

# The ICCPR Reporting Procedure in Special Administrative Regions of China: Process, Challenges and Perspectives

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FICHL Policy Brief Series No. 25 (2014)

## 1. Background

China signed the 1966 International Covenant on Civil and Political Rights ('ICCPR') in 1998 and has since then commenced a process of legislative and judicial reforms to prepare the ground for ratification. This process has received considerable attention from the international community and academia. Much less attention has been given to the fact that the ICCPR remains in force in the two Special Administrative Regions ('SARs') of Hong Kong ('HK') and Macao.

Before becoming SARs of China, these two cities were colonies of the United Kingdom ('UK') and Portugal respectively. They extended the reach of the ICCPR to these territories.<sup>1</sup> During the negotiation process on the return of HK in the 1980s, the effect of the ICCPR in the post-1997 period was considered. Consequently, the 1984 Sino-British Joint Declaration clearly stated that the Covenant "as applied to Hong Kong shall remain in force".<sup>2</sup> This was further recognized by the basic constitutional document of HK in 1990.<sup>3</sup> The return of Macao followed largely the example of HK, and the ICCPR remained in force under the constitutional document of Macao.<sup>4</sup>

<sup>1</sup> The UK ratified the ICCPR on 20 May 1976 and declared that the Covenant would apply to HK. Portugal ratified the ICCPR on 15 June 1978 and Resolution No. 41/1992 of the Portuguese Parliament extended the Covenant to Macao.

<sup>2</sup> See the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984), Annex 1, Section XIII (<http://www.legal-tools.org/doc/0b432d/>).

<sup>3</sup> Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('HK Basic Law') stated that the "provisions of the International Covenant on Civil and Political Rights [...] as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region" (<http://www.legal-tools.org/doc/342804/>).

<sup>4</sup> Article 40 of the Basic law of the Macao Special Administrative Region of the People's Republic of China ('Macao Basic Law')

Since the return of HK and Macao to China, the ICCPR has remained in effect in these territories. The two SARs have a continued obligation to report under the ICCPR. As the only compulsory procedural obligation of the Covenant, States Parties must submit periodic reports to the United Nation Human Rights Committee ('HRC') on measures they have adopted, giving effect to the rights recognized by the Covenant and the progress made in the enjoyment of these rights.<sup>5</sup> The participation of HK and Macao in the ICCPR reporting system deserves to be further explored.

We should review and assess how these two SARs have fulfilled their reporting obligations, engaged in the reporting procedure, and the possible impact of the ICCPR reporting system on their societies. At the same time, the reporting process in the two SARs can be viewed as valuable experience for Mainland China to understand the possible impact of and potential problems with the ICCPR reporting system. Such lessons may contribute to the ratification process of ICCPR in Mainland China.

In the following, we first review and assess the reporting process of HK and Macao post-1997 and -1999 respectively, before highlighting some potential challenges in the 'Concluding Observations' issued by the HRC to date. At the end, the brief offers some reflections on the ICCPR reporting process in the two SARs and possible implications for China.

## 2. Process

Prior to the return to China, periodic reports on HK and Macao were submitted by the UK and Portugal as supplements on their dependent territories.<sup>6</sup> The role of Chi-

repeated the relevant provision of the HK Basic Law, stating that the ICCPR as applied in Macao shall remain in force and shall be implemented through the laws of Macao SAR (<http://www.legal-tools.org/doc/e86ab3/>).

<sup>5</sup> ICCPR Article 40.

