

# HOUSTON JOURNAL OF INTERNATIONAL LAW

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VOLUME 10

AUTUMN 1987

NUMBER 1

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## THE INTERNATIONAL LEGAL STATUS OF HONG KONG UNDER POST- TRANSITIONAL RULE

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### I. INTRODUCTION

Hong Kong has functioned as a British Crown colony since 1842 when Great Britain (Britain) and China signed the Treaty of Nanking<sup>1</sup> under which Hong Kong was ceded in perpetuity. By means of the constitutional devices of Letters Patent and Orders in Council, the various parts forming the territory of Hong Kong have been brought under British administration.<sup>2</sup> The Government of the People's Republic of China (PRC), however, has consistently maintained that the three British treaties relating to Hong Kong are "unequal treaties"<sup>3</sup> and hence not binding upon China (and that Hong Kong is therefore part of Chinese territory). It consequently requested the removal of Hong Kong from the colonial territories listed by the United Nations (UN) under the Declaration on

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1. Treaty of Peace, Friendship, Commerce & Indemnity Great Britain-China, Aug. 29, 1842 30 Brit. For. 389, 93 Parry's T.S. 465 reprinted in Wesley-Smith, *British Dependent Territories: Hong Kong* in 5 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES 21 (A. & E. Blaustein ed. 1985) [hereinafter Blaustein]. Stonecutter Island and the Southern part of the Kowloon Peninsula were ceded under the Convention of Peace and Friendship Between Great Britain and China, signed at Peking October 24, 1860. *Id.* at 23. In 1898 the New Territories were leased to Britain for 99 years. *Id.* at 25.

2. See Charter for Erecting the Island of Hong Kong into a Separate Colony, and for Providing for the Government Thereof, April 5, 1843, Letters Patent. *Id.* at 22. Order in Council Providing for the Administration of the Territories Adjacent to Hong Kong Acquired by Her Majesty Under the Anglo-Chinese Convention of October 24, 1860. *Id.* at 27.

3. See P. WESLEY-SMITH UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES 162-63, 167-68, 185-87 (1980).

the Granting of Independence to Colonial Territories and Peoples.<sup>4</sup> The PRC's request was granted.<sup>5</sup>

The success of the Chinese request notwithstanding, the doctrine of the invalidity of unequal treaties cannot be said to be accepted as part of international law.<sup>6</sup> Indeed, despite views of some Chinese and Soviet jurists to the contrary,<sup>7</sup> there is no rule of international law invalidating a treaty merely by reason of inequality of obligations unless the conclusion of the treaty has been procured by a threat or use of force in violation of the principles of international law embodied in the UN Charter.<sup>8</sup> In any event, the application to the above British treaties<sup>9</sup> of the current rules of international law as expressed in the Vienna Convention on the Law of Treaties is precluded by virtue of the principle of nonretroactivity contained therein.<sup>10</sup>

This article will examine first, Hong Kong's present status in international law; second, the issue of self-determination for Hong Kong; third, the Sino-British Joint Declaration on the Future of Hong Kong, its

4. See Letter of March 10, 1972 from the Chinese delegate, Huang Hu, to the UN Committee on Decolonization, *reprinted in* 1 *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 384 (J. Cohen & H. Chiu eds. 1974) [hereinafter Cohen].

5. *Id.*

6. As elaborated by Chiu, no support can be found in the writings of Western international law scholars for the doctrine of the invalidity of unequal treaties. See Chiu, *Comparison of Nationalist and Communist Chinese Views of Unequal Treaties in CHINA'S PRACTICE OF INTERNATIONAL LAW*, 241, 267 (J. Cohen ed. 1972). Moreover, Western state practice includes several cases of acceptance of the validity of treaties which might be deemed "unequal." See Leng, *The Sino-Soviet Dispute in LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA AND SELECTED PROBLEMS OF INTERNATIONAL LAW* 263, 279 n.47 (S. Leng & H. Chiu eds. 1972).

7. See Dicks, *Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 *CHINA QUARTERLY* 727, 734 (1983) [hereinafter Dicks].

8. Vienna Convention on the Law of Treaties, art. 52 U.N. Doc. A/CONF. 39/27, *reprinted in* 8 *INT'L LEGAL MATERIALS* 679, 698 (1969) [hereinafter Vienna Convention]. Note, however, that "force" in art. 52 does not encompass economic and military coercion, although (as a compromise solution of conflicting state views) a Declaration incorporated in the Final Act of the Conference "[s]olemnly condemns the threat or use of pressure in any form, whether military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principle of the sovereign equality of States and freedom of consent." See also Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, Final Act of the U.N. Conference on the Law of Treaties, *reprinted in* 8 *INT'L LEGAL MATERIALS* 728, 733 (1969). It should nonetheless be noted that the Declaration is viewed as representing *lex ferenda* (the law which is desirable to establish) as distinct from *lex lata* (existing law). See H. Chiu, *THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 104 (1972) [hereinafter Chiu].

9. See *supra* note 1.

10. Art. 4 of the Vienna Convention, *supra* note 8, reads: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

For a general analysis of the effect on the validity of the Hong Kong treaties of arguments based on inequality see Note, *Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?*, 7 *FORDHAM INT'L L.J.* 534 (1984).

validity, implementation, interpretation, and the issue of nationality under the Joint Declaration; and last, Hong Kong's potential international status after the transition to Chinese rule in 1997. It will be argued that the Joint Declaration is a valid international treaty which provides a framework for preserving Hong Kong as an autonomous "city-state" whose socio-economic system reflects capitalist principles. At the same time, the limitations of the agreement will be highlighted and it will be emphasized that the future of the territory does not depend on the validity of the agreement alone but also depends on the willingness and ability of the PRC, Hong Kong and third parties to translate into reality the complex vision which it embodies.

## II. HONG KONG'S PRESENT STATUS IN INTERNATIONAL LAW

From a pragmatic point of view, Britain's responsibility for, and its administration over the territory have been acknowledged both by the international community and the PRC.<sup>11</sup> States have established treaty relations and other interests with the United Kingdom (UK) with respect to Hong Kong.<sup>12</sup> For its part, the PRC has not directly challenged or expressed any misgivings about Britain's conclusion of bilateral and multilateral agreements on behalf of Hong Kong, or the fact that it has represented the territory and its inhabitants in relation to third states.<sup>13</sup> Furthermore, the PRC has extended recognition to foreign consular representatives accredited by the British government in Hong Kong. It has also accepted the right of the UK to issue currency in Hong Kong (one of the most important attributes of sovereignty).<sup>14</sup>

Although under ultimate British control, Hong Kong has enjoyed a unique status with a considerable measure of independence in international contexts.<sup>15</sup> Thus, for example, it is treated as a separate territory for the purpose of multilateral agreements such as the General Agreement on Tariffs and Trade (GATT) and the United Nations Conference on Trade and Development (UNCTAD).<sup>16</sup> It is also a member of several

11. As pointed out by one observer, "[b]y removing Hong Kong from the list of colonies due to become independent, China in effect allowed the status quo to continue in 'Hong Kong.'" Ching, *The MacLehose-Youde Years: Steadying the 'Three Legged Stool'*. . . *The Historic Triangle of Britain, China and Hong Kong: A Sixty-Year Retrospective 1927-1987*, Hong Kong Baptist College, 11 June 1987, at 9.

12. See Dicks, *supra* note 7, at 737-39.

13. China's pragmatism can be attributed to the economic benefits which it derives from Hong Kong. See Jao, *Hong Kong's Role in Financing China's Modernization*, in CHINA AND HONG KONG 12 (A. Youngson ed. 1983).

14. See Dicks, *supra* note 7, at 739-41.

15. See Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. & POL'Y 171, 172-73 (1986) [hereinafter Mushkat].

16. See Booklet by British Caledonian Airways, BUSINESS DESTINATION HONG KONG 55 (1984) [hereinafter BUSINESS DESTINATION]. Note that in 1986 Hong Kong became a party

international organizations, including the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the Organization for Economic Cooperation and Development (OECD), the Asian Productivity Organization (APO) and the Asian Development Bank (ADB).<sup>17</sup> Furthermore, in several instances over the past decades, the Hong Kong Government, acting with the consent of the UK authorities,<sup>18</sup> has negotiated agreements with foreign governments concerning such critical matters as textile quotas.<sup>19</sup> It is also worth noting that local officials have concluded a number of agreements with the Provincial government of Guangdong on questions of significant interest, such as the supply of water.

