ONE Country, TWO International Legal Personalities

The Case of Hong Kong

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Chapter 1

Hong Kong's Status in International Law

HONG KONG'S CLAIM TO 'INTERNATIONAL LEGAL PERSONALITY'[1]

Can it be substantiated?

Defining Hong Kong's international legal status poses a daunting challenge to an international lawyer confronted with an entity which is not a 'state' — yet possessing 'stately attributes'; not 'sovereign' — yet 'highly autonomous'; not a 'conventional' member of the international community — yet a most respectable 'actor' on the international stage. Further, the validity of traditional notions of 'statehood' and 'sovereignty' is increasingly questioned in light of fundamental continuing changes in the structure of international relations. The traditional focus is particularly difficult to reconcile with the emerging pattern of shifting alliances, proliferation of new forms of identity, multiple tiers of jurisdiction, and escalation in the volume of transnational interactions on the part of a variety of non-state actors.

More specifically, commonly accepted criteria of statehood [2] — a permanent population; a defined territory; government; and capacity to enter into relations with other states' — cannot be held to represent sufficient [3] or

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1 International legal personality denotes the ability to act (exercise rights, bear duties) within the system of international law; entities possessing international legal personality are 'subjects' of international law.

2 See Art I, 1933 Montevideo Convention on Rights and Duties of States which is regarded as 'customary international law' ('general practice accepted as law').

3 Query, for example, whether the independent principality of Sealand (a steel-and-concrete second-world war anti-aircraft tower governed, since they liberated it in 1967 by Major/

even necessary [4] qualifications. Obviously, the less legalistic symbols of statehood, such as kings/presidents, armies, central banks, currency, or passports, offer no reliable yardsticks. [5] It is equally evident that UN [inconsistent] admission practices [6] or its current membership [7] are not particularly instructive in respect of the key distinguishing attributes of statehood.

Nor would the international lawyer's quest for indices of 'international legal personality' be advanced by adopting the 'sovereignty' test. As amply documented by theorists of widely diverging ideological persuasions, the position of the state as the central actor in the international community is being eroded, while 'non-sovereign' actors are increasingly assuming a prominent role in shaping the norms that order and maintain the international community. Analysts of contemporary global politics invariably note that the inefficacy of states to manage grave problems with ramifications beyond national frontiers (e.g. pollution), as well as formidable scientific and technological developments, have forced states to concede power to

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Prince Roy and Mrs/Princess Joan Bates) — which has its own constitution, flag, coat of arms, stamps, currency, and passport — is a 'state'. At a more scholarly level, it has been argued that *the method by which a 'state' comes into existence* is of crucial importance, 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).

4 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.

5 The European Community/Union, for example, has no king or army but its Ecu is a recognized, if unminted, currency; it also has its own diplomats, and holders of the standardized passports issued by its members enjoy 'citizen' status everywhere in the EC. The Community is also a member of several international organizations and a party to major international treaties.

6 Significant inconsistencies have been displayed particularly with regard to enforcement of requirements stipulated under Art 4 of the UN Charter:'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 Organization, are *able and willing to carry out these obligations.* ' [emphasis added]

7 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 (which has a population of 20 million and boasts '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' — see Fredrick F. Chien, 'UN Should Welcome Taiwan' *Far Eastern Economic Review*, 5 August 1993, 23).

international regulatory organs and surrender to regional organizations control over numerous areas previously within the exclusive domain of individual states.[8] It is also clear, in the light of an extensive body of human rights law, that states can no longer erect barriers in the name of sovereign/domestic jurisdiction and are subject to international scrutiny and judgement.

The inadequacy of concepts such as 'statehood' and 'sovereignty' should not, however, hinder the task of determining who is a 'subject' of international law or whether an entity possesses an 'international legal personality'. Rather, the inference to be drawn is that 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 the progressive requirements of a 'diffuse multi-centric world'. [9] It may be further observed that 'international legal personality' is a relative and open-textured concept which may depict different characteristics in different circumstances. Thus, states may be said to 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, whereas the extent of personality enjoyed by other subjects of international law depends on various factors such as a constitutent treaty or constitution and recognition.

Consequently, an assessment of international legal status/personality should be conducted with reference to a *range* of factors, including: factual 'stately' attributes (such as permanent population, defined territory, government); international recognition and 'legitimacy'; international legal entitlements (e.g. right to self-determination); membership in the 'international civil society'; [10] and *sui generis* qualities. It is within such a structure that the following analysis of Hong Kong's international legal status is undertaken.

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8 Including [the generally well-guarded sovereign] border control, as exemplified in the 1985 Schengen Agreement, implemented on 26 March 1995.

9 Term borrowed from James N. Rosenau, 'Patterned Chaos in Global Life: Structure and Process in the Two Worlds of World Politics' (1988) *International Political Science Review* 9. For the link between international legal personality and the 'needs of the [international] Community'/'requirements of international life' see: *Reparations for Injuries Suffered in the Service of the United Nations* , Advisory Opinion [1949] ICJ Reports 174,178.

10 The 'international civil society' consists of international/regional organizations, multilateral conventions and intergovernmental associations. See C.N. Murphy & E. Augelli, 'International Institutions, Decolonization, and Development' (1993) 14 *International Political Science Review* 71.

Factual 'stately' attributes

Its portable [11] dimensions notwithstanding, Hong Kong exhibits essential factual 'stately' attributes: it is populated by a community of permanent inhabitants whose ordinary place of residence is Hong Kong. Its physical existence as a distinct territorial unit within coherent frontiers is well established both in fact and in law. It is effectively ruled by a local government which exercises jurisdiction over the population and territory, and is endowed with the necessary legislative and administrative competence in respect of what is recognized as fundamental government functions (that is, promulgation of laws, maintenance of order, collection of taxes, dispensation of justice, and conduct of social affairs).

Furthermore, while lacking formal/'juridicial' sovereignty (in the sense of legal entitlement to constitutional independence), Hong Kong possesses a degree of latitude to engage in international action autonomously, said to be matched by no other non-sovereign government in the contemporary international system. Indeed, the territory's considerable international capacity — which is 'further enhanced by its economic strength and extensive involvement in the global economy' — and the extent of its 'empirical'/ 'positive' sovereignty (in the sense of ability to provide political goods for its citizens, collaborate with other governments in international arrangements and reciprocate in international commerce and finance) have led one political analyst to conclude that Hong Kong is well-qualified to be a 'quasi-state'. [12]

International recognition and 'legitimacy'

Amidst a continuing debate among international lawyers regarding the 'constitutive'[13] or 'declaratory'[14] nature of recognition, the practical relevance of the 'recognition factor' in the calculus of international legal personality is rarely disputed. Although it is widely conceded that according a political act a decisive force in the determination of international personality is

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[11] Note that 'minuteness of territory and population . . . does not constitute bar to statehood' — Ira A. Shearer, *Starke's International Law* (London: Butterworths, 1994) 89 (citing, e.g. the independent state of Nauru which has a territory of 8.25 square miles and an indigenous population of about 3000 persons).

[12] See James T.H. Tang, 'Hong Kong's International Status' (1993) 6 *The Pacific Review* 205.

[13] Under the 'constitutive' theory, the act of recognition establishes ('constitutes') the legal personality of the entity in question.

[14] Under the 'declaratory' theory, recognition is merely a formal acknowledgement of an already existing state of circumstances, indicating willingness to treat the entity as an international person.

undesirable (as well as theoretically unsound), recent events attest to the importance of recognition, particularly when collectively granted. [15] It also appears that some element of 'legitimacy' is sought to be appended to the award of recognition. An implied condition of this nature has arguably underscored UN decisions condemning and urging denial of recognition to entities created in violation of fundamental principles of international law, such as aggression, non-racial discrimination and self-determination. [16] In a more current context, 'legitimacy' has been translated into a requirement of respect for the 'rule of law, democracy and human rights'.[17] While not firmly established as a prerequisite of international legal personality, [18] it is nonetheless evident that the international community expects its members to abide by this trinity of governing norms. [19]

At the same time, given proclivity of domination of pragmatic considerations over principles and legal doctrines, 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 law. 'Recognition' may thus be inferred from treaty relationships, ministerial visits, formal communications, technical, cultural, or other exchanges. In a similar vein, memberships in international organizations and associations 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 will be elaborated later, Hong Kong has received a considerable measure of recognition as an autonomous entity by virtue of its extensive involvement in international activities, whether as member of international organizations or as party to multilateral treaties. Of recent significance in

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15 Note, for example, the admission to the UN of former Yugoslav republics and the apparent acceptance of the statehood of Bosnia-Herzegovina by the ICJ [*Prevention of Genocide Case* (1993) 32 *International Legal Materials* 888], notwithstanding lack of factual prerequisites such as an effective government, and regardless of 'legality' of creation.

16 Examples often cited by textbooks are, respectively, the Turkish Republic of Northern Cyprus; Southern Rhodesia; and the so-called 'Black homelands' of South Africa — Venda, Ciskei, Transkei, and Bophuthatswana. See Shearer, op.cit., at 87.

17 See Council of European Community, *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (16 December 1991).

18 Note that the 'Guidelines' have been stipulated by the European Council in the context of a *discretionary* act of recognition (rather than as prerequisites for statehood/international legal personality). It has been observed, however, that '[a]lthough by their terms [the Guidelines are] confined to Europe, and to a particular period of history, it is likely that these guidelines will be influential in shaping future state practice more widely, with necessary adaptations. At the very least they demonstrate that the Montevideo criteria of statehood . . . are no longer considered in practice a sufficient basis for decision.' Shearer, op.cit., at 125.

19 See later for a discussion on the right to democratic governance under international law.

this context is the ' *de jure* ' recognition extended to the territory under the US-Hong Kong Policy Act of 1992, whereby the United States 'should continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom and after June 30, 1997, should treat Hong Kong as a territory which is fully autonomous from the People's Republic of China' [20] in accordance with the provisions of the Sino-British Joint Declaration. Other less explicit[21] 'acts of recognition' by states include the acceptance of Hong Kong's official representatives and Government Offices overseas as well as its permanent missions in major cities such as Brussels, Geneva, London, Tokyo, Toronto,[22] San Francisco and Washington.

Hong Kong may further assert a claim to 'international legitimacy' founded on the territory's general adherence to relevant international norms. Notwithstanding the 'democratic deficit' [23] of its institutions or the flaws in its human rights system,[24] 'Hong Kong is a free society with most individual freedoms and rights protected by law and custom.' [25] It enjoys a well-entrenched tradition of rule of law — backed by 'democratic oversight from Westminister'[26] — an independent judiciary and a free press. The HKSAR is equally posed to make a similar claim to international legitimacy. Indeed, its case is bolstered by the 'internationalization' — through a legally binding international treaty — of respective guarantees for the maintenance in the territory of the rule of law and the integrity of the legal system; local governance in accordance with democratic principles; and protection of universally recognized human rights and fundamental freedoms.

