

# The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues

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## I. INTRODUCTION

Hong Kong has been a British colony since 1841 and as such has pursued a markedly different economic, legal, political and social path from that of China. While China has embraced communist ideology and practice, often in an extreme form, Hong Kong has unwaveringly maintained its capitalist orientation and has remained an integral part of the Western world. The bulk of the colony's population has always been Chinese and its cultural roots lie deeply in Chinese soil. In most other respects, however, the two systems are almost completely at variance with each other.

Despite the structural differences between Hong Kong and China, Hong Kong will shed its colonial status in 1997 and come under *de facto* Chinese sovereignty. After protracted negotiations, the People's Republic of China (PRC) and the United Kingdom have concluded an agreement on the future of Hong Kong which stipulates that the PRC will resume the "exercise of sovereignty" over the colony as of July 1, 1997 and that thereafter, Hong Kong will function for a period of 50 years as a "special administrative region" (SAR) of the PRC.<sup>1</sup>

The transition from British to Chinese rule is an event of enormous political magnitude with far-reaching repercussions. It raises a host of complex issues, both academic and practical. Many of these issues have already attracted the attention of scholars and policy-makers.<sup>2</sup>

Thus far, however, there has been little discussion from an international legal perspective of the radical changes under way. The arrangement for Hong Kong's future envisaged by the PRC and the United Kingdom has no exact precedent in the international legal arena and con-

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1. Draft Agreement between 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, White Paper (Sept. 26, 1984), *reprinted in* 23 I.L.M. 1366 (1984) [hereinafter cited as The Draft Agreement].

2. The University of Hong Kong, for instance, recently held a conference devoted exclusively to the 1997 question which provided a useful vehicle for a multifaceted examination of transition-related problems. See HONG KONG AND 1997: STRATEGIES FOR THE FUTURE (Y. C. Jao ed. 1985) [hereinafter cited as STRATEGIES].

sequently, should be of great interest to students of international law. Indeed, it is reasonable to assume that experts in this field will apply themselves earnestly to the subject in the near future. The aim of the present article is to provide, in the interim, a preliminary analysis of a number of key international legal issues which emanate from the Sino-British agreement. This is a challenging task given the *sui generis* position of Hong Kong vis-a-vis external entities and the diverging attitudes towards international law by the two principal parties involved, the PRC and the UK.

It is obvious that the legal facets of the agreement surrounding Hong Kong's future cannot be dissected in the light of established principles of international law alone. The PRC stance on many issues is so fundamentally different from the one embraced by the non-communist world that an alternative approach is called for. Ideally, a synthesis should be sought reflecting conventional international legal norms, the Chinese posture, and the realities of Hong Kong's geo-strategic situation. In this article, such a synthesis is attempted with respect to the questions of sovereignty, treaties, state succession and nationality.

## II. HONG KONG'S UNIQUE STATUS

Hong Kong, as a British dependent territory, lacks the main attributes of statehood from the standpoint of public international law. It can thus be deemed as having little, if any, international legal personality. The colony does have a legislature capable of legislating extensively on domestic law and an executive and judiciary with similar powers which may impinge on the UK's discharge of its international obligations. Its external links, however, both as a matter of fact and as a proposition of law, are largely managed by the UK authorities.

At the same time, and here lies the colony's uniqueness, the commercial and industrial prominence of Hong Kong has given it a considerable measure of independence in international contexts.<sup>3</sup> To illustrate, the colony is treated as a separate territory for the purpose of multilateral agreements such as the General Agreements on Tariffs and Trade (GATT) and the United Nations Conference on Trade and Development (UNCTAD).<sup>4</sup> It is also a member of several international organizations including the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the Organization for Economic Co-operation and Development (OECD), the Asian Productivity Organization (APO) and the Asian Development Bank (ADB). Furthermore, in several instances over the past decades, the Hong Kong Government, "acting with the consent of" the

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3. For an elaboration and further illustrations, see Dick, *The Law and Practice of Hong Kong and Foreign Investment*, in *INTERNATIONAL LAW PROBLEMS IN ASIA* 153 (V. Shepherd ed. 1956).

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187; U.N. Conference on Trade and Development, 609 U.N.T.S. 3.

UK authorities, has negotiated agreements directly with foreign governments concerning such crucial matters as textile quotas.<sup>5</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 mutual interest, such as the supply of water.<sup>6</sup>

Indeed, the high degree of independence enjoyed by Hong Kong in the management of its external affairs has been reaffirmed in the Sino-British agreement which seeks to formalize its status as a "separate customs territory" that "may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles."<sup>7</sup> The agreement also states that after 1997 the Hong Kong SAR "may on its own, using the name 'Hong Kong, China' maintain and develop relations and conclude and implement agreements with states, regions and relevant organizations in the appropriate fields including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields."<sup>8</sup> Finally, the agreement enables the SAR to participate in international organizations and conferences and trade agreements either as a member of the PRC delegation or in any other capacity as may be permitted by the Chinese authorities. The agreement may thus be seen as not merely reinforcing Hong Kong's unique position as a fairly independent actor in the international arena, but also lending to it additional substance. Under such circumstances, one can regard the territory as an entity approximating an international legal personality, with its own rights and obligations. Consequently, it is appropriate to examine questions of international law which originate from this unprecedented configuration.

### III. CONTRASTING CHINESE AND BRITISH ATTITUDES TOWARDS INTERNATIONAL LAW

While enjoying a notable measure of independence, Hong Kong is constrained in its external policy-making. It remains a British dependency and at the same time is increasingly sensitive to Chinese interests and wishes. Therefore, Hong Kong must operate within a complex legal framework, particularly since the PRC and the UK employ concepts of international law which are often extremely difficult to reconcile.

This complexity stems from the fact that the PRC's notion of law in general and its assumptions regarding the role, function, validity, and jus-

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5. Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, Misc. 18, UK Command Papers 6205 [hereinafter cited as MFA]. The Arrangement is indexed in M.J. BOWMAN & D.J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* No. 209 (1984).

6. See Water Supplies Department, Fact Sheet 1985.

7. The Draft Agreement, annex I, § 6, para. 1, *supra* note 1, at 1387.

8. *Id.* annex I, § XI, at 1376.

tification of the legal system do not coincide with those prevailing in the West.<sup>9</sup> Traditional Western doctrines portray the law as emanating from the people, thus according greater importance to the needs of the individual.<sup>10</sup> The Chinese idea of law is based on a set of norms which give clear preference to collective needs. Under the Western scheme, a strong emphasis is placed on codifying the law with a view to minimizing arbitrary conduct by power holders. By contrast, the PRC system distinguishes between *li* and *fa* (roughly translated as "customary norms of behavior" and "enacted law" respectively) with *li* normally prevailing.<sup>11</sup>

Perhaps the most significant practical difference between the attitudes of the two doctrines is that law is generally viewed in the West as a variable reflecting rather than causing societal change, whereas Chinese authorities perceive law as a political instrument of the State explicitly designed to serve political objectives. This applies to international as well as domestic law. As the Chinese scholar, Cho Fun-lan has elucidated:

International law in addition to being a body of principles and norms which must be observed by every country is also, just as any law, a political instrument; whether a country is socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy.<sup>12</sup>

Parallel views have been expressed by other well-known Chinese writers. Scott cites Chu li-lu, for instance, as stating that if international law is disadvantageous to the PRC, to the Socialist system or to the peace of the whole world, it should not be relied upon.<sup>13</sup> This instrumental conception of international law by the Chinese renders generalization about Hong Kong's future status rather difficult. For the dominant ideology in the PRC and the state/party interests, as interpreted by its ruling elite, are in constant flux and not likely to remain static on a strategic issue such as Hong Kong. Though one is compelled to grapple with elusive political variables, the PRC is in the process of moderating its practice of bending the law to promote political goals.<sup>14</sup>

#### IV. THE ISSUE OF SOVEREIGNTY

Sovereignty is often employed indiscriminately and accorded different meanings by decision-makers and scholars alike. The reason for the

9. See generally Lee, *Introduction to the Chinese Concept of Law*, 60 MICH. L. REV. 439 (1962); Li, *The Role of Law in Communist China*, 82 CHINA Q. 66 (1970). On the PRC's attitude towards international law, see, e.g., Chiu, *Communist China's Attitude Toward International Law*, 60 AM. J. INT'L L. 245 (1966).

10. J.C. SMITH & D. WEISSTUB, *THE WESTERN IDEA OF LAW* 3 (1983).

11. Lee, *supra* note 9, at 448-9.

12. Quoted in G. SCOTT, *CHINESE TREATIES: THE POST REVOLUTIONARY RESTORATION OF INTERNATIONAL LAW AND ORDER* 45 (1975).

13. *Id.* at 46.

14. Salinger, *The Fifth National People's Congress and the Process of Policy Making: Reform, Readjustment and the Opposition*, 22 ASIAN SURV. 1238, 1242 (1982).

vague and inconsistent usage of the term lies in the fact that sovereignty is a highly emotive symbol which is, *inter alia*, relied upon to induce a favorable response from the public in an era of nationalistic fervor. Two basic distinctions may nonetheless be drawn.

First, a distinction exists between the political or philosophical notion of sovereignty and the legal one. In its political or philosophical aspect sovereignty is perceived as an ideal. Thus, sovereignty, in conjunction with independence and equality as the classical attributes of the nation state,<sup>15</sup> is deemed by nations throughout the Third World (including China) as both the means of achieving national dignity and the measure of success in progressing towards this goal. The legal notion of sovereignty, however, hinges on a legal concept, or more precisely, a series of legal concepts.

This raises the second distinction between sovereignty in the international sense (i.e., as a crucial characteristic of independent states) and sovereignty as it is construed in the domestic law of any national entity. These concepts do not fully overlap since they are governed by different systems of law. Whereas the characteristics of a state as a member of the international community are defined by international law, the internal distribution of sovereignty of each state is determined by the rules of its own domestic law (i.e., its constitution).<sup>16</sup>

This distinction is highlighted in a dictum of a High Court judge in the local case of *Winfat Enterprises (HK) Co. Ltd. v. Attorney General*.<sup>17</sup> Mr. Justice Kempster stated that the New Territories Order in Council 1898 "formally vested sovereignty in and dominion over the New Territories in her Majesty."<sup>18</sup> This is a clear statement of domestic law which does not affect the question of whether, as a matter of international law, sovereignty over the New Territories is vested in the UK.

In essence, a legally sovereign state in the eyes of the international community is one which is capable of exercising plenary powers in relation to its territory without being legally subordinate to the will of any other state.<sup>19</sup> However, given the evolutionary nature of international law, sovereignty may be subject to modifications. Specifically, the scope of legal sovereignty in the international sense may expand or contract according to changes in the law. States are free to restrict their own sovereignty by entering into treaty relationships including some comprehensive

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15. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 15-16 (4th ed. 1982).

16. For an elaboration of this distinction and its application in the Hong Kong context, see Dicks, *Treaty, Grant, Usage or Sufferance?: Some Legal Aspects of the Status of Hong Kong*, 95 CHINA Q. 427, 430-1 (1983).

17. [1983] Hong Kong L. Rep. 211 (High Court).

