



HONG KONG: MISSING TRUTH, MISSING JUSTICE

THE CASE AND INTERNATIONAL LEGAL FRAMEWORK FOR THE
ESTABLISHMENT OF A COMMISSION OF INQUIRY INTO THE 2019 PROTESTS

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INTRODUCTION

The Hong Kong protests that erupted in 2019 started out as a movement to demand that the government withdraw an extradition bill that, if enacted, would have allowed suspects to be sent – among other places – to face mainland China’s criminal justice system, which has a well-documented record of human rights violations.¹

The proposal of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation Bill (Extradition Bill) triggered a series of protests beginning in March 2019, including three mass peaceful protests on 9 June, 16 June and 18 August, each attracting an estimated 1–2 million participants.

On 12 June 2019, the largely peaceful protesters faced an onslaught of tear gas, guns firing rubber bullets, pepper spray and baton charges from police to disperse the demonstration near government headquarters, causing at least 81 casualties. Since June 2019, Amnesty International has documented an alarming pattern of the Hong Kong Police Force employing reckless and indiscriminate tactics. Amnesty International also uncovered evidence of torture and other ill-treatment in detention.²

As the protests became more frequent, the Hong Kong police adopted a tougher approach to restricting public assemblies, ranging from revoking “notices of no objection” for marchers to objecting to protests outright on the grounds of “public security concerns”.³ From 9 June to 31 December 2019, the Hong Kong Police banned 47 of 537 applications for public procession or meeting.⁴

All of this signalled a clear attitude of repression and intolerance towards people wishing to peacefully exercise their human rights to freedom of expression, assembly and association. The ensuing unnecessary and excessive use of force and apparent total impunity for this behaviour added up to increasing tension and anger. The delay in the government responding to the demands of citizens further fuelled tensions.

As the year went on, the police and some protesters escalated violence. The heavy-handed police response to largely peaceful demonstrations was a main contributing factor to this escalation. At some protests where the majority of protesters was peaceful, small groups of protesters started to throw hard objects and petrol bombs at the police.⁵ Some protesters attacked individual police officers. Police deployed weapons such as water cannons to disperse protesters.⁶ In November 2019, the police laid siege to the Hong Kong Polytechnic University campus in an ongoing standoff. Police deployed tear gas and water cannon, including in an apparent attempt to keep

¹ Amnesty International, Hong Kong: Proposed extradition law amendments a dangerous threat to human rights ([Press Release](#), 7 June 2019).

² Amnesty International, Hong Kong: Arbitrary arrests, brutal beatings and other torture in police detention revealed ([Press Release](#), 19 September 2019).

³ According to Article 14 and 15 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. 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. Holmes Chan, “Don’t forget our original intentions”: Thousands protest in Kowloon, as Hong Kong police fire tear gas’, *Hong Kong Free Press*, 2 December 2019, www.hongkongfp.com/2019/12/02/pictures-hong-kong-police-fire-tear-gas-whampoa-tsim-sha-tsui-mong-kok-disrupting-protest-calm/; ‘Riot police move in, end rally in support of Uighurs’, *RTHK*, 22 December 2019, news.rthk.hk/rthk/en/component/k2/1499065-20191222.htm; Kris Cheng, ‘Hong Kong police ban major protest against anti-mask law, citing risk of bombs, arson and unrest’, *Hong Kong Free Press*, 18 October 2019, www.hongkongfp.com/2019/10/18/hong-kong-police-ban-major-protest-anti-mask-law-citing-risk-bombs-arson-unrest/.

⁴ According to the reply from the Hong Kong Police Force to our inquiry on 24 January 2020: “Between June and Dec 2019, Police received a total of 537 notifications regarding public order event of different themes. Police had raised no prohibition or objection to 490 public order events. Also, police had raised prohibition or objection to 47 public order events.”

⁵ Amnesty International, [UN High Commission of Human Rights: Condemn Systematic Violations of Fundamental Freedoms in Hong Kong & Police Violence](#) (Index: ASA 17/1609/2019).

⁶ Amnesty International Hong Kong, Open letter to the Chief Executive – calling for an independent commission of inquiry ([Press Release](#), 28 June 2019).

people, including hundreds of protesters, volunteer medics, social workers, journalists and other observers from leaving the scene.⁷

The scale of the Hong Kong protests, as well as the levels of violence used by both police and protesters, have been unheard of since the city was returned to China on 1 July 1997. The number of arrests is also extraordinarily high, with 6,943 protest-related arrests made as of 2 January 2020, a number not seen in the past 70 years.⁸ Of those arrested, 40% are students and over 13% are under 18 years old.⁹

By the time the Hong Kong government announced the formal withdrawal of the Extradition Bill on 4 September 2019, protesters had already broadened their calls with additional demands, including for an independent and impartial investigation into the use of force by police. Many voices from different circles in Hong Kong society have echoed this call, including veteran politicians, the Hong Kong Bar Association, religious leaders and civil society organizations.¹⁰ The UN High Commissioner for Human Rights has also called for an “effective, prompt, independent and impartial investigation”.¹¹ However, the Hong Kong government has repeatedly voiced opposition to establishing a separate investigatory mechanism, such as a commission of inquiry, claiming the existing police complaint system is adequate for investigating allegations of police violence and other misconduct.¹² This briefing discusses the necessity and framework for establishing a commission of inquiry to investigate the widespread human rights violations related to the protests in Hong Kong. It also lays down the core international human rights principles related to the establishment of commissions of inquiry, examines the inadequacy of the existing local mechanisms and highlights key elements of an independent, impartial, effective, prompt and thorough investigation into human rights violations.

WHAT IS A COMMISSION OF INQUIRY?

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has issued guidance regarding how commissions of inquiry (CoI) should carry out independent investigations into specific events that involve allegations of torture, deaths, and other human rights violations.¹³ According to these general parameters, the key objective of commissions of inquiry is to “discover, clarify and formally acknowledge the causes and

⁷ Amnesty International Hong Kong, Hong Kong: Police must defuse campus standoff to avoid more tragedy ([Press Release](#), 18 November 2019); Amnesty International Hong Kong, 24 NGOs to Carrie Lam: Cease the criminal investigations of human rights observers, drop all related charges ([Open Letter](#), 12 February 2020).

⁸ Press Releases, ‘LCQ4: Law enforcement procedures of Police’, *The Government of the Hong Kong Special Administrative Region (HKSAR)*, 8 January 2020, www.info.gov.hk/gia/general/202001/08/P2020010800626.htm.

⁹ Hong Kong Police Force verified Twitter account, 16 December 2019, twitter.com/hkpoliceforce/status/1206543778380578817; Press Releases, ‘LCQ2: Procedural issues of police’s handling of arrestees’, *HKSAR*, 13 November 2019, www.info.gov.hk/gia/general/201911/13/P2019111300539.htm?fontSize=1.