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[20] Sec. 103(3), United States-Hong Kong Policy Act of 1992, repr. in (1993) 32 *International Legal Materials* 545.

[21] As noted by the Commissioner for Canada in Hong Kong, no special legislation was considered necessary in order to treat Hong Kong as a separate entity, given established bilateral ties and accords between Canada and the territory. See Susan Furlong, 'Canada Ties "Not Affected by 1997" ' *South China Morning Post* , 2 November 1992, at 2.

[22] Note that, backed by an amended Foreign Missions and International Organizations Act 1991, the Canadian government has 'upgraded' the Hong Kong Office in Toronto, granting it 'quasi-consular' status. See 'New Diplomatic Status' *South China Morning Post* , 8 December 1991, at 2.

[23] See International Commission of Jurists, *Countdown to 1997. Report of a Mission to Hong Kong* (Geneva: ICJ, 1992) 68–77.

[24] See Amnesty International, *Hong Kong and Human Rights: Flaws in the System. A Call for Institutional Reform to Protect Human Rights* (London: International Secretariat, April 1994).

[25] *Report to Congress on Conditions in Hong Kong as of March 31, 1995 As Requested by Section 301 of the United States-Hong Kong Policy Act of 1992* (Hong Kong: Consulate General of the USA, 31 March 1995) 12.

[26] Christopher Patten, 'Why We Need a Rule of Law' *South China Morning Post* , 23 November 1993, at 17.

International legal entitlements

Hong Kong's claim to international legal personality is further substantiated by its right in international law to self-determination. [27] As a 'people' so entitled, the territory enjoys under the UN Charter a 'separate and distinct' [28] status (not to be equated with independent statehood). Its international personality by virtue of a right to self-determination should find additional support in international judicial decisions, most notably the International Court of Justice's Advisory Opinions concerning South West Africa. [29]

More specifically, Hong Kong's case as a 'self-determination unit' may be grounded on its status as a 'colony' or 'non-self-governing territory'. It is indisputable that Hong Kong came into being and has functioned as a British colony since 1842. To a certain extent, the territory's colonial status was acknowledged internationally when it was placed on the agenda of the UN Special Committee on Decolonization in 1961. Although — following a request by the PRC — Hong Kong was subsequently removed from the colonial territories listed by the UN under the Declaration on the Granting Independence to Colonial Territories and Peoples, no substantive decision has been rendered negating Hong Kong's status as a non-governing (colonial) territory. Nor did the action of the Decolonization committee have the 'effect in international law of removing from the people of Hong Kong (who had not been consulted on the Chinese request) their right to self-determination'.[30]

While it is generally accepted that the inhabitants of any non-self-governing colonial territory — being 'separate and distinct' — are 'peoples' for the purpose of the right of self-determination, [31] further enhancement for local 'national selfhood' could be provided. Hong Kong satisfies suggested

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[27] For the conclusion 'without hesitation, that the people of Hong Kong are entitled to the right of self-determination under international law' see: International Commission of Jurists' Report, op.cit., at 49.

[28] As 'solemnly declared' 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 [GA Res 2625, UN GAOR, 25th Sess Supp No 28, at 12, 124 UN Doc A/8028)]: 'The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter . . .'

[29] See *Western Sahara Case* [1975] ICJ Reports 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* [1971] ICJ Reports 16.

[30] International Commission of Jurists Report, supra (note 23) at 50.

[31] See ibid., at 47, 50.

UN criteria [32] as a 'social entity possessing a clear identity [at least, 'profoundly different from that of mainland China' [33]] and its own characteristics [including distinct legal and economic systems]' as well as 'a relationship with a territory'. Undoubtedly, it qualifies as a self-determination unit under British 'working definition or rule of thumb' which attaches importance to 'whether the people in a particular territory constitutes a settled and self-sustaining community with its own institutions and civil administration'.[34]

At the same time, it is evident that neither party to the Sino-British Joint Declaration has accepted self-determination for Hong Kong as a viable option;[35] that no international forum is likely to collectively sanction any 'decolonization' attempt;[36] and that 'in present circumstances a meaningful exercise of the right of self-determination is impractical.'[37] Yet, the inability to enforce its right to self-determination should not detract from the territory's legitimate claim to international legal personality based on such a right. Nor should support be withheld for international personhood, given the limited nature of the claim and the fact that 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.

Membership in the 'international civil society'

The relevance of international relationships and associations to the assessment of an entity's 'subjecthood' in international law requires little elaboration. It is also clear that in this regard, Hong Kong's claim to international legal personality is particularly strong. Hong Kong participates — either as a full member in its own right, associate member or a non-member participant —

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[32] See Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (New York: United Nations, 1981), para 279.

[33] International Commission of Jurists Report, supra (note 23) at 49.

[34] 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 17 January 1983, as repr. in (1983) 54 *British Yearbook of International Law* 398–400.

[35] For a description of China's 'uncompromising' views and the British 'non-view' attitude, see: International Commission of Jurists Report, supra (note 23) at 48–49.

[36] The UN has been radically inconsistent in articulating the norm of self-determination and selective in enforcing it, especially with respect to small or strategic places.

[37] International Commission of Jurists Report, supra (note 23) at 56.

in more than forty international organizations and associations.[38] Particularly noteworthy is the territory's membership in UN 'Specialized Agencies', [39] key international trade and financial institutions,[40] and in regional economic associations.[41]

Hong Kong is also under the regime of over two hundred multilateral treaties in fields such as customs, conservation, health, trade, transport, marine pollution, drugs, international crime, science and technology and private international law.[42] A similar number of bilateral agreements have also been extended to the territory. In addition, observers have pointed to the remarkably wide participation of Hong Kong in non-governmental organizations [43] as well as the fact the territory serves as a 'regional headquarters to close to one thousand multinational corporations'. [44]

Hong Kong's high profile as a member of the 'international civil society' is postulated — both internationally (under the Sino-British Joint Declaration) and constitutionally (under the Basic Law) to be preserved beyond 1997. Thus,

> The Hong Kong Special Administrative 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

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38 See Appendix A.

39 Including the ILO [International Labour Organization]; ICAO [International Civil Aviation Organization]; WHO [World Health Organization]; UNEF [United Nations Environment Programme] UNDP [United Nations Development Programme]; IAEA [International Atomic Energy Agency]; UPU [Universal Postal Union]; ITU [International Telecommunication Union; ITSO [International Telecommunications Satellite Organization]; WMO [World Meteorological Organization]; IMO [International Maritime Organization]. Note also that Hong Kong is an associate member of ESCAP [Economic and Social Commission for Asia and the Pacific] which is one of the regional organizations of ECOSOC [UN Economic and Social Commission].

40 Including membership in the World Bank [International Bank for Reconstruction and Development], IMF [International Monetary Fund], ADB [Asia Development Bank] and GATT [General Agreement on Tariffs and Trade]/WTO [World Trade Organization].

41 Including PECC [Pacific Economic Cooperation Conference]; APEC [Asia-Pacific Economic Cooperation.

42 Attorney General's Chambers, *Multilateral Treaties Applicable to Hong Kong* (Hong Kong: AG's Chambers, 1990); *International Labour Conventions Applicable to Hong Kong* (1985).

43 Hong Kong participates in 884 non-governmental organizations; see (1992/93) *2 Yearbook of International Organizations* 1613.

44 See Anthony C. Chan, *Hong Kong of 1997 Responding to Uncertainty* (Hong Kong: Business International, 1992) 41, 42, 49.

> economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields. Representatives of the Hong Kong Special Administrative Region Government may participate, as members of 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 may express their views in the name of "Hong Kong, China". The Hong Kong Special Administrative Region may, using the name "Hong Kong, China", participate in international organizations and conferences not limited to states.

Indeed, the attitude of the 'international civil society' — as reflected in the securing of Hong Kong's continued participation in key international organizations and multilateral treaties, [45] as well as the forging of bilateral agreements with post-1997 effect[46] — should serve to reinforce the territory's claim to international legal personality.

Sui generis qualities

That legal personality may be extended to entities professing unique qualities which are appropriately valued by the international community is commonly acknowledged in treatises on international law. 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 it cannot claim to have made significant contribution to global religious, spiritual, or social well-being, Hong Kong may nonetheless ground its case for international legal personhood, alternatively, on the unique characteristics it possesses.

In particular, Hong Kong could rely on its existence as a semi-autonomous/'quasi-state' entity for over 150 years, its unprecedented capacity for international action, its prominent position as a global economic actor, [47]

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[45] See *Achievements of the Joint Liaison Group and its Sub-Group on International Rights and Obligations, 1985 – May 1990* (Hong Kong: Government Printer, 1990).

[46] See Constitutional Affairs Branch, *List of Bilateral Treaties Which Will Continue to Apply in Hong Kong After 30 June 1997 (Agreed in the JLG)* (5 June 1995), including investment protection and promotion agreements, surrender of fugitive offenders agreements, and air services agreements.

[47] See Miron Mushkat, *The Economic Future of Hong Kong* (Boulder & London: Lynne Reinner Publishing, 1990).

and the respect it is accorded by the world's governing institutions. [48] Evidently, the British and Chinese governments have recognized Hong Kong's special qualities and — using the highest form of international legal expression (an internationally binding accord) — have signalled to the international community their determination to preserve the territory's distinct personality and the pivotal role it plays in both regional and global economies. The parties have conferred on the HKSAR express functions and powers that imply possession of international personality, including the maintenance and development of relations with states, regions, and international organizations as well as the conclusion and implementation of international and regional agreements; the issuing of its own passports and travel documents; regulation of immigration to the territory; and the establishment of official and semi-official economic and trade missions in foreign countries. The agreement also reflects 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 divergent economic systems, Hong Kong's distinctly separate personality must be secured.

THE CONTENT AND EXTENT OF HONG KONG'S INTERNATIONAL PERSONALITY

'Right to life'

Can Hong Kong expect international 'intervention' should the need arise to defend its autonomous political structure and the free choice of its people?

Whereas a state's 'right to life' is safeguarded under international legal rules prohibiting aggression, the applicability of these rules to nonstate legal entities is rather more ambiguous. In Hong Kong's case, can the territory be, for instance, devolved out of existence at the whim of Britain or China? In the event of a military occupation by the PRC, might Hong Kong legitimately expect to benefit from a supportive international response of the kind offered to Kuwait when faced with the Iraqi challenge?

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[48] See 'World Bank Praise for Hong Kong' *South China Morning Post* , 23 January 1995, at 1; 'Territory Hailed as Dynamic in GATT Report' *South China Morning Post*, 7 October 1994, at 12.

