protesters from harm by police and others. LRWC calls on the Hong Kong governing bodies to:

1. set up an independent body of specialists to investigate the 12 June 2019 use of force by the police and ensure the appropriate accountability;
2. devise and implement, in consultation with knowledgeable civil society specialists, directives and an action plan for police responses to mass demonstrations that comply with Hong Kong's international human rights obligations;
3. ensure that the protesters arrested in relation to the 12 June 2019 protest are not charged with offences that are not supported by credible evidence; and,
4. Ensure that the protesters arrested are granted release or pre-trial release in accordance with the requirements of international human rights law and that they are released unless a competent court determines there is a significant risk of flight, reoccurrence or tampering with evidence and there is no alternative to detention that would prevent the established risk(s).

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<sup>1</sup> LRWC is a committee of lawyers and others who promote international human rights through advocacy, education and research. LRWC has consultative status with the United Nations (UN) Economic and Social Council

## BACKGROUND

Reports indicate that on 12 June 2019 Hong Kong police used force against anti-extradition protesters that resulted in injuries to at least 81 people. Amnesty International reported having evidence of 14 incidents “of excessive use of force by the Hong Kong Police on the ground during the mass protest on 12 June 2019” that violated international law. The Amnesty report cites the unlawful use of batons, rubber bullets, tear gas and pepper spray, restriction of journalists and medics and lack of visible identification of some police. At least 81 protesters were treated for injuries in 10 hospitals. 22 police also sustained injuries. 32 protesters were arrested, including five for riot related offences and 10 for crimes related to violence, unlawful assembly and assaulting police officers. Some people were arrested in hospital. Eight people have been released and charges have not been announced.<sup>2</sup>

On 13 June, Police Commissioner, Stephen Lo has confirmed that police fired 150 rounds of tear gas, “several” rounds of rubber bullets and 20 beanbag shots during the 12 June protests, that Special Tactical Squads were deployed and that approximately 5,000 police were deployed. The New York Times reported that police were responding to a small number of protestors outside the Legislative Council throwing bricks and other objects at the police.<sup>3</sup> Mass demonstrations since 12 June involving more than a million people, amply demonstrate the resolve of the people to protest peacefully to protect rights and promote democratic reform.<sup>4</sup>

## HONG KONG’S INTERNATIONAL LAW OBLIGATIONS

### **The right to peaceful protest is guaranteed in Hong Kong**

The international human right of individuals and groups to peacefully protest and express their dissent, individually and collectively, is guaranteed in Hong Kong through the legitimate expression of a number of fundamental freedoms under international human rights law (IHRL) binding on Hong Kong, including the Universal Declaration on Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>5</sup> Such rights include freedom of expression, opinion and belief; freedom of association and peaceful assembly; the right to participate in public affairs; and the right to an effective remedy for all human rights violations. The right to peacefully protest is reaffirmed in article 12 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (“UN Declaration on Human Rights Defenders”).

### **Obligation to ensure the effective exercise of the right to peaceful protests**

Hong Kong is obligated under IHRL to respect the rights to peaceful protest, including the presumption in favour of allowing peaceful protests and the right of individuals and groups to choose the cause or issue

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<sup>2</sup> *How not to police a protest: Unlawful Use of Force by Hong Kong Police*, Amnesty International, 21 June 2019. see pages 6, 17, 18. available at <https://www.amnesty.org/download/Documents/ASA1705762019ENGLISH.pdf>

<sup>3</sup> *New York Times*, Hong Kong Official Defends Police’s Use of Force Against Protesters, Mike Ives and Katherine Li, 19 June 2019.

<sup>4</sup> *Video: ‘Sea of lights’ – Drone footage reveals scale of Hong Kong’s pro-democracy G20 protest*, Hong Kong Free Press, 27 June 2019 available at <https://www.hongkongfp.com/2019/06/27/video-sea-lights-drone-footage-reveals-scale-hong-kongs-pro-democracy-g20-protest/?fbclid=IwAR0jWgcdAzO-VMETOfiJqLQYfI2Y1ObsIF7ZRKVU9D3jvyJS8GpZkiVWjJQ>

<sup>5</sup> In 1976, the Government of the United Kingdom ratified the *International Covenant on Civil and Political Rights* with certain reservations and declarations, and extended the Covenant to 10 British dependent territories including Hong Kong. Under the Joint Declaration of the Government of the United Kingdom of Great Britain and North Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (“Joint Declaration”) signed on 19 December 1984, it is provided both in Section XI of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region from 1 July 1997. The application of the Covenant is also provided for in Article 39 of the Basic Law.