18. *Id.* at 217.

19. Basically, plenary powers are the sum total of jurisdictional and legislative powers and correlative rights conferred on it by international law. See 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 283-85 (2d ed. 1970).

schemes, such as the EEC. Indeed, there has been a trend since the end of the Second World War towards a more restrictive interpretation of sovereignty in the international context. This trend is reflected in the adoption of legal restraints on the use of force,<sup>20</sup> the enhancement of the institutional role of the UN and other international organizations<sup>21</sup> and the international protection of human rights.<sup>22</sup>

At the same time, distinct groups of states object strongly to internationalism. In particular, the Soviet Union and its communist allies insist on the inviolability and inalienability of national sovereignty. And not surprisingly, this interpretation of sovereignty has also been favored by the PRC. In fact, sovereignty is deemed by the PRC as the core of all fundamental principles of international law and, furthermore, as the legal foundation on which institutions and norms are grounded.<sup>23</sup> Chinese writings on the Charter-based international order emphasize the traditional positivist notion of sovereignty.<sup>24</sup> PRC experts have emphatically stressed that sovereignty is the most important principle of international law and the most valuable characteristic of the state. Any attempts to subvert, dilute or transfer sovereignty through such devices as "world law" or "transnational law" have consistently been dismissed as contrary to international law.

In the same vein, Chinese representatives have denied a legal personality to the UN by challenging the notion that international organizations could become subjects of international law. They have contended that the UN is merely an international organization among sovereign states and not a world government.<sup>25</sup> These representatives have also repudiated the idea that individuals might enjoy a similar status. Such extensions of the concept of international legal personality are frowned upon by the PRC lest they devalue the supremacy of state sovereignty.<sup>26</sup>

This rigid Chinese view of sovereignty has manifested itself through criticisms levelled by PRC commentators against the role of the UN in the maintenance of international peace and security. These commentators

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20. U.N. CHARTER art. 2, para. 4.

21. For example, the Convention of the International Labor Organization, Oct. 9, 1946, 38 U.N.T.S. 3.

22. Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

23. See generally, Shao-Chuan, *Chinese Law*, in SOVEREIGNTY WITHIN THE LAW 242-67 (1965). See also, T'ao Ying, *A Criticism of Bourgeois International Law Concerning the Question of State Sovereignty*, in 1 PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 106-110 (J.A. Cohen & H. Chiu eds. 1974) [hereinafter cited as 1 PEOPLE'S CHINA]; Hsin & Chien, *Expose and Criticize the Imperialist Fallacy Concerning the Question of State Sovereignty*, in *id.* at 110-17.

24. See generally 1 PEOPLE'S CHINA, *id.*

25. It should be noted in this connection that Chinese scholars have long maintained that General Assembly resolutions are not legally binding but are merely recommendatory. See 1 PEOPLE'S CHINA, *supra* note 23, at 88, 97-8.

26. See S. KIM, CHINA, THE UNITED NATIONS AND WORLD ORDER (1979).

have been adamant that the exercise of such a role by the UN is tantamount to interference in the domestic affairs of states in violation of Article 2(7) of the UN Charter.<sup>27</sup> Indeed, China's sensitivity about international interference in domestic affairs is well documented. The UN "interventions" in Korea, Hungary, the Congo (ONUC), Cyprus (UNFICYP), Vietnam, Tibet, Hong Kong and Macao were thus strongly condemned by the PRC as contraventions of the Charter's principles.<sup>28</sup>

As indicated, Chinese resistance to encroachments on state sovereignty have also been reflected in its qualified approach to human rights as an international concern. Most notably, the PRC has never endorsed the UN General Assembly Universal Declaration of Human Rights nor has it become a party to the International Convention on Civil and Political Rights. Chinese accession to the Convention on the Elimination of all Forms of Racial Discrimination (on 29 December 1981) and the PRC vote in support of General Assembly resolutions that condemned torture on the basis of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other internationally articulated standards<sup>29</sup> are seen as the exception rather than the rule in this respect.<sup>30</sup>

In seeking to reinforce the traditional legal doctrine of sovereignty, the PRC has not confined itself to negative measures, but has also actively pursued positive strategies. Prominent in this category have been the steps taken to promote the principles of peaceful co-existence adopted at the Bandung Conference in 1955.<sup>31</sup> The PRC has also incorporated references to these principles in many of its international agreements and statements, including those made by Premier Zhao Ziyang during Prime Minister Thatcher's visit to China in September 1982. Mr. Zhao took the opportunity to reiterate the relevance of the principles as a basis for problem-solving in the context of Sino-British relations.<sup>32</sup> The

27. See documents and discussions in the second volume of 1 PEOPLE'S CHINA, *supra* note 23, at 1322-61 (1974).

28. *Id.*

29. G.A. Res. 3059, 28 U.N. GAOR, U.N. Doc. A/PV 2163 (1973); G.A. Res. 3218, 29 U.N. GAOR, U.N. Doc. A/9031 (1974).

30. Some possible explanations for this uncharacteristic step are referred to — but not given credence to — by Cohen, *Reflection on the Criminal Process in China*, 68 J. CRIM. L. & CRIMINOLOGY 323, 353-4 (1977).

31. Five principles of peaceful co-existence were expressly agreed to by India and the PRC in the Preamble of the Treaty of Tibet signed in Peking on April 29, 1954. These were: (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual non-aggression; (3) mutual non-interference in each other's affairs; (4) equality and mutual benefit; and (5) peaceful co-existence. A year later in Bandung, Indonesia, the Asian Conference expanded the list to ten principles.

32. Two principles emphasized in relation to Hong Kong were the assertion of sovereignty over territory on the basis of historic — particularly precolonial — claims, and the principle that existing treaties were invalid because of their "unequal" character. Reported in the South China Morning Post, Sept. 24, 1982, at p. 1; Asian Wall Street Journal, Sept. 24, 1982, at p. 1.

unyielding Chinese position on the issue of sovereignty had also been apparent throughout the negotiations by the two parties and is mirrored in the agreement itself.

On the British side, of course, the claim to sovereignty over the territory has always been implicit in the factual and legal circumstances of Hong Kong. It may easily be inferred from the constitutional and legal practices adopted by the UK for governing the territory.<sup>33</sup> The PRC, on the other hand, has consistently emphasized that although the UK has *de facto* control over Hong Kong, it does not accept any British claim to permanent possession or sovereignty. There have been many official and semi-official statements to this effect. For example, the Chinese ambassador to the UN, in an address to the Chairman of the Special Committee on Colonialism seeking to remove Hong Kong and Macao from the list of territories falling within the Committee's terms of reference, stated that: ". . . Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories . . . ." <sup>34</sup>

This, again, highlights the distinctive attitude of the PRC with regard to sovereignty. As a leading Hong Kong commentator observed, although the Chinese request was successful, that in itself did not indicate the acceptance by UN members of the claim that the Hong Kong question rested exclusively within China's jurisdiction.<sup>35</sup> Indeed, many of those members have treaty relations and other interests with the UK with respect to Hong Kong.

It may be argued that the notion of "divided sovereignty," which is a recognized norm of international law,<sup>36</sup> could have been applied to the sovereignty of Hong Kong by the PRC. Such a concept is employed to describe a state of affairs whereby the sum total of powers accorded by international law to a sovereign state are exercised in respect of a territory by two or more states. Thus the UK, which clearly exercised in Hong Kong the kind of extensive powers that are the principal attributes of territorial sovereignty, may be said to possess what O'Connell calls "effective" sovereignty while China may be deemed to have the "titular" or "residual" sovereignty (i.e., the ultimate power to dispose of the territory).<sup>37</sup>

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33. Dicks, *supra* note 16, at 437-39. On the constitutional structure of Hong Kong in general and a useful list of references, see Wesley-Smith, *Hong Kong*, in *CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES* (A. Blaustein & E. Blautsein eds. 1985).

34. 1 *PEOPLE'S CHINA*, *supra* note 23, at 384.

35. Dicks, *supra* note 16, at 436 n.28.

36. O'CONNELL, *supra* note 19, at ch. 10.

37. *Id.*

### A. *Hong Kong's Status under the Laws of the PRC*

Notwithstanding the Chinese concept of an indivisible sovereignty,<sup>38</sup> in practice the PRC has treated the Hong Kong government as the lawful government of the territory.<sup>39</sup> Among many examples, China extends recognition to foreign consular representatives who are accredited by the British government in Hong Kong.<sup>40</sup> The PRC has not expressed any misgivings about the fact that the UK has consistently concluded bilateral and multilateral agreements on behalf of Hong Kong and represented the territory and its inhabitants in relation to third states. The Chinese authorities have also acknowledged the right of the UK to issue currency in Hong Kong (one of the most important attributes of sovereignty). Furthermore, for certain administrative and economic purposes the PRC legislation treats Hong Kong as a separate territory and the boundary between Hong Kong and China as an international frontier. Finally, the PRC also recognizes many legal and judicial acts which have taken effect under the law of Hong Kong, including, marriages, divorces, inheritances, incorporation and registration of companies. As might be expected, however, references to Hong Kong in Chinese legislation are made in such a way as to exclude any implication that the territory falls within the category of foreign states.<sup>41</sup>

The Sino-British Joint Declaration on the Future of Hong Kong gives concrete expression to both the narrow conception of sovereignty on the part of the PRC and its proclivity towards pragmatism in approaching problems at the tactical level. It is also an attempt to reconcile the conflicting notions of sovereignty held by the Chinese and British governments. Thus, the Chinese declare their decision to "resume the exercise of sovereignty over Hong Kong," whereas the British declare that they will "restore Hong Kong to the PRC". The pragmatic solution offered by the contracting parties, within the parameters set by China, is to accord the territory a quasi-autonomous status while reintegrating it into the PRC.

Specifically, Section I of Annex I stipulates that the Hong Kong SAR "shall enjoy a high degree of autonomy," except in foreign and defense affairs which will be the responsibility of the Central People's Government. According to the agreement, the Hong Kong SAR will be vested with "executive, legislative and independent judicial power, including that of final adjudication."<sup>42</sup> It "will retain the status of a free port and a

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38. *Accord*, Ch'in Fu, *Restoring Hong Kong is Perfectly Valid in International Law*, 4 J. INT'L STUDIES 3, 3-8 (Kit-yea Cheng trans. 1983).

39. Dicks, *The Position of Hong Kong and Macao in Recent Chinese Legislation*, 4 HONG KONG L. J. 151 (May 1974).

40. *Id.* For a full account, see Dicks, *supra* note 16, at 439-41.

41. See, e.g., Interim Regulations on Foreign Exchange Control of the People's Republic of China, art. 8 (1980) in which Hong Kong is listed separately from Macao in a way that indicates it is not a "foreign" country. *Reprinted in* 1 FOREIGN LANGUAGE PRESS, CHINA'S FOREIGN ECONOMIC LEGISLATION 118-38 (1980).