Clearly, as a 'separate and distinct' people, regardless of its lack of statehood, the territory's inhabitants may claim international protection on the basis of their right to self-determination. Under general international law, a forcible deprivation of such a right entitles the people of Hong Kong to seek political or judicial [49] remedies as well as to receive international assistance 'in accordance with the purposes and principles of the Charter of the UN'.[50] Nor is foreign intervention in such circumstances to be confined to struggles for external self-determination but is said to embrace 'efforts by outside forces to give a voice to the people' who have been prevented from exercising their right to internal self-determination or to a democratic order.[51] Indeed, one may query whether the United States' doctrine of 'intervention for democracy' — used to justify Operation Just Cause in Panama and the Grenada invasion — would also be adopted in relation to Hong Kong, given large American humanitarian and commercial stakes in the territory. Furthermore, since the right to self-determination — in the sense of the right of individuals and groups to participate in the creation and recreation of an internal social order — is continuous, neither the right nor any claim based on it should be affected by the transfer of administration over the territory in 1997.

Viewed in purely legal terms, an encroachment upon Hong Kong's territorial integrity before the 1997 handover would also be sufficient to justify an action in self-defence by the United Kingdom. Notwithstanding its reluctance to formally acknowledge Hong Kong's colonial status, China has nonetheless accepted British responsibility for Hong Kong, and hence

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[49] For support of an *actio popularis* in these circumstances, see *Barcelona Traction*, *Light & Power Co.*, Second Phase (Belgium v Spain) 1970 ICJ Reports 304 (Feb 5) (separate opinion of Judge Ammoun). Note also that an adjudication clause (Art 22) is incorporated into the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, to which the PRC is a party (subject, however, to reservations including in respect of Art 22). Note, nonetheless, the recent dictum by the International Court of Justice in the *Case Concerning East Timor* (Portugal v Australia) [reprinted in (1995) 34 *International Legal Materials* 1581, 1589) that although the right of peoples to self determination has an *erga omnes* character, the Court could not rule on the lawfulness of a conduct of state in the absence of the state's consent to jurisdiction.

[50] See G.A. Res. 2625 (XXV), 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations ('The Principle of Equal Rights and Self-Determination of People').

[51] See Kevin Ryan, 'Right, Intervention and Self-Determination' (1991) 20 *Denver Journal of International Law and Policy* 55, 65; See Also Malvina Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy' (1993) 34 *Harvard International Law Journal* 163–175.

has waived sovereign claims with respect to the territory. [52] Taken a step further, the recognition of Britain's right to govern Hong Kong is clearly implied in the Sino-British Joint Declaration and its British Implementing Act which stipulate, respectively, that the government of the PRC 'has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997'[53] and that the United Kingdom will relinquish sovereignty over Hong Kong at midnight, 30 June 1997. [54]

At the same time, while the maintenance of Hong Kong as an autonomous entity is explicitly guaranteed for a period of fifty years from 1 July 1997, in substance, the object of this protection is the territory's internal structure. Notwithstanding recent acknowledgements by the British Prime Minister that, as a signatory to the Sino-British Joint Declaration, Britain will have 'continuing [legal] [55] responsibilities' towards Hong Kong and that 'Hong Kong will never have to walk alone',[56] the transfer of sovereignty over Hong Kong will be total and complete, allowing the United Kingdom no right to recover sovereignty should the Sino-British Joint Declaration be abrogated. In contrast with the United States-Taiwan position as reflected in the Taiwan Relations Act of 1979, Britain did not express an intention 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 . . .'[57] of Hong Kong.

The prospects of a more global involvement hinge to a certain degree on whether the 'Hong Kong question' (conditions for coming into effect, existence/extinction and identity) is recognized as an 'international problem' governed by international rules and principles. Arguably, an entity 'created by international law' and possessing state-like characteristics of territory, population and government, should be internationally protected. It may be

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52 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.

53 JD, Art 1.

54 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').

55 '. . . not just a moral responsibility as the former colonial power, and as staunch friends of Hong Kong.' See extract from John Major's speech to business leaders in Hong Kong, reprinted in *South China Morning Post* , 5 March 1996, at 19.

56 Loc. cit.

57 Taiwan Relations Act, 22 USC 3301(2)(b)(6) (1979).

further contended that 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*.[58]

It is, however, unrealistic to ignore doubts as to whether the Hong Kong issue would indeed be viewed as a matter of concern for all states, whether the international community would assert the collective legal right to proceed against the sovereign power involved, and whether the exclusivity of domestic jurisdiction would no longer be deemed a legitimate defence when invoked by this sovereign. The Chinese government, on its part, has lent a high profile to its objections over 'internationalizing' or what it considers 'interfering'.[59] 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 Kong'.[60]

Since the main concern of the United Nations is the maintenance of peace, an intervention by that organization is not likely in the absence of a determination of a perceived threat to international peaceful relations. At the same time, the world's responses (based on 'humanitarian grounds'[61]) in

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[58] On the notion of *actio popularis* see Kenneth C. Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Texas Law Review* 785, 831–32.

[59] See, for example, Commentary in the People's Daily, 19 December 1989, cited in Chris Yeung and Shirley Yam, 'China Repeats Reform Warning' *South China Morning Post*, 20 December 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 internationalizing 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 Kong. They are actually trying to muster the international anti-Communist and anti-China forces to obstruct China from resuming its sovereignty over Hong Kong.' Earlier, in a statement quoted on state radio and television on 25 October 1989, Beijing said that Hong Kong's future was a matter between Britain and China, and the '[o]ther countries or international organizations have no right to interfere in it.' Ibid. 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' *South China Morning Post*, 26 October 1989, at 7. Chinese authorities protested strongly against US legislation of the United States-Hong Kong Policy Act 1992, which they deemed an 'unjustified interference in China's internal affairs' and a 'violation of universally acknowledged norms governing international relations.' See *A Report to Congress on Conditions in Hong Kong as of March 31, 1993* (Hong Kong: Consulate General of the United States of America, 31 March 1993), 4.

[60] Frank Ching, 'Calling a Spade a Club in Dealing Out Criticism' *South China Morning Post*, 22 December 1989, at 12.

[61] Including what was set out as a 'goal of the international community' – 'restoration of democracy;' see Resolution 940 on Haiti, adopted by the Security Council on 30 July 1994.

Haiti, Rwanda and Somalia should not be disregarded. UN member states appear to be increasingly aware that the distinction between internal and international conflicts is breaking down, and conflicts that begin within a state's border, such as human rights violations or struggles for self-determination, may ultimately pose a threat to international peace and security subject to international response. [62] Although the notion of a 'global neighbourhood'[63] appears as yet utopic, some progress could be said to have been made towards defining new principles for international action based on concerns for the 'security of people'[64] transcending state boundaries. Nor need 'intervention' necessarily take the form of a despatch of troops or military invasion, and other channels of 'indirect' international protective action may be available to Hong Kong through its membership in international and regional organizations (utilizing pressure-exerting devices such as fact-finding, reporting and inquiry). Indeed, in this respect, the territory's continued participation in international organizations and its international exposure might well prove to be imperative in forestalling potential dangers to Hong Kong's security and independence.

'High degree of autonomy'

How 'high' is HKSAR's 'high degree of autonomy'? [65]

Notwithstanding its prominence in both policy and academic discourse, the concept of 'autonomy' has not been authoritatively defined in international

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62 See Jane E. Stromseth, 'Iraq's Repression of its Civilian Population: Collective Responses and Continuing Challenges' in Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993) pp. 97–8.

63 See Ingvar Carlsson, 'The World Needs A Humanitarian Right to Intervene' *International Herald Tribune* , 25 January 1995, at 9 (the writer, Sweden's prime minister and co-chairman of the Commission on Global Governance, discusses a report entitled 'Our Global Neighbourhood' submitted to the UN Secretary-General).

64 See ibid. The concept of 'security of people' underlies a proposed amendment to the UN Charter, submitted by the Commission on Global Governance, that would permit international action in cases which, in the judgment of the Security Council, constitute such a gross violation of the security of people that an international response is required on humanitarian grounds.

65 JD, Art 3(2) ('The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.') Although Hong Kong is currently enjoying an 'autonomous' position, the first official reference to the phrase was made in the Sino-British Joint Declaration. The following analysis, therefore, focuses on the HKSAR.

law. Indeed, it was submitted by the authors of a comprehensive study on the subject that, given the broad array of recognized 'autonomous' entities and the divergence of relevant practices, a 'firm definition that is appropriate in all cases' could not be formulated. [66] By extension, constructing a scale for determining the degree to which autonomy may manifest itself in practice is fraught with considerable difficulties. Yet, since an essential component of autonomy is the non-interference by the principal government in areas within the sphere of competence of the secondary entity, some element of measurability is afforded by reference to the insularity of the latter from potential central control. [67]

At a minimum, an autonomous entity is expected to possess the following powers:[68] 'a locally selected chief executive [with general responsibility for administration and execution of local laws] who may be subject to approval by the central government'; 'a locally elected legislative body with some independent legislative authority [in areas of local concern] limited by a constituent document [and subject to no veto by the principal or sovereign government unless it exceeds its competence as defined in the constituent document]'; 'an independent local judiciary with full responsibility for interpreting local law'; and joint authority in areas of concern to both the autonomous and central governments.

As originally conceived, the HKSAR appears to meet these minimal requirements. In general, it will be vested with 'executive, legislative and independent judicial power, including that of final adjudication'. [69] More specifically, 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'. [70] The Region's legislature — which is to be 'constituted by election' [71] — 'may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures'. [72] Judicial power (including that of final adjudication) in the HKSAR is to be

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66 Hurst Annum & Richard B. Lillich, 'The Concept of Autonomy in International Law' in Yoram Dinstein, ed., *Models of Autonomy* (New Brunswick: Transaction Books, 1981) 215, 250.

67 For an attempt of evaluation along these lines, see Brian Z. Tamanaha, 'Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy" (1989) 20 *California Western International Law Journal* 41.

68 See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) 467–8.

69 JD, Art 3(3); see also BL, Art 2.

70 JD, Annex I, art I, para 3; BL, Art 45.

71 Loc. cit. Note further elaboration in BL, Art 68 that '[t]he ultimate aim in the election of all the members of the Legislative Council by universal suffrage.'

72 JD, Annex I, art II, para 2.

exercised by the local courts 'independently and free from any interference;'[73] the independence of members of the judiciary would be closely guarded in accordance with detailed provisions[74] pertaining to their appointment, removal from office and immunity from legal action in respect of judicial functions.