of protest and its form, timing and location, by refraining from interfering with or curtailing the enjoyment of these rights, except to the extent permitted by IHRL. Hong Kong's obligations to ensure the effective exercise of the right to peacefully protest requires that Hong Kong:

- (a) refrain from committing violations, including through the use of excessive force, against individuals exercising their rights to peaceful assembly, expression and association;
- (b) protect individuals exercising these rights from abuses committed by non-State actors; and
- (c) fulfil these rights by taking positive measures to prevent any violations from occurring, and to ensure that everyone can freely and effectively exercise such rights.<sup>6</sup>

The duty to facilitate peaceful protests implies that protests are not *per se* a threat to public order. When protests occur, the authorities should therefore engage in an open, inclusive, and meaningful dialogue with those who protest.<sup>7</sup>

### **Restrictions on the right to protest are strictly limited**

No restrictions on the rights to freedom of expression, assembly and association and privacy are permitted under IHRL unless the restriction is:

- in conformity with the **law**, and
- **necessary** in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.<sup>8</sup>

In addition to the requirements of legality and necessity, any restriction on the right to freedom of peaceful protest must also conform to the principle of proportionality. That is, the restriction must be **appropriate** to achieve its protective function, be the least intrusive measure among those which might achieve the protective function, and be proportionate to the value to be protected.<sup>9</sup>

### **Presumption in favour of allowing peaceful assembly**

Even if some protesters are violent, Hong Kong is not and was not on 12 June 2019, justified in dispersing an otherwise peaceful the assembly. Under IHRL, an assembly is deemed peaceful if its organizers and participants have peaceful intentions and do not use, advocate or incite violence.<sup>10</sup> Assembly organizers and participants who remain peaceful should not be considered or held liable for the unlawful conduct of others and should not be made responsible for the maintenance of public order.<sup>11</sup> Police have the duty to remove violent individuals in order to allow protesters to continue to exercise their right to assemble and express themselves peacefully.<sup>12</sup>

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<sup>6</sup> Maina Kiai, "Summary of the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests prepared by the Office of the United Nations High Commissioner for Human Rights", UN doc. A/ HRC/19/40, 19 December 2011, para. 14. See also HRC resolution 22/10, *The promotion and protection of human rights in the context of peaceful protests*, 9 April 2013, A/HRC/22/10, paras. 4,7.

<sup>7</sup> UN Human Rights Council, Resolution 22/10, 21 March 2013, Preamble, para. 16.

<sup>8</sup> ICCPR, article 21.

<sup>9</sup> HR Committee, *CCPR General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para. 34.

<sup>10</sup> UN HRC, *Report of the United Nations High Commissioner for Human Rights on Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, 21 January 2013, A/HRC/22/28, para. 10.

<sup>11</sup> UN HRC, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, 21 May 2012, A/HRC/20/27, para. 31.

<sup>12</sup> UN HRC, *Report of the United Nations High Commissioner for Human Rights on Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, 21 January 2013, A/HRC/22/28, para. 10.

### **Police action to disperse demonstration violates IHRL obligations**

The use of tear gas, guns firing rubber bullets, pepper spray and batons to disperse the demonstration was in violation of IHRL requirements to protect and enable the right to peacefully protest and protect participants from harm. Under Hong Kong's IHRL obligations, dispersal of an assembly must be resorted to only when strictly unavoidable, e.g. where violence is serious and widespread and represents an imminent threat to bodily safety or property and where law enforcement officials have taken all reasonable measures to facilitate the assembly and protect participants from harm.<sup>13</sup> Before taking dispersal measures, law enforcement authorities are obligated to identify and isolate any violent individuals from the main assembly and differentiate between violent individuals in an assembly and others, so as to enable the assembly to continue.<sup>14</sup> Shooting rubber bullets or tear gas at a dispersing crowd would not be considered necessary or reasonable.

### **The rights of protesters to be free from unlawful use of force**

The use of force by Hong Kong law enforcement authorities is constrained by IHRL, including the ICCPR and the UN Convention against Torture (CAT)<sup>15</sup>. Key norms governing the use of force derived from a combination of customary rules and general principles of law under IHRL are articulated in the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“UN Basic Principles”).

The UN Basic Principles provide:

**12.** As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

**13.** In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

**14.** In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.<sup>16</sup>

Under principle 9 authorities may resort to the lethal use of firearms only when strictly unavoidable to protect life.