¹⁰ See ‘Paper on the establishment of a commission of inquiry into the social unrest in Hong Kong’, *Hong Kong Bar Association*, 14 January 2020, bit.ly/2TxqV8m; Guest Contributor, ‘Interview: Ex-head of legislature Jasper Tsang says the gov’t is weakest player of four in Hong Kong’s struggle’, *Hong Kong Free Press*, 16 November 2019, www.hongkongfp.com/2019/11/16/interview-ex-head-legislature-iasper-tsang-says-govt-weakest-player-four-hong-kongs-struggle/; ‘Re: Independent Commission of Inquiry into Alleged Police Abuses’, *Civil Rights Observer, Human Rights Watch*, 8 January 2020, www.hrw.org/sites/default/files/supporting_resources/200108_hrw_cro_joint_letter.pdf; Gary Cheung, ‘Heavyweight backing for independent inquiry into Hong Kong extradition bill clashes’, *South China Morning Post*, 19 July 2019, www.scmp.com/news/hong-kong/politics/article/3019302/heavyweight-backing-independent-probe-hong-kong-extradition, and; ‘Opinion Survey on Public Attitudes towards Dialogue on Anti-Extradition Law Amendment Bill Movement’, *MWYO*, 27 November 2019, mwyo.org/assets/docs/community/dialogue_press_release_ENG.pdf, 63.8% of the 701 respondents of this survey stated “establishment of an independent commission of inquiry” as a prerequisite for public dialogues. Also see Annex I of the Hong Kong Bar Association Paper for an extensive list of public surveys, individuals and organizations supporting the establishment of a Commission of Inquiry.

¹¹ World News, ‘U.N. calls for probe into violence related to Hong Kong protests’, *Reuters*, 5 October 2019, www.reuters.com/article/us-hongkong-protests-un/un-calls-for-probe-into-violence-related-to-hong-kong-protests-idUSKCN1WK07G.

¹² The Chief Executive, in response to a question on setting up a commission of inquiry, said she had reiterated many times that the government ‘does not have to do down that road’. Press Releases, ‘Transcript of remarks by CE at media session before ExCo meeting (with video)’ (in Chinese), *HKSAR*, 7 January 2020, www.info.gov.hk/gia/general/202001/07/P2020010700422.htm?fontSize=1; See also Cannix Yau and Lilian Cheng, ‘Hong Kong police chief Chris Tang warns of rising number of students arrested for violent acts, blaming peer pressure and public’s refusal to condemn violence’, *South China Morning Post*, 1 December 2019, www.scmp.com/news/hong-kong/law-and-crime/article/3040100/hong-kong-police-chief-chris-tang-rules-out; Chris Lau and Alvin Lum, ‘Hong Kong protests: Carrie Lam has ruled out commission of inquiry into police actions, so what can replace it and will it work?’, *South China Morning Post*, 6 September 2019, www.scmp.com/news/hong-kong/politics/article/3025948/hong-kong-protests-carrie-lam-has-ruled-out-commission.

¹³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/19/61, para. 19, 28, 48. (hereinafter: UN Doc. A/HRC/19/61).

consequences of past violations in order to establish accountability”.¹⁴ The mandates, compositions, timeframe and terms or reference of different COIs can vary. Both domestic and international COIs are often results of concerted demands by civil society or the international community. Most COIs are national bodies that are often established at the initiative of national government authorities.¹⁵ International, regional and national entities have established such commissions to implement investigations and other functions, including but not limited to contributing to accountability for perpetrators, responding to the needs to victims, identifying institutional responsibility, promoting institutional, legal and personnel reforms, and promoting reconciliation by addressing issues that keep the cycle of violence going.¹⁶ UN independent experts see COIs as a valuable and frequently used tool for states to investigate human rights violations.¹⁷

In Hong Kong, there is a mechanism available for independent investigations into extraordinary events of public concern. COIs have been established pursuant to the Commissions of Inquiry Ordinance “to inquire into the conduct or management of any public body, the conduct of any public officer or into any matter whatsoever which is, in his [sic] opinion, of public importance”.¹⁸ For example, a COI was established to “inquire in the facts and circumstances leading to and surround the collision of the two vessels that took place near Lamma Island, Hong Kong on 1 October 2012.”¹⁹ On 13 August 2015, the government appointed a COI to investigate the causes of excess lead found in drinking water in public rental housing developments.²⁰

¹⁴ UN Doc. A/HRC/19/61, para. 25, 26.

¹⁵ UN Doc. A/HRC/19/61, para. 19.

¹⁶ OHCHR, *Commission of inquiry and fact-finding missions on international human rights and humanitarian law Guidance and Practice*, 2015, p.1, www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf (hereinafter: OHCHR, *Guidance and Practice*); Patrick Butchard and Christian Henderson, ‘A Functional Typology of Commissions of Inquiry’, *Commissions of Inquiry: Problems and Prospects*, 2017, p.11; UN Doc. A/HRC/19/61 para. 26.

¹⁷ UN Doc. A/HRC/19/61, para. 27; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 12 (hereinafter: UN Doc. A/HRC/8/3).

¹⁸ Section 2 of Cap. 86 Commissions of Inquiry Ordinance. For a list of the 16 commissions of inquiry established since the enactment of the Commission of Inquiry Ordinance in Hong Kong, see Annex III, ‘Paper on the establishment of a commission of inquiry into the social unrest in Hong Kong’, *Hong Kong Bar Association*, 14 January 2020, bit.ly/2tXqV8m.

¹⁹ ‘Terms of Reference’, *Commission of Inquiry into the Collision of Vessels near Lamma Island on 1 October 2012*, 3 May 2013, www.coi-lamma.gov.hk/eng.

²⁰ ‘Terms of Reference’, *Commission of Inquiry into Excess Lead Found in Drinking Water*, 20 May 2016, www.coi-drinkingwater.gov.hk/eng/index.html.

