

HONG KONG AS AN INTERNATIONAL LEGAL PERSON*

by
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I. HONG KONG'S CLAIM TO "INTERNATIONAL PERSONALITY"

Hong Kong is suffering from a bout of 1997 — induced anxiety because of the uncertainty relating to its future status. The territory, formally a British Crown colony, has thrived in the wake of the United Kingdom's policy of "benign neglect." For at least five decades, Hong Kong has operated comfortably as a "city-state" in all but name, making impressive strides on the socio-economic fronts. Unless this pattern of autonomy extends beyond 1997, Hong Kong could arguably lose its remarkable vitality

Insiders and outsiders alike understand this threat to its vitality. Even the control-minded Chinese officials emphasize Hong Kong's autonomous nature, as evidenced by its willingness to enter into a legally binding agreement to that effect with Great Britain. This notwithstanding, the degree to which post-1997 Hong Kong may act in an independent fashion remains subject to conflicting interpretations.

This Article will demonstrate that the territory can legitimately ground its autonomous aspirations in legal argument. Although the official representations and scholarly analyses have yet to make this point, Hong Kong can effectively claim to have an international legal personality and its corresponding rights and obligations. This claim falls short of sovereignty, yet it is nonetheless highly significant. The sections that follow explore this thesis from both a theoretical and a practical perspective.

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While not regarded by international law writers as an "established legal person," Hong Kong may nonetheless present a claim to "international personality"¹ founded on several recognized grounds: (1) from its legal proximity to states; (2) by analogy to special treaty-created international regimes; (3) as an entity *sui generis*; and (4) by virtue of the right of self-determination.

Traditional considerations should not prejudice the issue. Since international legal personality is a relative phenomenon that varies according to the progressive requirements of international life,² the determination of Hong Kong's legal status should be made by an analysis of the territory's particular circumstances in the context of the character and needs of the present international community

A. *Legal Proximity to Statehood*

As the author of a treatise points out, "there is no generally accepted and satisfactory modern legal definition of statehood."³ Yet, certain qualifications that "the State as an international legal person should possess" have been commonly admitted as reflecting the general requirements of statehood under international law. These, according to Article I of the 1933 Montevideo Convention on Rights and Duties of States are: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."⁴

Conceptualized in such broad terms, Hong Kong apparently sat-

¹ International personality denotes a capacity to enter into legal relations in the international arena and to create the consequent rights and duties attached to that capacity. Entities deemed under international law to possess international legal personality are the "subjects" of international law, although not all subjects have the same degree of legal personality.

² As observed by the International Court of Justice in its advisory opinion on the *Reparations for Injuries Suffered in the Service of the United Nations*, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life." 1949 I.C.J. 174, 178 (Apr. 11).

³ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 31 (1979).

⁴ Montevideo Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, 25 (1936).

isfies the formal criteria of statehood. The territory has a population (defined as an aggregate of individuals living together in a community) linked to it on a more or less permanent basis, which can be regarded as its inhabitants. The physical existence of Hong Kong as a distinct territorial unit within coherent frontiers is well established both factually and legally.⁵ An effective government also exists, exercising jurisdiction over the population and territory of Hong Kong and displaying fundamental legislative and administrative competence in the collection of taxes, promulgation of laws, maintenance of order, dispensation of justice, and conduct of social affairs. Finally, while not formally independent, Hong Kong possesses considerable latitude to engage in international action autonomously. Its international activities include membership and participation in several international organizations⁶ and multilateral conventions,⁷ as well as negotiation and conclusion of agreements with foreign governments.⁸

Indeed, the high degree of autonomy enjoyed by Hong Kong in the management of its external affairs has been reaffirmed in the

⁵ See Interpretation and General Clauses Ordinance, Hong Kong Laws, ch. 1 (1989) (demarcating Hong Kong's boundaries).

⁶ See GOVERNMENT PRINTER, HONG KONG, ACHIEVEMENTS OF THE JOINT LIAISON GROUP AND ITS SUB-GROUP ON INTERNATIONAL RIGHTS AND OBLIGATIONS: 1985 - MAY 1990 (1990) [hereinafter ACHIEVEMENTS] for a list which includes the UN Economic and Social Commission for Asia and the Pacific (ECOSOC); International Bank for Reconstruction and Development (IBRD); International Monetary Fund (IMF); UN Conference on Trade and Development (UNCTAD); World Health Organization (WHO); UN Commission on Narcotic Drugs (UNCND); Food and Agriculture Organization (FAO); International Labor Organization (ILO); International Maritime Organization (IMO); Universal Postal Union (UPU); International Telecommunication Union (ITU); International Telecommunications Satellite Organization (INTELSAT); International Atomic Energy Agency (IAEA); International Criminal Police Organization (INTERPOL).

⁷ Most importantly, Hong Kong is a signatory to the 1947 General Agreement on Tariffs and Trade (GATT). It may be interesting to note that while the EEC countries are represented by one person in GATT negotiations (i.e., no separate representation from the United Kingdom or other European countries), Hong Kong has its own representative, suggesting an independent economic policy.

⁸ See Arrangements Regarding International Trade in Textiles, Feb. 25, 1974, in M.J. BOWMAN & DAVID J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS; Agreement with the Government of Guangdong on the Supply of Water, Water Supplies Department, Fact Sheet 1985. Additionally, negotiation of separate air services agreements and the establishment of Hong Kong's autonomous shipping register are also being contemplated.

Sino-British Joint Declaration.⁹ This declaration seeks to formalize Hong Kong's 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."¹⁰ Additionally, even after 1997, the Hong Kong Special Administrative Region (HKSAR) "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 appropriate fields including the economic, trade, financial, monetary, shipping, communications, touristic, cultural and sporting fields."¹¹ HKSAR's powers also include issuing its own currency¹² and passports, regulating immigration to the territory,¹³ and instituting official and semi-official trade representation abroad, as well as authorizing the establishment of consular missions locally.¹⁴

Notwithstanding whether recognition by other states has a "constitutive"¹⁵ or "declaratory"¹⁶ effect on an entity's status in international law,¹⁷ the degree of recognition accorded to Hong Kong as an international person may be highlighted. Evidently, Hong Kong's trading partners, co-members of the international organizations referred to earlier, and parties to multilateral agreements rec-

⁹ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, CMND 9543, *reprinted in* 23 I.L.M. 1366 (1984) [hereinafter Sino-British Joint Declaration].

¹⁰ *Id.* Annex I, § 6, para. 3. *See also* ACHIEVEMENTS, *supra* note 6.

¹¹ Sino-British Joint Declaration, *supra* note 9, Annex I, § 11, para. 1.

¹² *Id.* Annex I, § 7.

¹³ *Id.* Annex I, § 14.

¹⁴ *Id.* Annex I, § 11.

¹⁵ A "constitutive" effect means that the act of recognition establishes ("constitutes") the international personality of the entity in question.

¹⁶ A "declaratory" effect means that recognition is only a formal acknowledgement of an already existing state of circumstances, indicating the willingness of the state to treat the entity as an international person.

¹⁷ For a recent analysis of the debate and its practical implications, see *S. v. Banda and others*, 82 I.L.R. 388 (Bophuthatswana, Supr. Ct., Gen. Div. 1989). After a thorough examination of the authorities and a careful evaluation of the relative merits of the constitutive and declaratory theories, Judge Friedman concluded (listing fourteen reasons) that the declaratory view is the more valid and acceptable one.

ognize and respect the separate identity of the territory.¹⁸ The acceptance overseas of Hong Kong government offices, official representatives (such as the Hong Kong Trade Development Council), and direct dealings in Hong Kong with foreign consular officers also reflect — apart from a significant range of international activity — a recognition of Hong Kong's capacity to engage in international relations.

Hong Kong makes no claim to statehood and, therefore, is not recognized as such despite contentions that it meets the formal criteria of statehood. Nonetheless, the territory's claim to international juridical personality may be based on its capacity to exercise functions and undertake rights and obligations that are similar to those exercised by states.

B. *Analogy to Special Treaty-Created International Regimes*

As laid down by the International Court of Justice,¹⁹ international personality is not limited to states alone. Territorial entities that do not satisfy the criteria of statehood may acquire separate legal personality under international law. Examples include autonomous entities created by treaty, commonly known as "internationalized territories"²⁰ best represented by the (now defunct) Free Treaty of Danzig. Said to be "carved out" by the international community and "given life" in the law of nations as a possible "solution to the problem of conflicting territorial claims and aspirations,"²¹ Danzig was deemed to enjoy legal personality governed by

¹⁸ They have indicated, in effect, their acceptance of Hong Kong's authority to enter into international agreements or join international organizations and assumed Hong Kong's intention to be responsible for its international acts without recourse to any other government (British or Chinese).

¹⁹ See generally *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 178.

²⁰ The concept has no legal meaning as such and is used to describe cases which vary considerably in nature and extent. The analogy here focuses on the aspect of creation of status by an international treaty, subject in any event to the proviso that each entity must be examined for its distinct characteristics.

²¹ John Kuhn Bleimaier, *The Legal Status of the Free City of Danzig 1920-1939: Lessons to be Derived from the Experiences of a Non-State Entity in the International Community*, 1988 HAGUE Y.B. INT'L L. 69, 70.

rules and principles of international law²²

Arguably, the entity envisioned in the Sino-British Joint Declaration — the HKSAR — may be viewed from a similar perspective. “[I]nternationally fixed in the interest of peaceful relations between the East and the West,”²³ it too was conceived not as a grant or delegation of powers under the domestic law of a particular state but as the creation of an international agreement taking due regard of “historical and political realities,”²⁴ such as Hong Kong’s autonomous character, its role as a major financial center, and the international nature of its economy. Hence, it may be contended that the HKSAR derives its validity from the international legal order and is subject to international law which determines its status and regulates its relations with other international entities.

The Sino-British Joint Declaration clearly reflects the intention of the signatories to give the HKSAR an international capacity of its own, separate and distinct from any state that otherwise may be entitled to exercise sovereign authority. The Declaration confers upon the HKSAR express functions that imply the possession of international personality. Apart from imposing binding obligations on the parties, the treaty also creates an objective international entity whose rights and responsibilities are governed by international law.

Admittedly, the “consensual” source of international personality may give rise to questions concerning “objectivity” (whether valid *erga omnes* or only *vis-à-vis* the states involved). Concerns such as these, however, pertain to the effectiveness with which the entity

²² Danzig’s separate international personality was reaffirmed by the Permanent Court of International Justice on several occasions. *E.g.*, Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (ser. B) No. 15, at 17 (Mar. 3) (the court emphasized that the enforced Treaty of Paris of Nov. 9, 1920, between Danzig and Poland was governed by international law); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1931 P.C.I.J. (ser. A/B), No. 44 (Feb. 4) (in the Court’s opinion, ordinary rules governing relations between states and general principles of international law were applicable to the relations between Danzig and Poland).

²³ Georg Ress, *The Hong Kong Agreement and Its Impact on International Law*, in HONG KONG: A CHINESE AND INTERNATIONAL CONCERN 150 (Jürgen Domes & Yu-ming Shaw eds., 1988).

²⁴ Sino-British Joint Declaration, *supra* note 9, art. 3(1).

performs its international functions and need not detract from the claim to juridical personality. There is little doubt that, to function effectively in the global arena, the HKSAR will require wide recognition of its autonomous position. Its international personality, however, is not a function of other parties' willingness to treat it as a separate entity.²⁵

C. *An Entity Sui Generis*

Rather than emphasize the relevance of traditional criteria of statehood or draw somewhat strained analogies with other established categories, Hong Kong may stress its unique characteristics as an entity *sui generis* deserving to be endowed with international personality. Apart from existing and operating objectively as an international person, it may be argued that Hong Kong is justified in being formally accepted as such based on the significant and unique services it renders the international community. Support for such a claim may be adduced from the international recognition extended to entities such as the Order of Malta, the Holy See, and national liberation movements whose purported aims (assisting the sick and the poor, leading the Catholic Church, and combating colonialism and other forms of subjugation, respectively) have been deemed by a large sector of the international community as useful, legitimate, and often unparalleled.

Hong Kong has existed as a semi-autonomous political entity for approximately 150 years, possessing many of the attributes of an independent sovereign state. Largely due to the fact that Hong Kong is governed by law-based institutions and practices, the territory has established itself as an important player in the global economic arena. Such an international economic position is evidenced by its status as the world's third largest banking center behind New York and London, the world's eleventh largest trading entity, and the world's busiest container port. Hong Kong is also a major foreign exchange and commodities market, the regional headquarters of a large number of multinational enterprises, and Asia's

²⁵ It may be noted in this connection that the Sino-British Joint Declaration has been received with much rhetorical approval from members of the international community.

leading communications center.²⁶ It is not surprising, therefore, that the Sino-British Joint Declaration reflects a strong determination to preserve the pivotal role played by Hong Kong in both the regional and the global economy. The agreement also acknowledges the reality that in order to enable the territory to continue to operate effectively, in light of the difficulties involved in assimilating two vastly different cultures and disparate economic systems, Hong Kong's distinctly separate personality must be secured.

Maintaining the vital functions performed by Hong Kong is in the interest of the international community as a whole. Recognition of the value of the territory's contribution to world affairs and the high esteem in which it is held have been displayed through its admittance to key international organizations and multinational conventions.²⁷ The international community's interest in sustaining Hong Kong's international status was recently reaffirmed in the arrangements made for continued HKSAR membership.²⁸ Thus, if the Holy See's international personality is grounded in its unique religious and spiritual authority, Hong Kong's claim to international personality arguably may be based on its characterization as an entity *sui generis*, its prominent economic position being one of the factors supporting such a characterization.

D. *Right to Self-Determination*

Perhaps more controversial is Hong Kong's claim to international personality by virtue of its right to self-determination. While international legal documents technically endorse the right of "all" peoples to determine freely their political status, in practice the right to self-determination appears to have been confined to "colonial" peoples.²⁹ An assertion of a right to self-determination on behalf of the inhabitants of Hong Kong would thus hinge on establishing their position as the population of a "[n]on-self-[g]overning [Colonial] Territor[y]" or a territory that has not yet gained its independence within the terms of the UN General Assembly Dec-

²⁶ See ANNUAL REPORT ON HONG KONG 1989, 1990, CMND 1047.

²⁷ See ACHIEVEMENTS, *supra* note 6.

²⁸ *Id.*

²⁹ HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 46 (1990).

laration on the Granting of Independence to Colonial Countries and Peoples.³⁰ As such, the residents of Hong Kong would not only be entitled to the “transfer of all powers . . . without any conditions or reservations, in accordance with their freely expressed will and desire,”³¹ but Hong Kong would also enjoy a “separate and distinct status” under the UN Charter, even prior to the actual transfer.³²

It is not subject to dispute that Hong Kong came into being and has functioned as a British Crown colony since 1842. Under the Treaty of Nanking the island of Hong Kong was ceded to Great Britain in perpetuity.³³ Stonecutters Island and the southern part of the Kowloon Peninsula were similarly ceded to the British in 1860 under the Peking Convention,³⁴ and in 1898 the New Territories were leased to Britain for ninety-nine years.³⁵ By means of recognized constitutional devices — Letters Patent and Orders in Council — the various geographical entities forming the territory of Hong Kong have been brought under British administration.³⁶

Hong Kong's colonial status received a certain international “acknowledgement” when it was placed on the agenda of a newly established UN Special Committee on Decolonization in 1961. Yet the Government of the People's Republic of China (PRC or China) has consistently maintained that the three treaties relating to Hong Kong are “unequal treaties” and hence not binding upon China. Rather, the PRC claims that Hong Kong is part of Chinese

³⁰ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, U.N. Doc. A/4684 (1960).

³¹ *Id.* at 67.

³² *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 12, 124, U.N. Doc. A/8028 (1970) [hereinafter *Friendly Relations*].

³³ Treaty of Nanking, Aug. 29, 1842, U.K.-China, art. 3, 30 B.S.P. 389 (U.K.).

³⁴ Treaty of Peking, Oct. 24, 1860, U.K.-China, art. 6, 50 B.S.P. 10 (U.K.).

³⁵ Treaty of Peking, July 1, 1898, U.K.-China, 90 B.S.P. 17 (U.K.).

³⁶ *See Charter for Erecting the Island of Hong Kong into a Separate Colony and for Providing for the Government Thereof*, Apr. 5, 1843; *Order in Council Providing for the Administration of the Territories Adjacent to Hong Kong Acquired by Her Majesty Under the Anglo-Chinese Convention of October 24, 1860*. By *Order in Council of October 20, 1898*, and *Order in Council of December 27, 1899*, the leased territories were declared to be part and parcel of the Colony of Hong Kong.

territory.³⁷ In 1972, China requested the removal of Hong Kong from the colonial territories listed by the UN under the Declaration on the Granting of Independence to Colonial Territories and Peoples.³⁸ The PRC's request was granted.³⁹ For what appear to be political and pragmatic reasons,⁴⁰ Great Britain did not protest the decision, although its Permanent Representative to the UN subsequently informed the Secretary-General that the action of the General Assembly in removing Hong Kong from the list of colonies and territories "in no way affects the legal status of Hong Kong."⁴¹

Notwithstanding its ultimate approval, grounding the Chinese request in the characterization of the treaties relating to Hong Kong as "unequal" and hence invalid, finds no support in Western-based international law and practice.⁴² As noted by one com-

³⁷ PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* 162-63, 167-68, 185, 186-87 (1980); *see supra* note 36.

