

Brooklyn Journal of International Law

Volume 40 | Issue 2

Article 3

2015

Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law

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Available at: <https://brooklynworks.brooklaw.edu/bjil/vol40/iss2/3>

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ROAD TO NOWHERE: HONG KONG'S DEMOCRATIZATION AND CHINA'S OBLIGATIONS UNDER PUBLIC INTERNATIONAL LAW

*Alvin Y.H. Cheung**

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“Today, we have entered the home stretch to universal suffrage.”

– Carrie Lam Cheng Yuet-ngor, Hong Kong Chief Secretary, December 4, 2013^a

“[T]he principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld.”

– National People’s Congress Standing Committee, August 31, 2014^b

“We do not consider that the terms of the 31 August . . . decision offer ‘genuine choice’ in any meaningful sense of the phrase, nor do we consider the decision consistent with the principle that Hong Kong should enjoy a high degree of autonomy.”

– U.K. House of Commons Foreign Affairs Committee, March 6, 2015^z

INTRODUCTION: WE’RE NOT LITTLE CHILDREN

On August 31, 2014, the National People’s Congress Standing Committee (“NPCSC”) ruled out democratic elections

^a Carrie Lam Cheng Yuet-ngor, H.K. Chief Sec’y for Administration, Speech to Legislative Council (Dec. 4, 2013), http://www.news.gov.hk/tc/record/html/2013/12/20131204_141632.shtml, *author’s translation*.

^b Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti He 2016 Nian Lifa Hui Chansheng Banfa De Jueding (全國人民代表大會常務委員會關於香港特別行政區行政長官普選問題和 2016 年立法會產生辦法的決定) [Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of 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 by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2014).

^z Foreign Affairs Committee, *The UK’s Relations With Hong Kong: 30 Years After the Joint Declaration, 2014–15*, H.C. 649 (U.K.).

for Hong Kong's legislature in 2016 and for its Chief Executive in 2017.¹ The NPCSC's Decision ("the 2014 Decision") declared that the implementation of universal suffrage in Hong Kong implicated China's "sovereignty, security and development interests."² It therefore imposed strict conditions on nomination and candidacy to ensure that candidates were politically acceptable to Beijing.³ Meanwhile, Beijing inveighed against collusion with external forces by democratic activists in Hong Kong and sought to block a British inquiry into developments in the former U.K. colony on the basis that it constituted "interference in China's internal affairs."⁴

This was not the first time foreign concern over Hong Kong's democratization had drawn a harsh Chinese response. In an op-ed published in Hong Kong's Chinese- and English-language papers of record on September 14, 2013,⁵ Hugo Swire, Minister of

1. See, e.g., Chris Buckley & Michael Forsythe, *China Restricts Voting Reforms for Hong Kong*, N.Y. TIMES (Aug. 31, 2014), <http://nyti.ms/1ndHqh9>. See also Alex Lo, *The Rotten Boroughs That Are the Main Stumbling Block to Reform*, S. CHINA MORNING POST (H.K.), Jan. 31, 2015, <http://www.scmp.com/comment/insight-opinion/article/1696759/rotten-boroughs-are-main-stumbling-block-reform>.

2. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti He 2016 Nian Lifa Hui Chansheng Banfa De Jueding (全國人民代表大會常務委員會關於香港特別行政區行政長官普選問題和 2016 年立法會產生辦法的決定) [Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of 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 by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014) [hereinafter *2014 Decision*].

3. See Buckley & Forsythe, *supra* note 1.

4. See 陳佐洱：不與「漢奸港獨」做朋友 [Chen Zu'er: Will Not Befriend "Traitors, Separatists"], MINGPAO (H.K.), Aug. 30, 2014 and Laura Kuenssberg, *China Accuses MPs of Hong Kong 'Interference'*, BBC NEWS (Sept. 1, 2014), <http://www.bbc.com/news/uk-politics-29016776>.

5. Hugo Swire, 選舉、民主和香港的未來 [Voting, Democracy and the Future of Hong Kong], MINGPAO (H.K.), Sept. 14, 2013; Hugo Swire, *People Must Have a Genuine Choice in the 2017 Chief Executive Election*, S. CHINA MORNING POST (H.K.), Sept. 14, 2013, <http://www.scmp.com/comment/insight-opinion/article/1309205/people-must-have-genuine-choice-2017-chief-executive>. See also Hugo Swire, *Voting, Democracy and the Future of Hong Kong*, GOV.UK (Sept. 14, 2013), <https://www.gov.uk/government/speeches/voting-democracy-and-the-future-of-hong-kong>.

State for the Foreign and Commonwealth Office (“FCO”) of the United Kingdom, stated his support for the introduction of universal suffrage in Hong Kong. Swire reiterated the United Kingdom’s commitment to Hong Kong under the Sino-British Joint Declaration of 1984 (“Joint Declaration”), adding, “the U.K. stands ready to support [Hong Kong’s transition to universal suffrage] in any way [it] can.”⁶ Official responses ranged from the unfriendly to the vitriolic. Leung Chun-ying (梁振英; commonly known as “C.Y. Leung”), the city’s Chief Executive, asserted that Hong Kong needed no foreign support to implement universal suffrage.⁷ The People’s Republic of China (“PRC”) Foreign Ministry denounced British intervention in Hong Kong’s internal affairs.⁸ Official media cited ominous warnings from Hong Kong-based pro-Beijing papers about the influence of British spies “across the city’s government, judiciary, chambers of commerce and the media.”⁹ Pro-democracy remarks by Clifford Hart, the American Consul-General, were met with a similarly hostile response.¹⁰

6. *Id.*

7. Tanna Chong & Stuart Lau, *Beijing to Britain: Stop Interfering With Hong Kong’s Internal Affairs*, S. CHINA MORNING POST (H.K.), Sept. 17, 2013, <http://www.scmp.com/news/hong-kong/article/1311049/beijing-britain-stop-interfering-hong-kongs-internal-affairs?page=all>; 梁振英：政改毋須外國援助 [C.Y. Leung: Political Reform Requires No Foreign Assistance], MINGPAO INSTANT NEWS (Sept. 27, 2013, 2:07 PM), <http://inews.mingpao.com/htm/INews/20130927/gb51407k.htm>.

8. Chong & Lau, *supra* note 7.

9. Te-Ping Chen, *Hong Kong Riddled With British Spies, Reports Say*, CHINA REAL TIME (Sept. 18, 2013, 6:17 PM), <http://blogs.wsj.com/china-realttime/2013/09/18/hong-kong-riddled-with-british-spies-reports-say/>.

10. *See, e.g.*, 京官轟夏千福沒資格談普選 [Beijing Officials Slam Clifford Hart as Unqualified to Discuss Universal Suffrage], APPLE DAILY (H.K.), Sept. 26, 2013. In a speech on September 24, 2013, Hart said that the United States had “no prescription for Hong Kong’s electoral process,” but it would not be silenced by China in its support of democracy. Keith Bradsher, *U.S. Envoy Affirms Support for Universal Suffrage in Hong Kong*, N.Y. TIMES, Sept. 24, 2013, <http://www.nytimes.com/2013/09/25/world/asia/us-envoy-affirms-support-for-universal-suffrage-in-hong-kong.html>; Greg Torode, *New U.S. Envoy to Hong Kong Vows to Push For Democracy*, REUTERS, Sept. 24, 2013, available at <http://www.reuters.com/article/2013/09/24/us-hongkong-usa-idUSBRE98N09820130924>. Although German Consul-General Nikolaus von der Wenge Graf Lamsdorff has also made remarks in support of universal suffrage, the author is not currently aware of any official response by the Hong

Beijing's shrill response to foreign comments on Hong Kong may belie unease about its failure to meet its international legal commitments. In the Joint Declaration, China promised Hong Kong a "high degree of autonomy" under the doctrine of "One Country, Two Systems" (一國兩制). Hong Kong would have an elected legislature after the resumption of Chinese sovereignty in 1997. The city's Chief Executive—its head of government—would be selected through elections or consultations.¹¹ The provisions of the International Covenant on Civil and Political Rights ("ICCPR") that the United Kingdom had acceded to on Hong Kong's behalf would continue to apply.¹² China later enshrined its commitments to Hong Kong's democratization in the Basic Law, the constitutional instrument for the country's first Special Administrative Region ("SAR").¹³ Articles 45 and 68 of the Basic Law proclaimed that the "ultimate aim" would be for Hong Kong to choose its Chief Executive and its legislature through universal suffrage.¹⁴

Yet, more than seventeen years after the transfer of sovereignty, China's promises of democratization in Hong Kong ring increasingly hollow. China butted heads with the United Kingdom over electoral arrangements for the city's Legislative Council ("Legco") throughout the 1990s;¹⁵ it ultimately reversed British reforms by setting up its own shadow legislature.¹⁶ After

Kong or Beijing Governments, *See On Democracy*, HARBOUR TIMES (H.K.), Jan. 10, 2014, available at <http://harbourtimes.com/openpublish/article/democracy>.

11. See "B. Background to the Joint Declaration," *infra*, at 14. See also "C. The Joint Declaration," *infra*, at 46.

12. See "E. The ICCPR," *infra*, at 50.

13. Macau, previously a Portuguese colony, became the second SAR on December 20, 1999. See Joe Havelly, *What Now for Macau?* BBC NEWS (Dec. 20, 1999), <http://news.bbc.co.uk/2/hi/asia-pacific/566074.stm>.

14. See *infra* Part II.D.

15. See Michael C. Davis, *Constitutionalism in Hong Kong: Politics Versus Economics*, 18 U. PA. J. INT'L ECON. L. 157, 169–73 (1997). See also *infra* Part I.D.

16. See *infra* Part I.D.

1997, the NPCSC repeatedly pushed back the deadline for democratization.¹⁷ In 2007, the NPCSC promised universal suffrage in the 2017 Chief Executive elections.¹⁸ Yet the 2014 Decision spells out—more clearly than any previous statement—that China’s “bottom line” is a power of veto over candidates with political views it deems repugnant.¹⁹

Beijing’s repeated moving of the goalposts is significant because it calls into question the PRC’s willingness to abide by its obligations under international law. As a result, it has prompted growing international fears for the territory’s future. Despite the hostile Chinese reception to the statements by Swire and Hart, the German Consul-General added his voice to the chorus in early 2014, stating, “[w]ith universal suffrage, our understanding is everybody has a vote and everybody can run.”²⁰ Sir Richard Ottaway, the Chair of the U.K. House of Commons Foreign Affairs Committee, declared on September 2, 2014, that there was “a prima facie case” that the 2014 Decision violated the Joint Declaration.²¹

Beijing’s lengthy history of default has had two major consequences. First, the absence of electoral reform has created an ongoing crisis of legitimacy. In 2012, C.Y. Leung was selected as

17. Lorenz Langer, *Electoral Reform in Hong Kong: From Schedule to Substance*, 22 H.K. J. (2011).

18. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu 2012 Nian Xingzheng Zhangguan He Lifa Hui Chansheng Banfa Ji Youguan Puxuan Wenti de Jueding (全國人民代表大會常務委員會關於香港特別行政區 2012 年行政長官和立法會產生辦法及有關普選問題的決定) [Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage] (adopted by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2007), available at http://www.npc.gov.cn/npc/xinwen/syxw/2007-12/29/content_1387576.htm [hereinafter *2007 Decision*].

19. See 2014 Decision, *supra* note 2. See also Xiaoyang Qiao, 喬曉陽在香港立法會部分議員座談會上的講話 [Qiao Xiaoyang’s Remarks at a Seminar With Some Members of the H.K. Legislative Council] (Mar. 24, 2013), http://www.locpg.gov.cn/shouyexinwen/201303/t20130327_7135.asp.

20. *On Democracy*, *supra* note 10.

21. Malcolm Moore, *China “Has Breached Terms of Hong Kong Handover”*, TELEGRAPH, Sept. 2, 2014, <http://www.telegraph.co.uk/news/world-news/asia/hongkong/11069949/China-has-breached-terms-of-Hong-Kong-handover.html>.

Chief Executive by an Electoral Committee of 1,200 people in a process the *Economist* described as a “farce.”²² In the same year, half of the legislative seats were chosen through a “functional constituency” voting system previously condemned by the U.N. Human Rights Committee as a system of unequal suffrage.²³ Second, public cynicism about “One Country, Two Systems” has taken root. The Hong Kong Government’s consultation on Chief Executive electoral reform for 2017 was met with suspicion, even before the consultation document’s release.²⁴ In December 2013, a University of Hong Kong survey revealed that 42.3 percent of respondents had no confidence in “One Country, Two Systems.”²⁵ The perception of bad faith in the part of Beijing and Hong Kong Governments even prompted calls for mass civil disobedience,²⁶ culminating in the Umbrella Movement protests of 2014.²⁷

22. *Hong Kong’s Chief-Executive “Election”: The Worst System, Including All the Others*, *ECONOMIST*, Mar. 31, 2012, <http://www.economist.com/node/21551482>. See also *infra* Part I.H.

23. See Human Rights Comm., *Concluding Observations of the Human Rights Comm.*, ¶ 19, U.N. Doc. CCPR/C/79/Add.57 (1995) [hereinafter *1995 Concluding Observations*]; SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 742 (3d ed. 2013). For a detailed explanation of functional constituencies, see SIMON N.M. YOUNG & ANTHONY LAW, *A CRITICAL INTRODUCTION TO HONG KONG’S FUNCTIONAL CONSTITUENCIES* (2004), available at <http://www.law.hku.hk/ccpl/Docs/FCsreport.pdf>. See also *infra* Part II.D.

24. See Tanna Chong & Stuart Lau, *Popular Nomination for Chief Executive Still A Possibility*, *S. CHINA MORNING POST* (H.K.), Nov. 24, 2013, <http://www.scmp.com/news/hong-kong/article/1364804/popular-nomination-chief-executive-still-possibility>; Tanna Chong & Tony Cheung, *Li Fei Offers More Questions Than Answers*, *S. CHINA MORNING POST* (H.K.), Nov. 23, 2013, <http://www.scmp.com/news/hong-kong/article/1363094/li-fei-offers-more-questions-answers>. For the consultation document, see H.K. GOV’T, *LET’S TALK AND ACHIEVE UNIVERSAL SUFFRAGE* (2013) [hereinafter *2013 CONSULTATION DOCUMENT*].

25. *People’s Lack of Confidence in HK’s Future, People’s Lack of Confidence in China’s Future and People’s Lack of Confidence in “One Country, Two Systems” (Monthly Average)*, HKU POP SITE, http://hkupop.hku.hk/english/popexpress/trust/conhkfuture/combine_no/datatables.html (last visited Jan. 10, 2014).

26. See discussion of “Occupy Central with Love and Peace” *infra* Part I.I.1.

27. See, e.g., Lauren Hilgers, *Hong Kong’s Umbrella Revolution Isn’t Over Yet*, *N.Y. TIMES MAG.*, Feb. 18, 2015, <http://www.nytimes.com/2015/02/22/magazine/hong-kongs-umbrella-revolution-isnt-over-yet.html>.

Although there has been extensive discussion since 1984 of Hong Kong's post-1997 constitutional order,²⁸ there has been relatively little discussion outside of Hong Kong legal academia regarding the impact of events after 1997.²⁹ Even within Hong Kong legal academia, discussion of recent milestones in electoral reform has been limited.³⁰ This paper brings the academic discussion of post-1997 Hong Kong up to date in light of developments during 2013 and the first three quarters of 2014, with limited consideration of the Umbrella Movement and its aftermath. It also examines the PRC's public international law obligations with respect to Hong Kong specifically.

Part I sets out the background to the resumption of Chinese sovereignty over Hong Kong in 1997. It posits that China laid the foundations for its later defaults on democratization as early as 1972, when it requested Hong Kong's removal from the United Nations' list of Non-Self-Governing Territories.³¹ The British policy of acquiescence during the 1980s aided and abetted future Chinese backsliding.³² Newfound and belated British assertiveness in the 1990s was insufficient to undo the damage done by years of British appeasement.³³ Part I then provides an account of Beijing's attempts to undermine democratic reform in Hong Kong from 2003 to date, culminating in the current round of debates regarding Chief Executive electoral reforms for 2017. After the NPCSC usurped the power to initiate electoral reform in Hong Kong in 2004,³⁴ it pledged in 2007 that Hong Kong could

28. See, e.g., Thomas Boasberg, *One Country, One-and-a-Half Systems: The Hong Kong Basic Law and Its Breaches of the Sino-British Joint Declaration*, 10 WIS. INT'L L.J. 282 (1991); Nancy C. Jackson, *The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, 5 BERKELEY J. INT'L L. 377 (1987).

29. See, e.g., BRUCE HERSCHENSOHN, *HONG KONG AT THE HANDOVER* (2000); RALF HORLEMANN, *HONG KONG'S TRANSITION TO CHINESE RULE: THE LIMITS OF AUTONOMY* (2002).

30. See, e.g., Albert H.Y. Chen, *Hong Kong's Constitutional Moment of 2014*, 43 H.K. L.J. 791 (2013).

31. YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 11*, 38 (2d ed. 1999); see also Boasberg, *supra* note 28, at 288–89.

32. See 英鴿派當道談判節節敗退 [British Doves Prevailed, Repeatedly Retreated in Negotiations], MINGPAO (H.K.), Jan. 4, 2014.

33. See *infra* Part I.D.

34. See *infra* Part I.E.

elect its own Chief Executive through universal suffrage in 2017.³⁵ Yet Beijing remains adamant on maintaining a power of veto by controlling the nomination process.³⁶

Part II considers the applicable international legal framework. It contends that any attempt by Beijing to impose political criteria on Chief Executive candidacy violates obligations imposed by the Joint Declaration, the ICCPR, and customary international law. First, the object and purpose of the Joint Declaration, the PRC's subsequent practice in promulgating the Basic Law, and other rules of treaty interpretation suggest that Beijing may not render the Joint Declaration's references to "elections" nugatory. Second, the provisions of the ICCPR requiring universal suffrage, equal suffrage, and the right to be elected regardless of political affiliation apply with full force to Hong Kong, despite insistence by pre-1997 and post-1997 Hong Kong Governments that they do not. The latter position is inconsistent with the Human Rights Committee's conclusions, established rules of treaty interpretation, and emergent rules of customary international law. Third, although customary international law does not support a right to democracy *per se*, it arguably supports a principle of "democratic teleology" or a right to democratization.

Part III considers possible remedies and means of enforcement. In the absence of compulsory jurisdiction by the International Court of Justice ("ICJ") or of individual communications under the Optional Protocol to the ICCPR, the options for enforcing the PRC's international law obligations are limited. Yet alternatives remain available. Unilateral monitoring by the United Kingdom, the prospect of a General Assembly request for an Advisory Opinion, or conduct by third States, provide possible—if unlikely—means of enforcement. Ultimately, the most effective means of exerting pressure on the PRC to abide by its international law obligations may not involve State actors. It may not even involve public international law at all. However, China's increasing hostility toward democracy and "universal values"³⁷ warrants pessimism toward the prospects of democratization in Hong Kong.

35. See *infra* Part I.F.

36. See *infra* Part I.I.

37. Document No. 9, an internal memorandum issued by the Chinese Communist Party in 2013, declared that "constitutional democracy," "universal values," human rights, and other "Western" ideas were subversive and should be

I. BACKGROUND AND HISTORY

Beijing's attempts to stymie Hong Kong's democratization began well before 1997. These efforts continued after the signing of the Joint Declaration and intensified after the transfer of sovereignty, especially after landmark protests in 2003 against national security legislation. Between 2003 and 2010, Beijing seized the power to initiate democratic reform in Hong Kong, delayed democratization until 2017 at the earliest, and created schisms within the pro-democracy camp. Despite these efforts, demand for democratization continued to build. The debacle surrounding the Chief Executive selection process in 2012 provided further impetus for reform. Despite—or perhaps because of—the growing clamor for reforms, the 2014 Decision entrenched Beijing's stranglehold over the nomination of candidates for Chief Executive.

A. The United Kingdom's Acquisition of Hong Kong

The United Kingdom acquired control over Hong Kong through three treaties with China during the nineteenth century. As part of the settlement of the First Opium War, China ceded the island of Hong Kong to the United Kingdom in perpetuity in 1842, under the Treaty of Nanking.³⁸ China ceded the Kowloon Peninsula under the First Convention of Peking of 1860 at the conclusion of the Second Opium War.³⁹ Under the third treaty, the Second Convention of Peking of 1898, China granted the United Kingdom a ninety-nine-year lease over the New Territories and Outlying Islands.⁴⁰

eliminated. *Document 9: A ChinaFile Translation: How Much is a Hardline Party Directive Shaping China's Current Political Climate?*, CHINAFILE (Nov. 8, 2013), <http://www.chinafile.com/document-9-chinafile-translation> [hereinafter Document 9]. For more recent developments, see generally Samuel Wade, *Unraveling China's Campaign Against Western Values*, CHINA DIGITAL TIMES (Mar. 5, 2015, 11:42 PM), <http://chinadigitaltimes.net/2015/03/unraveling-chinas-campaign-western-values/>.

38. GHAI, *supra* note 31, at 4.

39. *Id.* at 4–5.

40. *Id.* at 5–6.

Successive Chinese governments harbored resentment over the treaties on Hong Kong,⁴¹ but no Chinese government attempted to recover Hong Kong until 1982.⁴² Prior to 1982, the PRC maintained that the treaties imposed on China in the nineteenth and early twentieth centuries were void as unequal treaties, but that it would recover Hong Kong at an appropriate time.⁴³ Pursuant to that stance, the PRC successfully sought the removal of Hong Kong from the United Nations' list of Non-Self-Governing Territories in 1972.⁴⁴

B. Background to the Joint Declaration

By the early 1980s, the looming end of the British lease over the New Territories forced the British government to enter talks with Beijing over the future of Hong Kong.⁴⁵ China also found it expedient to negotiate. In 1978, the PRC secretly established the Hong Kong and Macau Affairs Office ("HKMAO");⁴⁶ by 1979 Deng Xiaoping had become General Secretary of the Communist Party of China.⁴⁷ The recovery of Hong Kong would not only preserve face for China; it would also aid China's economic development and damage Deng's hard-line rivals in Beijing.⁴⁸

The Chinese were determined to regain sovereignty over Hong Kong at all costs.⁴⁹ The British soon discovered the extent of that determination; Deng reacted angrily to Thatcher's claim that the treaties regarding Hong Kong remained valid.⁵⁰ The PRC further strengthened its bargaining position by threatening a unilateral declaration of its policies toward Hong Kong after 1997.⁵¹ Faced with an obdurate Chinese negotiating position, the Brit-

41. *Id.* at 9.