THE NECESSITY OF ESTABLISHING A COMMISSION OF INQUIRY

ALLEGATIONS OF WIDESPREAD AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS

Investigations into the widespread human rights violations committed during the Hong Kong protests would be far-reaching and complex. To carry this out would require considerable resources, including scientific and forensic expertise.²¹

Research carried out by Amnesty International have documented an alarming pattern of reckless and indiscriminate tactics being employed by the Hong Kong Police Force. The police adopted effectively a zero-tolerance approach to policing assemblies. There was only minimal willingness from the police to facilitate assemblies, and none to negotiate in case of problems or tension. Reports have also shown chaotic deployment of uncoordinated and unorganized police units, where individual police officer seemed to take their own decisions, including those in relation to the use of force.²² Amnesty International found evidence of torture and other ill-treatment in detention.²³ In several cases, detained protesters were severely beaten in custody and suffered other ill-treatment amounting to torture. In multiple instances, the abuse appears to have been meted out as “punishment” for talking back or appearing uncooperative.²⁴

Throughout the protests, Amnesty International has also documented unnecessary and excessive use of force by Hong Kong police, including the dangerous use of less-lethal weapons and other law enforcement equipment such as rubber bullets and bean bag and foam rounds, which led to serious eye injuries in some cases; assaulting and beating protesters who were not resisting, including with batons and shields, as well as by-standers and others; misuse of chemical irritants such as pepper spray and tear gas;²⁵ aggressive tactics to obstruct journalists and other observers at protest sites;²⁶ and use of water cannons to shoot liquid mixed with irritants and dye that indiscriminately marked individuals for identification later regardless of their involvement in the protests and whether they were involved in violent activities or completely peaceful. The use of water canon also indiscriminately endangered the health of people as a result of the chemical irritant added.²⁷ In at least seven instances police used live ammunition for “warning shots”, and in three cases directly against protesters, allegedly in self-defence, seriously injuring them.²⁸

²¹ UN Doc. A/HRC/8/3, para. 16.

²² Sue-lin Wong and Nicolle Liu, ‘Hong Kong: “You either have the rule of law or you don’t”’, *Financial Times*, 19 November 2019, www.ft.com/content/077054fe-06d9-11ea-a984-fbbacad9e7dd; Erin Hale, “Blunt, unplanned”: Police tactics under fire in HK protests’, *Aljazeera*, 1 November 2019, www.aljazeera.com/news/2019/11/blunt-unplanned-police-tactics-fire-hk-protests-191101070008742.html.

²³ Amnesty International, Hong Kong: Arbitrary arrests, brutal beatings and other torture in police detention revealed ([Press Release](#), 19 September 2019).

²⁴ Amnesty International, Hong Kong: Arbitrary arrests, brutal beatings and other torture in police detention revealed ([Press Release](#), 19 September 2019).

²⁵ Amnesty International, How not to police a protest: Unlawful use of force by Hong Kong police (Index: ASA 17/0576/2019); Amnesty International, Hong Kong: Rampaging police must be investigated ([Press Release](#), 1 September 2019).

²⁶ Amnesty International Hong Kong, 24 NGOs to Carrie Lam: Cease the criminal investigations of human rights observers, drop all related charges ([Open Letter](#), 12 February 2020).

²⁷ Amnesty International, Hong Kong: Water cannons pose real danger in hands of trigger-happy police ([Press Release](#), 9 August 2019).

²⁸ Press Releases, ‘Police severely condemn law-breaking acts of extremely violent protestors’, *HKSAR*, 26 August 2019, bit.ly/3cmWAlS; Press Releases, ‘Police strongly condemn continued violent protests’, *HKSAR*, 30 September 2019, bit.ly/211QrNm; Press Releases, ‘Police severely condemn massive violent protests’, *HKSAR*, 2 October 2019, bit.ly/2Prpwio; Press Releases, ‘Open fire in Yuen Long’, *HKSAR*, 5 October 2019, bit.ly/2vI0iv8; Press Releases, ‘Radical protestors vandalised facilities in various districts and Police officers drew their service arms from their holsters’, *HKSAR*, 11 November 2019, bit.ly/32xGOzB; Press Releases, ‘Police open fire in Yau Ma Tei’, *HKSAR*, 18 November 2019, bit.ly/39514ef.

The use of potentially lethal force by law enforcement officials is such a serious matter that it must be subject to particularly stringent controls, including thorough, independent and impartial investigations, allowing an assessment of the lawfulness of the use of force.

Under international standards, law enforcement officials have a duty to employ non-violent means first before using force to police assemblies.²⁹ When using force, they must seek to minimize harm and injury.³⁰ Should the dispersal of assemblies become justified, utmost restraint must be exercised.³¹ They also have a duty to prevent unnecessary escalation.³² Strong evidence suggests that the Hong Kong police have not only failed to de-escalate tension. On the contrary, through the frequent and often unnecessary use of vehement force as well as the persistent impunity for such behaviour, they have even fuelled tension further.

Allegations of sexual harassment and assault of protesters have been circulating since Hong Kong's current protest movement began.³³ Only one protester has used her real name in accusing the Hong Kong police of sexual assault. This woman, Sonia Ng, has since faced severe backlash for openly making the accusation and sharing her experience of being sexually harassed while in detention.³⁴

Complaints about police behaviour are not limited to their actions. There have been other instances where individuals and groups have complained about police inaction. For example, police inaction in the face of attacks by white-clad men on protesters, journalists and bystanders in Yuen Long on 21 July 2019 showed a clear failure to protect the rights to life and security of persons.³⁵ Pro-democracy protest organizers have repeatedly been harassed or even physically assaulted by third parties.³⁶ Evidence shows occasions in which the police in operations were not wearing visible tags, either with the individual officer's name or with a number identifying them.³⁷ In many cases the provision of medical assistance was either delayed, or even actively impeded.³⁸ Pierre Chan, a doctor and member of Hong Kong's Legislative Council, published information pointing to a leakage of patients' information to the police.³⁹ There are also reports of injured protesters not going to public hospitals due to the fear of being arrested.⁴⁰

Commissions of inquiry can play an important role in establishing a more comprehensive and nuanced picture of policy decisions that have contributed to public unrest and disorder and resulted in patterns of human rights violations, including torture and other forms of ill-treatment.⁴¹ As a Col is tasked with looking into particular issues surrounding the respective events, with adequate resources and investigative powers it can thoroughly assess the situation and issue recommendations crucial to preventing the same situation from recurring. Such recommendations can help tackle the root causes of human rights violations on a larger scale, instead of just exercising retrospective oversight in individual cases.⁴²

²⁹ Principle No.4 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereinafter: UN BPUFF).

³⁰ UN BPUFF, Principle No. 5b.

³¹ UN BPUFF, Principle No. 13.

³² Joint Report to the Human Rights Council, 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, para. 38.

³³ There have been [reports of assault in police stations](#), [footage of police exposing women's underwear during arrest](#) and [allegations of humiliating and unnecessary strip searches](#). See Amnesty International, [Sexual violence against Hong Kong protesters – what's going on?](#) (Blog, 20 December 2019).

³⁴ Amnesty International, [I'm prouder than ever to be from Hong Kong](#) (News, 25 November 2019)

³⁵ Amnesty International, [Beijing's "red line" in Hong Kong](#) (Index: ASA 17/0944/2019), p.37-38.

³⁶ Amnesty International, [Hong Kong: Vicious attack against pro-democracy protest organizer](#) (Press Release, 29 August 2019); Amnesty International, [Hong Kong: Protest leader left bleeding on street after brutal hammer attack](#) (Press Release, 16 October 2019)

³⁷ Amnesty International, [How not to police a protest: unlawful use of force by Hong Kong police](#) (Index: ASA 17/0576/2019), p.15).

