

# ANALYSIS



## The International Legal Personality of Macau

### *Introduction*

The question of international legal status/personality<sup>1</sup> is increasingly difficult to answer with a degree of precision since the relevance of traditional criteria and symbols of statehood is diminishing in a global environment characterised by the proliferation of not-readily-definable entities which clamour for recognition as autonomous political units.<sup>2</sup>

The requirements of 'a permanent population; a defined territory; government; and capacity to enter into relations with other States'<sup>3</sup> — which are accepted by international lawyers as 'customary international law' — by no means represent sufficient<sup>4</sup> or even necessary<sup>5</sup> qualifications of statehood. Clearly, the less legalistic symbols of statehood, such as kings/presidents, armies, central banks, currency, or passports, offer no reliable yardsticks.<sup>6</sup>

Nor for that matter is membership in the United Nations particularly instructive in respect of the key distinguishing attributes of statehood. Current members include Caribbean pinpoints such as Saint Christopher and Nevis or Saint Lucia, as well as other microentities like Vanuatu in the Pacific or San Marino in Europe — but not Taiwan.<sup>7</sup> Neither is the UN practice with regards to admission — including the implementation of stipulated<sup>8</sup> requirements

<sup>1</sup> 'International legal personality' is broadly defined in terms of the capacity to exercise international rights and duties.

<sup>2</sup> The International Standards Organisation, which assigns two-letter codes for country names, has 239 on the main list — including citizenless Antartica and the contested Falkland Islands — and another fifteen 'sensitive' places on a reserve list.

<sup>3</sup> Article I, 1933 Montevideo Convention on Rights and Duties of States.

<sup>4</sup> Is the independent principality of Sealand (a steel-and-concrete second-world-war anti-aircraft tower governed, since they liberated it in 1967, by Major/Prince Roy and Mrs/Princes Joan Bates) — which has its own constitution, flag, coat of arms, stamps, currency, and passport — a 'state'? At a more scholarly level, it has been argued that the method by which a 'state' comes into existence is of crucial relevance, and that entities that owe their existence to a use of force by one state against another, originate in interference with the exercise of the right of self-determination, or are created in violation of the principle of non-racial discrimination are a 'nullity' under international law (even if they satisfy the four 'traditional requirements'). See John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987).

<sup>5</sup> Note, for example, that Ukraine and Byelorussia were admitted as members of the UN — whose membership is confined to 'States' — for decades before they became independent states.

<sup>6</sup> The European Community/Union, for example, has no king, president, or army but its Ecu is a recognised, if unminted, currency; it also has its own diplomats, and holders of the standardised passports issued by its members enjoy 'citizen' status anywhere in the EC. The Community is also a member of several international organisations and a party to major international treaties.

<sup>7</sup> Notwithstanding the 'economic strength' ('the world's 25th highest per capita income; 20th largest gross national product; 15th biggest overseas trade volume; and the largest foreign-exchange reserve holdings in the world') of this 20 million-populated island, its 'preponderant de facto relationships with the vast majority of the world's other nations,' and its ability to 'significantly bolster the UN assets.' See Fredrick F Chien (Foreign Minister of the Republic of China), 'UN Should Welcome Taiwan,' *Far Eastern Economic Review*, 5 August 1993, p 23.

<sup>8</sup> UN Charter, Article 4: '1 Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.'

pertaining to the 'peace-loving' nature of applicants or their ability and willingness to carry out the obligations of membership (for example, under Chapter VII) — consistent enough to offer useful guidance.<sup>9</sup>

It is also evident that terms such as 'state,' 'nation,' or 'country' — which underline eligibility for membership in various international organisations and specialised agencies — have not assumed an identical (traditional or otherwise) meaning in all contexts.<sup>10</sup>

By the same token, 'international legal personality' is a relative phenomenon that — like the 'subjects' of law in any legal system — varies according to the progressive requirements of [an increasingly complex] international life.<sup>11</sup> It is a flexible and open-textured concept which may depict different characteristics in different circumstances. Nor is it constricted to 'sovereign' (itself a contextually and historically changeable concept)<sup>12</sup> entities. Thus, while states may be said to possess the fullest measure of international personality, international organisations are endowed only with the degree of personality that enables them to discharge their functions effectively, and the extent of personality enjoyed by other subjects of international law depends on various factors such as a constituent treaty or constitution and recognition.

As a further background to contemporary international legal norms pertaining to the subject, it should also be emphasised that even short of the establishment of a 'new order for a new world,'<sup>13</sup> it is apparent that rigid global structures have considerably loosened. As we are constantly reminded by world system analysts, human affairs are undergoing a process of relentless globalisation,<sup>14</sup> coinciding (perhaps paradoxically) with a process of progressive decentralisation of authority and fragmentation of society.<sup>15</sup> Such a dissolution of the national-international divide is aptly mirrored in an

<sup>9</sup> See Yehuda Z Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break?' (1992) 86 *American Journal of International Law* 830.

<sup>10</sup> See Frederic L Kirgis, Jr, 'Admission of "Palestine" as a Member of a Specialised Agency and Withholding the Payment of Assessments in Response' (1990) 84 *American Journal of International Law* 218.

<sup>11</sup> See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174, 178.

<sup>12</sup> See Joseph A Camilleri and Jim Falk, *The End of Sovereignty! The Politics of a Shrinking and Fragmenting World* (Aldershot, Hants: Elgar, 1992).

