



**British Institute of
International and
Comparative Law**

LEGAL ISSUES RELATING TO DEMOCRATIC PARTICIPATION IN HONG KONG

Scoping Report

17 October 2014

Legal Issues Relating to Democratic Participation in Hong Kong

I. Scope

1. The aim of this scoping report is to:
 - Set out the key elements of the law pertaining to the future of democratic participation in Hong Kong, focussing on the issues which are the subject of current protests there.
 - The report will cover the international law obligations of China and of the UK; the status of the Joint Declaration and Basic Law guarantees in Hong Kong law; and any relevant obligations of the UK Government under UK law.
 - Identify possible legal remedies for breach of any legal obligation under international or domestic law, and possible forums and avenues for seeking redress, for individuals or legal entities with an interest in Hong Kong.
2. The issues which are the subject of this report are whether certain proposed Hong Kong electoral reforms are compatible with China's international legal obligations and with Hong Kong law. The proposed reforms are those concerning the 2016 Legislative Council elections and 2017 Chief Executive elections, set out in the National People's Congress Standing Committee Decision of 31 August 2014.
3. This scoping report is by the British Institute of International and Comparative Law ("BIICL") and has been conducted by Jill Barrett and Robert McCorquodale.

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II. National People's Congress Standing Committee Decision of August 31 2014

4. The key document is the National People's Congress ("NPC") Standing Committee Decision of 31 August 2014 Concerning the 2016 Legislative Council elections and 2017 Chief Executive elections ("2014 Decision").¹

The Preamble states:

"Given the divergent views within the Hong Kong community on how to implement the Hong Kong Basic Law provisions on universal suffrage for selecting the Chief Executive, the Standing Committee of the National People's Congress finds it necessary to make provisions on certain core issues

.....[which include]

the principle that **the Chief Executive has to be a person who loves the country and loves Hong Kong** must be upheld.....

The method for selecting the Chief Executive by universal suffrage must provide **corresponding institutional safeguards for this purpose.**" (emphasis added)

5. The operative parts of the Decision provide:

➤ Election of the Chief Executive

"1. Starting from 2017, the selection of the Chief Executive of the Hong Kong Special Administrative Region may be implemented by the method of universal suffrage".

2. Two or three candidates will be chosen by a "broadly representative nominating committee", composed by the same method as for the fourth (previous) election of the Chief Executive.

3. All eligible Hong Kong voters will have the right to vote for one candidate.

4. Detailed procedures will be enacted by the NPC Standing Committee as an amendment to Annex I to the Basic Law, on the basis of a proposal by the Hong Kong Legislative Council ("LegCo"), which has to be endorsed by two-thirds of the members of LegCo and the Chief

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¹ The full title of the 2014 Decision is: "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (Adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014)" and the full text (in English translation) is available on the Xinhua website at: http://www.china.org.cn/china/2014-08/31/content_33390388.htm

Executive. In the absence of such a proposal, the election will proceed on the existing basis. (**Note:** The Chief Executive said he would introduce proposals to LegCo in the first quarter of 2015.²)

- Election of the Legislative Council ("LegCo")
5. The existing formation method and voting procedures for the Legislative Council as prescribed in Annex II to the Hong Kong Basic Law will not be amended. Elections in 2016 will take place on the basis of existing procedures. "After the election of the Chief Executive by universal suffrage, the election of all the members of the Legislative Council of the Hong Kong Special Administrative Region may be implemented by the method of universal suffrage."
The "Chief Executive elected by universal suffrage" (i.e. after 2017) will submit a report to the NPC Standing Committee, which will decide.

6. The features of the 2014 Decision which are likely to have the combined effect of restricting candidates for Chief Executive are:

- The Chief Executive must "love the country and love Hong Kong" – a phrase whose meaning is unclear and open to subjective interpretation, and which in practice might be used to bar certain individuals from candidacy;³
- Only 2 or 3 candidates will be permitted to stand;
- Candidates will be chosen by a 1,200 member Nominating Committee;
- Support from at least half of the nominators will be required for candidacy.

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² Chief Executive's media statement on 31 August 2014:

<http://www.info.gov.hk/gia/general/201408/31/P201408310834.htm>.

³ The kind of interpretation to which this phrase may lead is illustrated by the letter of the Ambassador of the PRC to the Chairman of the UK Foreign Affairs Committee of the House of Commons dated 14 July 2014, which has been published on the UK Parliament website at: <http://www.parliament.uk/documents/commons-committees/foreign-affairs/ChineseAmbassador.pdf>

III. The Sino-British Joint Declaration on the Question of Hong Kong

The Sino-British Joint Declaration on Hong Kong ("JD")⁴ was signed by Prime Ministers Zhao Ziyang and Margaret Thatcher on 19 December 1984. It entered into force on 27 May 1985, and was registered by both governments at the United Nations on 12 June 1985.⁵

7. The JD is a treaty, i.e. an intergovernmental agreement which is binding in international law. It is clear that both Governments intended it to be binding, both from the text itself (Paragraph 8: "This Joint Declaration and its Annexes shall be equally binding") and the fact that both Governments registered it as a treaty with the United Nations.⁶ The fact that it is named "Declaration" does not detract from its treaty status.⁷
8. Most of the substance of the JD is in Annex I "Elaboration by the Government of the PRC of its basic policies regarding Hong Kong". Although set out in the form of a unilateral declaration, it is part of the jointly agreed text, and as equally binding on China as is the main part of the JD.
9. A brief history of negotiation and implementation of the JD has the following elements:
 - The JD was negotiated bilaterally between the UK and Chinese Governments from 1982-1984. The Hong Kong Governor was a member of the UK delegation.
 - The Sino-British Joint Liaison Group was set up in 1985, pursuant to Annex II of the JD. It met regularly to prepare for the handover; and continued meeting until it was wound up at the end of 1999. Its mandate was to:

⁴ Its full title is: "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong". The authentic text is officially published by the UN at:

<https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>

at p.61. It is available in a more convenient form on the HK Government website at: http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/034B10AF5D3058DB482575EE000EDB9F?OpenDocument.