³⁸ Amnesty International, [Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed](#) (Press Release, 19 September 2019).

³⁹ Kris Cheng, ['Police can access full details of injured protesters in hospital, says medical sector lawmaker following patient arrests'](#), Hong Kong Free Press, 17 June 2019, www.hongkongfp.com/2019/06/17/police-can-access-full-details-injured-protesters-hospital-says-medical-sector-lawmaker-following-patient-arrests.

⁴⁰ ['被打至大小便出血不敢求診,公院醫生黃任匡籲傷者求醫'](#) (Dare not seek medical help even with blood in urine and stool due to beatings, public hospital doctor Wong Yam-hong advises injured to seek medical attention), *Sing Tao Daily*, 18 June 2019, bit.ly/2L4cWEN

⁴¹ UN Doc. A/HRC/19/61, para. 70.

⁴² Amnesty International Dutch Section, ['Analysis of Country Mechanisms: Minimum Requirements and Good Practices', Police and Human Rights Programme – Short paper series No. 2 Police Oversight](#), January 2015, p.16, www.amnesty.nl/content/uploads/2017/01/ainl_police_oversight.pdf?x44402 (hereinafter: Amnesty Dutch Section, *Police Oversight*).

The scope and types of information reviewed by a Col are different from (and usually broader than) those disclosed and examined through formal criminal investigation and prosecution. Hence, it can reveal insights into wider patterns of violation and institutional involvement and responsibility.⁴³

URGENCY OF REMEDYING HARM AND REBUILDING TRUST

Public trust towards the government and police has plummeted since the beginning of the protests. Approval ratings of key Hong Kong government officials and the Hong Kong Police Force have been decreasing rapidly. Since the beginning of the protests, the approval ratings of the Chief Executive had dropped from 52.6% to 20.8%; and police from 62.5% to 35.3%.⁴⁴ Survey respondents showing trust towards the government had also decreased from 34.3% to 19.1%.⁴⁵ The ongoing tension, escalating violence and increasing casualty numbers call for immediate intervention. The Hong Kong government has an obligation to immediately repair harms caused by the alleged human rights violations.⁴⁶

Many details of incidents related to the protests remain disputed and unclear to the public. On 18 November 2019, more than 30 people were sent to hospital after police dispersed protesters with tear gas, flash grenades and other weapons in Yau Ma Tei, a densely-populated tourist and shopping district in Kowloon. According to reports, firefighters and citizens have claimed there had been a stampede, but the government has disputed this.⁴⁷ In a separate incident that has aroused public controversy, a 22-year-old local university student named Chow Tsz-lok died from injuries sustained after falling from a car park near a protest site. The reason for his fall remains unclear.⁴⁸ President of the Hong Kong University of Science and Technology, where Chow studied, demanded a thorough and independent investigation into the allegation of police vehicles blocking an ambulance reaching Chow on the night of the incident.⁴⁹

Scholars in the field of transitional justice emphasize that a correct and more complete official statement of the historical record is important and significant when facts are hidden or disputed.⁵⁰ A Col can be a platform for an effective investigation when victims, relatives and witnesses lack confidence in the police and other authorities and are unprepared to cooperate with them.⁵¹ Setting up a Col to investigate human rights violations committed since the protests started in March 2019 would be an acknowledgement by the government that something has gone wrong and that urgent attention and rectification is needed.⁵² If the Col can effectively establish accountability and make recommendations for law enforcement agencies to adjust their operations in compliance with international human rights law and standards, it might stop the cycle of violence and reduce public anger against the police as people feel that the impunity is addressed. This might reduce acts of violence and help restore public order.

⁴³ UN Doc. A/HRC/19/61, para. 52.

⁴⁴ 'Please use a scale of 0-100 to rate your extent of support to the Chief Executive Carrie Lam, with 0 indicating absolutely not supportive, 100 indicating absolutely supportive and 50 indicating half-half. How would you rate the Chief Executive Carrie Lam? (Per Poll) (7/2019 – 1/2020)', *Hong Kong Public Opinion Research Institute*, www.pori.hk/popularity-of-chief-executive-carrie-lam-cheng-yuet-ngor; 'Are you satisfied with the performance of the Hong Kong Police Force? (Per Poll) (7/1997 – 11/2019)', *Hong Kong Public Opinion Research Institute*, www.pori.hk/-peoples-satisfaction-with-the-performance-of-the-hong-kong-police-force.

⁴⁵ 'On the whole, do you trust the HKSAR Government?', *Hong Kong Public Opinion Research Institute*, www.pori.hk/trusthk.

⁴⁶ Human Rights Committee, General Comment 31, The nature of the general legal obligation imposed on state parties to the covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 19.

⁴⁷ See Press Releases, 'Police clarify stampede rumour during operation in Yau Ma Tei on 18 November', *HKSAR*, 20 November 2019, www.info.gov.hk/gia/general/201911/20/P2019112000058.htm; 'Firefighters confirm reports of "stampede incident"', *RTHK English News*, news.rthk.hk/rthk/en/component/k2/1493235-20191119.htm, and; 陳信熙 鄭嘉如, '11.18 油麻地人疊人 CCTV 曝光證警驅急救員 人堆後射胡椒劑' (18 November Yau Ma Tei stampede CCTV proves police dispersed first-aiders and sprayed pepper spray from behind the crowd), *HK 01*, 18 December 2019, bit.ly/38bgJrN.

⁴⁸ Kris Cheng, 'Hong Kong university student dies following fall near police operation', *Hong Kong Free Press*, 8 November 2019, www.hongkongfp.com/2019/11/08/breaking-hong-kong-university-student-dies-following-fall-near-police-operation.

⁴⁹ Kris Cheng, 'Hong Kong police call for coroner investigation into student's death as university president demands explanation over ambulance delay', *Hong Kong Free Press*, 9 November 2019, www.hongkongfp.com/2019/11/09/hong-kong-police-call-coroner-investigation-students-death-university-president-demands-explanation-ambulance-delay.

⁵⁰ UN Doc. A/HRC/19/61, para. 29.

⁵¹ UN Doc. A/HRC/8/3, para. 16.

⁵² Amnesty Dutch Section, *Police Oversight*, p.43.

LIMITATIONS OF EXISTING MECHANISMS

The government has repeatedly said that there is no reason to establish a Commission of Inquiry because there is an existing statutory mechanism to investigate police misconduct.⁵³ However, international human rights treaty bodies and local stakeholders have repeatedly pointed out that the IPCC is institutionally limited in its capacity and ability to carry out an independent, impartial, effective and thorough investigation of the human rights violations related to the protests.