### III. THE ISSUE OF SELF-DETERMINATION FOR HONG KONG

Despite the high degree of independence enjoyed by Hong Kong, it remains in the final analysis a "colony" or a "non-self-governing territory." The question arises, whether its case falls within the terms of the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514).<sup>20</sup> Under this declaration it is required that "immediate steps shall be taken in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the people of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire. . ."<sup>21</sup>

Evidently, the UK government did not consider the issue of self-determination for Hong Kong a cause for waging a Falklands-type war. The UK government views Hong Kong differently presumably because it is a Chinese community which cannot be controlled indefinitely by a European power. In addition, Britain is obviously aiming at minimizing friction with the PRC and accommodating the latter's "reasonable" demands. Unlike the Falklands and Gibraltar, Hong Kong is apparently an issue which cannot be managed through confrontational tactics because the other party (the PRC) is a fairly formidable opponent.<sup>22</sup> Nor

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to GATT in its own right. See Hong Kong Government, HONG KONG 1987 at 29 (1987) [hereinafter HONG KONG].

17. See BUSINESS DESTINATION, *supra* note 16, at 55; HONG KONG 1987, *supra* note 16, at 76.

18. See Dicks, *The Law and Practice of Hong Kong and Foreign Investment* in INTERNATIONAL LAW PROBLEMS IN ASIA 153, 156 (Shepherd ed. 1969).

19. Bilateral restraint agreements with textiles importing countries are negotiated by Hong Kong within the Multi Fibre Arrangement (MFA) under the GATT. See HONG KONG 1987, *supra* note 16, at 69-70.

20. G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc A1468 (1960).

21. *Id.* at ¶ 5.

22. See Johnson, *The Mouse-trapping of Hong Kong: A Game in which Nobody Wins*, in 20 ISSUES AND STUDIES 26, 27 (1984).

did it declare its commitment to "honour the freely and democratically expressed wishes" of the Hong Kong people as it had promised to the inhabitants of Gibraltar.<sup>23</sup> The PRC's position was made clear when in 1972 it reasserted that the question of Hong Kong was a matter of Chinese sovereign right and that, as a consequence, Hong Kong should not be included in the list of colonial territories referred to in Resolution 1514.<sup>24</sup>

The Sino-British negotiations on the future of Hong Kong were treated throughout as a strictly bilateral, or even unilateral, affair and any notion of a "three-legged stool,"<sup>25</sup> real or apparent, was summarily dismissed.<sup>26</sup> The agreement itself,<sup>27</sup> referred to as the Joint Declaration, was viewed by the parties as a mere transfer of sovereignty as from a specific date.

Could the people of Hong Kong nonetheless claim a violation of a right to self-determination and perhaps call for the voidance of the Joint Declaration<sup>28</sup> on the ground of its conflict with a peremptory norm of international law (*jus cogens*) as stipulated in article 53<sup>29</sup> of the Vienna

23. See *United Kingdom Materials on International Law* in 52 BRIT. Y. B. INT'L L. 361, 386 (1981) (Lisbon statement made on 10 April 1980 by the UK and Spanish Governments). See also 56 BRIT. Y. B. INT'L L. 395-96 (1985) (Prime Minister Thatcher's statement in the House of Commons).

24. See Cohen, *supra* note 4. The content of Hu's letter was as follows:

As is known to all, the question of Hong Kong and Macao belong to the category of questions resulting from a series of unequal treaties left over by history, treaties which the imperialists imposed on China.

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the question of Hong Kong and Macao is entirely within China's sovereign right and does not fall under the category of colonial territories.

Consequently, they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and peoples.

With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions

25. . . .  
25. See Johnson, *supra* note 22, 40-41.

26. *Id.*

27. For the Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, see Blaustein, *supra* note 1, at 90 reprinted in 23 INT'L LEGAL MATERIALS 1366 (1984) [hereinafter Draft Agreement].

28. *Id.* Note that while technically the "Joint Declaration" constitutes only part of the Sino-British Agreement (other parts include three Annexes and Exchanges of Memoranda) the terms are used interchangeably.

29. The Vienna Convention on the Law of Treaties, *supra* note 8, art. 53:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Convention on the Law of Treaties?<sup>30</sup> The answer to the first part of the question largely depends on whether the people of Hong Kong as such constitute "self"<sup>31</sup> which would enable them to claim the right to determine their political status. An argument has been advanced that "a cohesive colony with an independent purpose, its own system of laws, and a clearly defined territory . . . [is] a prime candidate for self-determination",<sup>32</sup> and that Hong Kong qualifies as such given the unique nationality of its people, the separate and distinct nature of its territory, the governing capability of its institutions and its capacity to enter into relations with other states.<sup>33</sup> Yet, such a notion has clearly been rejected by the PRC<sup>34</sup> implying that the recovery of sovereignty over Hong Kong gave expression to the right of self-determination of the entire Chinese people.<sup>35</sup> Indeed, the acceptance by the UN of the PRC's request to remove Hong Kong from the list of colonies<sup>36</sup> combined with the absence

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30. *Id.* Claims concerning the preemptory nature of the doctrine of self determination are discussed in M. POMERANCE, SELF DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UN 63-72 (1982) [hereinafter POMERANCE].

31. None of the relevant international documents including the UN Charter, G.A. Resolution 1514, *supra* note 20, the two 1966 International Covenants on Human Rights *reprinted in* 61 AM. J. INT'L L. 861 (1967) and the 1970 Declaration or Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN Resolution 2625 (XXV), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 35 (1972)) contains a definition of the "peoples" who are the bearer of the right to self-determination. Nor are objective criteria furnished therein to separate legitimate from illegitimate claims. On the problem of "defining the 'self'" and "separating the intertwined territorial, ethnic and time factors" see Pomerance, *Self Determination Today: The Metamorphosis of an Ideal*, 19 ISRAEL L. REV. 310, 311-12, 320-27 (1984) [hereinafter *Metamorphosis*].

32. See Comment, *Self Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 853-54 (1985).

33. For a further discussion of this point see Wesley-Smith, *Settlement of the Question of Hong Kong*, 17 CAL. W. INT'L L. J. 116, 117-19 (1987). Wesley-Smith notes additional factors as supporting a claim by Hong Kong people for self-determination, namely their cultural distinction from the Mainlanders, absence of PRC influence in Hong Kong's affairs, the marked difference in the political and economic systems between Hong Kong and the Mainland and the significant role played by Hong Kong in the world economy. *Id.*

34. Since its establishment in 1947 the PRC has declared on various occasions that all Hong Kong Chinese, whether they are British subjects or not, are Chinese nationals. Indeed, in its reference to persons of Chinese ethnicity, China has always differentiated between two categories of Chinese: that of "compatriots" (i.e. those who live in Chinese sovereign territory including, Hong Kong, Macao and Taiwan) and "overseas Chinese" (i.e. those who reside in a foreign territory). For an extensive discussion of the PRC's policy towards Hong Kong people see Chang, *The Fate of Chinese British Subjects in Hong Kong: The Policy of Non-Recognition of the People's Republic of China, Working Paper* 1986. Note that in its Memorandum which formed part of the Joint Declaration, the government of the People's Republic of China reaffirmed that under its nationality law "all Hong Kong Chinese compatriots, whether they are holders of 'British Dependent Territories Citizens' Passport' or not, are Chinese nationals". Blaustein, *supra* note 1; Chinese Memorandum at 117.

35. See Draft Agreement, *supra* note 27, art. 1: "The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1987" [emphasis added].

36. See *supra* note 5.

of a strong local nationalist sentiment<sup>37</sup> and relevant UN practice<sup>38</sup> may indicate that if the question of the Hong Kong "self" were adjudicated by the international community, the PRC position would have attracted support, either active or passive.

