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Comments

SELF-DETERMINATION IN HONG KONG: A NEW CHALLENGE TO AN OLD DOCTRINE

The British Crown Colony of Hong Kong, long known for its status as a major Pacific Basin financial center, will become a "special administrative region" of the People's Republic of China (PRC) in 1997. Great Britain and the PRC have negotiated an agreement designed not only to transfer sovereignty over the colony to the PRC but also to allow the PRC to modernize its economy by preserving a capitalist enclave within the communist state. The maintenance of the economic stature of the colony and the success of this grand experiment is largely dependent upon the degree of confidence with which the people of Hong Kong view the agreement. This Comment argues that the right of self-determination should be invoked on behalf of the people of Hong Kong to allow them to make a free and informed choice for the future.

INTRODUCTION

"What is freedom? Freedom is the right to choose: the right to create for yourself the alternatives of choice. Without the possibility of choice and the exercise of choice a man is not a man but a member, an instrument, a thing."¹

In September 1984 our representatives of the governments of Great Britain and the People's Republic of China (PRC) concluded negotiations regarding the transfer of sovereignty over the 5.5 million inhabitants of Hong Kong when a lease covering most of the colony expires in 1997.² The draft agreement resulting from the negotiations is expected to be ratified in treaty form during the sum-

1. A. MACLEISH in PETER'S QUOTATIONS 208 (1977).

2. The ninety-nine year lease, obtained by Great Britain under the terms of the 1898 Convention of Peking, applies only to the New Territories located on the Chinese mainland north of the Kowloon Peninsula. Tso, *The Legal Implications of the Sino-British Treaties Regarding Hong Kong*, 4 LO. L.A. INT'L & COMP. L.J. 111, 113 (1981).

mer of 1985.³ There are many political, economic, and social problems to be resolved during the interim twelve-year period before the transfer occurs. One of the most pressing questions, however, is the extent to which the people of Hong Kong will have a say in their future.

The British and Communist Chinese have determined the future political status of the colony and the rights of its inhabitants without Hong Kong's active participation. The conduct of the negotiations and the agreement itself may thus be inconsistent with an established practice in international law. Professor Louis Henkin has identified what he calls "the classic case of self-determination — namely, the international recognition of the rights of the inhabitants of a *colony* to choose freely their independence or association with another state."⁴ The right of the people of Hong Kong to exercise self-determination has been largely ignored in international circles, and indeed, even in the United Nations, the birthplace of the principle.⁵

Nearly a quarter of a century ago, the UN forged a doctrine which is the foundation of existence for many of the states of the Third World today. Calling for a "speedy and unconditional end [to] colonialism in all its forms and manifestations,"⁶ the UN developed the principle of the right of self-determination to take into account the freely expressed wishes of the people of a territory seeking self-government.⁷ As an imperative and immediate goal for all peoples under colonial or alien domination,⁸ self-determination was widely used by the Third World bloc to counter "economic imperialism."⁹

Seeking to secure permanent sovereignty over their natural wealth and resources in a new international economic order,¹⁰ the Third World countries emphasized self-determination, anti-colonialism,

3. See generally A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984 [hereinafter referred to as Hong Kong White Paper].

4. L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 211 (1980) (emphasis added) [hereinafter cited as L. HENKIN].

5. Telephone interview with Mr. Jack Hand, Hong Kong Commission, British Embassy, New York (July 26, 1984).

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

7. U.N. CHARTER art. 76, para. b.

8. M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* 10 (1982).

9. Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 46, 51-52 (1974), reprinted in L. HENKIN, *supra* note 4, at 32.

10. See generally UN Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, (Sixth Spec. Sess.) 29 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974).

sovereign equality, non-intervention, and the invalidity of unequal treaties in their international affairs.¹¹ These new states, with the authority to make and to change law in the international political system,¹² have made self-determination “*the* preemptory norm of international law.”¹³ As new states carved out of old colonial regimes were admitted to the UN, adherence to the principle increased. The principle had a sort of “snowball” effect; as self-determination became more a part of the fabric of international law, other political units within colonial areas sought to exercise the right. These newly “self-determined” states aligned themselves with the growing Third World bloc.¹⁴ No longer the new doctrine of the United Nations,¹⁵ the principle of self-determination is capable of overriding any other preemptory norm of international law, including the prohibition of the threat or use of force in international relations.¹⁶ Within this historical context, the principle occupies a position of great importance in UN discussion.

The importance of the self-determination principle to the Third World has not been lost on the PRC, which has sought to emerge as the champion of the lesser-developed countries.¹⁷ Newly admitted to the UN, the PRC apparently accepts the right of self-determination in principle.¹⁸ Its refusal to accept an independent Taiwan, however, indicates a tendency to manipulate the principle without much regard for consistency or reciprocity.¹⁹ Some commentators believe that the PRC intends the Hong Kong “one country, two systems concept” to serve as a model for Taiwan and Portuguese owned Macao so as to soften its attempt to reunify China.²⁰

Although both the Peking and London governments have given assurances that the unique economic system and way of life of Hong Kong will be preserved,²¹ the juxtaposition of different political systems will undoubtedly require some adjustments in the economic system of Hong Kong. It is not surprising that much of the population

11. Lissitzyn, *International Law Today and Tomorrow*, (1965), reprinted in L. HENKIN *supra* note 3, at 31.

12. L. HENKIN, *supra* note 4, at 32.

13. M. POMERANCE, *supra* note 8, at 1 (emphasis in original).

14. L. HENKIN, *supra* note 4, at 32.

15. See generally M. POMERANCE, *supra* note 8.

16. *Id.* at 1.