³⁸ Letter from the Chinese United Nations Ambassador, Huang Hua, to the United Nations Committee on Decolonization (Mar. 10, 1972), in *PEOPLES CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 384. (Jerome A. Cohen & Hungdah Chiu eds., 1974). The content of Hua's letter is as follows:

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

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the 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.

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

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

Id.

³⁹ Information from Non-Self-Governing Territories Transmitted under Article 73(e) of the Charter of the United Nations, G.A. Res. 2978, U.N. GAOR, 27th Sess., Supp. No. 30, at 80, U.N. Doc. A/8730 (1972).

⁴⁰ Nihal Jayawickrama, *The Right of Self Determination*, in *HONG KONG'S BASIC LAW, PROBLEMS AND PROSPECTS* 85, 92-93 (Peter Wesley-Smith ed., 1990).

⁴¹ *Id.*

⁴² Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in *CHINA'S PRACTICE OF INTERNATIONAL LAW* 239, 267 (Jerome A. Cohen ed., 1972); Shao-chuan Leng, *The Sino-Soviet Dispute*, in *LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA AND SELECTED PROBLEMS OF INTERNATIONAL LAW* 263, 279 n.47

mentator, the Sino-British transactions over Hong Kong were all "valid transfers of territory according to the law, practice and values of that time. It was an age when territories changed hands as though they were private property. Occupation, conquest, sale, or lease gave good title to a sovereign intent on establishing an empire."⁴³ Nor would the "Hong Kong treaties" be regarded as "unequal" under current rules of international law as expressed in the Vienna Convention on the Law of Treaties.⁴⁴ The application of the Vienna Convention, however, is in any event precluded by virtue of the principle of nonretroactivity contained therein.⁴⁵ It has also been argued that, given the specific circumstances of its adoption, the decision to delete Hong Kong from the agenda of the Special Committee on Decolonization was a procedural one and did not preclude the restoration of Hong Kong to the agenda "if and when any initiative is taken in that direction."⁴⁶

The colonial status of the territory thus having remained unchanged, and pending an exercise of self-determination, the inhabitants of Hong Kong may insist on a distinct and separate personality as provided in UN resolutions⁴⁷ and affirmed by international judicial authorities.⁴⁸ Alternatively, they may rely on their right as a "people" in the context of a world community that is increasingly embracing human rights, minority rights, and indigenous rights. In establishing their case,⁴⁹ Hong Kongers would emphasize

(Shao-chuan Leng & Hungdah Chiu eds., 1972).

⁴³ Jayawickrama, *supra* note 40, at 90.

⁴⁴ The Vienna Convention on the Law of Treaties, May 23, 1969, arts. 54-64, U.N. Doc. A/CONF 39/27, 8 I.L.M. 679.

⁴⁵ *Id.* art. 4.

⁴⁶ See Jayawickrama, *supra* note 40, at 93.

⁴⁷ *Friendly Relations*, *supra* note 32. This declaration stipulates that "[t]he territory of a colony has a status separate and distinct from the territory of the State administering it; and such separate and distinct status shall exist until the people of the colony have exercised their right of self-determination." *Id.* at 124.

⁴⁸ See 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 [hereinafter Legal Consequences].

⁴⁹ See Jayawickrama, *supra* note 40, at 94-95 (contending that Hong Kong is a "nation"); Peter Wesley-Smith, *Settlement of the Question of Hong Kong*, 17 CAL. W. INT'L L.J. 116, 117-19 (1978) (factors supporting a claim by the people of Hong Kong for self-determination); Eric M. Amberg, Comment, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 852-54 (1985) (arguing that Hong Kong "fits

their cohesiveness as a national group with an independent purpose, their own system of laws, their unique cultural identity,⁵⁰ a clearly defined territory, and an effective government playing an active role in the world economy

Evidently, the PRC has not accepted the concept of nationhood for Hong Kong. The PRC apparently considers the recovery of sovereignty over Hong Kong in keeping with its emphasis on the principles of national unity and territorial integrity and thus a right of self-determination by the entire Chinese population.⁵¹ Yet, a rejection by the PRC of self-determination for the people of Hong Kong need not preclude a claim to a separate, international juridical personality. The Chinese — who have been ardent proponents of the right to self-determination⁵² — have taken this right to mean essentially liberation of nonself-governing peoples from both colonial or racist domination and foreign occupation.⁵³ A more limited claim to “personhood” that does not impair the State’s integrity, organic structure, or injure its vital interests may find the PRC’s endorsement.⁵⁴

The U.K.’s commitment to the right of self-determination in general, and in relation to the nonself-governing territories for which it is responsible, has been reiterated on numerous occasions.⁵⁵ The fact that the territory’s inhabitants qualify as a “peo-

the proper definition of a ‘self’ entitled to claim the right of self-determination”).

⁵⁰ For an analysis of the Hong Kong identity, see generally LAU SIU-KAI & KUAN HSIN-CHI, *THE ETHOS OF THE HONG KONG CHINESE* (1988).

⁵¹ See Sino-British Joint Declaration, *supra* note 9, art. 1. “The Government of the People’s Republic of China declares that to recover the Hong Kong area (including Hong Kong island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.” *Id.*

⁵² See *Statement on Combatting Racism and the Right to Self-Determination by the Chinese Ambassador*, U.N. GAOR 3d Comm., 44th Sess., 7th mtg., at 6-7, U.N. Doc. A/C.3/44/SR.7 (1989).

⁵³ See ANTONIO CASSESE, *Political Self-Determination — Old Concepts and New Developments*, in U.N. LAW/FUNDAMENTAL RIGHTS 137, 140 (Antonio Cassese ed., 1979).

⁵⁴ The notion of one country/two systems as reflected in the Sino-British Joint Declaration implies such support.

⁵⁵ See 1988 BRIT. Y.B. INT’L L. 441-43; 1987 BRIT. Y.B. INT’L L. 519-22; 1986 BRIT. Y.B. INT’L L. 514-17; 1985 BRIT. Y.B. INT’L L. 394-406; 1984 BRIT. Y.B. INT’L L. 430-37; 1983 BRIT. Y.B. INT’L L. 396-409.

ple" is also consistent with the British "working definition" regarding self-determination which attaches importance to "whether the people in a particular territory constitute a settled and self-sustaining community with its own institutions and civil administration."⁵⁶ For obvious political reasons and in order to minimize friction with the PRC and their "reasonable" demands, the British Government has not urged self-determination for Hong Kong. Its claim to international personality as a "people" in all likelihood would enjoy London's blessing, given the United Kingdom's explicit policy of nonintervention in local affairs and its active promotion of a high degree of autonomy for the territory.

Insofar as the rest of the international community is concerned, recognition of Hong Kong's right to self-determination is uncertain. While the probability of a collective UN finding that Hong Kongers have a right to self-determination is rather low — in view of relevant UN practice⁵⁷ and the difficulties in establishing a case based on colonial or alien domination⁵⁸ — wide acceptance of this principle may nevertheless prompt other countries to recognize the territory's separate international identity.

II. CONCLUDING OBSERVATIONS REGARDING INTERNATIONAL LEGAL PERSONALITY FOR HONG KONG

In light of the relative nature of the concept of international personality, it may be necessary to disregard preconceptions as to who can be subjects of international law and to focus on an entity's capacity, as this capability is the real key to international personality.⁵⁹ The test should be a functional one — whether, and to

⁵⁶ See Sir Ian Sinclair, Legal Adviser, Foreign and Commonwealth Office, *In the Course of Evidence to the Foreign Affairs Committee of the House of Commons on January 17, 1983*, reprinted in 1983 BRIT. Y.B. INT'L L. 399-400.

⁵⁷ The practice in question relates to cases involving strong objections and counter-claims by powerful neighboring states, e.g., Goa, East Timor, Ifni, Gibraltar, and the Falklands. See Michla Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 310, 322-34 (1984).

⁵⁸ It is not clear — even in light of recent events in Eastern Europe and the Baltics — that communist rule may be regarded as "alien" domination.

⁵⁹ D.P. O'Connell maintains that "even the smallest measure of international capacity is the index of personality and so it is incorrect to exclude subordinate entities like colonies

what extent, the entity is able to operate as a member of the international community

It is instructive that in this connection international organizations have adopted a "functionalist" approach in admitting members. An entity's eligibility depends on its ability to carry out the essential obligations of membership rather than to meet the traditional requirements of statehood. In fact, one can cite several examples of international organizations requiring statehood for admissibility yet allowing participation by nonstates.⁶⁰ Moreover, the constitutions of some specialized agencies contain provisions expressing that territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as associate members.⁶¹

Hong Kong has both the *de jure* and *de facto* capacity for independent action involving reciprocal rights and duties. Clearly, the many regional and international organizations that have approved the entity's affiliation consider Hong Kong to possess such capacities. An international personality is logically deduced from the considerable international powers enjoyed by Hong Kong.

One may also argue that effective control over a population liv-

or member States of federations from the conception of statehood in international law without previous reference to international legal acts which they may in fact perform." 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 283-84 (2d ed. 1970).

⁶⁰ As noted by Dugard, six of the UN's original members, India, the Philippines, Lebanon, Syria, Byelorussia and the Ukraine were not fully independent (the latter two not even putative states) in 1945. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 52-55 (1987). Dugard further argues that some of the subsequent members were not yet states as a matter of customary international law when they were admitted. Pre-independent Namibia, represented by the UN Council for Namibia, was admitted as a full member of the International Labor Organization. *Id.* at 126. W. Michael Reisman discusses the UN's membership policy as it plays down resource bases and sovereign independence. Examples from the 1960's are numerous. An obvious case from the 1970s is the admission of the tiny landlocked Himalayan Kingdom of Bhutan. As Reisman remarks, "[n]o one in the UN entertained any illusion about the immediate or prospective degree of effective independence from surrounding India." W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS* 61-62 (1975).

⁶¹ See Founding Documents of Food and Agriculture Org., art. 2, para. 3; United Nations Economic and Social Council, art. 2, para. 3; World Health Org., ch. 3, art. 8; International Telecommunications Union, art. 1, para. 4(b). The World Meteorological Organization provides in article 3(d)-(e) that any territory or group of territories maintaining its own meteorological service can become a "regular member" of the organization.

ing in a given territory is a key factor in eligibility for membership in the world community at large. According to one expert, some liberation movements have been elevated to the rank of international subjects mainly because they tend, or at least strive, to acquire control over territory.⁶² Moreover, this effective control takes precedence over international recognition.⁶³

Hong Kong has the control apparatus, as well as the political, technical, and financial capabilities, to exercise its international rights and duties in its relations with other international legal persons. Furthermore, Hong Kong has acquired a respectable measure of recognition as a viable and significant international political actor with ample capacity to operate internationally

From a broad legal standpoint, several developments in international law and practice should facilitate the international community's acceptance of Hong Kong's status as an international person. Generally, the notion of sovereignty seems to be eroding. In fact, sovereigns are unable to manage singlehandedly many contemporary problems, such as pollution with ramifications extending beyond national frontiers. International communications, maritime traffic, and airspace regulation signify the scientific and technological developments which have forced states to concede powers to international regulatory groups. Another factor undermining the traditional notion of sovereignty is the emergence of regional entities, such as the European Community (EC), or defence strategists, such as the Association of South East Asian Nations (ASEAN), which wield control over numerous areas previously within the exclusive domain of individual states.⁶⁴ Regional and international organizations increasingly enjoy some of the powers previously exercised by states. In theory, at least, most countries would be willing to surrender sovereignty in certain areas, such as health or international communications. Nor is there a strong fear of

⁶² ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 91 (1986).

⁶³ *Id.* at 78-79.

⁶⁴ It is arguable that to the extent that economics and politics are interdependent, economic unification involves political integration as well. As observed by one commentator, in Europe, "international borders are becoming increasingly less relevant and extensive informal and limited formal transborder cooperation is becoming the norm." Hurst Hannum, *The Foreign Affair Power of Autonomous Regimes*, 57 *NORDIC-J. INT'L L.* 273, 287 (1988).

domination by one or two countries, as military force is no longer the sole basis of power. Indeed, economic power in the international marketplace, such as that enjoyed by multinational corporations, is occasionally viewed as of greater significance than military strength. Additionally, the development of international human rights law⁶⁵ has meant that sovereign states can no longer erect barriers in the name of domestic jurisdiction. Nations are increasingly required to subordinate their acknowledged power to internationally recognized individual rights concerns and are called to subject themselves to international scrutiny and judgment.

Finally, recent events in the Soviet Union and Eastern Europe have come to symbolize the changing perceptions of world powers, and as a result there is little doubt that some of the structural underpinnings of the world order are assuming a less solid form. *Perestroika* and *glasnost* may represent only the beginning of a much more fundamental alteration, signalling the erosion of the position of the state as the central actor in the international community.⁶⁶ Arguably, there is a trend toward granting nonstate actors an increasingly prominent role in shaping the legal norms that will order and maintain the international community of the future. This increased participation and leadership is especially prevalent in the area of human rights and the environment. It is clear that in today's integrated and functionally complex international system, states are not the only, or even the major, players. Indeed, on a theoretical level, international law has been redefined⁶⁷ and ad-

⁶⁵ Most of the world's nations have now signed one or more of the international instruments obligating states to respect human rights. See U.N. CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS STATUS OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1987).

⁶⁶ Richard Falk predicts the break-up of the state-centered system of international relations and the emergence of new forms of "nonterritorial central guidance" and "communitarian organization." RICHARD FALK, REVITALIZING INTERNATIONAL LAW 5 (1989).

⁶⁷ JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 3 (10th ed. 1989). The definition advanced by Starke states:

That body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe in their relations with each other, and which includes also a) the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and b) certain rules of law relating to individuals and nonstate entities so far as the rights or duties of such

justed⁶⁸ to take account of the growing importance of entities of a nonterritorial nature. International law no longer reflects the unworkable proposition that the regulation of interstate relations is its exclusive concern.

As sovereignty assumes a somewhat diminished role in the world order, it is evident that states are prepared to admit a broad range of less-than-sovereign entities into the international legal system. Many composite configurations are being accorded recognition as international persons. These entities include groups such as unions, federations, and international organizations, or those entities that remain unincorporated. Federal or associated states include: the Cook Islands, Puerto Rico, and Toklau. Protectorates and colonies, as well as mandated or trust territories, are also being accorded recognition. Moreover, *sui generis* entities including governments in exile such as Cambodia, and insurgent communities such as the Eritrean Community, are also seeking and receiving international attention. Other groups include: Representative organizations, such as the Palestinian Liberation Organization (PLO) and South West Africa People's Organization (SWAPO), as well as historical and religious institutions. Legal capacity has also been extended to individuals under various treaties and customary international law. Thus, Hong Kong holds legitimate expectations regarding international recognition.

Since claims to international personality are to be assessed in light of the international community's societal needs,⁶⁹ and as Hong Kong possesses considerable capacities, attention must be paid to the international functions performed by the territory. Arguably, the Hong Kong model of autonomy, if faithfully executed, may be regarded as partial implementation of self-determination

individuals and nonstate entities are the concern of the international community.

Id.

⁶⁸ Luzius Wildhaber, *Sovereignty and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 425 (R. St. J. MacDonald & D.M. Johnston eds., 1983).

⁶⁹ For a discussion of the "international end" or "societal need" theory, see Tiyanjara Maluwa, *The Holy See and the Concept of International Legal Personality: Some Reflections*, 19 COMP. & INT'L L.J. S. AFR. 1-26 (1986). It is the writer's thesis that such a theory provides the legal and philosophical justification for according international legal personality to certain types of nonstate entities.

based upon a compromise between conflicting interests. As such, the model would not only be congruent with one of the main political aims of the community of nations, but it may also be viewed as a viable alternative to secession and the proliferation of mini-states.⁷⁰ Moreover, implementation would signify a pragmatic, peaceful means of dispute resolution. The nature of the regime envisaged for the region is also associated with certain principles, such as the rule of law and governmental structure, which are highly valued by the world's liberal societies. To secure these important ends, and also to minimize international disruption (for example, mass exodus of people), Hong Kong must be able to operate independently and on the basis of relative equality with other subjects in the international legal order; Hong Kong must operate as an international person.