⁵ United Nations Treaty Collection, Registration No. I-23391

⁶ Pursuant to Article 102 of the UN Charter which provides: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." Non-binding texts are not eligible for registration under this procedure.

⁷ See the Vienna Convention on the Law of Treaties 1969, Article 2.

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(a) conduct consultations on the implementation of the Joint Declaration; (b) discuss matters relating to the smooth transfer of government in 1997; (c) exchange information and conduct consultations on such subjects as may be agreed by the two parties.

- During the 14 years prior to 1997, the UK Government prepared meticulously for the transition in numerous ways: e.g. localization and adaptation of HK laws; and presenting proposals for the continued application by China of UK treaties applied to Hong Kong. It took many years to negotiate these proposals but most of them were agreed, and acted upon, before the transfer of government in 1997.⁸
- One of the most important outcomes was the simultaneous deposit of notifications on 20 June 1997 by both Governments to the UN on the status of Hong Kong in relation to treaties deposited with the Secretary-General.⁹ This included the statement:
“The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997.”

10. The JD guarantees about the electoral system:

- Paragraph 3(4) provides: “The chief executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally.”
- Annex I, paragraph I provides: “The chief executive of the Hong Kong SAR shall be selected by election or through consultations held locally and be appointed by the Central People’s Government....”
- The legislature of the Hong Kong SAR shall be constituted by elections.

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⁸ The proceedings of the Joint Liaison Group remain confidential unless otherwise agreed by the two sides (JD, Annex II, paragraph 10.) The two sides issued a number of joint communiques which indicated the matters discussed and agreed. See “Britain’s Record in Hong Kong” by Robin McLaren, a former UK Ambassador to the JLG, published in 1997 by the Royal Institute of International Affairs at: http://archive.org/stream/britainsrecordin00mcla/britainsrecordin00mcla_djvu.txt (see, especially para 50 et seq on elections prior to 1997).

⁹ See note 2 under UK and China on the UN Treaties website at: [https://treaties.un.org/Pages/HistoricalInfo.aspx?#"Hong%20Kong"](https://treaties.un.org/Pages/HistoricalInfo.aspx?#)

- Paragraph 3 (12): These “basic policies” “will be stipulated in a Basic Law of the Hong Kong SAR by the National Peoples Congress of the PRC and they will remain unchanged for 50 years.”
- The JD does not contain any more specific detail on the electoral system. Other relevant guarantees include the commitments on basic rights and freedoms in Annex I, Part XIII, in particular, to keep in force the provisions of the International Covenant on Civil and Political Rights (“ICCPR”), as applied to Hong Kong.

11. The nature of China’s rights and obligations under the JD:

- China’s rights and obligations under the JD continue for so long as the treaty remains in force. The treaty is of indefinite duration and contains no termination date, and no provision for either side to withdraw. China’s obligation to keep the “basic policies” set out in the JD “unchanged for 50 years” remains legally binding under international law, unless and until the treaty is wound up or amended by agreement between the two Governments.
- Treaty obligations are binding on the States Parties under international law. Although the beneficiaries of the obligations are the people of Hong Kong, in international law China owes its obligations to the UK Government. Under the general international law of treaties,¹⁰ the principle “pacta sunt servanda” applies, meaning that every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹¹
- Breach of a treaty obligation has legal consequences. This entitles the UK to raise any issues of compliance with the JD directly with the Chinese Government, and to call upon China to remedy the breach. Failure to do so would, in principle, place an obligation on China to make full reparation for any injury caused. In this case,

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¹⁰ The UK and China are both party to the Vienna Convention on the Law of Treaties 1969. China did not accede to it until 3 Sept 1997, so it does not apply to the JD as that was concluded earlier. However, the Vienna Convention is generally recognized to reflect customary international law, which is binding on all States, and so does apply to the JD.

¹¹ Vienna Convention on the Law of Treaties, Article 26. See also, for example, M. Bedjaoui, *International Law: Achievements and Prospects* (1991), 157, J. Crawford, *Brownlie’s Principles of Public International Law* (8th ed, 2012) p 377.

defining the nature of the injury, and the appropriate type of reparations, would be very difficult.

12. China's legal obligations under the JD are owed only to the UK, not to any third States, nor directly to the people of Hong Kong, although they are, of course, the intended beneficiaries.

13. The nature of the UK's rights and obligations under the JD:

- The UK Government has no continuing obligations under the JD; its substantive obligations were all to be carried out before the handover and any procedural obligations ended with the winding up of the Joint Liaison Group.
- Nevertheless, the existence of the legal obligations owed by China to the UK gives the UK clear standing to raise issues about China's compliance with the JD direct with China. Such issues are normally raised through confidential diplomatic channels. The communications themselves would normally remain confidential, but the UK Government could choose to report in Parliament or elsewhere the fact that it has raised them.