<sup>6</sup> For example, the final report by the UK in respect of HK under

na in that process was unclear. There were pessimistic views on whether the reporting obligation of HK would be affected post-1997, for example, on whether China would allow HK to submit reports or if she would insist on introducing her own amendments.<sup>7</sup> These views have been disproved by China's supportive role in the reporting process. In January 1999, China submitted the initial report prepared by HK and introduced the delegation of HK SAR to the HRC in its meeting held in November of that year, a fact welcomed by the HRC in its Concluding Observations.<sup>8</sup>

Since then, HK has actively participated in the reporting system by submitting three reports to the HRC, and Macao submitted its initial report in 2011. The two SARs prepared these reports and submitted them through China to the HRC.<sup>9</sup>

With regard to the first and second periodic reports submitted by HK, Dinusha Panditaratne has conducted a detailed study based on internal criteria (timeliness and content of report) and external criteria (public input and scrutiny).<sup>10</sup> She found that the reports were submitted timely to the HRC, with comprehensive information. The reporting process also benefitted from the scrutiny of local non-governmental organizations ('NGOs') and

media.<sup>11</sup> She concluded that "little has changed in the reporting process since 1997" and that "several aspects of the reporting process in Hong Kong might be regarded as exemplary by other states in Asia and beyond".<sup>12</sup>

The third periodic report submitted by HK in 2011 can be assessed against the same criteria. It was submitted slightly behind schedule with updated information.<sup>13</sup> The outline of the report was discussed in the HK Legislative Council, and representatives of interested NGOs presented their views during the discussion.<sup>14</sup> The media focused on the key issues of the report as discussed in the HRC meeting.<sup>15</sup> Overall, the reporting process of the third periodic report of HK satisfies the external and internal criteria.

The same criteria can also be applied to assess the report submitted by Macao SAR. After the return in December 1999, Macao took more than one decade to prepare its initial report, submitted in May 2011. Temporally, this is worse than HK, but by other criteria, the performance of Macao seems acceptable. It did provide thorough information in the report and a detailed written reply to a list of issues in a supplementary document,<sup>16</sup> for which the HRC expressed appreciation.<sup>17</sup> The report and other documents were posted on the government web site for comment. The relevant HRC meetings were covered by local media.<sup>18</sup> Considering that this is the initial report submitted by Macao SAR, the quality and publicity would seem satisfactory. There was, however, room for improvement, for example the timeliness of submission.

### 3. Challenges

At the domestic level, the positive side of the reporting procedure is obvious. It provides the State Party an opportunity to review whether its human right policy complies with the ICCPR, and to have a dialogue with various civil society actors. However, when considering the most important document of the process – the 'Concluding Observations' issued by the HRC – there are some potential challenges that deserve attention.

The Concluding Observations of the Committee serve

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the ICCPR (CCPR/C/95/Add.5) was submitted on 7 July 1995 (<http://www.legal-tools.org/doc/3b9612/>).

<sup>7</sup> Alison Conner, 'Human Rights in Post-1997 Hong Kong: Still a Key Role for International Law?', in *Southern Illinois University Law Journal*, 1997, Vol. 22, pp. 320–321.

<sup>8</sup> CCPR/C/79/Add.117, para. 3 (<http://www.legal-tools.org/doc/35e142/>).

<sup>9</sup> A factual overview of the documents and activities include: (1) In January 1999, HK SAR submitted its first periodic report (CCPR/C/HKSAR/99/1) in the post-1997 period (<http://www.legal-tools.org/doc/66975a/>). This report was considered by the HRC at its 1803rd to 1805th meetings (1–2 November 1999). The Concluding Observations concerning this report (CCPR/C/79/Add.117) was adopted on 4 November 1999 (see *supra* note 8). (2) In March 2005, HK SAR submitted its second periodic report (CCPR/C/HKG/2005/2) (<http://www.legal-tools.org/doc/ed0622/>). This report was considered by the HRC at its 2350th and 2351st meetings (on 20–21 March 2006). The Concluding Observations concerning this report (CCPR/C/HKG/CO/2) was adopted on 30 March 2006 (<http://www.legal-tools.org/en/doc/c14921/>). (3) In May 2011, HK SAR submitted its third periodic report (CCPR/C/CHN-HKG/3) (<http://www.legal-tools.org/en/doc/04b298/>). This report was considered by the HRC at its 2954th and 2955th meetings (on 12–13 March 2013). The Concluding Observations concerning this report (CCPR/C/CHN-HKG/CO/3) was adopted on 26 March 2013 (<http://www.legal-tools.org/en/doc/108a79/>). (4) In May 2011, Macao SAR submitted its first report (CCPR/C/CHN-MAC/1) (<http://www.legal-tools.org/en/doc/ab6ee7/>). This report was considered by the HRC at its 2962nd and 2963rd meeting (on 18–19 March 2013). The Concluding Observations concerning this report (CCPR/C/CHN-MAC/CO/1) was adopted on 27 March 2013 (<http://www.legal-tools.org/en/doc/1ae0f1/>).