42. The Draft Agreement, art. 3(3), *supra* note 1, at 1371.

separate customs territory"<sup>43</sup> and will continue to serve as an international financial center with its foreign exchange markets, free flow of capital and convertible currency.<sup>44</sup> The agreement also envisages for the Hong Kong SAR a quasi-autonomous status with respect to finances and taxes,<sup>45</sup> as well as a capacity to participate in relevant international organizations and international trade agreements.<sup>46</sup>

The formula of "one country, two systems" is the vehicle by which the PRC seeks to exercise its sovereignty over Hong Kong and at the same time ensure the territory's prosperity and stability. This novel scheme is by no means perceived as a restriction on Chinese sovereignty since no concessions are granted to any other power. Rather, it is a form of domestic delegation of power, broadly similar to that extended to various sub-national entities (e.g., special economic zones) and in line with Article 31 of the Constitution of the PRC which provides that "[t]he state may establish special administrative regions when necessary."<sup>47</sup>

A rather idealistic interpretation of the "one country, two systems" concept is furnished by Yan Ziaqui, who considers it as a viable model for solving certain types of international conflicts by peaceful means. He contends that within this flexible framework Hong Kong would in fact wield more power than member states in federal countries, and thereby deduces that the proposed national configuration is vastly superior to any feasible alternative.<sup>48</sup>

Opposing interpretations support the view that the Sino-British Joint Declaration affords no solid foundation for Hong Kong's future as a quasi-autonomous legal entity. Five arguments have been raised by Chiu in an article which constitutes the first critical scrutiny of the document by an international legal scholar.<sup>49</sup>

The most glaring threat to the "durability and credibility" of Hong Kong's future quasi-autonomy identified by Chiu, lies in the fact that both the legislative and interpretative powers of the Basic Law for the Territory are in the hands of the PRC's National People's Congress (NPC). Here, Section I, Paragraph 1 of Annex I of the Joint Declaration stipulates that the NPC "shall enact and promulgate a Basic Law of the Hong Kong SAR of the PRC" and, in addition, under Article 67 of the Chinese Constitution the Standing Committee of the NPC has the power to interpret the Constitution and those political bodies governed by it. The corollary is that the Basic Law will be subject to interpretation by

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43. *Id.* art. 3(6), at 1372.

44. *Id.* art. 3(7).

45. *Id.* art. 3(8).

46. *Id.* art. 3(9).

47. FOREIGN LANGUAGE PRESS, *THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA* (1983)[hereinafter cited as *THE CHINESE CONSTITUTION*].

48. Yan Ziaqui, *Concept Points to Reunification*, 14 *Beijing Rev.* 22, 22-23 (Apr. 1985).

49. Chiu, *The 1984 Sino-British Agreement on Hong Kong and its Implications on China's Unification*, 21 *ISSUES & STUD.* 13, 17-19 (Apr. 1985).

the same external body which endorses the Constitution.

The second argument regarding Hong Kong's future quasi-autonomy pertains to a statement in the Joint Declaration which provides that the "law previously in force in Hong Kong . . . shall be maintained save for any that contravene the Basic Law . . ." <sup>50</sup> Given the fact that under the Chinese Constitution the Standing Committee of the NPC has the right to "interpret statutes," the laws of Hong Kong may be subject to annulment by this body, on the ground, real or otherwise, that they contravene the Basic Law. <sup>51</sup>

Chiu's third argument is an extension of the second. He points out that the Chinese Constitution authorizes the Standing Committee of the NPC "to annul those local 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 Hong Kong legislature. <sup>52</sup>

Another possible threat to Hong Kong's future quasi-autonomy is inherent in the Chinese Constitution which entitles the State Council "to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels." <sup>53</sup> This may render the executive organ in the territory vulnerable to administrative interference from structurally higher levels of government within the PRC.

The last argument advanced by Chiu focuses on the decisive role to be played by China in the appointment of the Chief Executive of the Hong Kong SAR. <sup>54</sup> While prior local election or consultation are envisaged, it is questionable to what extent a measure of independence would be retained in the face of control by the Central People's Government.

Chiu's arguments, while not groundless, are open to counter-arguments. To begin with, the question of the interpretation of the Basic Law has not yet been authoritatively resolved and it is conceivable that an arrangement will allow the local courts to exercise this function, at least with respect to "purely" internal matters. <sup>55</sup> Indeed, even within China proper, the Standing Committee of the NPC is no longer the sole authority relied upon to interpret the Constitution and related legislation, for

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50. The Draft Agreement, annex I, § II, para. 1, *supra* note 1, at 1373.

51. THE CHINESE CONSTITUTION, *supra* note 47, art. 67, para. 4.

52. *Id.* art. 67, para. 8.

53. *Id.* art. 8, para. 14.

54. The Draft Agreement, annex I, § I, para. 3, *supra* note 1, at 1373.

55. According to a delegation of local lawyers who recently returned from China, Hong Kong courts will be granted the "judicial power" of interpreting the Basic Law in deciding cases after 1997, whereas the NPC will retain the "legislative power of interpretation," namely, the power to amplify laws by legislative edict. It should be noted that Hong Kong, being a common law jurisdiction, based on the doctrine of precedent, exercises a judicial power of interpretation. The PRC on the other hand, follows a system whereby the power of interpretation rests with the legislature and has to be laid down in laws.

some of this responsibility has recently been delegated to subordinate bodies.<sup>56</sup> Furthermore, it should be noted that the Standing Committee of the NPC seldom makes use of its interpretative powers and consequently those powers do not constitute a real threat under normal circumstances.

It is also becoming increasingly evident that Hong Kong will be given the opportunity to provide a tangible input into the drafting of the Basic Law, rather than having the document imposed upon it in a one-sided fashion. To the extent that the Basic Law will serve as a legal framework for the territory, the role of the Standing Committee of the NPC in shaping this framework can be defined in "duopolistic," instead of "monopolistic" terms.

The relationship between the Basic Law and municipal legislation is another domain in which a more sanguine outlook is warranted. Arguably, the Basic Law could merely replace the existing Letters Patent and the local courts will retain their formal power to declare laws as *ultra vires* to the supreme constitutional documents.

The third point raised by Chiu is the consequence of misreading the Chinese Constitution. Given the restricted meaning accorded to "autonomous regions" under Chapter 3, Section VI of the Constitution, it should not be seen as applying to special administrative regions such as Hong Kong. As the Chinese Law on Regional Autonomy for Minority Nationalities confirms, "autonomous regions" are designed to enjoy less autonomy than the special administrative category.<sup>57</sup>

A similar observation may be made with respect to the putative constitutional power of the State Council to review measures taken by "local organs of state administration." Local organs are dealt with under special provisions of the Chinese Constitution (Chapter 3, Section V), which seem not to encompass the special administrative region phenomenon. It may also be added that any State Council intervention in the internal affairs of Hong Kong could be construed as an infringement of the Sino-

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56. According to a resolution on *Strengthening the Work on Statutory Interpretation* adopted by the Standing Committee of the Fifth National People's Congress at the 19th Meeting of the Standing Committee on June 10, 1981, the following bodies are authorized to interpret the laws, in addition to the NPC's Standing Committee: the Supreme People's Court (to provide explanations on questions relating to the concrete application of the law in the courts' adjudicatory work); the Supreme People's Procuratorate (to provide explanations on questions relating to the concrete application of laws in procuratorial work); the State Council (to provide explanations on questions relating to the concrete application of laws which are not within adjudicatory or procuratorial work); the Provincial People's Congresses (to interpret and clarify or supplement local regulations made by them); and the Provincial Peoples Government (to provide explanations on questions relating to the concrete application of local regulations). *COLLECTION OF LAWS* (1981) (translated from Chinese by Albert Chen).

57. The Law on the Regional Autonomy for Minority Nationalities was adopted in the Second Session of the Sixth National People's Congress on May 23, 1984. See Chen, *Further Aspects of the Autonomy of Hong Kong Under the PRC Constitution*, 14 *HONG KONG L. J.* 341, 345-7 (1984).

British Joint Declaration and presumably the Basic Law.

Chiu's final point is perhaps the most valid from a procedural standpoint. It is clear that, unlike states in a federal country, Hong Kong would not be able to freely elect its Chief Executive. Yet, the formal arrangement envisaged under the terms of the Sino-British Joint Declaration provides the Central People's Government with a weaker control mechanism than Chiu implies. Specifically, it provides for a veto power rather than the direct positive power of appointment.

In the final analysis, Hong Kong's future as a separate entity hinges on the willingness and ability of the PRC to treat it as such and, to a lesser degree, on its own willingness and ability to contribute towards this goal. As stated previously, China is not inclined to allow legal constraints to impede its policies and neither the Sino-British Joint Declaration nor the Basic Law should be deemed as the principal variables likely to determine the extent of local autonomy. Needless to say, the success of the "one country, two systems" formula also depends on the recognition and support of third parties.

#### B. *The Role of the PRC*

Of these imponderable factors, Chinese willingness to grant Hong Kong a high measure of autonomy is the most difficult to analyze. It is not easy to draw inferences about attitudes prevailing within the PRC's hermetically closed system of policy-making and, to compound matters, one is often left with the impression that this rather chaotic system is inherently incapable of formulating coherent long-term policies.<sup>58</sup> The constant shifts in policy and the dialectical ambivalence of the statements accompanying them, belie the claims that firm societal steering and control are a feature of post-Mao decision-making in China.

Short-term intentions, nonetheless, are open to informed speculation. It appears that the PRC is contemplating a more limited form of delegation of power than the most favourable reading of the Sino-British Joint Declaration would suggest. The type of autonomy envisaged could be best described as "controlled" or "guided autonomy", which is a configuration entailing a subtle command relationship between the Beijing center and the Hong Kong periphery.

Chinese intentions in this respect rest on a number of assumptions which are presently valid, but may, of course, prove invalid through the course of time. The PRC is assuming that the form of authoritarian control, as exercised by the colonial government, can be substituted by another without unduly affecting the prosperity and stability of the territory (a goal to which the PRC is committed to for reasons of self-interest).<sup>59</sup> Still, the Chinese have not completely realized that the au-

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58. Until 1972, the only published legislative texts available outside of the PRC were in 1966. Dicks, *supra* note 39, at 152.

59. Hong Kong provides, regularly, about one-third of China's hard currency earnings

thoritarianism practiced by the colonial government is coupled with a wide array of freedoms which underpin prosperity and stability. These freedoms, which give economic agents the kind of extensive choices that are conducive to utility maximizing behavior, are apparently an anathema to the PRC.

The Chinese authorities, who are increasingly inclined to learn from experience,<sup>60</sup> may become aware of the tradeoff between rigid control, prosperity and stability. Under such circumstances, they might be willing to moderate the strong emphasis on control and bring the intentions attributed to them more in line with local expectations of prosperity and stability. Sensitivity towards the interests of third parties, particularly those of the United States and Japan, could have a similarly beneficial effect.<sup>61</sup>

The PRC may also prove reasonably sympathetic to Hong Kong's aspirations so long as the Taiwan issue remains unresolved. Until now, the Nationalist dominated island has flatly rejected all Chinese overtures for reunification, and the PRC is militarily too weak to impose its will by force in the foreseeable future. While China has not relaxed its iron grip over "autonomous" Tibet,<sup>62</sup> it may in the future display a more accommodating attitude towards Hong Kong with a view to signalling unequivocally to Taiwan that reunification need not adversely affect the latter's freedoms and way of life.