42. Boasberg, *supra* note 28, at 287–89.

43. *Id.* at 288–89.

44. GHAI, *supra* note 31, at 11, 38; Boasberg, *supra* note 28, at 288–89.

45. GHAI, *supra* note 31, at 36–38; Boasberg, *supra* note 28, at 289.

46. GHAI, *supra* note 31, at 37.

47. Boasberg, *supra* note 28, at 289.

48. GHAI, *supra* note 31, at 37.

49. *Id.* at 47; Boasberg, *supra* note 28, at 290–91.

50. GHAI, *supra* note 31, at 47.

51. *Id.* at 48–49; Boasberg, *supra* note 28, at 290.

ish abandoned their proposal to exchange sovereignty for administrative rights in late 1983.⁵² Chinese proposals provided the basis for further negotiations.⁵³

China's plan for Hong Kong rested on the concept of "One Country, Two Systems," under which Hong Kong would be ruled by Beijing but allowed to retain its capitalist economy. Deng promised that post-1997 Hong Kong would have a "high degree of autonomy" (高度自治) and that "Hong Kong people will rule Hong Kong" (港人治港).⁵⁴ Beijing encapsulated this policy in twelve points, which were presented to the United Kingdom on June 27, 1984.⁵⁵ These points included guarantees that:

- (1) Hong Kong would not be run by Beijing's plenipotentiaries;
- (2) Hong Kong would have a "mayor" elected by Hong Kong inhabitants, who should be a "patriot";
- (3) Except in matters of foreign affairs and defense, Beijing would not interfere in Hong Kong's governance; and
- (4) The PRC would tolerate political activities in Hong Kong, provided they did not constitute sabotage.⁵⁶

Deng hoped that "One Country, Two Systems" held the key to resolving the questions of Hong Kong and Macau—and, ultimately, to reunification with Taiwan.⁵⁷ To that end, the PRC's 1982 Constitution (promulgated as part of Deng's comprehensive reforms) included a provision allowing the creation of SARs, with systems of government to be prescribed by the National People's Congress ("NPC") "in the light of the specific conditions."⁵⁸

52. Boasberg, *supra* note 28, at 294; GHAI, *supra* note 31, at 47–48. See also 英鴿派當道談判節節敗退 [British Doves Prevailed, Repeatedly Retreated in Negotiations], *supra* note 31 and accompanying text.

53. GHAI, *supra* note 31, at 46, 48–50.

54. Boasberg, *supra* note 28, at 291.

55. GHAI, *supra* note 31, at 49–50.

56. *Id.* at 49–50.

57. Boasberg, *supra* note 28, at 291; Jackson, *supra* note 28, at 422.

58. XIANFA art. 31 (1982) (China).

China had initially been reluctant to enter into a binding treaty on the future of Hong Kong, although Deng ultimately relented.⁵⁹ The Joint Declaration was initialed on September 24, 1984 and came into force on May 27, 1985.⁶⁰ It was registered with the United Nations on June 12, 1985.⁶¹

C. *The Drafting of the Basic Law*⁶²

Following ratification of the Joint Declaration, the PRC set up the Basic Law Drafting Committee (“Drafting Committee”). The Drafting Committee consisted of fifty-nine members from Hong Kong and Mainland China, with Mainland members forming the majority.⁶³ The Drafting Committee was aided by a Basic Law Consultative Committee (“Consultative Committee”), ostensibly intended to introduce a degree of public participation.⁶⁴ The United Kingdom played a minimal role in the drafting process;⁶⁵ it had agreed not to engage in any constitutional reforms that would be inconsistent with the Basic Law, a policy referred to as “convergence.”⁶⁶ The drafting process ultimately became an attempt by a minority of liberal-minded Drafting Committee members to prevent erosion of Chinese commitments in the Joint Declaration.⁶⁷ With respect to democracy, they achieved only

59. GHAI, *supra* note 31, at 53.

60. *Id.* at 55–56.

61. Joint Declaration on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 33 [hereinafter Joint Declaration].

62. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (promulgated by Order No.26, Pres. of China, Apr. 4, 1990, effective Jul. 1, 1997) [hereinafter *Basic Law* or *BL*].

63. GHAI, *supra* note 31, at 57.

64. *Id.* at 58–59. The Consultative Committee's Secretary-General was C.Y. Leung, who would become Hong Kong's third Chief Executive in 2012. Colleen Lee, *Ex-Communist Raps Comrade C.Y.*, S. CHINA MORNING POST (H.K.), Mar. 19, 2012, <http://www.scmp.com/article/995884/ex-communist-raps-comrade-cy>.

65. See GHAI, *supra* note 31, at 59–60.

66. *Id.* at 59–60; Davis, *supra* note 15, at 170. The practical consequence—and, indeed, the intent—of “convergence” was to “contain the pace of political reform.” CHRISTOPHER PATTEN, *EAST AND WEST: CHINA, POWER, AND THE FUTURE OF ASIA* 25 (1998).

67. Davis, *supra* note 15, at 162.

limited success, especially after the Tiananmen Square Massacre of 1989.⁶⁸

The provisions governing Hong Kong's political system were particularly contentious.⁶⁹ Pro-Beijing conservatives sought to limit direct elections of the legislature and to have the Chief Executive selected through an electoral college.⁷⁰ Pro-democracy liberals sought the election of both the legislature and the Chief Executive through universal suffrage.⁷¹ The conservatives—with Beijing's blessing—ultimately won the argument.⁷²

The process of negotiating the Joint Declaration—and, to a lesser extent, the drafting process of the Basic Law—was remarkable for its lack of representation of the interests of the Hong Kong public. When then-Governor Sir Edward Youde declared in 1982 that he represented the interests of Hong Kong, the PRC Foreign Ministry responded that Youde could only be present as a representative of the United Kingdom.⁷³ During the drafting of the Basic Law, attempts by the Hong Kong public to make their views known had little impact on the Drafting Committee.⁷⁴ Chinese attitudes hardened further⁷⁵ after the Tiananmen Square Massacre as hardliners consolidated their position;⁷⁵ by the end of the drafting process, Beijing was “increasingly dictating the terms of the Basic Law.”⁷⁶

D. 1990-1997: A Day Late and a Dollar Short

The administration of Hong Kong between 1984 and 1997 raised thorny difficulties, even before 1989. The United Kingdom purported to retain administrative authority over Hong Kong.⁷⁷ Yet the PRC also claimed an interest in the prosperity and stability of the Crown Colony.⁷⁸ A smooth transition would only have been possible with the full cooperation of the United

68. *Id.* at 162–63.

69. GHAI, *supra* note 31, at 63.

70. *Id.*

71. *Id.*

72. *Id.*

73. STEVE TSANG, A MODERN HISTORY OF HONG KONG 222 (2007).

74. GHAI, *supra* note 31, at 60–61.

75. *Id.* at 60.

76. *Id.* at 61.

77. *Id.* at 75.

78. *Id.*

Kingdom and PRC and of Hong Kong's domestic institutions.⁷⁹ Instead, the two sovereigns began jockeying for power almost immediately.⁸⁰

The United Kingdom made an early push for Hong Kong's democratization in 1984 in a consultation document (a "Green Paper") that contained detailed proposals for a Parliamentary democracy;⁸¹ however, the Green Paper fell victim to the United Kingdom's policy of "convergence."⁸²

The United Kingdom would come to regret its policy of appeasement. The bloody suppression of the 1989 democracy movement shattered the Hong Kong public's confidence in Beijing, prompting mass emigration during the 1990s.⁸³ London came under pressure—both from Hong Kong and internationally—to hasten democratization and protect rights and freedoms;⁸⁴ for its part, Beijing fought British attempts at political reform at every turn.⁸⁵ The Memorandum of Understanding on Hong Kong's new airport, signed in 1991, also prompted the United Kingdom to reconsider its concessions to China.⁸⁶ The British negotiating position would harden after 1991, but this would have little effect in securing greater Chinese commitment to Hong Kong's democratization.

79. *Id.* at 73.

80. *See id.* at 75.

81. *See id.* at 76.

82. *See supra* note 64 and accompanying text. *See also* GHAI, *supra* note 31, at 76.

83. *See* Sebastian Veg, *Hong Kong's Enduring Identity Crisis*, ATLANTIC (Oct. 16, 2013, 3:26 PM), <http://www.theatlantic.com/china/archive/2013/10/hong-kongs-enduring-identity-crisis/280622/>.

84. GHAI, *supra* note 31, at 76.

85. *Id.*

86. The Memorandum of Understanding imposed various substantive and procedural requirements on the construction of the new Hong Kong International Airport, the effect of which was to require consultation or consent of the PRC and to dictate the Hong Kong treasury's fiscal reserves. The Memorandum also established an Airport Committee under the Joint Liaison Group (the latter being a creation of the Joint Declaration); the Airport Committee operated in secret, setting "a bad precedent for public participation, policy making and accountability." GHAI, *supra* note 31, at 77. *See also* Alvin Y. So, *The Tiananmen Incident, Patten's Electoral Reforms, and the Roots of Contested Democracy in Hong Kong*, in *THE CHALLENGE OF HONG KONG'S REINTEGRATION WITH CHINA* 49, 61–62 (Ming K. Chan ed., 1997).

The most prominent symbol of the United Kingdom's newfound assertiveness was the appointment of Chris Patten, a senior Conservative politician, as Hong Kong's last governor in 1992.⁸⁷ In October 1992, without consulting Beijing, Patten announced Legco electoral reforms for 1995, which, although conforming to the letter of the Basic Law, hastened the pace of democratization.⁸⁸ Beijing's reaction was vituperative.⁸⁹ After seventeen rounds of talks, Sino-British negotiations failed;⁹⁰ Legco passed Patten's reform package substantially unchanged.

Following the passage of the Patten reforms, Beijing went its own way. It declared that the "through train" arrangement, under which legislators elected in 1995 could remain in office until 1999, had been derailed.⁹¹ It also hastened arrangements for its own shadow government, the Preliminary Working Committee (PWC),⁹² and created a "provisional legislature"—a creature foreign to the Basic Law.⁹³ The deterioration of Sino-British relations after 1989 thus resulted in two tracks of government, with each track intent on undoing the reforms instituted by the other. This pattern of Chinese recalcitrance was an ominous sign of things to come. It showed, to many, a "cavalier attitude towards the Basic Law."⁹⁴ Subsequent events would prove the skeptics correct.

E. 2003-2004: Beijing Usurps Initiative

On July 1, 2003, an estimated 500,000 people marched in protest against proposed national security legislation.⁹⁵ Demands

87. See GHAI, *supra* note 31, at 78.

88. See So, *supra* note 86, at 63–64; see also GHAI, *supra* note 31, at 78.

89. Then-HKMAO chief, Lu Ping (魯平), castigated Patten as a "sinner of the ages." See Tony Cheung, *Last Governor Chris Patten Speaks of 'Regrets' Over Hong Kong Democracy*, S. CHINA MORNING POST (H.K.), Nov. 12, 2013, <http://www.scmp.com/news/hong-kong/article/1353799/last-governor-chris-patten-speaks-regrets-over-hong-kong-democracy>.

90. See So, *supra* note 86, at 65–67.

91. See So, *supra* note 86, at 67–68; see also GHAI, *supra* note 31, at 75–78.

92. So, *supra* note 86, at 67–68.

93. GHAI, *supra* note 31, at 78. The creation of the Provisional Legislature will be revisited at the end of this paper.

94. *Id.*

95. *Rebellion: Forcing a Backdown over Hong Kong's New Internal-Security Law Could Be Only the Beginning*, ECONOMIST, Jul. 10, 2003, <http://www.economist.com/node/1908260>.

for democratization followed. Advocates of democracy, fortified by high protest turnout, called for the election of the Chief Executive by universal suffrage in 2007. They also demanded the abolition of “functional constituency” legislators, who made up half of Legco and entrenched the influence of business and professional interests, by 2008.⁹⁶

The Beijing and Hong Kong Governments swiftly moved to dominate all subsequent discussion.⁹⁷ On January 7, 2004, then-Chief Executive Tung Chee-hwa (董建華) announced the creation of a Constitutional Development Task Force headed by Sir Donald Tsang Yam-kuen (曾蔭權), then-Chief Secretary,⁹⁸ to consult the Central People’s Government (“Central Government”) on constitutional development. Tsang explained the need to consult Beijing in the following terms:

Taking into consideration our duty to uphold the Basic Law, as well as political reality, we believe that we need to first initiate discussions with the central authorities before determining the appropriate arrangements for the constitutional review . . . At the most basic level, this will avoid the central authorities and the Hong Kong community reaching different understandings of those Basic Law provisions regarding constitutional development. Such a scenario could cause serious confrontation between the Hong Kong community and our sovereign government. Obviously, we do not want to precipitate such a situation.⁹⁹

On the same day, the HKMAO – an arm of the Beijing government – issued a press release emphasizing Hong Kong’s political development related to the implementation of “One Country, Two Systems” and to the relationship between the Central Government and the Hong Kong SAR.¹⁰⁰

96. Boasberg, *supra* note 28, at 331–32; GHAI, *supra* note 31, at 259–61; see Albert H.Y. Chen, *The Constitutional Controversy of Spring 2004*, 34 H.K. L.J. 215, 215-16 (2004) [hereinafter Chen, *Constitutional Controversy*]. For a detailed explanation of functional constituencies, see YOUNG & LAW, *supra* note 23. See also *infra* Part II.D.

97. Chen, *Constitutional Controversy*, *supra* note 96 at 216.

98. Second in line only to the Chief Executive in Hong Kong’s executive hierarchy.

99. Press Release, H.K. Gov’t, Task Force to Study Constitutional Review (Jan. 7, 2004), available at <http://archive.news.gov.hk/isd/ebulletin/en/category/administration/040107/html/040107en01003.htm>.

100. Chen, *Constitutional Controversy*, *supra* note 96 at 216.

Beijing would soon dictate its views on democratic development to Hong Kong. On March 26, 2004, the NPCSC announced that it would consider issuing an interpretation of the Basic Law provisions governing Hong Kong's political development at its next meeting.¹⁰¹ The deliberations were brief. On April 6, 2004, the NPCSC delivered its interpretation of Annexes I and II of the Basic Law (the "2004 Interpretation").¹⁰² The 2004 Interpretation required the Chief Executive to report to the NPCSC on the necessity of political reform, after which the NPCSC would determine whether such reform was indeed necessary.¹⁰³ The NPCSC thus seized the political initiative for electoral reform.¹⁰⁴ The Chief Executive obligingly submitted a report, stating that there was a need to amend the electoral arrangements for 2007 and 2008, but that "development towards the ultimate aim of universal suffrage must progress in a gradual and orderly manner step by step. The pace should not be too fast."¹⁰⁵ Armed with the Chief Executive's reservations, the NPCSC ruled out universal suffrage in 2007 and 2008 in its Decision of April 26, 2004 (the "2004 Decision").¹⁰⁶ A public relations offensive followed the

101. SOW KEAT TOK, *MANAGING CHINA'S SOVEREIGNTY IN HONG KONG AND TAIWAN* 124 (2013).

102. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Fujian Yi Di Qi Tiao He Fujian Er Di San Tiao de Jieshi (全國人民代表大會常務委員會關於《中華人民共和國香港特別行政區基本法》附件一第七條和附件二第三條的解釋) [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 by the Standing Comm. Nat'l People's Cong., Apr. 6, 2004), available at http://www.npc.gov.cn/wxzl/wxzl/2004-07/23/content_332218.htm [hereinafter *2004 Interpretation*].

103. Chen, *Constitutional Controversy*, *supra* note 96 at 218.

104. *Id.*

105. H.K. CHIEF EXEC., REPORT ON WHETHER THERE IS A NEED TO AMEND THE METHODS FOR SELECTING THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN 2007 AND FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN 2008, at 4 (2004), available at <http://www.basiclaw.gov.hk/en/basiclawtext/index.html> (select "Instrument 19").

106. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu 2007 Nian Xingzheng Zhangguan he 2008 Nian Lifa Hui Chansheng Banfa Youguan Wenti de Jueding (全國人民代表大會常務委員會關於香港特別行政區 2007 年行政長官和 2008 年立法會產生辦法有關問題的決定) [Decision of the Standing Committee of the National People's Congress on

legal offensive. Between 2004 and 2005, Beijing officials and their Hong Kong supporters let loose a “barrage” of hostility toward advocates of democratization.¹⁰⁷

F. 2007: Jam Tomorrow

In March 2007, twenty-one pro-democracy legislators presented their proposal for electoral reform in 2012. Under this proposal, all legislators would be elected through direct elections, putting an end to functional constituencies. The Chief Executive would be elected by universal suffrage from a list of candidates nominated by at least fifty members of a 1200-strong nominating committee.¹⁰⁸ The reform proposal became a key issue in the 2007 debates between Donald Tsang—by then running for re-election as Chief Executive—and Alan Leong Ka-kit (梁家傑), the pro-democracy candidate. Confronted with continued public demand for democratization, Tsang pledged that he would pursue a timetable for democratization if he were re-elected.¹⁰⁹ Tsang was duly re-elected; throughout April and May 2007, democrats pressed Tsang to abide by his promise of a timetable for reform.¹¹⁰

Beijing reacted quickly. On June 6, 2007, Tsang was summoned before NPC President Wu Bangguo (吳邦國), who declared that the SAR had no “residual power” to decide on political reforms.¹¹¹ On December 29, the NPCSC handed down its 2007 Decision—ruling out universal suffrage for any elections in 2012.¹¹² The earliest possible date for Chief Executive elections by universal suffrage, the NPCSC declared, was 2017—twenty

Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008] (adopted by the Standing Comm. Nat'l People's Cong., Apr. 26, 2004), available at http://www.npc.gov.cn/wxzl/wxzl/2004-07/23/content_332215.htm [hereinafter *2004 Decision*]. See also Michael C. Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT'L L. REV. 165, 166–67 (2005).

107. Davis, *supra* note 106, at 172–75.

108. Baohui Zhang, *Beijing's 2007 Political Reform Plan and Prospects for Hong Kong's Democratization*, 17 DEMOCRATIZATION 442, 447 (2010).

109. *Id.*

110. *Id.*

111. *Id.* at 448.

112. *2007 Decision*, *supra* note 18.

years after the establishment of the SAR and more than thirty years after the signing of the Joint Declaration.¹¹³

G. 2009-2010: Divide and Conquer

The first clash over electoral reform after the 2007 Decision began in November 2009, when the Hong Kong Government released its “Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012” (the “2009 Proposals”).¹¹⁴ Under the 2009 Proposals, the Election Committee would swell in numbers to 1200 people, but its basic contours would remain unchanged.¹¹⁵ The number of Legco seats would increase from sixty to seventy, with five new geographical constituency and five new functional constituency seats.¹¹⁶ The new functional constituency seats would be chosen by elected members of District Councils (local consultative assemblies).¹¹⁷

Pro-democracy politicians criticized the 2009 Proposals for their lack of ambition, but became bitterly divided over how to react.¹¹⁸ Legislators from the League of Social Democrats (社會民主連線, also known as 社民連; “LSD”) and the Civic Party (公民黨; “CP”) resigned in an attempt to trigger a “de facto referendum” on democratic reform. However, their efforts were hamstrung by the refusal of the Democratic Party of Hong Kong (民

113. *Id.*

114. H.K. CONST. AND MAINLAND AFF. BUREAU, CONSULTATION DOCUMENT ON THE METHODS FOR SELECTING THE CHIEF EXECUTIVE AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2012 (Nov. 18, 2009), http://www.cmab-cd2012.gov.hk/doc/consultation_document_en.pdf [hereinafter 2009 CONSULTATION DOCUMENT]. See also Albert H.Y. Chen, *Constitutional Developments in Autumn 2009*, 39 H.K.L.J. 751, 759–66 (2009) [hereinafter Chen, *Constitutional Developments*].

115. 2009 CONSULTATION DOCUMENT, *supra* note 114, ¶¶ 4.07, 4.13. See also Chen, *Constitutional Developments*, *supra* note 114, at 761–62.

116. 2009 CONSULTATION DOCUMENT, *supra* note 114, ¶ 5.06. See also Chen, *Constitutional Developments*, *supra* note 114, at 761.

117. 2009 CONSULTATION DOCUMENT, *supra* note 114, ¶ 5.13. See also Chen, *Constitutional Developments*, *supra* note 114, at 761, 764.

118. Chen, *Constitutional Developments*, *supra* note 114, at 764–65; Albert H.Y. Chen, *An Unexpected Breakthrough in Hong Kong’s Constitutional Reform*, 40 H.K. L.J. 259, 259–60 (2010) [hereinafter Chen, *Unexpected Breakthrough*].

主黨; “Democratic Party”)—then Hong Kong’s largest pro-democracy party—to participate.¹¹⁹ Instead, the Democratic Party and other “moderate” democrats formed the Alliance for Universal Suffrage (終極普選聯盟) to negotiate with the Hong Kong and Beijing Governments.¹²⁰

Beijing adeptly exploited the divisions between “moderate” and “radical” democrats. It strongly condemned the “de facto referendum”; pro-Beijing politicians boycotted the by-elections.¹²¹ Meanwhile, the Central Government’s Hong Kong liaison office (the “Liaison Office”) hosted an unprecedented series of meetings with “moderate” democrats.¹²² As a result of these talks, the 2009 Proposals received Legco approval in 2010, with minimal modifications.¹²³

The Democratic Party’s decisions to negotiate with Beijing and to vote in favor of the revised 2009 Proposals provoked widespread recriminations.¹²⁴ Beset by criticism from other pro-democracy parties and accused by the public of betrayal,¹²⁵ the party won only four out of thirty-five available Geographical Constituency seats in the 2012 Legco elections.¹²⁶ Its Faustian pact not only split the pro-democracy parties into “moderate” and “radical” camps; it also highlighted the steep political price of advancing proposals deemed to be politically unambitious.

