

The International Obligations of the People's Republic of China in respect of
the Election of the Chief Executive in Hong Kong: Article 25 of the
International Covenant on Civil and Political Rights

Analysis of the Hong Kong Bar Association

I. Introduction

1. This statement elaborates on the Submission of the Hong Kong Bar Association (“**HKBA**”) on the Consultation Document on Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016 dated 28 April 2014 in particular paragraphs 9 to 18. It addresses the obligations of the People's Republic of China (“**PRC**”) in respect of the election of the Chief Executive (“**CE**”) in Hong Kong under public international law.

2. In summary: -

(1) The PRC has unilaterally assumed responsibility to continue the application of the provisions of International Covenant on Civil and Political Rights¹ (“**ICCPR**” or “**Covenant**”) as applied to Hong Kong;

(2) Such provisions include Article 25(b). None of the reservations entered by the United Kingdom (and assumed by the PRC thereafter) applies to Article 25(b) insofar as the election of a Chief Executive is concerned; and

¹ International Covenant on Civil and Political Rights 999 UNTS 172 (“**ICCPR**”)

(3) Furthermore, Article 25(a) is likely to also provide another independent genuine basis to introduce universal suffrage insofar as election of a CE is concerned.

II. Background of the Introduction of ICCPR

3. The United Kingdom ratified the ICCPR on 20 July 1976 and extended its application to Hong Kong. At the same time a number of reservations were entered into in respect of Hong Kong.

4. The relevant provision of the ICCPR is Article 25: -

“Article 25

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;

[...]”

5. The relevant parts of the reservation read ‘...*the Government of the United Kingdom declare that... (c) In relation to Article 25 of the Covenant, they must reserve the right not to apply... (i) sub-paragraph (b) in so far as it may require the establishment of an elected legislature in Hong Kong...’² and that ‘[t]he Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong...’³ (“**Reservation**”).*

² ICCPR, 999 UNTS 172, 283.

³ Ratification by the United Kingdom of Great Britain and Northern Ireland, 1007 UNTS 393, 394.

6. The Reservation has not been withdrawn or modified since then. Its validity is not within the purview of this analysis and is not challenged.

III. The nature of the obligation of the PRC under public international law in respect of the provisions of ICCPR as applied to Hong Kong

7. The PRC did not become a signatory to the ICCPR until 5 October 1998 and has not ratified the Covenant to-date.

8. Whether a state is a party to a treaty or not must primarily be determined under the treaty provisions that stipulate the ways in which consent to be bound is to be expressed. Article 48 of the ICCPR provides that the Covenant is subject to ratification. Therefore as a matter of law, at any time prior to an effective ratification of the ICCPR, the PRC could not be considered as a party as such.⁴

9. The applicability of the provisions of the ICCPR thus has to be based otherwise than on the treaty itself. Two most obvious bases are firstly the doctrine of state succession and secondly unilateral assumption of obligations.

10. State succession in respect of treaties is generally governed by customary international law, the scope of which remains unclear.⁵ This is particularly so where the PRC is not a successor to the United Kingdom's treaty obligation as a succeeding treaty parties *as such*. It is instructive to recall what the late Professor Ian Brownlie has cautioned in 2008: -

⁴ See eg. Vienna Convention on the Law of Treaties 1155 UNTS 331 ("VCLT"), Article 14(1). See also *Territorial Jurisdiction of the International Commission of River Oder (United Kingdom v Poland)* (1929) P.C.I.J. (ser. A) No. 23 (Sept. 10) where the PCIJ in respect of a convention which specified that it is 'subject to ratification', whose instrument of ratification 'shall be transmitted to the Secretary-General of the League of Nations, who will notify the receipt' to other signatories, held that a convention which a State had not ratified had not come 'into force' for it.

⁵ See eg. Lowe, *International Law* (2007), p. 169. The Vienna Convention on Succession of States in respect of Treaties 1946 UNTS 3 has currently 19 signatories and 22 parties and is not in force as of now. However, a number of provisions of it have been accepted as reflecting customary international law.

*"A common fault of writers is to classify issues primarily as 'succession' and consequently to consider particular issues in isolation from the matrix of rules governing the subject-matter, which might involve, for example, the law of treaties or nationality. It has been pointed out earlier in this chapter that principles of acquiescences and estoppel are often dominant, and in the previous section the issues of succession to state property and private law rights were related to general principles of international law governing transfer of sovereignty. The need to consider problems precipitated by a change of sovereignty in relation to the particular body of legal principles is illustrated very well by the law relating to nationality and the law of treaties"*⁶ (emphasis added)

11. As will be shown below, this is such a case where unilateral assumption of responsibility is likely to take precedence over the difficult question of state succession.