Doubts have also been raised as to whether the principle of self-determination has attained the status of *jus cogens*. Derogation from such *jus cogens* is proscribed.<sup>39</sup> Such skepticism is reinforced by the "vagueness and indeterminacy" of the principle.<sup>40</sup> There is also idiosyncrasy and hypocrisy in its application.<sup>41</sup> The relative stature of the principle of self-determination is furthermore evident in the light of its conflicts with other fundamental norms of international law such as territorial integrity,<sup>42</sup> non-intervention<sup>43</sup> and sovereign equality.<sup>44</sup> Indeed, Resolution 1514 itself acknowledges a potential conflict between the principle of self-determination and the fundamental principle of territorial integrity in its stipulation that "any attempt aimed at a partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter."<sup>45</sup>

Needless to say, an argument against self-determination for the Hong Kong people based on territorial integrity would find support in

37. The grievances that fed nationalist movements in other British colonies—ethnic discrimination, economic underdevelopment, meagre opportunities for upward social mobility and poverty of the masses—are not to be found, or found in only a mild form, in Hong Kong. S. Lau, *Decolonization without Independence: The Unfinished Political Reforms of the Hong Kong Government* 10, (study for the Centre for Hong Kong Studies), Institute of Social Studies, The Chinese University of Hong Kong (1987).

38. The practice in question relates to cases involving strong objections and counter claims by powerful neighboring States, e.g., Goa, East Timor, Ifni, Gibraltar and Falklands. See *Metamorphosis*, *supra* note 31, at 322-23.

39. See POMERANCE, *supra* note 30. For the view that self-determination was never in fact an operative principle of the UN Charter but rather a *desiderata* of it see Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISRAEL L. REV. 509, 511 (1975).

40. POMERANCE, *supra* note 30, at 24-25.

41. See Resolution 1514, *supra* note 20.

42. See BASIC DOCUMENTS IN INTERNATIONAL LAW *supra* note 31, at 37. The 1970 Declaration on Principles of International Law provides: "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." *Id.* Demands for secession by a section of a nation clash with claims to territorial integrity or political independence of the State from which that section wishes to separate itself.

43. See *id.* at 40. "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter." (This principle in effect also protects the territorial integrity and political independence of States). Self-determination struggles often involve claims to external support from other states in manifest contradiction to the principle of non-intervention. *Id.*

44. *Id.* at 43. "The principle of sovereign equality of States" refers to the inviolability of States' territorial integrity and the rights of States to freely choose and develop their political, social, economic and cultural systems. The principle implies that sectional claims within a State conflict with the right of the State to develop as an aggregate entity.

45. See POMERANCE, *supra* note 30.

consistent statements by PRC officials that Hong Kong was an internal problem and part of Chinese territory. The idea of the maintenance of national unity and territorial integrity is reemphasized in the Sino-British accord, under which Hong Kong is declared as part of the PRC and its people are not regarded as constituting a special population or special nation of Hong Kong.<sup>46</sup>

It should be stressed, however, that the essence of self-determination is in the method not the result.<sup>47</sup> Self-determination need not culminate in full independence and may also be accomplished by free association with an independent state or an integration with such a state provided it follows an informed and democratic process, paying due regard to the freely expressed will of the people.<sup>48</sup>

Arguably, therefore, if the special legal status and the large measure of autonomy envisaged under the Sino-British Joint Declaration<sup>49</sup> for the territory materialized, regardless of the lack of full independence, the aspirations of the Hong Kong people as inferred indirectly would have been satisfied.<sup>50</sup>

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46. See Draft Agreement, *supra* note 27, art. 3(1), at 1371 which provides: "[u]pholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish . . . a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong." See also *supra* note 34.

47. See POMERANCE, *supra* note 30, at 24-25.

48. See Resolution 1514, *supra* note 20 and accompanying text. It is interesting to note that, having surveyed twenty-two instances of non-sovereign entities and federal states, Hannum and Lillich have concluded that a trend might in fact be discerned "away from independence and full statehood as the only answer to the problems perceived either by ethnic communities within existing States or by non-self-governing territories which have yet to emerge fully on the international stage." Hannum and Lillich, *Concept of Autonomy in International Law*, in *MODELS OF AUTONOMY* 215, 253-54 (Y. Dinstein ed. 1981) [hereinafter Hannum & Lillich].

49. See *infra* notes 51-111 and accompanying text.

50. It may be noted that while the general requirement for determining the people's aspirations is through an "informed and democratic process," it is by no means clear that plebiscites are the only proper means of ascertaining the population's desires. Indeed, UN practices seem occasionally to sanction processes which deviate from democratic norms. See discussion *Metamorphosis*, *supra* note 31, at 315-16, 330-31. It is in any event unlikely that the aspirations of the Hong Kong people would be determined by a "genuine" democratic process as it appears that neither the PRC Government nor the Hong Kong Government have taken active steps to promote "genuine" democracy in the territory. For discussion of the Chinese attitude see Chen, *Beijing Warns Hong Kong About Tilt to Democracy*, South China Morning Post, October 1, 1985, at 2.

#### IV. THE SINO-BRITISH JOINT DECLARATION ON THE FUTURE OF HONG KONG

##### A. *Its validity as a treaty under International Law*

With the exception of reservations expressed by some commentators,<sup>51</sup> the designation of the Sino-British accord as a "Declaration" does not devalue its legal effect as an international agreement.<sup>52</sup> It is clear that the parties themselves regard it as a binding legal instrument. Both prior to and after the announcement of the Declaration, the PRC and UK representatives stated that it constitutes an international agreement which "provides an effective guarantee for Hong Kong's future prosperity and stability."<sup>53</sup> The parties' sincere intention to contract a legally binding agreement is also reflected in their meticulous observance of the established practices regarding treaty making, namely accreditation of persons who conducted the negotiations, negotiations and adoption of the text (September 26, 1984), ratification, entry into force (May 27, 1985) and finally registration with the UN in accordance with article 102 of the UN charter (June 13, 1985).

At the same time, it is evident that the PRC and the UK opted for a special technique of treaty making which afforded each of them the opportunity to reserve their particular legal opinions in drafting the respective declarations.<sup>54</sup> Thus, "[t]he Government of the PRC declares . . . that it has decided to resume the exercise of sovereignty over Hong Kong" whereas the "Government of the UK declares that it will restore Hong Kong to the PRC."<sup>55</sup> The transfer of sovereignty is absolute<sup>56</sup> and

51. See, e.g., Schlender & Wong, *Businessman-like Plans for Hong Kong*, Asian Wall St. J., September 28, 1984, at 1.

52. See Vienna Convention, *supra* note 8, at 680-81. Art.2(1)(a) defines "treaty" as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." [emphasis added]. *Id.* See also ILC's commentary in *Summary Records of the 870th Meeting*, [1966] 2 Y.B. INT'L L. COMM'N 185, 188, U.N. Doc A/CN.4/186. It is interesting to note that under Chinese law as long as a written statement endorsed by two or more governments records not merely general principles but agreements on specific questions that incorporate definite rules of conduct it will be legally binding on the parties (no reference made to form). See Cohen, *Legal Implications of Recognition of the People's Republic of China*, 72 A. SOC'Y INT'L L. PROC. 240, 242 (1978). And as observed by Hsiung, the Chinese tend to "look to the consensual intent rather than the specific modality or form of an agreement as the source of its binding force." J. HSIUNG, *LAW AND POLICY IN CHINA'S FOREIGN RELATIONS* 223 (1972).

53. See *Hong Kong Lives!* Asiaweek, October 5, 1984, at 22 (statement by Chinese Deputy Foreign Minister Zhou Nan at the signing of the agreement); for similar British statements see Ching, *Hong Kong Clears the First Hurdle*, Asian Wall St. J., October 1, 1984, at 6 (quoting British Foreign Secretary Sir Geoffrey Howe and Hong Kong's later Governor Sir Edward Youde).

54. See Ress, *The Hong Kong Agreement and Its Impact on International Law* (Taipei, Taiwan) 6-8 (March 3-8, 1986) (a paper presented at an international symposium on Hong Kong: A Chinese and International Concern).