119. See Chen, *Unexpected Breakthrough*, *supra* note 118, at 259–60; *Hong Kong MPs Quit in Attempt to Push Beijing Towards Direct Elections*, GUARDIAN (Jan. 26, 2010, 9:00 AM), <http://www.theguardian.com/world/2010/jan/26/hong-kong-democracy-bid>.

120. Chen, *Unexpected Breakthrough*, *supra* note 118, at 260.

121. *Id.* at 260–61.

122. *Id.* at 261.

123. *Id.* at 262–64. As with the original 2009 Proposals, elected District Councilors would nominate candidates for the five new Functional Constituency seats. However, Hong Kong voters not already enrolled in an existing Functional Constituency would choose among the nominated candidates. See *id.* at 263.

124. See *id.* at 265.

125. See, e.g., Anne-Marie Evans, *Pro-Democracy Parties Hold Protests in Hong Kong*, BBC NEWS (July 1, 2010), <http://www.bbc.co.uk/news/10480116>; Suzanne Pepper, *A Replay of 2010?*, CHINA ELECTIONS AND GOVERNANCE BLOGS (Sept. 4, 2013, 8:43 AM), <http://chinaelectionsblog.net/hkfocus/?p=637>.

126. Simon Lee, *Hong Kong Democrat Leader Albert Ho to Resign on Election Result*, BLOOMBERG, Sept. 9, 2012, available at <http://www.bloomberg.com/news/2012-09-10/hong-kong-democrat-leader-albert-ho-to-resign-on-election-result.html>.

H. 2012: Playing Charades

The decline of “moderate” democrats was not the only factor to shape subsequent political debate. The process by which C.Y. Leung was selected to be Hong Kong’s third Chief Executive threw a spotlight on the defects of the existing system of selection.¹²⁷

Leung’s anointment ended a long, bruising campaign between Leung (previously Convenor of the Executive Council, Hong Kong’s cabinet) and Henry Tang Ying-yen (唐英年; previously Chief Secretary).¹²⁸ Tang, originally the front-runner,¹²⁹ was soon embroiled in scandals over marital infidelity and an unauthorized underground extension in his home.¹³⁰ Leung, for his part, was tarred with suggestions that he was an underground member of the Communist Party¹³¹ and that he had proposed the use of “riot police and tear gas” to quell protests in 2003.¹³² Members of the Election Committee alleged that the Liaison Office had openly urged them to support Leung.¹³³ Others sought to divine Beijing’s chosen candidate.¹³⁴ By the final stages of the

127. The *Economist* described the process as “Byzantine” and “[b]orn of China’s fear of leaders with a genuine electoral mandate” calculated to “cloak a decision taken elsewhere in some semblance of popular consultation.” *Hong Kong’s Chief-Executive “Election”: The Worst System, Including All the Others*, *supra* note 22.

128. Albert Ho also ran, but had no prospect of success: *Hong Kong Protests: No Exit*, *ECONOMIST*, Oct. 4, 2014, <http://www.economist.com/news/china/21621846-days-student-led-unrest-hong-kong-are-crisis-chinas-communist-party-no-exit>.

129. *Id.*

130. Gary Cheung & Tanna Chong, *C.Y. Leung Seeks Unity After Divisive Poll*, *S. CHINA MORNING POST* (H.K.), Mar. 26, 2012, <http://www.scmp.com/article/996589/cy-leung-seeks-unity-after-divisive-poll>.

131. Lee, *supra* note 64.

132. Tanna Chong, *Complaints Pour in Over Poll for Chief Executive*, *S. CHINA MORNING POST* (H.K.), Mar. 29, 2012, <http://www.scmp.com/article/996959/complaints-pour-over-poll-chief-executive>.

133. *Id.* See also *Beijing Lobbies in Push for a Leung Victory*, *S. CHINA MORNING POST* (H.K.), Mar. 21, 2012, <http://www.scmp.com/article/996111/beijing-lobbies-push-leung-victory>.

134. Tanna Chong & Peter So, *Delegates Await Word of Beijing’s Thinking on Race*, *S. CHINA MORNING POST* (H.K.), Mar. 4, 2012, <http://www.scmp.com/article/994424/delegates-await-word-beijings-thinking-race>.

race, some electors were considering whether to force a new election by casting blank ballots.¹³⁵

Meanwhile, attempts at introducing public opinion, if not participation, were savaged. Hao Tiechuan (郝鐵川), propaganda chief at the Liaison Office, suggested the regulation of opinion polls, ostensibly to reduce partisan influence.¹³⁶ Perhaps not surprisingly, an electronic public mock election organized by the University of Hong Kong came under sustained hacking attacks, forcing voters to cast paper ballots.¹³⁷

Leung's selection did not end the controversy. Shortly after winning the "election," Leung made a ninety-minute visit to the Liaison Office—three times as long as his meeting with outgoing Chief Executive Donald Tsang—raising suspicions that the Liaison Office had intervened to secure Leung's election.¹³⁸ Leung's credibility suffered further damage when—ironically—the press later discovered illegal structures at his own home.¹³⁹

I. The Current Debate

Professor Albert Chen (陳弘毅), writing about the 2007 Decision, observed that "[i]t is . . . unlikely that the Decision will have the effect of reducing significantly controversies regarding Hong

135. Vaudine England, *Hong Kong Election: All Bets Off After Frontrunner's Calamitous Campaign*, *GUARDIAN* (Mar. 23, 2012, 1:34 PM), <http://www.theguardian.com/world/2012/mar/23/hong-kong-election>.

136. Colleen Lee, *Liaison Office Man Airs Pre-Election Polling Curbs*, *S. CHINA MORNING POST* (H.K.), Mar. 22, 2012, <http://www.scmp.com/article/996230/liaison-office-man-airspre-election-polling-curbs>.

137. Chi-fai Cheung, *Pair Held Over Hacking of Mock Poll*, *S. CHINA MORNING POST* (H.K.), Mar. 26, 2012, <http://www.scmp.com/article/996598/pair-held-over-hacking-mock-poll>.

138. Tanna Chong, Gary Cheung, & Colleen Lee, *I Won't Be a Yes Man, Says Leung*, *S. CHINA MORNING POST* (H.K.), Mar. 28, 2012, <http://www.scmp.com/article/996786/i-wont-be-yes-man-says-leung>.

139. Tony Cheung, Joshua But & Joyce Ng, *Hong Kong Chief Executive Survives No Confidence Challenge*, *S. CHINA MORNING POST* (H.K.), Dec. 13, 2012, <http://www.scmp.com/news/hong-kong/article/1103900/hong-kong-chief-executive-survives-no-confidence-challenge>.

Kong's political development."¹⁴⁰ That remark has proved prescient.¹⁴¹ The NPCSC's 2004 and 2007 Decisions delayed democratic elections for Chief Executive from 2007 to 2017. The subsequent attempt by the Democratic Party to achieve compromise on electoral reform in 2010 split the pro-democracy camp and resulted in electoral defeat. The 2012 "election" of C.Y. Leung again exposed the shortcomings of the existing method of selection. The effect of Beijing's continued prevarication over electoral reform was not the abandonment of demands for democracy, but the intensification and radicalization of such demands.¹⁴²

1. 2013: The Moderates Lose Patience

Beijing's interference with Hong Kong's democratic development had long been a source of public anger. The eruption of that resentment in 2013 was nonetheless surprising, both in its source and its ferocity. March 27 marked the debut of a social movement called Occupy Central with Love and Peace (讓愛與和平佔領中環, also known as 佔領中環; "Occupy Central").¹⁴³ A reaction to growing frustration with Beijing's continued opposition to democracy in Hong Kong,¹⁴⁴ the movement had three cardinal principles. First, Hong Kong's electoral system must comply with international standards of universal suffrage—encompassing the number of votes per person, the weight to be accorded to each vote, and the right to stand for election.¹⁴⁵ Second, concrete proposals for reform should be decided through deliberation and

140. Albert H.Y. Chen, *A New Era in Hong Kong's Constitutional History*, 38 H.K. L.J. 1, 11 (2008).

141. See Chen, *Unexpected Breakthrough*, *supra* note 118.

142. See, e.g., Langer, *supra* note 17.

143. "Central" refers to Hong Kong's central business district.

144. See Benny Y.T. Tai, 公民抗命的最大殺傷力武器 [The Most Destructive Weapon of Civil Disobedience], H.K. ECON. J., Jan. 16, 2013, available at http://oclp.hk/index.php?route=occupy/article_detail&article_id=23, & Kin-man Chan, 讓愛與和平佔領中環 [Let Love and Peace Occupy Central], MINGPAO (H.K.), Mar. 4, 2013, available at http://oclp.hk/index.php?route=occupy/article_detail&article_id=19. See also Suzanne Pepper, *The 2017 Reform Campaign: First Draft Proposals*, CHINA ELECTIONS AND GOVERNANCE BLOGS (Aug. 5, 2013, 5:41 AM), <http://chinaelectionsblog.net/hkfocus/?p=631>.

145. XINNIAN SHU, MANIFESTO: OCCUPY CENTRAL WITH LOVE & PEACE (信念書), available at http://oclp.hk/index.php?route=occupy/book_detail&book_id=11 (last visited Sept. 27, 2013).

civic authorization.¹⁴⁶ Third, any act of civil disobedience in the struggle for universal suffrage must be nonviolent.¹⁴⁷ The substantive proposals themselves would be decided in a series of Deliberation Days.¹⁴⁸

Occupy Central was not an isolated phenomenon. Six days earlier, on March 21, twelve pro-democracy political groups formed the Alliance for True Democracy (真普選聯盟; “ATD”) to garner public support in the debate over political reform.¹⁴⁹ It, too, called for universal and equal suffrage and rejected any “filtering” of Chief Executive candidates.¹⁵⁰

The concern shared by Occupy Central and the Alliance for True Democracy—that Beijing would never allow truly democratic elections in Hong Kong—was not unfounded. On March 24, Qiao Xiaoyang (喬曉陽), Chairman of the NPC’s Law Committee, stated in a closed-door meeting that “chief executive candidates must be persons who love the country and love Hong Kong, while the methods in the universal suffrage must match with the Basic Law and the decisions by the [NPCSC].”¹⁵¹

Qiao maintained that it was the “clear and consistent” policy of the Central Government that no person who “confronts” the Central Government could become Chief Executive, citing Deng Xiaoping’s statement that Hong Kong must be run by people who “love the motherland and Hong Kong.”¹⁵² Although Qiao admitted “confronting the Central Government” could not be defined

146. *Id.*

147. *Id.*

148. *Id.* The idea of Deliberation Day originated from BRUCE A. ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004).

149. Joshua But, *Pan-Democrats Unite for 2017 Vote*, S. CHINA MORNING POST (H.K.), Mar. 22, 2013, <http://www.scmp.com/news/hong-kong/article/1196604/pan-democrats-unite-genuine-universal-suffrage>.

150. ALLIANCE FOR TRUE DEMOCRACY, *MANIFESTO* (Mar. 21, 2013), *available at* http://www.atd.hk/en/?page_id=10.

151. Joshua But & Colleen Lee, *Opponents of Beijing Ineligible to be CE: Top Chinese Official*, S. CHINA MORNING POST (H.K.), Mar. 24, 2013, <http://www.scmp.com/article/1199015/opposition-camp-members-cant-run-chief-executive-says-npc-official?page=all>.

152. Deng Xiaoping, *One Country, Two Systems*, PEOPLE’S DAILY (Jun. 22–23, 1984), <http://english.peopledaily.com.cn/dengxp/vol3/text/c1210.html>. Qiao did not, however, cite Deng’s explanation of what he meant by a “patriot.” “A patriot is one who respects the Chinese nation, sincerely supports the motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are

with substantive criteria or written law, he insisted that the Nominating Committee, the Hong Kong electorate, and the Central Government should each decide whether a candidate met that requirement. Most disturbingly for pro-democracy politicians, he hinted that the Central Government's patience had limits and that no consultation on political reform could begin unless they accepted that no "confrontational" candidate could ever become Chief Executive.¹⁵³

Pro-democracy politicians derided Qiao's comments as paving the way for a pre-selection mechanism inconsistent with universal suffrage.¹⁵⁴ Audrey Eu Yuet-mee (余若薇) of the Civic Party described Qiao's speech as a "big con."¹⁵⁵ Beijing has done little to assuage such concerns.¹⁵⁶ Zhang Xiaoming (張曉明), head of the Liaison Office, emphasized the need to eliminate politically undesirable candidates.¹⁵⁷ Professor Albert Chen and Maria Tam Wai-chu (譚惠珠), both members of the NPCSC's Basic Law

patriots, whether they believe in capitalism or feudalism or even slavery. We don't demand that they be in favour of China's socialist system; we only ask them to love the motherland and Hong Kong." *Id.*

153. Qiao, *supra* note 19.

154. 喬曉陽高調定底線 中央架空港府應戰泛民 [Qiao Xiaoyang's High-Profile Setting of a Bottom Line; Central Government Going Over the H.K. Government's Head to Fight Pan-Democrats], HOUSE NEWS (Mar. 25, 2013) (copy on file with author).

155. *Id.*

156. Beijing has quite literally "stuck to its guns." The People's Liberation Army ("PLA") Hong Kong Garrison intensified its live-fire training shortly before July 1, 2013. 解放軍日夜操炮 居民煩爆 [PLA Firing Exercises Day and Night Annoy Residents], APPLE DAILY (H.K.), Jun. 15, 2013, <http://hk.apple.nextmedia.com/news/art/20130615/18298331>. The *Global Times*—known for its belligerent editorial views—raised the possibility of a PLA deployment against Occupy Central. 官媒：解放軍隨時應付佔中 [Official Media: PLA Ready to Deal with Occupy Central], APPLE DAILY (H.K.), Sept. 23, 2013, <http://hk.apple.nextmedia.com/news/art/20130923/18434574>.

157. 張曉明以「筲箕」論特首篩選 堅決反對佔中 [Zhang Xiaoming Uses "Sieve" as Metaphor for Eliminating Chief Executive Candidates, Adamantly Opposes Occupy Central], H.K. ECON. J. FORUM, <http://forum.hkej.com/node/103480> (last visited Sept. 28, 2013); 張曉明筲箕妙喻民主程序 [Zhang Xiaoming Uses Sieve as Metaphor for Democratic Process], TA KUNG PAO (H.K.), <http://news.takungpao.com.hk/hkol/politics/2013-07/1766874.html> (last visited Sept. 28, 2013).

Committee (“BLC”), have differed in their proposals for nominations—but both have assumed that the public will have no power to make binding nominations.¹⁵⁸

The pro-Beijing counter-mobilization continued over the summer and autumn of 2013. On August 8, the pro-Government group “Silent Majority for Hong Kong” (幫港出聲) was set up, with no clear agenda other than opposition to Occupy Central.¹⁵⁹ The Hong Kong and Beijing Governments brusquely rebuffed statements by the U.K. FCO and the U.S. Consul-General in support of universal suffrage.¹⁶⁰ Comments by Lord Patten of Barnes (as Chris Patten had become) dismissing attempts at resisting increased political freedom as “spitting in the wind” drew harsh comments from the PRC Foreign Ministry and official media.¹⁶¹

Beijing continued to ratchet up its rhetoric in late 2013. In November 2013, Hong Kong media reported that former HKMAO Deputy Director Chen Zuo-er (陳佐洱), known for his bellicose Hong Kong policy, would set up a think-tank on Hong Kong and Macau policy.¹⁶² In the same month, BLC Chairman Li Fei (李飛

158. Tony Cheung, *Beijing Loyalists Split on Picking Top Job Hopefuls*, S. CHINA MORNING POST (H.K.), Sept. 21, 2013, <http://www.scmp.com/news/hong-kong/article/1314061/beijing-loyalists-split-picking-top-job-hopefuls>.

159. See Tony Cheung, *Silent Majority for Hong Kong Takes on Occupy Central in Campaign 'to Protect City's Interests'*, S. CHINA MORNING POST (H.K.), Aug. 9, 2013, <http://www.scmp.com/news/hong-kong/article/1295407/speaking-silent-majority>. The link between the phrase “silent majority” and Richard Nixon’s divisive electoral strategy appears to have been lost on the organizers of “SMHK.” See WILLIAM H. CHAFE, *PRIVATE LIVES/PUBLIC CONSEQUENCES: PERSONALITY AND POLITICS IN MODERN AMERICA*, 263–64 (2009).

160. See *supra* Introduction.

161. Patten Under Fire for Interfering, STANDARD (H.K.), Nov. 14, 2013, http://www.thestandard.com.hk/news_detail.asp?we_cat=4&art_id=139580&sid=40882515&con_type=1&d_str=20131114&fc=7; Zhang Dinghuai, *Patten's Interference Finds Little Audience*, GLOBAL TIMES, Nov. 21, 2013, <http://www.globaltimes.cn/content/826788.shtml>. For a summary of the interview, see Natasha Brereton-Fukui, *Hong Kong Ex-Governor: To Resist Elections Is 'Spitting in The Wind'*, CHINA REAL TIME (Nov. 11, 2013, 3:11 PM), <http://blogs.wsj.com/china-realttime/2013/11/11/former-governor-hong-kong-independence-vital-to-territory-china/>.

162. See 陳佐洱出山組超級智囊團 [Chen Zuo-er Emerges From Retirement to Form Super Think-Tank], SING TAO DAILY (H.K.), Nov. 11, 2013, <http://std.stheadline.com/yesterday/loc/1126ao01.html>. See also 星島：陳佐洱辦智庫研港政改 劉兆佳任副會長 [Sing Tao: Chen Zuo-er to Form Think-Tank on

) emphasized, during a high-profile visit to Hong Kong, that the power to nominate rested in a Nominating Committee and that the post of Chief Executive “must be taken up by a person who loves the country as well as Hong Kong.”¹⁶³

Beijing’s increasingly bombastic tone put the Hong Kong Government in an invidious position. Yet the latter did little to lower the political temperature. It released its consultation document on 2017 electoral reform in December 2013,¹⁶⁴ amidst widespread suspicion that the consultation was purely cosmetic.¹⁶⁵ The consultation document quoted extensively from speeches by Mainland officials, prompting allegations that the Hong Kong Government treated the speeches as “holy orders.”¹⁶⁶ It was also replete with leading questions regarding the composition of the Nominating Committee.¹⁶⁷ Yet the document made no reference to the ICCPR, Article 39 of the Basic Law, or the Bill of Rights Ordinance (transposing part of the ICCPR into Hong Kong

Hong Kong Political Reforms; Lau Siu-Kai to be Vice-Chairman], HOUSE NEWS (Nov. 26, 2013) (copy on file with author).

163. Tony Cheung & Tanna Chong, *Catch-22 Situation Looms Over Election for Chief Executive in 2017*, S. CHINA MORNING POST (H.K.), Nov. 22, 2013, <http://www.scmp.com/news/hong-kong/article/1363262/catch-22-situation-looms-over-election-chief-executive-2017>. See also Jeffie Lam, *Top Beijing Basic Law Official Dashes Hopes of Pan-Democrats*, S. CHINA MORNING POST (H.K.), Nov. 23, 2013, <http://www.scmp.com/news/hong-kong/article/1364088/top-beijing-basic-law-official-dashes-hopes-pan-democrats>.

164. 2013 CONSULTATION DOCUMENT, *supra* note 24.

165. See Chong & Lau, *supra* note 24; see also Chong & Cheung, *supra* note 24.

166. See, e.g., Au Nok-hin, *京官是聖旨的政改諮詢* [A Political Reform Consultation Where Beijing’s Officials Dictate Holy Orders], MINGPAO (H.K.), Dec. 6, 2013. Hong Kong 2020 (a think-tank headed by former Chief Secretary Anson Chan) and the pro-democracy Civic Party have issued a joint report with extensive criticisms of the consultation document. See CIVIC PARTY & HONG KONG 2020, FINDING THE RIGHT PATH TO UNIVERSAL SUFFRAGE: WHAT THE GOVERNMENT IS NOT TELLING YOU (2014). 陳太公民黨聯手 轟政改諮詢六倒退 [Anson Chan and Civic Party Join Hands, Blast Consultation’s Six Instances of Back-Sliding], MINGPAO (H.K.), Jan. 7, 2014. *Contra*, 指喬曉陽言論提供參考 袁國強：非法律框架解說 [Qiao Xiaoyang’s Comments for Reference Only; (Secretary for Justice) Rimsky Yuen: Not Explanation of Legal Framework], MINGPAO (H.K.), Jan. 7, 2014.

167. 2013 CONSULTATION DOCUMENT, *supra* note 24, ch. 5, ¶¶ 5.01–.05, at 38–39.

law).¹⁶⁸ Worse still, it avoided the elephant in the room—what the phrase “loving the country and loving Hong Kong” actually meant. The explanation by Chief Secretary Carrie Lam Cheng Yuet-ngor (林鄭月娥)—that the meaning of the phrase was “self-evident”—did nothing to dispel public suspicions.¹⁶⁹ Nor did the Government’s dismissal of a public poll commissioned by Occupy Central and conducted by the Hong Kong University Public Opinion Program.¹⁷⁰ The fact that the then-Chairman of the Hong Kong Bar Association warned the Hong Kong Government against presenting political objections to reform proposals as legal objections illustrates the extent to which the latter was suspected of whitewashing.¹⁷¹

2. 2014: Beijing’s Gloves Come Off; Hong Kong’s Umbrellas Come Out

As 2013 gave way to 2014, Beijing’s hardline stance showed no signs of abating. On January 9, 2014, Hao Tiechuan declared that the Central Government would declare a state of emergency if events in Hong Kong went “out of control,” presumably a threat directed at Occupy Central.¹⁷² On March 6, 2014, Zhang Dejiang (張德江), Chairman of the NPC, declared that any person selected for Chief Executive would have to “love the country

168. See FINDING THE RIGHT PATH TO UNIVERSAL SUFFRAGE, *supra* note 166, ch. 2, ¶¶ 2.02–03.

169. 愛國被指不言而喻 [Patriotism Described as Self-Evident], APPLE DAILY (H.K.), Dec. 5, 2013. See also But, *supra* note 149.