<sup>13</sup> Under the new order, international law making would be shared by all members of a non-authoritarian, broadly reconstituted international society (including a variety of 'sub-societies' — such as corporations, professional associations, and informal community groups — which are currently on the fringes of international law), disregarding national boundaries, ethnic difference, nationalism, and other notions of otherness and directed towards achievement of the fundamental goals and principles of the (international) society as a whole (that is, the well-being of humanity). See Philip Allott, *Eunornia: New Order for a New World* (Oxford: Oxford University Press, 1990).

<sup>14</sup> Markets are internationalised; rapidly developing technologies result in 'organisation, communication, cultural and economic interchange and political strategizing [which] extend over new communication territories which pay little or no attention to what may seem the increasingly ephemeral boundaries of nation and state' (*ibid*, p 5); world integration is 'bolstered' by globalisation of the security dilemma and the escalating impact of the ecological crisis.

<sup>15</sup> See James A Rosenau, 'Muddling, Meddling and Modeling: Alternative Approaches to the Study of World Politics in an Era of Rapid Change' (1979) 8 *Millennium: Journal of International Studies* 130.

embroidery of layers of transnational, supranational, subnational, as well as national organisations, criss-crossing territorial boundaries.<sup>16</sup>

Not only is the international political scene more diversified, theorists of widely diverging ideological persuasions have also noted the erosion of the position of the state as the central actor in the international community and discerned a trend towards granting non-state actors an increasingly prominent role in shaping the norms that order and maintain the international community.<sup>17</sup> The inefficacy of state action in managing contemporary problems (such as pollution), with ramifications extending beyond national frontiers, and formidable scientific and technological developments, have forced states to concede powers to international regulatory organs and surrender to regional organisations control over numerous areas previously within the exclusive domain of individual states. As clearly signified in the extensive body of international human rights law, states can no longer erect barriers in the name of domestic jurisdiction and are required to subject themselves to international scrutiny and judgment.<sup>18</sup>

One need not be a fully-fledged 'post-modernist'<sup>19</sup> to conclude that 'things are in a state of flux' and prone to rethinking and reconstruction. While no firm

<sup>16</sup> See R W Mansbach and J A Vasquez, In *Search of Theory: A New Paradigm for Global Politics* (New York: Columbia University Press, 1981).

<sup>17</sup> See R K Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' (1988) 17 *Millennium: Journal of International Studies* 229 (criticising the state-centric paradigm as clearly inadequate at a time of vast transnational interaction on the part of a variety of non-state actors); Camilleri and Falk (note 12 above) (illustrating the deficiency of a theory founded on compartmentalisation along the boundaries and within the history and planning horizons of nations/states in a world characterised by shifting alliances, new forms of identity, and overlapping tiers of jurisdiction). Ingrid D Delupis lists as possessing international legal personality non-state entities such as international organisations, individuals, 'nations,' belligerents and insurgents, liberation movements, international orders, non-governmental organisations, institutions, national public bodies, national private bodies, international companies, and joint ventures. See *The Concept of International Law* (Stockholm: Norstedts, 1987), pp 193-4. That multiple non-state actors participate in the 'global constitutive process of authoritative decision' has long been the position of the 'policy-oriented' or 'social process' school. See M McDougal et al, 'Theories About International Law: Prologue to Configurative Jurisprudence' (1967) 8 *Virginia Journal of International Law* 188. As elaborated by Lung-chu Chen, 'All participants — conveniently categorized as nation-states, international governmental organizations, nongovernmental organizations and associations (including political parties, pressure groups, and private associations) and individual human beings — now openly or recognizably play important roles and perform numerous functions': *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (New Haven: Yale University Press, 1989). Richard Falk predicts the break-up of the state-centred system of international relations and the emergence of new forms of 'nonterritorial central guidance' and 'communitarian organization': *Revitalising International Law* (Ames: Iowa State University Press, 1989), p 5.

<sup>18</sup> It is in fact contended that the term 'sovereignty' denotes now the 'people's sovereignty rather than the sovereign's sovereignty.' See W M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866, 869. See also J D Van der Vyver, 'Sovereignty and Human Rights in Constitutional and International Law' (1991) 5 *Emory International Law Review* 321.

<sup>19</sup> Taken here to connote the embracing of an intellectual approach which challenges boundaries, deconstructs categories, dispenses with metanarratives, eschews grand global pictures, and accepts, even celebrates, the simultaneous validity of multiple coexisting, conflicting, often interpenetrating realities. See, generally, Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minnesota: University of Minnesota Press, 1984).

definition of the [new] 'international legal person' is yet discernible — given prevailing shifts in allegiances, concepts, identities, and forms of authority, the complex forms of social, economic, and political organisation, and the multiple tiers of jurisdiction — it is nonetheless clear that the restrictive yardsticks of an older political space must be replaced with more flexible perspectives and way given to more expansive pluralistic frameworks able to accommodate 'a world in transition.'

An entity's international legal status/personality, or its capacity to act in some measure under international law, should consequently be assessed with reference to a range of factors, including: factual 'stately' attributes (such as permanent population, defined territory, government); international relationships and associations; international legitimacy (manner of coming into existence); international recognition; international legal entitlements (eg, right to self-determination); and *sui generis* qualities. It is within such a structure that the following determination of Macau's international legal status is undertaken.