As noted at the outset, however, international personality is a flexible and open-ended concept which may mean different things in different circumstances. While states possess the fullest measure of international personality, international organizations are endowed only with the degree of personality that enables them to discharge their functions effectively. The extent of personality enjoyed by other subjects of international law will depend on various factors, including a constituent treaty, a constitution, and recognition. In order to establish the international legal status of Hong Kong, it is therefore necessary to determine the substantive entitlements and responsibilities that are attached to entities with similar standing, as well as to examine Hong Kong's actual position. This inquiry involves an appraisal of the security of Hong Kong's existence, or its "right to life," and an analysis of concepts such as "autonomy" and "internal self-determination" and their application to the territory. In addition, there will be discussion of the implications of "state succession" in the context of transfer of sovereignty over Hong Kong. Special regard will be given to the questions of treaties, acquired private rights, public property, public funds, and nationality. Finally, an assessment will be taken of Hong Kong's capacity to bring international claims and to bear in-

⁷⁰ See Ruth Lapidoth, *Some Reflections on Autonomy*, in *MELANGES OFFERTS À PAUL REUTER* 379, 380 (A. Pedone ed. 1981).

ternational responsibility

A. *The Content and Extent of Hong Kong's International Personality*

1. *"Right to Life?"*

Whereas a state's "right to life" is safeguarded under international legal rules prohibiting aggression, more equivocal is the extent of protection afforded by international law to nonstate entities. Can Hong Kong, for example, be dissolved or disappear depending on the will of Britain or China? Were the territory to be taken over militarily by China, could Hong Kong expect an international reaction similar to the world's response to the invasion of Kuwait by Iraq?

From a strictly legal standpoint, the violation of Hong Kong's territorial integrity prior to 1997 would justify an action in self-defense by the United Kingdom. Notwithstanding its reluctance to embrace a "colonial" classification, the PRC has acknowledged British responsibility for Hong Kong and hence waived its own sovereign claims with respect to the territory.⁷¹ Moreover, a formal recognition of the British right to govern Hong Kong is implied in the Sino-British Joint Declaration and its British Implementing Act which provide, respectively, that the Government of the PRC "has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997"⁷² and that the United Kingdom will relinquish sovereignty over Hong Kong at midnight, June 30, 1997.⁷³ China, on its part, has pledged its cooperation in maintain-

⁷¹ The PRC has not directly challenged or expressed any misgivings about Britain's conclusion of bilateral and multilateral agreements on behalf of Hong Kong, or the fact that Britain has represented the territory and its inhabitants in relation to third states. Furthermore, the PRC has extended recognition to foreign consular representatives accredited by the British Government in Hong Kong. Moreover, China has also accepted the right of the United Kingdom to issue currency in Hong Kong; currency being one of the most important attributes of sovereignty.

⁷² Sino-British Joint Declaration, *supra* note 9, art. 1.

⁷³ Hong Kong Act of 1985, Public General Acts and Measures, Eliz. II, ch. 15 (Eng.) ("[a]n Act to make provision for and in connection with the ending of British sovereignty and jurisdiction over Hong Kong").

ing and preserving Hong Kong's economic prosperity and social stability⁷⁴

In light of the previous analysis,⁷⁵ one may also contend that the inhabitants of Hong Kong should be able to claim protection by virtue of their right to self-determination as a "people." A forcible denial of such a right should entitle the people of Hong Kong to seek political or judicial⁷⁶ redress and to receive international support. Their capacity to bring international claims must be assumed as an inherent and necessary attribute of the territory's international personality

The right of the Hong Kong people to self-determination, if accepted, is continuous and should not be affected by the 1997 change of administration. Protection on any other basis from that date onwards, however, is more doubtful. While Hong Kong's existence as an autonomous entity is guaranteed under a binding international treaty for a period of fifty years from July 1, 1997, what seems to be protected is the territory's internal structure. The transfer of sovereignty over Hong Kong may be interpreted as absolute: termination of the treaty for whatever reason will not entitle the United Kingdom to recover sovereignty. Unlike the United States-Taiwan position expressed in the Taiwan Relations Act of 1979, Britain has not declared a policy to "maintain the capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people" ⁷⁷ of Hong Kong.

The prospects of a broader international involvement hinge to a certain degree on the acceptance of the "internationalization" of the Hong Kong issue.⁷⁸ Arguing from such a perspective, it follows

⁷⁴ Sino-British Joint Declaration, *supra* note 9, art. 4.

⁷⁵ See *supra* notes 33-56 and accompanying text.

⁷⁶ For support of an *actio popularis* in these circumstances, see *Barcelona Traction, Light, & Power Co., Second Phase* (Belg. v. Spain), 1970 I.C.J. 304 (Feb. 5) (separate opinion of Judge Ammoun). Note also that an adjudication clause is incorporated into the International Convention on the Elimination of All Forms of Racial Discrimination, to which the PRC is a party. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 5 I.L.M. 352, 359-63.

⁷⁷ See Taiwan Relations Act, 22 U.S.C. § 3301 (2)(b)(6) (1979).

⁷⁸ This assertion is valid in the sense that the determination of Hong Kong's specific

that an entity "created by international law" with its own territory, population, and government, should be internationally protected. Further, an infringement of the territorial integrity and autonomous existence of such an international person constitutes a violation of the world's public order, or *jus cogens*, which could be vindicated by any member of the international community in an *actio popularis*.⁷⁹ It is, however, unrealistic to ignore doubts as to whether the Hong Kong issue would indeed be deemed the concern of all states, whether the international community would assert the legal right to proceed against the sovereign power involved, and whether the sovereign's defense of the exclusivity of domestic jurisdiction could be said to have become a thing of the past.

The PRC's protests at what it views as "internationalizing" or "interfering" have been well publicized.⁸⁰ Yet, as noted by one observer, the registration of the Sino-British Joint Declaration with the UN is "surely an invitation to the whole world to monitor the situation in Hong [K]ong."⁸¹ United Nations intervention is most unlikely (not only because of the Chinese veto) unless it perceives a threat to international peaceful relations.⁸² At the same time,

position — conditions for coming into effect, existence or extinction, and identity — is a problem requiring the analysis of international law.

⁷⁹ On the notion of *actio popularis*, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 831-32 (1988).

⁸⁰ See, for example, December 19, 1989 Commentary in the *People's Daily*, cited in Chris Yeung and Shirley Yam, *China Repeats Reform Warning*, S. CHINA MORNING POST, Dec. 20, 1989, at 4. The article branded as hegemony the view that foreign countries would naturally have an interest in the political development of Hong Kong because of their economic interests in the territory. It charged "[t]hose who advocate internationali[z]ing the question of Hong Kong" with "attempting to create a situation in which international forces will gradually and politically interfere in the affairs of Hong [K]ong. They are actually trying to muster the international anti-Communist and anti-China forces to obstruct China from resuming its sovereignty over Hong Kong." *Id.* Earlier, in a statement quoted on state radio and television on October 25, 1989, Beijing said that Hong Kong's future was a matter between Britain and China, and that "[o]ther countries or international organizations have no right to interfere in it." *Id.* The statement followed the issuing of a communique by the Commonwealth Heads of Government Meeting in Malaysia which had called for the restoration of confidence in Hong Kong. *Beijing Attacks UK Leaders Over Stance on Territory*, S. CHINA MORNING POST, Oct. 26, 1989, at 7.

⁸¹ Frank Ching, *Calling a Spade a Club in Dealing Out Criticism*, S. CHINA MORNING POST, Dec. 22, 1989, at 12.

⁸² See CASSESE, *supra* note 62, at 408. Cassese notes the view that "the UN's paramount concern is not so much with the rule of law or respect for justice, as with the maintenance of

other forms of international protective action could be anticipated.⁸³ In this respect, Hong Kong's wide participation in international organizations and its international exposure may provide a "safety net" capable of averting major risks to the security and independence of the territory

2. "High Degree of Autonomy"

Since a reference to a "high degree of autonomy" with respect to Hong Kong was made officially for the first time in the Sino-British Joint Declaration,⁸⁴ the following discussion will focus on the relevant implications of the period pursuant to the signing of the treaty. In accordance with the terms of the Joint Declaration,⁸⁵ until the formal transfer of sovereignty on July 1, 1997, Hong Kong's current "autonomous" position, within the context of overall British responsibility for administration, is to remain unchanged, notwithstanding the preliminary steps undertaken to implement the accord.⁸⁶ This means, *inter alia*, that internal matters not involving defense or foreign affairs are the exclusive province of the Hong Kong Government. Hence, during the transitional period, lo-

peace." *Id.* The United Nations' unimpressive record in suppressing genocide is a case in point. See Leo Kuper, *The Sovereign Territorial State: The Right to Genocide*, in HUMAN RIGHTS IN THE WORLD COMMUNITY, ISSUES AND ACTION 56-64 (Richard P. Claude & Byrns H. Weston eds. 1989). But see S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991) (determining that the refugee flow from Iraq toward neighboring Turkey and Iran constituted a threat to international peace and security).

⁸³ The UN General Assembly, on a significant number of occasions, has taken a position concerning situations involving breaches of human rights, passing numerous resolutions, for example, on racial discrimination in general and *apartheid* in particular. Political pressure by the General Assembly may involve a continuing element of inquiry and reporting by a subsidiary body, exemplified in the Special Committee on the Situation with Respect to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples; and the Committee Established to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.

⁸⁴ Sino-British Joint Declaration, *supra* note 9, para. 11.

⁸⁵ *Id.*

⁸⁶ *Id.* § 3, paras. 4-5. The preliminary steps are matters relating essentially to the "smooth transfer of government in 1997," which are the subject of consultations and discussions by the Sino-British Joint Liaison Group (JLG). Note that the JLG is "an organ for liaison and not an organ of power." *Id.* Annex II, § 6. It plays "no part in the administration of Hong Kong or the Hong Kong Special Administrative Region," nor shall it have "any supervisory role over that administration." *Id.*

cal economic decisions, such as the construction of a new airport and related infrastructure development, lie entirely within the limits of Hong Kong's autonomy⁸⁷ regardless of the post-1997 ramifications.

Autonomy has not been authoritatively defined in international law. In fact, the wide and varied range of recognized "autonomous" entities⁸⁸ and the considerable disparity among arrangements of autonomy have rendered a "firm definition that is appropriate in all cases . . . impossible."⁸⁹ Acknowledging the inherent elasticity of the term, the authors of a comprehensive survey on the subject have nonetheless attempted to identify "minimum governmental powers that a territory would need to possess if it were to be considered fully autonomous and self-governing"⁹⁰ These governmental powers comprise a locally elected legislative body capable of independent decision-making in local matters (such as health, education, social services, local taxation, internal trade and commerce, environmental protection, zoning, and local government structure and organization); a locally chosen chief executive with general responsibility for the administration and the execution of local laws or decrees; and an independent local judiciary.⁹¹ Autonomy is not inconsistent, however, with the retention by the sovereign government of authority over foreign relations and national defense,⁹² although wide discretionary powers in the external domain are an essential component of a strategy designed to enhance the local entity's status in the international arena.

⁸⁷ These decisions lie within the autonomy of the HKSAR, which under the Sino-British Joint Declaration shall decide monetary and financial policies on its own. Sino-British Joint Declaration, *supra* note 9, Annex I, §§ 5-9.

⁸⁸ An early study covers, under the category of "autonomy," "semi-sovereign states, protected independent states, guaranteed states, neutralized states, vassal states, protected dependent states, administered provinces, autonomous colonies and dependencies, members of federal union and confederacy." Brian Z. Tamanah, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy,"* 20 CAL. W. INT'L L.J. 41, 44 n.15 (1989) (citing WESTEL W. WILLOUGHBY & CHARLES FENWICK, *TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY* (1919)).

⁸⁹ Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, in *MODELS OF AUTONOMY* 215, 250 (Yoram Dinstein ed., 1981).

⁹⁰ *Id.* (emphasis omitted).

⁹¹ *Id.* at 250-51.

⁹² *Id.* at 251.

A "critical attribute of autonomy"⁹³ is noninterference by the principal government in areas within the sphere of competence of the secondary entity, especially where the main objective of the arrangement is to preserve the separate cultural, religious, ethnic, economic, and other identities of each entity. By the same token, the degree of autonomy is measured with reference to the insularity of the secondary entity from potential central control.

"Post-1997 Hong Kong easily satisfies the descriptive criteria of an autonomous entity under international law."⁹⁴ Under the Sino-British Joint Declaration, the HKSAR will be vested with "executive, legislative and independent judicial power, including that of final adjudication."⁹⁵ Its legislative capacity is set out more specifically in section II of Annex I, which stipulates that the legislature "may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures."⁹⁶ The Joint Declaration also provides that the legislature will be established by election,⁹⁷ while the Basic Law⁹⁸ further expounds that "[t]he method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage."⁹⁹

The HKSAR will be headed and represented by a chief executive, "selected by election or through consultations held locally and appointed by the Central People's Government."¹⁰⁰ Drafters of the Basic Law also appear concerned with emphasizing the local

⁹³ Tamanah, *supra* note 88, at 44.

⁹⁴ *Id.* at 47.

⁹⁵ Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 2.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress of the PRC on April 4, 1990, to be put into effect as of July 1, 1997. 29 I.L.M. 1511 (1990) [hereinafter Basic Law]. Provisions pertaining to "The Legislature" are contained in chapter 4, section 3, articles 66-79. *Id.* at 1531-33.

⁹⁹ *Id.* ch. 4, § 3, art. 68, at 1531.

¹⁰⁰ Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 3; Basic Law, *supra* note 98, ch. 4, § 1, art. 45.

character of a candidate by prescribing that the candidate be "a Chinese citizen . . . who is a permanent resident of the Region with no right of abode in any foreign country and [one who] has ordinarily resided in Hong Kong for a continuous period of not less than twenty years."¹⁰¹

Judicial power in the HKSAR is to be exercised by the local courts "independently and free from any interference."¹⁰² To ensure the independence of the judiciary, both the Sino-British Joint Declaration and the Basic Law contain detailed provisions pertaining to appointment (by the chief executive "acting in accordance with the recommendation of an independent commission comprised of local judges, persons from the legal profession and other eminent persons"),¹⁰³ removal from office (only for inability to discharge the functions of office or for misbehavior, and the process must be initiated by the chief executive acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges),¹⁰⁴ and immunity from legal action in respect of judicial functions.¹⁰⁵

Considerable power is vested in the HKSAR with respect to external affairs.¹⁰⁶ The Region "may on its own, using the name 'Hong Kong, China,' maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields, including the eco-

¹⁰¹ Basic Law, *supra* note 98, ch. 4, § 1.

¹⁰² Sino-British Joint Declaration, *supra* note 9, Annex I, § 3, para. 2; Basic Law, *supra* note 98, art. 84.

¹⁰³ Sino-British Joint Declaration, *supra* note 9, Annex I, § 3, para. 3; *see also* Basic Law, *supra* note 98, art. 87.

¹⁰⁴ Sino-British Joint Declaration, *supra* note 9, Annex I, § 3, para. 3; *see also* Basic Law, *supra* note 98, art. 88.

¹⁰⁵ Sino-British Joint Declaration, *supra* note 9, Annex I, § 3, para. 2; *see also* Basic Law, *supra* note 98, art. 84.

¹⁰⁶ A special provision concerning participation in international trade agreements is contained in Section VI of the Sino-British Joint Declaration. *See supra* note 9. Wide powers are granted also for the specific functions and responsibilities of the Hong Kong Special Administrative Region Government in the field of shipping in Section VIII and civil aviation in Section IX. All of the relevant provisions concerning external affairs are duplicated in chapter 5 (particularly §§ 3, 6, & 7) of the Basic Law, *supra* note 98.

conomic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields."¹⁰⁷ In addition:

[R]epresentatives of the Hong Kong Special Administrative Region Government may participate, as members of the delegations of the Government of the People's Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organization or conference concerned, and may express their views in the name of 'Hong Kong, China.'¹⁰⁸

In its role as an autonomous entity, the Special Administrative Region may also participate in international organizations and conferences not limited to states. Indeed, the Central People's Government undertakes "to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organizations of which the People's Republic of China is a member and in which Hong Kong participates in one capacity or another."¹⁰⁹ The PRC's undertaking also extends to facilitating the "continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member."¹¹⁰

Consistent with the emphasis on the development of external ties by the territory, the Sino-British Agreement stipulates the establishment, with the approval of the Central People's Government, of consular and other official or semi-official missions in the SAR.¹¹¹ The Agreement also provides for official and semi-official SAR economic and trade missions in foreign countries.¹¹² The SAR's external status is further enhanced by the authority granted

¹⁰⁷ Sino-British Joint Declaration, *supra* note 9, Annex I, § 11, para. 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Annex I, § 11, para. 2.

¹¹⁰ *Id.*

¹¹¹ *Id.* para. 3.