14. The UK Memorandum and the Chinese Memorandum:

- On 19 December 1984, at the same time as signing the JD, each Government signed its own unilateral Memorandum on matters concerning nationality and consular and diplomatic protection which had not been agreed in the JD. These Memoranda were published with the JD but do not form part of the treaty, and are not legally binding on the other Government.
- The UK Memorandum made a commitment to allow British nationals whose nationality derives from links with Hong Kong to retain a form of British nationality after 1997, and to receive British consular services and protection when in third States. The Chinese Memorandum states that "All Hong Kong Chinese compatriots" whether holders of this (Hong Kong-derived) form of British nationality or not, are Chinese nationals and are not entitled to British consular protection in Hong Kong.
- The effect is to exclude the majority of Hong Kong Chinese from British consular and diplomatic protection

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in Hong Kong. Those whose UK passport derives from UK, rather than Hong Kong, links are not excluded, but they are a relatively small minority.

15. Possible arguments that the 2014 Decision is not consistent with the JD:

- An interpretation of “elections” or “consultations” which permits a purely formal process in which the Hong Kong electorate “elects” one of two or three candidates pre-ordained by the Nominating Committee would strip those terms of any reasonable meaning. Further, the JD commitment that the Hong Kong SAR will enjoy “a high degree of autonomy” except in foreign and defence affairs (Paragraph 3(2)) means that the Hong Kong electorate should be allowed genuine choice in the election of Chief Executive. Moreover, China’s JD obligation to keep the ICCPR in force includes Article 25 of the ICCPR on the right to vote and take part in elections. (see below)

16. Possible arguments that the 2014 Decision is consistent with the JD:

- It could be argued that “elections” covers a variety of types of elections including indirect elections which have been a feature of Hong Kong’s electoral system for LegCo for some time.
- As far as the appointment of the chief executive is concerned, the JD commitment is to hold “elections or consultations” locally, and therefore a method which combines consultations and elections is consistent with this.
- With reference to the JD commitment to keep in force Article 25 of the ICCPR, this is subject to the reservation applied to Hong Kong, but there are weaknesses in reliance upon this reservation (see below).

17. Accordingly, in view of the vagueness of the commitment to “elections” for LegCo, and “elections or consultations” before appointment of the chief executive, it is, in our view, difficult to argue on the basis of the express JD provisions alone that the arrangements proposed in the 2014 Decision are inconsistent

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with the JD. Such arguments would need to be supplemented by reference to other texts referred to in the JD, namely the ICCPR and the Basic Law.

18. The JD does not contain any provision for third party dispute settlement. Since China has not accepted the mandatory jurisdiction of the International Court of Justice, the UK could not compel China to settle any dispute about its interpretation there.

IV. The Basic Law of the Hong Kong SAR of the PRC 1990

19. Legal status of the Basic Law in Hong Kong law and PRC law:

- The Basic Law was enacted by the National People's Congress ("NPC") on 4 April 1990.¹² The NPC is the supreme legislature of China. "Basic Law" is the term used in the Constitution for major legislation enacted by the full NPC, in contrast with ordinary Laws which are enacted by the NPC Standing Committee.
- The drafting of the Basic Law was handled by the Chinese Government, and was not negotiated with the UK. It was drafted by a Committee composed mostly of members from the mainland, with some Hong Kong members, selected by the Chinese Government. A Basic Law Consultative Committee, formed purely by Hong Kong people, was established in 1985 to canvass views in Hong Kong on the drafts. It was also appointed by the Chinese Government but had somewhat broader representation, and its input was advisory only.
- The first draft was published in April 1988, followed by a five-month public consultation exercise. The second draft was published in February 1989, and the subsequent consultation period ended in October 1989.

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¹² The full text of the Basic Law, and related information, is available on the Hong Kong Government website at:
<http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

20. Role of the UK Government in relation to the drafting of the Basic Law:

- The Chinese did not consult the UK about the terms of the Basic Law, as they considered it to be purely Chinese domestic legislation.
- The UK's view was that China had a legal obligation under the JD to enact a Basic Law consistent with the promises made. The UK Government had access to the various public drafts, and communicated its views privately to the Chinese on aspects which it considered not consistent with the JD. It focussed its comments on the JD compatibility issues, to underline that the legal basis for the UK's concern was the JD.
- When the final Basic Law was published, the UK Government said publicly that it was satisfied that it was generally consistent with the JD.

21. The Basic Law guarantees about the Hong Kong electoral system:¹³

The right to vote and stand for election

- **Article 26** provides that permanent residents of the Hong Kong SAR "shall have the right to vote and the right to stand for election in accordance with law."
- **Article 39, paragraph 1**, provides that the provisions of the International Covenant on Civil and Political Rights, as applied to Hong Kong, shall remain in force and be implemented through the laws of the HKSAR.
Paragraph 2 provides that:
"The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."
- Article 25 of the International Covenant on Civil and Political Rights ("ICCPR") sets out the right to vote and be elected (see below).

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¹³ Article 21 of the Basic Law concerns the right of Hong Kong residents with Chinese nationality to take part in electing Deputies to the National People's Congress. There may be important issues involved but this topic is outside the scope of this report.