17. L. HENKIN, *supra* note 4, at 32.

18. *Id.*

19. Lissitzyn, *supra* note 11, at 31.

20. The Washington Times, June 15, 1984, at 7A, col. 2.

21. Hong Kong White Paper, *supra* note 3, at 8, 12.

of Hong Kong remains skeptical of PRC assurances that the colony will be allowed to freely continue its economic pursuits.²² Ninety-eight percent of the population of Hong Kong is Chinese; many have immigrated from mainland China.²³ According to British government figures, approximately three-quarters of a million people, mainly from the commercial centers of Kwangtung province and Shanghai, left China and fled to Hong Kong when the communists came to power.²⁴ Although there is no accurate estimate of how many Chinese will leave the colony before 1997, many of the economically-minded citizens of Hong Kong are certain that a heavy-handed bureaucracy from the mainland will stifle the colony's "free-wheeling" economy.²⁵

Hong Kong presents an opportunity for the world community to review the self-determination principle from a fresh perspective. This Comment will briefly discuss the origins of the right of self-determination, trace its development as a norm of international law, and analyze the current UN practice of the right.²⁶ Specifically, the principle will be applied to the transfer of sovereignty of Hong Kong in light of the special circumstances of that territory and its people.

Without the right of self-determination, the people of Hong Kong have two choices: (1) remain in the territory and become citizens of the PRC; or (2) exercise the private equivalent of secession—emigration.²⁷ If they can successfully claim the right of self-determination, Hong Kong citizens will have "the right of every people to choose the sovereignty under which they shall live, to be free of alien masters, and not to be handed about from sovereignty to sovereignty as if they were property."²⁸

RELEVANT HISTORY OF SOVEREIGN CLAIMS TO HONG KONG

The Crown Colony of Hong Kong consists of Hong Kong Island, British Kowloon, Stonecutters Island, and the New Territories. British sovereignty over the colony began after the defeat of Chinese forces in the Opium War. Hong Kong Island, at the time little more than a barren rock, was formally occupied by a British Naval party on January 26, 1841, and was proclaimed a British colony a few

22. L.A. Times, Aug. 16, 1984, part I-B, at 6, col. 1.

23. Tso, *supra* note 2, at 128-29.

24. Fact sheet prepared by British Information Services, Oct. 1976, at 4. [hereinafter cited as Fact sheet].

25. Tso, *supra* note 2, at 134-35.

26. See generally M. POMERANCE, *supra* note 8 (Professor Pomerance thoroughly reviews the history of self-determination and its development as a norm of international law. It is recommended for any serious study of the principle.).

27. *Id.* at 27 n.151.

28. 3 THE PUBLIC PAPERS OF WOODROW WILSON (R. Baker & W. Dodds eds. 1927) cited in M. POMERANCE, *supra* note 8, at 1.

days later.²⁹ The 1842 treaty of Nanking ceded the island to Britain in perpetuity,³⁰ and declared Hong Kong a free port.³¹

Great Britain acquired control over Stonecutters Island and the Kowloon Peninsula at the 1860 Convention of Peking.³² The colony was further enlarged in 1898 by another Convention of Peking whereby Great Britain obtained a ninety-nine year lease for the New Territories.³³ The lease increased the size of the colony from 43 to 400 square miles—an action perceived by the British as necessary to protect the colony.³⁴ In 1997, when the lease expires, Great Britain will relinquish sovereignty over the New Territories as well as those areas held in perpetuity.³⁵

Since the establishment of the PRC in 1949, the Chinese have consistently asserted that Hong Kong is Chinese territory, and issues regarding Hong Kong and Macao are not subject to UN scrutiny but, rather, are entirely within the sovereign authority of the PRC.³⁶ The PRC's objections to China as a continued foreign presence in Hong Kong and Macao are regarded by some commentators as merely a preemptive effort "designed to abort any future claims by the inhabitants . . . to separate selfhood."³⁷

The Chinese view the treaties with Great Britain as unequal and imposed by duress during a period of weakness and thus unenforceable.³⁸ However, while reserving the right to adopt its own solution if agreement is not reached,³⁹ the PRC has negotiated the transfer and sovereignty on the basis of those treaties as a source of international law in accordance with Article 38 of the Statute of the International Court of Justice.⁴⁰

29. Fact sheet, *supra* note 24, at 4.

30. Under Article III of the Treaty of Nanking, the Island of Hong Kong was ceded to Britain "to be possessed in perpetuity by her Britain-nick Majesty, her Heirs and Successors. . . ." Tso, *supra* note 2, at 112.

31. Fact sheet, *supra* note 24, at 4.

32. Tso, *supra* note 2, at 113.

33. *Id.*

34. *Id.*

35. Wall St. J., June 22, 1984, at 1, col. 1. This decision has never really been in doubt as both the British and Chinese understand that the Island of Hong Kong could not remain under British control without the New Territories to support it. See Hong Kong White Paper, *supra* note 3, at 8.