#### *Factual 'stately' attributes*

Notwithstanding its diminutive dimensions,<sup>20</sup> Macau possesses factual 'stately' attributes. It has been inhabited on a permanent basis since its founding in 1557, and is clearly identified with a defined territorial unit (consisting of the Macau Peninsula, Taipa Island, and Coloane Island).<sup>21</sup>

An effective machinery of government, exercising jurisdiction over the population and territory, has also been in place throughout the 437 years of Macau's existence. Indeed, while in strict/formal constitutional terms, Macau is 'legally tied' to the Republic of Portugal,<sup>22</sup> local institutions of government — namely, the Governor, assisted by Under-Secretaries (Secretarios-Adjuntos) and advised by a Consultative Council, the Legislative Assembly, the

<sup>20</sup> Macau covers just 17.41 square kilometres (said to increase by 20 per cent upon the completion of a landfill project [Nam Van Lakes]: see Victoria Finlay, 'The Digest Gamble,' *South China Morning Post*, 29 January 1994); according to an official census conducted in August 1991, Macau has a population of 355,693 residents (see Hamid Brunning, 'Macau Census Yields Few Surprises,' *Long Kong Standard*, 15 March 1993). Others estimate the current population to be 464,000: see Jonathan Porter, 'The Transformation of Macau' (1993) 66 *Pacific Affairs* 7, 10n.

<sup>21</sup> See Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau, signed on 15 April 1987 in Beijing (hereafter 'Sino-Portuguese Declaration') Art 1, Official Journal of the Government Council of the PRC 1987, No 16, p 549, reprinted in (1987) 30(14) *Beijing Review*.

<sup>22</sup> Macau's 'constitution' — the Organic Statute (Estatuto Organico de Macao) of 1 February 1976 — derives its 'normative power' from the Portuguese constitution. As pointed out, however, by R Afonso and F G Pereira, the distinctive nature of the two orders is reflected, for example, in the placing of initiative for constitutional revision or amendments of the Organic Statute within the authority of the Governor of Macau or the Legislative Assembly; similarly, the appointment of the Governor, while ultimately made by the President of Portugal, is subject to previous consultations with the local population, through the Legislative Assembly and bodies representing the social interests of the territory.' See 'The Constitution and Legal System' in R D Cremer (ed), *Macau: City of Commerce and Culture* (Macau: API Press, 2nd ed 1991), pp 284-5.

judiciary,<sup>23</sup> as well as bodies such as the municipal councils,<sup>24</sup> and public institutes<sup>25</sup> — are endowed with a considerable degree of 'self-governing' capacity in respect of what is recognised as fundamental government functions (that is, promulgation of laws, maintenance of order, collection of taxes, dispensation of justice, and conduct of social affairs).<sup>26</sup>

The maintenance of the territory's political and administrative autonomy is guaranteed under the Sino-Portuguese Joint Declaration, which provides that the Macau Special Administrative Region will 'enjoy a high degree of autonomy' and 'be vested with executive, legislative, and independent judicial power, including that of final adjudication.'<sup>27</sup> Similar provisions are incorporated in the Basic Law of the Macau Special Administrative Region, promulgated on 31 March 1993.<sup>28</sup>

### *International relationships and associations*

Although only the 'limited sovereign' of Macau,<sup>29</sup> the Republic of Portugal, through its President, is the territory's representative in the realm of public international law. Under the Organic Statute of Macau,<sup>30</sup> '[t]he powers to deal with matters relating to foreign relations, international agreements or conventions, and the powers to represent Macau shall be vested in the President' who is nonetheless authorised to delegate to the Governor the 'powers to handle matters concerning the territory' and its external security.<sup>31</sup> Such competence has been employed by the Governor 'in the field of neighbourly relations.'<sup>32</sup> It has been used, for example, to facilitate the conclusion by Macau, on its own, of several bilateral agreements on textiles (with the EEC, USA, Canada,

<sup>23</sup> Note that following the 1989 revision of the Portuguese Constitution — which provided for an autonomous judiciary for Macau, adapted to local characteristics and specific requirements — and the enactment of the 1990 Law of Judicial Organisation, previous 'links' with the Portuguese judicial system have been largely severed. For a discussion of the 'evolution of an autonomous judiciary' in Macau, see Jorge Costa Oliviera et al, 'An Outline of the Macau Legal System' (1993) 23 HKLJ 358, 378-82.

<sup>24</sup> The Councils — the Leal Senado and Camera Municipal das Ilhas — provide cultural, recreational, and environmental sanitation services to Peninsular Macau and the Taipa and Coloane islands respectively.

<sup>25</sup> For example, the Monetary and Foreign Exchange Authority, the Civil Aviation Authority, the Cultural Institute of Macau, the Institute for the Promotion of Investment in Macau, and the Institute for Housing.

<sup>26</sup> It may be noted that the Organic Statute was revised in 1990 to give the territory even 'broader legislative, financial and judicial autonomy,' inter alia by strengthening the Legislative Assembly and its representation (adding six Assembly seats). See Afonso and Pereira (note 22 above), p 284.

<sup>27</sup> Art 2(2).

<sup>28</sup> See Chapter II ('Relationship Between the Central Authorities and the Macau Special Administrative Region'), Arts 12-23, Basic Law of the Special Administrative Region of Macau (hereafter the Basic Law), text reprinted in 36 Beijing Review, 3 May 1993.