170. 林鄭：元旦投票無大參考幫助 [Carrie Lam: New Year’s Poll Has Little Evidential Value], MINGPAO (H.K.), Jan. 3, 2014. More than 90 percent of the 62,000 people surveyed rejected “pre-screening” by Beijing. Michelle Yun, *Hong Kong Survey Shows Most People Want Open Elections in 2017*, BLOOMBERG, Jan. 1, 2014, available at <http://www.bloomberg.com/news/2014-01-02/hong-kong-survey-shows-most-people-want-open-elections-in-2017.html>.

171. Paul Shieh S.C., Chairman of the H.K. Bar Ass’n, Speech at the Opening of the Legal Year 2014 (Jan. 13, 2014), [http://hkba.org/whatsnew/chairman-corner/speeches/2014/Speech%20for%20the%20Opening%20of%20the%20Legal%20Year%202014%20-%20webpage%20\(E\).pdf](http://hkba.org/whatsnew/chairman-corner/speeches/2014/Speech%20for%20the%20Opening%20of%20the%20Legal%20Year%202014%20-%20webpage%20(E).pdf).

172. 郝鐵川：中央可宣佈香港緊急狀態 [Hao Tiechuan: Central Government Can Declare State of Emergency in Hong Kong], HOUSE NEWS (Jan. 9, 2014) (copy on file with author).

and love Hong Kong.”¹⁷³ He also asserted that there were no absolute rules for democratic development and that emulation of democratic practices from overseas could result in social and economic catastrophe.¹⁷⁴ On June 10, 2014, the State Council Information Office issued a White Paper on the Implementation of “One Country, Two Systems” in Hong Kong (“the White Paper”);¹⁷⁵ it asserted that Beijing “directly exercises jurisdiction over the HKSAR” and reiterated that “all those who administer Hong Kong” were required to be “patriotic.”¹⁷⁶

Despite these efforts, the pro-democracy camp remained undeterred. Between June 20 and June 29, Occupy Central held a referendum with the assistance of the Hong Kong University Public Opinion Program. Despite “one of the largest and most sophisticated denial-of-service attacks in the Internet’s history,”¹⁷⁷ nearly 800,000 voters participated.¹⁷⁸ All three electoral reform proposals on the ballot involved civil nomination of Chief Executive candidates; collectively, the three proposals received support from 91 percent of participating voters.¹⁷⁹ In addition, 87.8 percent of participating voters agreed that Legco should veto any proposal that was inconsistent with international standards.¹⁸⁰ Galvanized by the White Paper and the Occupy Central referendum, 510,000 people participated in the annual

173. 「另搞一套 影響普選實現」張德江亮底線陳健民：難坐低談判 [“Doing their own thing affects fulfilment of universal suffrage”: Zhang Dejiang Reveals Bottom Line; Chan Kin-man: Difficult to Negotiate], MINGPAO (H.K.), Mar. 7, 2014.

174. *Id.*

175. OFFICE OF THE COMM’R OF THE MINISTRY OF FOREIGN AFFAIRS OF CHINA IN H.K., *The Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region* (June 10, 2014), <http://www.fmcoprc.gov.hk/eng/xwtd/gsxw/t1164057.htm> [hereinafter *White Paper*].

176. *Id.* The implications of the White Paper for judicial independence are outside the scope of this article.

177. Paul Mozur & Chester Yung, *Hong Kong Democracy Poll Hit by Cyberattack*, WALL ST. J., June 20, 2014, <http://online.wsj.com/articles/hong-kong-democracy-poll-is-hit-by-cyberattack-1403258663>.

178. *Hong Kong Democracy “Referendum” Draws Nearly 800,000*, BBC NEWS (June 30, 2014), <http://www.bbc.com/news/world-asia-china-28076566>.

179. Press Release, Occupy Central with Love and Peace, Nearly 800 Thousand Hong Kong People Voted Against Non-Genuine Universal Suffrage (June 30, 2014), http://oclp.hk/index.php?route=occupy/eng_detail&eng_id=15.

180. *Id.*

July 1 pro-democracy march;¹⁸¹ 500 engaged in an overnight sit-in in Central.¹⁸²

Beijing's supporters stepped up their opposition to democrats over the summer of 2014. In June, the Hong Kong offices of the "big four" accounting firms warned against Occupy Central in a print advertisement.¹⁸³ An anti-Occupy Central petition allegedly gathered 1.4 million signatures, some of dubious origin or procured under suspicious circumstances;¹⁸⁴ C.Y. Leung even signed the petition in his "personal capacity."¹⁸⁵ A subsequent protest march on August 17 against Occupy Central was attended by a large number of paid and bussed-in protesters, many of whom were from Mainland China.¹⁸⁶

The Hong Kong and Central Governments also played a role in the city's summer of discontent. On July 15, 2014, the Hong Kong Government released its Consultation Report (the "2014 Consultation Report") and submitted a report to Beijing on electoral reform.¹⁸⁷ The reference in the 2014 Consultation Report's reference to "mainstream opinion" backing political vetting of

181. See Keith Bradsher, Michael Forsythe & Chris Buckley, *Huge Crowds Turn Out for Pro-Democracy March in Hong Kong, Defying Beijing*, N.Y. TIMES, July 1, 2014, <http://nyti.ms/1rauNcy>.

182. Alan Wong, *Police Make More Arrests in Huge Hong Kong Protest*, SINOSPHERE (July 4, 2014, 6:47 AM), http://sinosphere.blogs.nytimes.com/2014/07/04/police-make-more-arrests-in-huge-hong-kong-protest/?_php=true&_type=blogs&_r=0.

183. See, e.g., Enda Curran, Kathy Chu & James T. Areddy, *Hong Kong Election Ruling Stirs Fear Over City's Status as Finance Hub*, WALL ST. J., Sept. 1, 2014, <http://online.wsj.com/articles/beijing-decree-stirs-fear-over-hong-kong-status-as-finance-hub-1409615560>.

184. *Learning From the Enemy*, ECONOMIST, Aug. 23, 2014, <http://www.economist.com/news/china/21613292-damaging-confrontation-looms-over-election-2017-learning-enemy>; 部分街站無核對 簽名者不知主題 [Some Street Stands Fail to Verify Signatures; Signatories Unaware of Topic], MINGPAO (H.K.), July 20, 2014.

185. 梁振英將簽名撐「反佔中」 [C.Y. Leung: Will Sign Petition Supporting "Anti-Occupy"], MINGPAO (H.K.), July 27, 2014.

186. See *Learning From the Enemy*, *supra* note 184.

187. Press Release, H.K. Gov't, Opening Remarks by CE at Press Conference on Release of Constitutional Development Public Consultation Reports (July 15, 2014), <http://www.info.gov.hk/gia/general/201407/15/P201407150690.htm>.

candidates vindicated critics' skepticism toward the consultation process.¹⁸⁸ Although the 2014 Consultation Report left limited scope for compromise,¹⁸⁹ commentators nonetheless remained optimistic.

All such hopes, however, were dashed with the 2014 Decision. In its wake, Benny Tai declared, "[t]he road of dialogue has come to the end."¹⁹⁰ In protest against the 2014 Decision, the Hong Kong Federation of Students (HKFS), a group representing university students, organized a weeklong class boycott starting on September 22, 2014, which was joined by secondary school students on September 26.¹⁹¹ On the night of September 26, protesting students scaled a fence to enter the forecourt of Hong Kong Government Headquarters, known as Civic Square.¹⁹² Police moved in with batons and pepper spray and took the protesters—including HKFS leaders Alex Chow (周永康) and Lester Shum (岑敖暉), as well as Joshua Wong (黃之鋒), leader of the student protest group Scholarism—into custody.¹⁹³ In the early

188. See Suzanne Pepper, *Telling Beijing What Beijing Wants to Hear*, CHINA ELECTIONS & GOVERNANCE BLOGS (July 17, 2014, 4:55 AM), <http://chinaelectionsblog.net/hkfocus/?p=915> [Pepper, *Telling Beijing*]; *No Panderers, Please: This Issue's Black and White*, ECONOMIST, July 19, 2014, <http://www.economist.com/news/leaders/21607855-time-britain-rediscover-its-moral-compass-and-confront-china-over-hong-kong-no-panderers>. The "mainstream opinion" in question appears to have consisted in large part of *pro forma* submissions sent as a result of mobilization by pro-Beijing parties. See 建制表格式意見書製造萬計民意 [Establishment Parties' Pro-Forma Submissions Create Tens of Thousands in Public Opinion], MINGPAO (H.K.), July 16, 2014.

189. See Pepper, *Telling Beijing*, *supra* note 188.

190. *Political City: Denied Free Elections, Hong Kong's Democrats Plan, Reluctantly, for Protest*, ECONOMIST, Sept. 6, 2014, <http://www.economist.com/news/china/21615636-denied-free-elections-hong-kongs-democrats-plan-reluctantly-protest-political-city>.

191. *Timeline: Hong Kongers Call for Democracy and Universal Suffrage*, HUM. RTS. IN CHINA, <http://www.hrichina.org/en/timeline-hong-kongers-call-democracy-and-universal-suffrage> (last visited Mar. 5, 2015).

192. See Bei Hu, *Hong Kong Police Arrest Six in Clash With Democracy Protesters*, BLOOMBERG, Sept. 27, 2014, available at <http://www.bloomberg.com/news/articles/2014-09-27/hong-kong-police-arrest-six-in-clash-with-democracy-protesters>.

193. See Chris Buckley & Alan Wong, *Pro-Democracy Students Are Arrested in Hong Kong*, N.Y. TIMES, Sept. 26, 2014, <http://www.nytimes.com/2014/09/27/world/asia/hong-kong-democracy-leader-says-limits-harm-rest-of-china.html>; David Lague, James Pomfret, & Greg Torode, *Special Report: In "Umbrella Revolution," China Confronts Limits of Its Power*,

hours of September 28, after police moved to surround protesters gathered near Civic Square in support of the students, Benny Tai declared that Occupy Central had begun—days earlier than the movement's originally scheduled date of October 1.¹⁹⁴ Later that day, the police deployed teargas against the assembled, unarmed crowd.¹⁹⁵ The Umbrella Movement had begun in earnest.¹⁹⁶

3. Who Gets to Nominate?

As the debate over election of the Chief Executive in 2017 developed, controversy has centered on the nomination process, including the composition of the Nominating Committee and the criteria for nomination. Although there was some initial debate over the process of appointment—in particular, whether Beijing may veto a duly elected candidate—nomination remains the central cause of disagreement.

Over the course of 2013, several nomination proposals emerged, varying in levels of public participation. One of the earliest and most conservative proposals came from Martin Lee Chu-ming (李柱銘), a founding member of the Democratic Party. Lee proposed that the current Election Committee be renamed as the Nominating Committee, but that it be required to nominate five candidates. The latter requirement, Lee reasoned,

REUTERS, Oct. 1, 2014, available at <http://www.reuters.com/article/2014/10/01/us-hongkong-china-specialreport-idUSKCN0HQ4ZA20141001>.

194. See Chris Buckley & Alan Wong, *Pro-Democracy Group Shifts to Collaborate With Student Protesters in Hong Kong*, N.Y. TIMES, Sept. 27, 2014, <http://www.nytimes.com/2014/09/28/world/asia/pro-democracy-protest-in-hong-kong.html>.

195. Press Release, H.K. Bar Ass'n, Statement of the Hong Kong Bar Association on the Use of Force by the Hong Kong Police at Harcourt Road on 28 September 2014 (Sept. 29, 2014), http://www.hkba.org/whatsnew/misc/20140929-Press_Statement_of_HKBA_29_September_2014.pdf.

196. On the genesis and chronology of the Umbrella Movement, see generally Lauren Hilgers, *Hong Kong's Umbrella Revolution Isn't Over Yet*, N.Y. TIMES MAG., Feb. 18, 2015, <http://www.nytimes.com/2015/02/22/magazine/hong-kongs-umbrella-revolution-isnt-over-yet.html>. A detailed exposition of the Umbrella Movement and its aftermath is beyond the scope of this article.

would secure the nomination of at least one pro-democracy politician.¹⁹⁷ Lee's proposal—which he had not discussed with the Democratic Party—met with a “cool reception”; Lee retracted it within two days.¹⁹⁸

On May 8, 2013, the ATD set out what it described as “initial views for consultation.” Among the initial views were the following propositions:

- (1) The electoral system must guarantee the right to vote, the right to be elected and the right to nominate;
- (2) There should be no “preliminary election,” “screening,” or conditions for candidacy that cannot be objectively defined, such as “no confrontations with Beijing”;
- (3) The Nominating Committee infringes free and fair democratic principles. It should be formed by universal suffrage and should ultimately be scrapped; and
- (4) If a set proportion of Hong Kong voters nominates a particular person by signatures, the nominated person should become a candidate after the Nominating Committee verifies and endorses the public nomination.¹⁹⁹

Two months later, on July 20, the ATD unveiled its three substantive proposals for 2017:

(1) Proposal One. The Nominating Committee would resemble the current Election Committee in composition, albeit with the addition of directly elected District Councilors. Any candidate would have to be nominated by at least one tenth of the Committee's members, or by at least 2% of registered voters in geographical constituency elections;

(2) Proposal Two. The Nominating Committee would be directly elected by registered voters in geographical constituencies, by proportional representation. Any

197. Suzanne Pepper, *An Old Cat Singes His Whiskers*, CHINA ELECTIONS & GOVERNANCE BLOGS (May 2, 2013, 6:46 AM), <http://chinaelectionsblog.net/hkfocus/?p=574>.

198. *Id.*

199. ALLIANCE FOR TRUE DEMOCRACY, *2017 Chief Executive Election—Initial Views for Consultation*, http://www.atd.hk/en/?page_id=105 (last visited Jan. 21, 2014).

candidate would have to be nominated by at least one tenth of the Committee's members; and

(3) Proposal Three. The Nominating Committee would be composed of all elected District Councilors, and all elected Legislative Councilors. Any candidate would have to be nominated by at least one tenth of the Committee's members, or by at least 2% of registered voters in geographical constituency elections.²⁰⁰

Establishment figures responded with skepticism. Pro-Beijing politician Tam Yiu-chung (譚耀宗) argued that the Nominating Committee should be chosen from social sectors, along the lines of the current Election Committee.²⁰¹ Rao Geping (饒戈平), a senior BLC member, criticized the civil nomination process as having no legal basis in the Basic Law.²⁰²

The failure of more moderate proposals to gain momentum left an opening for more bolder suggestions. On July 29, 2013, the secondary school student activist group, Scholarism (學民思潮), announced that it would devote its energies to canvassing for political reform.²⁰³ Two days later, it declared that it would demand civil nomination of candidates for Chief Executive.²⁰⁴ How could there be a more "broadly representative" Nominating Committee, Scholarism asked, than a body composed of the entire Hong Kong electorate?²⁰⁵

200. ALLIANCE FOR TRUE DEMOCRACY, *Proposals for the 2017 CE Election Package*, http://www.atd.hk/en/?page_id=109 (last visited Sept. 27, 2013).

201. Kelly Ip, *Bid to Widen Role of Voters*, STANDARD (H.K.), Jul. 11, 2013, http://www.thestandard.com.hk/news_detail.asp?pp_cat=30&art_id=135417&sid=39938189&con_type=1. For an explanation of the current composition of the Election Committee, see *infra* Part II.D.

202. Ip, *supra* note 201.

203. Press Release, Scholarism, 729 政改晚會聲明 [Declaration on the Political Reform Gathering on the Evening of July 29] (Jul. 29, 2013), <http://scholarism.com/2013/07/31/729%E6%94%BF%E6%94%B9%E6%99%9A%E6%9C%83%E8%81%B2%E6%98%8E/>.

204. Press Release, Scholarism, 聲明：政改底線 寸步不讓 [Declaration: We Will Not Yield an Inch on the Bottom Line for Political Reform] (Jul. 31, 2013), <http://scholarism.com/2013/07/31/%E8%81%B2%E6%98%8E%EF%BC%9A%E6%94%BF%E6%94%B9%E5%BA%95%E7%B7%9A-%E5%AF%B8%E6%AD%A5%E4%B8%8D%E8%AE%93/>.

205. *Id.*

The Beijing and Hong Kong Governments fulminated against any suggestion that the public should be allowed to nominate candidates. Zhang Xiaoming refused to attend a forum organized by the Civic Party, curtly stating that Article 45 of the Basic Law only permitted nominations to be made by a Nominating Committee.²⁰⁶ C.Y. Leung spoke out against civil nomination, alleging that the Basic Law does not permit it.²⁰⁷ Professor Albert Chen has suggested that “nominations” by the public be treated as purely advisory.²⁰⁸ The Hong Kong electorate, it seemed, was free to suggest a name—but the Nominating Committee was equally free to ignore it.²⁰⁹ Rao Geping went further, asserting that even “civil recommendation” was impermissible.²¹⁰

The debate regarding nomination suggests that the official position from both Hong Kong and Beijing is that the Basic Law means, “[W]hatever Beijing officials say it means, whenever they choose to say it.”²¹¹ As a result, subsequent proposals for reform were clouded by defeatism. On January 8, 2014, the ATD proposed a “three-track” plan involving civil nomination, politi-

206. Tanna Chong, *Civil Nomination Proposal Violates Basic Law, Says Zhang Xiaoming*, S. CHINA MORNING POST (H.K.), Sept. 13, 2013, <http://www.scmp.com/news/hong-kong/article/1308950/civil-nomination-proposal-violates-basic-law-says-zhang-xiaoming>.

207. See, e.g., 梁振英：政改要跟《基本法》學者：針對公民提名 [C.Y. Leung: Political Reform Must Comply with Basic Law; Scholars: Remarks Targeted at Civil Nomination], MINGPAO (H.K.), Sept. 28, 2013.

208. See Stuart Lau, *Central Government Adviser on Hong Kong Rejects Civil Nomination for 2017*, S. CHINA MORNING POST (H.K.), Sept. 23, 2013, <http://www.scmp.com/news/hong-kong/article/1315514/central-government-adviser-hong-kong-rejects-civil-nomination-2017>.

209. Suzanne Pepper, *Exploring the Options: Civil Nomination*, CHINA ELECTIONS & GOVERNANCE BLOGS (Sept. 23, 2013, 7:32 AM), <http://chinaelectionsblog.net/hkfocus/?p=644> [hereinafter Pepper, *Exploring the Options*].

210. Kahon Chan, *Civil Nomination Breaches Basic Law: Expert*, CHINA DAILY (Mar. 24, 2014, 8:33 AM), http://www.chinadailyasia.com/hknews/2014-03/24/content_15126545.html. Chief Secretary Carrie Lam described Rao's comments as representing the “final word” on nomination. Kelly Ip, *Lam Hedges Over Her “Final Word” Meaning*, STANDARD (H.K.), Mar. 24, 2014, http://www.thestandard.com.hk/news_detail.asp?art_id=143753&con_type=1.

211. Suzanne Pepper, *New Year's Day, 2014: A Wake-Up Call?*, CHINA ELECTIONS & GOVERNANCE BLOGS (Jan. 6, 2014, 8:08 AM), <http://chinaelectionsblog.net/hkfocus/?p=713>.

cal party nomination, and Nominating Committee nomination.²¹² However, the “three-track” plan would involve no changes to the composition of the Nominating Committee compared to the composition of the current Election Committee.²¹³ On March 20, 2014, think-tank Hong Kong 2020, headed by former Chief Secretary Anson Chan (陳方安生), issued a proposal that made no provision for nomination by the public or by political parties.²¹⁴ The Hong Kong 2020 proposal altered the composition of the Nominating Committee, but provided that the support of 10 percent of nominators should be sufficient for candidacy.²¹⁵ On April 2, eighteen academics proposed a “civil recommendation” system under which any person could become a candidate for Chief Executive if they received the recommendation of 2–3 percent of the electorate, in addition to the support of one eighth of the Nominating Committee.²¹⁶ Ultimately, the “three-track” plan became one of three proposals listed on the Occupy Central referendum ballot in June 2014; despite—or perhaps because of—its relative lack of ambition, it was ultimately endorsed by a majority of voters participating in the referendum.²¹⁷

Despite these apparent concessions from the democratic camp, the 2014 Decision showed no signs of reciprocation. The 2014 Decision emphasized the Chief Executive’s responsibilities both to the HKSAR and to the Central Government and declared that the requirement of “loving the country and loving Hong Kong” was a corollary of that dual mandate.²¹⁸ It therefore declared

212. ALLIANCE FOR TRUE DEMOCRACY, *Chief Executive Election Plan*, <http://www.atd.hk/en/?p=174> (last visited Jan. 20, 2014).

213. Suzanne Pepper, *Pan-Democrats Answer Back*, CHINA ELECTIONS & GOVERNANCE BLOGS (Jan. 13, 2014, 6:59 AM), <http://chinaelectionsblog.net/hkfocus/?p=720>. For an explanation of the current composition of the Election Committee, see *infra* Part II.D.

214. See Press Release, Hong Kong 2020, Hong Kong 2020 Preliminary Proposals on ‘Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016’ (Mar. 20, 2014), <http://hongkong2020.files.wordpress.com/2014/03/hong-kong-2020-initial-response-with-annex.pdf>; 陳太普選方案無公民提名 [Anson Chan’s Universal Suffrage Proposal Omits Civil Nomination], MINGPAO (H.K.), Mar. 21, 2014.

215. *Id.*

216. 18 學者不違憲方案 設公民推薦 [18 Scholars’ Constitutional Proposal Provides for Civil Recommendation], MINGPAO (H.K.), Apr. 3, 2014.