The Chief Executive

- **Article 45** provides: “The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. **The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.** (emphasis added)

- **Annex I** (“Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”) sets out a method of indirect election of the Chief Executive, by an Election Committee of 800 members chosen by various commercial and professional interest groups and other bodies.
- It provides that, if there is a need to amend the method for selecting Chief Executives after 2007, such amendments “must be made with the endorsement of a two-thirds majority” in LegCo and the consent of the Chief Executive and “they shall be reported to the Standing Committee of the NPC **for approval**” (emphasis added).
- It was amended in 2010 for the fourth term election in 2012. The membership of the Election Committee was increased to 1200 but otherwise the procedures remained the same.¹⁴

The Legislative Council (“LegCo”)

- **Article 68** provides: “The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. **The ultimate aim is the election of all the members of the Legislative Council by universal suffrage** (emphasis added).

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¹⁴ The text of the amendment is at:

http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc1&2.pdf

- **Annex II** ("Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures") sets out a method of part indirect and part direct elections to LegCo. The directly elected component was increased to 50 per cent (30 members) for the third term, with the other 30 being elected by functional constituencies.
- It provides that if there is a need to amend the method for forming LegCo after 2007, such amendments "must be made with the endorsement of a two-thirds majority" in LegCo and the consent of the Chief Executive and "they shall be reported to the Standing Committee of the NPC **for the record**" (emphasis added). This was amended by the NPC Standing Committee in 2010 for the fifth term elections in 2012. The numbers of members was increased to 70; 35 directly elected and 35 by functional constituencies.¹⁵

The above provisions are the ones that will apply to the next elections, if no further amendments are made.

Is Decision 2014 consistent with the Basic Law?

22. Arguments are likely to focus around the following provisions of the Basic Law:

- Article 45, second paragraph: the requirement that the method for selecting the Chief Executive be specified:
 - (a) "in the light of the actual situation in the Hong Kong SAR"; and
 - (b) "in accordance with the principle of gradual and orderly progress."
- Article 45; second paragraph: the statement that the ultimate aim is selection of the Chief Executive
 - (a) "by universal suffrage"
 - (b) "upon nomination by a broadly representative nominating committee"
 - (c) "in accordance with democratic procedures"
- Article 68, second paragraph: provisions equivalent to those in Article 45, i.e. those listed above except with a reference to the nominating committee.

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¹⁵ The text of the amendments is at:

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- Article 26 and Article 39 of the Basic Law, combined with the interpretations set out below in relation to Article 25 of the ICCPR as applied to Hong Kong.

23. The provision concerning the “actual situation” is a particularly important one. While it leaves wide latitude for varying appreciations of the facts and how they should inform the selection method, it contains a clear legal requirement for evidence-based decision-making.
24. At a minimum, it means that the decision must be based on up-to-date and comprehensive information about the situation in Hong Kong. It also requires that the information be factual and objective. It follows that there would need to be inputs from appropriately qualified and recognised experts on various aspects of the situation in Hong Kong.
25. The “principle of gradual and orderly progress” is likely to generate opposing views on how it should be interpreted and applied to the next stage of the reforms. The word “gradual” implies that there will be several steps towards achievement of the ultimate aim. Since the next election will be for the fifth term, this requirement may already have been satisfied.
26. The requirement for progress to be “orderly”, may mean that it must take place at the right speed i.e. not too fast and not too slow. Arguments about pace need to take full account both of the risks of undue haste and the risks of undue delay. Those risks might include such possibilities as civil disorder in Hong Kong, loss of confidence among Hong Kong people in the system of governance, and loss of international confidence in the commercial and investment environment in Hong Kong. One controversial issue might be whether the “principle of gradual and orderly progress” refers only to “the actual situation in Hong Kong” or whether it is legitimate to take account of any impact the reforms might have on other parts of China.
27. How the elements of the ultimate aim set out in Article 45 should, in legal terms, guide the design of the next stage of reform, is a difficult question. The Basic Law does not specify a time-frame for the achievement of the ultimate aim. It does, however, set out criteria against which any proposed reforms may be assessed, such that if there is not progress towards those elements compared with the existing methods, their

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compatibility may be called into question. The most pertinent question in this case would seem to be whether the proposed reforms are moving towards a “broadly representative nominating committee”. It may be argued that broadly representative should include a broad spectrum of Hong Kong political opinion as well as sectors of society.

28. Questions of interpretation of these various elements of Article 45 (and the equivalent ones in Article 68) overlap to some extent with the Article 26 and Article 39 of the Basic Law, combined with Article 25 of the ICCPR as applied to Hong Kong, and therefore these texts need to be considered together.

29. Accordingly, it is, in our view, possible to argue on the basis of the provisions in the Basic Law that the arrangements proposed in the 2014 Decision might not be consistent with the Basic Law. Such arguments would need to be supported by sufficient evidence of the “actual situation” in Hong Kong.

V. The International Covenant on Civil and Political Rights as applied to Hong Kong

30. Application of the International Covenant on Civil and Political Rights (“ICCPR”) to Hong Kong

- The ICCPR is an international treaty, open only to States.
- The UK ratified the ICCPR on 20 May 1976, and its ratification applied to Hong Kong.
- China has not ratified the ICCPR, but agreed in the JD, that “the ICCPR as applied to Hong Kong shall remain in force beginning from 1 July 1997.”
- The UK and China jointly notified all other States, via the UN, of this agreement.¹⁶
- China is therefore responsible in international law for the implementation of the ICCPR in Hong Kong (but this does not imply any obligation to do so in the rest of China¹⁷).