Hong Kong currently has a two-tier police complaints system. The Complaints Against Police Office (CAPO) of the Hong Kong Police Force handles all incoming complaints. According to the Independent Police Complaints Council Ordinance, all complaints lodged are categorized as “reportable” complaints and “notifiable” complaints. CAPO is responsible for investigating all reportable complaints.⁵⁴ After completing its investigation, CAPO submits reports and relevant materials to the Independent Police Complaints Council (IPCC), a statutory body established according to the Independent Police Complaints Council Ordinance (IPCCO).⁵⁵ The IPCC reviews the investigation report and asks for clarification or further information if any doubt arises. If the IPCC finds an investigation inadequate, it can ask CAPO to investigate further. The IPCC endorses an investigation report when it completely agrees that the complaint has been properly handled. The IPCC does not have its own investigative powers, such as the power to subpoena documents or summon witnesses.

The UN Human Rights Committee and the Committee against Torture have each repeatedly commented on the limitations of the IPCC and CAPO in fulfilling the Hong Kong government’s obligation to investigate human rights violations. Both committees have called for two decades on the Hong Kong government to establish a fully independent mechanism to receive and investigate complaints against all officials.⁵⁶

The IPCC so far has decided to take the initiative to conduct a fact-finding study of several public order events connected to the 2019 protests. Specifically, it decided to look at incidents that took place between 9 June and 2 July 2019; incidents that occurred on 21 July, 11 August, 31 August; and the procedures for handling arrested persons at the San Uk Ling Holding Centre located in the far north of Hong Kong territory on 11 August.⁵⁷ The Council also invited a panel of foreign experts to take part in the fact-finding study.

The IPCCO sets the parameters of the IPCC study, meaning that the IPCC does not have investigative or subpoena powers. The purpose of the study is to offer “improvement recommendations to the police and assist the examination of related complaint cases”.⁵⁸

On 20 December 2019, the Court of First Instance of the Hong Kong High Court granted permission to an application for judicial review challenging the IPCC’s initiation of the fact-finding study as going beyond its statutory power.⁵⁹ Close to the scheduled publication date of the report,

⁵³ The Chief Executive, in response to a question on setting up a commission of inquiry, said she had reiterated many times that the government ‘does not have to do down that road’. Press Releases, ‘Transcript of remarks by CE at media session before ExCo meeting (with video)’ (in Chinese), HKSAR, 7 January 2020, www.info.gov.hk/gia/general/202001/07/P2020010700422.htm?fontSize=1.

⁵⁴ See Cap. 604 Independent Police Complaints Council Ordinance Section 11, 13 and 14 for detailed definition of the categories.

⁵⁵ The statutory functions of the IPCC include a) observing, monitoring and reviewing the handling and investigation of Reportable Complaints by the Commissioner of Police; b) monitoring actions taken or to be taken in respect of any police officer by the Commissioner of Police in connection with Reportable Complaints; c) identifying any fault or deficiency in police practices or procedures that has led to or might lead to a Reportable Complaint; d) advising the Commissioner of Police and/or the Chief Executive of its opinion and/or recommendation in connection with Reportable Complaints and; e) promoting public awareness of the role of the Council. See the full Independent Police Complaints Council Ordinance at www.elegislation.gov.hk/hk/cap604%21en.pdf.

⁵⁶ Concluding Observation of the UN Human Rights Committee (hereinafter HRC): Hong Kong, UN Doc. CCPR/C/79/Add.117 (1999), para. 11; Concluding observations of UN Human Rights Committee: Hong Kong: Hong Kong SAR, UN Doc. CCPR/C/HKG/CO/2 (2006), para. 9; Concluding observations of UN Human Rights Committee: Hong Kong, UN Doc. CCPR/C/HKG/CO/3 (2013), para. 12; Concluding observations of UN Committee against Torture: Hong Kong, UN Doc. CAT/C/HKG/CO/4 (2009), para. 12; Concluding observations of UN Committee against Torture: Hong Kong, UN Doc. CAT/C/CHN-HKG/CO/5 (2016), para. 9.

⁵⁷ Press Release, ‘Press Release from the Independent Police Complaints Council, *Independent Police Complaints Council*, 11 December 2019, www.ipcc.gov.hk/doc/en/pr/pr_20191211_e.pdf.

⁵⁸ Press Release, ‘Press Release from the Independent Police Complaints Council, *Independent Police Complaints Council*, 11 December 2019, www.ipcc.gov.hk/doc/en/pr/pr_20191211_e.pdf.

⁵⁹ *Lui Chi Hang Hendrick v. Independent Police Complaints Council* (HCAL2924/2019), Court of First Instance (2019), legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126221&QS=%24%28LUI%29%7C%28independent%2Bpolice%29&TP=JU.

the IPCC decided to delay the publication until the court has delivered a decision on the ongoing judicial review.⁶⁰

The foreign expert panel stepped down in December 2019, saying that the IPCC lacked the investigative powers and capabilities necessary to “begin to meet the standards citizens of Hong Kong would likely require of a police watchdog operating in a society that values freedoms and rights”.⁶¹

LACK OF INVESTIGATIVE POWERS

The current ordinance only gives the IPCC power to monitor and oversee the investigation conducted by CAPO.⁶² The UN Committee against Torture has repeatedly expressed concern about the fact that investigations of police complaints continue to be conducted by CAPO, which is a division of the police force, and that the IPCC remains only an advisory and oversight body of the investigations carried out by CAPO, with no power to conduct investigations on its own.⁶³

In a report submitted to the Bills Committee of the Legislative Council in 2008, the Hong Kong government argued that conferring the IPCC with investigative powers would be inappropriate for the following reasons:

“

- a. *IPCC does not have powers similar to those available to the Police, e.g. the search and seizure powers, or the necessary expertise and knowledge for investigating complaints which often involve allegations of breaches of police discipline or procedures or of criminal law. This would adversely affect the quality of IPCC's investigations;*
- b. *IPCC would need to have its own investigation team, in addition to the investigation complement in CAPO. This would result in an overlapping of resources and duplication of efforts. The cost-effectiveness of giving investigative power to IPCC is in doubt; and*
- c. *empowering IPCC to investigate complaints lodged with CAPO would confuse the IPCC's role as an oversight body. This arrangement might create two different sets of findings and results in respect of a complaint, and hence cause confusion. In contrast, under the established practice, IPCC and CAPO will seek to reach a consensus on the classification of a reportable complaint through discussions.”⁶⁴*

The government’s rationale for not conferring the IPCC with investigative powers further highlights the ineffectiveness of the existing police oversight mechanism. Granting the IPCC investigative power even if that “might create two different sets of findings and results in respect of a complaint” against the police is precisely the point of having one public body checking another. Instead, currently the IPCC cannot perform the crucial function of an oversight body – to overrule the decision of CAPO when it is deemed inappropriate upon review.

LACK OF INDEPENDENCE AND IMPARTIALITY

The UN Human Rights Committee has consistently commented on the IPCC’s lack of impartiality. As early as 1999, the Committee expressed concern about investigations of police misconduct remaining in the hands of the police themselves, which undermines the credibility of those

⁶⁰ Press Release, ‘Press Statement from the Independent Police Complaints Council’, *Independent Police Complaints Council*, www.ipcc.gov.hk/doc/en/pr/pr_20200116_e.pdf.