Greater willingness, however, on the part of the PRC to tolerate an autonomous Hong Kong may not be matched by its ability to achieve this in practice. The limitations of the central decision-making apparatus in China lie in deficient policy implementation, as well as inadequate policy formulation. The commands emanating from Beijing are often distorted in the process of top-down communication.<sup>63</sup> The temptation to gain control over Hong Kong, and the enormous personal benefits which may be derived therefrom, could motivate cadres assigned to the territory to tighten the grip over the local polity, irrespective of the original intentions of Beijing. The wide cultural gap between these cadres and the territory's strategic elites may further exacerbate the situation by creating mistrust, tension and conflict.

Indeed, the potential for conflict extends beyond the territorial confines of Hong Kong. Given the disparity in the standard of living and

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and serves as its offshore financial and information center. Jao, *Hong Kong's Role in Financing China's Modernization*, in CHINA AND HONG KONG: THE ECONOMIC NEXUS 1 (A. Youngston ed. 1983).

60. See, e.g., POLICY IMPLEMENTATION IN THE POST-MAO ERA (D. Lampton ed. 1986).

61. O'Leary, *China's Foreign Relations* in CHINA SINCE THE "GANG OF FOUR" 231-274 (B. Brugger ed. 1980); CHINA'S ECONOMIC REFORMS (Lin Wei & A. Chao eds. 1982); MODERNIZING CHINA (A. Barnett & R. Clough eds. 1986).

62. See, e.g., S. CLOUD, AUTONOMOUS TIBET (1983).

63. See, e.g., Lampton, *supra* note 60.

values between the PRC and its capitalist enclave,<sup>64</sup> ill will might develop and undermine the vision of autonomy reflected in the Sino-British Joint Declaration. Factions in the Communist Party which are not well disposed towards the "one country, two systems" formula and the overall modernization drive in China could exert a particularly disruptive influence in this respect.<sup>65</sup>

On the positive side, however, it should be noted that a continuing commitment on the part of the PRC to rapid economic growth through the liberalization of the economy<sup>66</sup> might work to the advantage of an autonomous Hong Kong. A liberalized economy generally breeds decentralization and the territory could be in a better position to avoid rigid central controls in a decentralized environment consisting of multiple control points. The question, of course, is whether China is likely to have progressed far enough, if at all, along the liberalization/decentralization path by 1997.

The substantial developmental gap between Hong Kong and the PRC, while problematic in most respects, also has a positive dimension. The fragile policy-making machinery in China could come to rely partly on its sophisticated Hong Kong counterpart for a wide range of informational inputs. Since information is an important source of power, this potential asymmetry of the relationship should marginally widen the scope of maneuvers available to local decision-makers.

### C. *The Role of Hong Kong*

The balance of the "one country, two systems" formula for autonomy hinges on the willingness and ability of Hong Kong to play its part in the scheme envisaged, as well as PRC cooperation. Unlike many other former colonies, the territory is endowed with a remarkable wealth of talent and abundant economic resources. Yet, questions arise about the long-term commitment of both the human capital and financial assets to Hong Kong, and the determination of the territory to administer itself effectively in the face of potential Chinese heavy-handedness.

Empirical evidence on this subject is scarce, but there are indications that Hong Kong's economic elites and professional classes have little de-

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64. According to studies by the World Bank, China's nominal income per capita is only one-thirteenth that of Hong Kong, and the average annual growth rate of Hong Kong's GDP per capita is nearly twice that of China. For documentation and analysis of the economic gap between Hong Kong and China, see Jao, *Hong Kong's Economic Prospects After the Sino-British Agreement: A Preliminary Assessment 51-2* (April 24-27, 1985) (unpublished manuscript presented to the Annual Meeting of the Western Social Science Association).

65. See, e.g., L. PYE, *THE DYNAMICS OF CHINESE POLITICS* (1981).

66. See generally, the following articles in Vol. 10 of *CHINA Q.* (Dec. 1984): Yeh, *Macroeconomic Changes in the Chinese Economy During the Readjustment*, at 691; Field, *Changes in Chinese Industry Since 1978*, at 742; Walker, *Chinese Agriculture during the Period of Readjustment 1978-83*, at 783; Kueh & Howe, *China's International Trade*; Lardy, *Consumption and Living Standards in China, 1978-83*, at 849.

sire to live under communist sovereignty and are actively exploring the "exit" option.<sup>67</sup> While the territory could eventually generate new valuable human and financial resources, the short and medium-term effects of large-scale migration will manifest itself in a diminished capacity for self-government and less incentive for the PRC to allow substantive autonomy.

Hong Kong is now in a process of developing its representative institutions.<sup>68</sup> These institutions, if allowed to mature, could theoretically serve as a barrier to excessive Chinese intervention, although fears have been expressed that they might give rise to polarization of the community, and hence immobilism. The extent to which the PRC leadership, with its proclivity towards "backdoor politics," would be inclined to encourage the partial democratization of Hong Kong is impossible to assess accurately.<sup>69</sup> However, one cannot dismiss the possibility of a Chinese attempt at far-reaching infiltration and domination. A significant number of influential PRC decision-makers still cling to the view that direct controls are preferable to indirect ones, in spite of evidence that the latter are more effective.<sup>70</sup> A decision to implement direct control over Hong Kong might sap the territory's vitality, and seriously detract from its willingness and ability to govern itself.

#### D. *The Role of Third Parties*

The position to be adopted by third parties is another significant factor in assessing the prospects of an autonomous Hong Kong. The Sino-British Joint Declaration has been received with much rhetorical approval from members of the international community. Eventually, however, self-interest might prevail and support for the thriving economic entity from actual and potential competitors could wane and turn into open obstruction. The rising tide of protectionism is a particularly ominous development on the horizon of the Hong Kong SAR.<sup>71</sup>

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67. I. Scott, *The Sino British Agreement and Political Power in Hong Kong* (Apr. 19, 1985)(unpublished manuscript presented to the workshop on The Future of Hong Kong, University of Toronto-York University Joint Centre on Modern East Asia).

68. See Green Paper: The Further Development of Representative Government in Hong Kong (July 1985); White Paper: The Further Development of Government in Hong Kong (Nov. 1984) The reforms basically aim at developing a quasi-parliamentary democracy based largely on indirect elections. For a thorough analysis and critique of the changes in Hong Kong's political and administrative structure, see SIU-KAI LAU, *POLITICAL REFORM AND POLITICAL DEVELOPMENT IN HONG KONG: DILEMMAS AND CHOICES* (1984).

69. See SUI-KAI LAU, *supra* note 68; G. Hicks, *Hong Kong on the Event of Communist Rule 19-26* (April 24-27, 1985)(unpublished manuscript presented at the Annual Meeting of the Western Social Science Association); Walden, *Hong Kong Chases a Democratic Mirage*, *Asian Wall St. J.*, Mar. 7, 1985, at 6.

70. See Salinger, *supra* note 14, at 1238.

71. Thus, in view of the fact that textile and clothing industries account for about 41 percent of Hong Kong's total industrial workforce, and 40 percent of its total domestic exports, any attempt by an importing country to abolish Hong Kong's independent quota (and merge it with that of China's) would have serious repercussions and could well be disas-

Nevertheless, the attitude of third parties toward the Territory could have a positive influence on the PRC. If China is genuinely committed to maintaining Hong Kong's prosperity and stability, it must respect its status as a separate economic entity, otherwise international recognition might be withheld.<sup>72</sup> The territory's external predicament can thus be viewed both as a threat to its envisaged independence and as a constraining factor upon the PRC.

From a broad legal standpoint, changing notions of sovereignty should facilitate the recognition of Hong Kong's status as an international legal person by the international community. Given the fact that states now tend to admit non-state actors, such as international organizations and multinational corporations, into the international legal system, legitimate expectations have been created for extending a similar recognition to autonomous regions which enjoy a particularly high degree of international exposure. It is possible to draw analogies here with other configurations recognized in international law,<sup>73</sup> such as federal states (e.g., Basque country, Catalonia, Eritrea, Greenland, United Arab Emirates), internationalized territories and territories of particular international concern (e.g., the Free City of Danzig, the Free Territory of Trieste, the International Settlement of Shanghai, the Memel territory), associated states (e.g., Cook Islands, Niue, Puerto Rico, Tokelau) and "unincorporated territories" (e.g., Guam, Netherlands Antilles, U.S. Virgin Islands). An analysis of these configurations suggests that the degree of international legal personality accorded is the function of three factors: control over (national) defense, control over foreign relations and competence to enter into international agreements, with or without the consent of the central/sovereign government.<sup>74</sup> The greater the freedom exercised in the above domains, the more likely is the recognition of a dependent territory as a discrete entity with a measure of international legal personality.

While the conduct of foreign affairs remains the most conspicuous symbol of sovereign power, the conduct of economic exchanges with other national entities, for all practical purposes, acquired greater significance.<sup>75</sup> On this basis, the considerable formal power to be retained under the Sino-British Joint Declaration by the Hong Kong SAR in relation to "transnational or external affairs" (as distinct from "foreign affairs" which encompass basically national security and territorial integrity) should be granted due international recognition.<sup>76</sup> The Sino-British agree-

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terous if such a tactic was widely followed. See Kayser Sung, *Trading On from 1997, with Special Reference to Hong Kong's Textile Agreements*, in STRATEGIES, *supra* note 2, at 305-24.

72. See Jao, *Hong Kong's Economic Prospects*, in STRATEGIES, *supra* note 2, at 49.

73. See generally, Hanum & Lillich, *The Concept of Autonomy in International Law*, in MODELS OF AUTONOMY 215 (Y. Dinstein ed. 1981)[hereinafter cited as AUTONOMY].

74. *Id.* at 232-6.

75. See generally *id.*

76. This distinction has been raised and developed by Yiu Chu Liu in a paper on the Scope of Foreign and Defense Affairs, presented to the Future of Hong Kong Study Group

ment stipulates that "the Hong Kong SAR may on its own maintain and develop economic and trade relations with all states and regions."<sup>77</sup> Of particular importance are the provisions granting to Hong Kong the authority to determine its own fiscal policy, manage its financial resources and monetary system, regulate international travel and commerce, emigration and immigration, exercise control over importation of foreign goods and flow of capital, maintain and develop cultural relations, and conclude relevant agreements with states, regions and international organizations. Thus, it appears that under the agreement China, in effect, retains a residual power which is "nothing more than that part of the SAR's transnational or external relations which cannot be conducted by the SAR in the name of 'Hong Kong, China' due to the SAR not being a nation-state."<sup>78</sup>

From a legal standpoint the residual power determined through the text of the agreement cannot be the exclusive determinant of the balance of power between the central and local authorities.<sup>79</sup> This point finds judicial expression through the Permanent Court of International Justice in the *Interpretation of the Statute of Memel Case*<sup>80</sup> and the *Lighthouse in Crete and Samos Case*.<sup>81</sup> As may be inferred from both judgments, notwithstanding any autonomy arrangement and regardless of the extent of power transferred, sovereignty of the central government is not diminished and its residual power "may prove to be of tremendous importance when the matter is put to the test."<sup>82</sup>

The above observation should not detract from the local entity's claim to recognition as an international legal person. Given the current emphasis on the ability and effectiveness of the self-governing institutions,<sup>83</sup> the Hong Kong SAR has a strong claim for recognition in this respect. Obviously, its case could gain widespread support from a Chinese declaration to that effect in the UN. Such a step seems, however, unlikely at this juncture since the PRC has resisted all along any attempt to internationalize the issue of Hong Kong. Hong Kong's claim for autonomy can be enhanced by third parties' attitude. At present, it appears that most other parties would be prepared to contribute to the maintenance of Hong Kong's unique status as an autonomous entity. Yet, as indicated, their position may undergo a radical change in the future. This is why prompt action by Hong Kong in this matter is essential. By securing early recognition of the territory's international personality by other relevant

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on May 29, 1985.