217. See Press Release, Occupy Central with Love and Peace, *supra* note 179.

218. See 2014 Decision, *supra* note 2.

that candidates (of which there would be between two and three) had to be selected by a Nominating Committee with the same composition as the existing Election Committee.²¹⁹ Each candidate would have to receive the support of at least half of the members of the Nominating Committee.²²⁰ The practical effect of these requirements, taken in conjunction, would be to make it “effectively impossible” for any pro-democracy politician to stand for election.²²¹ The 2014 Decision came with an embedded threat: if electoral reforms could not be approved, the 2017 election would continue to use the same arrangements as the much-maligned 2012 election.²²² The tough line from Beijing reflected in the 2014 Decision not only frustrated Hong Kongers’ democratic aspirations; it also made the explosion of public discontent in the Umbrella Movement inevitable.²²³

The Hong Kong Government has conducted a second round of public consultations on electoral reform. However, it proceeded on the basis of the much-maligned 2014 Decision.²²⁴ Despite efforts to salvage the 2014 Decision²²⁵—most notably by Albert

219. *Id.*

220. *Id.*

221. See, e.g., Shannon Tiezzi, *China Drafts Rules for Hong Kong Elections*, DIPLOMAT, Aug. 29, 2014, <http://thediplomat.com/2014/08/china-drafts-rules-for-hong-kong-elections/>. This seems to have been the intended effect. See James Pomfret, *China Asserts Paternal Rights Over Hong Kong in Democracy Clash*, REUTERS, Sept. 11, 2014, available at <http://www.reuters.com/article/2014/09/11/us-china-hongkong-insight-idUSKBN0H600120140911> (citing anonymous sources stating that Zhang Xiaoming told Hong Kong democrats that the fact that they were allowed to stay alive was abundant reflection of Chinese inclusiveness).

222. See 2014 Decision, *supra* note 2.

223. See Charles Mok, *This Clash With Beijing’s Outmoded Thinking Was Inevitable*, N.Y. TIMES ROOM FOR DEBATE (Sept. 29, 2014, 12:57 PM), <http://www.nytimes.com/roomfordebate/2014/09/29/is-autonomy-possible-for-hong-kong/this-clash-with-beijings-outmoded-thinking-was-inevitable> (comments by a pan-democratic legislator).

224. H.K. GOV’T, 2017 SEIZE THE OPPORTUNITY: METHOD FOR SELECTING THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE CONSULTATION DOCUMENT, foreword, ¶ 4, at v (2015). The paragraph gives an indication of the extent of governmental indifference to demands for democracy (“Regardless of which view you hold”); see also H.K. GOV’T, 2017 MAKE IT HAPPEN: METHOD FOR SELECTING THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE CONSULTATION REPORT AND PROPOSALS (2015).

225. See, e.g., Press Release, Hong Kong 2020, Hong Kong 2020 Proposal (Mar. 4, 2015), <http://hongkong2020.com/2015/03/04/press-release-04032015->

Chen²²⁶—pan-democrats have vowed to veto any proposal based on the framework it prescribes.²²⁷ Beijing's response was to make the pan-democrats an offer they could not refuse: if the reform was vetoed, Rao Geping declared, all future reforms would proceed on the basis of the 2014 Decision.²²⁸

II. APPLICABLE LAW

This Part shall discuss the legal underpinnings of the post-1997 Hong Kong legal order, before turning to the PRC's attitude toward treaties and the relevant provisions of the Joint Declaration, the Basic Law, and the ICCPR. It will then consider the potential applicability of customary international law, insofar as it is reflected in the Universal Declaration of Human Rights ("UDHR") and other indicia of customary international law.

A. *The Contested Basis of Hong Kong's New Legal Order*

Mainland Chinese commentators have emphasized that post-1997 Hong Kong is a creature of the PRC Constitution. Peking University's Qiang Shigong (強世功) has asserted that the Basic Law derives its normative nature from the PRC Constitution,

hongkong2020-proposal/ (expressing dismay at the 2014 Decision but stating a desire to continue participating in the consultation process).

226. See, e.g., Stuart Lau, *Basic Law Expert Albert Chen Tries to Steer Middle Road on Reform for Hong Kong Chief Executive Election*, S. CHINA MORNING POST (H.K.), Jan. 26, 2015, <http://www.scmp.com/news/hong-kong/article/1691393/basic-law-expert-albert-chen-tries-steer-middle-road-reform-hong-kong>; Albert Chen, "Pocket the Proposal First?" *Folk Wisdom and the Mentality of Hong Kong's Pan-Democrats*, HKU LEGAL SCHOLARSHIP BLOG (Mar. 3, 2015, 10:47 PM), <http://researchblog.law.hku.hk/2015/03/albert-chen-pocket-proposal-first-folk.html>.

227. Jeffie Lam, Stuart Lau & Joyce Ng, *Prospects for Political Reform in Hong Kong Fade as Pan-Democrats Vow to Block Plan*, S. CHINA MORNING POST (H.K.), Jan. 8, 2015, <http://www.scmp.com/news/hong-kong/article/1676748/government-wants-political-reform-vetoed>.

228. 饒戈平: 倘拉倒 日後仍循8·31 [Rao Geping: If Vetoed, Future Proposals Will Follow August 31 Decision], MINGPAO (H.K.), Mar. 3, 2015, http://news.mingpao.com/pns/%E9%A5%92%E6%88%88%E5%B9%B3%EF%B9%95%E5%80%98%E6%8B%89%E5%80%92%20%E6%97%A5%E5%BE%8C%E4%BB%8D%E5%BE%AA%8E2%80%A731-%E3%80%8C%E4%BA%BA%E5%A4%A7%E6%A1%86%E6%9E%B6%E7%84%A1%E4%BF%AE%E6%94%B9%E5%8F%AF%E8%83%BD%E3%80%8D/web_tc/article/20150304/s00001/1425405749443.

not the Joint Declaration.²²⁹ Similarly, the White Paper devotes only one paragraph to the Joint Declaration,²³⁰ referring to it merely as “confirmation” of China’s resumption of sovereignty.²³¹

Such accounts of Hong Kong’s legal order, framed purely in terms of Chinese domestic law, are misleading. The Preamble to the Basic Law expressly states that it has been enacted “to ensure the implementation of the basic policies of the [PRC] regarding Hong Kong.”²³² The “basic policies” referred to in the Preamble could only be those referred to in the Joint Declaration; indeed, Article 3(12) of the Joint Declaration declares that the basic policies would be “stipulated” in the Basic Law.²³³ Xiao Weiyun (蕭蔚雲), a member of the Drafting Committee hailed as one of the “guardians” of the Basic Law,²³⁴ acknowledged that the Joint Declaration “has its legal status and effect” and that it “affirms the task to enshrine in law the principle of ‘one country, two systems.’”²³⁵

Nonetheless, even if one accepts that China intended to implement the Joint Declaration through the Basic Law, it does not follow that the Basic Law achieves that objective. This article proceeds on the basis that the provisions of the Basic Law admit of an interpretation consistent with the Joint Declaration. However, the compatibility of the Basic Law with the Joint Declaration—in particular, whether its provisions on “elections” are consistent with the Joint Declaration—remains an open question.²³⁶

229. Shigong Qiang, *國際人權公約在香港：被誤讀的國際條約* [The ICCPR in Hong Kong: The Misinterpreted International Treaty], MINGPAO (H.K.), Aug. 25, 2014.

230. See *White Paper*, *supra* note 175.

231. Hong Kong pro-democracy tabloid *Apple Daily* alleged that Qiang was one of the co-authors of the White Paper. 撰文撐中央干預港事務 強世功幕後黑手 [Qiang Shigong Mastermind of Articles Advocating Central Intervention in Hong Kong Affairs], APPLE DAILY (H.K.), June 12, 2014.

232. *Basic Law*, *supra* note 62, at Preamble.

233. Joint Declaration, *supra* note 61, art. 3(12).

234. See Jimmy Cheung, *Basic Law ‘Guardian’ Dies at 78*, S. CHINA MORNING POST (H.K.), Jul. 16, 2004, <http://www.scmp.com/article/463304/basic-law-guardian-dies-78>.

235. See XIAO WEIYUN, ONE COUNTRY, TWO SYSTEMS: AN ACCOUNT OF THE DRAFTING OF THE HONG KONG BASIC LAW 13 (2001).

236. *Id.* at 67–69; Boasberg, *supra* note 28.

B. The PRC's Attitude Toward Treaties

1. The Vienna Convention on the Law of Treaties ("VCLT")

The PRC acceded to the VCLT on September 3, 1997.²³⁷ Xue Hanqin (薛捍勤), writing in a personal capacity prior to her appointment to the ICJ, suggested that, as a party to the VCLT, "China should comply with its treaty obligations in good faith and should not use its internal law as a justification for evading its international obligations, as provided in Article 27 of the Convention."²³⁸ Even prior to the PRC's accession to the VCLT, it considered many of the VCLT's provisions to reflect existing principles of customary international law.²³⁹

The VCLT, and the rules of customary international law it reflects, are relevant to the observance and interpretation of treaties, including the Joint Declaration and the ICCPR. They are also relevant to the validity of reservations to the ICCPR.

The rules governing the observance of treaties are uncontroversial. The Article 26 rule of *pacta sunt servanda* ("agreements must be kept") was well established by Ulpian's time;²⁴⁰ its validity has never been questioned by any international tribunal.²⁴¹ Similarly, the rule in Article 27 that a party's domestic law does not excuse its non-performance of a treaty reflects customary international law.²⁴²

The VCLT's provisions regarding treaty interpretation and reservation are more problematic. Under Article 31(1), "[a]

237. *Status of the Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Dec. 30, 2013).

238. Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 305 (2009).

239. Jay R. Goldstein, *Chinese and Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong*, 1 AM. U. INT'L L. REV. 167, 177-78 (1986). See also Panos Merkouris, *Introduction: Interpretation Is a Science, Is an Art, Is a Science*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 30 YEARS ON 1, at 9 (Malgosia Fitzmaurice et al. eds., 2010).

240. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 363 (2009).

241. *Id.*

242. *Id.* at 370.

treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²⁴³ Article 31(2) defines what the “context” of the treaty is for the purposes of interpretation. Article 31(3) provides that, in addition to the context, the following factors should be taken into account:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.²⁴⁴

Article 31(3)(c) does not specify whether the “relevant rules” are the rules applicable at the time the treaty was entered into or the rules applicable at the time of interpretation.²⁴⁵ Scholarly opinion differs as to the question of intertemporality. Judge Mark Villiger, writing extrajudicially, suggests that the applicable rules are those in force at the time of interpretation.²⁴⁶ Such an interpretation creates the possibility that customary rules may substantially modify treaty provisions over time.²⁴⁷ Professors Ulf Linderfalk and Campbell McLachlan, however, suggest that it is only appropriate to consider the rules in force at the time of interpretation if the parties had so intended.²⁴⁸ Professor McLachlan identifies three indicia of intent to adopt a term or concept with an ambulatory meaning:

243. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

244. *Id.* art. 31(2), (3).

245. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279, 290–91 (2008).

246. VILLIGER, *supra* note 240, at 433.

247. *Id.*

248. McLachlan, *supra* note 245, at 316–18; ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 182 (2007).

- (1) Use of a term which carries an evolving meaning as a matter of general international law, without adopting a specific definition;
- (2) Entry into a treaty which commits the parties to a program of progressive development; and
- (3) Description of obligations in general terms, which must be read in light of changing circumstances.²⁴⁹

Article 32 permits the use of supplementary means of interpretation, including the *travaux préparatoires* (preparatory works) and the circumstances of its conclusion, to confirm an interpretation made under Article 31 or to determine the meaning when an interpretation under Article 31 is ambiguous, obscure, or leads to a “manifestly absurd or unreasonable” result.²⁵⁰

Article 19 permits reservations to treaties unless the reservation is prohibited by the treaty, the reservation falls outside a closed list of reservations enumerated in the treaty, or the reservation is otherwise incompatible with the object and purpose of the treaty.²⁵¹ However, Article 19 does not state the legal consequences of a legally impermissible reservation. The International Law Commission suggests that such a reservation may be severable if the reserving State intended to be bound by the treaty without the benefit of the reservation.²⁵²

2. Customary International Law

Even prior to the PRC's accession to the VCLT, it considered the VCLT's provisions—in particular, the provisions governing treaty interpretation and termination—to be binding, insofar as they reflect customary international law.²⁵³

249. McLachlan, *supra* note 245, at 317–18.

250. VCLT, *supra* note 243, art. 32.

251. *Id.* art. 19.

252. Rep. of the Int'l Law Comm'n, 63rd Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, ¶ 4.5.3, U.N. Doc. A/66/10/Add.1; GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter ILC Guide to Practice]. See also Edward T. Swaine, *Treaty Reservations*, in THE OXFORD GUIDE TO TREATIES 293–98 (Duncan B. Hollis ed., 2012).

253. Goldstein, *supra* note 239, at 177–78.

Articles 26 and 27 of the VCLT codify pre-existing rules of customary law on the duty to observe treaties.²⁵⁴ The position regarding Articles 31 and 32 is less certain. The existence of *any* customary rules regarding treaty interpretation prior to the VCLT is questionable.²⁵⁵ However, it is at least arguable that Articles 31 and 32 now reflect emerging customary law.²⁵⁶ Similarly, it appears that the VCLT's provisions on reservations (including Article 19) may not have reflected pre-existing customary law, but have given rise to a new customary norm.²⁵⁷

C. *The Joint Declaration*

The PRC's "basic policies" toward Hong Kong are set out in Article 3 of the Joint Declaration, with further elaboration in Annex I.²⁵⁸ These basic policies include the following:

- (1) Hong Kong would enjoy "a high degree of autonomy, except in foreign and [defense] affairs";
- (2) The Central Government would appoint the Chief Executive based on the results of elections or consultations;
- (3) "Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region;" and
- (4) The basic policies would be set out in the Basic Law and would remain unchanged for 50 years after the creation of the Hong Kong SAR.

Section I of Annex I explained the means by which the Chief Executive and legislature would be chosen:

The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The

254. VILLIGER, *supra* note 240, at 363, 370.

255. *Id.* at 439–40, 448.

256. *Id.*

257. *Id.* at 324–25. See also Thomas Giegerich, *Treaties, Multilateral, Reservations to*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Jan. 6, 2014), ¶ 7.

258. Joint Declaration, *supra* note 61, art. 3 & Annex I.

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. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.²⁵⁹

Article 8 of the Joint Declaration provided that the provisions of the Joint Declaration and of its annexes "shall be equally binding."²⁶⁰

On its face, the Joint Declaration merely requires selection of the Chief Executive by one of two means: election or consultation. It imposes no specific requirements regarding the election or consultation process.²⁶¹ However, in promulgating the Basic Law, Beijing has elected to select the Chief Executive using an "election" process—albeit (from the perspective of advocates of democratization) a fundamentally flawed one.

D. The Basic Law

The Basic Law is not a treaty. However, it is partly a creature of the Joint Declaration.²⁶² The drafting process was fraught with tensions between liberal and conservative Drafting Committee members;²⁶³ after 1989, Beijing threw its weight behind the conservative faction. The structure of Legco from 1997 to 2007 reflected the extent of the conservative victory. During that period, half of its members were selected through functional constituencies,²⁶⁴ cementing the influence of business and professional interests.²⁶⁵ During the same 10-year period, the number

259. *Id.* Annex I, ch. I.

260. *Id.* art. 8. See also XIAO, *supra* note 235, at 13.

261. See, e.g., C.Y. Leung, *Hong Kong Must Seize the First Chance to Elect Its Own Leaders*, FINANCIAL TIMES, Sept. 8, 2014, <http://www.ft.com/intl/cms/s/0/22864004-34ee-11e4-aa47-00144feabdc0.html>.

262. See XIAO, *supra* note 235, at 13.

263. See *supra* Part I.C.

264. Boasberg, *supra* note 28, at 331–32; GHAI, *supra* note 31, at 259–60.

265. Boasberg, *supra* note 28, at 332; GHAI, *supra* note 31, at 260–61.

of directly elected members increased from twenty to thirty over the course of three electoral terms.²⁶⁶

Nonetheless, Article 68(2) of the Basic Law declared:

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.²⁶⁷

Annex II to the Basic Law provides that amendments to the composition of Legco can only be made after 2007. Provided “there is a need” for such amendment:

[S]uch amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress *for the record*.²⁶⁸ (Emphasis added)

The selection of the Chief Executive was a similar combination of the reactionary with the aspirational. To select the first Chief Executive, the NPC would appoint a Preparatory Committee, which would in turn appoint a Selection Committee, which would in turn recommend a candidate.²⁶⁹ Subsequent Chief Executives would be chosen by an 800-member Election Committee from a list of candidates, each nominated by at least one hundred electors.²⁷⁰ The Central Government would appoint members of the Election Committee from four interest groups (selecting 200 members from each group):

- (1) The industrial, commercial and financial sectors;
- (2) The professions;

266. *Basic Law*, *supra* note 62, Annex II; Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (adopted by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1990), http://www.legislation.gov.hk/blis_ind.nsf/curalleng-doc/8E4706E4D2D578D7482575EE000E4FB6?OpenDocument (China).

267. *Basic Law*, *supra* note 62, art. 68(2).

268. *Id.* Annex II.

269. Boasberg, *supra* note 28, at 334–35; GHAI, *supra* note 31, at 258.

270. GHAI, *supra* note 31, at 258–59.

(3) Labour, social services, religious and other sectors;
and

(4) Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.²⁷¹

Article 45(2) of the Basic Law provides that the "ultimate aim" is for the Chief Executive to be selected "by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."²⁷²

Annex I to the Basic Law governs amendments to the selection method of the Chief Executive after 2007. If "there is a need" for amendment:

[S]uch amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress *for approval*.²⁷³ (Emphasis added)

Neither Article 45 nor Article 68 set a deadline for democratization. The only apparent stipulation is that no changes may take place before 2007.²⁷⁴

Despite its promises of universal suffrage for the Chief Executive and Legco elections, the Basic Law provides a multitude of methods for Beijing to block democratization in Hong Kong. Legco electoral methods must comply with "the actual situation" in Hong Kong and "the principle of gradual and orderly progress."²⁷⁵ Yet the Basic Law offers no guidance on who determines the "actual situation" in Hong Kong or what criteria are relevant to that determination. Similarly, the Basic Law does not define what "broadly representative" means in the context of nominations of candidates for Chief Executive. Nor does it state who determines whether there is a "need" for amendment. Perhaps most damningly, the Basic Law does not prescribe any

271. *Basic Law*, *supra* note 62, Annex I.

272. *Id.* art. 45(2).

273. *Id.* Annex I.

274. *Id.* Annexes I and II.

275. *Id.* art. 68(2). The language of "gradual and orderly progress" also appears in art. 45(2), governing Chief Executive electoral reform.

timeline for democratization—except that no changes may take place before 2007.²⁷⁶ The power to determine the “actual situation” in Hong Kong or the “need” to amend the electoral process would amount to a power of veto over democratic development. A particularly obstructive NPCSC might determine that the “actual situation” in Hong Kong demanded political stagnation until 2047, when the PRC’s basic policies toward Hong Kong expire. Alternatively, the NPCSC could dictate terms of reform inconsistent with internationally accepted conceptions of democracy. The NPCSC could interpret “broadly representative” to permit exclusion of discrete minorities from the Nominating Committee. The reference to “democratic procedures” suggests a particularly thin conception of democracy in the nominating process, without regard to substantive rights associated with democracy.

E. The ICCPR

The last paragraph of Chapter XIII of Annex I in the Joint Declaration and Article 39 of the Basic Law both provide that the provisions of the ICCPR, “as applied to Hong Kong,” will remain in force after 1997.²⁷⁷ These provisions include Article 40, which imposes the obligation to submit reports to the Human Rights Committee.²⁷⁸

When the United Kingdom ratified the ICCPR in 1976, it entered (*inter alia*) the following reservation in respect of Hong Kong:

The 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.²⁷⁹

Article 25(b) of the ICCPR provides that every citizen shall have the right “[t]o vote and to be elected at genuine periodic

276. *Id.* Annexes I and II.

277. Joint Declaration, *supra* note 61, Annex I, ch. XIII; *Basic Law*, *supra* note 62, art. 39.

278. International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

279. *Status of the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec#EndDec (last visited Dec. 30, 2013).

elections which shall be by universal and equal suffrage . . . guaranteeing the free expression of the will of the electors.”²⁸⁰ Such a right shall not be subject to distinctions of, *inter alia*, political opinion, nor shall it be subject to unreasonable restrictions.²⁸¹

1. Interpreting the ICCPR

Scholars have debated whether normal rules of treaty interpretation apply to the interpretation of the ICCPR. Dr. Başak Çali has argued that the interpretation of human rights treaties involves a specialized application of the VCLT, rather than a distinct set of interpretive principles.²⁸² In Dr. Çali’s account, the starting point in interpreting human rights treaties is the principle of effectiveness.²⁸³ As a corollary of the good faith requirement of Article 31 of the VCLT, the proper interpretation of human rights treaty provisions is an interpretation that makes their provisions “effective, real, and practical.”²⁸⁴ The effectiveness principle has two aspects. First, provisions should be interpreted in a manner that confers effective, rather than formal, rights.²⁸⁵ Second, interpreters should adopt a teleological approach and ask what circumstances allow other concerns to trump human rights treaty provisions.²⁸⁶ As a result of the effectiveness principle, interpreters have favored dynamic interpretation over original intent in interpreting human rights instruments.²⁸⁷

A further corollary of Article 31 of the VCLT in the human rights treaty context is the principle of coherence. Interpreters of human rights treaties typically interpret treaties in light of general international law and other treaties and instruments.²⁸⁸

280. ICCPR, *supra* note 278, art. 25(b).

281. *Id.* art. 2 & art. 25(b).

282. Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, in THE OXFORD GUIDE TO TREATIES 525, 533–37 (Duncan B. Hollis ed., 2012).

283. *Id.* at 538.

284. *Id.*

285. *Id.* at 539.

286. *Id.*

287. *See Id.* at 547.

288. *Id.* at 541–42.