36. J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 383-84 (1974), cited in Tso, *supra* note 2, at 115-16.

37. M. POMERANCE, *supra* note 8, at 27.

38. Tso, *supra* note 2, at 118.

39. The Times (London), Feb. 23, 1984, at 9, col. 5. See Hong Kong White Paper, *supra* note 3, at 7.

40. See generally Statute of the International Court of Justice, 59 Stat. 1055,

In March 1984, the appointed legislative council of Hong Kong (LEGCO) claimed the right to debate any proposals regarding the future of the colony.⁴¹ Recently, the British government has set up the Macpherson assessment office in Hong Kong to solicit comments from the residents.⁴² Apparently, Great Britain is willing to let Hong Kong have a say in its own future but only to the extent that Hong Kong can approve or reject the whole agreement.⁴³ If it is apparent, through whatever indicia available, that Hong Kong will not accept the agreement as proposed, the British Parliament will not ratify that agreement.⁴⁴ The leader of the PRC, Deng Xiaoping, met with members of Hong Kong's appointed executive council (EXCO) but refused to allow any Hong Kong representative, other than the British-born governor, to actively participate in the negotiations.⁴⁵ Hence, the people of Hong Kong have not had any real impact upon the agreement. If the agreement is not ratified by the British Parliament, Hong Kong may be forced to comply with essentially the terms dictated by the PRC.⁴⁶

The lack of a representative government in Hong Kong presents a major obstacle in determining a consensus of the people regarding the agreement. The present government, apart from British authorities, is largely appointive. The Unofficial Members of the Executive and Legislative Councils (UMELCO) is the highest consultative body of the Hong Kong government.⁴⁷ Its members are appointed by the governor under the authority vested in him by Letters Patent and Royal Instructions.⁴⁸ The purpose of UMELCO is to provide a channel of communication by which the people of Hong Kong can express their views to the British authorities.⁴⁹

In attempting to convey the concerns of the Hong Kong people to both the Peking and London governments, UMELCO has been discredited by members of the British parliament as being "unrepresentative."⁵⁰ This position is ironic, considering that this undemo-

T.S. 993, 3 Bevens 1179 (1945).

41. The Times (London), Mar. 17, 1984, at 4, col. 7.

42. Telephone interview with Mr. Jack Hand, Hong Kong Commission, British Embassy, New York (July 24, 1984). The British government has set up an assessment office in Hong Kong under the direction of Mr. Ian Macpherson. The office will begin to function after the draft 1997 agreement is published. See Hong Kong White Paper, *supra* note 3, at 8-9.

43. Hong Kong White Paper, *supra* note 3, at 7-9.

44. Telephone interview with Mr. Jack Hand, Hong Kong Commission, British Embassy, New York (July 24, 1984).

45. *Id.*

46. Hong Kong White Paper, *supra* note 3, at 7.

47. South China Morning Post, July 25, 1984, at 2, col. 4.

48. Letters Patent and Royal Instructions were commonly issued to administrative authorities in the British Commonwealths to delineate their powers.

49. Fact sheet, *supra* note 24, at 5.

50. South China Morning Post, July 25, 1984, at 2, col. 4.

cratic form of government was imposed upon Hong Kong by Great Britain. Nevertheless, the people of Hong Kong should determine whether or not UMELCO represents their views. The crucial issue is how the acceptability of the agreement will be tested.

Reforms advocating indirect elections to LEGCO have been proposed by members of the Hong Kong community in order to secure a more representative government.⁵¹ The "Green Paper"⁵² currently being discussed in LEGCO acknowledges the need to "firmly establish the root of the authority of the Government in the community despite the change in Hong Kong's sovereignty."⁵³ It proposes gradual introduction of direct elections with a review of the process to be conducted in 1989.⁵⁴ The objective of the paper is to provide an authoritative channel for the expression of the views of the people of Hong Kong.⁵⁵

From the foregoing, it appears that the people of Hong Kong are laying the groundwork for a claim to self-determination. One of the major tenets of self-determination is that integration into another state should be the result of the "freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."⁵⁶ Peking is displeased with these developments because a more representative government, with direct elections, may not be in accord with China's own plans for the administration of the region.⁵⁷ Official disapproval of the "Green Paper", however, would in all likelihood generate charges of meddling in Hong Kong affairs even before 1997. The PRC has therefore declared that the document is a matter for the British to resolve. Thus, it has tacitly reserved the right to disagree in the future.⁵⁸

The PRC has concerned itself with implementation of the transfer of sovereignty, seeking a smooth transitional period prior to 1997. Having determined the basic structure of administration of Hong Kong, the PRC has attempted to gain the confidence of the people of

51. *Id.* at 9, col. 4.

52. A "Green Paper" is a preliminary document circulated in the British government on a particular subject. Upon passage by the British Parliament, a "White Paper" formalizing the proposal is issued.

53. South China Morning Post, July 26, 1984, at 9, col. 4.

54. *Id.*

55. *Id.*

56. M. POMERANCE, *supra* note 8, at 10-11.

57. South China Morning Post, July 26, 1984, at 9, col. 1.

58. *Id.*

the territory by illuminating, in as much detail as it deems necessary, the provisions of the Hong Kong agreement.