77. The Draft Agreement, art. 3(10), *supra* note 1, at 1372.

78. Liu, *supra* note 76.

79. Dinstein, *Autonomy*, in *AUTONOMY*, *supra* note 73, at 291, 296.

80. *Interpretation of the Statute of Memel Territory (Merits)*, 1932 P.C.I.J., Ser. A/B, no. 49, at 35 (Hudson ed. 1938).

81. *Lighthouse in Crete and Samos*, 1937 P.C.I.J., Ser. A/B, no. 71, at 243 (Hudson ed. 1943).

82. Dinstein, *supra* note 79, at 300.

83. Hannum & Lillich, *supra* note 73, at 250-1.

external actors, Hong Kong could, with the assistance of the UK, render subsequent reversals less likely.

## V. THE ISSUE OF TREATIES

### A. *The PRC Concept of Treaties*

Treaties are the major instruments for facilitating interactions within the international legal system. They are also an important source of international law, creating norms of international law and establishing obligations and rights of contracting parties. By concluding a treaty, the contracting parties apply the most significant norm of customary international law,<sup>84</sup> namely the rule of *pacta sunt servanda* (treaties must be observed), which in fact is the underlying rationale of the binding quality of treaty obligations.

It is interesting to note that this principle is hailed by the PRC which, like other communist countries, deems treaties as the primary source of international law.<sup>85</sup> It should be observed, however, that China only regards "just" or "equal" treaties as legitimate sources of international law. Generally, the PRC considers as "unequal" all treaties imposed on China in the 19th and early 20th centuries (i.e., those concerning consular jurisdiction, unilateral most-favored nation treatment, restrictive tariff regulations, territorial cessions or leases, including the treaties relating to Hong Kong).<sup>86</sup> While the treaties alluded to involved many instances of extreme inequality, both in terms of the bargaining power of the parties and the benefits and burdens created by the treaties themselves, other treaties exist which are to all appearances acceptable to the PRC. Nevertheless, such treaties undertaken by the parties cannot be described as truly "equal" and consequently, the meaning of "unequal treaty" remains obscure.<sup>87</sup>

Students of Chinese politics have contended that "political considerations, apparently more frequently than legal ones, motivate the PRC in the application of the [unequal treaty] concept" and that the Chinese have conveniently constructed a legal machinery "in order to extricate themselves from difficult or unmitigable situations."<sup>88</sup> With reference to these critical comments, Scott remarks that "this does nothing to set the PRC apart from other states which may be champions of the Western

84. The rule is restated in article 26 of the 1969 Vienna Convention on the Law of Treaties, which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679 (1969) [hereinafter cited as 1969 Vienna Convention].

85. For a discussion and further references, see G. SCOTT, *supra* note 12, at 59-61.

86. HUNGDAH CHIU, *PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 60-71 (1972). See also W.L. TUNG, *CHINA AND FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES* (1970).

87. G. SCOTT, *supra* note 12, at 92-6.

88. *Id.* at 96-7.

system of international law"<sup>89</sup> and that Western states also often use international law merely to cloak otherwise questionable acts in a mantle of legality. Scott identifies what he perceives to be a "politically parallel concept in Western international law," namely, *rebus sic stantibus*. This concept, which is incorporated in the 1969 Vienna Convention on the Law of Treaties,<sup>90</sup> allows termination of or withdrawal from a treaty where there has been a "fundamental change of circumstances." Scott maintains that the *rebus sic stantibus* clause often becomes the basis for politically motivated change in the *status quo*.

The unequal treaty concept, while enjoying support among third world countries, cannot be said to have gained general acceptance as a rule of international law. The Law of Treaties,<sup>91</sup> to which China has not acceded, goes no further than to stipulate that a treaty shall be void if procured by force contrary to the principles of international law embodied in the UN Charter.<sup>92</sup> There is no reference to economic inequality in bargaining power, which the PRC appears to include in its doctrine of unequal treaties.<sup>93</sup> Nor are the equality or inequality of obligations assumed by the parties taken into account in regulating treaties. Attention should be drawn, to the non-binding Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the Vienna Treaty Conference,<sup>94</sup> which "solemnly 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 principles of the sovereign equality of states and the freedom of consent."

The divergence between Western and Chinese views on "unequal treaties" has clearly manifested itself with regard to Hong Kong. While the PRC deems the treaties relating to the acquisition of Hong Kong as unequal and hence null and void,<sup>95</sup> the UK has asserted that the doctrine amounts to no more than a political principle which may justify a moral condemnation of historical events but has no binding legal effect.<sup>96</sup> In any event, the debate concerning the relative strength of the respective claims by the two sides must now be relegated to the academic realm. The more pertinent question is whether the Sino-British Joint Declaration on the future of Hong Kong constitutes a valid international treaty which is binding on the contracting parties. This question has attracted considerable attention on the part of general commentators, without the emergence

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89. *Id.* at 97.

90. 1969 Vienna Convention, *supra* note 84.

91. *Id.*

92. U.N. CHARTER art. 52.

93. HUNGDAH CHIU, *supra* note 86.

94. The declaration is annexed to the Final Act of the United Nations Conference on the Law of Treaties. 1969 Vienna Convention, *supra* note 84, at 733.

95. See P. WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* (1980).

96. See Dicks, *supra* note 16, at 434-5.

of a clear consensus.

### B. *The Validity of the Joint Declaration*

On balance, the position held that the agreement is a valid international treaty has greater merit, insofar as formal aspects of treaty making are concerned. This conclusion rests on the fact that the Joint Declaration falls within the established definition of an international treaty as incorporated in Article 2 of the 1969 Vienna Convention on the Law of Treaties. This definition equates a treaty with "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."<sup>97</sup>

Since the PRC is not a party to the 1969 Vienna Convention, it is important to emphasize that the above definition codifies, to a large extent, customary international law with respect to treaties.<sup>98</sup> Chinese non-accession to the Convention is merely a "technicality" which should have no direct bearing on the status of the agreement as an international treaty.

Given the relevance of the definition, the designation of "Joint Declaration" rather than "treaty," does not detract from its validity as an instrument compatible with the Convention criteria. As elaborated by many international authorities,<sup>99</sup> the designation of a treaty is of no great significance (although it may indicate certain procedural differences or degrees of formality). A treaty may thus be labelled "protocol," "arrangement," "statute," "declaration," "final act," "general act," etc. and enjoy equal international legal validity.

The fact that the Joint Declaration consists of several documents<sup>100</sup> does not dilute its force as a binding international treaty. As the definition states, the number of documents is not of any relevance. Furthermore, the agreement itself stipulates that both the Joint Declaration and

97. 1969 Vienna Convention, art. 2(a), *supra* note 84, at 680-1.

98. See Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970); Sinclair, *Vienna Convention on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47 (1970). It is clear that the Convention's provisions constitute presumptive evidence of general international law rules. See, e.g., North Sea Continental Shelf [Germany v. Denmark and The Netherlands], 1969 I.C.J. 3, 13; and Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18. In respect to rules concerning the termination of treaties, for example, it was confirmed by the International Court of Justice that they "may in many respects be considered as a codification of existing customary law on the subject." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (advisory op.).

99. See, e.g., The International Law Commission's Commentary, [1966] 2 Y.B. INT'L L. COMM'N 188.

100. The Draft Agreement, *supra* note 1, contains the Joint Declaration, three annexes and one exchange memoranda. It also includes a lengthy introduction on the British Government's position and other explanatory notes.

its Annexes "shall be equally binding."<sup>101</sup>

In addition, the Sino-British Joint Declaration is the product of a process throughout which the contracting parties have meticulously followed the established practices regarding treaty-making. These include the accreditation of persons who conducted the negotiations, negotiations and adoption of the text (26 September, 1984), authentication, signature and exchange of instruments (19 December, 1984), ratification, entry into force (27 May, 1985) and, finally, registration with the United Nations in accordance with Article 102 of the UN Charter (13 June, 1985).

### C. *The Implementation of the Treaty*

It is not possible, at the present juncture, to assess the parties' exact intentions with respect to the final phase of the treaty-making process, namely, application and enforcement. This normally entails some form of incorporation of the treaty provisions into the domestic law of the parties and actual application of the provisions along with implementation of the administrative arrangements agreed upon. Administrative arrangements, in the context of the Sino-British Joint Declaration, include the establishment of the Sino-British Joint Liaison Group and the Land Commission, the details of which are provided in Annexes II and III of the Agreement.

The application of a treaty raises the wider issue of the position of treaties in domestic law and, at a higher plane, that of the relationship between international law and municipal legislation. The British position in this regard mirrors the "transformation," as distinct from "incorporation," theory whereby international agreements are transformed into domestic law by means of appropriate constitutional law.<sup>102</sup> According to this theory, treaties cannot operate of themselves within the state but require the passage of enabling statutes. The Crown in the UK retains the right to sign and ratify international agreements, yet is unable to legislate directly. Hence, before a treaty can become part of English law an Act of Parliament is essential.<sup>103</sup> In line with this approach, the Hong Kong Act of 1985 was passed by Parliament, stating that "[a]s from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong"<sup>104</sup> and included provisions on the three crucial matters of nationality, amendments to the laws of Hong Kong and

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101. The Draft Agreement, art. 8, *supra* note 1, at 1372.

102. Mann, *The Enforcement of Treaties by English Courts*, 44 *TRANSACTIONS GROTIUS Soc'y* 29 (1958-59). See generally A.D. McNAIR, *THE LAW OF TREATIES* (1961).

103. There are three exceptions to this practice. For example, treaties relating to the conduct of war or to cession of territory do not need an intervening act of legislation before they can be made binding upon the citizens of the country. By the same token, relatively unimportant administrative agreements which do not require ratification also apply automatically, provided of course, they do not purport to alter municipal law. Generally, however, where the rights and duties of British subjects are affected, an Act of Parliament is necessary to render the provisions for the particular treaty operative within the United Kingdom. Mann, *supra* note 102.