¹¹² *Id.* Annex I, § 6, para. 4.

to it by the PRC to issue passports and travel documents,¹¹³ as well as to conclude agreements for the mutual abolition of visa requirements.¹¹⁴

With respect to defense, while such affairs are to be managed and funded by the Central People's Government, the maintenance of public order in the SAR should be the responsibility of the SAR Government. "Military forces sent by the Central People's Government to be stationed in the [Region] for the purpose of defense shall not interfere in the internal affairs of the Hong Kong Special Administrative Region."¹¹⁵

Furthermore, an attempt has clearly been made to preserve the territory's separate social and economic identity, coupled with a Chinese pledge of noninterference¹¹⁶ insofar as the socialist system and policies will not be practiced in Hong Kong for fifty years.¹¹⁷ Basically, the HKSAR will "maintain the capitalist economic and trade systems previously practi[c]ed in Hong Kong."¹¹⁸ Accordingly, the HKSAR Government is granted almost total control over the economy,¹¹⁹ including the power to decide its own economic and trade policies,¹²⁰ develop its own economic and trade relations with other states and regions,¹²¹ formulate its own monetary and financial policies,¹²² and determine its own excise and taxation policies.¹²³ The HKSAR will retain its status as a free port,¹²⁴ continue to pursue its free trade policy, including free movement of goods and capital,¹²⁵ and maintain its freely convertible cur-

¹¹³ *Id.* Annex I, § 14, para. 2.

¹¹⁴ *Id.* para. 7.

¹¹⁵ *Id.* Annex I, § 12.

¹¹⁶ *See, e.g.,* Basic Law, *supra* note 98, pmb. paras. 2, 3.

¹¹⁷ Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 1; Basic Law, *supra* note 98, art. 4.

¹¹⁸ Sino-British Joint Declaration, *supra* note 9, Annex I, § 6, para. 1; *see, e.g.,* Basic Law, *supra* note 98, arts. 4, 8.

¹¹⁹ While notes 119-33 are from the Sino-British Joint Declaration, *supra* note 9, similar provisions are contained in chapter 5 of the Basic Law, *supra* note 98.

¹²⁰ Sino-British Joint Declaration, *supra* note 9, Annex I, § 6, para. 1.

¹²¹ *Id.* para. 2.

¹²² *Id.* Annex I, § 7, para. 2.

¹²³ *Id.* Annex I, § 6, para. 3.

¹²⁴ *Id.* para. 2.

¹²⁵ *Id.*

rency¹²⁶ The HKSAR will remain a separate customs territory, capable of participating as such in relevant international organizations and securing its own export quotas, tariff preferences, and other similar arrangements.¹²⁷ Hong Kong's separate shipping register¹²⁸ and civil aviation management are also to be retained.¹²⁹

In what is considered a somewhat unusual feature in autonomous entity/central authority relationships,¹³⁰ there will be essentially no formal financial ties between the HKSAR and the Central People's Government. Rather, the HKSAR will have independent finances to use exclusively for its own purposes. No funds will be channeled to the Central People's Government,¹³¹ nor will the CPG be permitted to levy any taxes in the territory¹³²

Obligations have also been undertaken to preserve Hong Kong's current social system and lifestyle.¹³³ Under the Sino-British Joint Declaration, the rights and freedoms enjoyed by Hong Kong residents:

including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research, and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance, and foreign investment will be protected by law.¹³⁴

The agreement further provides that:

The Hong Kong Special Administrative Region shall maintain the educational system previously practi[c]ed in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies re-

¹²⁶ *Id.* Annex I, § 7, para. 1.

¹²⁷ *Id.* Annex I, § 6, para. 3.

¹²⁸ *Id.* Annex I, § 8, para. 2.

¹²⁹ *Id.* Annex I, § 9, para. 1.

¹³⁰ See Hannum, *supra* note 64, at 277.

¹³¹ Sino-British Joint Declaration, *supra* note 9, Annex I, § 5, para. 2.

¹³² *Id.*

¹³³ *Id.* para. 3(5).

¹³⁴ *Id.*

garding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications. Institutions of all kinds, including those run by religious and community organizations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.¹³⁵

The above obligations have been reaffirmed and details of their implementation stipulated in the HKSAR Basic Law.¹³⁶

As emphasized above, the “*high*” degree of autonomy pledged for the territory hinges to a large extent on the insulation of Hong Kong from potential and actual intervention by the PRC. Several concerns have been raised in this regard, identifying conceivable sources of control or interference that range from the specific-legalistic to the more general-ideological.

With respect to the legislative powers with which the HKSAR Government is endowed, three potential constraints have been highlighted: (1) laws enacted by the local legislature are subject to invalidation by the Standing Committee of the National People’s Congress (SC-NPC); (2) PRC legislation may be applicable in Hong Kong; and (3) the power to amend the Region’s Constitution is vested in the NPC.

It appears that the power to invalidate HKSAR legislation assumed by the PRC under article 17 of the Basic Law goes beyond that which is envisaged in the Sino-British Joint Declaration.¹³⁷ Although such power is confined to challenging the “constitution-

¹³⁵ *Id.* Annex I, § 10, para. 1.

¹³⁶ Basic Law, *supra* note 98, chs. 3, 6.

¹³⁷ Sino-British Joint Declaration, *supra* note 9, Annex I, § 2, para 2 (“The legislature may on its own authority enact[s] laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People’s Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.”)

ality" of laws "regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region," the power of review should more appropriately¹³⁸ — and more consistently with a high degree of autonomy¹³⁹ — be exercised by the local judiciary

It has been further argued that the Basic Law expands PRC authority to enact legislation applicable in Hong Kong "in violation of the very limits of autonomy the Basic Law is supposed to preserve."¹⁴⁰ The extension to the territory of PRC laws "relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law,"¹⁴¹ is incompatible with the notion of Hong Kong's legislative autonomy. Such legislative autonomy is reflected in the negatively-phrased provision in the Joint Declaration that "[e]xcept for foreign and defence affairs the Hong Kong Special Administrative Region shall be vested with legislative power."¹⁴² The potential for PRC intrusion through legislation is perceived to have increased by the stipulation in the Basic Law that "[i]n the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region."¹⁴³

A potentially more serious problem, insofar as the danger of PRC "legislative infiltration" is concerned, stems from the fact that the power to amend the Basic Law is vested in the National People's Congress¹⁴⁴ and may be exercised without consulting the HKSAR.¹⁴⁵ Yet, as argued by a comparative constitutional law ex-

¹³⁸ Judicial review would arguably avoid politicization of constitutional issues.

¹³⁹ See Tamanah, *supra* note 88, at 51.

¹⁴⁰ *Id.* at 51-52.

¹⁴¹ Basic Law, *supra* note 98, ch. 2, art. 18.

¹⁴² Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 2.

¹⁴³ Basic Law, *supra* note 98, ch. 2, art. 18.

¹⁴⁴ *Id.* ch. 8, art. 159.

¹⁴⁵ "Before a bill for an amendment [to the Basic Law] is put on the agenda of the

pert, the "key elements of the autonomy of the Hong Kong SAR are beyond amendment."¹⁴⁶

[T]he special circumstances of the enactment of the Basic Law — a solemn international treaty and undertaking, the fundamental principle on which Britain transferred responsibility and sovereignty over Hong Kong to China, the assurances given by both to the People of Hong Kong, and their participation in its preparation premised on the principles of the Joint Declaration — all point to an instrument which, though enacted by one party, represents the will of several parties. As such, its unilateral amendment would be contrary to good faith and justice.¹⁴⁷

A further reassurance is provided under the Basic Law itself to the effect that "[n]o amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong"¹⁴⁸ which "have been elaborated by [the Chinese Government] in the Sino-British Joint Declaration."¹⁴⁹

The above concerns have prompted one observer to conclude that "[u]sing International practice as a standard, in the legislative area Hong Kong clearly does not enjoy a 'high degree' of autonomy."¹⁵⁰ Even entities with less autonomy generally hold residual legislative power, possess the power to amend their own constitution without approval of the central government, and are not subject to central government veto of legislation.

With regard to executive powers, fears over PRC interference have focused on his/her appointment¹⁵¹ by and accountability¹⁵² to the Central People's Government. It has been contended that the

National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region [half of whose membership consists of Hong Kong residents] shall study it and submit its views." *Id.*

¹⁴⁶ Yash Ghai, *A Comparative Perspective*, in *THE BASIC LAW* 13 (R. Wacks ed., 1990).

¹⁴⁷ *Id.* at 21.

¹⁴⁸ Basic Law, *supra* note 98, ch. 8, art. 159.

¹⁴⁹ *Id.* pmbl.

¹⁵⁰ Tamanahah, *supra* note 88, at 50.

¹⁵¹ Basic Law, *supra* note 98, ch. 4, art. 45.

¹⁵² *Id.* ch. 4, art. 43. Among other duties, the Chief Executive is to "implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this Law." *Id.* ch. 4, art. 48, para. 8.

Chief Executive's power ("with divided loyalties") to dissolve the legislature¹⁵³ and appoint judges of the courts,¹⁵⁴ may compromise the independence of the legislative and judicial branches of the HKSAR Government.¹⁵⁵

Arguably, since considerable emphasis is placed on the democratic selection of the Chief Executive, it is possible to maintain independence between the branches of government.¹⁵⁶ China's power of "appointment" should not be interpreted to mean that "approval can be withheld at will by the PRC."¹⁵⁷ Certain checks and balances effectively serve to prevent such unilateral action. For example, the Chief Executive has a duty to consult the Executive Council before dissolving the Legislative Council.¹⁵⁸ Additionally, the appointment of judges is based "on the recommendation of an independent commission composed of local judges, persons from the legal profession, and eminent persons from other sectors."¹⁵⁹ Furthermore, the Legislative Council has the power to impeach the Chief Executive.¹⁶⁰

Possibly, the most intense debate is over the preservation of independent local judicial power. The central issue of this debate is whether the interpretation of the Basic Law is the "linchpin"

¹⁵³ *Id.* ch. 4, art. 50.

¹⁵⁴ *Id.* ch. 4, art. 48, para. 6.

¹⁵⁵ See Tamanah, *supra* note 88, at 49.

¹⁵⁶ "The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." Basic Law, *supra* note 98, art. 45. Details of the specific method of selection of the HKSAR's Chief Executive are provided in Annex I of the Basic Law.

¹⁵⁷ Tamanah, *supra* note 88, at 48. A local commentator speculated that the appointment will be a "mere formality" to demonstrate China's sovereignty over Hong Kong. He suggests that if the Central Government refused to appoint the Chief Executive elected by the local authorities, a constitutional crisis will follow with a serious adverse impact on the stability and prosperity of the territory. Joseph Cheng, *Looking at the Other Options*, S. CHINA MORNING POST, Mar. 2, 1986, cited in Roda Mushkat, *The International Legal Status of Hong Kong Under Post Transitional Rule*, 10 Hous. J. INT'L L. 1, 22 n.128 (1987).

¹⁵⁸ Basic Law, *supra* note 98, art. 50.

¹⁵⁹ *Id.* art. 88.

¹⁶⁰ *Id.* art. 73, para. 9.

upon which rests the success or failure of the future system.”¹⁶¹ Specifically, the debate focuses on whether consolidation of power by the NPC will erode the “power of final adjudication” guaranteed to the HKSAR courts under the Sino-British Joint Declaration.

At the same time, it appears that the Central Government’s jurisdiction over certain judicial decisions is not inconsistent with relevant international practice.¹⁶² When appropriately constrained, this jurisdiction “does not inevitably threaten the judiciary’s right of final adjudication.”¹⁶³ Regrettably, no clear delineation of power is offered under the Basic Law. However, some division may be discerned whereby local courts would exercise an incidental, interpretative function, and defer whenever necessary to the SC-NPC’s interpretation of the Basic Law provisions “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region.”¹⁶⁴ Although critics correctly point out the ambiguity of phrases such as “affairs which are the responsibility of the Central People’s Government,” inherent in the local courts’ power to determine the need for referral is also the competence to classify properly the issues.¹⁶⁵

Perhaps a more serious curtailment in power is the SC-NPC’s ability to “disallow” locally enacted legislation.¹⁶⁶ As contended by one writer, the SC-NPC is authorized to “nip errant HKSAR legis-

¹⁶¹ Daniel R. Fung, *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China: Problems of Interpretation*, INT’L & COMP. L.Q. 701, 706 (1988). See also MARTIN LEE & SZETO WAH, *THE BASIC LAW: SOME BASIC FLAWS* 69 (1988).

¹⁶² “In virtually all the autonomous entities, the central government has final jurisdiction, whether appellate or original, for judicial decisions regarding the relationship between it and the secondary entity, and exclusively controls decisions relating to its power over foreign affairs and defense matters.” Tamanah, *supra* note 88, at 54-55.

¹⁶³ *Id.* at 55.

¹⁶⁴ Basic Law, *supra* note 98, art. 158. Deferral is further circumscribed by the requirement of necessity. The SC-NPC is obliged to consult the Hong Kong Basic Law Committee before giving an interpretation, and that while their interpretation is binding on the courts, “judgments previously rendered shall not be affected.” *Id.*

¹⁶⁵ See, e.g., Che-ning Liu, *The Power of Interpretation of the Hong Kong Special Administrative Region Basic Law — Where Do We Go From Here?*, 4 CHINA L. REP. 185, 193 (1989).

¹⁶⁶ See *supra* note 138 and accompanying text.

lation in the bud, thus preempting the courts from exercising the already severely circumscribed interpretive powers granted to them under article 157 by denying them even the very opportunity of reviewing the constitutionality of such legislation."¹⁶⁷ Notwithstanding reassurances by Chinese officials that "the NPC will be unlikely to exercise the power frequently,"¹⁶⁸ judicial review of legislation should reside in SAR courts.

The ousting of the HKSAR courts' jurisdiction over acts of state, such as defense and foreign affairs, may also raise concern as to what other acts of state may be excluded from the purview of the local judiciary.¹⁶⁹ In light of the present judicial practice, which remains unchanged in the HKSAR, the local courts shall decide whether the subject-matter is beyond their judicial scope.¹⁷⁰ Despite this autonomy, the courts must obtain a certificate from the Chief Executive on "questions of fact concerning acts of state such as defense and foreign affairs." This certificate is binding on the courts.¹⁷¹

Despite the fact that the reservation of power to the PRC over defense and foreign affairs is a common feature in autonomous arrangements, it may nevertheless pose certain risks to Hong Kong's autonomy. First, since a formal definition of either "foreign affairs" or "defense" is nonexistent, the scope and extent of the Central Government's responsibility is not clearly demarcated.¹⁷²

¹⁶⁷ Liu, *supra* note 165, at 195.

¹⁶⁸ Quoted in MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG: ISSUES AND IMPLICATIONS OF THE BASIC LAW 44, 55-67 (1990) (proposing a model for constitutional judicial review in Hong Kong). This model combines a "decentralized incidenter system" which permits the local courts to review the acts of the legislative and executive branches for conformity to the Basic Law. *Id.* at 63. The decentralized incidenter system is in contrast with "components of [the] centralized principaliter system" (a special committee composed of an equal number of Hong Kong and mainland compatriots, aims to "resolve constitutional issues involving constitutional powers or jurisdiction questions between the central and local government or questions involving the Constitution of the People's Republic of China"). *Id.* at 64.

¹⁶⁹ Basic Law, *supra* note 98, art. 19.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Distinctions employed in both the Joint Declaration and the Basic Law between foreign and external affairs or defence and public order tend to obscure rather than elucidate the meaning of the two key terms. See generally Roda Mushkat, *Foreign, External*

Apart from these definitional problems is the concern that, as an integral part of the Chinese body politic and as a component of the PRC foreign affairs apparatus, Hong Kong would no longer be perceived as politically neutral. The territory may not be able to maintain close economic or political relations with countries that do not maintain diplomatic ties with China. Furthermore, Hong Kong may lose its status as an effective intermediary between the PRC and such countries.¹⁷³ This result may not only prove costly in terms of lost business opportunities, but it may consequently undermine Hong Kong's image as an autonomous entity.

China's ideologically-inspired foreign policy decisions may also conflict with the territory's right to formulate its own economic and trade policies, and jeopardize its status as a separate customs territory.¹⁷⁴ In the extreme case, whereby China imposes sanctions upon another country, Hong Kong will have to take similar action and incur the risk of being perceived as an active player in the game of international power politics. Such a position is inconsistent with the aim of promoting Hong Kong as an autonomous territorial unit motivated by its desire to live according to the principles of free trade.¹⁷⁵

Another potential drawback is that policy instability within China would have implications for the SAR. Specifically, factional disputes in Beijing over foreign policy may spill over into other policy domains in the PRC.¹⁷⁶ In the absence of a British buffer,

and Defence Affairs, in *THE BASIC LAW AND HONG KONG'S FUTURE* 248 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

¹⁷³ See Y.C. Jao, *Hong Kong's Economic Prospects After the Sino-British Agreement: A Preliminary Assessment*, in *THE FUTURE OF HONG KONG, TOWARD 1997 AND BEYOND* 57, 86 (Hungdah Chiu et al. eds., 1987); Y.C. Jao, *Hong Kong's Future as a Free Market*, 22 *ISSUES & STUD.*, June 1986, at 139.