⁶¹ Natasha Khan, ‘Foreign Panel Steps Down From Probe of Hong Kong Police’, *The Wall Street Journal*, 10 December 2019, www.wsj.com/articles/foreign-panel-steps-down-from-probe-of-hong-kong-police-11576018800.

⁶² Cap. 604 Independent Police Complaints Council Ordinance’, *Hong Kong e-Legislation*, www.elegislation.gov.hk/hk/cap604.

⁶³ Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/HKG/CO/4 (2009), para. 12; Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/CHN-HKG/CO/5 (2016), para. 8.

⁶⁴ Legislative Council, ‘Investigative power’, *Report of the Bills Committee on Independent Police Complaints Council Bill (LC Paper No. CB(2)2499/07-8)*, 2008, p. 16, www.legco.gov.hk/yr06-07/english/bc/bc63/reports/bc630709cb2-2499-e.pdf.

investigations. Instead, the Committee stressed, the Hong Kong government should provide for independent investigation of complaints against the police.⁶⁵ The Committee repeated these concerns in 2006 and 2013 and also expressed concern about the fact that the members of the IPCC are appointed by the Chief Executive.⁶⁶

In 2016, the Committee against Torture also expressed concern about “the lack of an independent and effective mechanism for lodging complaints without fear of reprisals within the detention facilities under the police department, immigration department or the correctional services department”.⁶⁷ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has remarked that “without external oversight, police are essentially left to police themselves”,⁶⁸ and “independent, external oversight of police is a best practice.”⁶⁹ If the possibility that law enforcement officials can escape from being held accountable for the unlawful use of force is to be effectively prevented, the present complaints system, which is independent only in name, is insufficient.

A Col can play an important role as an independent and impartial body in combating impunity when key government agents, such as police, are themselves involved in abuses and there is no reliable system of police oversight.⁷⁰

LACK OF EFFECTIVENESS

The IPCC endorsed 5,338 complaints as properly handled by CAPO from 2017 to 2019, including complaints of police officers fabricating evidence and assaulting citizens.⁷¹ Only 3.5% of these complaints were considered to have been substantiated, and no police officers were prosecuted.⁷² Between 2010 and 2018, among all of the cases on police misconduct substantiated by the IPCC, the police only referred one case for prosecution, while officers in the majority of cases were only given “advice”, which is often not recorded in the their divisional record file.⁷³

Shortly after the enactment of the IPCCO in 2008, in 2009 the UN Committee against Torture was concerned that, despite the considerable number of reportable complaints filed with the CAPO, only a small percentage of them were considered as substantiated and only in one case an officer has been prosecuted and convicted of a criminal offence.⁷⁴

In 2016, the Committee against Torture expressed regret about the Hong Kong government’s failure to provide complete statistical data with regard to the number of complaints of torture or other ill-treatment (including police abuse) received by the CAPO in the reporting period and on the outcome of those complaints.⁷⁵

CONCLUSION

UN bodies have clearly and consistently observed that the existing mechanism for investigating complaints against the police in Hong Kong falls short of international law and standards. The faults in the system now become ever clearer when mirrored against the widespread human rights violations committed by members of the Hong Kong police force during the 2019 protests. The Hong Kong government for decades has refused to follow the UN bodies’ advice. It is both overdue and urgent that an alternative system is established, which allows for fully independent, impartial, effective and thorough investigations, in compliance with international human rights

⁶⁵ Concluding observations of UN Human Rights Committee: Hong Kong, CCRP/C/79/Add.117 (1999), para. 11.

⁶⁶ Concluding observations of UN Human Rights Committee: Hong Kong, CCRP/C/HKG/CO/2 (2006), para. 9; Concluding observations of UN Human Rights Committee: Hong Kong, CPR/C/CHN-HKG/CO/3 (2013), para. 12.

⁶⁷ Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/CHN-HKG/CO/5 (2016), para. 8.

⁶⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/14/24 Add. 8 (2010), para. 3.

⁶⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/26/36 (2014), para. 84.

⁷⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 22.

⁷¹ Independent Police Complaints Council, *Report 2018/19*, p.43-45.

⁷² Independent Police Complaints Council, *Report 2018/19*, p.43-46.

⁷³ Amnesty International, Hong Kong Human Rights Monitor, Human Rights Watch, *Open letter calling for an independent commission of inquiry*, 28 June 2019, www.hrw.org/sites/default/files/supporting_resources/190628_hk_lam_police_force.pdf.

⁷⁴ Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/HKG/CO/4 (2009), para. 12.

⁷⁵ Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/CHN-HKG/CO/5 (2016), para. 8.

law. It is suggested that the Hong Kong government establishes a special commission of inquiry specifically into police conduct during the Extradition Bill protests.

INTERNATIONAL HUMAN RIGHTS PRINCIPLES

While the mandate of a commission of inquiry should be designed in light of the protests in Hong Kong, it should always reflect international law and standards on human rights fact-finding and be drafted in such a way as to enable the Col to conduct its work in line with good practice methodology. The terms of references should neither prejudge the outcome of the commission's work, nor exclude any areas of state responsibility from the start.⁷⁶

INVESTIGATE HUMAN RIGHTS VIOLATIONS

States have duties to investigate, prosecute and provide full accountability and reparations for human rights violations by their authorities, including in the area of the policing of assemblies. The failure by a state to investigate allegations of human rights violations and bring all those suspected of criminal responsibility to justice in fair trials is itself a separate breach of international human rights law, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT).

Hong Kong is bound by customary international law and such international treaties as ratified by China (or the United Kingdom prior to 1 July 1997, when China resumed sovereignty over Hong Kong). Both the ICCPR and CAT were ratified by the UK government, as China did with the CAT in 1988, and remain binding on Hong Kong.⁷⁷

Prompt and impartial investigation by competent authorities is required to deliver effective remedy for allegations of torture and other forms of ill-treatment.⁷⁸ All allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by a competent national authority.⁷⁹ A Col composed of independent experts could be an effective tool for this task.

States have an obligation to establish appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.⁸⁰ As discussed above, given the severity, scale and nature of the human rights violations that have occurred during the Hong Kong protests, a Col with designated and sufficient resources, powers and competence is a useful and necessary tool to investigate allegations of human rights violations independently, impartially, thoroughly and effectively.⁸¹

⁷⁶ OHCHR, *Guidance and Practices*, p. 10.

⁷⁷ For the ICCPR, see Article 39 of the Basic Law. When China ratified CAT, it added a declaration that it would not recognize the competence of the Committee against Torture as provided for in article 20 of the CAT to carry out confidential inquiries into allegations of systematic practices of torture.

⁷⁸ Human Rights Committee General Comment 20, para. 14.