IV. Unilateral Assumption of Responsibility

12. The HKBA considers that in public international law, the PRC has unilaterally assumed responsibility to continue the application of the provisions of ICCPR as applied to Hong Kong.

13. A state may evidence a clear intention to accept obligation vis-à-vis certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from the states concerned.⁷

14. In the *Nuclear Tests* litigation, Australia and New Zealand sued France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons in the Pacific Ocean. France made a number of statements, including to Australia a communiqué of 8 June 1974 stating '*...France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.*' and to New Zealand a note of 10 June 1973 stating that '*...Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type*'. Furthermore, on 25 July

⁶ Brownlie, *Principles of Public International Law* (7th ed., 2008), p. 655. Professor James Crawford has preserved the passage's essence in the most recent edition: Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 438.

⁷ Crawford (2012), above, pp. 416-417, citing inter alia McNair's *Law of Treaties* written in 1961 and *South West Africa* [1962] ICJ Rep 319, pp. 402-4, 417-8 (per Jessup J, SO) and other sources.

1974 the French President said in the press conference that ‘... *I had myself made it clear that this round of atmospheric tests would be the last*’. Similar statements were made by the Minister of Defence and Foreign Affairs in August to October 1974 on three occasions. The Minister of Defence no longer insisted on the phrase ‘in the normal course of event’ as stated in the note sent to New Zealand earlier.

15. It thus emerged that the criteria to hold a state responsible for its unilateral declaration were:

- (1) Intention of the maker to be bound;
- (2) The undertaking was given publicly, it does not need to be made to a particular state/party; and
- (3) Notably, there was no requirement of reliance or acceptance of the undertaking, nor was there a requirement that such statement be made in written form.⁸

16. The HKBA is of the view that by virtue of consistent statements and conduct,⁹ the PRC has assumed the responsibility to continue the application of provisions of ICCPR as applied to Hong Kong. Such statements and conduct *at least* include: -

- (1) The Joint Declaration: Under the Joint Declaration as a bilateral treaty, the application of the ICCPR was brought about by Annex I.¹⁰ The fact that the Joint Declaration is titled ‘Declaration’ does

⁸ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, p. 472. The principles were affirmed in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, pp. 43, 132 and *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 554, pp. 573-574.

⁹ *North Sea Continental Shelf* [1969] ICJ Rep 4, p. 25.

¹⁰ 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

not detract from its binding nature.¹¹ In particular when the Joint Declaration was properly signed, ratified by both parties and registered with the Secretariat of the United Nations under Article 102 of the Charter of the United Nations;

- (2) The Basic Law: The promulgation of the Basic Law of Hong Kong, being an objective act of state, Article 39 of which provides that *“The provisions of the [ICCPR] [...] as applied to Hong Kong shall remain in force”*;¹²
- (3) The S-G Memorandum: A memorandum dated 20 June 1997 sent to the Secretary General by the PRC signified that *“The provisions of the [ICCPR] [...] as applied to Hong Kong shall remain in force beginning from 1 July 1997”*;¹³ and
- (4) Express permission and/or acquiescence to the HKSAR to report to the Human Rights Committee since 1997: In November 1999 the HKSAR submitted its first report to the Human Rights Committee via the PRC. The Committee said the followings in its first Concluding Observations *‘[The Committee] thanks the [PRC] for its willingness to participate in the reporting procedure under article 40 of the Covenant by submitting the report prepared by the HKSAR authorities and by introducing the HKSAR delegation to the Committee. The Committee affirms its earlier pronouncements on the continuity of the reporting obligations in relation to Hong Kong.’*¹⁴

1399 UNTS 33 (**“Joint Declaration”**), Annex I, Section XIII (*“The provisions of the [ICCPR] ... as applied to Hong Kong shall remain in force”*).

¹¹ Mushkat, *One Country, Two International Legal Personalities* (1997), pp. 140-141; Crawford, *Rights in One Country: Hong Kong and China* (2005), pp. 28-29.