Edging towards the 'higher' end of the autonomy scale — and geared to the preservation of the territory's social system and lifestyle [75] — are the self-governing powers and independent decision-making capacity to be enjoyed by the HKSAR in respect of a wide-range of fields, including education, science, culture, sports, religion, labour, and social services. [76] Especially important to the maintenance of the Hong Kong's separate economic identity, is the extensive (near-total) control granted to the HKSAR over the economy: The local government is empowered to decide its own economic and trade policies,[77] develop its own economic and trade relations with other states and regions, [78] formulate its own monetary and financial policies,[79] and determine its own excise and taxation policies. [80] HKSAR's status as a separate customs territory — entitled to its own export quotas, tariff preferences and other similar arrangements — is to be retained. [81] Additionally, the Region will continue to have a separate shipping register [82] and be responsible for its civil aviation management.[83] Also to be maintained are Hong Kong's distinct 'capitalist economic and trade systems' [84] — as reflected in its status as a free port, [85] its policy of free trade, free movement of goods and capital, [86] and a freely convertible currency. [87] Ranking even 'higher' in the context of autonomous entity/central authority relationship, is the lack of formal financial ties between the HKSAR and the Central People's government:[88] The HKSAR is to have independent finances, to be used exclusively for its own purposes. No funds will be channelled to the

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73 JD, Annex I, art III, para 2; BL, Art 85.
74 See JD, Annex I, art III, para 3; BL, Arts 88, 89, 85.
75 JD, Art 3(5).
76 See details of implementation in BL, Chap VI.
77 JD, Annex I, art VI, para 1.
78 Ibid., para 2.
79 JD, Annex I, art VII, para 2.
80 JD, Annex I, art VI, para 3.
81 Loc. cit.
82 JD, Annex I, art VIII, para 2.
83 JD, Annex I, art IX, para 1.
84 JD, Annex I, art VI, para 1; BL, Art 5.
85 JD, Annex I, Art VI, para 2; BL, Art 114.
86 JD, ibid; BL, Art 115.
87 JD, Annex I, Art VII, para 1.
88 See JD, Art V; BL, Arts 106, 108.

Central People's government, nor will the CPG be permitted to levy any taxes in the territory.

Perhaps, given its significance to the latter's 'international personality', most weight on the autonomy scale should be assigned to the considerable powers vested in the HKSAR regarding external affairs. 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 economic, trade, financial and monetary, shipping communications, touristic, cultural and sporting fields'. [89] In addition,

> [r]epresentatives of the Hong Kong Special Administrative 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". [90]

The Special Administrative Region, in its role as an autonomous entity, may also take part in international organizations and conferences not limited to states. Indeed, under the Joint Declaration, China has agreed '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. [91] The PRC has also undertaken to facilitate 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 is not a member'. [92]

Consistent with the emphasis on the development of external ties by the territory, the Sino-British Accord stipulates the establishment, with the approval of the Central People's Government, of consular and other official or semi-official missions in the SAR.[93] The Accord also provides for official and semi-official SAR economic and trade missions in foreign countries. [94] The SAR's external relations capacity is further enhanced by the authority

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89 JD, Annex I, art XI, para 1; BL, Art 151.
90 JD, ibid; BL, Art 152.
91 JD, Annex I, Art XI, para 2; see also BL, Art 152.
92 Loc. cit.
93 JD, Annex I, Art XI, para 3.
94 JD, Annex I, Art VI, para 4.

granted to it by the PRC to issue passports and travel documents, [95] as well as to conclude agreements for the mutual abolition of visa requirements. [96]

Finally, to buttress the territory's autonomous status, the Basic Law expressly stipulates [97] that '[n]o department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which Hong Kong Special Administrative Region administers on its own in accordance with [the Basic] Law.' Consent for the setting-up of any Central Government's offices in the HKSAR must be obtained from the government of the Region, and the personnel of such offices 'shall abide by the laws of the Region'.

In contrast to the high level of non-subordination described above, several conceivable sources of central government's interference as well as apparent curbs on HKSAR's powers appear to be pulling the autonomy scales downwards. Noted, in particular is the wide scope for indirect control through the appointment of a power-wielding Chief Executive, who is to be 'accountable'[98] to the Central People's government. Regarding the legislative powers with which the HKSAR is endowed, three potential constraints have been highlighted: (a) laws enacted by the local legislature are subject to invalidation by the Standing Committee of the National People's Congress [SC-NPC];[99] (b) PRC legislation — beyond that envisaged in the Sino-British Joint Declaration[100] — may be applicable in Hong Kong;[101] and (c) the power to amend the Region's 'constitution' (the Basic Law) is vested in the NPC.[102] The power of the National People's Congress to interpret the Basic Law (and its assumed derivative power of 'disallowance' of locally enacted legislation) underscores perceived derogation from the Region's autonomous judicial competence and the 'final adjudication' to be exercised by HKSAR's courts. Additional concerns arise from the ousting of the courts' jurisdiction

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95 JD, Annex I, Art XIV, para 2.

96 Ibid., para 7.

97 BL, Art 22.

98 See BL, Art 43. The Chief Executive is expected, *inter alia*, to 'implement the directives issued by the Central People's government in respect of the relevant matters provided for in [the Basic] Law' — Art 48(8).

99 See BL, Art 17.

100 See JD, Annex I, art I, para 2.

101 Under BL, Art 18 laws 'relating to defence and foreign affairs *as well as other matters outside the limits of the autonomy of the Region as specified by [the Basic] Law*' [emphasis added] may be applied in the HKSAR. Additionally, '[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 is in a state of emergency, the Central People's government may issue an order applying the relevant national laws in the Region.'

102 See BL, Art 159.

over undefined 'affairs which are the responsibility of the Central People's Government'[103] and 'acts of state, such as defence and foreign affairs.' [104] Apart from 'legalistic' sources of encroachment, more concrete intervention is also feared as a result of an undemarcated allocation to the Central government of responsibility over foreign affairs and defence, especially in the light of the stationing in the HKSAR of Chinese military forces (which may be mobilized under the pretext of responding to a 'foreign affairs' crisis or upon a declaration of a 'state of emergency' by the SC-NPC).

To shift the pendulum towards the higher end of the autonomy scale, some counterweights can be employed (with varying degrees of force) to moderate the autonomy-diluting currents. Thus, China's power of 'appointment' of a democratically-selected [105] Chief Executive ought not to be interpreted to mean that approval can be withheld at will by the PRC. [106] Nor should 'accountability' imply compliance with orders violating the autonomy guaranteed under the Basic Law. [107] The available 'checks and balances' — such as the Chief Executive's duty to consult the Executive Council before dissolving the Legislative Council,[108] the Legislative Council's power to impeach the Chief Executive, [109] and the requirement that judges' appointment be based on the recommendation of an independent commission[110] — may also serve to allay concerns over compromises in the independence of the legislative and judicial branches of the HKSAR

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[103] BL, Art 158.

[104] BL, Art 19.

[105] Under BL, Art 45, '[t]he 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 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.'

[106] A local commentator speculated that the appointment will be a 'mere formality' to demonstrate China's sovereignty over Hong Kong. He suggested that if the Central government refused to appoint the Chief Executive elected by the local authorities, a constitutional crisis would follow with a serious adverse impact on the stability and prosperity of the territory. See Joseph Y.S. Cheng, 'Looking at the Other Options' *South China Morning Post*, 2 March 1986.

[107] Under BL, Art 43, the Chief Executive 'shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region *in accordance with the provisions of [the Basic] Law* [emphasis added].'

[108] BL, Art 50.

[109] BL, Art 73(9).

[110] BL, Art 88; the Commission is to be 'composed of local judges, persons from the legal profession, and eminent persons from other sectors'.

government by a Chief Executive 'with divided loyalties' who is empowered to dissolve the legislature [111] and appoint/remove judges of the courts. [112]

Potential 'infiltration' of HKSAR's legislative autonomy may be countered (with somewhat limited force) by emphasizing, *inter alia* , the restraints embedded in assurances provided by the Basic Law; the confinement of the SC-NPC's review powers to the 'constitutionality' of HKSAR laws (i.e. whether 'regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region' [113]); and the explicit stipulation that '[n]o amendment to [the Basic] Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong' [114] which 'have been elaborated by [the Chinese Government] in the Sino-British Joint Declaration'.[115]

With respect to the SAR's judicial autonomy, it may be observed that — although judicial review of legislation ought to reside in the Region — '[i]n 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 defence matters'. [116] Arguably, the local courts would be able to exercise an incidental, interpretative function — including the classification of issues — and defer to the SC-NPC, when considered necessary, the interpretation of 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'. [117] The SC-NPC, in turn, is obliged to consult the Hong Kong Basic Law Committee before giving an interpretation, and while their interpretation is binding on the courts, 'judgments previously rendered shall not be affected'. [118]

The danger of physical invasion — presently less feared than more subtle forms of intervention — might be mollified by the pledges in both the Sino-British Joint Declaration and the Basic Law that '[t]he maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region Government'

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[111] BL, Art 50.
[112] BL, Art 48(6).
[113] BL, Art 17.
[114] BL, Art 159.
[115] BL, Preamble.
[116] Tamanaha, supra (note 64), at 54–5.
[117] BL, Art 158.
[118] Ibid.

and that '[m]ilitary forces sent by the Central People's Government for the purpose of defence shall not interfere in the internal affairs of the Hong Kong Special Administrative Region.' [119] It may also be noted that under an agreement signed between Britain and China, PLA troops stationed in the territory would be subject to HKSAR law. [120]

On balance — from a purely international legal perspective, and assuming the narrowest construction of potential constraints — the HKSAR appears to have been endowed with a 'high degree of autonomy'.

Internal self-determination

A 'right to democracy'?

While it 'cannot be said to vest in any fragment of a territorially defined national community' nor, as yet, 'entail obligations *erga omnes* of governments of the world that may be universally enforced as a matter of *jus cogens* '[121] — the right to 'internal self-determination' [122] arguably embodies a right of people to 'be able to have a full voice within the legal system of the nation-state, control over its natural resources, appropriate ways of preserving and protection their culture, and generally to be a partner or participant with equal powers within the overall national polity'. [123] There is moreover strong support for the contention that a 'right to democracy' (in the sense of relatively full, free and equal participation in the political process) has evolved as a normative and customary rule of the international system.[124]

Thus, the right of every person to participate in one's government is recognized and guaranteed in all major human rights instruments. It is

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[119] JD, Annex I, Art XII; BL, Art 14.

[120] See 'Britain and China Agree Military Land Transfer' *Financial Times*, 1 July 1994, at 1.

[121] J.D. van der Vyver, 'Sovereignty and Human Rights in Constitutional and International Law' (1991) 5 *Emory International Law Review* 321, 416.

[122] The right to self-determination has been interpreted as pertaining to two aspects: external — alluding to the achievement of independence or other appropriate legal status by peoples under colonial and alien domination; and internal — which refers to the right of citizens to 'maintain, assure and perfect their full legal, political and cultural sovereignty.' See H. Gros Espiell, 'The Right to Self-determination: Implementation of United Nations Resolutions' UN Doc. E/CN.4/Sub.2/405, para 47.

