

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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Thursday 19 December

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Re: Need for an Independent Commission of Inquiry to investigate unlawful use of force by Hong Kong Police Force and other non-state actors

Lawyers' Rights Watch Canada (LRWC)¹ urges Hong Kong to comply with its international law obligations to ensure rights to protest and investigate and remedy violations. LRWC calls on Hong Kong authorities to recall that failure to afford protection by the rule of law is known to "[compel] recourse, as a last resort, to rebellion against tyranny and oppression." (Universal Declaration of Human Rights Preamble).

LRWC asks Hong Kong authorities to take all measures necessary to ensure:

1. the right of protesters to voice their demands and engage in peaceful protests free from arbitrary arrest or detention, the excessive use of force by police, or violence from state or non-state actors;
2. an investigation by independent experts into allegations of excessive or unlawful use of force by police against protesters and journalists to determine whether use of force by police complied with or contravened international human rights laws and standards and to recommend the remedies and reform required to redress any violations of State duties and individual rights, ensure accountability, and prevent reoccurrence; and,

¹ 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

3. compliance with the requirements of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR),² the UN Convention against torture and other cruel, inhuman or degrading punishment or treatment (CAT)³ and other applicable instruments, as well as with recommendations issued by the Human Rights Committee in March 2013⁴ and of the Committee against Torture in December 2015.⁵

LRWC further urges the Hong Kong authorities to strengthen cooperation with the UN Office of the High Commissioner for Human Rights and relevant Special Procedures of the Human Rights Council. This cooperation should include seeking technical assistance in taking the above-mentioned measures within a clearly established timeframe.

BACKGROUND

In a letter dated 28 June 2019,⁶ LRWC identified reports of excessive and unlawful use of force by members of the Hong Kong Police Force (“the police”) against peaceful protesters on 12 June 2019 which included allegations of disproportionate and unnecessary police use of batons, rubber bullets, tear gas, pepper spray and beanbag shots. Other police actions apparently in contravention of international human rights law cited in that letter were mass arrests, lack of visible identification of police officials, and restricted access to medics seeking to give medical attention injured protesters and journalists seeking to report on the protests.

Since June 2019, Hong Kong authorities have increased police powers, sought to restrict and criminalize the exercise of rights to freedoms of assembly and expression, and encouraged or allowed an alarming increase in the dangerous use of force by police against protesters and journalists. These measures have resulted in serious injuries to protesters and bystanders, mass arrests, and restriction of the public’s right to freedom of information. Increased use of force by police since June has included the use of live ammunition against unarmed protesters, the indiscriminate blasting of protesters with water containing chemical dye and continued use of tear gas, rubber bullets, pepper spray, and bean bags. State authorities have inaccurately

² 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.

³ 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.

⁴ UN Human Rights Committee (HRC), Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11-28 March 2013) (CCPR/C/CN-HKG/CO/3), 29 April 2013: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3&Lang=En

⁵ UN Committee Against Torture (CAT) Concluding observations on the fifth periodic report of China with respect to Hong Kong (CAT/C/CHN-HKG/CO/5), 3 February 2016: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/CHN-HKG/CO/5&Lang=En

⁶ LRWC, China: Unlawful Use of Force by Police on 12 June 2019, Letter dated 28 June 2019: <https://www.lrwc.org/china-unlawful-use-of-force-by-police-on-12-june-2019-letter/>

characterized protesters as "rioters" and as of 4 December 2019 more than 5,800⁷ individuals have been arrested. Police have also blocked medical personnel and emergency ambulances from effectively attending to injured protesters and obstructed the work of news media by dispersing and targeting journalists.

Instead of addressing the protesters' legitimate demands for reform or encouraging meaningful dialogue, Hong Kong authorities have misused powers of arrest, prosecution, and law-making to impose arbitrary control, block peaceful dialogue, and criminalize criticism and opposition. Protesters have been detained and criminally charged for "rioting," "unlawful assembly" or "disorder in public places" under the Public Order Ordinance. The UN Human Rights Committee in its 2013 review of Hong Kong's compliance with its obligations under the ICCPR, expressed concern about the application of such terms under the Ordinance "which may facilitate excessive restriction to the Covenant rights," and recommended that authorities "ensure the implementation of the Public Order Ordinance is in conformity with the Covenant."⁸

Additional actions taken by Hong Kong authorities include failing to confirm withdrawal of the proposed extradition bills until 26 October 2019; failing to respond in a timely and adequate manner to violent mobs at the Yuen Long station on 21 July 2019; allowing, directing or encouraging an increase in the use of force by police; and failing to halt violence against protesters by armed gang members. The authorities also fast-tracked the adoption of legislation banning face masks at public gatherings, used by protesters to protect themselves from tear gas and to avoid being identified. The ban has since been ruled unconstitutional by Hong Kong's High Court, but the Court's power to rule on constitutionality under Hong Kong's Basic Law has been challenged by China's top legislative body, the Standing Committee of the National People's Congress.