THE DETAILS OF THE AGREEMENT

Great Britain and the PRC have agreed upon an arrangement that will preserve Hong Kong's unique economic system and way of life for fifty years after 1997.⁵⁹ The agreement and all its annexes will be legally binding and "prescribed with sufficient clarity and precision to command the confidence of the people who live, work, trade and invest" in Hong Kong.⁶⁰

Hong Kong will be governed as a "special administrative region" of the PRC, allowing the capitalist enclave a "high degree of autonomy."⁶¹ The PRC has previously indicated that the economic and social systems will remain basically unchanged, except for those "laws which are colonialist or diminish China's sovereignty."⁶²

Specifically, the agreement will provide for the preservation of Hong Kong's legal system and the body of laws in force, including common law rules of equity, ordinances, subordinate legislation, and customary law. The power to make laws will continue to lie with the legislative authorities of Hong Kong.⁶³ Judicial power, including the final right of appeal, will remain in the courts of Hong Kong.⁶⁴ Essentially, the agreement guarantees that Hong Kong will be governed by Hong Kong people.⁶⁵

Furthermore, Hong Kong will be able to continue to operate as a separate customs territory; to continue to participate in international organizations and trade agreements, such as the General Agreement of Tariffs and Trade (GATT); and to continue to enjoy its own export quotas and tariff preferences. In short, Hong Kong will retain its status as a free port and a major manufacturing and trading economy.⁶⁶

Most importantly, Hong Kong will manage its own financial affairs and retain its revenues for its own purposes.⁶⁷ Although it is unclear how the PRC will integrate capitalist methods into its own economy, Hong Kong will continue to serve as an important outlet for Chinese goods. The juxtaposition of these seemingly incompatible systems should prove to be an extremely interesting aspect of the agreement to economists.

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59. Hong Kong White Paper, *supra* note 3, at 8.
 60. South China Morning Post, Aug. 2, 1984 at 8, col. 1.
 61. Hong Kong White Paper, *supra* note 3, at 11.
 62. The Times (London), Jan. 17, 1984, at 28, col. 1.
 63. Hong Kong White Paper, *supra* note 3, at 15.
 64. *Id.* at 15-16.
 65. L.A. Times, Aug. 2, 1984, part I, at 16, col. 1.
 66. Hong Kong White Paper, *supra* note 3, at 12.
 67. *Id.* at 12, 17.

The personal rights of the residents of Hong Kong will be protected; they will continue to enjoy the right to travel and to move freely into and out of Hong Kong. The various educational programs of Hong Kong will be preserved, as will the present freedom of choice of education, including the ability to pursue an education overseas.⁶⁸ In sum, the agreement theoretically will "provide for the preservation of all rights and freedoms which the people of Hong Kong now enjoy."⁶⁹

The manner in which foreign policy and defense functions of Hong Kong will be conducted is of major concern to its citizens. The agreement provides that Chinese communist troops will be garrisoned in Hong Kong, but does not permit these forces to interfere with the internal affairs of the Hong Kong Special Administrative Region (SAR).⁷⁰ The maintenance of public order shall be the responsibility of the Hong Kong SAR government.⁷¹ The presence of troops in Hong Kong may be justified in order to protect the territorial integrity of the PRC. The question remains, however, whether that sovereign right must yield to the self-determination principle.⁷²

Finally, Britain has agreed to a Chinese proposal that a joint liaison group be formed to observe the transition process. The group will meet alternately in Peking, London and Hong Kong before permanently headquartering in Hong Kong in 1988. The group will have no supervisory role, but will act only as a consulting body. It will have no part in the administration of Hong Kong, but will serve as a vehicle for the exchange of information on the implementation of the agreement.⁷³ The liaison group is crucial to the need of the PRC to fully understand the intricacies of the Hong Kong economic system. The actions of the liaison group will be closely followed by the people of Hong Kong. Although Peking has asked that the group include local leaders,⁷⁴ Hong Kong remains wary of any Chinese interference in its affairs.⁷⁵ The value of the liaison group may be measured by the impression the Chinese members make upon the people of Hong Kong, rather than the information that the PRC can extract during the transition period. Whether the region will remain

68. *Id.* at 21.

69. South China Morning Post, Aug. 2, 1984, at 8, col. 1.

70. Hong Kong White Paper, *supra* note 3, at 23.

71. *Id.*

72. *See supra* note 14; *see also infra* note 82.

73. Hong Kong White Paper, *supra* note at 13, 26-27.

74. South China Morning Post, July 25, 1984, at 1, col. 1.

75. *Id.* at 9, col. 1.

a major Pacific Basin financial center must ultimately be determined by the people of Hong Kong. Given the freedom to determine their political status and to pursue their economic, social, and cultural development, they will more readily accept the challenge of this unique proposal for coexistence. It is within this setting that the principle of self-determination should be reviewed.