¹² Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4 April 1990) 29 ILM 1511 (**“Basic Law”**)

¹³ *“The Position of the People’s Republic of China and the United Kingdom on Multilateral Treaties Applying to the Hong Kong Special Administrative Region”* (1997) 36 ILM 1675 (**“June 1997 Memorandum”**), 1676.

¹⁴ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Hong*

17. These incidences of statements and conduct, taken together, is highly suggestive that the PRC has assumed obligation (and has not revoked such assumption) to continue the application of the provisions of ICCPR as applied to Hong Kong by the United Kingdom under public international law.

V. Meaning and Extent of “provisions of ICCPR as applied to Hong Kong”

18. Having established the basis for state responsibility, the next step is to look at the content of the responsibility assumed, that is, the extent to which the provisions of ICCPR were applied to Hong Kong

19. Insofar as the textual meaning as the word ‘as applied’ means, it means ‘practical application’.¹⁵ The Hong Kong Court of Final Appeal has opined on the meaning of ‘as applied to Hong Kong’ as follows: -

“... Article 39 [of the Basic law] provides that “The provisions of the [ICCPR] ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR]”. It is common ground (and plainly correct) that the words I have italicised refer to the original application of the Covenant to Hong Kong by the United Kingdom when it ratified the ICCPR in 1976 and declared that its acceptance extended to Hong Kong. Such application was obviously subject to the stipulated reservations, including the immigration reservation.” (emphasis added)¹⁶

20. Furthermore, the HKBA considers that the phrase ‘as applied to’ has been deliberately adopted. This phrase is to be contrasted with “as applied in”. ‘As applied to’ means that one is concerned with ICCPR as applied to Hong Kong under *public international law* rather than *domestic law* (which will then be a question of ICCPR ‘as applied in’ Hong Kong). One of the most important consequences of taking a public international law view is that

Kong Special Administrative Region, UN Doc CCPR/C/79/Add.117 (15 November 1999), §§2-3.

¹⁵ The Oxford English Dictionary (2nd ed., 1989, Vol. I), p. 576.

¹⁶ *Ubamaka Edward Wilson v Secretary for Security & Anor* [2013] 2 HKC 75, CFA, §53. See also Ghai, *Hong Kong’s New Constitutional Order* (2nd ed., 1998), p. 409.

domestic law, i.e. the Basic Law and the Bill of Rights Ordinance (Cap 383), would then be irrelevant.¹⁷

21. Therefore it is vital to look at the wordings of the Reservation to determine to what extent Article 25(b) has been reserved upon and therefore was not 'as applied to' Hong Kong.

22. One may take the restrictive view that if a provision has been reserved upon in any sense then it is not a provision 'as applied to Hong Kong'. However, that is unconvincing. The phrase 'as' is there to introduce an element of quantity and extent.¹⁸ The proper reading of the phrase 'provisions of ICCPR as applied to Hong Kong' should be read as provisions *insofar as* they are applied to Hong Kong or *to the extent that* they are applied to Hong Kong. It is illogical to argue that because a clause under a treaty has been reserved upon for one matter (say, immigration) it is reserved as a whole in all aspects.

23. This is also consistent with the trite principle of a state is bound by those treaties that it is a party except and only except those that has been expressly reserved upon.¹⁹

The interpretation of 'an elected Executive and Legislative Council' in the Reservation

¹⁷ See eg. Articles on Responsibility of States for Internationally Wrongful Acts *Annexed to* UNGA Res 56/83, UN Doc A/RES/56/88 (28 January 2002) Article 32; VCLT, Article 27. Section 13 of the Bill of Rights Ordinance provides that "Article 21 [ie. the mirror of Article 25 of ICCPR] does not require the establishment of an elected Executive or Legislative Council in Hong Kong.' This is observably wider than what has been reserved against Article 25(b) of the ICCPR in public international law.

¹⁸ The Oxford English Dictionary (2nd ed., 1989, Vol I), pp. 672-673.

¹⁹ See eg. VCLT, Article 21(1) ('A reservation modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation...' (emphasis added)). It is noted that most of the rules set out in the Vienna Convention re reservations are arguably representative of customary international law as of now: see Corten & Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), pp. 427-431 and the practices cited therein.

24. The above analysis brings up the issue of interpretation of the Reservation and of ascertaining what has been reserved upon.