Other rules of international law may be excluded, deemed to displace human rights treaty interpretation, or accommodated in the interpretation of human rights treaties.²⁸⁹

Reservations to human rights treaties raise further questions. In General Comment 24, the Human Rights Committee considered that, in general, incompatible reservations may be severed from the ICCPR.²⁹⁰ However, General Comment 24 drew strong criticism from, *inter alia*, the United Kingdom.²⁹¹ The International Law Commission has rejected the idea that a special regime applies to reservations to human rights treaties;²⁹² in its Guide to Practice, it espouses a more generalized approach to severability, under which severability depends on whether the reserving State intended to be bound without the benefit of the reservation.²⁹³

2. Status of the Reservation to Article 25(b)

When the United Kingdom ratified the ICCPR on behalf of Hong Kong in 1976, it entered a reservation in respect of Article 25(b), insofar as Article 25(b) required the establishment of an elected Executive or Legco in Hong Kong. Opponents of democratization have cited the reservation as evidence that Article 25(b) does not apply to Hong Kong at all. In its submissions to the Human Rights Committee, the SAR Government—and, prior to 1997, the U.K. Government—maintained that the reservation continues to apply.²⁹⁴ BLC members Maria Tam and Rao

289. *Id.* at 541–45.

290. Human Rights Comm., Gen. Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994). *See also* Swaine, *supra* note 252, at 295–96; Çali, *supra* note 282, at 533–37; and JOSEPH & CASTAN, *supra* note 23, at 886–87.

291. Çali, *supra* note 282, at 536. *See also* JOSEPH & CASTAN, *supra* note 23, at 886.

292. Swaine, *supra* note 252, at 298.

293. ILC Guide to Practice, *supra* note 252, ¶ 4.5.3; *see also* Swaine, *supra* note 252, at 296–98.

294. U.K. GOV'T, SUPPLEMENTARY REPORT BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 35 (1996) [hereinafter 1996 SUPPLEMENTARY SUBMISSIONS]; H.K. GOV'T, REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA IN

Geping have argued that Article 25(b) does not apply to Hong Kong,²⁹⁵ as has Qiang Shigong.²⁹⁶

The Human Rights Committee, however, contends that the reservation no longer applies. In considering the existence of functional constituency seats in Legco, the Committee concluded that, once an elected legislature was established, its election must conform to the requirements of Article 25(b):

The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant.²⁹⁷

Successive Hong Kong Governments, both before and after 1997, have given four responses to the Human Rights Commit-

THE LIGHT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 461 (1999) [hereinafter 1999 SUBMISSIONS]; H.K. GOV'T, FIRST REPORT OF THE HKSAR OF THE PRC IN THE LIGHT OF THE ICCPR: SUPPLEMENTARY INFORMATION ¶ 169 (1999) [hereinafter 1999 SUPPLEMENTARY SUBMISSIONS]; H.K. GOV'T, SECOND PERIODIC REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA IN THE LIGHT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION'S RESPONSE TO THE LIST OF ISSUES PRESENTED BY THE HUMAN RIGHTS COMMITTEE ON 7 NOVEMBER 2005 (CCPR/C/HKG/Q/2) ¶ 1.11 (2005) [hereinafter 2005 SUBMISSIONS]; H.K. GOV'T, THIRD PERIODIC REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA IN THE LIGHT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶¶ 315–23 (2013) [hereinafter 2013 SUBMISSIONS].

295. Tony Cheung & Emily Tsang, *Query on Need to Meet World Standards*, S. CHINA MORNING POST (H.K.), Jul. 11, 2013; Stuart Lau & Colleen Lee, *Basic Law Expert Accused of Twisting Facts on Voting Rights*, S. CHINA MORNING POST (H.K.), Apr. 1, 2013, <http://www.scmp.com/news/hong-kong/article/1204187/basic-law-expert-accused-twisting-facts-voting-rights>. *But see* Geping Rao, *The Application of the International Covenant on Civil and Political Rights to Hong Kong*, 2 PAC. RIM. L. & POL'Y J. 9, 13 (1993) (stating without explanation that developments in Hong Kong put the continued necessity of the reservation in question).

296. Shigong Qiang, *The ICCPR in Hong Kong: The Misinterpreted International Treaty*, *supra* note 229.

297. 1995 CONCLUDING OBSERVATIONS, *supra* note 23, ¶ 19.

tee. First, the Human Rights Committee overlooked the reservation to Article 25(b).²⁹⁸ Second, the system of functional constituencies did not give rise to any incompatibility with any of the provisions of the ICCPR as applied to Hong Kong.²⁹⁹ Third, functional constituencies served a historical function in providing representation to Hong Kong's economic and professional sectors to reflect their importance in the community.³⁰⁰ Fourth, functional constituencies are a transitional measure in the pursuit of the ultimate aim of universal suffrage.³⁰¹

However, none of these arguments withstands scrutiny. The first and second arguments amount to the assertion that Article 25(b) never applied to Hong Kong. Such an assertion begs the question of the continued relevance of the reservation to Article 25(b).³⁰² The third and fourth arguments presuppose that Article 25(b) applies to Hong Kong, but that there is no breach of the obligations contained therein.³⁰³ The 1995 iteration of the Human Rights Committee rejected that premise. It found that functional constituencies gave "undue weight to the views of the business community" and therefore, contravened the equal suffrage requirement of Article 25.³⁰⁴

It is not entirely clear how the Human Rights Committee reached its conclusion that, once a legislature is constituted by elections, its election must comply with the requirements of Article 25(b).³⁰⁵ Nonetheless, the Human Rights Committee's conclusion may be supported by interpreting the ICCPR in light of customary international law, under Article 31(3)(c) of the VCLT.

Article 40 of the ICCPR imposes a reporting obligation, under which state parties must regularly submit reports on, *inter alia*,

298. 1999 SUBMISSIONS, *supra* note 294, ¶ 461; Seren S.T. Tang, Status of the Reservation to the Right to Vote in Hong Kong 5 (H.K. Univ. Ctr. Comp. & Pub. L., Occasional Paper No. 17, 2008).

299. *Id.*

300. 1996 SUPPLEMENTARY SUBMISSIONS, *supra* note 294, ¶ 34; 1999 SUBMISSIONS, *supra* note 294, ¶ 461(b); Tang, *supra* note 298, at 5.

301. Tang, *supra* note 298, at 5.

302. *Id.*

303. *Id.* at 5–6.

304. 1995 CONCLUDING OBSERVATIONS, *supra* note 23, ¶ 19; JOSEPH & CASTAN, *supra* note 23, at 742. For the views taken by subsequent iterations of the Committee, *see infra*.

305. Tang, *supra* note 298, at 5.

the "progress made" in the enjoyment of ICCPR rights.³⁰⁶ It imposes ongoing duties on parties to ensure that all individuals subject to their respective jurisdictions enjoy ICCPR rights.³⁰⁷ Hence, insofar as it is necessary to consider customary international law in interpreting the ICCPR, current customary law regarding democracy and democratization is relevant to the interpretation of Article 25(b).³⁰⁸ If there were indeed a right to democratization as a matter of customary international law, Article 25(b) would require a party that has embarked on a process of democratization to continue with that process. Read in such a light, once the United Kingdom introduced elected seats to Legco, its reservation to Article 25(b) could no longer be consistent with the object and purpose of Article 25(b).

The invalidity of the reservation to Article 25(b) would likely only result in severance of the invalid reservation. The Joint Declaration and Basic Law both provide that the provisions of the ICCPR previously in force in relation to Hong Kong shall continue to apply.³⁰⁹ This is inconsistent with the suggestion that invalidity of the reservation to Article 25(b) would nullify all of the provisions of the ICCPR, as applied to Hong Kong. Thus, in the absence of evidence that the reservation was a fundamental condition of the United Kingdom's assent to the ICCPR, Article 25(b) applies in full force to Hong Kong, along with other provisions of the ICCPR.³¹⁰ The PRC would therefore be obliged to secure the rights guaranteed by Article 25(b) in respect of Hong Kong, including the right of universal suffrage and the right to be elected. Any conditions imposed on the exercise

306. ICCPR, *supra* note 278, art. 40(1).

307. ICCPR, *supra* note 278, art. 2(1); Human Rights Comm., Gen. Comment No. 3: Implementation at the National Level, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

308. On the applicable customary international law, see *infra* Part II, G.

309. Joint Declaration, *supra* note 61, Annex I, ch. XIII; *Basic Law*, *supra* note 62, art. 39.

310. ILC Guide to Practice, *supra* note 252, ¶ 4.5.3.

of these rights must be based on “reasonable and objective criteria.”³¹¹ In particular, political or other views are an impermissible reason for restricting these rights.³¹² The application of Article 25(b) to Hong Kong would therefore be fatal to the notion that candidates for Chief Executive should be “screened” for ideological purity.

Nonetheless, despite its previous position regarding the inapplicability of the reservation to Article 25(b), the Human Rights Committee now appears to accept that the reservation remains in place. The Concluding Observations issued in 2013 expressed “concern” about the continuation of the reservation and recommended that the Hong Kong Government “consider steps leading to withdrawing the reservation to article 25(b) of the Covenant.”³¹³ This represents a marked—and unexplained—departure from previous Concluding Observations by the Committee, which maintained that the reservation no longer applied.³¹⁴ The Human Rights Committee returned to the issue of voting rights in Hong Kong on October 23, 2014, in light of the 2014 Decision.³¹⁵ Although the Committee demanded information on measures taken to withdraw the reservation to article 25(b), it declared that “universal suffrage” included both the right to vote

311. Human Rights Comm., Gen. Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote): The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶¶ 4, 15, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 16, 1996) [hereinafter Gen. Comment 25].

312. *Id.* ¶ 15; ICCPR, *supra* note 278, art. 2.

313. Human Rights Comm., Concluding Observations on the Third Periodic Report of Hong Kong, China, 107th Sess., Mar. 11–28, 2013, ¶ 6, U.N. Doc. CCPR C/CHN-HKG/CO/3 (Apr. 29, 2013) [hereinafter 2013 Concluding Observations].

314. *See, e.g.*, Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Hong Kong Special Administrative Region (HKSAR), ¶ 18, U.N. Doc. CCPR/C/HKG/CO/2 (2006) [hereinafter 2006 Concluding Observations]. The 2013 Concluding Observations made no reference to the 1999 Concluding Observations. 2013 Concluding Observations, *supra* note 313, ¶ 6.

315. *UN Human Rights Body to Take Up Hong Kong Voting Rights Issue at Public Session*, STRAITS TIMES, Sept. 10, 2014, <http://www.straitstimes.com/news/asia/east-asia/story/un-human-rights-body-take-hong-kong-voting-rights-issue-public-session-201>.

and the right to stand for election.³¹⁶ It therefore sought further information on the proposed Chief Executive electoral reforms and their compatibility with the ICCPR.³¹⁷

3. Universal Suffrage and the Right to Vote

The Human Rights Committee considers that the right to vote “should be available to every adult citizen.”³¹⁸ Thus, states parties are required to “ensure that the broadest pool of voters be allowed to cast ballots.”³¹⁹ The exercise of such rights may only be suspended or excluded as prescribed by law and on objective and reasonable grounds.³²⁰ The ICCPR does not impose any particular electoral system.³²¹ However, it does not follow that there are no “international standards” at all (as Li Fei asserted in announcing the 2014 Decision).³²²

The Election Committee in its present form does not comply with the requirement of universal suffrage under Article 25. Nor is the selection of members of the Election Committee open to all registered voters in Hong Kong.³²³ However, the main controversy regarding Chief Executive electoral reform has been that of nomination, rather than the actual process of choosing between candidates. General Comment 25 does not prescribe any particular nomination mechanism or process; it merely requires that nomination criteria not constitute an unreasonable barrier to entry.³²⁴

316. See Human Rights Comm., Report on Follow-Up to the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/112/2 (2014), at p. 22.

317. *Id.*

318. Gen. Comment 25, *supra* note 311, ¶ 4.

319. Avery Davis-Roberts & David J. Carroll, *Using International Law to Assess Elections*, 17 DEMOCRATIZATION 416, 423 (2010).

320. Gen. Comment 25, *supra* note 311, ¶ 4.

321. Gen. Comment 25, *supra* note 311, ¶ 21.

322. See, e.g., *Li Fei: NPCSC's Important Decision on HK*, RADIO TELEVISION H.K., Aug. 31, 2014, http://rthk.hk/rthk/news/english-news/20140831/news_20140831_56_1033905.htm.

323. Chief Executive Election Ordinance (2001) Cap. 569, 19–27, pt. 2 (H.K.).

324. See *infra* Part II.E.5.

4. Equal Suffrage

The ICCPR does not prescribe any particular electoral system.³²⁵ However, any such system must “give effect to the free expression of the will of the electors.”³²⁶ Thus, although electoral systems such as electoral college systems are permissible, the functional constituency system is not.³²⁷ The Human Rights Committee found that functional constituencies gave “undue weight to the views of the business community” and therefore, contravened the equal suffrage requirement of Article 25.³²⁸

The Election Committee’s composition is, in essence, the functional constituency system writ large. It privileges the views of social sectors “deemed to be friendly to Beijing,” such as the commercial and agricultural sectors, at the expense of sectors considered politically hostile.³²⁹ Any retention of the Election Committee as an electoral body will therefore violate Article 25.

5. The Right to Be Elected

Although General Comment 25 does not prescribe a specific nomination mechanism or process, it does not follow that it is silent on issues relating to nomination.³³⁰ In paragraphs 15–17 of General Comment 25, the Human Rights Committee emphasized that limits on the right to stand for election can only be

325. See Gen. Comment 25, *supra* note 311, ¶ 21.

326. *Id.*

327. JOSEPH & CASTAN, *supra* note 23, at 742.

328. *Id.*

329. Keith Bradsher, *Beijing Switches Sides in the Race for Hong Kong’s Chief Executive*, N.Y. TIMES, Mar. 21, 2012, <http://www.nytimes.com/2012/03/22/world/asia/beijing-switches-support-in-race-for-hong-kong-chief.html>; Te-Ping Chen, *Meet Hong Kong’s Voters—All 1,200 of Them*, CHINA REAL TIME (Mar. 19, 2012, 10:22 PM), <http://blogs.wsj.com/china-realttime/2012/03/19/meet-hong-kong%E2%80%99s-voters-all-1200-of-them/>. As of 2012, members of the Election Committee included 241 members of pro-Beijing political parties, Hong Kong deputies to the National People’s Congress, Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference, and members of the New Territories Heung Yee Kuk (representing the interests of indigenous villagers in the New Territories). *Id.*

330. Qiang Shigong has asserted that the ICCPR is silent on issues of nomination, but without apparent reference to General Comment 25. See Shigong Qiang, *The ICCPR in Hong Kong: The Misinterpreted International Treaty*, *supra* note 229.

based on “objective and reasonable criteria.” In particular, it stated that political affiliation was not a permissible ground for barring a person from standing for election. Nor may states require candidates to be members of parties or of specific parties.³³¹

The Human Rights Committee considered discrimination on the ground of political opinion in *Bwalya v. Zambia* (314/1988). Bwalya, a Zambian national, ran for a parliamentary seat as a member of an opposition party. The Zambian authorities subjected him to threats and intimidation, expelled him and his family from their home, and detained him for belonging to a political party banned under Zambia’s one-party Constitution. The Human Rights Committee found that Zambia had violated Article 25.³³² More recently, in a series of cases concerning Belarus’ system of registering electoral candidates, the Committee held that arbitrary denial of registration, and denial of registration to candidates whose registrations appeared to be lawful, violated Article 25.³³³

However, even the Human Rights Committee has recognized that some political affiliations are beyond the pale; it has taken the view that Article 25 permitted a ban on far-right parties. It justified such a ban by invoking Article 5(1), under which groups aiming to undermine or destroy the ICCPR rights of others cannot avail themselves of the ICCPR.³³⁴ The exception to the principle that candidacy cannot be refused on grounds of political affiliation is therefore a narrow one. Any attempt by the PRC to exclude pro-democracy politicians from candidacy for Chief Executive would not fall within the exception.³³⁵

331. Gen. Comment 25, *supra* note 311, ¶¶ 15–17.

332. Chiiko Bwalya v. Zambia, ¶¶ 6.6 & 7, U.N. Doc. CCPR/C/48/D/314/1988 (1993); JOSEPH & CASTAN, *supra* note 23, at 745.

333. See Lukyanchik v. Belarus, ¶ 8, U.N. Doc. CCPR/C/97/D/1392/2005 (2009); Sudalenko v. Belarus, ¶ 6.7, U.N. Doc. CCP R/C/100/D/1354/2005 (2010) respectively. See also JOSEPH & CASTAN, *supra* note 23, at 745–46. Denial of registration meant that a person could not legally become a candidate. *Id.*

334. JOSEPH & CASTAN, *supra* note 23, at 746.

335. But not for want of trying. See *Chen Zuor: Will Not Befriend “Traitors, Separatists”*, *supra* note 4 (comparing democrats to “terrorists”).

F. *The Right to Self-Determination*

Academic and lay observers have at various times suggested that the right to self-determination applies to Hong Kong.³³⁶ The circumstances of Hong Kong's removal from the list of Non-Self Governing Territories in 1972 suggest two possible explanations. The first is that the right of the Hong Kong people to self-determination was violated by the PRC, with the connivance of the United Kingdom.³³⁷ The second is that the lease of the New Territories, coupled with the largely ethnic Chinese population of the territory, warrant the setting aside of self-determination.³³⁸ Regardless of which view is correct, the issue of self-determination for Hong Kong—at least insofar as it encompasses *external* self-determination—is now politically unfeasible.³³⁹

G. *A Right to Democracy in Customary International Law?*

In the event that ICCPR Article 25(b) does not apply to Hong Kong, it falls to consider the extent to which customary international law protects a right to democratic participation. Neither the UDHR, nor any other evidence of customary international law, provides a strong foundation for any obligation by the PRC to democratize Hong Kong. Nineteen years after Professor Thomas Franck referred to an “emerging right to democratic

336. See generally Patricia A. Dagati, *Hong Kong's Lost Right to Self-Determination: A Denial of Due Process in the United Nations*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 153 (1992); John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination*, 46 U. KAN. L. REV. 283 (1997); William Pfaff, *Why Not Support Self-Determination For Hong Kong?*, CHI. TRIB., Feb. 2, 1990, http://articles.chicagotribune.com/1990-02-02/news/9001090967_1_hong-kong-tiananmen-square-china.

337. See Dagati, *supra* note 336, at 154–55; Head, *supra* note 336, at 298–304.

338. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 79–80 (1995) [hereinafter CASSESE, SELF-DETERMINATION]. Despite widespread disillusion with the Central Government in Hong Kong after the Tiananmen Square Massacre of 1989, the ascent of assertive nativism in Hong Kong did not begin until well after 1997. See Veg, *supra* note 83.

339. Head, *supra* note 336, at 304. See generally Robert W. McGee & Danny Kin-Kong Lam, *Hong Kong's Option to Secede*, 33 HARV. INT'L L.J. 427 (1992). Nonetheless, there has been a revival of academic and popular discussion of whether Hong Kongers are a “people” entitled to self-determination. See, e.g., Cheung Sze-tsai, *香港是否應有民族自決的權利?* [Should Hong Kong Have the Right to Self-Determination?], UNDERGRAD (H.K.), Feb. 2014.

governance,”³⁴⁰ the right has not yet become consolidated as a norm of customary international law.³⁴¹ Even if such a norm has come into being, the PRC would be considered a persistent objector.³⁴²

Under Article 21(3) of the UDHR, “[t]he will of the people shall be the basis of the authority of government,” as expressed in “periodic and genuine elections which shall be by universal and equal suffrage.”³⁴³ When the UDHR was first drafted and adopted, it was treated as a non-binding instrument.³⁴⁴ Although many of its norms are now considered binding as a matter of customary international law,³⁴⁵ it is doubtful that a *right* to democracy *per se*—as formulated in Article 21(3) of the UDHR or otherwise—has attained the status of customary international law.³⁴⁶

However, there may be sufficient evidence to support a principle of “democratic teleology”—a right to *democratization*, rather

340. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

341. Professor Greg Fox, one of the more optimistic commentators on the emerging right to democracy, acknowledges that continued disagreement over its substantive content, as well as disparate observance of the norm, have “limited the emergence of a right to democracy in customary or conventional law.” Greg Fox, *Democracy, Right to, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶¶ 35–37, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Oct. 6, 2013). The late Professor Cassese referred, in 2005, to such a norm as “[p]robably . . . currently in the process of coming into being.” ANTONIO CASSESE, INTERNATIONAL LAW 395 (2d ed. 2005). *But see* Niels Petersen, *Elections, Right to Participate in, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶¶ 17–18, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Oct. 4, 2013) (expressing skepticism as to the existence of *opinio juris* and sufficient supporting state practice). *See also* Susan Marks, *What has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507, 511 (2011); Jean d'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 EUR. J. INT'L L. 549 (2011).

342. d'Aspremont, *supra* note 341, at 557. Professor d'Aspremont suggests that the rise of the PRC as a world power has helped to undermine the emergence of the norm altogether, by enticing emerging democracies with the promise of cooperation without ideological baggage. *Id.* at 562–63.

343. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 21(3), U.N. Doc. A/810 at 71 (1948).

344. Davis-Roberts & Carroll, *supra* note 319, at 421.

345. *Id.*

346. Petersen, *supra* note 341, ¶¶ 17–18.

than a right to *democracy*.³⁴⁷ Dr. Niels Petersen, writing in the *Max Planck Encyclopedia of Public International Law*, identifies a series of General Assembly resolutions entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.”³⁴⁸ Resolutions prior to 1992 consisted mainly of normative statements, implying the existence of a right to democracy.³⁴⁹ Subsequent resolutions focused on electoral assistance provided by the Secretariat.³⁵⁰ The latter set of resolutions refer to the “continuation and consolidation of the democratization process” or to efforts to “consolidate and regularize the achievements of previous elections.”³⁵¹ Petersen cites the teleological connotations of the words “promoting” and “consolidating” as supporting the idea of a duty to develop toward democracy.³⁵² This idea finds further support in a separate series of General Assembly resolutions. Following General Assembly Resolution 55/96 on Promoting and Consolidating Democracy,³⁵³ the General Assembly passed a series of resolutions on the promotion and consolidation of new or restored democracies.³⁵⁴ Some of

347. *Id.* ¶ 22.

348. *Id.* ¶ 20.