⁷⁹ Principle No.2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁸⁰ Human Rights Committee General Comment 31, para. 15.

⁸¹ It should be noted that a Col is not a replacement for criminal investigations. Establishing a Col does not relieve states of their obligations to prosecute those who allegedly violated human rights. See UN Doc. A/HRC/19/61, para. 47-56.

PROVISION OF EFFECTIVE REMEDY

The Hong Kong government has the obligation to ensure that individuals whose rights are violated have access to effective remedies. To achieve that, the government should establish appropriate judicial and administrative mechanisms to address claims of rights violations.⁸²

All states have an obligation not only to prevent and prohibit torture, which is a gross violation of human rights and a crime under international law, but also to provide victims with access to justice, rehabilitation and other forms of reparation.⁸³ The government must provide reparations to fulfil its obligations to provide an effective remedy.⁸⁴ Appropriate reparations can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition or changes in relevant laws and practices.⁸⁵

The scale of the Hong Kong protests and the number of allegations against police suggest that there are severe problems with current law enforcement practices in policing assemblies. Guarantees of non-repetition and changes in relevant law and practice would be particularly appropriate reparations in this context, as evidence suggests that many of the violations that have occurred during the protests were not stand-alone incidents but, rather, the result of structural failures. Without changes to current practices, it is likely that these violations will re-occur. An essential part of the Hong Kong government's obligation to fulfil its obligation as stipulated in ICCPR Article 2 is to take measures to prevent recurrence of these violations. As noted by the UN Human Rights Committee, cessation of ongoing violations is an essential element of the right to an effective remedy.⁸⁶

When a CoI publishes its findings, the government should respond promptly to its report, indicating acceptance or rejection of each recommendation with carefully reasoned explanations and ideally a timetable for implementation of the recommendations.⁸⁷

ACCOUNTABILITY

Under international standards, states must ensure the full and transparent accountability of law enforcement agencies, including frontline officers and officers in commanding positions, for all their actions and, in particular, for incidents related to the use of force. This is especially imperative given the great importance of their responsibility and duty to society, the wide powers granted to them, and the potentially severe impact of law enforcement actions on a person's human rights, [in particular, the right to life, physical and mental integrity and human dignity]. This includes that they must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished, and that an effective review process is available.⁸⁸ Superior and commanding officers must be held accountable for any action or omission that led to human rights violations being committed, such as issuing orders that have led to the human rights violations and failure to exercise command and control to prevent violations.⁸⁹

No public officials or state agents can relieve perpetrators from personal responsibility. According to the Human Rights Committee, "States Parties must ensure that those responsible are brought to justice... These obligations arise notably in respect of those violations recognized as criminal

⁸² Human Rights Committee General Comment 31, para. 15.

⁸³ Principle No. 18 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

⁸⁴ Human Rights Committee General Comment 31, para. 16.

⁸⁵ Human Rights Committee General Comment 31, para. 16.

⁸⁶ Human Rights Committee General Comment 31, para. 15.

⁸⁷ Paragraph 119 of Istanbul Protocol, UN Doc. A/HRC/19/61, para. 77.

⁸⁸ UN BPUFF, Principles Nos. 7, 22.

⁸⁹ UN BPUFF, Principles Nos. 24, 26; see also overall Amnesty International Dutch Section, Chapter 3.2.3 and 10.2, *Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, September 2015, p. 69, 182, www.amnesty.nl/content/uploads/2017/07/guidelines_use_of_force_eng.pdf?x97316

under either domestic or international law”; and that “no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility”.⁹⁰

COMPETENCE

As discussed in the previous section, the existing police oversight mechanism does not have the capacity or ability to conduct an independent investigation of widespread human rights violations that took place during the protests. Many international standards on independent and effective inquiries adopted by the UN have stressed that a Col composed of members with requisite expertise can ensure an effective investigation.⁹¹

The Hong Kong government must ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture or other ill-treatment has been committed in any territory or to any person under its jurisdiction.⁹²

States have an obligation to ensure that individuals who are allegedly subjected to torture have the right to complain to, and to have the cases promptly and impartially examined by, its competent authorities. The Hong Kong government should ensure that the complainant and witnesses are protected against all ill-treatment or intimidation because of the complaints or any evidence given.⁹³

INDEPENDENCE

Under international standards, persons affected by the use of force by law enforcement officials must have access to an independent process.⁹⁴ In particular, investigations must be carried out by a body without links to the one of the law enforcement officials under investigation.

The independence of the members gives a Col legitimacy in the eyes of the public and helps ensure the commission’s findings will be accepted by the public.⁹⁵ When the commission is not independent from any institution or person with an interest in the outcome of the inquiry, the inquiry is unlikely to be capable of providing an unbiased assessment of the protests.⁹⁶ The commission must therefore be set up as a separate institution from the government to guarantee structural independence.⁹⁷ The individual members of the commission should also be independent and not be seen to have a vested interest in the outcome.

CONCLUSION

All state agents, including law enforcement officials, need to be held accountable whenever the exercise of their powers has infringed the human rights of a person. When it comes to excessive, arbitrary, abusive or otherwise unlawful use of force by law enforcement, the most important factor leading to such behaviour is when impunity prevails. Individuals are more likely to break laws, rules and regulations if they do not have to fear any consequences of doing so. Thus, effective accountability of individuals and the identification of institutional shortcomings are indispensable to ensure lawful, human rights compliant policing and prevent reoccurrence of violations. It is therefore important that an independent external mechanism can look into these

⁹⁰ Human Rights Committee General Comment 31, para. 18.

⁹¹ Philip Alston, ‘Introduction: Commissions of Inquiry as Human Rights Fact-Finding Tools’, *Proceedings of the Annual Meeting (American Society of International Law)*, 2011, p. 81-82.

⁹² Articles 12, 13, 16 of Convention Against Torture; see also for example Article 8 of the Inter-American Convention against Torture.

⁹³ Article 13 of Convention Against Torture.

⁹⁴ UN BPUFF, Principle No. 23.

⁹⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 38.

⁹⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 33.

⁹⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 34.

serious matters, in order to re-establish public trust in the police force and governance more generally.

RECOMMENDATIONS FOR THE ESTABLISHMENT OF A COMMISSION OF INQUIRY

In order for a commission of inquiry to effectively and thoroughly investigate human rights violations related to the protests in Hong Kong since June 2019, address impunity and provide full accountability of relevant state authorities, it must be independent, impartial and competent.⁹⁸ To ensure this, the following criteria for the formation and operation of the commission should be considered, which reflect good practice and general acceptance as expressed in relevant international standards.