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¹⁶ The UK and China deposited parallel communications to the Secretary-General. See United Nations Treaty Collection, Historical Information, China, Note 2, and UK, Note 2, available at: <https://treaties.un.org/pages/HistoricalInfo.aspx>

¹⁷ The PRC signed the ICCPR on 5 October 1998. Signature engages certain obligations under the international law of treaties, including the obligation to refrain

- China's obligations under the ICCPR include the requirement to submit periodic reports to the UN Human Rights Committee ("HR Committee"), on how the rights are implemented in Hong Kong. This Committee is an expert, though not a judicial, body and its views are highly influential in international interpretation of the ICCPR.

31. In Hong Kong domestic law, the ICCPR rights are implemented through the Hong Kong Bill of Rights Ordinance 1991, as amended.

32. Guarantees in the ICCPR about the electoral system, and how they are implemented in Hong Kong law:

- **Article 25** provides: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
 - (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
 - (c) to have access, on general terms of equality, to public service in his country.
- The qualification "as applied to Hong Kong" in the JD commitment "to the ICCPR as applied to Hong Kong" refers to the reservations in the application of the ICCPR to Hong Kong entered by the UK to certain provisions. When the UK ratified the ICCPR in 1976, it reserved the right not to apply Article 25(b) "in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong". China opted to "inherit" that reservation in 1997.

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from acts which would defeat the object and purpose of the ICCPR (Vienna Convention on the Law of Treaties, Article 18). This is not equivalent to an obligation to implement the provisions of the ICCPR. See Palchetti "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?" in Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (2011).

- Article 25 ICCPR is replicated in Article 21 of the Hong Kong Bill of Rights Ordinance. But it is subject to section 12 which provides: “Article 21 does not require the establishment of an elected Executive or Legislative Council in Hong Kong.”

33. It would be difficult to argue that the UK reservation (inherited by China) is invalid as being contrary to the “object and purpose” of the ICCPR. The HR Committee has considered reservations to the ICCPR to be invalid as contrary to the object and purpose of the ICCPR only in rare situations, such as discrimination.¹⁸ In our view, a reservation to Article 25(b) is unlikely to be seen as against the object and purpose of the entire ICCPR.

34. China has provided three periodic reports to the ICCPR on Hong Kong.¹⁹

- In its examination of China’s reports on Hong Kong, the HR Committee has expressed concern about the lack of a clear plan to institute universal suffrage and to ensure the rights of all persons to vote and to stand for election without unreasonable limitations” and recommended that steps be taken to withdraw the reservation to Article 25(b).²⁰
- This observation adds to the force of arguments that the present proposals contain unreasonable restrictions.

35. The HR Committee has interpreted the Hong Kong reservation as meaning that once an elected Legislative Council is established, its election must conform to Article 25.²¹ It has also recommended that China “consider steps leading to

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¹⁸ See *Rawle Kennedy v Trinidad & Tobago*, HR Committee (2000), as explained in Dixon, McCorquodale and Williams, *Cases and Materials on International Law* (5th ed, 2011) p.78-81

¹⁹ Concluding observations of the Human Rights Committee on the second periodic report of the Hong Kong SAR, 21 April 2006 (CCPR/C/HKG/CO/2); Concluding Observations on the third periodic report of Hong Kong, China, 29 April 2013 (CCPR/C/CHN-HKG/CO/3).

²⁰ HRC Concluding Observations on the third periodic report of Hong Kong, China, 29 April 2013.

²¹ Concluding observations of the Human Rights Committee on the second periodic report of the Hong Kong SAR, 21 April 2006, paragraph 18.

withdrawing the reservation to Article 25(b) of the Covenant.”²²
There is no inconsistency between these two views: the reservation remains in place until formally withdrawn by China; and even if its content is exhausted with respect to the Legislative Council, it still applies to the Executive Council which is not elected (its members are appointed by the Chief Executive).

36. Are the proposed new electoral reforms compatible with the ICCPR?

- There is considerable scope for argument both as to the content of the right in Article 25 of the ICCPR and the effect of the Hong Kong reservation to it.
- Article 25 requires “genuine periodic elections” “by universal and equal suffrage” but it does not specify which public bodies have to be elected.
- The HR Committee, in its General Comment no. 25 (57) stated that “Although the Covenant does not require any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the voters.”²³
- It is implicit that elections must include the legislature, and may also include executive bodies, but not that the head of the executive must necessarily be directly elected (given that this is not the case in many democracies including those with a “Westminster-style” parliamentary system of government).
- It may reasonably be argued that whenever there are elections to public bodies, they must satisfy the requirements of Article 25, and be guaranteed by law.²⁴
- The Hong Kong reservation applies only to “an elected Executive or Legislative Council”. It refers to the Executive Council and the Legislative Council, and so, arguably, does not include the Chief Executive. Since it cannot be held that Article 25 requires the Chief Executive to be directly elected, the reservation would not have needed to cover this office.

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²² Concluding observations on the third periodic report of Hong Kong, China, 29 April 2013, paragraph 6.

²³ Human Rights Committee, General Comment no. 25(57) of 27 August 1996, paragraph 21.

²⁴ Ibid, paragraph 9.