SELF-DETERMINATION AS A NORM OF INTERNATIONAL LAW

Self-determination, like any other principle of international law, derives its legitimacy from the degree of acceptance it receives from the community of nations. Whether a state accepts a principle as a norm of international law is largely dependent on the source to which it may be attributed, and the extent to which that source reflects the national interest of the state.⁷⁶ Nations recognize that observance of customary norms of international law is often in their national interest. Principles of reciprocity and continuity in mutual relations among states suggest that even if there is no international authority to enforce the law, there is "horizontal enforcement" in the reactions of other nations.⁷⁷

A body of international law has been developed in the sense that commonly accepted *sources* of international law have been identified. Article 38 of the International Court of Justice (ICJ)⁷⁸ provides that the Court, in interpreting international law, shall apply international conventions, international custom, the "general principles of law recognized by civilized nations," and the judicial decisions and teachings of the most highly qualified publicists.⁷⁹ A prerequisite to the use of treaties and custom as methods of creating principles of international law is agreement among states on the recognition of certain rules as norms.⁸⁰ There is a distinction between the binding effect of treaties and that of customary law. Treaties are actually only a source of obligation, derived from mutually binding promises, rather than a source of law. Yet it is a general principle of law, recognized by civilized nations, that the obligation be carried out, or *pacta sunt servanda*.⁸¹ Continued adherence to an international convention is evidence of a general practice accepted as law, or interna-

76. See generally, L. HENKIN, *HOW NATIONS BEHAVE* (1979), reprinted in L. HENKIN, *supra* note 4, at 14-16.

77. *Id.* at 15.

78. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179, art. 38, para. 1(a)-(d).

79. *Id.*

80. Tunkin, *Coexistence and International Law*, 3 RECUEIL DES COURS 1, 21-23 (1958), reprinted in L. HENKIN, *supra* note 4, at 70.

81. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, SYMBOLAE VERZIL 153, 157-59 (1958), reprinted in L. HENKIN, *supra* note 4, at 69-70.

tional custom, a source of law.⁸² When a custom satisfies the requirements of Article 38 of the ICJ, it constitutes a general rule of international law that applies to every state, unless a state unambiguously and consistently objects to the recognition of the practice as law.⁸³

The UN is the institution best suited for the development of custom-based international law. The UN provides a forum for discussion on any subject of concern to interested states; it may adopt principles in formal declarations and resolutions; and it allows a state to register formal objections.⁸⁴

The pronouncements of the UN and the ICJ represent a consensus, especially within the Third World, of the importance of the principle of self-determination to world peace and stability. General Assembly Resolution 1514 (XV) of 1960,⁸⁵ the cornerstone of self-determination, declares in part: "All peoples have the right to self-

82. L. HENKIN, *supra* note 4, at 36.

83. Waldock, *General Course on International Law*, 2 RECUEIL DES COURS 1, 49-53 (1962), reprinted in L. HENKIN, *supra* note 4, at 66.

84. See generally U.N. CHARTER arts. 33-38.

85. G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). The resolution declares:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, noninterference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Id.

determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”⁸⁶

As Professor Michla Pomerance recounts, “[no] resolution in UN history has been cited more frequently than Resolution 1514 (XV), the Declaration on Colonialism.”⁸⁷ One view of the effect of this practice was expressed as follows: “[T]he cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time . . . [is] a general *opinio juris* . . . [constituting] a norm of customary international law.”⁸⁸ Resolution 1514 (XV) and the long list of resolutions in its wake, which proclaim the principle of self-determination to be an operative right in the decolonization of non-self-governing territories, constitute a general practice accepted as law.⁸⁹

A contrary view contends that self-determination was never an operative principle of the UN Charter, but rather a *desiderata* of it.⁹⁰ Other commentators deny that the principle has become a right, thus minimizing the authority of the UN.⁹¹

The Declaration of Colonialism is consistent with the purposes and principles of the UN Charter, which include the desire “[t]o develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples.”⁹² Chapters XI and XII of the UN Charter emphasize the necessity of taking account the wishes of the people, with deference accorded to the particular circumstances of each territory and its peoples.⁹³ The self-determination principle implicitly regards the particular circumstances of each territory as a crucial element in applying the right.⁹⁴

A second, less widely recognized resolution, adopted by the General Assembly one day before the adoption of Resolution 1514 (XV), identifies the methods by which a Non-Self-Governing Territory⁹⁵ may exercise the right of self-determination. General Assembly Resolution 1514 (XV)⁹⁶ states that self-determination is accomplished by: (1) emergence as a sovereign independent state; (2) free associa-

86. *Id.*

87. M. POMERANCE, *supra* note 8, at 1.

88. Western Sahara, 1975 I.C.J. 4, 113 (advisory opinion) (separate opinion of J. Dillard).

89. *Id.*

90. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISRAEL L. R. 511 (1975) (emphasis in original) *cited in* M. POMERANCE, *supra* note 8, at 9.

91. Western Sahara, 1975 I.C.J. 4, 113 (advisory opinion) (separate opinion of J. Dillard).

92. U.N. CHARTER art. 1, para. 2.

93. *Id.* at art. 73, para. b, art. 76, para. b.

94. M. POMERANCE, *supra* note 8, at 10-11.

95. *See generally* U.N. CHARTER art. 73-74.