<sup>29</sup> See F G Pereira, 'Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries' in Cremer (note 22 above), pp 261, 269ff.

<sup>30</sup> For an English version, see Peter Wesley-Smith, 'Macau' in Blaustein and Blaustein (eds), *Constitutions of Dependencies and Special Sovereignties* (New York: Oceana, 1987).

<sup>31</sup> Arts 3, 12.

<sup>32</sup> Walter Rudolf, 'Macau' in R Bernhardt (ed), *Encyclopedia of Public International Law* (1981-date), Instl 12 (1990), p 224-

Sweden, Austria, Norway) as well as its subscription to the instrument which created the International Textiles and Clothing Bureau.<sup>51</sup>

While Macau's participation in international organisations largely reflects the previously narrow base of its economy, and its somewhat peripheral existence, recent trends point to an increased international orientation and a desire to assume a more active role in the global arena.<sup>14</sup> The recently acquired status as a 'full member' in the General Agreement on Tariffs and Trade (GATT) is a strong manifestation of this change in circumstances and attitude. Also of significance is Macau's memberships in the Economic and Social Commission for Asia and the Pacific (ESCAP),<sup>35</sup> the Asian and Pacific Development Centre (APDC),<sup>56</sup> the International Maritime Organisation (IMO),<sup>57</sup> the World Tourist Association (WTO), and the International Criminal Police Organisation (Interpol).

It is anticipated that to accomplish the aims of developing Macau as an 'international city,' the Portuguese and Chinese authorities would co-operate to secure Macau's participation in other important international organisations.<sup>38</sup> In fact, under the Sino-Portuguese Joint Declaration, the Macau Special Administrative Region 'may on its own, using the name "Macau, China," maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organisations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports.<sup>59</sup> In such a capacity, the Macau SAR may also 'participate in international organisations and conferences not limited to states,<sup>40</sup> whereas in international organisations or conferences which are limited to states, representatives of the Macau SAR 'may participate as members of the delegations of the Government of the People's Republic of China ... or may attend in such other capacity as may be permitted by the Central People's Government and the organisation or conference concerned, and may express their views in the name of "Macau,

<sup>33</sup> See Rui Afonso and Francisco Gonçalves Pereira, 'The Political Status and Government Institutions of Macau' (1986) 16 HKLJ 28, 40n.

<sup>34</sup> For a list of the 'international Organizations Joined by Macau' see Liu Rolong, 'International Organization and Macau's Development' (1993) 10 Journal of Macau Studies 17, 19.

<sup>35</sup> ESCAP is a subsidiary body of the Economic and Social Council of the United Nations charged with the co-ordination of economic and social planning within the region; its activities range from providing research and planning for economic development to carrying out development projects.

<sup>36</sup> The APDC is an inter-governmental institution for policy research and training related to development. Participation enables members to be involved in the research programmes of APDC; to take part in regional discussions on developmental issues; to have a wider contact with academic and policy makers in other countries; and to facilitate the process of closer economic co-operation in the region.

<sup>37</sup> The IMO, a United Nations specialised agency, is the principal world organ for co-ordination of governmental regulation and practices relating to technical matters affecting shipping engaged in international trade.

<sup>38</sup> See Liu (note 34 above).

<sup>39</sup> Annex I, Sec VIII.

<sup>40</sup> Ibid.

China."<sup>41</sup> The territory's latitude to engage in international relations is reaffirmed and restated in some detail in the Basic Law of the Macau SAR.<sup>42</sup>

### *International legitimacy*

There is no universally accepted test of 'legitimacy' by which the eligibility of candidates for 'international personality' is measured, although some support may be adduced for denying recognition of 'statehood' to entities which have been created in violation of fundamental principles of international law such as non-racial discrimination and self-determination.<sup>43</sup>

At the same time, it is evident that the international community expects its members to structure their political arrangements on principles inherent in the idea of representativeness and responsible government. The emergence of such a norm of 'democratic governance'<sup>44</sup> is amply depicted in international declarations, stressing 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 governments.'<sup>45</sup>

If the 'legitimacy' factor is accepted as relevant to international personality, it may be inquired to what extent could the Macau government be said to be representative of its people and conducting the political, economic, social, and cultural affairs of the territory with reference to wishes and interests of the local population.

As noted earlier, Macau is ruled by a Governor (assisted by Under-Secretaries) who is appointed by the President of Portugal, after consultation with the Macau Legislative Assembly and representatives of the territory's social interests. The Legislative Assembly is composed of twenty-three deputies with four-year tenures of office, of whom only eight are elected by direct universal suffrage; eight deputies are elected by indirect suffrage (from among local residents with recognised merit and standing in the local community);<sup>46</sup> and seven are appointed by the Governor. The Governor's advisory body, the Consultative Council, consists of five members appointed by the Governor and five indirectly-elected members.

<sup>41</sup> Ibid.

<sup>42</sup> See Ch VII, Arts 135-42.

<sup>43</sup> Examples often cited by textbooks are Southern Rhodesia and the territories of Venda, Ciskei, Transkei, and Bophuthatswana. See, eg, Martin Dixon, *Textbook on International Law* (2nd ed, 1993),

<sup>44</sup> P H

See Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46 (it is Franck's conclusion, following a rigorous analysis, that what he terms 'the democratic entitlement' has evolved as a normative rule of the international system).