- The terms of the reservation do not exclude all obligations under Article 25(b), but only “in so far as it may require the establishment of an elected Executive or Legislative Council”. This appears to reflect uncertainty on the part of the UK (in 1976) as to whether Article 25 did require such elections.
- It may reasonably be argued that, once an elected Executive or Legislative Council is established, the reservation no longer has any content in respect of that body; the election procedures must then satisfy the requirements of Article 25(b). Otherwise the proviso set out in the second part of the reservation would be deprived of meaning.
- This latter argument would, in our view, have more merit than the contrary argument that, even after elections are established, the procedures do not have to satisfy Article 25(b). If the reservation had been intended to exclude all obligations under Article 25(b), it would simply have said “The Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of Article 25.”²⁵ The HR Committee has expressed a similar view.²⁶
- The HR Committee has stressed the need for rights under Article 25 to be effective and consistent with “democratic government based on the consent of the people”, to provide “participation through freely chosen representatives”, subject only to “reasonable restrictions”.²⁷
- The HR Committee has also addressed the aspect of Article 25(b) which concerns the right “to be elected”. It has expressed the view that “Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria.” and that State reports “should explain how the different political views in the community are represented in political bodies.”²⁸

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²⁵ Further research on this issue would be useful, in particular, to see if the UK’s periodic reports on Hong Kong to the HR Committee shed any light on its intended meaning, and also if China’s periodic reports on Hong Kong contain any opinion on its interpretation of this reservation.

²⁶ HR Committee Concluding Observations regarding the fourth periodic report of the UK relating to Hong Kong, 1 November 1995.

²⁷ Human Rights Committee General Comment no. 25 (57) of 27 August 1996.

²⁸ Ibid, paragraphs 19-22.

37. Applying these principles and views to electoral reforms in Hong Kong, it would be reasonable to argue that they must satisfy the following requirements:
- Any nomination committee must be fairly representative;
 - The nomination process must be reasonably transparent; and
 - The nomination process should be reasonably open, and not subject to unreasonably high numbers of nominees or an unreasonably low cap on the number of candidates.
38. The proposals in the 2014 Decision do not appear to meet these requirements:
- The requirement that candidates must “love China and love Hong Kong” is not transparent or objective;
 - The nomination process is not reasonably transparent;
 - The threshold for nomination is very high (half of the 1200 members of the nominating committee); and
 - The cap of only 2 or 3 candidates is too limited.
39. The above analysis points to there being credible arguments to be made that the reforms proposed in the 2014 Decision would not be consistent with Article 25 of the ICCPR as applied to Hong Kong, both as a matter of international law and in Hong Kong law, via the Basic Law and the Bill of Rights Ordinance.
40. The HR Committee is an independent committee of experts. There are opportunities for civil society to submit views and information, and the HR Committee takes these views seriously and can incorporate them in its Concluding Observations on State reports.

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VI. Hong Kong’s Bilateral Investment Treaties

41. Hong Kong has the capacity to enter into certain international agreements (treaties) in its own name (JD, paragraph 3(10), and Basic Law, Article 151). It has entered into Bilateral Investment Treaties (“BITS”) – sometimes called International Promotion and Protection Agreements (“IPPs”) - with 17 states



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and other entities, including the UK, Australia, New Zealand and several European states.²⁹

42. A BIT is an international agreement between governments for the promotion and protection of investments made by investors of one contracting party in the area of the other contracting party. A typical BIT provides, among other things, guarantees of fair and equitable treatment and full protection and security for investors and investments, protection against uncompensated losses arising from actions by the authorities including expropriation, and settlement of investment disputes by international arbitration. The obligations and guarantees under a BIT are reciprocal: investors and investments are protected in Hong Kong and Hong Kong investors and investments are protected abroad.

43. The right for investments and returns of investors to enjoy full protection and security ("the FPS standard") could become relevant to disputes under Hong Kong's BITs, as the situation in Hong Kong develops. The FPS standard has been applied to both physical and legal security and in instances of government action and inaction, where the requirement on the authorities is to act with reasonable diligence. In addition the investor would need to show that it was the Hong Kong government's failure to exercise reasonable diligence which caused the loss rather than unattributable conduct of private actors.

44. The UK – Hong Kong BIT,³⁰ which entered into force in 1999, provides for recourse to international arbitration, at the option of an investor. A British investor (British national or company) may invoke the right to submit a dispute with the Hong Kong government to independent arbitration on the basis of the Arbitration Rules of the United Nations Commission on International Trade (UNCITRAL), if other means of settlement are not agreed within 3 months (Article 8). Hong Kong's other BITs all have similar dispute settlement provisions conferring a right to invoke international arbitration on an investor. The

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²⁹ They are listed on the Hong Kong Department of Justice website at:
<http://www.doj.gov.hk/eng/laws/table2ti.html>

³⁰ Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, signed on 30 July 1998. The text is at:
http://www.tid.gov.hk/english/trade_relations/ippa/files/17.IPPAUKe.PDF

precise circumstances in which claims might be based on arguments concerning the FPS standard, or the right to compensation for losses arising from strife, will depend upon the terms of the particular BIT. Its chance of success will depend on the particular facts and whether a sufficient link between the investment, the loss and the government's action or inaction can be shown.

