STATEMENT OF THE NEW YORK CITY BAR ASSOCIATION
ON POLICE USE OF FORCE IN HONG KONG AND
CALL FOR AN INQUIRY COMMISSION

The New York City Bar Association is deeply concerned by reports of human rights abuses by the Hong Kong police force in the Special Administrative Region and the erosion of the democratic process in Hong Kong.

BACKGROUND ON THE PROTESTS AND POLICE ACTIONS

The current wave of protests in Hong Kong began in summer 2019. These protests—which were largely peaceful—followed the decision of the Hong Kong government to rush through a bill that would permit extradition of criminal suspects to mainland China,1 a measure that the Association opposed in its April 2019 letter to Hong Kong’s chief executive.2 Since then, the protests grew significantly in size,3 and the protesters expanded their concerns to five core demands: (1) permanent withdrawal of the Extradition Bill; (2) establishment of an Independent Commission of Inquiry into abuse of power by the Hong Kong police force; (3) dual and genuine universal suffrage (for both the Legislative Council and the Chief Executive); (4) release of all arrested protesters, and a pledge that they will not be further prosecuted; and (5) retraction of characterization of the protests as a “riot.”4

On September 3, 2019, the Hong Kong government relented and agreed to withdraw the Extradition Bill, and the Bill was formally withdrawn on October 23, 2019.

The Association is concerned that the Hong Kong government is increasingly failing to protect its residents in the exercise of their rights under the International Covenant on Civil and Political Rights (the “ICCPR”). There have been widespread reports that the Hong Kong police force has engaged in potentially serious human rights violations, in the following respects:

- **Treatment of Detainees:** There have been widespread reports that the police have engaged in beating of detainees and other ill-treatment amounting to torture. Moreover, some detainees have been transferred to a remote detention camp known as San Uk Ling near the Chinese border where they have been abused. Detainees are in a vulnerable position and need protection from human rights abuses, especially regarding the right to humane treatment, which must be guaranteed with respect to both the state’s own actions as well as those of third parties. Any use of force against persons in custody must be the minimum necessary for the maintenance of security or order within the institution, conforming with the requirements of necessity and proportionality.

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proportionality. This requirement on minimum use of force has been incorporated directly into Hong Kong law under CAP 234A Prisons Rules, Article 237.

- **Treatment of Hospital Staff:** Hong Kong police have also been alleged to engage in harassment of hospital staff while searching for protesters. The harassment of staff and patients during the administration of medical care and the prevention of access to medical care raise serious concerns under international law. When such acts involve deprivation of medical care, they may constitute torture or other cruel, inhuman or degrading treatment or punishment in violation of the Convention Against Torture. When physicians and other medical staff are harassed or co-opted into police activity in a manner that prevents their delivery of medical care to patients, this could constitute a violation of the principle of medical neutrality which requires that medical personnel in civil strife situations be protected and respected during the performance of their duties.

- **Police Acting as Agents Provocateurs:** The news media has reported that Hong Kong police officers may have acted as agents provocateurs during protests. The use of agents provocateurs raises important questions, particularly when those agents provocateurs or undercover police officers are allegedly involved in inciting unlawful or violent activity among protesters. At a minimum, police conduct which itself is violent or illegal may raise problems for the admissibility of any evidence obtained or the prosecution of offenders arrested in connection with that police activity. But it...

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11 See supra note 31.


16 Paul Lewis & Rob Evans, Activists walk free as undercover officer prompts collapse of case: Six defendants call for inquiry into activities of PC Mark Kennedy, who infiltrated environmental group, THE GUARDIAN, Jan. 10, 2011, https://www.theguardian.com/environment/2011/jan/10/activists-undercover-officer-mark-kennedy ; See R v D’Arrigo [1991] 58 A Crim. R. 71 (Austl.). In New York City, the use of undercover officers to “monitor activity of political and protest organizations is subject to the Handschu Guidelines, which state unequivocally: Undercovers are strictly prohibited from engaging in any conduct the sole purpose of which is to disrupt the lawful exercise of political activity, from instigating unlawful acts or engaging in unlawful or unauthorized investigative activities.” See, Handschu v. Special Services Division, 288 F.Supp.2d 411 (S.D.N.Y., Aug. 6, 2003) at 429 available at NEW YORK CIVIL LIBERTIES UNION, HANDSCHU v. SPECIAL SERVICES DIVISION (CHALLENGING NYPD SURVEILLANCE
also raises questions about the aims of the police themselves. Indeed, two different United Nations Special Rapporteurs have written about the negative restrictions and positive duties that international law imposes on states with respect to the proper management of assemblies:

*International law requires that States respect and ensure the rights of all individuals. The obligation to respect rights means that States must refrain from restricting the exercise of the rights where it is not expressly allowed under international law. The obligation to ensure is a positive duty that requires States both to fulfil and to protect rights.*

Thus, the use of undercover police to incite unlawful activity is contrary to the principles enshrined by international law.19

- **Rubber Bullets, Tear Gas, and Live Bullets:** The news media has reported that the Hong Kong police force has over-used and/or misused rubber bullets and tear gas against protestors.20 More recently, there have been reports of the use of live ammunition by the Hong Kong police force against a protester during demonstrations on Tuesday, October 1, 2019 and another protester on Monday, November 11, 2019.21 The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* require that “deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully

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19 **STUART CASEY-MASLEN, POLICE USE OF FORCE UNDER INTERNATIONAL LAW, Ch. 6, (2017).**


controlled.” Misuse of these “less-than-lethal” weapons raises serious concerns about violations of both the *Convention Against Torture* and the *ICCPR*.23

- **Treatment of Journalists:** There are also reports that the Hong Kong police force has shot projectiles at and endangered the lives of journalists.24 Attacks on journalists are quintessential violations of the human rights principles. The deliberate or reckless targeting of journalists and other media representatives threatens freedom of speech and the press as protected under *ICCPR* Article 19(2) and Hong Kong Basic Law Article 27.