Since the first incident of police violence on 12 June 2019, the Hong Kong Government has failed to establish an independent investigation of allegations of unlawful use of force and misconduct by police that could ensure the remediation and restrictions required by international human rights law.

INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

The right to engage in peaceful protest is protected by the ICCPR and affirmed by 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). This right is instrumental to the defence of other internationally protected rights. Any restrictions on this right, such as the use of excessive or unlawful force by police, must be held to a very high standard of compliance with international human rights law. As observed by UN Special Rapporteur, Michel Forst,

⁷ Statistics on arrestees in public events between June and November: Reply of Secretary for Security John Lee, 4 December 2019., <https://www.info.gov.hk/gia/general/201912/04/P2019120400451.htm>

⁸ HRC, *Concluding observations on the 3rd periodic report of Hong Kong, China, adopted by the Committee at its 107th session, 11-28 March 2013* : HRC, 29 April 2013, CCPR/C/CHN-HKG/CO/3, para 10: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3&Lang=En.

Even where some rights or freedoms are restricted in a situation of emergency or to protect public order, the right to associate, advocate and protest in relation to the restrictions, in effect to monitor and debate the restrictions, can neither be restricted nor suspended (...) in times of great peril, the need for a robust civil society and independent voices, for independent monitoring and accounting, is even greater.⁹

International human rights law requires that the use of force by police at public demonstrations be the exception and used under strictly necessary circumstances consistent with internationally recognized principles.¹⁰ The use of force must be governed by principles of legality, necessity, and proportionality, and authorities are to use only those measures that are safest and least harmful to demonstrators.¹¹

The ICCPR creates binding obligations on Hong Kong to exercise due diligence to prevent, punish, investigate, and redress violations of protected rights committed by State or non-state actors. Failure to take such measures can constitute violations by the State of the ICCPR. The UN Human Rights Committee stated in General Comment 31:

There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹²

Credible complaints of unlawful force by police must be fully investigated by a body of competent experts acting independently of police and the executive. The purpose of an investigation is to establish what occurred; whether the use of force complied with the applicable international human rights law, to ensure accountability and non-reoccurrence and to provide redress to victims of violations. An investigation by a body lacking independence or competence is not considered an investigation and cannot result in the remedies required.

The Independent Police Complaints Council (IPCC)¹³ is not capable of conducting the required investigation due to factors such as lack of independence, lack of competence and lack of public trust. Indicators of lack of independence include: IPCC members are appointed by the Chief Executive and do not have security of tenure; the Chief Executive can remove the Chair and Vice-Chairs; and, fees and allowances for IPCC members are determined and paid at the

⁹ UN General Assembly, *Situation of human rights defenders, Report of the Special Rapporteur on the Situation of Human Rights Defenders*, 23 July 2018, A/73/215, para. 24.

¹⁰ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, paras. 13 and 14. 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. 13.

¹¹ UN SR on the Protection and Promotion of the Right to Freedom of Opinion and Expression and SR for Freedom of Expression of the OAS IACHR, *Joint declaration on violence against journalists and media workers in the context of protests*, September 13, 2013.

¹² HR Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

¹³ The IPCC is governed by the Independent Police Complaints Council Ordinance, Ord. No. 33 of 2008 A1479

discretion of the Chief Executive.¹⁴ With respect to competence, the IPCC does not have the power to subpoena witnesses or evidence. In November, an international panel of experts (IPE) appointed to advise the IPCC confirmed that the IPCC was not equipped to carry out the type of investigation required. A month later, on 10 December, the IPE withdrew reiterating, “We ultimately concluded that a crucial shortfall was evident in the powers, capacity and independent investigative capability of IPCC.”¹⁵ Lack of public trust is demonstrated by the fact that the purported IPCC investigation has not satisfied the protesters’ demand for an investigation of police brutality and misconduct.

RECOMMENDATIONS OF UN HUMAN RIGHTS MONITORING BODIES

In its third review of Hong Kong in March 2013, the Human Rights Committee remained “concerned that investigations of police misconduct are still carried out by the police themselves through the Complaints Against Police Office (CAPO) and that IPCC has only advisory and oversight functions to monitor and review the activities of CAPO and that the members of IPCC are appointed by the Chief Executive.”¹⁶ The Committee recommended that authorities:

12. (...) take necessary measures to establish a fully independent mechanism mandated to conduct independent, proper and effective investigation into complaints about the inappropriate use of force or other abuse of power by the police and formulate binding decisions in respect of investigations conducted and findings regarding such complaints.