<sup>10</sup> Dinusha Panditaratne, 'Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse Since 1997?', in *Human Rights Law Review*, 2008, Vol. 8, No. 2, pp. 295–322.

<sup>11</sup> *Ibid.*, pp. 304–318.

<sup>12</sup> *Ibid.*, p. 322.

<sup>13</sup> The HRC requested the HK SAR to submit the third periodic report in 2010.

<sup>14</sup> See the third report submitted by HK SAR, *supra* note 9, p. 1.

<sup>15</sup> See, for example, Stuart Lau and Greg Torode, 'UN charter on suffrage 'too risky' for Hong Kong to ratify', *South China Morning Post*, 19 March 2013.

<sup>16</sup> CCPR/C/CHN-MAC/Q1/Add.1 (<http://www.legal-tools.org/en/doc/e54bac/>).

<sup>17</sup> The 2013 Concluding Observations for Macao SAR, *supra* note 9, para. 2.

<sup>18</sup> See, for example, Grace YU, 'Human rights situation reasonable, but democracy legitimacy needed', *Macau Daily Times*, 22 March 2013.

as a 'report card' for a State Party under the ICCPR, with two main functions.<sup>19</sup> It provides an external assessment of the human rights record of the State Party as well as recommendations for improvement of its human rights policy.

With regard to the Concluding Observations on reports submitted by the two SARs, some of the recommendations are positive and have to a large extent been observed by the reporting SAR. For example, the HRC expressed concern in its 1999 Concluding Observations for HK SAR<sup>20</sup> that the age of criminal responsibility was seven years and recommended that it "should be raised so as to ensure the rights of children". As a response, the minimum age of criminal responsibility in HK SAR was raised to 10 years in 2003.<sup>21</sup>

However, when it comes to some political rights under the ICCPR or in relation to the constitutional structure of SARs, the assessments and recommendations provided by the Concluding Observations seem to be more challenging given the current processes of gradual political reform in the SARs.

First, the HRC has provided assessments with regard to the controversial question of universal suffrage through its Concluding Observations, which have played directly into a polarised debate that may prove to be unhelpful to the systematic improvement of this issue under the prevailing plans for constitutional development in HK SAR. In the colonial period, the UK made a clear reservation to Article 25(b) of the ICCPR.<sup>22</sup> A similar reservation was made by Portugal and it was recognized in the notification submitted by China to the UN Secretary-General with regard to the effect of the ICCPR in Macao SAR.<sup>23</sup> However, the HRC has repeatedly raised concern on this issue,<sup>24</sup> and provided a controversial assessment of the reservation in its 2006 Concluding Observations.<sup>25</sup> According to the interpretation of the HRC,

the reservation to Article 25(b) in HK SAR is no longer compatible with the ICCPR. In its 2013 Concluding Observations with regard to the third report submitted by HK SAR and the first report submitted by Macao SAR, the HRC recommended both SARs "to consider steps leading to withdrawing the reservation to article 25(b) of the Covenant".<sup>26</sup> The Solicitor General of HK SAR rejected this recommendation due to a risk of law suits that could derail the reform process.<sup>27</sup>