[123] William S. Grodinsky, 'Remarks' (1992) *American Society of International Law Proceedings* 394, 395.

[124] See Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46. See also Gregory H. Fox, 'The Right to Political Participation in International Law' (1992) *Yale Journal of International Law* 539.

enunciated in the Universal Declaration of Human Rights,[125] the International Covenant on Civil and Political Rights, [126] as well as the American, [127] European[128] and African [129] Conventions on Human Rights. It is further affirmed and reinforced in General Assembly Resolution on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, [130] which 'stresses' the member nations' 'conviction that . . . the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of human rights and fundamental freedoms, embracing political, economic, social and cultural rights. Clearly, the most comprehensive prescription of the 'democratic entitlement' is contained in the documents[131] generated by the thirty-four members[132] of the Conference on Security and Co-operation in Europe [CSCE]. [133]

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[125] UNGA Res 217A(III) 1948, Art 21. That the Universal Declaration has acquired the force of customary international law is amply evidenced by subsequent events and the practice of states during the past forty-seven years. See John P. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in B.G. Ramcharan, ed., *Human Rights — Thirty Years After the Universal Declaration* (The Hague: Nijhoff, 1979) 33. See also Richard L. Lillich, 'Civil Rights' in Theodore Meron, ed., *Human Rights in International Law — Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 116–117. Some authors have suggested that the Universal Declaration has in fact the 'attributes of *jus cogens*'. See Myres M. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Order* (New Haven: Yale University Press, 1980) 274.

[126] Repr. in (1967) 6 *International Legal Materials* 368. Article 25 extends to every citizen the right (a) to take part in the conduct of public affairs directly or through freely chosen representatives; (b) to vote and be elected at genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. With a 'balance heavily tilting towards the substantial new majority of states actually practising a reasonably credible version of electoral democracy', the legal obligations contained in the Covenant (now binding on more than two-thirds of all states) may be held to be 'stating what is becoming a customary legal norm applicable to all'. Franck, supra (note 124), 64.

[127] Repr. in (1970) 9 *International Legal Materials 673, 682; Art 23.*

[128] First Protocol to the European Convention on Human Rights, European Treaty Series No 9, 213 UNTS 262,264 (1952); Art 3.

[129] African Charter on Human and Peoples' Rights, repr. in Malcolm Evans, ed., *Blackstone's International Law Documents* , 2nd ed. (London: Blackstone Press, 1994) 251; Art 13.

[130] G.A. Res. 45/150 (21 Feb. 1991).

[131] See Document of the Copenhagen Meeting of the Conference on the Human Dimension, repr. in (1990) 29 *International Legal Materials* 1305, 1308 (para. 5); Charter of Paris for a New Europe, repr. in (1991) 30 *International Legal Materials* 190,194; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, repr. in (1991) 30 *International Legal Materials* 1670; and most recently, The Budapest Summit — Declaration on Genuine Partnership in a New Era, repr. in (1995) 34 *International Legal Materials* 764.

[132] Including Canada, the US and the nations of Eastern Europe.

[133] Renamed the Organization for Security and Co-operation in Europe [OSCE].

Apart from an international normative framework, progress towards what has been termed 'collective democratic security' [134] can be discerned at the international institutional level. Most significant in this respect is the developing practice of election monitoring (including the formulation of relevant guiding rules) under the auspices of international and regional organizations such as the UN, the Organization of American States (OAS), the CSCE and the Commonwealth. [135] A greater willingness to 'intervene' — both 'judicially' (by international human rights courts and commissions)[136] and 'materially' (through the imposition of sanctions or military action) [137] to promote and protect democratic values and principles is also evident.

By the same token, the emerging norm of democracy has found expression in 'state practice'. As amply supported by contemporary studies, the world is undergoing 'democratic globalization' [138] and [a 'third wave' of] 'democratic expansion'.[139] Indeed, even Asia's traditionally authoritarian regimes have gradually embraced democratic ideas and opened the governmental process to grass-root elements. [140]

Leaving aside debates [141] regarding issues such as the universality of western/Westminster model of democracies, the emphasis of elections as the most crucial element of the democratic process or whether democracy is always the 'people's choice/interest' — Hong Kong satisfies the general requirements of democracy. [142] It features an increasingly politicized active

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[134] See James Crawford, 'Democracy and International Law' (1993) *British Yearbook of International Law* 113.

[135] See elaboration in Crawford, ibid., at 123–5.

[136] See Crawford, ibid., at 125–6.

[137] Most recently the UN authorized [under SC Resolution 940 (30 July 1994)] a mission to restore to power the democratically elected president in Haiti.

[138] See Larry Diamond, *The Globalisation of Democracy* (Boulder, Col.: Lynne Rienner Publishers, 1993).

[139] See Samuel D Huntingon, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press, 1991.

[140] See Diane Stormont, 'Democracy Creeps Across Asia — An Analysis' *South China Morning Post*, 22 December 1992, at 5; 'Suharto Calls for More Democracy' *South China Morning Post*, 2 March 1993; Jonathan Braude, 'Leading Asian Slams Autocracy' *South China Morning Post*, 3 December 1994 (referring to a speech by the Malaysian Deputy Prime Minister, Dr Anwar Ibrahim, in which he urged Asian governments to eradicate the vestiges of what he called "oriental despotism" by "enhanc[ing] the workings of truly representative, participatory governments, promot[ing] the rule of laws rather than men, and foster[ing] the cultivation of a free and responsible press").

[141] See, for example, Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law' (1992) *American Society of International Law Proceedings* 261.

[142] See Mason Hills, 'The Rule of Law and Democracy in Hong Kong — Comparative Analysis of British Liberalism and Chinese Socialism' (1994) 1 *E Law — Murdoch University Electronic Journal of Law* .

population, freedom of speech, potentially capable political leaders, belief in democratic principles and individual rights, high level of literacy and education, a pluralistic social order, lack of extreme inequalities among the politically relevant strata, an advanced system of law and regulation of executive and administrative action, as well as a political system which is influenced by a large number of interest groups none of which has absolute control of resources and outcomes.

At the same time, it is evident that the 'democratization' of Hong Kong has not progressed in accordance with local expectations, and falls short of internationally postulated norms (at least in terms of erecting the necessary formal structures). Notwithstanding expressions of the public desire for a faster pace and the consensus advice given by the Office of Members of the Executive and Legislative Councils [OMELCO] on the need for an accelerated timetable to full democracy, the British government resolved to open only 18 of the sixty seats in the Legislative Council for direct elections in 1991 and 20 in 1995 (the last elections due under British rule). [143]

Although a set of reform proposals — introduced by Hong Kong's Governor (Mr Patten) [144] with the aim of expanding the voting franchise in the territory and broadening other democratic initiatives [145] — has recently (30 June 1994) been passed into law, it is viewed by democratically inclined observers as a 'small and belated steps towards the fully democratic political system for which Hong Kong has long been ready'. [146] Indeed, the Governor

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[143] See White Paper on the Annual Report on Hong Kong 1989 to Parliament (Hong Kong: Government Printer, 18 April 1990) para. 29. It may be noted that until 1985 all members of the Legislative Council were either government officials or appointed by the Governor. In 1985 a system of indirect elections was instituted whereby 12 members (out of 57) were elected by functional constituencies (e.g. commercial, financial, education and other professions) and another 12 by an electoral college. First direct elections were held in 1991.

[144] See Governor's Address at the Opening of the Hong Kong Legislative Council, *Our Next Five Years, The Agenda for Hong Kong* (7 October 1992), paras. 101–147 ('The Constitutional Package').

[145] The proposals are: to lower the voting age from 21 to 18; to replace the 1991 system of double member constituencies which are directly elected with single seat constituencies; to replace the corporate voting in existing functional constituencies by individual votes; to make all District Board members elected and to abolish appointed members of Municipal Councils; to give District Boards responsibility for local public work projects and other local activities; to increase their funding; to establish an independent Boundary and Election Commission; to draw all or most of the members of the 1995 Election Committee (which will select Hong Kong's Chief Executive) from the elected membership of the District Boards.

[146] Christine Loh, 'Not Far Enough' *Far Eastern Economic Review* (8 April 1993) 24. Note that under the new system, only 20 LegCo members (out of 60) are elected by universal suffrage.

himself has admitted that the fierce row between Britain and China, triggered by the proposals, was not about whether Hong Kong would soon become a democracy but over 'greater or lesser degrees of semi-autonomy'. [147]

Post-1997 prospects for the implementation of the right of Hong Kong people to internal self-determination do not appear encouraging.[148] 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 . . .'[149]

Yet, as emphasized by the same observer, [150] 'the participation of the Hong Kong people in the autonomous political processes of the SAR immediately on the termination of colonial rule not only underlies the Basic Law, but is central to its success. The denial of that opportunity would confuse and demoralize the community of Hong Kong, sap the vitality of its public life, upset the balance of political forces through outside intervention and destroy the status of the Basic Law. Many other negative consequences would follow, inconsistent with the goal of the stability and prosperity of Hong Kong proclaimed in the Joint Declaration and the Basic Law.'

Succession

Will the HKSAR succeed to existing memberships in international organizations and associations and to rights currently enjoyed by Hong Kong under international agreements?

Given the importance of international links to the maintenance of Hong Kong's status as a major international commercial centre, questions of

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147 Cited in 'Patten's Next Stand' *The Economist* (2 July 1994).

148 Apart from ongoing Chinese threats to dismantle Hong Kong's political institutions in 1997.

149 Yash Ghai, 'A Comparative Perspective' in Peter Wesley-Smith, ed., *Hong Kong's Basic Law Problems & Prospects* (Hong Kong: Faculty of Law University of Hong Kong, 1990) 11.

150 See Yash Ghai, 'Basic Flaws in China's Thinking' *South China Morning Post*, 14 December 1994, at 21.

succession loom large on the agenda of the transfer of sovereignty in 1997. Although some international rules governing the subject of 'state succession'[151] have emerged, they are yet to be crystallized as customary international law. As observed by international jurists, the practice of states in this area has been largely based on political expediency, pragmatic solutions and on power relationships between the states involved, resulting in 'an abundance of contradictory and conflicting trends upon which no coherent theory and principles can be built'. [152]

By the same token, 'a tendency' has been discerned 'to pay regard to the question whether it is just, reasonable, equitable, or in the interests of the international community that rights or obligations should pass upon external changes of sovereignty over territory . . . Moreover, treaties providing *expressis verbis* for the transfer of certain obligations upon changes of sovereignty have generally been interpreted by international tribunals in the light of considerations of reason and justice'. [153]

Yet, insofar as specific provisions are concerned, state practice has remained 'unsettled and full of inconsistencies', [154] notwithstanding the conclusion of the 1978 Vienna Convention on the Succession of States in Respect of Treaties [155] and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. [156] Indeed, while the subject as a whole appears unsuited for doctrinal solution, it is clear that the issue of succession to membership in international organizations cannot be resolved effectively by uniform rules. [157]

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[151] 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, the situation falls within the definition of 'state succession' given that the responsibility for the foreign relations of the territory is passed from one sovereign to another.