Following its 2015 review of Hong Kong, the Committee against Torture reiterated concerns expressed in its 2008 review that investigations of police continue to be conducted by CAPO, and that the IPCC “remains an advisory and oversight body of the investigations of the Complaints Office, with no power to conduct investigations on its own.”¹⁷ Among its principal recommendations for implementation, the Committee reiterated its previous recommendation that:

9. (...) Hong Kong, China, consider establishing a fully independent mechanism mandated to receive and investigate complaints against all officials and ensure there is no institutional or hierarchical relationship between the investigations of that particular body and the suspected perpetrators of the acts that form the basis of a complaint.

Additional norms governing the use of force and the duty to investigate violations derived from a combination of customary rules and general principles of law under international human rights

¹⁴ *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*, See Schedule 2, s. 5, Part 1, s. 4, Part 2, s. 5.

¹⁵ See: *Hong Kong’s Police Watchdog Is Unable to Do Its Job, Experts Say*, Amy Gunia, Time, 11 November 2019, at <https://time.com/5723615/hong-kong-ipcc-police-complaints/>; *Int’l Experts to Quit Hong Kong investigation into police handling of protests*, 11 December 2019, AFP, at <https://www.hongkongfp.com/2019/12/11/breaking-international-experts-quit-hong-kong-investigation-police-handling-protests/>

¹⁶ HRC, *Concluding observations on the 3rd periodic report of Hong Kong, China, adopted by the Committee at its 107th session, 11-28 March 2013 : Human Rights Committee*, 29 April 2013, CCPR/C/CHN-HKG/CO/3, para 12.

¹⁷ CAT, *Concluding observations on the fifth periodic report of China with respect to Hong Kong*, 3 February 2016, CAT/C/CHN-HKG/CO/5, para 8 and 9
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/CHN-HKG/CO/5&Lang=En.

law include the UN Code of Conduct for Law Enforcement Officials,¹⁸ the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles)¹⁹ complemented by the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (“UN Guidance”)²⁰. Article 2 of the Code obliges law enforcement officials to “respect and protect human dignity and maintain and uphold the human rights of all persons.” Article 3 prohibits the use of force except where force is reasonably necessary, appropriate and proportionate to the object to be achieved. The use of firearms is prohibited except where “a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.” In addition, the UN Guidance reinforces “the use of less-lethal weapons to disperse an assembly should be considered a last resort.”

Regarding assemblies, the UN Basic Principles provide as follows:

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 9.²¹

Under principle 9 of the UN Basic Principles, authorities may resort to the lethal use of firearms only when strictly unavoidable to protect life. The UN Human Rights Committee recommended in 2013 that Hong Kong should “increase its efforts to provide training to the police with regard to the principle of proportionality when using force, taking due account of the United Nations [Basic] Principles.”²² In addition, the Committee against Torture in its 2016 report recommended that authorities “publicize the police general orders and related guidelines on the use of force and make sure that they are in compliance with international standards,” and

¹⁸ *Code of Conduct for Law Enforcement Officials*, Adopted by General Assembly resolution 34/169 of 17 December 1979: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

¹⁹ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²⁰ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, issued in October 2019 by the Office of the High Commissioner for Human Rights (OHCHR) https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf

²¹ 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”.

²² HRC, *Concluding observations on the 3rd periodic report of Hong Kong, China, adopted by the Committee at its 107th session, 11-28 March 2011*, 29 April 2013, CCPR/C/CHN-HKG/CO/3, para 11.

“strengthen ongoing training for all law enforcement officers (...) on international standards on the use of force, as well as on their liability in the event of excessive use of force.”²³

When the complaints relate to State agents, the State must ensure an investigation independent of the State agents and of the State authorities in charge of the agents. Principle 23 identifies the requirement of an independent process to determine whether the use of force or firearms by police was lawful and if unlawful, to determine remedies.

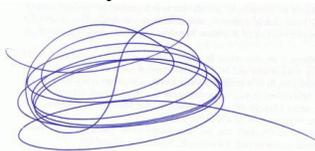
23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly (emphasis added).

CONCLUSION

LRWC encourages you and the relevant parts of the Hong Kong Government to seriously consider taking the steps outlined in this letter, to ensure compliance with international human rights obligations and the safeguarding of fundamental freedoms.

We welcome a response from you in the coming weeks.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Gail Davidson', written over a light blue grid background.

Gail Davidson, Executive Director, LRWC

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²³ CAT, Concluding observations on the fifth periodic report of China with respect to Hong Kong, 3 February 2016, CAT/C/CHN-HKG/CO/5, para 15.

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