45. This is an area in which further research would be merited, at a time when concern has been expressed about the effect of the current situation in Hong Kong on public confidence in the international arbitration system.³¹

VII. Possible remedies and forums in Hong Kong

46. Hong Kong Courts: the Court of First Instance and the Court of Final Appeal (CFA):

- Hong Kong's courts are authorised by the NPC Standing Committee to interpret the Basic Law. They may interpret those provisions of the Basic Law which are "within the limits of the autonomy" of Hong Kong, however, where the provisions concern "the relationship between the Central Authorities and the Region" they may need to seek an interpretation from the NPC Standing Committee. If the Standing Committee has issued a relevant interpretation, Hong Kong courts must apply it.³² (see Article 158 Basic Law). Under Article 84 of the Basic Law the courts may refer to precedents of other common law jurisdictions. More importantly, article 85 stipulates the judicial power shall be exercised by the courts independently and without any interference.
- The power of judicial review of legislation has been exercised by the courts. The Court of Final Appeal has examined whether legislation enacted or acts of the executive authorities are consistent with the Basic Law,

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³¹ See for example, Thomson, "Hong Kong Chief Justice calls on arbitrators to build public confidence", *Global Arbitration Review*, 15 October 2014.

³² See for example, The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted on 6 April 2004. The text is at:
http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc18.pdf

and decided that if they are not consistent, the Court has jurisdiction to declare it invalid.³³

- The Court takes a common law approach to the interpretation of the Basic Law; even though it is a China-enacted law, it functions in the Hong Kong legal system as a constitution.³⁴ The Court has shown an institutional commitment to protect the autonomy of Hong Kong and preserve the common law based legal system, which has generally met the approval of Hong Kong legal commentators.

47. It might be possible for an application to be made to the Courts to review the validity of executive or legislative action in Hong Kong in connection with the introduction of electoral reforms. For example:

- A challenge to action by the Chief Executive, such as reporting (or not reporting) to the Central People's Government or the Standing Committee of the NPC on changes to the actual situation in Hong Kong;
- A challenge to any legislative bill introduced by the Hong Kong government to amend the electoral procedures in Annex I or Annex II of the Basic Law, whether by way of challenge to the executive action in bringing the bill; or as a challenge to the Basic Law compatibility of the bill itself;
- A challenge to the constitutionality of the law following enactment.

48. The Hong Kong Courts do not have the power to review the 2014 Decision, as this was issued by the NPC Standing Committee. That Decision does not, however, implement any reforms in Hong Kong law, rather, it sets out the procedures for doing so. This requires further stages in the political process in Hong Kong, the outcomes of which might be susceptible to scrutiny in the Courts. For example, the 2014 Decision was issued after consideration of a report from the Chief Executive³⁵,

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³³ As illustrated by *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, para. 25 H-I, *Charles Mok v Tam Wai Ho* (2011), *Leung Kwok Hung & Others v HKSAR* (2005), and *Yeung May Wan & Others v HKSAR* (2005). See Lo, "An Internationalist, Consequentialist and Non-progressive Court: Constitutional Adjudication in Hong Kong (1997-2009)", (2010) 2 City University of Hong Kong Law Review 215-235.

³⁴ *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

³⁵ Report on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2016



and this enabled the NPC Standing Committee to state that it had taken full account of the views of Hong Kong people. Action now rests with the Hong Kong Government to introduce a bill to LegCo to implement reforms. If the Government concludes that a bill introduced in accordance with that Decision would not now be appropriate in light of the changed situation in Hong Kong or would not pass LegCo, the Chief Executive could submit a further report to the NPC Standing Committee. Such issues would be more appropriately resolved through public debate and political processes than by judicial determination on points of legality; but if not, legal challenges may follow.

49. Further research is needed on possible factual scenarios that might present opportunities for aggrieved individuals to bring the matter before the Hong Kong courts, and on the relevant law, including on matters of standing and procedure. In this connection, consideration also needs to be given to the concurrent responsibility of the Hong Kong Courts and the NPC Standing Committee for the interpretation of the Basic Law, and how that might impact upon the judicial and legislative process.³⁶

VIII. Possible remedies and forums in the UK

UK Courts

50. Various kinds of claims might be brought against the UK Government in the UK courts arising from the situation in Hong Kong. The most likely type of litigation would be a judicial review action seeking to oblige the Government to act, for example:

- To make diplomatic representations to China regarding its compliance with the Joint Declaration; and/or
- To exercise diplomatic or consular protection on behalf of UK nationals or companies in Hong Kong.

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submitted by Leung Chun-ying, the Chief Executive of the Hong Kong Special Administrative Region, on 15 July 2014. It is referred to in the fourth preambular paragraph of the 2014 Decision. The text is at:
<http://www.2017.gov.hk/en/npcsc/index.html>

³⁶ See for example Yang, "Two interpreters of the Basic Law", in Young and Ghai (eds), *Hong Kong's Court of Final Appeal* (CUP, 2013), and Wen, "Interpretation of Law by the Standing Committee of the National People's Congress" in Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (HKUP, 2002).