¹⁷⁴ In recent years, the reassertion of control by the Chinese Communist Party over foreign affairs has been largely formulated by the Ministry of Foreign Affairs of the State Council, China's Central Government. Willy Wo-Lap Lam, *Party Tightens Grip on Foreign Affairs*, *S. CHINA MORNING POST*, Dec. 27, 1989, at 8.

¹⁷⁵ See *HONG KONG 1989: A REVIEW OF 1988* (Aladin Ismail ed., 1989). "Hong Kong believes in free trade. The aims of Hong Kong's external commercial relations policy are thus to safeguard its rights and to discharge its obligations in the pursuit of free trade." *Id.* at 83.

¹⁷⁶ See Kenneth Lieberthal, *Domestic Politics and Foreign Policy*, in *CHINA'S FOREIGN RELATIONS IN THE '80s* 43 (Harry Harding ed., 1984). See also MICHAEL YAHUDA, *TOWARDS*

Hong Kong may not be immune. For example, under the pretext of responding to a "foreign affairs" policy crisis, China could interfere in the internal affairs of the SAR. By doing so, it would violate the letter and spirit of the Sino-British Joint Declaration. Since the vagueness of the relevant terms in the Basic Law will facilitate direct interference, it may be impossible to reconcile such interference with notions of genuine autonomy¹⁷⁷

The "*fear of economic intrusion*"¹⁷⁸ by the PRC is understandably less intense.¹⁷⁹ Yet, a recurrent concern underlying discussion of the territory's economic prospects has been the "interventionist" nature of any version of socialism and China's tradition of strict control over every aspect of the country's economy.¹⁸⁰ Observers have noted, in particular, a recent ideological shift within the Chinese Communist Party, "away from Deng's economic reforms"¹⁸¹ turning "back towards the more traditional Maoist socialist principles."¹⁸² Others have drawn attention to signs of actual intervention through transfer of PRC personnel and resources to the territory¹⁸³

THE END OF ISOLATIONISM: CHINA'S FOREIGN POLICY AFTER MAO 239 (1983) (discussing the serious effects of a backlash against the "open door" policy).

¹⁷⁷ See Deng Xiaoping, *Current Policies and Prospects for Hong Kong*, 31 BEIJING REV. 18 (1988). Notwithstanding the allocation of responsibility over "public order" to the SAR, the troops stationed locally "will go into action . . . when turmoil and big riots occur." *Id.* The necessity to suppress rioting as a "threat to the political stability and economic prosperity of the country" has recently been emphasized by China's Prime Minister, Li Peng. Nicholas D. Kristof, *Chinese Premier Defends '89 Crackdown on Protesters*, N.Y. TIMES, Apr. 10, 1991, at A3.

¹⁷⁸ Eric X. Shiu, *Hong Kong: Prospects of Autonomy Under Chinese Rule After 1997*, 3 TRANSNAT'L LAW. 141, 163 (1990).

¹⁷⁹ The *raison d'être* of Hong Kong's autonomy is the preservation of its economic distinctiveness. One commentator even refers to the "almost hermetically sealed economic separation between China and Hong Kong." Ghai, *supra* note 146, at 11.

¹⁸⁰ See Shiu, *supra* note 178, at 163.

¹⁸¹ David M. Corwin, *China's Choices: The 1984 Sino-British Declaration and its Aftermath*, 19 L. AND POL'Y IN INT'L BUS. 505, 529 & n.122 (1987).

¹⁸² *Id.* at 528 & n.121.

¹⁸³ Y.L. Wu and Y.C. Jao, *The Economic Consequences of 1997*, 20 CASE W. RES. J. INT'L L. 17, 39-40 (1988). According to the authors, "the Xinhua [New China] News Agency, the PRC's *de facto* diplomatic mission in Hong Kong has a staff of about 700. The number of PRC-controlled enterprises in Hong Kong has been stated as over 3000 [and] [o]verall legal immigration from China to Hong Kong increased to over 221,000 persons in 1986. This total includes persons placed in Hong Kong business, financial, and professional orga-

By the same token, the Chinese Government has reaffirmed its commitment to economic policies of modernization¹⁸⁴ and promised that Hong Kong will remain "a place where foreign investors' participation in free competition is guaranteed."¹⁸⁵ The PRC authorities, who are increasingly inclined to learn from experience, may become aware of the trade-off 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.¹⁸⁶ It is also evident that given the comprehensiveness and the detailed nature of provisions in the Sino-British Joint Declaration pertaining to Hong Kong's economic autonomy, any attempt at interference would constitute a flagrant violation of an international treaty, which China is unlikely to risk.¹⁸⁷

If Hong Kong's economic system appears relatively insulated, its lifestyle and the rights and freedoms of its people may not be similarly immune from potential encroachment. Concerns have been voiced, in particular, over the power given under the Basic Law to the Central People's Government to impose national laws ("including the notorious offenses of counter-revolutionary crimes"¹⁸⁸) upon a declaration of a "state of emergency"¹⁸⁹ by the Standing

nizations to learn how the Hong Kong economy operates. Along with the influx of personnel, Chinese capital investment in Hong Kong has also increased." *Id.*

¹⁸⁴ *Reform Will Continue: An Official Explanation — and Promise*, WORLD PRESS REV., Mar. 1987, at 13.

¹⁸⁵ *Hong Kong & China: The Golden Bowl*, ECONOMIST, Mar. 16, 1991, at 34 (statement of Lu Ping, China's senior official for Hong Kong affairs).

¹⁸⁶ See Roda Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DENV. J. INT'L L. & POL'Y 171, 184 (1986).

¹⁸⁷ See Corwin, *supra* note 181, at 520-23; Shiu, *supra* note 178, at 180-82 (setting forth considerations that might endure PRC compliance with the joint declaration).

¹⁸⁸ HONG KONG BAR ASSOCIATION, SUBMISSION OF THE HONG KONG BAR ASSOCIATION TO THE UN HUMAN RIGHTS COMMITTEE ON THE THIRD PERIODIC REPORT ON HONG KONG, para. 11.2 (Mar. 1991). It is further noted therein that "[p]rocedural safeguards for fair and open trial may be ignored. There is no limitation on the scope of derogable rights, nor is there any provision on when the declaration of the state of emergency should be lifted." *Id.*

¹⁸⁹ Basic Law, *supra* note 98, art. 18. The Standing Committee of the National People's Congress may base its decision to declare a state of emergency on a determination that turmoil "exists within the Hong Kong Special Administrative Region which endangers na-

Committee of the NPC. Furthermore, fear exists that article 23 of the Basic Law may enable the Central People's Government to indirectly restrain personal freedoms by imposing restrictions on freedom of expression, association, or movement.¹⁹⁰ This provision instructs the HKSAR to enact laws to prohibit, *inter alia*, "subversion against the Central People's Government foreign political organizations or bodies from conducting political activities in the Region, and political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."¹⁹¹

These fears have not been alleviated by the recent manifestation of the Chinese leadership's resolve to use all means necessary to quash resistance.¹⁹² Nonetheless, article 39 of the Basic Law¹⁹³ may prove effective in ensuring conformity with the international covenants on human rights of both the Basic Law and Hong Kong Laws, and thus, could secure international monitoring of human rights in Hong Kong.¹⁹⁴

Clearly, the cementing of some gaps would not guarantee the complete insularity of the territory, nor will the extent of local autonomy be determined by legal constraints alone. However, barri-

tional unity or security and is beyond the control of the government of the Region." *Id.*

¹⁹⁰ See HONG KONG JOURNALISTS ASSOCIATION (HKJA), HONG KONG JOURNALISTS ASSOCIATION I SUBMISSION TO UN HUMAN RIGHTS COMMITTEE ON THE THIRD PERIODIC REPORT BY HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, paras. 41-43 (Mar. 1991). The HKJA says Chinese pressure is currently in effect, and makes reference in support of this contention to a letter written by the HK Government's Political Adviser to the official New China News Agency pledging the HK authorities had no intention of permitting the colony to be used as a base for subverting China. *Id.* para. 63 & app. 19.

¹⁹¹ Basic Law, *supra* note 98, art. 23.

¹⁹² See Kristof, *supra* note 177.

¹⁹³ Basic Law, *supra* note 98, art. 39. Article 39 provides that "[t]he provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law" and further states that these legal restrictions are limited by the specified human rights agreements. *Id.*

¹⁹⁴ British and Hong Kong officials allegedly told the UN Human Rights Committee that the question of monitoring the implementation of international human rights covenants in Hong Kong after 1997 would be raised at the Sino-British Joint Liaison Group. See *Rights Pact Urged by UN*, HONG KONG STANDARD, Apr. 3, 1991.

ers may be erected which will minimize, if not prevent, excessive Chinese intervention. For example, strong democratic institutions¹⁹⁵ could serve as such a barrier.

3. "Internal Self-Determination"

Notwithstanding any reservation that may be raised with respect to claims by Hong Kong people to be free from foreign rule and domination, their right to "internal self-determination . . . to elect and keep the government of [their] choice"¹⁹⁶ finds ample support in contemporary international law. They may rely on the UN Charter, which calls on member states administering nonself-governing territories "to develop self government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."¹⁹⁷ Further reference could also be made to the obligation incorporated in the 1966 International Covenants on human rights to promote the realization that "[a]ll peoples have the right of self-determination . . . [and the right to] freely determine their political status and freely pursue their economic, social and cultural development."¹⁹⁸

The people of Hong Kong will find the 1975 Final Act of the Conference on Security and Co-Operation in Europe (the Helsinki Accord)¹⁹⁹ particularly instructive in the elaboration of internal self-determination. It provides that "[b]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they

¹⁹⁵ See further discussion in the following section.

¹⁹⁶ Cassese, *supra* note 62, at 134.

¹⁹⁷ U.N. CHARTER art. 73(b). The principle of self-determination is upheld in Articles 1 and 55 of the Charter.

¹⁹⁸ International Covenant on Civil and Political Rights of 1966, art. 1, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 128 (Ian Brownlie ed., 2d ed. 1981) [hereinafter BASIC DOCUMENTS]; International Covenant on Economic, Social and Cultural Rights of 1966, art. 1.

¹⁹⁹ Conference on Security & Cooperation in Europe - Final Act, 14 I.L.M. 1292 (1975) [hereinafter Helsinki Accord]. Although the Helsinki Accord is not a binding treaty, it involves undertakings by the signatory states which preclude them from claiming that the matters dealt with are within the exclusive domestic jurisdiction of the respective signatories. See Oscar Schachter, Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”²⁰⁰

The right of internal self-determination “inexorably demands a democratic system under which the government is chosen from time to time by a process of free and fair elections, held on the basis of genuinely popular suffrage.”²⁰¹ Indeed, the Conference on Security and Co-Operation in Europe recently declared “free elections” to be one of the “elements of justice which [is] essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings.”²⁰² Other essential elements include a representative government with an accountable executive, accessible legislation, equal protection of the law, an independent and impartial judiciary, and fundamental rights of the criminally accused.²⁰³ The states participating in the Conference further declared that the “will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.”²⁰⁴

In a similar vein, if the right of internal self-determination is to be guaranteed,

people must have regular opportunities to choose their governments and their social systems, and to change their governments and their social systems if they so wish. This, in turn, means that each individual must be able to exercise the *other* rights set out in the Covenants, such as the rights to

²⁰⁰ See Helsinki Accord, *supra* note 199, at 1295.

²⁰¹ Geoffrey Marston, *United Kingdom Materials on International Law 1988*, 1988 BRIT. Y.B. INT'L L. 421, 441 (statement of H. Steel, United Kingdom Representative to the UN Commission on Human Rights, Feb. 9, 1988).

²⁰² Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security & Cooperation in Europe, 29 I.L.M. 1305, 1308 (1990) [hereinafter Copenhagen Meeting].

²⁰³ *Id.* at 1308-09.

²⁰⁴ *Id.* at 1309. Sections 7.1-7.9 list obligations which participating states must undertake to ensure that the will of the people forms the basis of governmental authority, including free elections, popularly elected chamber(s) of legislature, universal and equal voting rights, secret ballot or other free voting procedure, freedom of citizens to seek candidacy, freedom to form political parties, freedom to campaign politically, and nondiscriminatory access to the media for all political participants. *Id.* at 1310.

freedom of thought and expression; the rights of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections. It is on these fundamental rights that truly democratic societies are built.²⁰⁵

The entrenchment of democratic values and institutions in Hong Kong is necessary in order to guarantee the territory's future autonomy and stability within the terms of the Sino-British Joint Declaration. However, the "democratization" of Hong Kong — or, more specifically, the development of "a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong"²⁰⁶ — has not progressed in accordance with local expectations.²⁰⁷

²⁰⁵ Geoffrey Marston, *United Kingdom Materials on International Law 1987*, 1987 BRIT. Y.B. INT'L L. 519 (quoting Timothy Eggar, the British Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, during the 43d session of the UN Commission on Human Rights, Feb. 10, 1987).

²⁰⁶ GOVERNMENT PRINTER, HONG KONG, WHITE PAPER ON THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG, para.2 (Nov. 1984).

²⁰⁷ Despite the public's desire for a faster pace of democratization and the Office of Members of the Executive Council and Legislative Council's (OMELCO) consensus regarding the need for an accelerated timetable to full democracy (the people directly electing 50 percent of the Legislature Council's members before 1997), the Foreign and Commonwealth Secretary announced on February 16, 1990, that the Government intended to introduce only 18 (out of 60) directly elected seats in the Legislative Council in 1991, and 20 in 1995. See GOVERNMENT PRINTER, HONG KONG, WHITE PAPER ON THE ANNUAL REPORT ON HONG KONG 1989 TO PARLIAMENT, para. 29 (Apr. 18, 1990) [hereinafter 1989 WHITE PAPER]. Democratically-inclined observers have also noted the failure to establish a separation of powers between the executive and the legislative branches as envisaged in the Sino-British Joint Declaration, by allowing the Legislative Council to elect its own President. Noted in the report are:

examples of government decisions that have stymied public participation in the political process [which] include the denial of the right to vote to adults between 18 and 20 years old, the retention of large numbers of government-appointed members on the district boards and municipal councils, the refusal to accept political parties, the refusal to implement a scheme of automatic registration to all eligible voters, and the gerrymandering of electoral district boundaries in violation of the principle of one-person, one-vote.

HONG KONG LEGISLATIVE COUNCIL REPORTS, 128-29 (Oct. 24, 1990) (statement of Martin Lee, Legislative Council Member).

Furthermore, post-1997 prospects for the implementation of the people of Hong Kong's right to internal self-determination do not appear encouraging. As pointed out by one commentator, the Basic Law

accepts democracy as a long term principle (BL 45 and 68) but does not provide it. Neither the first chief executive nor the majority of the legislature to take office in July 1997 will be directly elected. No significant change in the method of selecting the Chief Executive is contemplated until 2007 (that is, after two terms of office) nor is it intended that the legislature would have a majority of directly elected representatives until at least after that date (annexes I and II). Thereafter the system may be altered, but only with the support of two-thirds of the members of the legislature, the chief minister, and the Standing Committee of the National People's Congress

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Finally, the full realization of the people's right to internal self-determination depends upon whether the rights and freedoms of the people of Hong Kong are respected. The entrenchment of the Hong Kong Bill of Rights²⁰⁹ should prove to be a step in this direction.

4. *Succession*

In ascertaining the extent of Hong Kong's international personality (its international rights and obligations, responsibilities, and entitlements) attention should also be paid to the territorial implications of international legal norms regarding "state succession." Despite China's contention that no transfer of sovereignty is to take place, since it will merely "resume" the exercise of sovereignty over Hong Kong,²¹⁰ the situation falls within the definition of "state succession."²¹¹ The replacement of one state by another for

²⁰⁸ See Ghai, *supra* note 146, at 11.

²⁰⁹ A Hong Kong Bill of Rights Ordinance was enacted on June 5, 1991.

²¹⁰ Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 1.

²¹¹ Vienna Convention on Succession of States in Respect of Treaties, art. 2, U.N. Doc. A/CN.8031/Corr. 2 (1978), 17 I.L.M. 1488 (1978) [hereinafter 1978 Convention on Succession].

the responsibility of the international relations of a territory is tantamount to state succession and is subject to relevant international legal regulation. The explanatory notes to the annexes of the Sino-British Joint Declaration and the notes to the Associated Exchange of Memoranda explicitly refer to the imminent territorial changes in terms of China's succession. Specifically, the explanatory notes state that "foreign and defense affairs which are now the overall responsibility of Her Majesty's Government . . . will with effect from July 1, 1997, become the overall responsibility of the Central People's Government of the People's Republic of China."²¹²

Yet, the Hong Kong case is unique. Although the responsibility over foreign affairs is transferred to the PRC, the territory is vested with a high degree of autonomy, including extensive powers of external relations. In the majority of cases, it is in this respect that the question of succession of treaties arises, but the issue does not lend itself to a determination by a straight forward application of established rules of state succession.²¹³

a. *Treaties*

Since Hong Kong will not gain full independence, the "clean slate" theory which advocates the right of newly independent states²¹⁴ to decide which bilateral and multilateral treaties will remain in force, has no direct relevance. Nor is the "moving treaty

²¹² Sino-British Joint Declaration, *supra* note 9, Annex I, § 1, para. 4; Annex I, § 11, para. 1.