96. G.A. Res. 1541(XV), *cited in* M. POMERANCE, *supra* note 8, at 10.

tion with an independent state; or (3) integration with an independent state. Resolution 1514 (XV) further states that free association and integration should be the result of informed and democratic processes.⁹⁷ A decision to associate with another state is always reversible.⁹⁸ Integration, on the other hand, is permanent. It must, therefore, be attained on the basis of complete equality.⁹⁹

The ICJ discussed the principle of self-determination in *Western Sahara*.¹⁰⁰ In reviewing Resolutions 1514 (XV) and 1541 (XV), the Court reiterated the need to take into account the wishes of the people concerned.¹⁰¹ More importantly, it cited Resolution 2625 (XXV),¹⁰² the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.¹⁰³ Resolution 2625 (XXV) expands the application of the self-determination principle beyond the scope of Resolutions 1514 (XV) and 1541 (XV). Recognizing that the self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for promoting friendly relations among states,¹⁰⁴ the resolution proclaims that "the establishment of a sovereign and independent State, the free association or integration with another State or *the emergence into any other political status freely determined by a people* constitute modes of implementing the right of self-determination by that people."¹⁰⁵ Thus, the principle applies not only to Non-Self-Governing-Territories as defined in the UN Charter,¹⁰⁶ but to all other territories which have not yet attained independence.

Broad pronouncements such as these disguise the real difficulty in applying the self-determination principle. Each claim of self-determination involves not only the reconciliation of conflicts with other norms of international law, such as territorial integrity, non-intervention, and sovereign equality, but also with competing claims for self-

97. *Id.* See also *infra* note 49 and accompanying text.

98. M. POMERANCE, *supra* note 8, at 10.

99. *Id.*

100. *Western Sahara*, 1975 I.C.J. 4, 23 (advisory opinion).

101. *Id.* at para. 55, 57.

102. *Id.* at para. 58.

103. G.A. Res. 2625(XXV), 25 U.N. GAOR, Supp. (No. 28) at 42, 28 U.N. Doc. A/8028 (1970).

104. *Id.*

105. *Id.* (emphasis added).

106. U.N. CHARTER art. 73-74.

determination.¹⁰⁷ Other political units within the same territorial unit may feel that it is a more appropriate “self”, or that its claim has more validity because of sovereign rights.

The self-determination principle must be applied in light of the special circumstances of each territory and its peoples.¹⁰⁸ The validity of the principle, however, is not affected by the fact that the General Assembly, in certain cases, did not consult the inhabitants of a territory.¹⁰⁹ The ICJ explained that those “were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination or on the conviction that a consultation was totally unnecessary in view of special circumstances.”¹¹⁰ The exercise of self-determination may be set aside if its fulfillment would cause tension and conflicts.¹¹¹

Although the balancing of competing interests causes an inconsistent application of the right of self-determination, it places the principle more squarely in line with the basic nature of international law: negotiation and compromise. Justification for support of the principle may be found in the manner in which self-determination has become a customary norm of international relations. The repeated expressions of the need to focus on the freely expressed will of peoples in the UN Charter and subsequent UN resolutions, together with pronouncements of the ICJ, lend further credence to the acceptance of the principle as law.

SELF-DETERMINATION IN PRACTICE

Determining the “Self”

The first step in the application of the principle of self-determination to a given territory is the determination of upon whom the right is to be conferred. Much of the difficulty in the current use of the principle is identifying the “self” which can claim the right to determine its political status.¹¹² The right of self-determination is said to belong to “all peoples”;¹¹³ to “those who are still dependent” (in Trust and Non-Self-Governing Territories);¹¹⁴ to “those subject to alien subjugation, domination or exploitation;”¹¹⁵ and to the people of “all other territories which have not yet attained indepen-

107. M. POMERANCE, *supra* note 8, at 2-3.

108. *Id.* at 10-11.

109. Western Sahara, 1975 I.C.J. 4, 19-20 (advisory opinion).

110. *Id.*

111. M. POMERANCE, *supra* note 8, at 28.

112. *Id.* at 14.

113. G.A. Res. 1514(XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) Annex at 52, U.N. Doc. A/6316 (1966).

114. M. POMERANCE, *supra* note 8, at 1.

115. *Id.*

dence."¹¹⁶ Generally speaking, the right belongs to all "colonial peoples."¹¹⁷

In order to reconcile conflicting claims to "selfhood" the definition of the self must be internationally determined.¹¹⁸ The UN has adopted a territorial rather than an ethnic criterion to define the self.¹¹⁹ It has shown respect for the former colonial boundaries in a region; the determination, however, is still made in light of the particular circumstances of a territory.¹²⁰

The right does not apply to peoples in a territory not under colonial or alien domination.¹²¹ Resolution 1514 (XV) and other UN instruments condemn any attempt at the partial or total disruption of the territorial integrity of a state.¹²² The 1977 Gros Espiell report¹²³ on self-determination states, however, that the guise of national unity may not be used to conceal colonial and alien domination if it does in fact exist, and that the right of the people concerned cannot be ignored without international law being violated.¹²⁴

The Third World believes that new political units emerging from colonialism are entitled, *ipso facto*, to an "integral existence."¹²⁵ General Assembly Resolution 2625 (XXV)¹²⁶ declares that a colony has a status separate and distinct from that of the state administering it and that such status "shall exist until the people of the colony . . . have exercised their right to self-determination."¹²⁷ A cohesive colony with an independent purpose, its own system of laws, and a clearly defined territory would thus appear to be a prime candidate for self-determination.