[152] See D.P. O'Connell, *State Succession in Municipal and International Law* (Cambridge: Cambridge University Press, 1967), 490.

[153] Ivor A. Shearer, *Starke's International Law*, 11th ed. (London: Butterworths, 1994), 293.

[154] Loc.cit.

[155] Repr. in (1978) 17 *International Legal Materials* 1488.

[156] Repr. in (1983) 22 *International Legal Materials* 306.

[157] 'It has long been recognized that succession to international organization membership is a different question from succession to treaty rights and obligations, even though such membership is often derived from the terms of a multilateral agreement. This difference exists because membership in an international organization creates multiple rights and obligations that extend beyond the comparatively limited and explicit obligations found in most treaties. As such . . . international organization issues need to be considered more on a case-by-case basis in light of the specified conditions of membership.' Edwin D. Williamson, 'Remarks' *American Society of International Law Proceedings*, 1992, at 13–14.

Nor for that matter are any of the few formulated theories commonly associated with state succession strictly appropriate in the unique circumstances of Hong Kong, which is not gaining full independence yet vested with a high degree of autonomy, including extensive powers of external relations. Thus, for example, the 'clean slate' theory advocating the right of newly independent states to decide which bilateral and multilateral treaties will remain in force, has no direct relevance. By the same token, the 'moving treaty frontiers rule' — 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 — is not applicable in light of Hong Kong's special autonomous status (distinguished from complete submergence/integration with another state). In addition to defying easy categorization, Hong Kong's succession problems are further compounded by the fact that the successor sovereign, the PRC is not a party to many of the international agreements presently extending to the territory and is not a member of all the international organizations of which Hong Kong is a member.

It is not surprising, therefore, that the sides to the Sino-British Joint Declaration have opted for a pragmatic formula whereby international agreements implemented in Hong Kong remain in force, even if the PRC is not a party to the agreement, while international agreements to which the PRC is a party (but not Hong Kong) would apply to the territory by the Central People's government only after seeking the views of the SAR government.[158] Additionally, the Chinese government 'shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements'.[159] Special attention is accorded to agreements regarding Hong Kong's international air transport relations, in order to ensure the maintenance of the territory's status as 'a centre of international and regional aviation'.[160] Thus, the HKSAR, acting under authorization from China, may 'renew or amend Air Service Agreements and arrangements previously in force . . .'[161]

The reasonableness of the Hong Kong succession formula apart, third party states must consent to the arrangements postulated since they are not obliged to accept new parties within their treaty relations. Endorsement must

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158 JD, Annex I, art XI, para. 1. See also BL, Art 153.

159 Loc.cit.

160 JD, Annex I, art IX, para. 1. See also BL, Art 128.

161 JD, Annex I, art IX, para. 3; BL, Art 128. In fact, not only will the HKSAR succeed to aviation related rights currently enjoyed by Hong Kong, but it may also assume additional international responsibilities with respect to the management of civil aviation. These responsibilities include the negotiation and conclusion of new Air Services Agreements (ASAs). JD, Annex I, art IX, para. 3; BL, Art 128.

also be gained from the members of the relevant international organizations for the succession of the territory's membership in these organizations. The tasks of procuring the necessary acceptances and working out the technical details of treaty succession have been assigned to the Sino-British Joint Liaison Group [JLG],[162] which lists amongst its 'achievements' securing Hong Kong's continued participation in thirty international organizations[163] as well as preserving the application to the territory of about half of the multilateral agreements currently in force in Hong Kong. [164] Noted in this regard is the approval obtained for Hong Kong's preservation of its own GATT (General Agreement for Trade and Tariffs) membership [165] and the related capacity to enter in its own right into bilateral fibre export restraint agreements under the Multi-Fibre Arrangement.

Of particular significance among treaties to be succeeded to by the HKSAR are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights whose continuance has been specifically guaranteed under the Sino-British Joint Declaration.[166] In fact, it is arguable that even in the absence of an express provision, a presumption operates in favour of continued application of multilateral conventions pertaining to human rights (as well as health, narcotics, and similar matters), which are regarded as 'universal' in nature and hence should not be deemed inapplicable by reason of changes of sovereignty.[167] Such a perception has been recently acknowledged in respect of succession to human rights treaties by former Yugoslavian republics. Looking into this issue, the UN Human Rights Committee took the view

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[162] JD, Annex II.

[163] See *Achievements of the Joint Liaison Group* , supra (note 45); agreement for continued participation in three additional organizations was secured since 1990. For the position in respect of specific organizations as of 31 March 1996 see *United States-Hong Kong Policy Act Report* (1 April 1996), pp. 24–26.

[164] See Constitutional Affairs Branch, *List of Agreed Multilateral Treaties* (5 June 1995). See also Joint Liaison Group *Joint Communique*, 35th Meeting (6, 7, 9 February 1996), announcing that the parties 'reached an agreement in principle on the mechanism for giving legal form to all the agreements on international rights and obligations reached so far by the IRO [International Rights & Obligations] Sub-Group.'

[165] Hong Kong became a separate contracting party to GATT in 1986. See Accession of Hong Kong, Succession, GATT Doc. L/5976 (Apr 23, 1986), repr. in 4 *GATT: Basic Instruments and Selected Documents* 27 (34th Supp 1988).

[166] JD, Annex I, sec. XIII, para. 4.

[167] See Shearer, supra (note 153), at 295. Moreover, it has been suggested that future state practice — shaped by concerns for stability and predictability in international relations — is likely to reconfirm this widely-accepted presumption of continuity of treaty rights and obligations. See Oscar Schachter, 'State Succession: The Once and Future Law' (1993) 33 *Virginia Journal of International Law* 253, 260.

that 'successor states were automatically bound by obligations under international human rights instruments [which applied previously to the respective territories].'[168] Indeed, the Committee further emphasized that no declaration of confirmation was required of the successor governments. [169]

Will acquired property rights be protected after 1997? Would contracts, leases and agreements signed and ratified by the Hong Kong government be valid after 30 June 1997?

According to a well established principle of international law, 'private rights acquired under existing law do not cease on a change of sovereignty.' [170] The *droits acquis principle* has been applied in respect of a variety of rights in ownership and possession of assets, whether vested in natural or jurisdic person, claimed against other private person or against the state. [171] Under European Community law, moreover, acquired rights (*acquis communautire*) encompass *all* rights held by citizens (*qua* citizens) of the Community by virtue of EC legislation and regulation (including freedom of movement within the EC, freedom to establish business and the right to continued payment of national social welfare and medical benefits). [172]

Yet, the *perpetual* maintenance of these rights is not guaranteed and, following the transfer of sovereignty, a successor state is not prohibited from introducing new legislation which would modify or even expropriate private property rights.[173] To safeguard against such eventuality — and to achieve

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[168] See UN ECOSOC, Commission on Human Rights, *Succession of States in Respect of International Human Rights Treaties, Report of the Secretary-General* , E/CN.4/1995/80 (28 November 1994), 4.

[169] Note that all former republics did confirm officially that they continued to be bound by obligations under the relevant international human rights treaties.

[170] Advisory Opinion, *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* 1923 PCIJ (Ser. B) No 6, at 36 ('. . . It can hardly be maintained that, although the law survives, private rights acquired under it have perished'). The principle was also confirmed in *Certain German Interests in Polish Upper Silesia (Germany v Poland)* 1926 PCIJ (Ser. A) No 7. For a most comprehensive exposition of the doctrine of acquired rights and relevant practice see O'Connell, supra (note 152), vol. I, pp. 237–481.

[171] For references to cases regarding land leases, right to exploit forest resources and right to exercise a profession or established business see Michael John Volkovitch, 'Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts' (1992) 92 *Columbia Law Review* 2162, 2204 (notes 227–9).

[172] See Volkovitch, ibid, at 2205 (citing the *Oxford Encyclopedia of European Law: Institutional Law*, pp. 9–10 to support the contention that the concept of *droits acauis* 'has become a fundamental tenet of European Community Law').

[173] See G. Kaeckelbeck, 'The Protection of Vested Rights in International Law' (1936) *British Yearbook of International Law* 1, 17.

smooth transition with a view to maintaining the economic prosperity and social stability of Hong Kong — the preservation of laws currently in force in Hong Kong (including common law, rules of equity, ordinances, subordinate legislation and customary law) beyond 1997 has been secured by an internationally binding agreement, namely the Sino-British Joint Declaration.[174] Thus, whether valid under the territory's common law or granted pursuant to existing ordinances, [175] legal rights acquired prior to the establishment of the HKSAR are to be recognized and protected after 1997. In particular, '[p]rivate property, ownership of enterprises . . . and foreign investment will be protected by law.' [176]

The obligation to honour pre-1997 acquired rights is entrenched in the SAR's Basic Law which — apart from providing in general that the HKSAR 'protect the right of private ownership of property in accordance with law' [177] as well as the 'right of individuals and legal persons to the acquisition, use disposal and inheritance of property and their right to compensation for lawful deprivation of their property' [178] — specifically states that 'documents, certificates, contracts and rights and obligations valid under laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided they do not contravene the [Basic] Law. [179]

No distinction is drawn between rights arising out of private legal arrangements and contracts, leases and agreements signed and ratified by the Hong Kong government. Nor is the legality of any action to be determined by political considerations or approval,[180] if the Rule of Law is upheld. Hence, notwithstanding the termination of Britain's rule over Hong Kong on 30 June 1997, and regardless of any strain in the relationship between the Chinese and British governments, valid legal transactions — entered into by government of private individuals — should retain their validity beyond 1997 (if consistent with the Basic Law). Included are also employment contracts

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[174] JD, Annex II, art II, para 1; see also BL, Art 8.

[175] For example, franchises granted under the Telecommunication Ordinance, the Ferry Service Ordinance, the Cross Harbour Tunnel Ordinance, the Peak Tram Ordinance, or the Television Ordinance.

[176] JD, Art 3(5); Annex I, art VI; BL, Arts 6, 105.

[177] BL, Art 6.

[178] BL, Art 105.

[179] BL, Art 160.