Admittedly, due to the "broad supervisory role of the treaty bodies under the specific treaties", the HRC can address issues where the State has legitimate discretion, such as reservations.<sup>28</sup> Nevertheless, it is necessary to keep in mind that the assessments and recommendations provided by the HRC in its Concluding Observations are in essence non-legally-binding. The HRC does not have judicial powers. It is merely a treaty body to monitor the implementation of the ICCPR. Reservations such as these belong to the realm of legitimate State discretion and can only be changed or withdrawn by a State, even if non-governmental organisations or other actors may fundamentally disagree with the reservations.<sup>29</sup>

However, despite its non-binding nature, the assessment provided by the HRC in its Concluding Observations has had a significant socio-political impact on the ongoing reform process of the electoral system of HK SAR. Universal suffrage as the "ultimate aim" for the process to select the Chief Executive and members of the Legislative Council has been clearly stipulated by the HK Basic Law.<sup>30</sup> Moreover, as replied to a report submitted by the Chief Executive of HK, the Standing Committee of the National People's Congress of the People's Republic of China ('NPCSC') decided in December 2007 that the election of the fifth Chief Executive of HK SAR in 2017 "may be implemented by the method of universal suffrage".<sup>31</sup> The opposition group, however,

<sup>19</sup> Sarah Joseph, Jenny Schultz and Mellsa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Second Edition, Oxford University Press, 2004, p. 18.

<sup>20</sup> See the 1999 Concluding Observations, *supra* note 9, para. 17.

<sup>21</sup> See Panditaratne, *op. cit.*, p. 318.

<sup>22</sup> The reservation of UK government under the ICCPR (<http://www.legal-tools.org/doc/88a7d1/>).

<sup>23</sup> The initial report submitted by Macao SAR, *supra* note 9, para. 6.

<sup>24</sup> See, for example, the 1999 Concluding Observations, *supra* note 8, para. 12.

<sup>25</sup> It stated that: "[...] it referred to the reservation made by the United Kingdom according to which article 25 b) did not require the establishment of an elected legislature in Hong Kong. The Committee took the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. As stated at that time, and reiterated in its concluding observations on the initial report of the HK SAR, adopted on 4 November 1999, the Committee still considers that the electoral system in Hong Kong does not meet the requirements of Article

25, as well as Articles 2(1) and 26 of the Covenant". See the 2006 Concluding Observations, *supra* note 9, para. 18.

<sup>26</sup> See the 2013 Concluding Observations for HK SAR, *supra* note 9, para. 6, and the 2013 Concluding Observations for Macao SAR, *supra* note 9, para. 7.

<sup>27</sup> He said: "If this [withdrawal] is done [...] there could be and certainly would be domestic challenges brought before the HKSAR courts to challenge the existing system. We cannot be diverted and distracted from the challenge to implement democracy by unnecessary lawsuits", see Stuart Lau and Greg Torode, *supra* note 15.

<sup>28</sup> Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies', in *Human Rights Law Review*, 2006, Vol. 6, p. 27.

<sup>29</sup> RAO Geping, 'The International Covenant on Civil and Political Rights is Not the Legal Basis for Hong Kong's Universal Suffrage', in *Peking University Law Review*, 2008, Vol. 20, pp. 453-454.

<sup>30</sup> See Articles 45 and 68 of the HK Basic Law, *supra* note 3.

<sup>31</sup> Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the

still believed that the reservation to Article 25(b) was denied by the HRC and claimed that the reform of the electoral system should be based on this provision. Therefore, they urged universal suffrage in 2012.<sup>32</sup> Until recently, different actors were still debating the effect of Article 25(b) of the ICCPR.<sup>33</sup> This situation could actually lead to a delay in the introduction of universal suffrage.<sup>34</sup>

Second, the recommendations of the HRC in terms of the judicial structure and interpretation of the Basic Laws of the SARs are not easy to implement. This issue seems less contentious, but the HRC has repeatedly stressed it in its Concluding Observations.<sup>35</sup> According to the stipulation of the Basic Laws of HK and Macao, the NPCSC has the power of interpretation of the Basic Law.<sup>36</sup> The HRC recommended that the two SARs “should be ensured that all interpretations of the Basic Law [...] are in full compliance with the Covenant”.<sup>37</sup> However, the interpretative power of the NPCSC in relation to the HK and Macao Basic Laws is in accordance

with the contemporary Chinese constitutional structure, which falls outside the scope of this brief.<sup>38</sup> As local governments, it is difficult for the SARs to influence the interpretative power of the NPCSC. In this regard, this recommendation is hard to realise for the SARs.