51. The Government's exercise of prerogative powers, including in the field of foreign affairs, is in principle subject to judicial review.³⁷ However, the Courts are very cautious in their review of certain types of government actions such as treaty-making, because by their nature and subject-matter they are not easily amenable to the judicial process. It does not follow that the Courts would always decline to review Government actions concerning treaties and their invocation against other States; it depends on the nature of the specific question and whether it is justiciable.³⁸

52. The power to review decisions on the exercise of diplomatic and consular protection is similarly limited.³⁹

- However, the Courts have recently held that, although UK nationals only have a legitimate expectation, they do have a right, enforceable by judicial review, that their government give due *consideration* as to whether to exercise consular assistance or diplomatic protection. The nature of the assistance, if provided, is determined by the balance of various policy considerations: 'Even where there has been a gross miscarriage of justice, there may perhaps be overriding reason of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgement as to the gravity of the miscarriage, it is impossible for the balance to be properly conducted.'⁴⁰
- An Australian case has also opened up possible new lines of reasoning in this regard.⁴¹
- This may offer some scope for legal action if there is a suitable claimant. The chances of success are probably not high, but litigation of this kind might expose the government's decision-making process.

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³⁷ *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374.

³⁸ *R (on the application of Gentle) v The Prime Minister*, [2008] UKHL 20; *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHR 1409.

³⁹ For example, *The Queen on the Application of Al-Haq and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin).

⁴⁰ *Abbasi v Secretary of State for Foreign Affairs* [2002] EWCA at [100].

⁴¹ *Hicks v Ruddock* [2007] FCA 299 at [21].

UK Parliament

53. The UK House of Commons Foreign Affairs Committee is conducting an inquiry into the UK's relations with Hong Kong: 30 years after the Joint Declaration.⁴²

- This inquiry is considering how the FCO monitors the implementation of the Joint Declaration, as well as the broad range of the UK's relations with Hong Kong, including economic and cultural ties.
- The Committee has invited submissions of evidence and possible recommendations, including on the FCO's monitoring of the implementation of the Joint Declaration and Basic Law and the UK's position on progress on political and constitutional reform in Hong Kong as it moves toward universal suffrage, taking note of the wider context of social and economic development in Hong Kong.

IX. Conclusions of Scoping Report

54. There are respectable arguments to be made that the proposed electoral reforms in the 2014 Decision are deficient, in terms of the JD and Basic Law.

55. The arguments based on Article 25 of the ICCPR may be advanced both in relation to the JD and the Basic Law, as both incorporate reference to the ICCPR, including Article 25 and the reservation to it.

56. The arguments based on the guarantees concerning the electoral system are much stronger when based on the Basic Law than on the JD.

57. The Basic Law contains promises regarding the gradual development of the method of electing the Chief Executive and LegCo, both in terms of the stated ultimate aim of universal suffrage in each case, and also that decisions made at each stage of the reform should be based on the "actual situation" and with the principle of "gradual and orderly development". (Articles 45 and 68, and Annexes I and II). None of these

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⁴² <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/news/hong-kong-tor/>

details are in the JD, so that its provisions are of a more static nature, reflecting the system as it was in 1984.

58. For foreign investors of certain nationalities in Hong Kong, there may be the potential to invoke the applicable BIT in the event of damage to investments, as these disputes may be taken to mandatory international arbitration. The arguments would be based upon the treaty concerned, interpreted according to international law, not Hong Kong law.
59. The legal basis for the UK Government to raise issues is the JD and not the Basic Law. The paucity of detail in the JD about the electoral system makes it difficult to argue that the Basic Law – now or amended as proposed – is inconsistent with it.
60. Although there are good arguments to be made in relation to the compatibility of the proposed reforms with Article 25 of the IPPCR, these depend on the view that the Hong Kong reservation is no longer applicable or would not be applicable to the particular proposed reforms. The UK Government may not be best placed to make such an argument, being the author of the reservation, and having used it during its own period of governance. In Hong Kong, arguments based on the nature of progressive reforms since 1997 might resonate more readily.
61. There may be potential for a case to be brought to the Hong Kong courts to challenge Hong Kong executive or legislative action relating to the proposed reforms, on the grounds of inconsistency with the Basic Law, including the provisions incorporating Article 25 of the ICCPR. How and by whom such a case could be brought would require further consideration of factual scenarios, and further research on the constitutional position and judicial precedents in common law jurisdictions.
62. In the more immediate term, arguments based on the Basic Law could be made that the Chief Executive should review his previous advice to the Beijing Government, and submit a new report to the NPC Standing Committee, setting out the intervening changes in the actual situation in Hong Kong, including developments in public opinion about the appropriate pace and nature of electoral reforms. Any new report should be based on objective factual evidence, including

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from experts as required. If this were done, it might affect attempts at challenge in the Hong Kong Courts

63. As far as the UK Government is concerned, it would be difficult for it to accuse China of violations of the JD in relation to these electoral reforms, as the legal arguments based on that text alone are not compelling enough. It is also very unlikely that a UK court would compel it to do so.
64. There may be scope for judicial review action in the UK courts by specific individuals, for example a British national or corporate national, whose interests are affected by the developments in Hong Kong. It is difficult to assess the likelihood of success in the abstract; it would depend on the individual circumstances and how they connected to the government's action or failure to protect them. Such litigants might achieve an airing of the issues and some exposure of the government's decision-making, though it is unlikely that there would be a remedy that would compel the government to take action in relation to China.
65. The Foreign Affairs Committee of the House of Commons is continuing with its Inquiry into Hong Kong despite China's attempts to dissuade it from doing so, and this may be an arena for raising issues about the reforms and UK Government's reaction to them.
66. In general, Hong Kong would seem to be a more suitable forum for the development and resolution of these issues, which need to be framed in terms of the Basic Law, combined with the presentation of factual evidence about the actual situation in Hong Kong and the appropriate pace of democratic change to meet local aspirations.

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