55. See Vienna Convention, *supra* note 8, arts. 1 and 2.

a termination of the treaty for whatever reason will not entitle the UK to recover sovereignty.<sup>57</sup> Indeed, since it involves a partially consummated transaction, the Joint Declaration has given rise to "territorial" rights which are "inviolable" and cannot suffer from any subsequent termination of the treaty which originally created them.<sup>58</sup> Nor for that matter could the parties invoke article 62 of the Vienna Convention on the Law of Treaties in support of termination of the Sino-British Joint Declaration by virtue of a change of circumstances (e.g. changes in the internal structure of the (Hong Kong Special Administrative Region)) given the nature of the agreement as a territorial treaty establishing a boundary<sup>59</sup> and a territorial status.<sup>60</sup>

The effectiveness of the Joint Declaration, however, as distinct from its validity, hinges on complex factors which may induce a sense of uneasiness among those seeking a high degree of certainty. The reason lies in the fact that the PRC is perceived as an actor that operates in the national and international arenas in a manner which reflects *ad hoc* interests of the faction in power rather than under international legal agreements.<sup>61</sup> Yet, analysts have offered a number of compelling reasons—economic, political and social—for Chinese adherence to the accord.<sup>62</sup> Commentators have also suggested that the PRC record of honoring its international agreements is reassuring insofar as future compliance with

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56. In accordance with section 1(2) of the Hong Kong Act 1985 ("An Act to make provision for and in the connection with the ending of British sovereignty and jurisdiction over Hong Kong"), "[a]s from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong." Under the Act this section came into force on May 27, 1985 upon the exchange of instruments of ratification of the Joint Declaration between the Government of the UK and the PRC Government.

57. See Vienna Convention, *supra* note 8, art. 70, sec. 1(b) which provides that the termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

58. See A. DAVID, THE STRATEGY OF TREATY TERMINATION, LAWFUL BREACHES AND RETALIATIONS 14 (1975). "[T]o admit that consummated transactions can be affected by later changes in circumstances would expose territorial and other possessions to insecurity . . ." which will result eventually in a breach of international peace and order. *Id.* at 209.

59. Under the Vienna Convention, *supra* note 8, art. 62, § 2, "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty (a) if the treaty establishes a boundary. . . ."

60. Note that although the exception in article 62 has not been formally extended to all territorial rights *per se*, objections raised in this regard are confined to treaties which cannot be said to have been executed *uno actu* (e.g., treaties guaranteeing rights to passage or authorizing the establishment of military bases). See Haraszti, *Treaties and the Fundamental Change of Circumstances*, III RECUEIL DES COURS 1, 66-67 (1975). Arguably, a treaty such as the Sino-British Joint Declaration which defines territorial sovereignty can be assimilated to a "boundary treaty" for the purpose of exclusion from the ambit of the *Rebus Sic Stantibus* claim under article 62, § 2.

61. See L. PYE, THE DYNAMICS OF CHINESE POLITICS 6-13 (1981).

62. See Comment, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEX. INT'L L.J. 167, 184-87 (1985) [hereinafter *Legal Aspects*]; Day, *The Recovery of Hong Kong by the People's Republic of China—A Fifty Year Experiment in Capitalism and Freedom*, 11 SYRACUSE J. INT'L L. & COMM. 625, 643-48 (1984).

the Joint Declaration is concerned.<sup>63</sup>

## B. Implementation

### (1) Formal/Institutional

The formal implementation of the Joint Declaration does not seem to pose any obvious problems. Indeed from an institutional standpoint, the implementation process has progressed according to schedule<sup>64</sup> and significant achievements have been registered.<sup>65</sup> The Sino-British Joint-Liaison Group, set up under the terms of the accord on May 27, 1985 has met regularly and established several subgroups of experts to discuss specific issues with a view to ensuring a smooth transfer of government and the continued application of international rights and obligations to Hong Kong after 1997.<sup>66</sup> Similarly, the Sino-British Land Commission, which was mandated to monitor and consult on land matters, has been quite effective in constructing land disposal programs, including accounting arrangements for the sharing of income from land sales and devising legal documents for use in transactions.<sup>67</sup> Organizational progress has also marked the work of the Basic Law Drafting Committee. This Committee was appointed by the Chinese National People's Congress in accordance with paragraph 3(12) of the Joint Declaration and the policies of the PRC regarding Hong Kong as elaborated in annex I of the Joint Declaration.<sup>68</sup> The Basic Law Drafting Committee is charged with the responsibility of producing a draft Basic Law for the HK SAR in 1988. In addition, the Basic Law Consultative Committee formed by the Chinese

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63. See *Legal Aspects*, *supra* note 62; Mushkat, *supra* note 15, at 193-94.

64. For an account of the developments which are described in the following paragraphs see WHITE PAPER ON THE ANNUAL REPORT ON HONG KONG 1984-85 TO THE UNITED KINGDOM PARLIAMENT, 18 December 1985 [hereinafter WHITE PAPER I] WHITE PAPER ON THE ANNUAL REPORT ON HONG KONG 1985-86 TO THE UNITED KINGDOM PARLIAMENT, 21 February 1987 [hereinafter WHITE PAPER II].

65. Including a Sino-British agreement that Hong Kong should be deemed a separate contracting party to the GATT and should continue in that status after 1997 in the name of "Hong Kong, China," see WHITE PAPER II, *supra* note 64, at 3; an agreement for the continued membership of Hong Kong in the Asian Development Bank under which the PRC will guarantee Hong Kong's financial obligations to the Bank after 1997, see WHITE PAPER I, *supra* note 64, at 2; an agreement on transitional measures relating to the principal travel and identity documents issued to Hong Kong residents (to avoid any disruption in this area on 1 July 1997); an agreement on the principles for the establishment of a separate Hong Kong register of shipping which can be maintained beyond 1997; an agreement for the construction of separate Air Service Agreements between Hong Kong and its aviation partners which are capable of remaining in force after 1997; an agreement on the introduction of a new pension scheme for civil servants in Hong Kong; an agreement that Hong Kong should continue its present participation in the Universal Postal Union, the World Meteorological Organization, the International Maritime Organization and the International Telecommunication Union after 1997, see WHITE PAPER II, *supra* note 64, at 3.

66. See WHITE PAPER I, *supra* note 64, at 2.

67. *Id.* at 4.

68. See Draft Agreement *supra* note 27; WHITE PAPER II, *supra* note 64, at 5-6.

government to reflect the views of the people of Hong Kong to the Drafting Committee has been reasonably active in pursuing its task.<sup>69</sup>

## (2) Interpretation

The interpretation of the Joint Declaration appears to present more serious issues.<sup>70</sup> These conflicts will be raised in summary form only by this author. Certain conflicts have already manifested themselves. Most notably is the vague stipulation of a high degree of autonomy for the territory.<sup>71</sup> Vagueness may induce conflict because the parties involved (The PRC, Britain and Hong Kong) have different expectations with respect to the meaning of autonomy. If autonomy were more strictly defined, the scope for conflict would have been reduced. Critical terms such as "democratic consultation"<sup>72</sup> in the constitution of the Basic Law Consultative Committee or "accountability"<sup>73</sup> (which describes the relationship between the executive and legislative branches in art. I, annex I of the Joint Declaration) are subject to different interpretations.<sup>74</sup> Another issue has arisen concerning the compatibility of political reforms in the pre-1997 period with the Joint Declaration. The Chinese argument is that pre-1997 political reforms should not deviate from the post-1997 model of government that the PRC is presently designing, and more specifically, that direct elections to the Legislative Council are contrary to the spirit and principles of the Joint Declaration.<sup>75</sup> The British Government, on the other hand, could resort to a clause in the Joint Declaration which stipulates that "[t]he legislature of Hong Kong Special Administrative Region shall be constituted by election."<sup>76</sup> And while no further

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69. WHITE PAPER II *supra* note 64, at 5-6.

70. It has been noted that most of the difficulties arising from concluding treaties with the PRC involve disputes regarding interpretation. *See* Chiu, *supra* note 8, at 72, in which Chinese writer Lin Hsin described this problem as "sleeping in the same bed but dreaming different dreams."

71. *See* Fong, *HK Autonomy Won't Mean Independence*, South China Morning Post, May 5, 1987, at 1 (report on meeting with Lu Ping, General Secretary, Basic Law Drafting Committee).

72. *See* Foreign Broadcast Information Service (China), September 16, 1985, at 105 (According to Xu Jiatur, Director of the New China News Agency in Hong Kong [Beijing's top official in Hong Kong], consultation is a form of democracy).