[180] According to a statement by the Hong Kong government, major government franchises and contracts straddling 1997 are discussed — 'as a matter of current practice' — with the Chinese side of the Joint Liaison Group. Reported in Fanny Fong, 'China Veto Threat' *South China Morning Post* , 1 December 1992, at 1.

of civil servants and members of the judiciary, which are in fact given added protection under the Joint Declaration and the Basic Law. [181]

In light of the 'important part which land plays in the development and economy of Hong Kong',[182] a special agreement has been reached under the Sino-British Joint Declaration with respect to land leases. Specifically, all existing leases which extend beyond June 30, 1997 and all rights in relation to such leases, 'shall continue to be recognized and protected under the law of the Hong Kong Special Administrative Region'. [183] Moreover, all long-term leases of land granted by the British Hong Kong government which expire before 30 June 1997 without a right of renewal may be extended until 30 June 2047, without payment of an additional premium. [184] Leases of land which expire after the establishment of the HKSAR would be dealt with under the laws and policies formulated by the Region on its own. [185] 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 30 June 2047),[186] although it is limited to an annual grant of fifty hectares and must share premium income from land transactions equally with the government of the SAR. [187] Particular consideration is given under the Joint Declaration 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 that property since that time), who will pay the same nominal rent as long as the property stays in the male line of the family. [188]

Are foreign investments in the territory safe?

Investors in Hong Kong have to assume a (not uncommon) risk that the territory might experience changes in its political and economic systems. Clearly, not all property rights affected or losses accruing as a result are protected or indemnifyable under general international law. Yet, the right of a state to nationalize, expropriate or transfer ownership of foreign property is subject to generally recognized (both in state practice and judicial decisions)

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[181] JD, Annex I, art IV; BL, Art 100 (all public servants may remain in their employment and retain their conditions of service after 1997); JD, Annex I, arts I, II, III; BL, Arts 8, 19, 80 to 93 (preservation of the existing legal system, judicial system and independence of the judiciary).

[182] JD, 'Explanatory Notes', art 53.

[183] JD, Annex III, art 1.

[184] Ibid., art 2.

[185] Ibid.

[186] Ibid., art 3.

[187] Ibid., art 8.

[188] Ibid., art 2.

international legal restraints. In particular, such acts must not be arbitrary, discriminatory or motivated by considerations of political nature unrelated to the internal well-being of the state. Neither may changed political, economic or social circumstances be invoked to avoid liability for a deprivation of an alien's property that is attributed to the state.[189] Furthermore, the 'taking'[190] of property[191] is contingent upon the payment of appropriate compensation (although opinions diverge regarding the standard and measure of compensation). Foreign nationals must, in any event, be allowed access to the domestic courts to assert their rights and are entitled to due process of the law in respect of a legal dispute arising in the state.

Despite the protection afforded by international law, the Hong Kong government has sought to provide additional assurances in an attempt to stave off fears foreign investors may have over the future of the territory under Chinese rule. Accordingly, it has been negotiating Investment Promotion and Protection Agreements [IPPAs] with its major trading partners.[192] Under such internationally binding treaties (which, being approved by China, are to remain in force after 1997), the parties assume obligations to ensure equality of treatment between foreign and domestic investors; restrict the circumstances in which investments can be expropriated; pay prompt, adequate and effective compensation, should expropriation occur; guarantee that foreign investors are able to remove their investment without restriction in a convertible currency; and provide for the settlement of disputes between investors and local authorities in accordance with agreed procedures by an impartial body. The latter provision is particularly necessary given

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[189] For a detailed discussion of the circumstances in which liability arises see: George H. Aldrich, 'What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal' (1994) 88 *American Journal of International Law* 585.

[190] Including 'constructive taking' [see Burns H. Weston, ' "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"' (1975) 16 *Virginia Journal of International Law* 103] and interference which renders property rights 'useless', regardless of whether the state has purported to expropriate these rights and whether legal title to the property formally remains with the original owner [see, e.g. *Starratt Housing Corporation v Iran* (1983-III) 4 Iran-USCTR 122, repr. in (1984) 23 *International Legal Materials* 1090].

[191] 'Property' is not limited to tangible assets but may include valuable intangible assets such as contractual rights, intellectual property and rights of management and control. See Martin Dixon, *Textbook on International Law*, 2nd ed. (London: Blackstone Press, 1993) 213 (and cases cited therein). It should be noted that certain contracts between an individual/company and a state are regarded as 'internationalised' and hence subject to international law; breach of such contracts may give rise to international responsibility. See ibid., at 218–220.

[192] IPPAs have been concluded with Netherlands, Australia, Sweden, Denmark, Switzerland. See *List of Bilateral Treaties*, supra (note 46). Six more are expected to be signed with Canada, Italy, Germany, France, New Zealand, Belgium, and Austria.

that neither Hong Kong nor China are parties to the 1964 International Convention for the Settlement of Investment Disputes between States and Nationals of Other States. It should nonetheless be added that China is at present signatory to over 18 bilateral Agreements Concerning the Encouragement and Reciprocal Protection of Investment which contain *inter alia* some mutually agreed ad hoc dispute settlement schemes.

Capacity to bear international responsibility

Can Hong Kong be held internationally responsible for failing to perform international obligations?

With the state widely regarded as the fundamental unit of international relations and international law, questions of responsibility in international law are commonly expressed in the context of 'state responsibility'. Nonetheless, there are other bodies or entities which have been recognized or accepted as being capable of incurring international responsibility. Thus, for example, responsibility is borne by international organizations under the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. The European Community has assumed responsibility under the various international treaties and conventions it has concluded, particularly in the areas of trade and international environmental law.

Of particular significance is the increasing tendency under international law to cast responsibility on individuals for international deliquencies: 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 Nuremberg Trials and the Nuremberg Charter as confirmed by the General Assembly; the 1948 Genocide Convention emphasizes that ordinary persons guilty of offences 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 offences have also been made triable and punishable universally by a series of international conventions; individuals are also bound directly by international criminal laws pertaining to espionage, counterfeiting currency, illicit traffic in dangerous drugs, slave trading, trading in women and children, pollution of the seas, damaging submarine cables, offences against persons protected by international law, unlawful despatch of explosives through post, pirate broadcasting, and theft of national and archaeological treasures.

This is not to suggest that the nature or scope of responsibility are identical in respect of all 'subjects' of international law. Most noticeably, while state responsibility ensues *ipso facto* , the responsibility of other international legal persons — as 'creatures of [international] law' — can be said to arise only *ipso jure*. Such entities are beholden to their international responsibilities according to their distinctive role and functions under international law and hence the variance in substance and degree of responsibility among them.

Despite a dearth of international legal rules directly governing the international responsibility of nonstate actors, it may be observed that current discussion surrounding 'state responsibility'[193] has not been oriented towards connecting international legal responsibility with state sovereignty or exclusivity.[194] Indeed, lack of sovereignty is not seen as an obstacle to the attribution of international responsibility: agreements concluded by component units of federal states acting within the limits of proper international personality are the responsibility of such units; similarly, an insurrectionist movement which does not become the new government of a state may, if vested with international personality, engage eventually its own responsibility.

Rather than sovereignty, international responsibility appear to be founded upon 'jurisdictional' competence, namely the competence to make and apply law, and effective control over territory. In this vein, a belligerent state, which exercises jurisdictional competence within the territory it occupies, may be held liable for consequences of activities over which it exercises jurisdiction; whereas in circumstances such as unlawful occupation, annexation, or intervention, responsibility may be based on control of *de facto* jurisdiction. In fact, responsibility for what possibly constitutes the major part of 'state responsibility' — failure to discharge international duties owed to aliens within its borders — is ascribed to the territorial controlling authority.

For its part, the Hong Kong government (and the HKSAR after 1997) is endowed with both jurisdictional competence and effective control over the territory. Consequently, it may be held liable for internationally injurious consequences of activities which originate in the territory and about which the government has knowledge or which fall under its regulatory capacity. Acting as an international juridical person within the limits of its personality,

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[193] The most authoritative study of the topic has been undertaken by the International Law Commission (which has had the topic of state responsibility on its agenda since 1953).

[194] For a recent general analysis of the trend away from a sovereign-centred approach towards a 'functional' one which reflects a 'multi-layered reality consisting of a variety of authoritative structures', see: Christoph Schreuer, 'The Waning of the Sovereign State: Towards a Paradigm for International Law' (1993) 4 *European Journal of International Law* 447.

the Hong Kong government may engage its own responsibility, attributable neither to Britain nor to China. Indeed, it is arguable that the territory's admission as a party to international agreements or as a member of international organizations is impliedly contingent on both an authority (to enter international agreements and join international organizations) and an undertaking to assume responsibility for its own actions.

Accordingly, the local government may be internationally responsible for violating its obligations under treaties to which Hong Kong is a party. It may likewise bear responsibility for infringements of [customary] international law resulting from activities or events over which it has control or jurisdiction. Such infringements may arise, for example, in the context of its obligations pertaining to the treatment of aliens (including refugees), privileges and protection of diplomats, or protection of the environment. [195]

Capacity to bring international claims

Does Hong Kong possess the capacity to bring claims before international forums?

An inquiry into the substance of Hong Kong's international legal identity, its constellation of rights and obligations, is left incomplete without considering the territory's capacity to bring international claims. That the Hong Kong government has the capacity to contract, acquire and dispose of property as well as institute legal proceedings is readily substantiated. Moreover, the government's juridical personality, and that of its 'successor' the HKSAR government, are not confined to the sphere of private law. As explicitly enunciated in the Sino-British Joint Declaration, [196] and reaffirmed in the Basic Law,[197] the territory has been endowed with considerable power to conclude international treaties in its own name and assume overall responsibility for the conduct of its external affairs. Hong Kong's international juridical personality is further manifested in its extensive participation in the activities of international and intergovernmental organizations which invariably entails undertakings of international duties.

Concurrently with the liabilities it has accepted, the territory is bequeathed with international rights both under conventional-treaty law and general-customary international law. Thus, when entering into international

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[195] For a discussion of applicable international obligations in the areas of international refugee law and international environmental law, see Chapter 3.

[196] See JD, Art 3(10); Annex I, art XI.

[197] See BL, Art 151.

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* (treaties are binding on the parties and must be performed in good faith). The territory is similarly entitled to privileges and immunities afforded under general international law to entities discharging governmental functions,[198] including immunity from jurisdiction of foreign domestic courts without the express consent of the Hong Kong government as well as reciprocal privileges and immunities for its official representatives.[199]

It also follows that to vindicate the rights it is bestowed upon by international law, Hong Kong must be deemed to possess the capacity to claim the due benefits and enforce such claims through the appropriate international judicial channels. To enable it to seek reparations on the international plane, the territory should be allowed to gain access to international dispute-resolution forums. Given, however, traditionalist notions regarding *locus standi* before international tribunals, could Hong Kong bring a case on its own behalf to the International Court of Justice?

After conducting a thorough analysis of both the relevant United Nations Charter provisions and international practice, a renowned international lawyer has concluded[200] that '[t]here is a firm policy in favour of increasing the participation of territorial communities in that Statute of the International Court of Justice.' Furthermore, even a 'territorial community with minimum independence and minimum international activity [such as Liechtenstein][201] may elect to become a party to the Statute'. Indeed, 'the prescription of conditions set by the Security Council[202] aims [not at precluding an applicant but] at ensuring effective participation in the work of the Court and related United Nations activity'.