Although Hong Kong has been under British supervision and authority, it has exhibited many of the characteristics of a sovereign state. According to the customary international law, a sovereign state has the following attributes: (1) a people, (2) a territory, (3) a government, and (4) the capacity to enter into relations with other

116. See *supra* note 82 and accompanying text.

117. M. POMERANCE, *supra* note 8, at 14.

118. L. HENKIN, *supra* note 4, at 211.

119. M. POMERANCE, *supra* note 8, at 18.

120. See *supra* note 91 and accompanying text.

121. M. POMERANCE, *supra* note 8, at 15.

122. See *supra* note 82 and accompanying text.

123. M. POMERANCE, *supra* note 8, at 15.

124. *Id.*

125. *Id.* at 41.

126. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 42, U.N. Doc. A/8028 (1970).

127. *Id.* See also M. POMERANCE, *supra* note 8, at 44-45.

states.¹²⁸

The people of Hong Kong of Chinese descent hold special British citizenship. Under the provisions of the British Nationality Act of 1981, those born in Hong Kong possess British "dependent territories" citizenship.¹²⁹ This class of citizenship does not grant the "right of abode" in the United Kingdom.¹³⁰ When the British government pulls out of Hong Kong, the Chinese in the colony will lose their British citizenship.¹³¹ Arguably, the people of Hong Kong have a unique status separate from any other group and may be considered a somewhat homogenous population.

The boundaries of the colony have remained the same since the lease of Hong Kong was granted to Great Britain in 1898.¹³² Notwithstanding the claim by the PRC that Hong Kong is "an inalienable part of Chinese territory,"¹³³ the colony has a separate and distinct status¹³⁴ that will continue after 1997 when Hong Kong will be governed as a "special administrative region."¹³⁵

As mentioned above, the status of the Hong Kong government is uncertain.¹³⁶ However, the colony presently has its own legal system, including legislative and judicial branches.¹³⁷ These institutions can serve in the capacity of a governing body, especially if a more representative government is established.

Hong Kong has already exhibited a capacity to enter into international relations. The colony is a contributing member of GATT (General Agreement of Tariffs and Trade) and has negotiated its own export quotas and tariff preferences.¹³⁸ Although Hong Kong reflects the characteristics of a sovereign state, it is not entitled to independence as a matter of international law. Its characteristics, however, do support a compelling argument that the colony, as it now exists, fits the proper definition of a "self" entitled to claim the right of self-determination.

How the Right of Self-Determination is Given Effect

As evidenced by the title of Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peo-

128. Jessop, *The Conditions of Statehood*, 3 U.N. SCOR (383d mtg.) at 9-12 (1948), cited in L. HENKIN, *supra* note 4, at 172.

129. Tso, *supra* note 2, at 133.

130. *Id.*

131. *Id.*

132. See *supra* note 31 and accompanying text.

133. Tso, *supra* note 2, at 132.

134. See *supra* note 125 and accompanying text.

135. See *supra* note 59 and accompanying text.

136. See *supra* note 49 and accompanying text.

137. See *supra* note 61 and accompanying text.

138. See *supra* note 63 and accompanying text.

ples,¹³⁹ there is a strong bias in UN practice towards independence as the preferred mode of implementing self-determination.¹⁴⁰ Although it has been suggested that any decision to merge with an existing state must follow independence and not be merely a substitute for it,¹⁴¹ the ICJ in *Western Sahara* avoided reference to the necessity of presenting the independence option to the integrating territory.¹⁴² Integration into another state may come about without the independence option being offered. Granting independence to a non-viable political entity invites the perpetuation of the prior dependent relationship or the substitution of a colonial situation with a new neo-colonialist relationship.¹⁴³

Most commentators agree that Hong Kong cannot become self-sufficient.¹⁴⁴ It is dependent upon the PRC for most of its food and a third of its petroleum and water.¹⁴⁵ These conditions, however, should not prevent the right of self-determination to be exercised by free association or integration.¹⁴⁶ Trade agreements with the PRC could satisfy the need of the colony for resources and insure a substantial flow of capital to the PRC in return. In effect, the agreement envisions this relationship by maintaining a capitalist enclave in the PRC. The essence of self-determination, however, is in the method, not the result.¹⁴⁷ Integration or free association in accordance with the principle must be accomplished by granting due regard to the freely expressed will of the people of the territory concerned.¹⁴⁸

The role of the UN in promoting the principle of self-determination is limited by the provisions of its Charter. It is not authorized to intervene in "matters which are essentially within the domestic jurisdiction of any State."¹⁴⁹ By adopting Resolution 1514 (XV), however, it may be asserted, as a matter of international law, that if a colonial situation exists it cannot be considered an essentially domes-

139. See *supra* note 82.

140. M. POMERANCE, *supra* note 8, at 25.

141. *Id.*

142. *Western Sahara*, 1975 I.C.J. 4, 60 (advisory opinion).

143. M. POMERANCE, *supra* note 8, at 17.

144. Telephone interview with Mr. Jack Hand, Hong Kong Commission, British Embassy, New York (July 24, 1984).

145. Tso, *supra* note 2, at 116.

146. See *supra* note 82, para. 4.

147. M. POMERANCE, *supra* note 8, at 24-25. See also *Western Sahara*, 1975 I.C.J. 4, 35 (advisory opinion).

148. See *supra* note 82.

149. Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345, 345 (1983) (Mr. Szasz is the Principal Officer of the Office of the United Nations Legal Counsel.). See generally U.N. CHARTER art. 2, para. 7.

tic conflict.¹⁵⁰ The argument thus shifts to whether the conflict is "colonial."