73. *See* Foreign Broadcast Information Service (China), January 20, 1986, at 128 (In Xu Jiatur's words, "accountable" as used in the Joint Declaration means merely "the duty to give explanation and to seek advice"); *See also* commentary *Drafters Find Consensus Elusive*, South China Morning Post, October 27, 1986, at 15.

74. *See supra* notes 72-73.

75. *See* Yeung, *Reforms May Mean Trouble, Warns Xu*, South China Morning Post, November 22, 1983, at 11 (statement of Xu Jiatur that current moves towards political reforms constitute "a deviation from the spirit and principles of the Joint Declaration.").

76. Draft Agreement, *supra* note 27, at 1373 annex I, art. 1.

details are provided as to the manner in which elections are to be conducted, the text does not exclude the possibility of direct elections. Indeed, given the object and purpose of establishing an autonomous SAR, and bearing in mind that one of the main attributes of autonomy in international law is a locally elected legislative body capable of independent decision making in local matters,<sup>77</sup> an interpretation which embraces direct election would not be inconsistent with the Joint Declaration.

The "compatibility" issue is further complicated by China's perception of the Hong Kong Government as one performing a caretaker role prior to the transfer of sovereignty in 1997 and, therefore, inherently incapable of initiating significant structural changes. In support of this position, Chinese authorities cite the assumption of responsibility by Britain under article IV of the Joint Declaration "for the administration of Hong Kong with the object of *maintaining and perserving* its economic prosperity and social stability" (emphasis added).<sup>78</sup> Counterclaims are nonetheless available to the British Government, including the point that while the Sino-British agreement envisages continuation of legal, judicial, social and economic systems, no indication is given that the political structure would remain unchanged. In fact, China may be estopped from disputing political reforms having raised no objections to the fairly radical changes of the 1984 White Paper on Representative Government. China may also be estopped having not expressed any reservations in September 1985 when indirect elections were implemented.<sup>79</sup>

Interpretation issues arising out of the Sino-British Joint Declaration should also be viewed against the omission of a specific provision in the Joint Declaration for the settlement of disputes. Admittedly, the Joint Liaison Group is charged with the smooth transfer of government and the effective implementation of the Joint Declaration, but it is intended to be an organ for liaison, consultation, exchange of information and is not equipped with supervisory or enforcement powers. Furthermore, the Group's mandate expires on January 1, 2000.<sup>80</sup> The subtlety of some of the grey areas in the Declaration may allow the Chinese members of the Liaison Group to claim literal application by reliance on the obscure intentions of the drafters.<sup>81</sup>

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77. See Hannum and Lillich, *supra* note 48, at 250.

78. See Yeung, *China Warns Hong Kong Not to Change Status Quo*, South China Morning Post, May 25, 1987, at 1, col. 1 (interview with Fang Jun, Head of Kowloon Office of NCNA who said that any moves to change the powers of the Legislative Council and its composition were not within the jurisdiction of the Hong Kong government given the stipulation in the Joint Declaration to the effect that the government is responsible for the maintenance of the present systems, while the Basic Law will decree future systems).

79. For an account of the reforms see WHITE PAPER I, *supra* note 64, at 6-8.

80. See Draft Agreement, *supra* note 27, annex II, § 6, at 1379.

81. See Chiu, *The 1984 Sino-British Agreement on Hong Kong and Its Implications on*

Given the nature of the interpretation conflicts noted above, the lack of procedure for solving disputes may prove problematic.<sup>82</sup> This is particularly true in the light of the PRC's reluctance to submit to third party adjudication for the settlement of international disputes and its nonacceptance of the compulsory jurisdiction of the International Court of Justice.<sup>83</sup>

### (3) Succession of Treaties

It is generally accepted that a territory which undergoes a change of sovereignty passes from the treaty regime of the preceding state directly to that of the acquiring one.<sup>84</sup> Treaties of the successor state begin automatically to apply from the date of succession.<sup>85</sup> The treaties of the predecessor state cease automatically to apply from that date.<sup>86</sup> State practice suggests, however, that this "moving treaty frontier rule" is not commonly adhered to in the context of acquisitions of territorial sovereignty over dependent territories. Rather, specific arrangements would be made in the treaty pertaining to the transfer of sovereignty. This was the position taken by the PRC and UK in the Sino-British Joint Declaration.<sup>87</sup>

The problem faced by the drafters of the Joint Declaration was to ensure the continued prosperity of the territory and the maintenance of its status as the third most important financial center in the world.<sup>88</sup> All

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*China's Unification*, 21 ISSUES AND STUDIES 13, 15 (1985) [hereinafter Chiu, *The 1984 Sino-British Agreement*].

82. It has nonetheless been noted that the UK may force, by means of bargaining techniques, the expansion of the Joint Liaison Group's authority in accordance with annex II, art. 11 (which empowers the JLG to establish subgroups to deal with particular subjects requiring expert assistance) with a view to forming an arbitration panel similar to the Korean Armistice Commission to which the PRC uncharacteristically had given its consent. See *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. J. INT'L L. & POL'Y 167, 191-92, 194 (1986).

83. See Chiu, *The 1984 Sino-British Agreement*, *supra* note 81, at 15.

84. See Klein, *Treaties, Effects of Territorial Change*, reprinted in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 473-75 (R. Bernhardt ed. 1984). See art. 15 of the 1978 Vienna Convention on Succession of States in Respect of Treaties [hereinafter 1978 Succession Convention] 72 AM. J. INT'L L. 971, 975 (1978).

85. Vienna Convention, *supra* note 84, art. 15: "When part of the territory of a State or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of State."

86. *Id.* Under art. 15(b) "treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

87. See Draft Agreement, *supra* note 27, annex I, art. XIV, at 1377-78.

88. See Jao, *Hong Kong's Future as a Financial Centre*, *THE THREE BANKS REV.*, March 1985, at 35.

external links and international treaties had to continue. At the same time, the PRC, which is not a party to many of the international treaties applicable to the territory, could not accord to Hong Kong the independent power of concluding international agreements. The formula reached, therefore, provided that the international agreements implemented in Hong Kong remain in force even if the PRC is not a party to the agreement. The application to the territory of international agreements to which the PRC is a party, if so decided by the Central People's Government, would be considered in accordance with circumstances and needs of the SAR government after seeking the latter's view.<sup>89</sup>

However, since third-party states to the treaties are not obliged to accept new parties within their treaty relations, their consent must be secured.<sup>90</sup> This mammoth task has been undertaken by the Joint Liaison Group which appears to have adopted the strategy of ensuring the autonomous participation of the SAR in major international agreements such as GATT and MFA. This arrangement is used as a model precedent for solving similar issues. It is inevitable, nonetheless, that individual treaties will need to be sustained and *ad hoc* solutions formulated. The smooth succession of treaties will depend on the willingness of the PRC to reconcile conflicting domestic pressures and exert influence on behalf of an autonomous Hong Kong.

The applicability of two international treaties, however, has been assured expressly in the Joint Declaration itself. Article XIII of annex I of the Joint Declaration stipulates that "[t]he Provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force" (notwithstanding that the PRC is a signatory to neither).<sup>91</sup> It should be noted, however, that in Hong Kong, because

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89. See Draft Agreement, *supra* note 27, annex I, art. XI, at 1376.

90. Although devolution (or "inheritance") agreements feature in State practice, doubts as to their legal validity vis-a-vis third parties have been expressed. See Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, VI, January 1—June 30, 1958, 7 INT'L & COMP. L.Q., 514, 525-26 (1958) (Lauterpacht maintains that "[t]he absence of any clear rule of international law relating to the assignment of treaty rights and duties, coupled with the generally accepted principle *pacta tertiis nec nocent nec prosunt*, suggests that these agreements may be of no real legal force." Citing O'Connell, who considers that in strict law, the consent of other signatories to this novation of the contractual relationship would be essential.) See also Convention on Succession, *supra* note 84, art. 8: "1. The obligations or rights of the successor States towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State."