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[198] Under modern doctrine and practice of international law, 'state function' has replaced 'sovereignty' as the rationale and standard of immunity.

[199] 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.

[200] See W. Michael Reisman, *Puerto Rico and the International Process* (Washington: West Publishing, 1975) at 78.

[201] Liechtenstein was admitted as a party to the Statute of the ICJ notwithstanding the fact that it had delegated full authority to Switzerland to administer its foreign affairs. In fact, Liechtenstein was actually involved in proceedings before the ICJ during the time it had deprived itself of capacity to conduct its own foreign relations. See *Nottebhom Case* (Liechtenstein v Guatemala) [1955] ICJ Reports 4.

[202] Under UN 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.'

As reflected in the UN's deliberations of Liechtenstein's application for membership in the ICJ Statute, emphasis has been placed on 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 universality of participation would be realized'. [203] In an analogous context, Hong Kong's status and capacity as an international actor, its extensive international relationships, and the obvious benefits all parties would derive from its adherence to the Statute of the International Court of Justice, should act to reinforce the territory's case for becoming a party to the Statute.

Potentially, Hong Kong may gain access to the International Court of Justice by virtue of its membership in a 'specialized UN agency'. [204] Thus, should the International Labour Organization, for example, be authorized by the General Assembly to request the ICJ's Advisory Opinion[205] on matters related to the territory, Hong Kong is likely[206] to be permitted to communicate relevant grievances. Similar 'procedural' allowances to present claims before the Court could possibly be secured by reference to comparable concessions made to individuals [207] and other legal persons, [208] in the light of a growing concern for human rights and a recognition of the imperative role of non-state actors in addressing global security challenges (e.g. environment, refugees, etc.).[209]

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[203] See Reisman, supra (note 200) at 69–70.

[204] UN 'specialized agencies' include the: International Labour Organization, World Health Organization, the World Bank, International Monetary Fund, International Civil Aviation Organization, UN Educational, Scientific and Cultural Organization, Universal Postal Union, International Communication Union, Inter-Governmental Maritime Consultative Organization, World Trade Organization.

[205] In accordance with UN Charter, Art 96(2).

[206] Based on previous practice of the Court. Note, for example, the right granted by the ICJ to the International League for the Rights of Man to submit a written statement on legal issues in respect of the international status of South West Africa, [1950] ICJ Reports 128.

[207] See discussion in P.K. Menon, 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1 *Florida State University Journal of Transnational Law and Policy* 151, 158–174. Note that individuals have *locus standi* before international tribunals such as the Iran-United States Claims Tribunal and the United Nations Compensation Commission established after the 1990–1991 Persian Gulf Crisis. Regionally, the European Court of Justice grants standing to individuals or other non-state actors for certain types of cases.

[208] For example, the International League for Human Rights was permitted to submit information in the *South-West Africa* proceedings.

[209] For a forceful argumentation in favour of allowing nongovernmental organizations active involvement in the international adjudicatory process see: Dianah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611.

Could the Hong Kong/HKSAR government offer 'diplomatic protection' to 'its people'?

Apart from the issues of Hong Kong's capability to bring international claims on its own behalf and the territory's *locus standi* before international tribunals, a related question may arise in respect of the right of the Hong Kong/HKSAR government to [diplomatically] protect or make specific representation involving claims to reparation and compensation arising from injuries to 'its nationals'. As currently understood, 'diplomatic protection' is 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'. [210] Hence, statehood is not a necessary condition of diplomatic protection, and the lack of statehood should not in itself preclude Hong Kong from extending protection to its inhabitants.

However, subjects of international law are entitled to protect only those individuals with whom they have a special relationship. This relationship is usually defined as nationality, although exceptions have been admitted. For instance, the UN may institute a claim on behalf of an injured UN employee.[211] Another example is the practice of extending a state's diplomatic protection to seamen of any nationality who are serving on a ship flying that state's flag.[212] The rule can, in any event, be waived with the consent of the respondent state.

Not only have deviations from the traditional 'nationality rule' been accepted but the doctrinal foundation of the rule itself has been questioned. Predicated as it is on the assumption that

> [i]n taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting *its own right* , the right to ensure in the person of its nationals respect for the rules of international law . . . [213]

the rule is at clear variance with both international legal theory and practice which recognize individuals as 'subjects' of international law. Indeed, it is contended that the emphasis on human rights in current international law

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[210] William K. Geck, 'Diplomatic Protection' in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* (Amsterdam, New York, Oxford: North Holland Publishing, 1981-), Instl. 10 (1987) 99, 100.

[211] See *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174.

[212] See A.D. Watts, 'The Protection of Alien Seamen' (1958) *International and Comparative Law Quarterly* 691.

[213] *Panevezys-Saldutiskis Railway Case* (Estonia v Lithuenia) [1939] PCIJ Reports (ser. A/B, No. 76) 16. [emphasis added]

finds its corollary in the right of each state to take protective measures in favour of *all* (regardless of nationality) persons whose rights are immediately threatened.[214]

It may, therefore, be concluded that even if some sort of relationship is to remain a prerequisite for diplomatic protection, that relationship need not be nationality. In fact, the *Nottebhom Case*,[215] often cited as authority for the nationality rule, could be said to have replaced the nationality nexus with that of a 'genuine link'.[216] Such a 'link' is also emphasized in the context of international maritime law[217] pertaining to diplomatic protection to ships against which international wrongs have been committed. Applying these contemporary international legal perceptions to the Hong Kong predicament, it is evident that the territory's residents stand in a sufficiently 'close relationship' to the Hong Kong government to place on the latter a responsibility for their welfare and protection and to permit the espousal of a claim for damages suffered by them as a result of breach of an international obligation. The competence of the HKSAR government to attribute national character to its ships[218] and the authority granted to it to issue passports and conclude visa abolition agreements with foreign states or regions[219] serve to uphold the right of that government to represent the interests of its citizens in the sphere of international relations.

It is also clear that neither the British Nationality (Overseas) [BN(O)] nor the Chinese nationality to be conferred on the inhabitants of the HKSAR could be regarded as providing real and effective nationality,[220] thus reinforcing the case for the HKSAR to afford diplomatic — or equivalent — protection for its people. Furthermore, given that British consular protection (or for that matter protection of other foreign countries where 'HKSAR Chinese nationals' have established a right of abode)[221] would not

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[214] See Geck, supra (note 210), at 115.

[215] [1955] ICJ Reports 4. The case involved proceedings instituted by the government of Liechtenstein against Guatemala for acting unlawfully towards the person and property of Friedrich Nottebhom, a citizen of Liechtenstein.

[216] The International Court of Justice found that Nottebhom had little real/genuine connection with Liechtenstein, whereas he had been settled in Guatemala for 34 years and had an intention to remain there. His connection with Guatemala was held far stronger than his 'nationality' connection with Liechtenstein and, consequently, Liechtenstein was not entitled to extend to Mr Nottebhom diplomatic protection.

[217] See, e.g. Art 91(1), 1982 UN Convention on the Law of the Sea; 1987 UN Convention on Conditions for Regulation of Ships.

[218] Through registration and documentation. See JD, Annex I, art VIII, para 2; BL, Art 125.

[219] See JD, Annex I, art XIV; BL, Arts 154 & 155.

[220] For further elaboration see discussion in Chapter 4.

[221] See Chapter 4.

be available in the HKSAR 'and other parts of the People's Republic of China',[222] the right of the HKSAR government to furnish diplomatic protection to Hong Kong people should extend to injuries caused by internationally wrongful acts committed within the PRC. A contention that HKSAR citizens would be 'seeking remedy in international forums against their own government' [223] may not be invoked since the PRC, although the sovereign power, is not the 'government of the Hong Kong people'.

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[222] See JD, 'Chinese Memorandum', para 4.

[223] A doubtful contention in any event in the light of rights granted to individuals under international law against their own state. See, e.g. International Covenant on Civil and Political Rights, art 41; European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 24 & 48.

Epilogue

This book focuses on Hong Kong as a highly autonomous territory from an international legal perspective. The approach is grounded in a broad normative framework which transcends constraints imposed by narrowly-based shifting political configurations. The spirit pervading the text is consistently positive in affirming the vision inspired by the 1984 Sino-British Joint Declaration.

It needs to be acknowledged, however, that the implementation of this vision hinges on the political realities unfolding in both China and Hong Kong — perhaps even Taiwan — and the quality of the relationship between Beijing and the outside world. These crucial non-legal factors could either undermine or underpin the vision, or just dilute it sufficiently to render the original blueprint largely irrelevant.

At the time of writing, for instance, one cannot dismiss the prospect of a power struggle in China. Such a destabilizing development might have the effect of redirecting mainland energies inwards in a disruptive manner and plunging Hong Kong into an identity crisis. Even the mere escalation in nationalist sentiment in Beijing, already reflected to some extent in policies vis-à-vis Hong Kong and Taiwan, could materially diminish the prospect of a high degree of autonomy for the territory.

Indeed, it is not altogether clear that China is committed to the 'one country, two systems' formula as construed in this book. Recent events suggest that Beijing is inclined to seize control of the 'commanding heights' of the Hong Kong power structure — the legislature, the civil service, the judiciary, the media and strategic industries such as aviation. The process may possibly be carried far enough to undermine local autonomy.

The transition from British to Chinese rule could also prove not entirely smooth due to resistance from segments of Hong Kong society — such as its vociferous democrats — that Beijing is determined to remove from the political arena. The reaction which this might provoke could rapidly shift the balance from self-rule to central control. A deterioration in the relationship

between China and Taiwan, or between the former and major international powers such as the United States, could reinforce the trend.

As the above caveats demonstrate, the 'one country, two systems' concept is easier to grasp at the theoretical than practical level. Two divergent entities — an advanced capitalist society which is driven by the 'rule of law' and a country at early stages of capitalist development which is propelled by the 'rule of man' — are brought within a single political framework, albeit a flexible one. It remains to be seen whether the partial integration with the mainland leaves the foundations of the Hong Kong system intact.

On the positive side, the divergence between the two entities is diminishing. China is evolving into a less centrally controlled society and one which is governed in a less arbitrary fashion. From a long-term perspective, this process, which is nearly two decades old, is bound to continue and even gather further momentum. A feature of the transformation is a greater willingness to abide by established international legal norms. This increases the probability of Hong Kong functioning within the kind of normative framework envisaged in the present book.

If a more pessimistic scenario materializes, our effort would not necessarily be in vain. Such a normative framework is needed to assess actual practices in terms of their deviation from the prescribed international standards. Political realities are a fact of life which cannot be denied, but they need to be critically evaluated in the light of generally accepted legal principles.

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