104. Hong Kong Act, ch. 15, 1985.

the granting of diplomatic privileges to Chinese members of the Joint Liaison Group.<sup>105</sup>

The PRC doctrine on the relationship between international and domestic law is rather ambiguous. The Chinese Constitution (1982) furnishes no guidelines in this respect and Chinese writers seldom address this question. An outside expert has expressed the view that in order to implement a treaty in the municipal law of the PRC, laws or decrees need to be enacted.<sup>106</sup> As a matter of practice, some treaties are indeed included in China's official *Collection of Laws and Regulations* and presumably have the same legal status as other legislation incorporated in the collection. Informal discussions with scholars specializing in PRC law suggest, however, that the American model, which differentiates between "self-executing" and "non self-executing" treaties,<sup>107</sup> is more applicable in China than the British "transformation" theory. Indeed, this would dovetail with the PRC's tendency to blur the distinction between law and policy.

The PRC has undertaken the incorporation of the Sino-British Joint Declaration into a "Basic Law," which is to be drafted by the National People's Congress.<sup>108</sup> This document is intended to serve as the constitution of the Hong Kong SAR for a fifty year period following the transfer of sovereignty.<sup>109</sup> The Basic Law will be regarded as the supreme legal instrument in the territory, providing both an overall yardstick for evaluating the validity of local legislation and establishing the institutional framework for an autonomous Hong Kong.

There appears to be little doubt that China will take the necessary formal steps to implement the Joint Declaration.<sup>110</sup> The PRC's reasonably good record of compliance with treaties lends support to this contention. As Lee has observed, China has been particularly careful in adhering to the provisions and meeting the obligations of its trade agreements.<sup>111</sup> He acknowledges that negotiations with Beijing are not an easy matter, but asserts that once an unambiguous agreement is reached, compliance normally follows.<sup>112</sup>

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105. *Id.*

106. HUNGDAH CHIU, *supra* note 87, at 7.

107. While the former are able to operate automatically within the domestic sphere without the need for any municipal legislation, the latter require enabling acts before they can function inside the country and within the American courts. The distinction is based on the political content of the treaties, such as where a political issue is involved the treaty is likely to be treated as non self-executing and vice versa.

108. The Draft Agreement, art. 3, para. 12, *supra* note 1, at 1372.

109. *Id.*

110. The Joint Liaison Group and the Land Commission were set up on May 27, 1985 with the respective aims of ensuring the smooth transfer of sovereignty and handling of related land questions. A Basic Law Drafting Committee was established on June 18, 1985.

111. L. LEE, *CHINA AND INTERNATIONAL AGREEMENTS: A STUDY OF COMPLIANCE* 119 (1969).

112. *Id.*

In support of the above claim, Lee postulates that the Confucian emphasis on *ch'eng* (sincerity) and *hsin* (trustworthiness) seems to have been extended from interpersonal to interstate relations and that this may account for the generally satisfactory record of both the PRC and Nationalist China in complying with treaty commitments.<sup>113</sup> In the case of the PRC, this compliance is not entirely consistent with the domestic law practice of elevating *li* over *fa*.<sup>114</sup> One possible explanation for the inconsistency is that the good external records reflects the weakness of the PRC as an actor in the international arena, particularly vis-a-vis the superpowers.<sup>115</sup> Another reason may lie in the Chinese sensitivity to their external image and the resultant tendency to differentiate between international behavior and domestic application.<sup>116</sup>

The formal implementation of the Sino-British Joint Declaration does not appear to pose any serious problems in relation to the viability of the arrangements envisaged for Hong Kong. However, a more critical issue is that of interpretation. Given the wide disparities between the notions of law prevailing on both sides, the agreement is open to conflicting interpretations. No procedure for solving interpretation disputes is provided under the Joint Declaration and this omission may be a source of considerable difficulties in view of the PRC's reluctance to submit to third party adjudication in the settlement of international disputes and its non-acceptance of the compulsory jurisdiction of the International Court of Justice.<sup>117</sup>

## VI. THE ISSUE OF STATE SUCCESSION

The change of sovereignty over Hong Kong gives rise to a host of "succession" questions. Even though China contends that no transfer of sovereignty is to take place, since it is to "resume" the exercise of sovereignty,<sup>118</sup> the situation effectively falls within the definition of "state succession."<sup>119</sup> Under this definition, the replacement of one state by another in the responsibility for the international relations of a territory is tantamount to state succession and, as such, subject to relevant international legal regulation. The explanatory notes to the Annexes of the Sino-British Joint Declaration and to the Associated Exchange of Memoranda explicitly refer to the imminent changes in the territory in equivalent terms.<sup>120</sup> Specifically, it is stated therein that "foreign and defense affairs which are now the overall responsibility of Her Majesty's Government . . . will

113. *Id.*

114. See *supra* note 11 and accompanying text.

115. L. LEE, *supra* note 111, at 129.

116. See generally CHINA AND THE GLOBAL COMMUNITY (J. Hsiung & S. Kim eds. 1980).

117. HUNGDAH CHIU, *supra* note 49, at 15.

118. See *supra* note 20-24 and accompanying text.

119. 1978 Vienna Convention on Succession of States in Respect of Treaties, art. 2, U.N. Doc. A/Conf. 80/31/Corr. 2, reprinted in 17 I.L.M. 1488 (1978)[hereinafter cited as Convention on Succession].

120. The Draft Agreement, *supra* note 1, at 1382-87.

with effect from 1 July 1997 become the overall responsibility of the Central People's Government of the People's Republic of China."<sup>121</sup>

Though the specific rules which govern state succession are not as unequivocal, some underlying principles may be discerned from state practice, judicial authorities and doctrine. Moreover, codified authority is present in the 1978 Vienna Convention on Succession of States in respect of Treaties<sup>122</sup> and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.<sup>123</sup>

Whether any rights or obligations should pass upon external changes of sovereignty is theoretically determined by considerations of justice, reasonableness, equity and the interests of the international community. As Starke emphasizes, however, state practice in this domain is "unsettled and full of inconsistencies" and these have not been resolved in the recent conventions on succession referred to above.<sup>124</sup> Consequently, states tend to deal expressly with possible succession questions within the context of the treaty pertaining to the transfer of sovereignty. Any subsequent problems are reviewed in light of the intentions of the parties, relevant laws, treaties, declarations and other arrangements accompanying the change of sovereignty.

The position of newly independent states is quite straightforward.<sup>125</sup> The emphasis here is on a modernized version of the "clean slate" theory.<sup>126</sup> As evidenced in the Vienna Conventions on Succession, and the discussions leading up to their conclusion, little has been allowed to derogate from the right of newly independent sovereign states to decide which bilateral and multilateral treaties will remain in force.<sup>127</sup> At the same time, the basic human desire for stability, reflected in the practice of concluding devolution agreements<sup>128</sup> and more recently the growing number of unilateral declarations,<sup>129</sup> has prompted newly independent states to retain many of the treaties in force.

The predicament of Hong Kong in this regard is unique, because of

121. *Id.* para. 4, at 1382.

122. Convention on Succession, *supra* note 119.

123. U.N. Doc. A/Conf. 117/14 (April 7, 1985), reprinted in 22 I.L.M. 306 (1983).

124. See J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 313 (9th ed. 1984).

125. See generally OKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES (1972).

126. CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 15 (1974).

127. Convention on Succession, *supra* note 119.

128. Devolution agreements provide for the "assignment" or "devolution" upon a successor state, the treaty rights and obligations of the predecessor state. These agreements were used widely by many former British territories in order to secure succession to treaties. Lawford, *The Practice Concerning Treaty Succession in the Commonwealth*, 1967 CAN. Y.B. INT'L L. 3.

129. Unilateral Declarations, commonly utilized by Central and East African ex-British territories, generally provided that the treaty relationship will be maintained by the successor states for a limited period during which it will decide which treaties it wishes to retain indefinitely and which to discontinue.

the large measure of autonomy which it enjoys. The continuation of external ties, and hence international agreements, is the key to the territory's prosperity including the maintenance of its status as the third most important financial center in the world. The PRC would presumably not acquiesce to Hong Kong signing international agreements without authority or generally acting as if it were an independent sovereign state. Thus, the objective, as expressed by a local government official, is to achieve "maximum freedom of action consistent with China's international responsibility for Hong Kong."<sup>130</sup> The problem is compounded by the fact that the PRC is not a party to many of the international agreements presently applicable to the territory. Nor is China a member of many international conferences and organizations of which Hong Kong is currently a member, either in its own right or as an adjunct of the British delegation (when meetings are confined to sovereign states alone).

The Sino-British Joint Declaration has provided a formal mechanism for consolidating the territory's external links. Specifically, international agreements which are implemented in Hong Kong may remain with the Hong Kong SAR, even if China is not a party.<sup>131</sup> One such contingency expressly covered in the agreement is the continued application to the SAR of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, notwithstanding that the PRC is a signatory to neither.<sup>132</sup> On the other hand, under the Joint Declaration, international agreements to which China is a party may be applied to the territory, if so decided by the Central People's Government, in accordance with circumstances and needs of the SAR Government and after seeking the latter's views.

The technical details of treaty succession will have to be worked out by the Sino-British Liaison Group. The Group faces a daunting task, given the multitude of multilateral and bilateral treaties applicable to Hong Kong, and the fact that the consent of third parties must be secured. Several strategies have been considered by Hong Kong officials to overcome this problem.<sup>133</sup>

One strategy is to guarantee the status of a separate customs territory to the SAR and ensure its autonomous participation in international trade agreements such as GATT<sup>134</sup> and MFA.<sup>135</sup> Article XXVI 5(c) of the GATT stipulates that a territory which possesses "autonomy in the conduct of external commercial relations . . . shall, upon sponsorship

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130. Quoted in Tsang, *Colossal Task of JLG to Forge a Sound Future*, South China Morning Post, May 23, 1985, at 2.

131. The Draft Agreement, annex I, § XI, *supra* note 1, at 1376-77.

132. Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

133. See Tsang, *JLG Looks Set for a Long, Hard Slog*, South China Morning Post, May 24, 1985, at 2.

134. GATT, *supra* note 4.

135. MFA, *supra* note 5.

through a declaration by the responsible contracting party establishing [the fact of its autonomy], be deemed to be a contracting party."<sup>136</sup> Such a configuration should, under the optimistic assumption of third parties' future cooperation, serve as a model and precedent for solving similar issues.

A more prudent course of action would entail the scrutiny of each individual treaty and the formulation of an *ad hoc* solution in the light of its specific circumstances. Such an approach may be dictated by the myriad of configurations by which Hong Kong, the UK and the PRC participated in various agreements, and the conservative attitude to problem-solving of Britain and China, although such a narrow strategy may prove counterproductive and inefficient in the long run.

The most undesirable scenario is modeled on the Taiwan arrangement, whereby international obligations, commercial and others, would be undertaken and fulfilled by the territory without its being externally recognized as an autonomous entity. Needless to say, explicit rather than implicit recognition is essential if Hong Kong is to continue functioning as a major international financial center.

Little is known about feasible scenarios that the PRC has constructed for its capitalist enclave. The success of the strategies contemplated by the Hong Kong Government hinges primarily on Chinese attitudes and behavior.<sup>137</sup> The PRC enjoys greater leverage in its relations with other actors in the international arena, but it remains to be seen whether it would be willing and able to reconcile the conflicting domestic pressures and exert influence on behalf of autonomous Hong Kong in order to render the succession of treaties as smooth as possible.