91. See Draft Agreement, *supra* note 27, annex I, art. XIII, at 1377. The PRC is understood to have indicated during the Sino-British negotiations its intention to sign these two Covenants in the near future. See Lescot, *Beijing Ready to Sign UN Human Rights Conventions*, South China Morning Post, November 25, 1986, at 1; Wong, *China 'to Uphold International Rights Agreement'*, HK STANDARD, December 29, 1986, at 8; Chinese participation in a

treaties do not automatically form part of the local law,<sup>92</sup> the rights and duties stemming from the covenants will not be enforceable locally unless incorporated by legislation into the domestic law. An implied commitment to take such an action is contained in rights and freedoms enumerated in article XIII of annex I of the Joint Declaration which envisages the inclusion in the Basic Law of the HK SAR.<sup>93</sup>

#### (4) Nationality

One of the most crucial issues arising from the transfer of sovereignty over Hong Kong is the nationality of its inhabitants. Little guidance is provided, however, by international law. Generally, subject to the proscription of rendering people stateless,<sup>94</sup> no express obligation is imposed under international law on the successor state to grant any right of option as to nationality. For that matter there is no corresponding obligation on the predecessor state to withdraw its nationality from persons normally living or domiciled in the transferred territory.<sup>95</sup> At the same time, a right to the option of nationality in such circumstances may be said to be derived from general notions underpinning human rights law<sup>96</sup> or more specifically as a possible expression of the right to self-

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UN sponsored workshop on human rights in Manila, December 1986, was also interpreted to mean that China is "on the verge of signing" the Covenants. See *Beijing Close to Signing Two UN Conventions*, South China Morning Post, January 19, 1987, at 9.

92. Hong Kong follows British practice founded on the constitutional principle of separation of powers, whereby Parliament's approval (in the form of legislation) must be granted for treaties (which are within the prerogative powers of the Crown-Executive) to have legal effect under municipal law. Such a practice is acknowledged in a number of judicial authorities (e.g., *A-G for Canada v. A-G for Ontario* [1937] A.C. 326, 347; *Blackburn v. A-G* [1971] 2 All E.R. 1380; *Laker Airways v. Department of Trade* [1977] 1 Q.B. 643) which are binding on Hong Kong courts. Note, however, Mann's conclusion that "English courts, when the occasion or necessity arises, are in principle neither unable nor unwilling to look at, construe, and give effect to treaties which have not been adopted by Parliament." MANN, *FOREIGN AFFAIRS IN ENGLISH COURTS* 87 (1986).

93. See Draft Agreement, *supra* note 27, annex I, art. XIII, at 1377. See also PROGRESS REPORT OF THE [BLDC] SUBGROUP ON FUNDAMENTAL RIGHTS AND DUTIES OF HONG KONG INHABITANTS, April 13, 1987.

94. See 1961 Convention on the Reduction of Statelessness, U.N. Doc. A/CONF.9/14, reprinted in 8 DIG. OF INT'L L. 91 (M. Whiteman ed. 1967), art. 10: "1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions. 2. In the absence of such provisions a Contracting State to which a territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

95. State practice in respect of succession and nationality is sparse and varied, although a right of option of the inhabitants transferred was incorporated in peace treaties following the First and Second World Wars. See Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW*, 469, 479-80 (M. Sorensen ed. 1968). See also Gettys, *The Effect of Changes of Sovereignty on Nationality*, 21 AM. J. INT'L L. 268, 271 (1927); Kunz, *Nationality and Option Clauses in the Italian Peace Treaty*, 41 AM. J. INT'L L. 622 (1947).

96. Included is human dignity (the idea of freedom to shape one's own fate being an

determination where sovereignty over a population is transferred with the territory without the population's consent.<sup>97</sup>

The memoranda exchanged between the British and Chinese governments as part of the Joint Declaration set out their respective positions of the status of British Dependent Territories Citizens (BDTC's) in Hong Kong and related issues. The UK position, as stated in its memorandum, is that since Hong Kong will no longer be a British dependent territory after 1997,<sup>98</sup> BDTC's by virtue of some connection with Hong Kong would cease to have that status effective from July 1, 1997. It will not be possible to acquire BDTC citizenship by virtue of a connection with Hong Kong on or after July 1, 1997. The people excluded by this position will, however, be eligible to retain an appropriate status (not to be acquired by anyone born on or after July 1, 1997) which will enable them to continue to use British passports and receive consular protection when in third countries, provided they hold or are included in such a passport before July 1, 1997 (or up to December 1997 if born in the first six months of that year). Arrangements will be made for the renewal and replacement of those passports by UK consular officers.<sup>99</sup>

The PRC's position in its memorandum as stated is that all Hong Kong compatriots, whether they are holders of the BDTC passport or not, are Chinese nationals.<sup>100</sup> But, "taking account of the historical

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essential element of it). See P. WEIS, NATIONALITY AND STATELESSNESS 160 (1979) [hereinafter P. WEIS]. In fact, the right of "voluntary expatriation" (or to change one's nationality) has increasingly been recognized in general community expectations as a fundamental human right. See McDougal, Laswell and Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas* in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 555, 583 (M. McDougal & W. Reisman eds. 1981). Such expectations are reflected in the 1948 Universal Declaration of Human Rights, reprinted in J. SWEENEY, C. OLIVER, N. LEECH, THE INTERNATIONAL LEGAL SYSTEM, Doc. Supp. 60 (1981), art. 15(2): "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"; See also the 1969 American Convention on Human Rights, reprinted in *id.*, at 399. Note in particular the 1933 Inter-American Convention on Nationality concluded at Montevideo, December 26, 1933, 6 HUDSON, INTERNATIONAL LEGISLATION 593 (1937), art. 4: "In case of the transfer of a portion of territory on the part of one of the States signatory hereof to another of such States, the inhabitants of such transferred territory must not consider themselves as nationals of State to which they are transferred, unless they expressly opt to change their original nationality."

97. See Ress, *supra* note 54, at 21. See also Kiss, *The People's Right to Self Determination* 7 HUMAN RIGHTS 165, 174 (1986).

98. The practice of the UK has been largely influenced by the territorial nature of the common law; nationality is affected by the link or otherwise of the people with British territory. See Weis, *supra* note 96, at 139-40, 146, 148, 153-54, 158.

99. AN ORDER IN COUNCIL HONG KONG (BRITISH NATIONALITY) ORDER 1986 issued, further to the HONG KONG ACT 1985, on June 5, 1986 giving effect to the British position. It accordingly provides that BDT citizenship cannot be retained or acquired by virtue of a connection with Hong Kong after July 1, 1997 and that BDTC's by virtue of such connection may, before that date, acquire the new form of British nationality known as British Nationals (Overseas) [BN(O)].

100. See Draft Agreement, *supra* note 27, at 1381.

background of Hong Kong and its realities,"<sup>101</sup> the authorities of the PRC will, from July 1, 1997 permit Chinese nationals in Hong Kong to use travel documents issued by the UK government for the purpose of traveling to other states and regions. These persons will not be entitled, however, to British consular protection in the HK SAR and other parts of China.<sup>102</sup>

Does this mean the people of Hong Kong have been accorded the right to the option of nationality? The answer to this question is contingent on whether the British Nationality Order (BNO) provides a "nationality" at all. The BNO provides a nationality without continued connection to Hong Kong,<sup>103</sup> without the right to reside and live in the UK,<sup>104</sup> and without the right to transmit it to one's offspring born after 1997. Evidently, the PRC does not consider it a nationality or else it would not have agreed to what manifestly transgresses the PRC's fundamental prohibition of dual nationality.<sup>105</sup> A statement by an official of the Hong Kong government suggests that the Hong Kong government also regards the BNO passport as a travel document that attests to the bearer's residential status, not his nationality.<sup>106</sup> Furthermore, it is possible that other states would not recognize the UK's undertaking of diplomatic (or consular) protection and refuse permission to British diplomatic missions to intervene on behalf of BNO since the "genuine link" in the sense of the *Nottebohm Case*<sup>107</sup> is lacking. Such countries may entertain doubts, for instance, as to whether the UK would accept

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101. *Id.* The "realities" are the fact that Hong Kong functioned independently from the PRC for a long time and is perceived as a semi-autonomous entity.

102. *Id.*

103. In fact, a BNO passport does not give its holder a right of abode anywhere. Instead the passport will state that the holder has a HK identity card which grants the holder the right of abode in Hong Kong. Britain had to obtain from the PRC permission, to insert this statement on the BNO passport (Memoranda were exchanged on April 11, 1986 between the British Embassy in Beijing and the Chinese Ministry of Foreign Affairs). See WHITE PAPER II, *supra* note 64, at 4-5.