#### 4. Perspectives

Despite the transformation from being British and Portuguese colonies to the status of SARs of China, the two territories have continuously participated in the reporting system of the ICCPR. The reporting process in the two SARs can be considered a two-sided story. On the one hand, there are certain positive aspects with regard to the reporting procedure as well as many helpful recommendations provided by the HRC. On the other hand, however, despite the non-binding nature of the HRC’s recommendations, they have the capacity to play into highly polarised socio-political contexts. Criticism by treaty bodies can indeed lead to positive change. But it may also reinforce disagreements in ways which delay commonly intended reform processes.

Substantively speaking, China has already commenced profound legal and judicial reforms to prepare the ground for the ratification of the ICCPR.<sup>39</sup> But she may not be entirely familiar with the procedural aspects of the ICCPR. The experiences of the two SARs of HK and Macao provide an opportunity for China to understand more fully the ICCPR reporting procedure. This may be helpful in the further consideration of China’s ratification of the ICCPR.

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*PURL: <http://www.legal-tools.org/doc/8dafd6/>*

<sup>38</sup> According to Article 67(4) of the Chinese Constitution, the NPCSC has the power to “interpret statutes” which includes the HK and Macao Basic Laws (<http://www.legal-tools.org/en/doc/0764a1/>).

<sup>39</sup> For example, it amended the Law on Lawyers and the Law on State Compensation for the ratification process, see ‘China amends law for ratification of ICCPR’, *Xinhua News Agency*, 14 July 2011. For an academic review on this process, see Kaite Lee, ‘China and the International Covenant on Civil and Political Rights: Prospects and Challenges’, *Chinese Journal of International Law*, pp. 445–474.

Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong (<http://www.legal-tools.org/en/doc/ec1170/>).

<sup>32</sup> Summary from Michael Davis, ‘Universal suffrage naysayers have no legal leg to stand on’, *South China Morning Post*, 25 February 2014. Yeung Chi-Keung, ‘Opposition seeks to create impasse on reform’, *China Daily (HK Edition)*, 24 November 2009.

<sup>33</sup> See, for example, the views between Michael Davis, *op. cit.*, and Song Sio-Chong, ‘HKBA submission worthy of discussion’, *China Daily (HK Edition)*, 5 May 2014.

<sup>34</sup> It is worth noting that the NPCSC voted on 31 August 2014 on the plan for 2017 Chief Executive elections in HK SAR. Under this plan, universal suffrage is confirmed, see Kahon Chan, ‘Rules set for HK chief vote’, *China Daily (HK Edition)*, 1 September 2014. But the opposition group is not satisfied with this plan since it requires would-be candidates to secure the support of more than half of a 1,200-strong nominating committee before going to the public ballot in 2017, see Joyce Ng, ‘UN Human Rights Committee to discuss universal suffrage’, *South China Morning Post*, 10 September 2014.

<sup>35</sup> See the 1999 Concluding Observations, *supra* note 8, para. 10; 2006 Concluding Observations, *supra* note 9, para. 18; 2013 Concluding Observations for HK SAR, *supra* note 9, para. 5; 2013 Concluding Observations for Macao SAR, *supra* note 9, para. 6.

<sup>36</sup> HK Basic Law, *supra* note 3, Article 158; Macao Basic Law, *supra* note 4, Article 143.

<sup>37</sup> The 2013 Concluding Observations for HK SAR, *supra* note 9, para. 5, and the 2013 Concluding Observations for Macao SAR, *supra* note 9, para. 6.