SCOPE OF INQUIRY

- The scope of the commission's mandate should cover the range of human rights violations that occurred in the context of the protests since June 2019, including but not limited to crimes under domestic and international law.⁹⁹
- The commission should be established and operate irrespective of whether a criminal investigation has started but should not preclude or replace criminal proceedings.
- The commission must be capable of leading to a determination of whether the force used was or was not justified in the circumstances in question, regardless of whether a specific complaint was brought.
- The commission should be able to identify suspected perpetrators of human rights violations and gather information indicating individual responsibility, with a view to contributing to disciplinary and judicial investigations and where warranted prosecution of those who are suspected to be responsible for human rights violations.
- The commission should also be able to identify any instances in which internal regulations and operational procedures of the Hong Kong police force were breached in the policing of assemblies, detention, or other relevant contexts, as well as whether these regulations and procedures and their application are in compliance with international human rights law and standards.
- The commission should be able to make recommendations regarding the improvement of institutional framework and redress of systematic failures with regard to the policing of assemblies, including the overall approach, the functioning of a law enforcement agency, training and internal review mechanisms.
- In particular, the commission should be able investigate all individual cases of violations. Its investigation should establish whether law enforcement officials committed, colluded or were in any way complicit in human rights violations during the protests and, where

⁹⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/8/3, para. 25.

⁹⁹ 35 NGOs have suggested terms of reference of the Commission, see Amnesty International Hong Kong Section, *Open letter to the Chief Executive – Calling for an independent Commission of Inquiry*, 28 June 2019, www.amnesty.org.hk/en/open-letter-to-the-chief-executive-calling-for-an-independent-commission-of-inquiry.

relevant, establish responsibility of superior officers for crimes committed by themselves or subordinate officials under their effective authority and control. It should also seek to identify any systematic patterns in human rights violations.

- The investigation should include an analysis of all physical and documentary evidence and statements from witnesses. The investigation should seek to establish the number of any people killed or injured in connection with police use of force, as well as their identities, and should seek to ascertain the fate and whereabouts of any individuals who remain missing.
- The commission should delve more deeply and broadly into the relevant facts and circumstances that led to the violations than a prosecutorial investigative authority would, with the aim to reveal insights into wider patterns of violations, institutional involvement and command responsibility, as well as provide valuable background information.¹⁰⁰
- As new incidents and evidence are emerging from the ongoing protests, the commission should have the flexibility to amend its terms of reference in exceptional cases. The commission's decision should publicly and transparently explain the decision if it finds the newly found element warrants the amendment.¹⁰¹
- The commission should have the power to oversee the implementation of its recommendations, including the proper conduct of any indicated disciplinary measures or criminal investigations and the prosecutorial process; it should also intervene in case of apparent partiality or undue delays.

COMPOSITION

- Members of the commission should be selected on the basis of their competence in human rights, policing, gender-based violence and other relevant fields. The commission should have access to a wide range of expertise and experience, such as fact-finding methodologies, assessment of the quality of evidence, forensic pathology, crime scene investigation and other specialized areas.¹⁰²
- The process of selecting members of the commission must be entirely transparent and following a public appointment process.
- Members of the commission should be independent of the government and any institution, agency or person who may be the subject of, or otherwise involved in, the investigation.¹⁰³ There should be no institutional or hierarchical relationship between the investigators of that particular body and the suspected perpetrators of the acts that form the basis of a complaint.¹⁰⁴
- Members of the commission should be chosen for their recognized impartiality and personal integrity and must meet the highest professional and ethical standards.¹⁰⁵
- Members of the commission, staff and other relevant associated person should, before their selection, disclose any information that could call into question their independence, impartiality and integrity.
- The commission should aim to fairly reflect society in terms of key factors, such as age, gender or ethnicity.

¹⁰⁰ UN Doc. A/HRC/19/61, para. 52.

¹⁰¹ Paragraph 107(c) of Istanbul Protocol; UN Doc. A/HRC/19/61, para. 64.

¹⁰² UN Doc. A/HRC/19/61, para. 61.

¹⁰³ Paragraph 109 of Istanbul Protocol.

¹⁰⁴ Concluding observations of UN Committee against Torture: Hong Kong, CAT/C/CHN-HKG/CO/5 (2016), para. 9.

¹⁰⁵ UN Doc. A/HRC/19/61, para. 60.

- The commission should include individuals with sufficient awareness and knowledge to understand the specific ways in which people with various sexual orientations and gender identities suffer from human rights violations, including sexual violence and torture and other forms of ill-treatment, and ensure full access of such victims to the proceedings.¹⁰⁶
- The commission must be able to seek international assistance as needed, including by inviting international experts to join the commission.¹⁰⁷

POWER AND RESOURCES

- The commission should be mandated with the powers and authority to gather all information it considers relevant, including the power to compel the production of information and the attendance of officials and other persons as and when necessary. The Commission must be able to receive and inspect all relevant documents in public agencies and archives.¹⁰⁸
- The commission should have freedom of movement and be granted free access to all relevant places.
- The commission must be guaranteed the full co-operation of the Hong Kong government and all authorities, in particular all law enforcement agencies.
- The commission should also have the means and power to protect witnesses, victims and their families from possible reprisal for their testimonies.¹⁰⁹
- The commission should have adequate staff, budget and other resources to carry out investigations and tasks necessary to fulfil its mandate.¹¹⁰

PROCESS

- The official investigation must be initiated by the state, as soon as reasonably possible.
- The public announcement of the inquiry should include an invitation to the wider public, but also individual law enforcement officials, to submit relevant information and written statements to the mechanism and instructions to persons willing to testify.
- The commission should offer victims and witnesses, including law enforcement officials, the protection of fundamental legal safeguards, such as the right against self-incrimination.
- The commission should provide for adequate involvement and information of victims in its inquiry.
- Any limitations of transparency in terms of the commission's activities must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring fundamental judicial guarantees of private persons and police officers, ensuring the integrity of ongoing investigations, protecting the safety of a witness or encouraging testimony or securing sensitive information about intelligence sources or police operations. In particular, the commission may not carry out its work in such a way that it negatively affects either the right to a fair trial of the law enforcement official or the admissibility of evidence in future disciplinary or criminal proceedings.

¹⁰⁶ A/HRC/19/61, para. 62.

¹⁰⁷ A/HRC/19/61, para. 59.

¹⁰⁸ UN Doc. A/HRC/19/61, para. 65.

¹⁰⁹ Paragraph 117 of Istanbul Protocol; UN Doc. A/HRC/19/61, para. 65.

¹¹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/26/36 (2014), para. 84.

- The commission must issue a public report of its findings.¹¹¹ The commission should make the report accessible to the broadest audience possible.¹¹² The report should include detailed recommendations for all branches of government on how to fulfil the state's obligations with regard to truth, justice and reparation to victims and the wider public, including guarantees of non-repetition.¹¹³

¹¹¹ UN Doc. A/HRC/19/61, para. 74.

¹¹² UN Doc. A/HRC/19/61, para. 77.

¹¹³ UN Doc. A/HRC/19/61, para. 77.

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