25. Interpreting a reservation is different from interpreting a treaty – it is a unilateral declaration by states capable of creating legal obligation²⁰ and the prime purpose of interpretation is to reveal the intention of the reservation maker. Relevant aspects to be looked at include: (1) the text of the reservation interpreted in a natural and reasonable way having due regard to the intention of the State concerned; (2) the context in which the clause is to be read including object and purpose of the treaty; (3) the evidence regarding the circumstances of its preparation and the purposes intended to be served.²¹

26. Taking the Reservation textually as a starting point,²² it is open to two interpretations. One is that it relieves the state party from establishing an elective *Executive* and elected *Legislative Council*, another is that it does not require the establishment of an elected *Executive Council* and *Legislative Council*.

27. The context of the Reservation points strongly to the latter interpretation. Given the political system of Hong Kong was set up in the colonial period, the terminology used most likely denotes the two Councils. In fact, the ICJ has also previously referred to the '*general historical context in which the reservation...had come into the use*' to assist interpretation.²³ The Letters Patent 1917-1995 provide that: -

Article I. There shall be a Governor and Commander-in-Chief in and over Our Colony of Hong Kong and its Dependencies (hereinafter called the Colony), and

²⁰ See eg. VCLT, Article 2(1)(d).

²¹ *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1952] ICJ Rep 432, 453-454. See also International Law Commission, Guide to Practice on Reservations of Treaties in Report of the International Law Commission on the work on its 63rd Session, UN Doc A/66/10/Add.1 (2001), §4.2.6. For the avoidance of doubt, and without forming a definitive view on the proper approach applicable, this statement has not adopted a 'restrictive approach' in interpreting the Reservation.

²² *Boyce et al. v Barbados* IACHR-Ser C No. 169 (Judgment of 20 Nov 2007), §§13-17.

²³ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, p. 29.

appointments to the said Office shall be made by Commission under Our Sign Manual and Signet.

Article V. There shall be an Executive Council in and for the Colony, and the said Council shall consist of such persons as We shall direct by Instructions under Our Sign Manual and Signet [...]The Governor may upon sufficient cause to him appearing suspend from the exercise of his functions in the Council any Member thereof pending the signification of Our pleasure [...]

Article VI. (1) There shall be a Legislative Council in and for the Colony and the said Council shall consist of (a) the Governor [*and other members of the Council etc...*]

28. Thus at the time when the Reservation was entered, there were established in Hong Kong three main bodies: the Governor, the Executive Council and the Legislative Council. There was no such thing as 'Executive' as such (noting that in the Reservation the word executive was capitalised). In that context, it is reasonable to interpret the Reservation as covering the two Councils. It would further be artificial to extend the word "executive" to cover the then Governor Office because as shown in the quoted sections of the Letters Patents, despite the fact that the Governor did sit in the Executive and Legislative Councils, the Letters Patent were clear on their terms - the Governor was a *separate* body. Similarly, the CE under the Basic Law is a separate body from the Executive Council²⁴ and without doubt, the Legislative Council.

29. The Inter-American Court of Human Rights in *Boyce* has recognised that Reservations are only effective insofar as what it textually provides. The HKBA considers that it is a plain manifestation of the principle that a state reserves no more than what is contained in the text of the reservation itself.²⁵

30. Therefore, from the text and context of the Reservation, the Governor, being the historical counterpart of the CE, would not and could not have been covered by merely the word of "*Executive*" as used in the Reservation.

²⁴ See eg Basic Law, art 54 (*'The Executive Council ... shall be an organ for assisting the Chief Executive in policy-making'*) See also Basic Law, arts 55-56.

²⁵ See note 20 above. See also *Advisory Opinion OC-3/83: Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights, Series A, No. 3 (8 Sep 1983), §69.*

Implications on the content of responsibility to which PRC had assumed

31. The HKBA emphasises that the interpretation of the Reservation considered against the context whereby the PRC assumed responsibility under the ICCPR are instructive to infer the contemporaneous intention of the PRC as to what it had proposed to assume *at the time* of the assumption.²⁶

32. A review of the contemporaneous historical context confirms that the PRC did not intend to have the Reservation (as assumed) to cover the election of the CE. Readers are referred to paragraph 16 above. It was apparent that the PRC assumed the Reservation *as it was* (see paragraphs 26-33 above) against the background that elections for the CE was clearly contemplated already.

33. In particular, as early as in the Joint Declaration the United Kingdom and the PRC had expressly covenanted that '*the chief executive will be appointed by [CPG] on the basis of the results of elections or consultations to be held locally*' (Joint Declaration §3(4)).