### **Use of force may only be used exceptionally, when strictly necessary and to the limited extent required to obtain a legitimate objective**

The legitimate use of force is governed by the principles of legality, precaution, necessity, proportionality and accountability.<sup>17</sup> The principle of precaution “requires that all feasible steps be taken in planning,

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<sup>13</sup> UN HRC, *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*, 4 February 2016, A/ HRC/31/66, para. 61.

<sup>14</sup> *Ibid.*

<sup>15</sup> Upon resuming the exercise of sovereignty over Hong Kong, China notified the UN Secretary-General that the Convention against Torture with the reservation made by China (ratified 8 October 1988) will also apply to the Hong Kong special Administrative Region.

<sup>16</sup> Principle 9 states: “[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”.

<sup>17</sup> UN HRC, *Joint report of the Special Rapporteur on the rights to freedom of peaceful*

preparing, and conducting an operation related to an assembly to avoid the use of force or, where force is unavoidable, to minimize its harmful consequences".<sup>18</sup> Any force used should only be targeted at individuals using violence or to avert an imminent threat.<sup>19</sup> Even where demonstrators act in a violent way, police must use only the minimum force necessary to contain the situation and re-establish public order. The UN Basic Principles requires States to have in place processes and procedures to minimize the use of force in assemblies and to ensure accountability for unlawful acts or omissions by law enforcement officers.<sup>20</sup>

### **The use of force against protesters in violation of IHRL**

The following actions by Hong Kong law enforcement authorities on 12 June 2019, as verified by Amnesty International, are in violation of Hong Kong's obligations under IHRL to protect and ensure rights to life, security of the person, and freedom from cruel, inhuman or degrading treatment or punishment:

- the use of tear gas, guns firing rubber bullets, pepper spray and batons to disperse the demonstration;
- The beating of subdued protesters;
- The firing of rubber bullets at a protester's head, risking serious injury; and
- the firing of multiple rounds of tear gas fired against protesters who were trapped in a confined area with severely limited opportunities for escape.

Such use of force cannot be considered necessary or proportionate under IHRL. To the extent that "less-than-lethal" weapons, such as rubber bullets or batons are deployed in manner which may be lethal, such intentional use is only lawful when it is strictly unavoidable to protect another life from an imminent threat.<sup>21</sup>

### **Disproportionate police presence in violation of IHRL**

The deployment of excessively high numbers of police officers and visible heavy anti-riot equipment by Hong Kong authorities is likely to have had an intimidating effect on protesters and have increased tensions and fear, leading to further violence and disorder, in violation of Hong Kong's obligations under IHRL to facilitate the exercise of peaceful protest, reduce tension and maintain order.

### **Violation of right of journalists to disseminate information about the protest**

Aggressive police tactics against journalists, as verified by Amnesty International, violated Hong Kong's IHRL obligations to ensure the right of the media to cover the conduct of the demonstration, as an element of protection of human rights in the context of peaceful protests<sup>22</sup> and the right of the media to access information on public affairs and the right of the general public to receive media output.<sup>23</sup>

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*assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 February 2016, A/ HRC/31/66, para. 50.*

<sup>18</sup> *Ibid*, para. 52.

<sup>19</sup> *Ibid*, para. 57.

<sup>20</sup> Principle 22 of the Basic Principles, and article 8, with commentary, of the Code of Conduct for Law Enforcement Officials.

<sup>21</sup> *Ibid*, Principles 19.

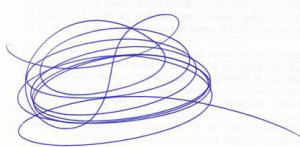
<sup>22</sup> UN HRC, *Report of the United Nations High Commissioner for Human Rights on Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, 21 January 2013, A/HRC/22/28, para. 68.

<sup>23</sup> HR Committee, *CCPR General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para. 18.

### **Accountability in policing assemblies**

Hong Kong should put in place processes and procedures to minimize the use of force in assemblies, including the “negotiated management” approach to policing assemblies<sup>24</sup> and to ensure accountability for unlawful acts or omissions by law enforcement officers,<sup>25</sup> by *inter alia*, requiring police officers to display identity numbers. Under IHRL, failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of ICCPR article 2(3).

Sincerely,



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Lois Leslie, LRWC

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<sup>24</sup> UN HRC, *Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests: Report of the United Nations High Commissioner for Human Rights*, 21 January 2013, A/HRC/22/28, para. 24.

<sup>25</sup> UN, HRC, *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*, 4 February 2016, A/ HRC/31/66, paras. 64-66. See also *UN Basic Principles*, Principle 22; *Code of Conduct for Law Enforcement Officials*, Article 8, with commentary.

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