Another facet of the "state succession" issue is the succession of acquired private rights. International law requires that such rights be respected by the successor state.<sup>138</sup> As held by the Permanent Court of International Justice in the well-known case of the *German Settlers*,<sup>139</sup> "Private rights acquired under existing law do not cease on a change of sovereignty." "It can hardly be maintained," declared the court, that "although the law survives, private rights acquired under it have perished."<sup>140</sup> The acquired rights rule only means that change of sovereignty has no effect on private rights; it is not a rule for the perpetual maintenance of these rights. By implication, after the transfer of sovereignty, the successor state may modify or even expropriate private property rights.<sup>141</sup>

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136. GATT, art XXVI 5(c), *supra* note 4.

137. See *supra* Part IV(B) for a more elaborate discussion of the Chinese role.

138. *Settlers of German Origin in the Territory Ceded by Germany to Poland* (Ger. v. Pol.), 1923 P.C.I.J. ser. B, No. 6.

139. *Id.* at 36.

140. This principle was also confirmed in *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J., ser. A, No. 7.

141. Clearly, if as a result of a change of sovereignty the possessor has acquired the

Insofar as the position of Hong Kong is concerned, the Sino-British Joint Declaration stipulates that private property will be protected by law,<sup>142</sup> that the laws which are currently in force in Hong Kong will remain fundamentally unchanged<sup>143</sup> and that all rights in relation to pre-1997 leases of land extending beyond 1997 "shall continue to be recognized and protected under the law of the Hong Kong SAR."<sup>144</sup> Yet, as noted above, the continuation of such rights is subject to any alterations made to the former municipal law by the Central Government of the PRC. Thus, as observed by Wesley-Smith, if Annex III concerning "Land Leases," is not incorporated into the Basic Law of the SAR or in any other legislation, "a lessee of land who is aggrieved by government action after 1997 will have no remedy in the courts."<sup>145</sup> The obligations announced in the Joint Declaration would then be "obligations which want the *vinculum juris*, although binding in moral equity and conscience."<sup>146</sup> The SAR government would be "bound in for conscientiae to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law."<sup>147</sup>

It is hoped, therefore, that China would take the necessary steps to convert the provisions of the Joint Declaration into effective domestic legal instruments. Indeed, the expectation is that the Basic Law might fill the existing gap in this respect. However, doubts are likely to persist about the PRC's willingness and ability to interpret the Basic Law in the spirit of the Joint Declaration.

## VII. THE ISSUE OF NATIONALITY

### A. *The Transfer of Nationality under International Law*

International law accords states a high degree of discretion in the conferment of nationality. The 1930 Hague Convention on Nationality Laws states that "it is for each state to determine under its own law who are its nationals" and that "any question as to whether a person possesses the nationality of a particular state shall be determined in accordance

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nationality of the successor state, the rule that his rights have survived is only relevant to the extent to which domestic law protects them, for as a national he is at the mercy of the legislative powers of the successor state. See Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 1936 BRIT. Y.B. INT'L L. 1, 17. He states that: "a cession of territory does not affect private rights is valid only as long as new legislation is not introduced which affects them . . . . [T]he introduction of such legislation is not prohibited by international law, and is not in particular made by it dependent on payment of compensation." *Id.*

142. The Draft Agreement, annex I, § VI, para. 1, *supra* note 1, at 1374.

143. *Id.* annex I, § II, para. 1, at 1374.

144. *Id.* annex III, art. 1, at 1380.

145. P. Wesley-Smith, Act of State: Lord Diplock's Curious Inconsistency (unpublished manuscript).

146. *Id.*

147. *Id.*

with the laws of that state."<sup>148</sup> Nonetheless, there are some imposed limitations, such as the requirement that the nationality law of each state "be recognized by other states so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality."<sup>149</sup> The Hague Convention, however, does not specify the criteria to confer nationality that are recognized or required by international law.

Furthermore, any such criteria must be inferred from customary practice which has been limited to either or both of two major principles: *jus sanguinis* (conferment of nationality by blood relation-descent) and *jus soli* (conferment of nationality based on place of birth). It appears that the so called "countries of emigration" tend to emphasize *jus sanguinis* for the purpose of retaining the allegiance of descendents of their nationals who have settled in various parts of the world, while "countries of immigration" are inclined to emphasize the *jus soli* in order to have the allegiance of persons born within their territories to alien parents. Traditionally, also, *jus sanguinis* is preferred by civil law countries whereas the principle of *jus soli*, which is an outgrowth of the feudal system, is favored by common law countries. Presently, in most countries one can find the two principles employed in varying combinations.<sup>150</sup>

Whichever of these two principles is relied upon, it is argued by McDougal, Lasswell and Chen that most of mankind has their nationality thrust on them with little effective prospect for change (after all, individuals cannot choose their parents or their place of birth).<sup>151</sup> Even though consent is presently given greater emphasis in decisions concerning conferment of nationality after birth, involuntary naturalization is quite common.

McDougal and his associates have made the controversial counter-proposition that:

given the differential distribution of resources and opportunities for value shaping and sharing about the globe, the instability and fragility of the inherited organizations of territorial communities and the ever increasing mobility of people and frequency of transnational interactions, every individual person should be free to effect a voluntary change in his nationality and thus to identify with the political community of his own choice. . . . As a matter of human rights every person should be free to change his nationality.<sup>152</sup>

148. 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, arts. 1 & 2, April 12, 1930, 179 L.N.T.S. 89, reprinted in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 555, 570 (3rd. ed. 1983).

149. *Id.*

150. Scott, *Nationality: Jus Soli or Jus Sanguinis?*, 24 AM. J. INT'L L. 158 (1930).

151. M. McDougal, H. Lasswell & L. Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL IN CONTEMPORARY PERSPECTIVE 555, 570 (M. McDougal & W.M. Reisman eds. 1981).

152. *Id.* at 578.

Indeed, some recognition is accorded to this notion in the Universal Declaration of Human Rights which proclaims that "no one shall be arbitrarily . . . denied the right to change his nationality."<sup>153</sup>

Of interest in the case of Hong Kong is the question of withdrawal of nationality.<sup>154</sup> The common view among jurists is that in the absence of treaty obligations states have an unlimited competence to withdraw nationality, though "general community expectations would today appear to be moving toward restricting such allegedly 'unlimited' competence."<sup>155</sup> Clearly, community policies in the field of human rights point to this trend, including the policy of minimizing statelessness and the peremptory norm (*jus cogens*) of non-discrimination.<sup>156</sup> It is beyond doubt that denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law.<sup>157</sup>

While nationality is a matter for domestic law, it also involves concerns at the international level, particularly with regard to the question of statelessness. The status of statelessness "entails a most severe and dramatic deprivation of the power of an individual . . . . The stateless person — who has been compared to a '*res nullius*' — has no state to 'protect' him and lacks even the freedom of movement to find a state that is willing to protect him."<sup>158</sup> In other words, a stateless person has no avenue to act against a state which acts abusively towards him. Indeed, the list of deprivations visited upon the stateless individual is very long.<sup>159</sup>

Not surprisingly, the international community has sought to eliminate or reduce statelessness since World War I. The earliest effort was the Protocol Relating to a Certain Case of Statelessness signed on April 12, 1930, which was concerned with the avoidance of statelessness at birth.<sup>160</sup> The wholesale denationalization of people during the Second World War prompted international action in the form of Article 15 of the 1948 Universal Declaration of Human Rights which stipulates that "[e]veryone has the right to a nationality" and "[n]o one shall be arbitrarily deprived of

153. 1948 Universal Declaration on Human Rights, art. 15(2), U.N. Res. 217A (III), 3(1) U.N. GAOR at 71, *reprinted in* , P. WEISS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 264-9 (2d. ed. 1979) [hereinafter cited as Human Rights].

154. As we shall note later, the UK government in its memorandum attached to the Sino-British Joint Declaration, has declared that all persons who on June 30, 1997 are British Dependent Territories Citizens (BDTCs) under the law in force in the UK will cease to be BDTCs with effect from July 1, 1997.

155. McDougal, *supra* note 151, at 569.

156. See Human Rights, *supra* note 153, at 125.

157. See P. WEISS, *supra* note 153. After a study of state practice and judicial decisions on denationalization measures, he concluded that the right of a state to make rules governing the loss of nationality is in principle unrestricted, although he nonetheless acknowledges the existence of a possible exception in the case of denationalization on the grounds of race, etc. *Id.*

158. McDougal, *supra* note 151, at 605.

159. *Id.* at 605-7.

160. 179 L.T.S. 115, *reprinted in* 5 M. HUDSON, INTERNATIONAL LEGISLATION 364 (1937).

his nationality nor denied the right to change his nationality."<sup>161</sup> An international conference, convened by the General Assembly in 1961, adopted a UN Convention on Reduction of Statelessness which came into force in 1975.<sup>162</sup> The Convention provides, *inter alia*, that a person who would otherwise be stateless be given the opportunity to acquire the nationality of the country of birth, or of one of the parents at the date of birth and that a loss of nationality be conditional upon the acquisition of another nationality.<sup>163</sup>

Similar principles have evolved in relation to the question of succession to nationality. Under international law there is no obligation imposed on the successor state to grant any right of option as to citizenship, nor is there any corresponding obligation on the predecessor state to withdraw its nationality from persons normally living or domiciled in the transferred territory.

The position adopted by courts in the UK suggests that English law deprives inhabitants of their nationality when the territory is lost, unless they take steps to retain it.<sup>164</sup> This rule, however, is predicated on the acquisition by these inhabitants of the nationality of the successor state, and that English law will not render a former national stateless as a result of the transfer of sovereignty over British territory.

The question as to who constitutes an "inhabitant" is generally answered with reference to the concept of "substantial connection" with the territory by citizenship, residence or family relation. The above rule may be construed as a special aspect of the general principle of "real and effective link" confirmed in the *Nottebaum* case.<sup>165</sup> It possible to argue, however, that for the individuals concerned at the moment of transfer, the connection with the successor state is fortuitous, while a connection with the territory is of great significance.<sup>166</sup> One should not view territory as an "empty plot," rather, "territory connotes population, ethnic groupings, loyalty patterns, national aspirations" and so forth.<sup>167</sup> Thus, to regard a population as related to particular areas of territory is "to recognize a human and political reality which underlies modern territorial settlements."<sup>168</sup> Indeed, this seems to be the basis of the self determination principle, which tends to create demands for changes in territorial sovereignty. Employing the above reasoning, Brownlie concludes that since the population has a "territorial" or local status, that is, the "population goes with the territory," it would be illegal for the transferor to

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161. Human Rights, art. 15, *supra* note 153.

162. Convention on the Reduction of Statelessness, 1961, U.N. Doc. A/Conf. 9/15, 989 U.N.T.S. 175.

163. *Id.*

164. *See, e.g.*, *Murray v. Parkes* [1942] 2 K.B. 123.

165. *Nottebaum Case* (*Lich. v. Guat.*), 1955 I.C.J. 4.

166. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 661 (3rd. ed. 1979).

167. *Id.*

168. *Id.*

retain the population as its own nationals, and on the other hand, it would be illegal for the successor to take any steps to avoid responsibility for the population, such as, by treating them as *de facto* stateless. This conclusion, as well as the principles outlined above, should be born in mind in evaluating those provisions in the Sino-British Joint Declaration concerning nationality.