34. It is notable also that the PRC has not sought to vary the Reservation, for example, by way of ratifying the ICCPR and entering a new reservation and so on. Instead, when the PRC notified the Secretary General by the June 1997 Memorandum, it must be taken to have done it with the knowledge of its policy in the Joint Declaration and the Basic Law that *unlike* the then Governor, the CE would be appointed on the basis of election.

35. These were clear indications that parties including United Kingdom who put forward the Reservation did not intend the Reservation to cover CE.

²⁶ *Frontier Dispute (Burkina Faso v Mali)*, above, p. 573 ("...it all depends on the intention of the State in question"). See also International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto *in* Report of the International Law Commission on the work on its 58th Session, UN Doc A/61/10/(2006), pp. 371-372.

Rather, a process of ‘election and consultation’ (subject to all other applicable provisions of the ICCPR) was then envisaged independent of the Reservation.

36. Given that the Reservation could not have and was not intended by the United Kingdom and PRC to cover CE elections, the provisions of ICCPR as applied to Hong Kong include Article 25(b) in full insofar as the election for the CE is concerned.

VI. The relevance of Article 25(a) of the ICCPR

37. The HKBA draws attention to the fact that the Reservation in any event only extends to Article 25(b) of the ICCPR. A passing note is warranted that it does not cover Article 25(a) (which has been set out above).²⁷

38. Article 25(a) is the basis of representative democracy in that it recognises in modern society it is no longer possible to always have direct political participation.²⁸ It nevertheless is there to guarantee democratic accountability in spite of that recognition and to ensure that the representatives elected are “*ultimately responsible to the people and may also be controlled and deposed by it*”.²⁹

39. “Public affairs” is clearly broad enough to cover election of a CE who is the head of the Hong Kong Special Administrative Region and the head of the executive authorities in Hong Kong under the Basic Law.³⁰

²⁷ See also note 20 above.

²⁸ During the formulation of Article 25, a proposal was made that direct suffrage should be the general rule, but the majority thought that both direct suffrage and indirect suffrage were admissible: UN Doc E/CN.4.SR.366, at p. 6 and E/CN.4/SR.367, p. 10 cited in Bossyut, *Guide to the “Travaux préparatoires” of the International Covenant on Civil and Political Rights* (1987), pp. 471-472.

²⁹ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd Rev Ed., 2005), p. 570.

³⁰ See eg. Human Rights Committee, General Comment No. 25, UN Doc CCPR/C/21/Rev.1/Add.9, §5. The weight of the General Comments is not to be doubted: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* [2010] ICJ Rep 639, §66. In any event, it is unconvincing to argue the otherwise that election of a CE is *not* public affairs on its plain terms.

40. It is not disputed that Article 25(a) does not presuppose any particular system of government and of course Article 25(a) does not grant unlimited right of participation in all aspects of governance.³¹

41. However, in any case the exercise of the right embodied in Article 25(a) must ensure that the representatives are '*freely chosen*'. The European Court of Human Right has forcefully pronounced: '*[a]s the Court has emphasised many times, there can be no democracy without pluralism.*'³²

42. The HKBA adopts the opinions and logic thereof of these highly regarded jurists.

43. As noted in the Human Rights Committee's General Comment No. 25, participation through freely chosen representatives is exercised through voting processes which must be established by law in accordance with Article 25(b). It is clear that the General Comment's interpretation of the relationship between Article 25(a) and Article 25(b) is sound on the text of the Covenant.

44. Equal and universal suffrage must therefore be the prime mode of application of Article 25(a) for a citizen to choose his or her representative *freely and without discrimination* and to ensure a plurality of participation.³³

45. The HKBA therefore considers that Article 25(a) does provide a genuine independent basis for equal and universal suffrage for the election of CE in Hong Kong.

³¹ *Marhsall v Canada* UNHRC Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991) '*article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs*'.

³² *Socialist Party and Others v Turkey* (ECHR, No. 20/1997/804/2007) Judgment of 25 May 1998, reported in (1998) 27 EHRR 51, §41.

³³ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd Rev Ed., 2005), p. 570.

VII. Conclusion

46. The unilateral assumption of responsibility under customary international law of “provisions of ICCPR *as applied* to Hong Kong” by the PRC includes Article 25(a), as well as Article 25(b) at least insofar as the election of a Chief Executive of the HKSAR is concerned.