349. See G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988); G.A. Res. 44/146, U.N. Doc. A/RES/44/146 (Dec. 15, 1989); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); and G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991). Petersen argues that none of the resolutions in question expressly confers a right to vote in elections. Petersen, *supra* note 341, ¶ 20.

350. See, e.g., G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Dec. 18, 1992); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 50/185, U.N. Doc. A/RES/50/185 (Dec. 22, 1995); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 54/173, U.N. Doc. A/RES/54/173 (Dec. 17, 1999); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001); G.A. Res. 58/180, U.N. Doc. A/RES/58/180 (Dec. 22, 2003); G.A. Res. 60/162, U.N. Doc. A/RES/60/162 (Dec. 16, 2005); G.A. Res. 62/150, U.N. Doc. A/RES/62/150 (Dec. 18, 2007); G.A. Res. 64/155, U.N. Doc. A/RES/64/155 (Dec. 18, 2009); G.A. Res. 66/163, U.N. Doc. A/RES/66/163 (Dec. 19, 2011). See also Petersen, *supra* note 341, ¶ 20.

351. *Id.*

352. Petersen, *supra* note 341, ¶ 20.

353. G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Dec. 4, 2000).

354. See, e.g., G.A. Res. 56/96, U.N. Doc. A/RES/56/96 (Dec. 14, 2001); G.A. Res. 58/13, U.N. Doc. A/RES/58/13 (Nov. 17, 2003); G.A. Res. 60/253, U.N. Doc. A/RES/60/253 (May 2, 2006); G.A. Res. 62/7, U.N. Doc. A/RES/62/7 (Nov. 8, 2007); G.A. Res. 64/12, U.N. Doc. A/RES/64/12 (Nov. 9, 2009); and G.A. Res. 66/285, U.N. Doc. A/RES/66/285 (Jul. 3, 2012).

these resolutions contain language suggesting that states are under a duty to democratize.³⁵⁵

State practice may also support a duty to democratize. Petersen, citing mechanisms within the OAS and the AU to sanction unconstitutional removal of elected governments, suggests that “[i]nternational practice is . . . principally directed against setbacks in the democratization process.”³⁵⁶ The European Commission’s threat of proceedings against Hungary³⁵⁷ and the European Union’s suspension of association agreement negotiations with Ukraine³⁵⁸ may provide further evidence of an international norm against democratic “back-sliding.”

H. Breaches of Public International Law

Sections A to G of this Part considered the PRC’s obligations under the Joint Declaration, the ICCPR, and customary international law. This section argues that the PRC’s history of obstructing democratic development in Hong Kong, as set out in Part I of this article, violates these obligations.

1. The Joint Declaration

The question of whether the PRC’s obstruction of Hong Kong’s democratization violates the Joint Declaration hinges on the interpretation of the Joint Declaration. Both the United Kingdom and the PRC adopt the rules set out in Article 31 of the VCLT on treaty interpretation. Thus, any interpretation of the Joint Declaration must consider:

- (1) The requirement of good faith;
- (2) The ordinary meaning of its provisions in context;

355. See, e.g., G.A. Res. 64/12, *supra* note 354 and G.A. Res. 66/285, *supra* note 354.

356. Petersen, *supra* note 341, ¶ 21.

357. Gergely Szakacs, *Hungary Backtracks on Contested Reforms After EU Pressure*, REUTERS, Sept. 17, 2013, available at <http://www.reuters.com/article/2013/09/17/us-hungary-constitution-idUSBRE98G0DV20130917>. *Contra* Kristina Jovanovski, *Hungary Dodges “Democracy” Surveillance*, AL-JAZEERA, Jun. 26, 2013, <http://www.aljazeera.com/indepth/features/2013/06/201362612313956611.html>.

358. See Andrew E. Kramer, *European Union Suspends Trade Talks With Ukraine*, N.Y. TIMES, Dec. 15, 2013, <http://www.nytimes.com/2013/12/16/world/europe/ukraine-protests.html>.

- (3) Its object and purpose;
- (4) Subsequent agreements regarding its interpretation or application;
- (5) Subsequent practice establishing the parties' agreement regarding its interpretation; and
- (6) Other rules of public international law governing Sino-British relations.³⁵⁹

As the *travaux préparatoires* of the Joint Declaration have not yet been made public, Article 32 of the VCLT has limited relevance.³⁶⁰

On its face, the Joint Declaration merely requires “elections” or “consultation,” before appointing the Chief Executive. The Joint Declaration does not itself define “elections.” However, the interpretive criteria in Article 31 of the VCLT militate against restrictions on the electoral process. First, any interpretation of “elections” or “consultation” that allows a merely formal process of “election” or “consultation” would denude these terms of meaning. An “election” in which only one man had one vote, for example, would be consistent neither with the requirements of good faith, nor with the ordinary meaning of the word “election.”

An expansive interpretation is also consistent with the object and purpose of the Joint Declaration. One of the main purposes of the Joint Declaration was to secure a “high degree of autonomy” for Hong Kong, except in foreign affairs and defense. Any attempt at “watering down” the involvement of the Hong Kong public in electing the Chief Executive would frustrate the purpose of securing autonomy to Hong Kong after 1997.

Further, to the extent that the United Kingdom has acquiesced to the Basic Law, Article 45 may be treated as subsequent practice in the application of the Joint Declaration.³⁶¹ That Article requires a “broadly representative nominating committee” and elections by “universal suffrage.” These terms should be given their ordinary meaning.

359. See *supra* pp. 40–41.

360. See Yash Ghai, *The Intersection of Chinese Law and Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?*, 37(2) H.K.L.J. 363, 387 (2007) (*travaux préparatoires* of Joint Declaration and Basic Law protected by Chinese secrecy laws).

361. See PATTEN, *supra* note 66, at 32–33. Xiao Weiyun states that the obligation to enact the Basic Law stems from the Joint Declaration. See XIAO, *supra* note 235, at 13.

Lastly, other applicable rules of public international law point toward an expansive interpretation of “elections.” The term “elections” is not defined in the Joint Declaration. However, China has succeeded to the United Kingdom’s obligations relating to Hong Kong under the ICCPR; its provisions, for reasons set out above, are also relevant to the election of the Chief Executive.

Further, rules of customary international law—in particular, emerging norms regarding democratization—are also relevant to interpretation of the Joint Declaration. The following factors in the Joint Declaration suggest that the parties intended “elections” to have an ambulatory meaning:

- (1) The absence of a specific definition of “elections”;
- (2) Under Article 3(12), the PRC has committed itself to maintaining its basic policies for 50 years after the establishment of the Hong Kong SAR, i.e. it is under ongoing obligations with respect to Hong Kong; and
- (3) China described its “basic policies” in general terms, the implementation of which will necessarily be context-sensitive.³⁶²

In that light, current or recent rules of customary international law in favor of democratization should also shape the interpretation of the Joint Declaration. Read in light of the ICCPR and current rules of customary international law, the word “elections” in the Joint Declaration must admit of a substantive meaning, rather than a merely formal one. Restrictions on the electoral process by manipulating nomination criteria would render the term “elections” nugatory. They are therefore inconsistent with the PRC’s obligations under the Joint Declaration.

This argument is not universally accepted, even by advocates of Hong Kong’s democratization.³⁶³ But the Chinese and Hong

362. See *supra* p. 41.

363. In his evidence before the U.K. House of Commons Foreign Affairs Committee, Lord Patten described this argument as “pretty heavy duty and pretty unfair.” Lord Patten of Barnes, Evidence Given to the House of Commons Foreign Affairs Committee, Nov. 4, 2014, <http://data.parliament.uk/written-evidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/the-uks-relations-with-hong-kong-30-years-after-the-joint-declaration/oral/15097.html>. Similarly, in her evidence before that Committee, Democratic Party legislator Emily Lau declined to identify a specific provision of the

Kong governments have gone much further than merely arguing over interpretation, instead seeking to contest the Joint Declaration's continued validity. In response to an inquiry into the implementation of the Joint Declaration by the U.K. House of Commons Foreign Affairs Committee ("FAC"), Ni Jian, China's Deputy Ambassador to the United Kingdom, claimed that the Joint Declaration lapsed with the transfer of sovereignty in 1997.³⁶⁴ Hong Kong's Secretary for Constitutional and Mainland Affairs, Raymond Tam, echoed these sentiments. In response to a question from a Hong Kong legislator, Tam asserted that the Joint Declaration's provisions "have been fully implemented, and its purpose and objectives have also been fully fulfilled."³⁶⁵ In response to further legislative questioning, Tam went even further—arguing that China's "basic policies" in Article 3 were a unilateral declaration by China,³⁶⁶ implying that they had no binding effect.

Neither of these arguments withstands scrutiny. The notion that the Joint Declaration lapsed in 1997 flatly contradicts the 50-year entrenchment of China's "basic policies."³⁶⁷ It also ignores other provisions in the Joint Declaration that survived the transfer of sovereignty in 1997, such as those regarding the Sino-British Joint Liaison Group.³⁶⁸ Although Tam's argument regarding Article 3 being a unilateral declaration is ingenious, it does not survive a context-sensitive reading of Article 3. Under

Joint Declaration that had been breached with respect to Chief Executive electoral arrangements. Emily Lau, Evidence Given to the House of Commons Foreign Affairs Committee, Dec. 18, 2014, <http://data.parliament.uk/written-evidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/the-uks-relations-with-hong-kong-30-years-after-the-joint-declaration/oral/16902.html>.

364. See 2 Dec. 2014, *PARL. DEB., H.C.* (2014) 164 (U.K.) (speech by Sir Richard Ottaway MP, Chairman of the FAC). See also 陳佐洱：英對「一國兩制」無監督權 [Chen Zuoer: UK has No Supervisory Powers Over "One Country, Two Systems"], *WEN WEI PO* (H.K.), Dec. 15, 2014, <http://paper.wenweipo.com/2014/12/15/HK1412150006.htm> (asserting that the "theme" of the Joint Declaration had been accomplished in 1997).

365. Press Release, H.K. Gov't, LCQ5: The Joint Declaration on the Question of Hong Kong (Dec. 17, 2014), <http://www.info.gov.hk/gia/general/201412/17/P201412170731.htm>.

366. 譚志源：50年不變英無權監督 [Raymond Tam: UK Has No Supervisory Authority Over "Unchanged for 50 Years"], *MINGPAO* (H.K.), Dec. 18, 2014.

367. Joint Declaration, *supra* note 61, art. 3(12) & Annex I, ch. I.

368. *Id.*, Annex II.

Article 8, the entirety of the Joint Declaration—along with all of its Annexes—are equally binding.³⁶⁹ Although the invocation of international law by Beijing and Hong Kong officialdom marks a welcome departure from bluster over “color revolutions” and “external forces,”³⁷⁰ the arguments that have emerged are neither legally nor logically sound.

2. The ICCPR

If one accepts that the Joint Declaration remains in place and that the reservation to Article 25(b) has been severed, the method of selection of the Chief Executive in 2017 must comply with the requirements of Article 25(b). Article 25(b) must be interpreted in accordance with the principle of effectiveness.³⁷¹ Thus, the right of universal suffrage, the right to vote, equality of suffrage, and the right to be elected must be interpreted as conferring substantive rights on Hong Kong residents, not merely formal rights.³⁷²

The PRC seeks to maintain control over the nomination of Chief Executives. These proposed restrictions directly impinge upon the right to be elected. That right may only be restricted based on objective and reasonable criteria. Subject only to the limited exception in Article 5(1) of the ICCPR, affiliation with a political party or political opinion are criteria that are neither objective nor reasonable. As Qiao Xiaoyang candidly admitted, the filtering of candidates for Chief Executive by the criterion of “non-confrontation” with Beijing does not admit of objective definition.³⁷³ The use of political criteria in “filtering” candidates therefore infringes Article 25(b).³⁷⁴

369. *Id.*, art. 8.

370. See, e.g., Nectar Gan & Stuart Lau, *Occupy Central Was an Attempt at Colour Revolution: PLA General*, S. CHINA MORNING POST (H.K.), Mar. 3, 2015, <http://www.scmp.com/news/hong-kong/article/1728027/occupy-central-was-attempt-colour-revolution-pla-general> (referring to “external forces” who “orchestrated a Hong Kong version of a colour revolution”).

371. See *supra* Part II.E.1.

372. See *supra* pp. 57–60.

373. Qiao, *supra* note 19.

374. As the Human Rights Committee has stated, “political opinion may not be used as a ground to deprive any person of the right to stand for election.” Gen. Comment 25, *supra* note 311, ¶ 17.

The question of civil nomination is slightly less clear-cut. On its face, Article 25 requires only that the nomination process not constitute an unreasonable barrier to candidates. Neither Article 25, nor General Comment 25, offers guidance as to the mechanics of the nomination process. This raises the question of whether the Hong Kong public has a “right to nominate” under Article 25. Maria Tam and Suzanne Pepper have suggested that it does not.³⁷⁵ However, for other electoral rights to be effective, voters must have a free choice of candidates.³⁷⁶ As Professor Benny Tai (戴耀廷), a founder of Occupy Central, observed, a choice between a rotten apple and a rotten orange is no choice at all.³⁷⁷

3. Customary International Law

The PRC has opted to implement the Joint Declaration by appointing a Chief Executive after “elections,” rather than after consultations. It has also declared in the Basic Law that the “ultimate aim” is the election of the Chief Executive by universal suffrage. Even as a matter of customary international law, the PRC is arguably under a duty not to engage in acts that would undermine democratic development in the SAR—and perhaps a positive duty to democratize Hong Kong. Thus, it would no longer be open to the PRC to adopt a system of appointing the Chief Executive after only conducting local consultations, notwithstanding the provisions of the Joint Declaration.

III. REMEDIES

Breaches of duty mean little without remedies. Unfortunately for Hong Kong, there are few effective remedies for the PRC’s breaches of public international law. Members of the Hong Kong public have no standing to enforce China’s duties under customary international law; the United Kingdom or other States could only enforce such duties if they are obligations *erga omnes*. Neither the ICCPR, nor the Joint Declaration, provides for dispute

375. Lau & Lee, *supra* note 295; Pepper, *Exploring the Options*, *supra* note 200. I refer here to the right to nominate, not the right to be nominated.

376. Gen. Comment 25, *supra* note 311, ¶ 15.

377. Lau & Lee, *supra* note 295. On the issue of genuine choice, see also *Monty Python’s Flying Circus* (BBC television broadcast Dec. 15, 1970), available at https://www.youtube.com/watch?v=M_eYSuPKP3Y (the Spam sketch).

resolution mechanisms that apply to Hong Kong. Nor has the PRC accepted ICJ compulsory jurisdiction.

A. *The Joint Declaration*

The Joint Declaration contains no provisions for enforcement. It would not be open to the United Kingdom to withdraw from the Joint Declaration; the treaty establishes a boundary and therefore, falls within the proviso under Article 62(2)(a) of the VCLT barring withdrawal due to a fundamental change in circumstances.³⁷⁸ Although the PRC's stated "basic policies" will purportedly remain unchanged over fifty years, the PRC has vehemently resisted any attempts by the United Kingdom to hold the PRC to its promises.³⁷⁹ An early skirmish in 1996 suggests that the prospects for arbitration or adjudication are bleak. In response to the PRC's unilateral decision to replace the Legco members elected in 1995 with a "provisional legislature" selected by a 400-member Selection Committee (itself chosen by the PRC), then Foreign-Secretary Malcolm Rifkind threatened to refer the establishment of the provisional legislature to the ICJ.³⁸⁰ His Chinese counterpart, Qian Qichen, brusquely responded that it was "futile" to "play the 'international card.'"³⁸¹

B. *The ICCPR*

Although individuals may not enforce the PRC's obligations with respect to Hong Kong under the ICCPR, it is open to other parties to the ICCPR to do so. On May 17, 1976, the U.K. Government made a declaration under Article 41 of the ICCPR that it recognized the competence of the Human Rights Committee to receive and consider communications submitted by other States parties that had also made Article 41 declarations at least

378. Lorenz Langer, *Out of Joint?—Hong Kong's International Status From the Sino-British Joint Declaration to the Present*, 46 ARCH. VÖLKERRECHTS 309, 336 (2008).

379. See, e.g., Todd Crowell & Law Siu Lan, *Tale of Two Legislatures*, ASIaweek (Jan. 10, 1997), <http://www-cgi.cnn.com/ASIANOW/asiaweek/97/0110/nat7.html>; Chong & Lau, *supra* note 7.

380. HERSCHENSOHN, *supra* note 29, at 21.

381. Crowell & Law, *supra* note 379.

twelve months before the date of the submitted communications.³⁸² Article 41 continues to apply to Hong Kong by virtue of Annex III, Chapter XIV of the Joint Declaration, and Article 39 of the Basic Law.³⁸³ However, proceedings under Article 41 do not result in legally binding judgments.³⁸⁴

C. Customary International Law: Obligations Erga Omnes?

The PRC's obligations under customary law in respect of Hong Kong are only enforceable by third States if they are obligations *erga omnes*. The ICJ defined obligations *erga omnes* in the seminal *Barcelona Traction* case (Second Phase), when considering whether Belgium had standing to sue on behalf of shareholders of a company incorporated in Canada that had been declared bankrupt by a Spanish court. The ICJ held that Belgium lacked standing. However, it held (in *obiter dicta*) that there was a distinction between obligations owed *vis-a-vis* other States in the field of diplomatic protection, and obligations *erga omnes*—obligations “towards the international community as a whole” and which were “the concern of all States.”³⁸⁵ Such obligations derived from the prohibition of “acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” Obligations *erga omnes* also arose from “international instruments of a universal or quasi-universal character.”³⁸⁶

The ICJ held that the obligation to respect a people's right to self-determination is an obligation *erga omnes* in the *Palestine Wall* and *East Timor* cases.³⁸⁷ In the *East Timor* case, Portugal, the former colonial power in East Timor, brought proceedings against Australia, challenging the latter's Timor Gap Treaty

382. *Status of the International Covenant on Civil and Political Rights*, *supra* note 279.

383. Joint Declaration, *supra* note 61, Annex I, ch. XIII; *Basic Law*, *supra* note 62, art. 39.

384. See JOSEPH & CASTAN, *supra* note 23, at 22–23.

385. *Barcelona Traction, Light, and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

386. *Id.* ¶ 34.

387. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 155–56 (July 9); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶ 29 (1995).

with Indonesia. Portugal alleged that Indonesia had no authority to negotiate the treaty as it had illegally invaded East Timor in 1975 and subsequently occupied it illegally. Portugal further alleged that the treaty violated the right of the people of East Timor to self-determination. The ICJ declined to rule on the lawfulness of Indonesia's conduct, but held that Portugal's submission that the right to self-determination was assertable *erga omnes* was "irreproachable."³⁸⁸ In the *Palestine Wall* case, the U.N. General Assembly sought an advisory opinion regarding the legal consequences of Israel's construction of a wall through the occupied West Bank to prevent would-be attackers from entering Israel. The General Assembly made the request after the United States vetoed a draft Security Council resolution condemning the wall. The ICJ held that the wall amounted to *de facto* annexation of the West Bank and that the wall, along with related measures, severely impeded the Palestinian people's right to self-determination.³⁸⁹

However, the relevance of the right to self-determination to Hong Kong is questionable. Although the existence of a "people" deserving of a right to self-determination has often been assumed without discussion, there is still no generally agreed-upon definition of the term "people."³⁹⁰ As Professor Cassese observed, the population of Hong Kong has remained largely Chinese in ethnic composition.³⁹¹ On the other hand, University of Hong Kong survey data has shown that, with few exceptions, more respondents have identified as "Hongkongers" or "Hongkongers in China" than as "Chinese" or "Chinese in Hong Kong" since August 1997.³⁹² Although earlier data is not available, proponents of a distinct Hong Kong identity have grown more assertive after 1997.³⁹³ Nonetheless, the factual basis for

388. East Timor, *supra* note 387, ¶¶ 28–29.

389. Palestine Wall Advisory Opinion, *supra* note 387, ¶¶ 121–22.

390. Daniel Thürer & Thomas Burri, *Self-Determination*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶18, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Nov. 4, 2013).

391. CASSESE, SELF-DETERMINATION, *supra* note 338, at 79–80.

392. Ethnic Identity Poll, HKU POP SITE, <http://hkupop.hku.hk/english/popexpress/ethnic/eidentity/poll/datatables.html> (last visited Nov. 8, 2013).

393. Veg, *supra* note 83.

referring to Hong Kong's population as a distinct "people" remains uncertain.

The right to democratization is on shakier ground still. The *Barcelona Traction* case suggests that obligations deriving from basic human rights may be obligations *erga omnes*, yet it offers no guidance as to how to identify specific rights that give rise to obligations *erga omnes*. No consensus has emerged in academic literature. Although Professor Christian Tams identifies a "core of obligations *erga omnes*" deriving from peremptory norms of international law, he concedes that identifying obligations *erga omnes* outside of *jus cogens* is "considerably more difficult."³⁹⁴ Similarly, Dr Maurizio Ragazzi identified five common elements of existing obligations *erga omnes*, but added that they were not rigid prescriptive criteria.³⁹⁵ It is therefore unclear whether the right to democratization—if it exists at all—gives rise to an *erga omnes* obligation to respect that right.

D. Means of Enforcement

Three main difficulties arise with respect to enforcement: the absence of any individual right of petition, the PRC's refusal to accept ICJ jurisdiction, and the issue of how obligations *erga omnes* should be enforced.

1. Absence of Individual Right of Petition

Traditionally, public international law only recognized States as actors; individuals enjoyed no rights under international law and were not subject to duties under it.³⁹⁶ To bring claims before international judicial bodies, individuals had to persuade the government of their home State to bring a claim in the exercise of diplomatic protection.³⁹⁷ Although individual access to judicial proceedings is now available in specific fields, such as international human rights and international commercial arbitration, individual access is a creature of international treaties and is

394. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 156–57 (2005).

395. THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 474–76 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

396. Simone Gorski, *Individuals in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶ 1, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Nov. 4, 2013).