The status of persons who are now British Dependent Territorial Citizens (BDTC) are covered in two memoranda which were formally exchanged between the British and Chinese Governments on the same day that the Joint Declaration was signed. The memoranda set out the respective positions of the two governments on this subject.<sup>169</sup>

The UK position was that since Hong Kong will no longer be a British dependent territory after 1997, it would not be appropriate for BDTCs to retain this status. The affected people, the Government declared, would be entitled to a new status with an appropriate title, now referred to as British Nationals (Overseas) (BNOs), that would not entitle them to a right of abode in the UK (which they do not presently possess), but would carry benefits similar to those currently enjoyed by BDTCs.<sup>170</sup> Such a status, according to the UK Memorandum, is not transferable by descent.<sup>171</sup> There is also the condition that these BDTCs have possession of or be included in passports of parents with the British passport before July 1, 1997. This effectively excludes holders of Certificates of Identity (CIs), who make up half of those people who possess some sort of a travel document and who would not be entitled to the new passport.<sup>172</sup>

The Chinese Memorandum states that all Hong Kong Chinese are Chinese nationals under the Nationality Law of the PRC.<sup>173</sup> It allows Chinese nationals who hold British travel documents to continue to use them after July 1, 1997 for the purpose of traveling to other states and regions. The PRC Memorandum emphasizes, however, that these persons will not be entitled to British consular protection in the Hong Kong SAR and

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169. Before recounting the substantive aspects of the Memoranda, it should be emphasized that doubts have been expressed with regard to the binding force of the Memoranda. Critics have alleged that they do not amount to a joint statement but simply constitute declarations made by individual countries. The implication is that the effectiveness of the relevant provisions depends on what measures each of the two states would take to render its Memorandum binding. Report of the Independent Monitoring Team, Arrangements for Testing the Acceptability in Hong Kong of the Draft Agreement on the Future of the Territory (Nov. 1984) ch. 4, pt 4.

170. These benefits include entitlement to use British passports and to receive British consular services and protection in third countries.

171. The Draft Agreement, *supra* note 1, at 1381.

172. The Hong Kong people at present hold one of two kinds of travel documents, a British passport or a Certificate of Identity, which do not offer equal travelling rights.

173. While the PRC has integrated *jus sanguinis* with *jus soli* in its nationality law, it clearly considers *jus sanguinis* as the first and primary principle. Thus persons may acquire Chinese nationality through parent-offspring relations whether they are born in China or abroad. Wau Keju, *Basic Principles of the Nationality Law*, 1982 CHINESE Y.B. INT'L L. 220.

other parts of China.

### B. *The Fate of the Non-Chinese Residents of Hong Kong*

While the Memoranda may have defined the position of most of the territory's residents for fifty years after 1997, it has left doubts among those who are neither Chinese nor expatriates holding foreign passports as to their nationality status in post-1997 Hong Kong. These people are at present BDTCs who will be entitled like others to the new British passport, but whose position appears to differ from people of Chinese race. The latter will be considered PRC nationals for whom the travel document issued by the British Government will merely amount to an "extra privilege," theoretically facilitating their geographical mobility.

Indeed, it is clear that the UK authorities did not mean to confer nationality by the issuance of the new passport, for China would never have agreed to dual nationality.<sup>174</sup> While, arguably, a dual authorized passport may be *prima facie* evidence of nationality,<sup>175</sup> there have been judicial decisions to the effect that a passport is not conclusive proof of nationality, except in conjunction with other evidence.<sup>176</sup> Basically, a passport is an identity document for travel purposes and identity may be certified by non-national as well as by national states. In fact, there is nothing to prevent a state from issuing a passport to an alien.<sup>177</sup> Thus, the mere fact that one holds a travel document issued by the UK Government would not, in the eyes of third countries, confer upon one the status of a British national.

Based upon these assumptions, it follows that the minority groups in question would in effect be stateless. Clearly, under the Sino-British Joint Declaration, the next generation born to those BDTCs would be stateless since the new status is not transferrable. However, according to the Joint Declaration, such persons may have the right of abode (i.e., to enter, re-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>178</sup> Nevertheless, a right of abode is quite distinct from the concept of nationality. Even if the child of a non-Chinese BDTC acquires the right of abode, he can still be judged stateless under international law if he does not possess nationality.

174. 1980 Nationality Law of the PRC, article 3. This article states: "[t]hat the PRC does not recognize dual nationality for any Chinese national." Non-recognition of dual nationality, or the principle of "one nationality for one person," is in fact the major concept of China's nationality law. The PRC attaches great importance to this question and has been determined to eliminate dual nationality whether through its nationality laws or within bilateral treaties. 1 PEOPLE'S CHINA, *supra* note 23, at 746. See also Ginsberg, *The Nationality Law of the PRC*, 30 AM. J. COMP. L. 458 (1982).

175. See, e.g., *Rv. Brailsford* [1905] 2 K.B. 730, 745; *Joyce v. D.P.P.* 1946 A.C. 347.

176. J.G. STARKE, *supra* note 124, at 331.

177. Though for obvious reasons it would not normally do so, especially since a passport is the basis on which a person can invoke the protection of a particular embassy.

178. The Draft Agreement, annex I, § XIV, *supra* note 1, at 1377-78.

As observed earlier, the international community has laid down certain rules in an attempt to eliminate or at least minimize statelessness. Indeed, under the UN Convention on the Reduction of Statelessness, Britain, as a party, is bound to grant nationality to people born in its territory who would otherwise be stateless.<sup>179</sup> It is also obliged, according to this Convention, to use its best endeavors to include in any treaty which it makes with a non-contracting state (such as the PRC), provisions designed to ensure that no person shall become stateless as a result of transfer of sovereignty.<sup>180</sup>

Forced into a difficult position by the uncompromising Chinese posture on the one hand (the PRC objected to the transferability of the new status for ex-BDTCs) and its own international commitments on the other, the UK Government has devised a typically awkward formula. It has opted to sidestep the issue altogether by creating yet another form of British nationality. The "status B" or the British Overseas Citizen (BOC) will cover two categories of people: the post-1997 babies and what is expected to be a very small number of non-Chinese people who are BDTCs on June 30, 1997 but who, for one reason or another, have by then not succeeded to obtain a passport entitling them to the BNO status (for example, they might be in prison, hospital or for some other unforeseen reason).

Both types of nationality are non-transferable, thus, there are no arrangements to prevent statelessness for children of BOCs. Likewise, both BNOs and BOCs may use UK passports and enjoy British consular protection. The major difference, however, lies in admission to third countries, for BOCs would, in all probability, be perceived as stateless. Indeed, the key question with regard to both these new types of passports is whether third countries are likely to accept and recognize them. Proposals have been made to indicate in the new passports the holder's right of abode in Hong Kong to facilitate acceptance by other countries.<sup>181</sup>

There are additional gaps in the protection of ethnic minorities under the Sino-British Joint Declaration. For one, it is not clear whether they would enjoy British consular protection in the Hong Kong SAR since they are not Chinese nationals, or what other consular protection these people might be entitled to in the territory after 1997. On the question of repatriation, which country a non-Chinese BNO travelling on BNO travel documents should be repatriated to is not clear. Obviously, it should not be to the UK because he has no right of abode there. At the same time, the British consul presumably helping the BNO would not be able to repatriate him to Hong Kong, since he will have no jurisdiction over the Hong Kong SAR.

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179. Convention on Statelessness, art. 10, *supra* note 162.

180. *Id.*

181. Legislative Council Debate on February 6, 1985. South China Morning Post, Feb. 7, 1985, at 10.

In sum, the Joint Declaration falls short, both in terms of form and substance, of prevailing international legal standards on nationality. A sizeable minority of the local population is to be rendered effectively stateless and, while informal assurances have been given by the UK authorities, they are not only vague but lacking in credibility. This is especially true in view of the fact that British attitudes towards admission of minority groups into the UK are likely to grow more, rather than less, hostile.

This situation extends beyond the legal matter of creating a stateless minority. The transition from British to Chinese control is unprecedented, in that it entails the transfer of a substantial population from a relatively benevolent rule to one which may prove to be difficult to endure. There are hopes that the PRC would continue to pursue a more enlightened path, but these hopes might easily crumble. By Western criteria, China remains an essentially oppressive country and the Hong Kong people, most of whom may be seen as refugees from communism, are likely to be denied the power to choose their nationality.

Whether the UK could have provided such a choice is a moot point, yet one is inclined to argue that the British are mistaken in perceiving people as a liability rather than an asset. An infusion of a large number of industrious and entrepreneurial Chinese would have done much to revitalize their sagging economy. It is not realistic to expect the UK to modify its narrow attitude, but it is conceivable that other countries, particularly the United States, would prove more forthcoming in this respect. Indeed, the availability of a potential exit option to local business people and professionals might prompt the PRC to be more accommodating *vis-à-vis* Hong Kong.

#### VIII. CONCLUSION

British rule over Hong Kong will come to an end in 1997 after a century and a half of colonial control in the Western mold. The gradual disengagement by the UK and the eventual departure of its official representatives may turn out to be one of the most significant international developments in the coming decades. One hopes that the assumption of the exercise of sovereignty by the PRC will not disrupt the territory's stable and prosperous existence, but a pessimistic scenario cannot be dismissed lightly. For this reason, it behooves international lawyers to scrutinize the Sino-British Joint Declaration with a view to determining its viability as a foundation for the Hong Kong SAR.

The Joint Declaration has its share of detractors. As argued here, the criticisms levelled at it are not always warranted, for it provides a sound formal mechanism for territorial autonomy within the sovereign framework of the PRC. There are also significant reasons to postulate that this document constitutes a valid bilateral international treaty, creating legal rights and imposing legal obligations on the signatories. Some of its provisions, most notably those concerning nationality, may be inadequate, but

its value as a formal basis for the preservation of the Hong Kong lifestyle in a communist context cannot be questioned.

Needless to say, however, the implementation of the Joint Declaration hinges primarily on factors which lie outside the strictly conceived legal realm. Future Chinese attitudes and policies, developments within Hong Kong, and third parties' response are likely to exert a far greater influence than the agreement itself. Sustained negative pressures from the above sources might undermine the "one country, two systems" formula and render the agreement effectively void.

The international community should not, therefore, be content with the Joint Declaration as such, but should act in various ways to ensure that its substance is not dissipated. It is imperative for the Hong Kong issue to remain one of international concern and not be removed from the international agenda. While the PRC is inclined to exclude any international involvement in what it deems to be an internal affair, subtle external pressure could be brought to bear upon it. The Hong Kong people enjoy a wide range of rights, and the preservation of these rights falls within the ambit of international law.

The Sino-British Agreement also calls for greater attention on the part of international legal scholars, whether they are motivated by humanitarian considerations or otherwise. The "one country, two systems" formula which it embodies is unprecedented and thus opens up new vistas in international legal research. Should the formula prove viable it might constitute a model for the resolution of similar international problems. Even if it fails to satisfy the expectations of interested parties, the concept is doubtless an intriguing one and its various aspects ought to be thoroughly explored.