²¹³ Notwithstanding the conclusion of the 1978 Convention on Succession, *supra* note 210, and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, U.N. Doc. A/CN.117/14 (1983), 22 I.L.M. 306 (1983), state practice in this domain has remained "unsettled and full of inconsistencies." JOSEPH GABRIEL STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 324 (10th ed. 1989). 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.

²¹⁴ In practice, newly independent states seeking to maintain stability have opted to retain many of the treaties of the predecessor states. See Hugh J. Lawford, *The Practice Concerning Treaty Succession in the Commonwealth*, 5 CAN. Y.B. INT'L L. 3 (1967).

frontiers rule,"²¹⁵ which provides that a territory undergoing a change of sovereignty passes from the treaty regime of the preceding state directly to that of the acquiring one, applicable in light of Hong Kong's special autonomous status. The territory's predicament lies in the fact that the continuation of external ties and international agreements²¹⁶ is essential in order to maintain the territory's prosperity and its status as a major international commercial center. This predicament is compounded because the PRC is not a party to many of the international agreements presently extending to the territory. Furthermore, it is questionable whether the territory will be given the "maximum freedom of action consistent with China's international responsibility for Hong Kong."²¹⁷ China is not a member of many international conferences and organizations of which Hong Kong is a member, either in its own right or as an adjunct of the British delegation (when meetings are confined to sovereign states).

The pragmatic approach taken by both sides is reflected in the formula adopted under the Sino-British Joint Declaration whereby international agreements implemented in Hong Kong remain in force, even if the PRC is not a party to the agreement. The Central People's Government would apply international agreements to which the PRC is a party to Hong Kong only after seeking the

²¹⁵ See Eckart Klein, *Treaties, Effects of Territorial Changes*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 473 (Rudolph Bernhardt et. al. eds., 1984). The rule is incorporated in Article 15 of the 1978 Convention on Succession which stipulates:

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

1978 Convention on Succession, *supra* note 211, Annex I, pt. 2, art. 15.

²¹⁶ Including those which create international organizations whose activities Hong Kong participates.

²¹⁷ Tsang, *Colossal Task of JLG to Forge a Sound Future*, *S. CHINA MORNING POST*, May 23, 1985, at 2.

views of the SAR Government.²¹⁸ Notwithstanding the reasonableness of such a solution, third party states must consent to this arrangement since they are not obliged to accept new parties within their treaty relations.²¹⁹ The tasks of procuring their consent and working out the technical details of treaty succession have been assigned to the Sino-British Joint Liaison Group (JLG),²²⁰ which has secured the continued application to Hong Kong of a considerable number of international agreements.²²¹

The Sino-British Joint Declaration has accorded special attention to the issue of Hong Kong's international air transport relations in order to ensure the maintenance of the territory's status as "a center of international and regional aviation."²²² Thus, the HKSAR, acting under special authorization from China, may "renew or amend Air Service Agreements and arrangements previously in force . . ."²²³ The JLG has been examining the possible mechanisms for succession of relevant treaties.

Not only will the HKSAR succeed to aviation-related rights currently enjoyed by Hong Kong, but it may also assume additional

²¹⁸ Sino-British Joint Declaration, *supra* note 9, Annex I, § 11, para. 1.

²¹⁹ Although devolution (or "inheritance") agreements feature in state practice, doubts regarding their legal validity vis-à-vis third parties have been expressed. See E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law — Survey and Comment*, VI, 7 INT'L L. COMP. L.Q. 514, 525-26 (1958). Lauterpacht maintains that "[t]he absence of any clear rule of international law relating to the assignment of treaty rights and duties, coupled with the generally accepted principle *pacta tertiis nec nocent nec prosunt*, suggests that these agreements may be of no real legal force." *Id.* (citing O'Connell, who considers that in strict law, the consent of other signatories to this novation of the contractual relationship would be essential). See also 1978 Convention on Succession, *supra* note 211, pt. I, art. 8:

The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor States towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

²²⁰ Sino-British Joint Declaration, *supra* note 9, Annex II.

²²¹ See ACHIEVEMENTS, *supra* note 6.

²²² Sino-British Joint Declaration, *supra* note 9, Annex I, § 9, para. 1. See also The Basic Law, *supra* note 98, art. 128.

²²³ Sino-British Joint Declaration, *supra* note 9, Annex I, § 9, para. 3; Basic Law, *supra* note 98, art. 128.

international responsibilities with respect to the management of civil aviation. These responsibilities include the negotiation and conclusion of new Air Services Agreements (ASAs) providing routes for incorporated airlines that have their principal place of business in the region, as well as negotiation and conclusion of provisional arrangements where no ASA with a foreign state or other region is already in force.²²⁴ Bilateral ASAs with the Netherlands, Switzerland, and Canada provide precedents which affirm the territory's power to negotiate and conclude ASAs by its own rights.²²⁵

The Sino-British Joint Declaration expressly provides for the succession of two specific treaties neither of which the PRC has signed. Section 13 in Annex I stipulates that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." Since treaties do not automatically form part of the law of Hong Kong,²²⁶ only the legislature's incorporation of the Covenants into the domestic law would render the rights and duties stemming from them enforceable by the local courts.²²⁷

The Sino-British Joint Declaration has laid down no concrete strategy for the succession by the HKSAR of extradition treaties currently in force in Hong Kong. Nevertheless, the undertaking by the Central People's Government to assist or authorize the HKSAR Government "to make appropriate arrangements for re-

²²⁴ Sino-British Joint Declaration, *supra* note 9, Annex I, § 9, para. 3; Basic Law, *supra* note 98, art 128. Under other provisions therein, the SAR will be authorized to implement ASAs, to issue licenses to airlines incorporated and having their principal place of business in the SAR, and to issue permits to foreign airlines.

²²⁵ Gary N. Heilbronn, *The Changing Face of Hong Kong's International Air Transport Relations*, 20 CASE W. RES. J. INT'L L. 195, 219-23 (1988); Gary N. Heilbronn, *Hong Kong's First Bilateral Air Services: A Milestone in Air Law and an Exercise in Limited Sovereignty*, 18 HONG KONG L.J. 64 (1988).

²²⁶ Hong Kong follows British practice founded on the constitutional principle of separation of powers, whereby Parliament's approval must be granted for treaties in the form of legislation (which are within the prerogative powers of the Crown-Executive) to have legal effect under municipal law. Such a practice is acknowledged in a number of judicial authorities which are binding on Hong Kong courts. *See, e.g.,* Blackburn v. Att'y Gen., 2 All E.R. 1380 (1971); Laker Airways v. Department of Trade, 1 Q.B. 643 (1977).

²²⁷ Roda Mushkat, *International Human Rights Law and Domestic Hong Kong Law*, in HONG KONG'S BILL OF RIGHTS, PROBLEM AND PROSPECTS 25-38 (R. Wacks ed., 1990).

ciprocal juridical assistance with foreign states may implicitly recognize the need to ensure the continuation of Hong Kong's extradition treaties beyond 1997."²²⁸

One scholar has systematically dissected the nature of the problem by emphasizing, *inter alia*, that while the United Kingdom has assumed powers relating to extradition as part of its overall responsibility for the territory's foreign affairs, a direct transfer or succession to British treaties by the PRC is untenable.²²⁹ According to that writer, it is not possible "to replace the present British-based statutes, treaties and relations with comparable statutes, treaties and relations derived from the extradition laws and relations of the PRC" given the incompatibility of the latter with HK-SAR's domestic legal system, as well as the limited formal extradition relations maintained by China with other states.²³⁰ The solution to the problem lies outside traditional succession norms.²³¹

b. *Acquired Private Rights*

A complex, indeed a critical, legal issue faced by the negotiators and drafters of the Sino-British Joint Declaration is the future of land leases in Hong Kong.²³² The application of norms of state suc-

²²⁸ Sino-British Joint Declaration, *supra* note 9, Annex I, § 3, para. 2. The provision is paralleled in Basic Law, *supra* note 98, art. 96.

²²⁹ Janice M. Brabyn, *Extradition and the Hong Kong Special Administrative Region*, 20 CASE W. RES. J. INT'L L. 169, 174-75, n.33 (1988) (contending that original parties may regard such treaties as having lapsed upon the transfer of responsibilities).

²³⁰ *Id.* at 175-76.

²³¹ Brabyn outlines available options. *Id.* at 186-194. Discussions are still in progress at the JLG. It was reported that a "complicated four-party arrangement" (involving Hong Kong, China, and Britain) might be adopted as a model extradition treaty to be negotiated by Hong Kong and take effect before 1997. As international agreements implemented in Hong Kong, such treaties would continue to be implemented in the HKSAR. See Brian Power & Kathy Griffin, *H.K. Rethinks Extradition Laws*, S. CHINA MORNING POST, Nov. 4, 1990, at 1.

²³² The magnitude of the problem has been highlighted by:

Under the present law, the British Hong Kong Government holds title to all land in Hong Kong, and, instead of selling it outright, leases it. Leases are sold at public auctions and are a valuable source of revenue for the Government. Most leases in Kowloon and Hong Kong Island extend for seventy-five years, subject to renewal. In general, leases in the New Territories will terminate three days before the 1898 Convention of Peking expires on July 1, 1997.

cession pertaining to "acquired private rights" should secure respect for such rights by the successor state.²³³ Yet, while international law provides for the survival of acquired private rights upon a change of sovereignty, it does not guarantee the perpetual maintenance of those rights. By implication, following the transfer of sovereignty, the successor state may modify or even expropriate private property rights.²³⁴

The territory's particular situation and "the important part which land plays in the development and economy of Hong Kong"²³⁵ have dictated a formula reflecting local circumstances. Thus, the parties agreed in the Sino-British Joint Declaration that all existing leases which extend beyond June 30, 1997, and all rights in relation to such leases, "shall continue to be recogni[z]ed and protected under the law of the Hong Kong Special Administrative Region."²³⁶ Moreover, all long-term leases of land granted by the British Hong Kong Government which expire before June 30, 1997, without a right of renewal may be extended until June 30, 2047, without payment of an additional premium.²³⁷ Laws and policies formulated by the Region on its own will deal with leases of land without a right of renewal that expire after the establishment

If China and Britain had announced that in 1997 all Crown leases were to be dissolved or that they were to be subject to an exorbitant renewal rate, they would have created a major economic disturbance. Long-term leaseholders in Hong Kong and Kowloon, upon discovering their leases were to be terminated in 1997, would disinvest immediately. Potential investors would not have been interested in Hong Kong because any lease into which they entered would only be valid until 1997.

Susan L. Karamanian, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEX. INT'L L.J. 167, 174, 175 (1985) (footnotes omitted).

²³³ *Settlers of German Origin in the Territory Ceded by Germany to Poland* (Ger. v. Pol.), 1923 P.C.I.J. (ser. B) No. 6, at 36 (Sept. 10) ("Private rights acquired under existing law do not cease on a change of sovereignty . . . It can hardly be maintained that, although the law survives, private rights acquired under it have perished."). 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 (May 25).

²³⁴ G. Kaeckelbeeck, *The Protection of Vested Rights in International Law*, 1936 BRIT. Y.B. INT'L L. 1, 17 (stating 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 . . .").

²³⁵ Sino-British Joint Declaration, *supra* note 9, Annex III, § 14, para. 53.

²³⁶ *Id.* Annex III, para. 1.

²³⁷ *Id.* Annex III, para. 2.

of the HKSAR.²³⁸ The Hong Kong Government may also grant new leases, from the date of entry into force of the Joint Declaration for terms expiring no later than June 30, 2047.²³⁹ The Government, however, is limited to an annual grant of fifty hectares²⁴⁰ and must share premium income from land transactions equally with the government of the SAR.²⁴¹ The Sino-British Joint Declaration gives special consideration to the maintenance of title to land held by indigenous villagers (those whose families resided in a Hong Kong village in 1898 and have remained on the same property since that time), who will pay the same nominal rent as long as the property stays in the male line of the family.²⁴²

The above obligations announced in the Sino-British Joint Declaration have been incorporated into the Basic Law,²⁴³ adding the required *vinculum juris*. Also reaffirmed under the Basic Law is the protection of the rights of property ownership, including those relating to acquisition, use, disposal, inheritance, and compensation for lawful deprivation of property. Such compensation shall correspond to the real value of the property concerned, be freely convertible, and paid without undue delay.²⁴⁴

c. *Public Property and Public Funds*

General succession rules pertaining to public property and public funds have also been modified to take account of Hong Kong's special autonomous status. Thus, while

[t]he land and natural resources within the Hong Kong Special Administrative Region shall be State property, [t]he Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations The revenues derived therefrom shall be

²³⁸ *Id.*

²³⁹ *Id.* Annex III, para. 3.

²⁴⁰ *Id.* Annex III, para. 4.

²⁴¹ *Id.* Annex III, para. 6.

²⁴² *Id.* Annex III, para. 2.

²⁴³ Basic Law, *supra* note 98, arts. 120-39.

²⁴⁴ *Id.* arts. 6, 105.

exclusively at the disposal of the government of the Region.²⁴⁵

In line with its economic and financial autonomy, the HKSAR Government will assume the management of public funds such as the Capital Works Reserve Fund (into which proceeds of land sales are deposited),²⁴⁶ the Exchange Fund,²⁴⁷ and the ["ordinary"] Reserve Fund. At the same time, the PRC — which wants to ensure that the previous "occupant 'didn't take the carpets and the light fixtures with him' " when he [left]²⁴⁸ — has nonetheless attempted to exert control by various means.²⁴⁹

d. *Nationality*

Perhaps the most perplexing concept in the context of succession is the question of nationality. In fact, international law provides little guidance in this respect. Generally, subject to the prohibition of rendering people stateless,²⁵⁰ no express obligation is imposed under international law on the successor state to grant any right of option as to nationality. Nor is there a corresponding obligation on the predecessor state to withdraw its nationality from persons living or domiciled in the transferred territory.²⁵¹ At

²⁴⁵ Sino-British Joint Declaration, *supra* note 9, Annex III, § 6.

²⁴⁶ *Id.* Annex III, para. 7.

²⁴⁷ *Id.* Annex I, § 7, para. 4.

²⁴⁸ *China Delays the Take-Off*, *ECONOMIST*, Apr. 13, 1991, at 34.

²⁴⁹ For discussion of the fifty-hectares limitation of land sales and the HK/HKSAR income-sharing, see *supra* notes 241-42.

²⁵⁰ See 1961 Convention on the Reduction of Statelessness, UN Doc. A/CONF.9/14 (1961), reprinted in 8 Marjorie M. Whiteman, *DIGEST OF INTERNATIONAL LAW* 91 (1967). Article 10 provides:

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which a territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

Id. at 95.

²⁵¹ State practice in respect to succession and nationality is limited and varied, although a right of option of the inhabitants transferred was incorporated in peace treaties

the same time, a right to the option of nationality in such circumstances may be said to be derived from general notions underpinning human rights²⁵² or, more specifically, to exist as a possible expression of the right of self-determination where sovereignty over a population is transferred with the territory without the population's consent.²⁵³

The memoranda exchanged between the British and Chinese Governments as part of the Sino-British Joint Declaration set out their respective positions on the status of British Dependent Terri-

following the First and Second World Wars. See Shigeru Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 469, 479-80 (Max Sorensen ed., 1968). See also C. Luella Gettys, *The Effect of Changes of Sovereignty on Nationality*, 21 *AM. J. INT'L L.* 268, 271 (1927); Joseph L. Kunz, *Nationality and Option Clauses in the Italian Peace Treaty*, 41 *AM. J. INT'L L.* 622 (1947). It may be interesting to note that an "option of nationality" was recognized by the PRC in a boundary treaty with Burma signed in 1960; In an exchange of notes, Premier Zhou Enlai and Prime Minister U Nu declared:

The inhabitants of the areas to be handed over by one side to the other in pursuance of the provisions of articles 1, 2 and 3 of the Sino-Burmese Boundary Treaty shall, after the handing over of the areas, be definitely considered citizens of the side to which the areas belong. Any inhabitants of these areas who do not wish to be transferred to the other side along with the areas may within one year of the coming into force of the treaty, declare their choice of nationality of the original side and may, within two years, move into the territory of the original side.