<sup>45</sup> Sec 6, Copenhagen Declaration of the Conference on Security and Co-operation in Europe [CSCE], reprinted in (1990) 29 *International Legal Materials* 1305; see also Charter of Paris for a New Europe, under which members of the CSCE, ushering in a 'new era of democracy, peace and unity,' pledged 'to build, consolidate and strengthen democracy as the only system of government of [their] nations.'

<sup>46</sup> Reprinted in (1991) 30 *International Legal Materials* 190.

That is, nominated by local civic associations following election by functional constituencies representing economic, labour, professional and cultural, educational, and social interests.

Although generally 'moves towards democratic reform have not been encouraged,<sup>47</sup> some democratic element was introduced by the new electoral law of 1988 into Macau's two municipal councils. Thus, an expanded Leal Senado is now composed of fifteen members: six directly elected, six indirectly elected, and three appointed. The Camera Municipal das Ilhas, which in the past had no elected members, now has four directly elected, four indirectly elected, and three appointed councillors.

The Sino-Portuguese Joint Declaration, which purports to give expression to the principle of 'Macau residents administering Macau' (Aoren ihi Ao), stipulates that '[b]oth the government and the legislature of Macau Special Administrative Region will be composed of local inhabitants. The Chief Executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held in Macau';<sup>48</sup> 'The executive authorities shall be accountable to the legislature,<sup>49</sup> the majority of which 'shall be elected.'<sup>50</sup> Similar provisions and further elaboration are also contained in the SAR's Basic Law.<sup>51</sup>

Needless to say, Macau people have thus far exercised little control over their destiny. They were not consulted prior to the signing of the Sino-Portuguese Joint Declaration<sup>52</sup> nor have they had a major impact on the drafting of the Basic Law.<sup>53</sup> Criticism has also been levelled at the slow process of 'decolonisation/localisation' of the Macau administration.<sup>54</sup> Yet, within the existing democratic deficiency in respect of the ability of the people of Macau to change their government or determine their political future, it has been observed that Macau's citizens 'enjoy a wide range of rights and freedoms.'<sup>55</sup>

<sup>47</sup> See Richard Louis Edmonds, 'Macau: Past, Present and Future' (1 W) 24 Asian Affairs 3, 8.

<sup>48</sup> Art 2 (3).

<sup>49</sup> Annex I, Sec II.

<sup>50</sup> Annex I, Sec III.

<sup>51</sup> See Chapter IV ('Political Structure'), Arts 4<sup>^</sup>—102. Under the Decision of the National People's Congress on the Method for the Formation of the First Government, the First Legislative Council, the First Judiciary of the Macau Special Administrative Region, adopted by the First National People's Congress at its First Session on 31 March 1993, the first Legislative Council will retain its present composition of 23 members, 'with 8 members returned through direct elections, 8 members returned through indirect elections, and 7 members appointed by the Chief Executive.'

<sup>52</sup> See Jamie Walker, 'Macau in the Dark in Terms of Agreement,' South China Morning Post, 24 March 1987; see also Louise do Rosario, 'Time to Take Possession,' Far Eastern Economic Review, 9 April 1987, p 4.

<sup>53</sup> Drafters of Macati's Basic Law consisted largely (two-thirds) of Mainland Chinese or officials of Macau's NCNA (New China News Agency/Xinhua, the local political 'arm' of the PRC's ('entral Government) while the majority of the 'Macau drafters' were 'pro-China businessmen.' See Ilerbert S Yee and Lo Shiu-hing, 'Macau in Transition: The Politics of Decolonization' in Donald H McMillen and Michael E DeGolyer (eds), *One Culture, Many Systems. Politics in the Rcmificaiium of China* (Hong Kong: Chinese University Press, 1993), p 191.

<sup>54</sup> See Goncalo Cesar de Sa, 'Lisbon's Obligation to Macau's Future,' Far Eastern Economic Review, 8 May 1986, pp 40-1; Yee and Lo (note 53 above). The authors also note the domination of the Legislative Assembly by 'pro-government, pro-Portugal and pro-China' legislators and the insignificant number of 'liberal-minded' legislators, which account for the nature of the Legislative Assembly as 'more an executive arm of the administration than an institution checking the executive power': *ibid*, p 189. The authors further highlight the success of Hong Kong's directly-elected liberal legislators in 'making bureaucrats more accountable to the public' and contrast it with the failure of their Macau counterparts to 'increase governmental responsiveness': *ibid*, p 190.

<sup>55</sup> US Department of State, Report on Human Rights in Maciam in 1993 (accessed through Interneth



Human rights provisions of the Portuguese Constitution and (more recently)<sup>56</sup> the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights are applicable in Macau. Under the Sino-Portuguese Joint Declaration, '[a]ll rights and freedoms of the inhabitants and other persons in Macau, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike, of choice of occupation, of academic research, of religion and belief, of communication and the ownership of property will be ensured by law in the Macau Special Administrative Region.<sup>57</sup> Post-1999 guarantees of human rights are also contained in the Basic Law of the Macau Special Administrative Region.<sup>58</sup>

The government of Macau is reported to respect civil liberties, including freedom of expression, although it has been noted that most of Macau's newspapers 'do not give equal coverage to liberal and prodemocratic forces' and that 'self censorship is growing among newspaper reporters' (and some academics are 'avoiding research on topics that entail criticism of China').<sup>59</sup>