104. It should be noted, however, that the British government, in response to a request from the Legislative Council has agreed to introduce an endorsement into the BNO passport exempting the holder from the requirement of entry certificate or visa to visit the UK. See *London Endorses BN(O) Visa-free Entry*, HK Standard, April 24, 1986, at 2 [hereinafter *London Endorses*] (texts of a parliamentary question asked by MP Colin Moynihan and the written reply given by the Home Secretary Sir Douglas Hurd).

105. See The 1980 Nationality Law of the People's Republic of China, art. 3, which states that "the People's Republic of China does not recognise dual nationality for any Chinese national," reprinted in 40 BEIJING REV. 17, 18 (1980). For a discussion of the importance attached by the PRC to this question see Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 AM. J. COMP. L. 459 (1982).

106. See Henricus, *Groups Worry About Future Rights of Abode*, HK Standard, April 4, 1987, at 1.

107. In this case the ICJ held that Guatemala was entitled to treat a naturalized Liechtenstein citizen as a German, even though he had forfeited German citizenship on naturalization, because he had no genuine link with Liechtenstein. In the words of the Court, "[n]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be

responsibility for, and meet temporary financial demands on behalf of, or arrange the repatriation of a BNO passport holder who encounters difficulties while visiting a foreign country. It seems, in the final analysis, that the BNO passport is no more than a travel document whose value hinges on the number of countries that are prepared to formally recognize it.<sup>108</sup>

Particularly problematic is the post-1997 status of the territory's residents who are neither Chinese nor expatriates holding foreign passports. While their Chinese BDTC brethren will be given Chinese nationality and granted a BNO passport which may offer them some "extra travel privileges," non-Chinese BDTCs, although entitled to the new BNO passport, may in effect be deprived of a nationality, thereby becoming stateless. Admittedly, according to the Joint Declaration such persons may have the right of abode (e.g. to enter, live and work) in Hong Kong by virtue of their continuous residence of at least seven years and the fact that they have taken the territory to be their place of permanent residence.<sup>109</sup> A right of abode, however, is *quite distinct* from the conception of nationality.

To prevent non-Chinese BDTCs, their children and grandchildren from becoming stateless, the Hong Kong BNO of 1986 entitles them to yet another status, namely that of British Overseas Citizens (BOC).<sup>110</sup> This new status, however, gives them no right of abode in Britain or anywhere else; their right of abode in Hong Kong must derive instead from the laws of a region which will be part of a country whose nationality law is drawn up along racial lines. And while the British Home Secretary believes that the government of the day would "consider" sympathetically the case for admission to the UK, if any British national were in the future to come under pressure to leave Hong Kong,<sup>111</sup> other

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said to constitute the judicial expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State." [emphasis added] Note also the introduction into the British Nationality Act of 1981 the requirement of "a real and close personal connection with the United Kingdom" for the acquisition of British citizenship. See Home Office, *British Nationality Law Outline of Proposed Legislation* (London: Her Majesty's Stationary Office, 1981), at 2.

108. So far only 24 countries have done so, following the extensive diplomatic exercise embarked upon by the UK in September 1986 to explain to other countries the new status and the corresponding passport. See Robinson, *New Passports Issued, But Only 24 Nations Say Yes*, *South China Morning Post*, July 1, 1987, at 2.

109. See Draft Agreement, *supra* note 27, annex I, art. XIV, at 1377-78.

110. Article 6(2) confers BOC citizenship to former HK BDTC's automatically at birth on children born on or after July 1, 1997 if these children would be otherwise stateless. The automatic provisions that apply to the first generation do not apply to the second generation, but the latter have an entitlement to registration as BOC's; Articles 6(3) & 6(4).

111. See *London Endorses*, *supra* note 104.

states may not necessarily be impressed with the nationality claims of such a person.

#### V. HONG KONG'S "INTERNATIONAL" STATUS AFTER THE TRANSITION TO CHINESE RULE IN 1997

As indicated earlier, the Joint Declaration pronounced that the HK SAR "shall enjoy a high degree of autonomy."<sup>112</sup> No definition of autonomy is provided in the treaty, nor is one in fact available in any other international document. Hannum and Lillich acknowledge, in the survey referred to previously, the inherent elasticity of the term and admit that a "firm definition that is appropriate in all cases is impossible."<sup>113</sup> Yet they make a genuine effort to identify the "minimum governmental powers that a territory would need to possess if it were to be considered fully autonomous and self-governing."<sup>114</sup> These governmental powers comprise of a locally elected legislative body capable of independent decision making in local matters (e.g. health, education, social services, local taxation, internal trade and commerce, environmental protection, zoning and local government structure and organization); a locally chosen Chief Executive with general responsibility for administration and execution of local laws or decrees, and an independent local judiciary.<sup>115</sup>

To what extent will the HK SAR correspond with such a model of autonomy? Under the Joint Declaration it will be vested with "executive, legislative and independent judicial power, including that of final adjudication."<sup>116</sup> More specifically, its legislative capacity is set out in art. II of annex I, which stipulates that the legislature "may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures."<sup>117</sup> The Joint Declaration also provides that the legislature will be established by election.<sup>118</sup> At the same time, no further details are given as to the manner in which election is to be conducted. Thus, since the Joint Declaration envisages a continuation after 1997 of the system of government which exists prior to that date, whether the SAR's legislature will be "locally elected" would depend largely on the progress made in the current development of the representative government in Hong Kong. At present only twenty-four of the Legislative Council's fifty-six members are elected.<sup>119</sup> It is probable,

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112. *See supra* note 76.

113. *See* Hannum and Lillich, *supra* note 48, at 250.

114. *Id.*

115. *Id.* at 250-51.

116. *See* Draft Agreement, *supra* note 27, art. 3(3), at 1371.

117. *See supra* note 27, at 1373.

118. *See* Draft Agreement, *supra* note 76, annex I, art. I and accompanying text.

119. Until 1985, the Legislative Council consisted of appointed members only. Following

therefore, that if Hong Kong does not have a strong and soundly based government with some claim to a popular mandate, it will be incapable of resisting the inevitable erosion of the system.

Yet, doubts as to the capability of independent lawmaking of even a "locally elected" body in the SAR government have been raised.<sup>120</sup> On the face of it, the National People's Congress (NPC) of the PRC, which is charged with the enactment and promulgation of a Basic Law for Hong Kong, is also authorized (through its Standing Committee) to interpret it and consider the annulment of laws of the HK SAR if such laws contravene the Basic Law. The Standing Committee of the NPC is additionally empowered under the Chinese Constitution "to annul those regulations or decisions of the organs of state power of . . . autonomous regions . . . that contravene the Constitution, the Statutes or the administrative rules and regulations," thus imposing further potential constraints on the legislative power of the HK SAR legislature.

As argued elsewhere,<sup>121</sup> however, doubts concerning the powers of the NPC in relation to the Basic Law may be unwarranted. In particular, attention should be drawn to the fact that the interpretive authority of the NPC Standing Committee is rarely employed.<sup>122</sup> Moreover, its interpretive authority is not concentrated at one institutional level and may be shared with local courts in the same manner as the NPC Standing Committee shares with parallel bodies such as the Supreme People's Court, Supreme People's Protectorate, State Council, Provincial People's Congresses and Government.<sup>123</sup> Finally, it should be noted that the Standing Committee's power to annul local legislation that contravenes Chinese laws may be inapplicable in special administrative zones such as Hong Kong.<sup>124</sup>

It is nonetheless unclear to what extent the SAR legislature will be the only law making body for the territory on matters within its jurisdiction or, in other words, whether legislation (other than the Basic Law

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the principles formulated in the 1984 Hong Kong Government Paper on the Further Development of Representative Government in Hong Kong, twenty-four members of the Council have, since 1985, been chosen by a system of indirect election. Twelve are elected by electoral college, comprising all members of the District Boards and the Urban Regional Councils (themselves consisting of both elected and appointed members), and twelve by functional constituencies representing significant sectors of the community. A green paper has now been published exploring further developments in representative government. THE 1987 REVIEW OF DEVELOPMENTS IN REPRESENTATIVE GOVERNMENT, Hong Kong Government, May 1987.