See *A COLLECTION OF LAWS: REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA*, No. 12, 46-47 (July 1960-Dec. 1961) (in Chinese); The Sino-Burmese Boundary Treaty is reproduced in *JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 432-35 (1974).

²⁵² The freedom to shape one's own fate is an essential element of "human dignity" in which human rights are grounded. See PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW*, 160 (2d ed. 1979). In fact, the right of "voluntary expatriation" has increasingly been recognized in general community expectations as a fundamental human right. See Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, in *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 555, 583 (Myres S. McDougal & W. Michael Reisman eds., 1981). Such expectations are reflected in the 1948 Universal Declaration of Human Rights; Article four provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." 1948 Universal Declaration of Human Rights, art. 4, reprinted in *BASIC DOCUMENTS*, *supra* note 198. See also 1969 American Convention on Human Rights, art. 4, reprinted in *Manley O. Hudson*, 6 *INTERNATIONAL LEGISLATION* 593 (1937) ("In case of the transfer of a portion of territory on the part of one of the States signatory hereof to another of such States, the inhabitants of such transferred territory must not consider themselves as nationals of the State to which they are transferred, unless they expressly opt to change their original nationality.").

²⁵³ See Alexandre Kiss, *The People's Right to Self-Determination*, 7 *HUM. RTS. L.J.* 165, 174, 175 (1986).

tories Citizens (BDTCs) in Hong Kong and other related issues. The U.K. position, as stated in its memorandum, is that because Hong Kong will no longer be a British dependent territory after 1997,²⁵⁴ BDTCs, by virtue of some connection with Hong Kong, would cease to have that status effective from July 1, 1997. The impact of the British position is that it will not be possible to acquire BDT citizenship by virtue of a connection with Hong Kong on or after July 1, 1997. The people excluded by this position, however, will be eligible to retain a special status which will enable them to continue to use British passports and to receive consular protection when in third countries, provided they hold or are included in such a passport before July 1, 1997 (or up to December 1997, if born in the first six months of that year but not to be acquired by anyone born on or after July 1, 1997). Arrangements will be made for the renewal and replacement of those passports by U.K. consular officers.²⁵⁵

The PRC's position, as stated in its memorandum, is that all Hong Kong "compatriots,"²⁵⁶ whether they are holders of the BDTC passport or not, are Chinese nationals.²⁵⁷ But "taking account of the historical background of Hong Kong and its realities," the authorities of the PRC will, from July 1, 1997, permit Chinese nationals in Hong Kong to use travel documents issued by the U.K. Government for the purpose of travelling to other states and regions. These persons, however, will not be entitled to British

²⁵⁴ The practice of the United Kingdom has been largely influenced by the territorial nature of the common law; nationality is affected by the link or otherwise of the people with British territory. See WEIS, *supra* note 252, at 139-40, 146, 148, 153-54, 158.

²⁵⁵ An Order in Council, Hong Kong (British Nationality) Order 1986, was issued pursuant to the Hong Kong Act of 1985, on July 5, 1986, giving effect to the British position. It accordingly provides that BDT citizenship cannot be retained or acquired by virtue of a connection with Hong Kong after July 1, 1997, and that BDTCs by virtue of such a connection may, before that date, acquire the new form of British nationality known as British Nationals (Overseas) (BN(O)). S.I. 1986 No. 948.

²⁵⁶ The PRC provides no definition of the term "compatriot." The term is commonly taken to mean "fellow-countrymen" so that it may have been used here to avoid saying "Chinese nationals are Chinese nationals." It may, however, "imply a test to exclude those who are politically unsound." See Robin M. White, *Hong Kong: Nationality, Immigration and the Agreement with China*, 36 INT'L & COMP. L.Q. 483, 493 n.40 (1987).

²⁵⁷ Sino-British Joint Declaration, *supra* note 9, Chinese Memorandum.

consular protection in the HKSAR and other parts of China.²⁵⁸

Have the people of Hong Kong been accorded the right to an option of nationality? Clearly, the Chinese Government, departing from precedent,²⁵⁹ has not granted the people of Hong Kong such an option. The insistence on applying the Nationality Law of the People's Republic of China means that the PRC will not recognize any foreign nationality acquired by Hong Kong Chinese, unless preceded by a successful renunciation of the Chinese nationality. Such renunciation, in turn, involves procedures which leave little room for individual choice.²⁶⁰

The British Memorandum has not provided a method for Hong Kong Chinese to choose their nationality either. Indeed, a question may be raised whether the new status created, the British Nationality (Overseas) (BN(O)), constitutes a "nationality" at all. Skepticism is generated by the fact that the BN(O) is a nationality without continued connection to Hong Kong,²⁶¹ without the right to

²⁵⁸ *Id.*

²⁵⁹ See *supra* note 251. See generally, 1955 Sino-Indonesian Treaty on Dual Nationality, Apr. 25, 1955, reprinted in COHEN & CHIU, *supra* note 251, at 754 (providing that "any person desiring to retain the nationality of the People's Republic of China must declare before the appropriate authorities of the People's Republic of China that he or she renounces the nationality of the Republic of Indonesia"). Later talks resulted in further "concessions" by China, absolving certain ethnic Chinese (whose "social and political status testifies that they have already implicitly renounced the nationality of the People's Republic of China") from the need to renounce Chinese nationality. Note from Mr. Chou En-lai to Dr. Sastroamidjojo on the Dual Nationality Treaty, June 15, 1955, reprinted in COHEN & CHIU, *supra* note 251, at 760. Moreover, the parties agreed that "in accordance with the principle of respect for one's own will, those who had not come of age and had [their nationality] renounced by their parents on their behalf are considered as still holding dual nationality and consequently enjoying the right to choose their nationality." Arrangement for the Implementation of the Treaty concerning the Question of Dual Nationality, Dec. 27, 1960, reprinted in COHEN & CHIU, *supra* note 251, at 762.

²⁶⁰ See 1980 Nationality Law of the People's Republic of China, art. 10, reprinted in 23 BEIJING REV. 17 (No. 40, Oct. 6, 1980). Upon satisfying certain conditions (having close relatives who are foreign nationals, being settled abroad, or having other legitimate reasons), an applicant must seek permission from the Ministry of Public Security to renounce his or her nationality. Such permission may be granted or withheld. A person may also lose his or her Chinese nationality if "settled abroad" and has acquired foreign nationality of his or her own free will. *Id.* art. 9.

²⁶¹ In fact, a BN(O) passport does not give its holder a right of abode anywhere. Instead, the passport will state that the holder has a HK identity card which grants the holder the right of abode in Hong Kong. Britain had to obtain from the PRC permission to insert

reside and live in the United Kingdom,²⁶² without the right to consular protection by the government of the United Kingdom in the SAR or other parts of China,²⁶³ and without the right to transmit it to one's offspring born after 1997. Evidently, the PRC does not consider BN(O) status a nationality,²⁶⁴ because if it did it would not have agreed to what manifestly transgresses the PRC's fundamental prohibition of dual nationality.²⁶⁵ A statement by an official of the Hong Kong Government suggests that it also regards the BN(O) passport as a travel document that attests to the bearer's residential status, not his nationality.²⁶⁶

Furthermore, it is possible that other states will not recognize

this statement on the BN(O) passport (Memoranda were exchanged on April 11, 1986, between the British Embassy in Beijing and the Chinese Ministry of Foreign Affairs). See GOVERNMENT PRINTER, HONG KONG, WHITE PAPER ON THE ANNUAL REPORT ON HONG KONG 1985-86 TO PARLIAMENT 21, paras. 15, 17 (Feb. 21, 1987).

²⁶² It should be noted, however, that the British Government, in response to a request from the Legislative Council has agreed to introduce an endorsement into the BN(O) passport exempting the holder from the requirement of entry certificate or visa to visit the United Kingdom. See *London Endorses BN(O) Visa-Free Entry*, HONG KONG STANDARD, Apr. 24, 1986, at 2 (texts of a parliamentary question asked by MP Colin Noyrihan and the written reply given by the Home Secretary Sir Douglas Hurd). See also Mushkat, *supra* note 157, at 18 n.106.

²⁶³ Sino-British Joint Declaration, *supra* note 9, Chinese Memorandum.

²⁶⁴ It appears, in fact, that PRC authorities — invoking China's nationality law — deem (wrongly) ethnic Chinese HK BDTCs to be Chinese nationals (although the Basic Law affirmed that the Nationality Law of the PRC will be "applied locally [only] with effect from July 1, 1997"). Basic Law, *supra* note 98, Annex III, para. 5. Accordingly, they have denounced a British scheme offering full British citizenship to 50,000 heads of family in HK as conferring British nationality in violation of the UK's "solemn commitment under the Joint Declaration." See Saith Faison, *China Makes New Threat on Passports*, S. CHINA MORNING POST, Mar. 2, 1990, at 1; Saith Faison, *China Launches Fresh Attack on Passports Scheme*, S. CHINA MORNING POST, Apr. 13, 1990, at 1. By implication, had the BN(O) been recognized by the Chinese Government as "nationality," the scheme could have been accepted as representing a mere change from one category of British nationality to another (apart from the contention that "in [the U.K.] Memorandum, the United Kingdom never undertook not to grant British citizenship to people in HK before 1997"). 170 PARL. DEB., H.C. (6th ser.) 1569 (1990).

²⁶⁵ "The People's Republic of China does not recognize dual nationality for any Chinese national." 1980 Nationality Law of the People's Republic of China, *supra* note 260, art. 3. For a discussion of the importance attached by the PRC to this question, see George Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 AM. J. COMP. L. 459 (1982).

²⁶⁶ Henricus, *Groups Sorry About Future Rights of Abode*, HONG KONG STANDARD, Apr. 4, 1987, at 1. See Mushkat, *supra* note 157, at 18 n.106.

the United Kingdom's undertaking of consular protection of a BN(O). British diplomatic missions attempts to intervene on a BN(O)'s behalf may be refused by a state who claims that the "genuine link" between the state (Britain) and its national (the BN(O)) is lacking.²⁶⁷ Such countries may entertain doubts, for instance, as to whether the United Kingdom would accept responsibility for, meet temporary financial demands on behalf of, or arrange repatriation of a BN(O) passport holder who encounters difficulties while visiting a foreign country. It seems in the final analysis that the BN(O) passport is no more than a travel document whose value hinges on the number of countries that are prepared to recognize it formally.

Particularly problematic is the post-1997 status of the territory's residents who are neither Chinese nor expatriates holding foreign passports. While their Chinese BDTC brethren will be granted Chinese nationality and offered a BN(O) passport which may provide some "extra travel privileges," non-Chinese BDTCs, although entitled to the new BN(O) passport, may, in effect, be deprived of Chinese nationality, thereby becoming stateless. Admittedly, according to the Sino-British Joint Declaration, such persons may have the right of abode (that is, to enter, live, and work) in Hong Kong. To qualify for this right, a person must reside in Hong Kong for at least seven continuous years and have chosen the territory as

²⁶⁷ In the *Nottebohm Case*, the I.C.J. held that Guatemala was entitled to treat a naturalized Liechtenstein citizenship as German, even though he had forfeited German citizenship on naturalization, because he had no genuine link with Liechtenstein. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6), reprinted in LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 374, 376 (2d ed. 1980). In the words of the court:

[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

Id. Note also the introduction into the British Nationality Law requires that there be a "real link" and a close personal connection with the United Kingdom for the acquisition of British citizenship. See HOME OFFICE, *BRITISH NATIONALITY LAW OUTLINE OF PROPOSED LEGISLATION*, paras. 11, 18, 37, 39.

his or her permanent residence.²⁶⁸ A right of abode, however, is quite distinct from the concept of nationality

To prevent non-Chinese BDTCs, and their children, and grandchildren from becoming stateless, the Hong Kong (British Nationality) Order 1986 entitles them to yet a different status, namely that of British Overseas Citizenship (BOC).²⁶⁹ This new status, however, gives them no right of abode in Britain nor anywhere else. Their right of abode in Hong Kong must be derived instead from the laws of a country whose nationality requirements are structured along racial lines. While the Home Secretary believes that the admission to the United Kingdom of "any British national [who] in the future [will] come under pressure to leave Hong Kong" will be "considered sympathetically [by] the government of the day,"²⁷⁰ other states may not necessarily be impressed with the nationality claims of such a person.

A high degree of uncertainty also characterizes the position of Vietnamese refugees in Hong Kong who, after June 30, 1997, will not be entitled to any form of British²⁷¹ or Chinese nationality (not being Chinese compatriots),²⁷² nor, for that matter, to a right of

²⁶⁸ Sino-British Joint Declaration, *supra* note 9, Annex I, § 14.

²⁶⁹ Article 6, paragraph 2 confers British Overseas Citizenship automatically at birth on children of former HK BDTCs born on or after July 1, 1997, if these children would be otherwise stateless. Hong Kong (British Nationality) Order 1986. The automatic provisions that apply to the first generation do not apply to the second generation, but the latter are entitled to register as BOCs. *Id.* art. 6, para. 3; art. 6, para. 4.

²⁷⁰ See 96 PARL. DEB., H.C. (6th ser.) 148 (1986). The statement was recited again on June 13, 1990. 174 PARL. DEB., H.C. (6th ser.) 294 (1990).

²⁷¹ Children of Vietnamese refugees who are BDTCs, having been born in Hong Kong prior to the entry into effect, in 1983, of the British Nationality Act of 1981 will be entitled to British Nationality. See Hong Kong (British Nationality) Order 1986, *supra* note 269, art. 2.

²⁷² Theoretically, they may, like other aliens and stateless persons, acquire Chinese nationality if they are "willing to abide by China's Constitution" and they have close relatives in China, or they have settled in China, or have "other legitimate reasons." 1980 Nationality Law of the People's Republic of China, *supra* note 260, art. 7. In practice, approval of applications may not be forthcoming, especially in view of China's hard-line policy vis-a-vis Vietnam. See Robert G. Sutter, *Peking's Relations with Vietnam and Korea: Implications for Future Change in Peking's Foreign Policy*, 23 ISSUES AND STUD. 92 (1987). It may be noted also that PRC authorities have indicated their "firm desire" that the "refugee issue" be resolved prior to July 1, 1997. See *Row Over Refugees Residency*, S. CHINA MORNING POST, Mar. 24, 1989, at 1.

abode in the territory (failing to comply with the requirement of ordinary residence).²⁷³

With regard to all of the succession problems, the inadequacy of relevant international rules is the most troublesome. The sovereignty-inspired formulae — “it is for each state to determine under its own law who are its nationals” and “[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State”²⁷⁴ — are deficient. The deficiency is particularly apparent where the future status of a people, both internationally and in the municipal sphere, is to be defined by conflicting systems of laws, values, and policies such as those of the British and the Chinese.

Yet the pragmatic strategies of the type favored by the U.K. Government are not commendable in circumstances such as those presented in the case of Hong Kong. These legal principles, lacking in definition, are further disordered by the creation of racially-tainted multifarious categories of nationality, each with its own set of entitlements.²⁷⁵ Additionally, an occasional elevation from one category to another when the need arises,²⁷⁶ utilization of *ad-hoc* “assurance schemes,”²⁷⁷ employment of legal terms of art like the

²⁷³ Under Hong Kong's Immigration Ordinance, Vietnamese refugees are granted permission to stay pending resettlement elsewhere.

²⁷⁴ 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, ch. 1, art. 2, 179 L.N.T.S. 89, 101.

²⁷⁵ U.K. law recognizes the following categories of nationality: British Subject (BS) (held automatically by every citizen of every Commonwealth country); British Subject Without Citizenship (BSWC) (held by those who were British subjects before the British Nationality Act 1948 but did not acquire citizenship of a Commonwealth country under the 1948 dispensation); British Dependent Territories Citizenship (BDTC) (replaced Citizenship of the United Kingdom and Colonies); British National (Overseas) (BN(O)); British Overseas is Citizenship (BOC); British Protected Persons (BPP). Only the “British Citizen (BC)” category of nationality carries with it full citizen rights in the United Kingdom. British Nationality Act 1981. For a detailed examination of British Nationality law, see L. FRANSMAN, *FRANSMAN'S BRITISH NATIONALITY LAW* (1989).

²⁷⁶ For example, the British Nationality (Hong Kong) Act of 1990, implements proposals to grant full British citizenship to 50,000 BDTCs in Hong Kong. Explaining the rationale underlying the offer, the Secretary of State for Home Affairs stated, “the selection of 50,000 key personnel who are essential to the good government of Hong Kong and the management of its economy will stabiliz[e] Hong Kong, keep it prosperous and thus provide an incentive for the rest of the people to stay.” 170 PARL. DEB., H.C. (6th ser.) 1571 (1990).

²⁷⁷ Such as the scheme under which persons may qualify for British passport and a

"right of abode,"²⁷⁸ and the use of discretionary power to grant passports²⁷⁹ have added confusion to an area of the law already marked by labored distinctions, such as the difference between nationality and citizenship, and nationality for international/domestic purposes.