### *International recognition*

Whether recognition by other states has a 'constitutive'<sup>60</sup> or 'declaratory'<sup>61</sup> effect has long occupied and divided international lawyers, who on the whole have tended to support the latter doctrine.<sup>62</sup> That it is undesirable to accord a political act such as recognition a decisive force in the determination of international personality is subject to little doubt, even apart from the 'insoluble theoretical and practical problems' which are raised.<sup>63</sup>

Some contemporary jurists have indeed argued that, at least in respect of recognition of statehood, states no longer retain the authority unilaterally to acknowledge or deny legal status (as distinct from a discretion whether to establish formal diplomatic relations or not). Rather, it is contended,

<sup>56</sup> See Macau's Official Gazette, Resolution No 41/92 of 31 December 1992.

<sup>57</sup> Art 2(4).

<sup>58</sup> Chapter III ('Fundamental Rights and Duties of Residents'), Arts 24-44. It may be noted that under Art 40, '[t]he provisions of the International Covenant on Civil and Political rights, International Covenant on Economic, Social and Cultural Rights and international labour conventions as applied to Macau shall remain in force and shall be implemented through the laws of Macau Special Administrative Region.'

<sup>59</sup> See note 54 above.

<sup>60</sup> A 'constitutive' effect means that the act of recognition establishes ('constitutes') the international legal personality of the entity in question.

<sup>61</sup> A 'declaratory' effect means that recognition is only a formal acknowledgement of an ahead existing state of circumstances, indicating willingness to treat the entity as an international person.

<sup>62</sup> The debate has also found its way into judicial deliberations as in the case of *S v Banda* (Bophuthatswana, SCT, Gen Div 1989), extracted in 82 International Law Reports 388. 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.

<sup>63</sup> See Dixon (note 43 above), pp 103-4. The author notes problems such as the consistency with the operation of *any* system of law that legal personality should depend on the subjective assessment of third parties, the degree of recognition required and whether some states or groups of states are more 'important' when it comes to recognition.

international legal status is a matter to be determined collectively by the UN<sup>64</sup> (an argument which seems to be based on the somewhat questionable assumption that UN political organs function as independent actors). Several recent examples, in fact, attest to the importance of collective recognition to questions of statehood, even over factual prerequisites (such as an effective government) or the legality of creation.<sup>65</sup>

It is clear in any event that pragmatic considerations often dominate principles or legal doctrines, and that different patterns of interaction are developed among the various actors in the international arena and new norms of behaviour are formed to cope with the emerging vicissitudes of international life. 'Recognition' may thus be inferred from treaty relationships, ministerial visits, formal communications, technical, cultural, or other exchanges. Similarly, memberships in international organisations may be taken to imply (at the very least) an acknowledgement of the entity's ability to carry out the essential obligations of membership.

As illustrated in Macau's various affiliations with international organisations, memberships in multilateral agreements, and bilateral accords<sup>66</sup> with foreign countries, the territory has been accorded a measure of international recognition as an entity capable of engaging in international relations.

### *International legal entitlements*

The relevance to international legal personality of the right to self-determination needs little restatement. As 'solemnly proclaimed' in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,<sup>67</sup> the territory of a colony or of other non-governing territory has a status 'separate and distinct' from the state administering it; such a status exists until the people of the colony or the non-self-governing territory have exercised their right of self-determination. The international personality of 'self-determination units' has been affirmed by international tribunals as well, most notably in the International Court of Justice's Advisory Opinions concerning South West Africa.<sup>68</sup>

<sup>64</sup> See Dugard (note 4 above).

<sup>65</sup> Dixon cites the admission of some former Yugoslav republics to the UN and the apparent acceptance of the statehood of Bosnia-Herzegovina by the International Court of Justice in the Prevention of Genocide Case (1993) 32 International Legal Materials 888. The author also notes that 'Russia has been accepted as capable of succeeding to the Soviet Union's place on the Security Council and this was done purely informally through acquiescence of the old Soviet Republics and acceptance by other members of the Council and UN': Dixon, *ibid*, p 95.

<sup>66</sup> Mention can also be made in this context of the 1993 Agreement on Trading and Co-operation in the Fields of Technology, Science, Economics, Finance and Profession Training signed between Macau and the European Community; the parties also agreed on the establishment of a 'Euro-Infocentre' geared to facilitating trade between Asian and European businesses. See 'Macau's New Lease of Life,' *Window*, 26 January 1994, p 35.

<sup>67</sup> GA Res 2625, UN GAOR, 25th Sess Supp No 28, at 12, 124 UN Doc A/8028 (1970).

<sup>68</sup> See *Western Sahara Case* (1975) ICJ Rep 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1971) ICJ Rep 16.