An otherwise domestic conflict may also be internationalized if it creates conditions which extend past the borders of the state concerned. A flow of refugees is the most common spillover effect of an otherwise domestic conflict.¹⁵¹ There is a strong possibility that this will occur in Hong Kong. More important to the international economic community is the issue of how the internal conflict in Hong Kong will affect the extensive foreign investment in the colony. This question itself could serve to internationalize the Hong Kong problem.

Assuming that UN intervention in Hong Kong is appropriate, several methods may be utilized to analyze the application of the self-determination principle. The General Assembly may open discussion by placing the matter on the agenda, it may establish an organ to consider and report on a territory's claim, and it may seek an advisory opinion from the ICJ.¹⁵² These actions are intended to present relevant information to the General Assembly.

For example, the UN sought an advisory opinion of the ICJ to provide information on the self-determination claim of certain areas of the Western Sahara.¹⁵³ In the *Western Sahara* case, the ICJ focused on whether there were sufficient "legal ties of such a nature as might affect the application of 1514 (XV). . . and in particular, of the principle of self-discrimination."¹⁵⁴ An analysis of the "ties of sovereignty"¹⁵⁵ in the history of a colony has relevance in reconciling conflicting claims. The ICJ, however, had more than ties of sovereignty in mind, although those are the most important. Legal ties, such as economic, cultural, and social similarities, would further evidence the desires of the inhabitants to determine whether to associate or integrate with another state.

In agreeing with the holding of the Court that sufficient legal ties did not exist, Justice Boni, in a separate opinion, noted that:

If the General Assembly had had before it an advisory opinion of the Court declaring that there were ties of sovereignty between Morocco and certain areas of Western Sahara, it would have been obliged to consult the inhabitants of the region on the different options provided for in resolution 1514(XV).¹⁵⁶

In another separate opinion, Justice Dillard diminished the impor-

150. Szasz, *supra* note 149, at 349-50.

151. *Id.* at 348.

152. *Id.* at 353.

153. *See generally* Western Sahara, 1975 I.C.J. 4, 19-20 (advisory opinion).

154. *Id.* at para. 167.

155. *Id.*

156. Western Sahara, 1975 I.C.J. 4, 114 (advisory opinion) (separate opinion of J. Dillard).

tance of "legal ties," admitting that while "they may influence some of the projected procedures for decolonization" they will have "only a tangential effect on the ultimate choices available to the people."¹⁵⁷ He further stated that "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people."¹⁵⁸

Once the UN has decided to act upon a self-determination claim, a method must be prescribed by which the people concerned can freely express their will. There are several methods, accepted in UN practice, to ascertain the wishes of the people. First, a plebiscite may be conducted under neutral auspices.¹⁵⁹ This method is preferable where integration or free association are considered. Free association should be the result of a "free and voluntary choice . . . expressed through informed and democratic processes."¹⁶⁰ Integration should be on the basis of complete equality,¹⁶¹ and a result of "the freely expressed wishes of a territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."¹⁶² Plebiscites, however, are not the only method by which to ascertain the will of the people.

The UN may rely upon the opinion of an expert commission or a representative body of the territory.¹⁶³ Often, the establishment of a "national liberation movement" serves as a better method to determine the wishes of the people than a referendum.¹⁶⁴ In Hong Kong, the plebiscite option has been ruled out by the British authorities.¹⁶⁵ Great Britain has determined that the report of the assessment office in Hong Kong will adequately represent the views of the people.¹⁶⁶ If the wishes of the people of Hong Kong are somehow to be determined, however, the right of self-determination requires that their views be considered in any decision regarding their future political status.

157. *Id.*

158. *Id.*

159. M. POMERANCE, *supra* note 8, at 4.

160. *Id.* at 10.

161. *Id.*

162. *Id.* at 10-11.

163. *Id.* at 4.

164. *Id.* at 35.

165. *See supra* note 142.

166. *Id.*

CONCLUSION

The transfer of sovereignty over Hong Kong must be accomplished within generally accepted principles of international law. The principle of self-determination has had a significant effect upon contemporary international law and plays an important role in the mutual relations of states. The doctrine does not require that every territory claiming self-determination be granted independence. Each claim must be addressed according to the particular circumstances of the territory and its peoples.

The crucial question in the Hong Kong situation is not whether the colony is entitled to independence, but rather whether Great Britain and the PRC will pay due regard to the wishes of the people in determining how to complete the transfer of sovereignty. The people of Hong Kong may express a desire for free association with the PRC or integration on the basis of equality.

Historically, the UN has intervened in other colonial situations to promote and protect the right of peoples to choose the sovereignty under which they shall live. The development of the Third World as a major force in international affairs is directly attributable to the UN placing paramount importance upon the self-determination principle. Hong Kong is a classic colonial example. In contrast to lesser-developed countries in the Third World, however, Hong Kong has achieved prominent economic status in the Pacific Basin while under colonial rule. Its people should be no less entitled to UN protection. Discussions within the General Assembly regarding self-determination in Hong Kong should be called for before the treaty is formalized next year.

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