Given the crucial role played by nationality in the life of individuals, their choice, rather than sovereignty-grounded norms or governmentally-determined exigencies ought to be the leading principle. Solutions for succession of nationality problems should, it is submitted, be sought in the realm of human rights, particularly where a substantial population is transferred from a relatively benevolent rule to one which may prove difficult to endure.

5. *Capacity to Bring International Claims*

The definition of Hong Kong's international legal identity, that is, its constellation of rights and obligations, would appear incomplete if no inquiry was made into its capacity to bring international claims. That the Hong Kong Government has the capacity to contract, acquire, and dispose of property and institute legal proceedings is readily substantiated. Its juridical personality, and that of its "successor," the HKSAR Government, moreover, is not limited to the sphere of private law. The considerable power of the territory to conclude international treaties in its own name and to take overall responsibility for the conduct of its external affairs has been explicitly enunciated in the Sino-British Joint Declaration²⁸⁰

right to abode in the United Kingdom without having to live in Hong Kong. The British Government has also encouraged other governments to introduce similar assurances schemes. See 1989 WHITE PAPER, *supra* note 207, para. 26.

²⁷⁸ The term is not known to international law. It is defined in the U.K. Immigration Act as the freedom "to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required to enable [the] right to be established or as may be otherwise lawfully imposed" Immigration Act of 1971, pt. I, § 1, para. 1. The Hong Kong version of the "right of abode" includes the right to land in Hong Kong, the right to remain free of conditions of stay, the right not to be deported or removed. Laws of Hong Kong, Immigration Ordinance, ch. 115, pt. I A, § 2A (1989).

²⁷⁹ United Kingdom passports are issued under the Royal Prerogative and may be refused, revoked and impounded at the absolute discretion of the Crown.

²⁸⁰ Sino-British Joint Declaration, *supra* note 9, art. 3, para. 10.

and reaffirmed in the Basic Law.²⁸¹ Hong Kong's participation in the activities of international and intergovernmental organizations, which entails the undertakings of international duties, further attests to its juridical personality.

In addition to the international liabilities assumed by the territory, a network of international rights has been attributed to it under conventional, as well as general international law. Thus, when entering into international agreements with other states Hong Kong has the right to demand performance under the agreement in accordance with a fundamental rule of international law: *pacta sunt servanda*. It is equally entitled to privileges and immunities accorded by general international law in connection with the discharge of governmental functions.²⁸² These rights include immunity from suit before foreign courts without the express consent of the Hong Kong Government and reciprocal privileges and immunities for its official representatives.²⁸³

As an entity endowed with international juridical personality, Hong Kong must also be deemed to possess the capacity to protect its interests as an inherent attribute of its personality. This perception would allow Hong Kong to make a claim for reparations with respect to injuries on an international, as well as a domestic plane. The territory should be able, therefore, to gain access to international dispute-resolution forums. Could it, however, bring a case on its own to the International Court of Justice?

After a careful analysis of the relevant United Nations Charter

²⁸¹ Basic Law, *supra* note 98, ch. 7, art. 151.

²⁸² Under modern doctrine and practice of international law, "state function" has replaced "sovereignty" as the rationale and standard of immunity. See Hans van Houtte, *The Faded Sovereignty of Federated States and their Immunity from Jurisdiction*, 1 NOTRE DAME INT'L & COMP. L.J. 1, 20 (1983); See also United Nations: International Law Commission Draft Articles on Jurisdictional Immunities of States and their Property, 26 I.L.M. 625 (1987). Clearly, under U.K. law, Hong Kong may claim such immunity, citing precedents such as *Duff Dev. Co. v. Kelantan*, App. Cas. 797 (1924); *Mellenger E.A. v. New Brunswick Dev. Corp.*, 2 All E.R. 593 (1971); See also U.K. State Immunity Act, §§ 17(a) & (b), which takes a broad view of foreign states, including their political subdivisions, agencies or instrumentalities.

²⁸³ It should be noted, however, that there is no obligation under international law to grant immunity (*ratione personae*) to nonstate entities and practice is largely contingent on recognition.

provisions²⁸⁴ and international practice, W Michael Reisman concluded that:

There is a firm policy in favor of increasing the participation of territorial communities in the Statute of the International Court of Justice; that a territorial community with minimum independence and minimum international activity may elect to become a party to the Statute, that the prescription of conditions set by the Security Council aims at ensuring effective participation in the work of the Court and related United Nations activity [rather than decide whether or not to permit an applicant to become a party to the Statute].²⁸⁵

Reisman further cites discussions in the UN regarding the case of Liechtenstein's application to illustrate the emphasis in the decision-making process, highlighting factors such as (1) whether the applicant "would benefit by adherence to the Court, (2) [whether] other states with which it has relations would benefit by its adherence and (3) [whether] the general principle of the universality of participation would be realized."²⁸⁶ By analogy, given Hong Kong's status and capacity as an international actor, its extensive international relationships, and the obvious benefits all would derive from its adherence to the Statute of the International Court of Justice, Hong Kong's application to become a party to the Statute should be endorsed.²⁸⁷

Hong Kong could possibly gain access to the International Court

²⁸⁴ U.N. CHARTER art. 93, ¶ 1: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice"; U.N. CHARTER art. 93, ¶ 2: "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on condition to be determined in each case by the General Assembly upon the recommendation of the Security Council."

²⁸⁵ REISMAN, *supra* note 60, at 78. *See also id.* at 68-79. It may be noted that Liechtenstein was admitted as a party to the Statute of the I.C.J. notwithstanding the fact that it had delegated full authority to Switzerland to administer its foreign affairs. Indeed, Liechtenstein was actually involved in proceedings before the I.C.J. during the time it had deprived itself of capacity to conduct its own foreign relations. *See Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

²⁸⁶ *Id.* at 69-70.

²⁸⁷ Realistically, however, there is little doubt that the PRC, which has vociferously objected to the "internationalization" of the Hong Kong issue, would exercise its right to veto any such application in the Security Council. *See supra* note 80. Nor is it likely that China would agree even to a limited standing, given its narrow conception of sovereignty.

of Justice through other means, for example, as parties in "disguised"²⁸⁸ cases by virtue of its membership in specialized UN agencies like the International Labor Organization. Were an advisory opinion requested on matters relating to the territory, it is also likely, based on previous practice of the court,²⁸⁹ that Hong Kong would be allowed to communicate relevant grievances. Other procedural capacities such as presenting claims before the court could perhaps be secured by concessions to individuals and other legal persons.²⁹⁰

Hong Kong's juridical personality notwithstanding, a related question may be raised regarding the capacity of its government to bring international claims on behalf of the people of Hong Kong thereby offering diplomatic protection to its citizens. "Diplomatic protection" is understood, in accordance with prevalent practice and opinion, as the "protection given by a subject of international law to individuals, *i.e.*, natural or legal persons, against a violation of international law by another subject of international law"²⁹¹ Hence, statehood is not a necessary condition of diplomatic protection, and the lack thereof should not preclude Hong Kong from extending protection to its inhabitants.

Subjects of international law, however, are entitled to protect only those individuals with whom they have a special relationship. This relationship is usually defined as nationality,²⁹² although exceptions have been admitted. For instance, the UN may make a

²⁸⁸ Formally, it is considered an object of an advisory opinion, although for the organization concerned, it will constitute a binding judgment.

²⁸⁹ See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 736 (1965) (reference to the request by the League of Nations on December 14, 1939, for an advisory opinion in the matter of the Former Officials of the Government Commission of the Saar Territory, whereby the complainants had been allowed to lodge a memorandum addressed to the League that was later transmitted to the Court as part of the relevant documents). Note also that the I.C.J. granted the International League for the Rights of Man the right to submit a written statement on legal issues in respect of the international status of South West Africa, 1950 I.C.J. 128, (July 11).

²⁹⁰ See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 586-92 (4th ed. 1990).

²⁹¹ Wilhelm K. Geck, *Diplomatic Protection*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 100 (Rudolf Bernhardt ed., 1987).

²⁹² See *Panevezys-Saldutiskis Ry. Case (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); *Nottebohm Case (Liech v. Guat.)*, 1955 I.C.J. 24 (Apr. 6); *Barcelona Traction Case (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

claim on behalf of an injured UN employee.²⁹³ Diplomatic protection has been extended by states to seamen of any nationality serving on ships flying their flag.²⁹⁴ It has been suggested that the emphasis on human rights in current international law finds its corollary in the right of each state to take protective measures in favor of all persons whose rights are immediately threatened.²⁹⁵ Adherence to the traditional rule of nationality has also been questioned from a doctrinal point of view, in light of the erosion of the "foundations for the assumption that the State only claims reparation for the violation of its rights and not the rights of the injured individuals."²⁹⁶ Even if a right of protection is to be predicated on some relationship, it need not be nationality. In fact, the *Nottebohm Case*,²⁹⁷ often cited as authority for the nationality rule, could be said to have replaced the nationality nexus with that of a "genuine link."²⁹⁸

Hong Kong residents are in a position to make the Hong Kong Government responsible for their welfare and protection and to permit the espousal of a claim for damages suffered by them as a result of the breach of an international obligation. The competence of the HKSAR Government to attribute national character to its ships²⁹⁹ as well as its authority to issue passports and conclude visa abolition agreements with foreign states or regions³⁰⁰ serves to uphold its right to represent the interest of its citizens in the sphere of international relations. Clearly neither the BN(O) nor the Chi-

²⁹³ See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

²⁹⁴ See A.D. Watts, *The Protection of Alien Seamen*, 7 INT'L & COMP. L.Q. 691 (1958).

²⁹⁵ See Geck, *supra* note 291, at 115.

²⁹⁶ Rudolf Dolzer, *Diplomatic Protection and Foreign Nationals*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 121, 123-24 (Rudolf Bernhardt ed., 1987). Clearly human rights treaties do not serve the national interests of the individuals' nationality state but the interests of all individuals and the legal community.

²⁹⁷ *Nottebohm Case*, 1955 I.C.J. 4.

²⁹⁸ Note also the recent emphasis in international law on "genuine link" in respect of ships (as against "flags of convenience").

²⁹⁹ Attributing national character to HKSAR ships is accomplished through registration and documentation. See Sino-British Joint Declaration, *supra* note 9, Annex I, § 8; Basic Law, *supra* note 98, art. 125. As a "flag state" the HKSAR has the right to give diplomatic protection against international wrongs committed in regard to the ship.

³⁰⁰ Sino-British Joint Declaration, *supra* note 9, Annex I, § 14.

nese nationality to be conferred on the inhabitants of the HKSAR can be regarded as providing a real and effective nationality, thus reinforcing the case for the HKSAR to afford diplomatic protection³⁰¹ for its people. Such a right, moreover, should be applicable with respect to loss or injury caused by wrongful acts committed within the PRC, given the denial of British consular protection in the HKSAR "and other parts of the People's Republic of China."³⁰² Since the PRC, although the sovereign power, is not the "government of the Hong Kong people," it cannot be contended that the injured HKSAR citizens would be seeking remedy in international forums against their own government.³⁰³

6. *Capacity to Bear International Responsibility*

Since states are generally regarded as the principal subjects of international relations and international law, the question of responsibility in international law finds its common expression in the context of "state responsibility." Yet, in addition to states, there are other subjects of international law which may incur international responsibility.³⁰⁴ Unlike state responsibility which ensues

³⁰¹ To distinguish from the protection afforded by a state, the term "humanitarian protection" may be used.

³⁰² Sino-British Joint Declaration, *supra* note 9, Chinese Memorandum.

³⁰³ In fact, individuals are granted rights in international law against their own state. *See, e.g.*, International Covenant on Civil and Political Rights, art. 41, *reprinted in* BASIC DOCUMENTS, *supra* note 198, at 128. European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 24 & 48, *reprinted in* BASIC DOCUMENTS, *supra* note 198, at 242.

³⁰⁴ *See, e.g.*, the responsibility borne by international organizations under the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, art. 4. The EC has assumed responsibility under various international treaties, including the recent Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989). Direct responsibility has also been imposed on individuals in certain specified matters: the commitment of "piracy" as defined under international law engages the individual offender in a crime against the international society punishable by international tribunals or by any state; individual responsibility for crimes against peace, war crimes, and crimes against humanity is well established following the Nürnberg Trials and the Nürnberg Charter as confirmed by the General Assembly; the 1948 Genocide Convention emphasizes that ordinary persons guilty of offenses connected with genocide could be tried either by national courts of the territory in which the acts were committed or by international penal tribunals; narcotics and hijacking offenses have also

ipso facto, however, the responsibility of other subjects can be said to arise only *ipso jure* — its limits varying in accordance with the distinctive nature of the entity in question.

While there are no general rules of international law directly governing the international responsibility of nonstate actors, it may be observed that contemporary discussion of “state responsibility” has not sought to attach international responsibility to the sovereign or exclusive status of the state in international law³⁰⁵ Conversely, lack of sovereignty is not considered a bar to the attribution of international responsibility³⁰⁶ Rather, responsibility is ascribed by virtue of jurisdictional competence, i.e., the competence to make and apply law³⁰⁷ and effective control over territory³⁰⁸

The government of Hong Kong (and HKSAR post-1997) is endowed with jurisdictional competence and effective control over the territory and may be held liable for internationally injurious consequences of activities originating therein of which it has knowledge or which fall within its regulatory capacity As an international juridical person acting in its name within the limits of its personality, the government may engage its own responsibility, not attributable to the sovereign state. Thus, the government may be

been made triable and punishable universally by a series of international conventions. Attention may also be drawn to the 1977 Protocol I Additional to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391. It provides that armed conflicts in which peoples are fighting against racist regimes in the exercise of their right to self-determination constitute “international conflict”; this means that members of national liberation movements may be subject to obligations imposed by international law on belligerents engaged in international armed conflicts.

³⁰⁵ See also Special Rapporteur Julio Baboza’s Fourth Report on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, A/CN.4/413 [and Corr. 1]; related discussion by the International Law Commission. [1988] 1 Y.B. Int’l L. Comm’n 222.

³⁰⁶ For example, agreements concluded by component units of federal states acting within the limits of proper international personality are the responsibility of such units. Similarly, an insurrections movement which does not become the new government of a state may, if vested with international personality, engage eventually its own responsibility.

³⁰⁷ *E.g.*, for certain matters, a belligerent state exercises jurisdictional competence within the territory it occupies, hence it may be held liable for consequences of activities over which it exercises jurisdiction.

³⁰⁸ Responsibility may be based on control of *de facto* jurisdiction in circumstances such as unlawful occupation, annexation, or intervention.

responsible for failing to perform international obligations arising from Hong Kong's treaty relations or for violations of international law caused by activities or events over which it exercises jurisdiction or control. For example, these violations may arise in the context of the treatment of aliens, privileges and protection of diplomats, and international environmental laws.

III. CONCLUDING OBSERVATIONS REGARDING THE CONTENT AND EXTENT OF HONG KONG'S INTERNATIONAL PERSONALITY

The preceding discussion has highlighted the multidimensional nature of Hong Kong's legal personality and has explored the limits of its constituent parts. While the criterion-specific analysis indicates that in terms of certain yardsticks the territory may fall short of qualifying as a "primary" subject of international law, it does have the necessary attributes to justify a claim to being a distinct international legal entity with corresponding international rights and obligations.

As a "creature of international law" Hong Kong/HKSAR's existence or its "right to life" ought to be internationally guaranteed and the "peoplehood" of its inhabitants respected. The high degree of autonomy pledged under a binding international agreement endows the territory with consequential powers and, if duly observed, should secure for it a significant place in the international community. Hong Kong's international status as an autonomous and stable political entity would be further enhanced by virtue of the internationally recognized right of its people to "internal self-determination," or democracy.

Examination of the effects of the "transfer of sovereignty" on Hong Kong's assortment of entitlements and responsibilities reflects "succession formulae" geared toward preserving the territory's unique international position. Such an orientation finds expression in arrangements pertaining to the succession of treaties, property rights, and public funds. In relation to nationality, however, Hong Kong people have failed to insure implementation of their putative "right to an option."

As an inherent and necessary attribute of its personality, the ter-

ritory possesses a capacity to protect its interests which, in turn, denotes a capacity to bring international claims. Authoritative support for this position may also be adduced by favorable consideration of an application by Hong Kong to become a party to the Statute of the International Court of Justice, should the local government so opt. An equally plausible case could be made regarding the territory's right to offer diplomatic or humanitarian protection to its people and represent them in the international domain.

Finally, in conjunction with its international entitlements and its juridical competence and effective control over the land and its people, the Hong Kong Government may incur international responsibility for violations of its international obligations. Subject to jurisdictional immunities and privileges granted to it under international law, it may also be required to repair harm caused thereby. Arguably, the configuration of entitlements and responsibilities outlined in this article is consistent with aspirations to an international legal status which fully reflects present political and economic realities.