It is nonetheless evident that (at least insofar as the 'external'<sup>69</sup> manifestation of the right of self-determination is concerned) qualified entities are assumed to have been subjected to colonial rule, alien domination, or racist regimes. They are also expected to constitute a 'people,' although no attempt has been made in any relevant international text clearly to define or characterise 'peoplehood.'<sup>70</sup>

Could Macau be considered a 'self-determination unit'? Described as a 'pragmatic anomaly in international relations,'<sup>71</sup> Macau's status defies easy categorisation. In contrast to Hong Kong it has been 'administered by Portugal not on the basis of a fixed-term lease but by virtue of a series of shifting and often loosely-defined bilateral arrangements' with periodic assertions of sovereignty by each party.<sup>72</sup> Yet, whether 'pragmatic' or other type of imperialism, the cession of Macau to Portugal 'in perpetuity' was confirmed in the 1887 Sino-Portuguese Treaty of Friendship and Commerce.<sup>73</sup>

While in 1972 the territory was removed, at China's request,<sup>74</sup> from the colonial territories listed by the United Nations under the Declaration on Granting Independence to Colonial Territories and Peoples, no substantive decision had been rendered negating Macau's status as a colonial territory. Nor could the self-imposed restriction on Portuguese sovereignty over Macau (as reflected in the Portuguese Constitution of 1976), the reluctance of Portugal to continue its imperialist role,<sup>75</sup> or what is commonly referred to as the Portuguese policy of 'benign neglect' in respect of Macau alter the fact that the people of Macau have not been able to change their government or determine their political future.

Their 'colonial' status apart, whether the people of Macau are a 'people' for the purpose of entitlement to self-determination hinges on which view of national selfhood is adopted. It may be contended, for example, that the

<sup>69</sup> 'External self-determination' alludes to the achievement of independence or other appropriate legal status by peoples under colonial and alien domination; 'internal self-determination' refers to the right of citizens to maintain, assure, and perfect their full legal, political, economic, and cultural sovereignty; as well as the right of ethnic, racial, or religious segments of the population in a sovereign country not to be oppressed by a discriminatory government. See A Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986).

<sup>70</sup> The on-going debate among scholars is structured by two main concepts of 'peoplehood': one focusing on relatively subjective factors in determining the identity of the 'self' (in self-determination), whereas the opposite stresses certain objective characterisations of a group of people, such as common territory, ethnicity, language, or culture. See, generally, James Crawford (ed), *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

<sup>71</sup> See Norman MacQueen, 'Macau: End of a Special Case?' 41 (1985) *The World Today* 167.

<sup>72</sup> See *ibid.*

<sup>73</sup> Further arrangements concerning administrative rights as well as questions of law and customs were agreed upon in the Nanking treaty of 1928.

<sup>74</sup> See letter of 10 March 1972 from the Chinese delegate, Huang Hua, to the UN Committee on Decolonisation, reprinted in Jerome Cohen and Hungdah Chiu (eds), *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974), p 384.

<sup>75</sup> It has been reported the Portugal made two (unsuccessful) attempts to 'return Macau to China' in 1967 and 1974. See Jaw-ling Joanne Chang, 'Settlement of the Macau Issue: Distinctive Features of Beijing's Negotiating Behaviour' (1988) 20 *Case Western Reserve Journal of International Law* 253, at 256-7 (and references therein).

inhabitants of Macau have not exhibited a 'common subjective attachment' or strong nationalist sentiments, nor engaged in any struggle for an altered political status,<sup>76</sup> and hence cannot be regarded as constituting a 'people.' On the other hand, criteria such as territorial and social bonding,<sup>77</sup> or the settled and self-sustaining nature of a community with its own institutions and civil administration, are arguably satisfied.

Inability to establish the juridical validity of a right to self-determination need not, however, preclude a legitimate claim to international 'personhood,' especially where, as in the case of Macau, no threats to the integrity, organic structure, or vital interests of any state are posed. Reliance on the right of 'peoples' should, moreover, be favourably regarded in the context of a world community that is increasingly embracing human rights, minority rights, and indigenous rights.

### *Sui generis qualities*

As commonly acknowledged in treatises on international law, legal personality may be extended to entities professing unique qualities which are appropriately valued by the international community. Examples cited invariably include the Order of Malta (for its dedication to the assistance of the world's sick and poor), the Holy See (for leading the Catholic Church), and, occasionally, national liberation movements (for their purported aim to combat colonialism).

While Macau's contribution to global religious, spiritual, or social well-being has not been particularly significant, it could perhaps emphasise its uniqueness as a 'microcosm of geopolitical history and crossculture interaction'<sup>78</sup> and its distinct identity which has been tenaciously maintained throughout four centuries of existence.

Evidently, the Republic of Portugal and the People's Republic of China have recognised Macau's special qualities and — using the highest form of international legal expression (an internationally binding accord) — have signalled to the international community their desire to preserve and enhance the territory's distinct personality. The Sino-Portuguese Joint Declaration

<sup>76</sup> Note, however, the 'ineffectual atentado' mounted in Macau in July 1975. See MacQueen (note 71 above), p 168. The lack of nationalist fervour in Macau may lie in the absence of grievance- (eg. ethnic discrimination, economic underdevelopment, poverty) that led nationalist movement- in other Portuguese dependencies such as Angola or Mozambique. According to a recent study, Macau's populace 'are not resentful of the colonial government'; indeed, are 'grateful to the government for the economic prosperity as well as the freedom of speech and freedom of publication.' See Herbert S Yee, Liu Bo-long, and NgoTak-wing, 'Macau's Mass Political Culture' (1993) 15 *The Asian Journal of Public Administration* 177, 189. The authors suggest that there may be a tendency to use Mainland China as a reference point for comparison and hence residents of Macau 'feel that the Macau government, when compared to the low efficiency, wide-spread corruption and incompetence of the Mainland Chinese authorities, is not bad at all' (at p 191).