These reported abuses raise grave concerns about the human rights situation in Hong Kong and call into question the training, professionalism, and capacity of the Hong Kong police force.25 Under the *ICCPR* and its own Basic Law, Hong Kong is obligated to allow for freedom of expression (*ICCPR* Article 19(2); Basic Law Article 27), peaceful assembly (*ICCPR* Article 21; Basic Law Article 27), and freedom of association (*ICCPR* Article 22(1); Basic Law Article 27). Not only has the Hong Kong police force reportedly threatened these rights, but it has also reportedly engaged in widespread violations of human rights through its excessive use of force.26

**THE NEED FOR A NEUTRAL AND INDEPENDENT INQUIRY**

The Association believes that these issues warrant a neutral and independent inquiry, which is an important step in rebuilding trust in and the legitimacy of the Hong Kong government. Indeed, on October 5, 2019, the United Nations High Commissioner for Human Rights, Michelle Bachelet, urged Hong Kong to undertake an “effective, prompt, independent and impartial inquiry [that] is a quintessential step in rebuilding trust in the State’s monopoly on the use of force.”

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23 See, e.g., Gorovenky v Ukraine, Eur. Ct. H. R. (April 12, 2012) at §38 available at http://hudoc.echr.coe.int/eng?i=001-108572 “States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria... In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.”


26 Giuliani v. Italy, 2011 54 Eur. H. R. Rep. 10, (March 24, 2011), available at http://hudoc.echr.coe.int/eng?i=001-104098 at § 300, “For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, Gülec, cited above, §§ 81-82, and Oğur, cited above, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force (see Hugh Jordan, cited above, § 106; Ramsahai and Others [GC], cited above, § 325; and Kolevi v. Bulgaria, no. 1108/02, § 193. 5 November 2009).”
investigation” into acts of violence including the shootings.27 The Former Chief Justice of Hong Kong, Andrew Li, has also called for an independent inquiry because it would benefit the police, protesters and the community at large.28 As inquiries into the London 2011 riots showed and independent research by the UK’s National Policing Improvement Agency have shown, a loss of the legitimacy of the police and public trust in police can be critical factors behind escalating violence and social disorder.29 The Association’s request is also consistent with calls for an independent inquiry from bar associations and organizations throughout the world, including from the Bar Human Rights Committee of England and Wales,30 the Hong Kong Bar Association,31 the German Bar Association,32 the International Bar Association’s Human Rights Institute,33 and prominent NGOs.34


33 INT’L BAR ASS’N HUMAN RIGHTS INSTITUTE, IBAHRI URGES CARRIE LAM TO OPEN AN INDEPENDENT INVESTIGATION INTO POLICE BRUTALITY IN HONG KONG, (Sept. 12, 2019) https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=BABC7E8-A767-4028-8CB2-52584A12257B. The Association notes that the International Bar Association’s Human Rights Institute here calls for an independent investigation “into the police brutality meted out against those protesting the bill and journalists covering the humanitarian emergency.”

The Association is concerned that the current inquiry being undertaken by the Independent Police Complaints Commission is inadequate because the Commission does not possess the requisite degree of investigatory powers or the institutional protections for impartiality and independence.\textsuperscript{35} Despite recent attacks on their independence,\textsuperscript{36} Hong Kong’s legal profession and its judiciary have the capacity to be a neutral and independent third-party in an inquiry,\textsuperscript{37} and the Association urges the executive government to utilize these trained professionals in the inquiry.

CONCLUSION

Hong Kong is a vibrant city that remains a critical meeting point for cultures, ideas and business. However, its reputation is seriously threatened by concerns that the Hong Kong government may be failing to live up to its human rights obligations. The Hong Kong police force can be an effective agent for community safety, but it needs community trust and confidence to achieve this. Trust and confidence are undermined when allegations of human rights violations and misconduct are not independently investigated. It is therefore incumbent on the Government of the Hong Kong Special Administrative Region to commence a full and independent inquiry into police conduct during the protests of 2019.

International Human Rights Committee
Lauren Melkus, Chair

Asian Affairs Committee
Jian Wu, Chair

Task Force on the Independence of Lawyers and Judges
Christopher Pioch, Chair
Jessenia Vazcones-Yagual, Chair

November 2019

\textsuperscript{35} See detailed analysis of why the Independent Police Complaints Council and Complaints Against Police Office mechanisms are not adequate. \textit{CHINESE HUMAN RIGHTS DEFENDERS, OPEN LETTER FROM 35 NGOs CALLING FOR AN INDEPENDENT COMMISSION OF INQUIRY INTO USE OF FORCE BY HONG KONG POLICE ON JUNE 12, 2019,} (June 12, 2019) \url{https://www.nchrd.org/2019/06/hong-kong-excessive-use-of-force-open-letter/}.