120. See Chiu, *supra* note 81, at 17-19.

121. See Mushkat, *supra* note 15, at 180-83.

122. *Id.* at 182.

123. *Id.* at 181-82.

124. *Id.* at 182.

and matters concerning foreign affairs and defense) enacted by the Chinese authorities shall apply domestically after sovereignty reverts to the mainland.<sup>125</sup>

The second requirement identified by Hannum and Lillich,<sup>126</sup> namely to have a locally chosen Chief Executive, poses perhaps a greater challenge to the autonomy of the HK SAR since under the Joint Declaration the final decision with respect to the appointment lies with the Central People's Government.<sup>127</sup> It is arguable, however, that the mechanism envisioned under the Joint Declaration to have selection of a Chief Executive through consultation or by election held locally is unworkable. An appointment by the Central People's Government provides the HK SAR with only a "veto power" rather than a direct positive power of appointment.<sup>128</sup> By the same token, the autonomous status of the Chief Executive lies in the answer to questions such as "will [he] have the sole right of introducing bills into the legislative chamber or possess the power of veto? Will he be expected to carry out policies formulated by the Central People's Government or the Communist Party in Beijing?"<sup>129</sup>

Finally, the importance of an independent local judiciary to the territory's autonomy cannot be overemphasized. The Joint Declaration appears to safeguard the independence of the judiciary. It provides that judges will be appointed by the Chief Executive who will act in accordance with the recommendation of an independent commission comprised of local judges, persons from the legal profession and "other eminent persons."<sup>130</sup> Removal of judges, on the other hand, is only exercised for inability to discharge the functions of their office or for misbehavior. Removal is initiated by the Chief Executive acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court

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125. The issue was recently debated by the Basic Law Drafting Committee and a "compromise" proposal emerged to the effect that China's State Council will only be allowed to issue an order to the future Chief Executive of the SAR enabling him to enact laws corresponding to the national laws if they are in accordance with the Basic Law and article 31 of the Chinese Constitution (which provides for the setting up of the SAR). See Yeung, *Compromise Over Laws*, South China Morning Post, April 15, 1987, at 7. Note, however, Basic Law drafter Martin Lee's objection to the application in the HK SAR of any Chinese laws, besides those on defense and foreign affairs, as a breach of the Sino-British Declaration. See, Yeung, *Sub-group View 'Violates Joint Declaration'*, South China Morning Post, June 9, 1987, at 2.

126. See Hannum and Lillich, *supra* note 48.

127. See Draft Agreement, *supra* note 27, annex I, art. I, ¶ 3, at 1373.

128. A local commentator speculated that the appointment will be a "mere formality" to demonstrate China's sovereignty over Hong Kong. He suggests that if the Central Government refused to appoint the Chief Executive elected by the local legislature, a constitutional crisis will follow with a serious adverse impact on the stability and prosperity of the territory. See Cheng, *Looking at the Other Options*, South China Morning Post, March 2, 1986, at 11.

129. Wesley-Smith, *China and Hong Kong*, in NEW ZEALAND AND CHINA PAPERS OF THE TWENTY-FIRST FOREIGN POLICY SCHOOL 1986, at 87, 92 (Trotter ed. 1986).

130. See Draft Agreement, *supra* note 27, annex I, art. III, at 1373-74.

of final appeal and consisting of no fewer than three local judges.<sup>131</sup> It may be argued, however, that unless the pre- and post-1997 judiciary is made truly independent, it may not be able to prevent executive action contrary to the spirit of the Joint Declaration. At present, Hong Kong judges are employed by the Hong Kong government and their salaries are determined in accordance with the Civil Service pay scale. A Magistrate's appointment is subject to contracts which are renewable at the discretion of the Judicial Services Commission. Worries over conditions of pay and security of tenure may thus cast a shadow over the independence of judges.<sup>132</sup>

Of equal importance for an autonomous HK SAR is the scope of judicial power, especially the power to interpret the Basic Law and review legislation that conflicts with it. The Joint Declaration states that the power of final adjudication "shall vest in the courts of the HK SAR."<sup>133</sup> While this certainly means that after 1997 appeals from these courts will no longer go to the Privy Council in London,<sup>134</sup> it is not clear whether it covers interpretation of the Basic Law. The issue has not yet been resolved authoritatively, although it is conceivable that the Hong Kong courts will be granted the judicial power of interpreting the Basic Law in deciding cases after 1997, whereas the NPC will retain a legislative power of interpretation, namely the power to amplify laws by legislative edict.

As observed by Hannum and Lillich,<sup>135</sup> autonomy is not inconsistent with the retention by the central or sovereign government of authority over foreign relations and national defense. Thus, the stipulation in the Joint Declaration that "foreign and defense affairs are the responsibilities of the Central People's Government"<sup>136</sup> should not detract from the SAR autonomy especially given the considerable formal power to be retained by the latter under the accord. The formal power includes the authority, under the name of "Hong Kong, China," to enter into agreements with states, regions and international organizations in appropriate

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131. *Id.*

132. Note that a Judiciary Bill designed to officially separate the judiciary from government has been proposed. See Course, *Bill Will Ensure 1997 Independence. Plan to "Free" Hong Kong Judiciary*, South China Morning Post, June 3, 1985, at 1. See also Course, *Judiciary Split From the Government Expected Soon*, South China Morning Post, December 10, 1987, at 1.

133. See Draft Agreement, *supra* note 27, annex I, art. III, ¶ 1, at 1373.

134. See *id.* "Explanatory Notes" n.12, at 1383.

135. See Hannum and Lillich, *supra* note 48.

136. See Draft Agreement, *supra* note 27, art. III(2), at 1371. Note that article XII of annex I provides that military forces sent by the PRC to be stationed in the HK SAR for the purpose of defense shall not interfere in the internal affairs of the HK SAR. Commentators, like Chiu question, however, whether in the light of historical events, particularly Tibet between 1950 and 1959, PRC forces will really abstain from interfering in the internal affairs of the HK SAR. See Chiu, *supra* note 81, at 20.

fields (e.g. economic, trade, financial and monetary)<sup>137</sup> and the freedom to formulate the territory's own internal economic policies.<sup>138</sup> Whether other states will recognize these special powers of "Hong Kong, China", remains open to dispute. It is clear in any event, that without the express consent of third parties, such third parties will incur no obligations or liabilities under the Joint Declaration.<sup>139</sup>

## VI. CONCLUSION

Indeed, in the final analysis, the viability of autonomy for the SAR will be determined largely by third parties' responses as well as Chinese attitudes, policies and developments within Hong Kong.<sup>140</sup> These factors are open to conflicting interpretations and can thus lead to the construction of a number of scenarios ranging from highly optimistic to highly pessimistic. Other countries, which are not parties to the Sino-British Joint Declaration and are thus not bound by it, may opt to treat Hong Kong as an autonomous entity or instead may find it more expedient to regard it as an integral part of the PRC. Chinese attitudes and policies constitute an even more critical variable because of Hong Kong's dependence on Beijing and the fact that the PRC is likely to be constrained by the provisions of the Sino-British Joint Declaration only if they coincide with the broader national interests (as perceived by the country's power holders). Finally, Hong Kong may continue to function smoothly or it may show signs of disintegration (in the latter case, China may feel compelled to assume control whether or not it is favorably disposed towards the notion of autonomy). It is realistic to suppose that these complex factors, rather than formal international legal agreements, will influence the evolution of Hong Kong from a British colony to a special administrative region of the PRC and determine its ability to remain stable and prosperous.

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137. See Draft Agreement, *supra* note 27, art. III(10), at 1372, and annex I, art. XI, § 1, at 1376.

138. See *id.*, Annex I, art. VI, § 1, at 1375.

139. See Vienna Convention, *supra* note 5, art. 34 dictates that "A treaty does not create either obligations or rights for a third State without its consent." Article 35 dictates that "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." The general rule in art. 34, which is known as *pacta tertiis nec nocent nec prosunt*, or agreements shall neither burden nor benefit third parties, reflects customary international law. See generally HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 608 (1983).

140. See Mushkat, *supra* note 15, at 183-89.