<sup>77</sup> A majority of citizens in Macau have 'emotional attachment' to the territory. See *ibid*, p 189. See also Porter (note 20 above) p 18 (referring to the identification of the people with 'Macau as a place').

<sup>78</sup> See Paul T K Lin, 'Preface' in Cremer (ed), *Macau: City of Commerce and Culture* (Hong Kong: L HA Press, 1987).

clearly reflects the intentions of the signatories to give the Macau Special Administrative Region an international capacity on its own, separate and distinct from any state that otherwise may be entitled to exercise sovereign authority. The Declaration confers on the Macau SAR express functions and powers that imply possession of international personality, including the maintenance and development of relations with states, regions, and international organisations as well as the conclusion and implementation of international and regional agreements;<sup>79</sup> the issuing of its own passports and travel documents;<sup>80</sup> regulation of immigration to the territory;<sup>81</sup> and the establishment of official and semi-official economic and trade missions in foreign countries.<sup>82</sup>

*Does Macau have a 'Hong Kong-style' international legal personality?*

Although this question appears to have a rhetorical quality, given the relative nature of the concept of international personality, each case needs to be assessed on its own merits and with reference to its peculiar circumstances and distinctive features. Thus, notwithstanding their obvious similarities, a synchronised comparison between the Hong Kong and Macau situations has been resisted. Moreover, in spite of the almost identical language used in the respective pertinent texts, there are important differences — not only in the pre- or post-negotiation maneuvers and tactics<sup>83</sup> but in the political realities these texts are assumed to reflect.

As may be discerned from the above application of the various indicia of international legal personhood in the context of the Macau case, the territory appears to have a legitimate claim to some measure of international legal personality<sup>84</sup> by virtue of meeting factual requirements such as permanent population, defined territory, and effective government; a capacity to enter into international relations and associations; a reasonably 'democratic' political arrangement; some international recognition as an entity capable of international intercourse; 'self-determining' potential; and a 'uniqueness' of sorts.

Nonetheless it should be reiterated that the possession of legal personality does not denote equality with other international legal 'subjects' in respect to the scope of international rights and duties. Macau's entitlements and respon-

<sup>79</sup> Joint Declaration, Art 2(7); Annex I, Sec VIII.

<sup>80</sup> Joint Declaration, Art 2(7); Annex I, Sec IX.

<sup>81</sup> Joint Declaration, Annex I, Sec IX.

<sup>82</sup> Joint Declaration, Annex I, Sec X.

<sup>83</sup> See Chang (note 75 above).

<sup>84</sup> If forced to engage in quantitative comparison—which may not be particularly meaningful — it may be said that Hong Kong possibly enjoys a 'larger' measure of international legal personality both in the light of functions and powers conferred under the constitutive documents and in realpolitik terms.

sibilities under international law are circumscribed by the relevant constitutive documents and the applicable international customary norms.<sup>85</sup>

Rock Mushkat\*

## Arising out of ... the Employment: Employees' Compensation and *United Ford Development Limited*

### *Introduction*

For an injured worker in Hong Kong to qualify for compensation under the Employees' Compensation Ordinance, it is not enough to prove that the accident causing the injury arose in the course of the employment.<sup>1</sup> According to s 5(1) the worker must also show that the accident arose 'out of the employment.'<sup>2</sup> The judicial interpretation to be put on this curiously worded phrase has considerable practical importance. Recently, for instance, a number of employees of the Shamshuipo branch of the Hong Kong and Shanghai Bank were killed when an intruder, apparently motivated by a personal grudge against one of the staff, threw a firebomb into the bank's premises.<sup>5</sup> Although that accident certainly arose in the course of the employment of the bank's staff, it is not entirely clear that the accident would (if litigated) also be held to have arisen out of the employment. This note will consider the 'arising out of the employment' requirement in the light of a recent decision of the Hong Kong Court of Appeal, *Fung Yin-ye v United Ford Development?* a decision which, it will be shown, clarifies the meaning of that requirement and in the process advances the position of workers in Hong Kong seeking compensation under the Employees' Compensation Ordinance.

<sup>85</sup> For an analysis of the content and extent of Hong Kong's international personality, see R Mushkat, 'Hong Kong as an International Legal Person' (1992) 6 *Emory International Law Review* 105, 123—70.

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<sup>1</sup> Although this is a condition for compensation: s 5(1). It involves essentially temporal and spatial considerations, conditioned by reference to the worker's service: *Dover Navigation Co v Isabella Craig* [1940] AC 190, 199. Put more simply, the worker must be shown to have been doing the employer's work when injured.

<sup>2</sup> More fully, s 5(1) requires 'personal injury by accident arising out of and in the course of the employment ...' Therefore it is a further requirement that the worker was injured by 'accident,' as opposed to a continuing process, as explained recently in *Wong Chick v Swire Pacific Limited* (1992) HCt, ECCNol65of 1991 (noise over a course of years causing deafness not an accident). And finally, the worker must show that he was engaged in a contract of service (s 2(1)), as opposed to a contract of services, the current judicial interpretation of which is to be found in the Privy Council decision in *Lee Ting-sang v Chung Chi-keung* [1990] HKLR 764.

<sup>3</sup> *South China Morning Post*, 11 January 1994.

<sup>4</sup> (1993) Civ App No 149 of 1992.