397. *Id.* ¶ 19.

not universal.³⁹⁸ None of the treaty-created exceptions to the customary rule apply to Hong Kong. The PRC is not a party to the First Optional Protocol to the ICCPR, which provides for individual complaints to the Human Rights Committee.³⁹⁹ It would therefore fall to the United Kingdom to enforce the PRC's duties under the Joint Declaration. Alternatively, the United Kingdom—or a third State—could enforce the PRC's obligations under the ICCPR, or its obligations *erga omnes* under customary international law.

2. The PRC's Refusal to Accept ICJ Jurisdiction

The PRC has not accepted the compulsory jurisdiction of the ICJ. It has also entered a reservation to Article 66 of the VCLT, providing for references of treaty disputes to the ICJ, arbitration, or conciliation. Nor is China likely to accept voluntary ICJ jurisdiction in any dispute with the United Kingdom regarding implementation of the Joint Declaration or of the ICCPR. The PRC has jealously guarded control over Hong Kong, viewing it as an internal matter;⁴⁰⁰ any request by the United Kingdom for arbitration or litigation would likely be viewed as impinging on the PRC's sovereignty. The PRC has long rejected forms of dispute resolution involving a neutral third party in matters involving its sovereignty, most recently with respect to the Philippines' request for arbitration of the East Philippine Sea / South China Sea dispute.⁴⁰¹ It will likely adopt a similar approach with respect to Hong Kong, as it did in 1996 in the provisional legislature dispute.⁴⁰²

398. *Id.* ¶¶ 25–26.

399. *Status of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-5&chapter=4&lang=en (last visited Dec. 30, 2013).

400. Chong & Lau, *supra* note 7.

401. Embassy of China in Phil., Chinese Spokesperson Hong Lei's Remarks on China Returned the Philippines' Notification on the Submission of South China Sea Issue to International Arbitration (Feb. 19, 2013) <http://ph.china-embassy.org/eng/xwfb/t1014903.htm>.

402. *See supra* Part III.A.

3. Difficulty in Enforcing Obligations *Erga Omnes*

The *Barcelona Traction* case suggests that obligations deriving from basic human rights may be obligations *erga omnes*, yet it also states that human rights instruments do not confer on States the capacity to protect victims of human rights infringement regardless of nationality.⁴⁰³ In the *Palestine Wall* case the ICJ held that, as far as self-determination was concerned, all States were under several primary obligations. First, States could not recognize the illegal situation resulting from the Israeli wall. Second, States could not render aid or assistance in maintaining that situation. Third, States were bound to ensure (within the limits of the U.N. Charter and international law) that any impediment to the Palestinian people's right to self-determination is brought to an end.⁴⁰⁴

Thus, although it would likely not be open to a third State to challenge the PRC's conduct in respect of Hong Kong before the ICJ, it may be open to such a State to encourage the PRC to comply with its obligations *erga omnes* in respect of Hong Kong by other means.⁴⁰⁵

4. Potential Solutions

These difficulties are not insurmountable. Despite Chinese intransigence, it may nonetheless be possible to exert pressure on China to comply with its international law obligations in respect of Hong Kong through unilateral conduct by the United Kingdom or through attempts to refer the underlying legal issues to the ICJ. Enforcement by third States may also be possible, insofar as the PRC has breached obligations which are *erga omnes* in nature.

First, the United Kingdom could, of its own motion, publicly monitor the PRC's compliance with the Joint Declaration,⁴⁰⁶ and

403. *Barcelona Traction, Light, and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 91 (Feb. 5).

404. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, ¶ 159 (Jul. 9).

405. See *infra* Part III.D.4.

406. Lord Patten of Barnes has publicly argued that the United Kingdom is "honour bound to speak up for Hong Kong." Chris Patten, *Britain is Honour Bound to Speak Up For Hong Kong*, FINANCIAL TIMES, Sept. 2, 2014, <http://www.ft.com/intl/cms/s/0/6458d53c-328c-11e4-93c6-00144feabdc0.html#axzz3IKVOqmcC>.

engage in retorsion or countermeasures in response to Chinese breach.⁴⁰⁷ The FCO has prepared six-monthly reports to Parliament on the implementation of the Joint Declaration since July 1997; continued six-monthly reports by the FCO, as well as public statements similar to Hugo Swire's statement on September 14, 2013, could help draw attention to the PRC's continued delinquency over Hong Kong's democratic development. However, to date, the FCO has shown minimal interest in doing so. Its most recent report, issued in February 2015, maintained that "the best way to preserve Hong Kong's strengths is through a transition to universal suffrage, which delivers a genuine choice for the people of Hong Kong."⁴⁰⁸ Regrettably, this language is much weaker than that in earlier reports. The FCO's July 2013 report, for instance, insisted that Hong Kong's stability and prosperity were best guaranteed by "moving to a democratic system of universal suffrage in line with public consultations, the promised timetable and international standards."⁴⁰⁹ In a similar vein to the February 2015 report, the FCO's initial response to the 2014 Decision, issued on September 4, 2014, stated merely that there was "no perfect model" for universal suffrage and asserted that the details were for the Hong Kong and Central Governments and the people of Hong Kong to decide.⁴¹⁰ Audrey Eu tartly responded that it would have been preferable for the FCO to say nothing at all.⁴¹¹

407. On retorsion and countermeasures, *see generally* James R. Crawford, *State Responsibility*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Mar. 3, 2015) and Thomas Giegerich, *Retorsion*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, <http://opil.ouplaw.com/home/EPIL> (enter title as search term) (last visited Mar. 3, 2015).

408. FOREIGN & COMMONWEALTH OFFICE, THE SIX-MONTHLY REPORT ON HONG KONG: 1 JULY TO 31 DECEMBER 2014, at 2 (2015).

409. *Id.* at 8.

410. Press Release, Foreign & Commonwealth Office, Foreign Office Responds to Hong Kong Reform Plans (Sept. 4, 2014), <https://www.gov.uk/government/news/foreign-office-responds-to-hong-kong-reform-plans>.

411. Letter from Audrey Eu, Chairman, Civic Party, to Caroline Wilson, Consul-General, British Consulate-General, H.K. (Sept. 5, 2014), <http://www.post852.com/> (enter "not to speak at all" as search term).

In the absence of resolute action from the FCO, Parliament has stepped in. In 2014 the FAC launched its own inquiry into implementation of the Joint Declaration.⁴¹² Despite being barred from entering Hong Kong,⁴¹³ the FAC finished obtaining oral evidence in January 2015,⁴¹⁴ and published its report on March 6, 2015.⁴¹⁵ In its report, the FAC roundly criticized the FCO for its

412. See *The UK's Relations With Hong Kong: 30 Years After Joint Declaration*, PARLIAMENT.UK (July 22, 2014), <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/news/hong-kong-tor/>. The author submitted written evidence to the FAC inquiry: Written Evidence From Alvin Y.H. Cheung (HNG0270), Oct. 2014, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/the-uks-relations-with-hong-kong-30-years-after-the-joint-declaration/written/13380.html>.

413. See *FCO Should Summon Chinese Ambassador, Says Committee*, PARLIAMENT.UK (Dec. 10, 2014), <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/news/report-hong-kong-visit-ban/>. The Chinese decision to prevent the FAC from visiting Hong Kong is arguably in breach of the Joint Declaration, which provides that Hong Kong may exercise its own immigration controls: Joint Declaration, *supra* note 61, Annex I, ch. XIV. Regardless of legality, the decision triggered a “diplomatic crisis.” 2 Dec. 2014, PARL. DEB., H.C. (2014) 180 (U.K.) (speech by Sandra Osborne MP during an emergency debate on the issue).

414. See *The UK's Relations With Hong Kong: 30 Years After The Joint Declaration*, *supra* note 412.

415. Foreign Affairs Committee, *The UK's Relations With Hong Kong: 30 Years After the Joint Declaration, 2014–15*, H.C. 649 (U.K.) [hereinafter FAC Report].

“misleading” and “evasive” language in defending the 2014 Decision,⁴¹⁶ as well as the FCO’s weak response to the Chinese refusal to allow the FAC to visit Hong Kong.⁴¹⁷ The FAC also expressed concern that the FCO’s “lack of clarity” in commenting on Hong Kong’s constitutional development led to the perception that the FCO was primarily concerned with maintaining trade relations with China.⁴¹⁸ Regrettably, it seems unlikely that the report will result in more robust British attitudes.⁴¹⁹

Alternatively, the United Kingdom may threaten—or seek to commence—international judicial proceedings. Although the PRC’s lack of cooperation hinders the ability to bring such proceedings, it does not preclude them entirely. For instance, despite Chinese non-participation, the Philippines’ arbitration proceedings in respect of the East Philippine Sea / South China Sea dispute may nonetheless exert moral and political pressure on China.⁴²⁰ Although contested ICJ proceedings cannot take place without Chinese cooperation, a British offer to refer disputes

416. See FAC Report, *supra* note 415, ch. 5, ¶¶ 53–57, at 30–32. For instance, Hugo Swire—the author of the op-eds that attracted a hostile response from Beijing in 2013—defended the 2014 Decision by arguing that “[a] genuine choice can mean something different from what we would regard as a genuine choice and from what other democracies around the world regard as a genuine choice.” Rt. Hon. Hugo Swire MP, Minister of State, FCO, Evidence Given to FAC Inquiry, Jan. 13, 2015, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/the-uks-relations-with-hong-kong-30-years-after-the-joint-declaration/oral/17498.html> (answer to Q362). See also Stephen Lillie, Director, Asia-Pacific, FCO, Evidence Given to FAC Inquiry, Jan. 13, 2015, <http://data.parliament.uk/written-evidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/the-uks-relations-with-hong-kong-30-years-after-the-joint-declaration/oral/17498.html> (answer to Q371). The FCO had in previous years been rather more robust. See Keith Bradsher, *China Bars Steps by Hong Kong Toward More Democratic Voting*, N.Y. TIMES, Apr. 27, 2004 (Bill Rammell, then FCO minister for China and Hong Kong, alleged that the 2004 Decision was inconsistent with a “high degree of autonomy” for Hong Kong).

417. See FAC Report, *supra* note 415, ch. 1, ¶¶ 4–7, at 10–11.

418. *Id.* at 7, ¶¶ 90–92, at 47–48.

419. The FCO rejected many of the recommendations in the FAC Report. See Foreign & Commonwealth Office, Government Response to the House of Commons Foreign Affairs Committee Report: The UK’s Relations With Hong Kong: 30 Years After the Joint Declaration, 2015, Cm. 9038.

420. Greg Torode, *Philippines South China Sea Legal Case Against China Gathers Pace*, REUTERS, Sept. 27, 2013, available at <http://www.reuters.com/article/2013/09/27/us-china-philippines-idUSBRE98Q0BX20130927>.

over Hong Kong's democratization to the ICJ—perhaps in conjunction with an effort to procure a U.N. General Assembly request for an Advisory Opinion, as occurred with the *Palestine Wall* case—may be capable of exerting similar pressure on China.

Conduct by third States provides a further, if less plausible, possibility for enforcement. Hong Kong's limited international capacity is a function of its constitutional order under the Basic Law.⁴²¹ It may therefore be open to third States to enforce the PRC's obligations *erga omnes* with respect to Hong Kong (insofar as such obligations exist) by ceasing to recognize Hong Kong as having any separate international capacity at all. Hong Kong currently enjoys its own bilateral economic and cultural ties with the United States and the European Union;⁴²² Hong Kong SAR passport holders enjoy visa-free access to a significantly larger number of countries than holders of ordinary PRC passports.⁴²³ Any suspension or cessation in third States' recognition of Hong Kong's limited international personality—as contemplated in the US—Hong Kong Policy Act⁴²⁴—may constitute a valid countermeasure under international law in the event of severe Chinese inroads into Hong Kong's autonomy under the Joint Declaration and the Basic Law.⁴²⁵

Ultimately, however, the efficacy of such measures is questionable. As Langer observed in 2008, the United Kingdom was not in a position to impose its own views on the Joint Declaration on

421. Langer, *supra* note 378, at 333.

422. *Id.* at 339–41.

423. *Visa-Free Access for HKSAR Passports*, GovHK, <http://www.gov.hk/en/residents/immigration/traveldoc/hksarpassport/visafreeaccess.htm> (last visited Nov. 7, 2013); Mark Johanson, *The Best Passports to Have for Unrestricted Travel Around the World*, INT'L BUS. TIMES (Oct. 11, 2013), <http://www.ibtimes.com/best-passports-have-unrestricted-travel-around-world-1422038>.

424. United States-Hong Kong Policy Act, 22 U.S.C. §§ 5701–5732 (2010).

425. A bipartisan group of Representatives has suggested updating the US—Hong Kong Policy Act and reinstating the requirement under that Act that the State Department prepare annual reports into conditions in Hong Kong. See Hong Kong Human Rights and Democracy Act, H.R. 1159, 114th Cong. (2015). See also Press Release, Representative Chris Smith (R-NJ), Bipartisan Group of Legislators Announces Bill to Ensure that U.S. Policy Supports Hong Kong's Freedom and Democracy (Feb. 27, 2015), <http://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=397953>.

China.⁴²⁶ China's subsequent growth in economic stature can only have weakened the United Kingdom's position further, as reflected in the FCO's insipid response to the 2014 Decision and to Chinese obstruction of the FAC inquiry.⁴²⁷ Perhaps most alarmingly, PRC leadership under Xi Jinping has shown increasing hostility toward universal values and constitutional government.⁴²⁸ The PRC may be in grave dereliction of its international law duties with respect to Hong Kong, but it is unlikely to respond to international remonstrations for the foreseeable future.

CONCLUSION: THEY'LL MAKE A FOOL OF YOU

Hong Kong's current predicament flows, in large part, from China's consistent refusal to allow Hong Kong's own population to have any meaningful participation in deciding its own future.⁴²⁹ The removal of Hong Kong from the list of Non-Self-Governing Territories took place at the PRC's behest, with no consultation of the Hong Kong public. Sir Edward Youde's presence as a representative of the Hong Kong people (albeit an unelected one) at the Sino-British negotiations leading to the Joint Declaration was roundly rejected by the PRC Foreign Ministry. Hong Kong civil society had minimal input in the drafting of the Basic Law; pro-democracy voices in the Drafting Committee were expelled or ignored after the Tiananmen Square Massacre of 1989. After the establishment of the Hong Kong SAR in 1997, the PRC has consistently moved to seize control of the political reform process and throttle democratic reforms.⁴³⁰ Faced with a *cri de coeur* from pro-democracy advocates in the form of Occupy Central, Beijing's representatives in Hong Kong threatened to declare a state of emergency. Although the Umbrella Movement

426. Langer, *supra* note 378, at 343.

427. *Supra*, pp. 180–183.

428. See Document 9, *supra* note 37.

429. *Contra* TOK, *supra* note 101, at 125–28.

430. Declassified British Government papers show that, as early as 1984, then-Prime Minister Margaret Thatcher predicted Beijing would interfere in Hong Kong's affairs after 1997, as "[t]he Chinese had no concept of a free society." 憂回歸後中央干預 鍾士元倡「築壩」 [Fearing Central Government Interference After Handover, Sir David Akers-Jones Suggested "Dam-Building"], MINGPAO (H.K.), Jan. 4, 2014.

did not end with the large-scale bloodshed some feared, there are signs of an ongoing campaign of governmental recriminations.⁴³¹

The PRC's lengthy history of obstructing democratization in Hong Kong violates its commitments under the Joint Declaration, the ICCPR, and customary international law. The PRC's promulgation of the Basic Law shows that it has chosen to allow the Chief Executive to be chosen by elections rather than by consultations; in such circumstances, a purposive interpretation of the Joint Declaration militates against democratic "back-sliding." Established rules of treaty interpretation and emergent rules of customary international law both suggest that Article 25(b) of the ICCPR applies to Hong Kong, notwithstanding the United Kingdom's initial reservations; any attempt by Beijing to dictate political criteria for Chief Executive candidacy is therefore a breach of Article 25(b). The emergent principle of "democratic teleology" in customary international law further suggests that the PRC may not renege on its promise of democracy in Hong Kong.

Nonetheless, the prospect of enforcing China's international law obligations in respect of Hong Kong is slim. In the absence of any individual right to petition or of ICJ compulsory jurisdiction, available options for enforcement are limited. Other options for enforcement such as unilateral monitoring by the United Kingdom, the threat of an advisory opinion, or third-State conduct exist. However, Chinese obstinacy—even toward the United Kingdom, its counterparty in the Joint Declaration—casts doubt on the effectiveness of such measures.

Ultimately, the enforcement of China's international law obligations with respect to Hong Kong's democratization may depend on non-State actors. China has long emphasized that it values Hong Kong's economic stability and prosperity;⁴³² democratic reforms are therefore likely to be justifiable to Beijing only insofar as they fulfill these objectives. The U.S.-Hong Kong Policy Act—with its implicit threat that the United States will cease

431. See, e.g., S.C. Yeung, *Graffiti Girl—Police Killing a Chick to Scare the Monkeys*, EJINSIGHT (H.K.), Jan. 2, 2015, <http://www.ejinsight.com/20150102-graffiti-girl-police-killing-a-chick-to-scare-monkeys/> (translation of an op-ed in the *Hong Kong Economic Journal*).

432. See, e.g., *Hu Reaffirms Support to Hong Kong's Stability, Prosperity*, XINHUA, Nov. 11, 2013, http://news.xinhuanet.com/english2010/china/2011-11/12/c_131242195.htm.

to recognize Hong Kong as having any distinct international legal personality—is an especially potent economic incentive. Nonetheless, private actors, with none of the political baggage that governmental intervention carries, can bring greater pressure to bear. American Bar Association President James Silkenat warned that failed political reforms might drive international financial and legal institutions to Shanghai and Singapore.⁴³³ Ultimately, a combination of foreign investment and Hong Kong civil society may be the most effective means to prevent China from backtracking further on its commitments to Hong Kong. However, in light of increasing PRC invective against the “value bombs” of constitutionalism and human rights,⁴³⁴ and continued hostility toward democracy by pro-Beijing politicians in Hong Kong,⁴³⁵ the prospects for genuine elections in Hong Kong remain grim.

China’s disregard of the Joint Declaration also holds broader lessons, at home and abroad. Hong Kongers should be alarmed by Beijing’s overt abandonment of the Joint Declaration. Absent political willingness in the Hong Kong and Beijing Governments to protect Hong Kong’s autonomy and allow meaningful democratization, international law may become one of the few effective remaining means of exerting pressure. Beijing’s disregard for the Joint Declaration suggests that Hong Kong residents, already wary of growing Mainland encroachment into their city’s

433. Tanna Chong, *Foreign Firms may Flee Hong Kong if Reforms go Wrong Way: Top US Lawyer*, S. CHINA MORNING POST (H.K.), Nov. 5, 2013, <http://www.scmp.com/news/hong-kong/article/1347760/foreign-firms-may-flee-hong-kong-if-reforms-go-wrong-way-top-us>.

434. Party media and officials have increasingly turned to “militaristic metaphors” in criticizing ideas, such as constitutionalism. *Value Bombs*, CHINA MEDIA PROJECT, <http://cmp.hku.hk/2013/10/02/34224/> (last visited Nov. 8, 2013). See also Document 9, *supra* note 37.

435. Ann Chiang Lai-wan, a member of the pro-Beijing Democratic Alliance for the Betterment and Progress of Hong Kong (DAB), claimed that popular elections would result in “many incidents.” 蔣麗芸：普選會製造很多事端 [Ann Chiang: Universal Suffrage Will Create Numerous Incidents], MINGPAO INSTANT NEWS (Jan. 5, 2014, 5:01 PM), http://news2.mingpao.com/ins/%E8%94%A3%E9%BA%97%E8%8A%B8%EF%BC%9A%E6%99%AE%E9%81%B8%E6%9C%83%E8%A3%BD%E9%80%A0%E5%BE%88%E5%A4%9A%E4%BA%8B%E7%AB%AF/web_tc/article/20140105/s00001/1388912533900.

affairs,⁴³⁶ should expect further incursions into their civil liberties, ostensibly guaranteed by the ICCPR and the Joint Declaration.⁴³⁷

China's treatment of the Joint Declaration should also alarm its international neighbors, despite its newly conciliatory tone in foreign relations.⁴³⁸ ASEAN members, for instance, would be right to wonder whether China would abide by a maritime Code of Conduct—even if one could ultimately be agreed upon.⁴³⁹ For all of Beijing's professed respect for the "international rule of law,"⁴⁴⁰ China's disregard of its obligations toward Hong Kong suggests that such rhetoric—like the emphasis on domestic "rule of law" issues at the Fourth Plenum in 2014⁴⁴¹—should be viewed with skepticism.

436. See, e.g., James Pomfret, *In HK, China Likely to Use Pressure, Intimidation to Ward Off More Protests*, REUTERS, Dec. 12, 2014, available at <http://www.reuters.com/article/2014/12/12/us-hongkong-china-campaign-idUSKBN0JQ0W720141212?irpc=932>.

437. Inroads into press freedoms, for instance, have increasingly received international attention. See, e.g., PEN America, *Threatened Harbor: Encroachments on Press Freedom in Hong Kong* (2015), Int'l Fed'n of Journalists, *China's Media War: Censorship, Corruption & Control* (2015). See also FAC Report, *supra* note 415, ch. 6.

438. See, e.g., Matthew Miller, *China's Xi Strikes Conciliatory Note, Broadens Diplomatic Focus*, REUTERS, Nov. 30, 2014, available at <http://www.reuters.com/article/2014/11/30/us-china-southchinasea-idUSKCN0JE04J20141130>.

439. See Amanda Fernandez, *ASEAN Countries Agree to Discuss Code of Conduct in South China Sea*, GMA NEWS (Manila), Nov. 13, 2014, <http://www.gmanetwork.com/news/story/387868/news/nation/asean-countries-agree-to-discuss-code-of-conduct-in-south-china-sea>.

440. *Full Text of Chinese FM's Signed Article on Int'l Rule of Law*, XINHUA, Oct. 24, 2014, http://news.xinhuanet.com/english/china/2014-10/24/c_133740723_2.htm.

441. See, e.g., Carl Minzner, *After the Fourth Plenum: What Direction for Law in China?*, CHINA BRIEF (Nov. 20, 2014, 1:47 PM), http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=43105.

