

# SETTLEMENT OF THE QUESTION OF HONG KONG

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## INTRODUCTION

On September 26, 1984 the Sino-British Joint Declaration on the Question of Hong Kong<sup>1</sup> was initialled in Beijing. It was signed by Prime Minister Margaret Thatcher and Premier Zhao Ziyang on December 19, 1984 and ratifications were exchanged on May 27, 1985. The following month, the declaration was jointly registered by the parties with the United Nations under Article 102 of the Charter. By virtue of the Joint Declaration and the Hong Kong Act passed in April 1985, British sovereignty and jurisdiction over Hong Kong will cease in 1997.<sup>2</sup> Hong Kong<sup>3</sup> will then be transformed from a British colony into a Special Administrative Region (SAR), governed in accordance with a Basic Law to be promulgated in 1990 under the ultimate authority of the Government of the People's Republic of China.

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1. The agreement, referred to in this paper as the Joint Declaration, is entitled "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 Question of Hong Kong," 1984 Gr. Brit. T.S. No. 2352 (Cmd. 20). The basic documents, along with a chronology of events, bibliography, notes on Hong Kong's present constitutional structure and an essay on the Joint Declaration are contained in the Hong Kong booklet 5 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (Blaustein & Blaustein eds. 1985). References generally in this Article to the "British" or "Great Britain" are to the representative government of the United Kingdom of Great Britain and Northern Ireland. References to "China" or the "Chinese" are to the Government of the People's Republic of China (PRC).

2. See Wesley-Smith, *The Hong Kong Act 1985*, PUB. L. 122 (1986).

3. Hong Kong presently consists of Hong Kong Island, Kowloon and the New Territories. Originally, these were three separate areas. They are treated as one in this paper and in the Joint Declaration.

Great Britain has "ownership" of two of the areas in question but only a leasehold interest in the New Territories. Prior to the Joint Declaration, the British had expressed an interest in enforcing their "legal right" to Hong Kong Island and Kowloon, even though the entire area had always been administered as a single colony. This idea was abandoned, however, when it became apparent that the stability of Hong Kong as an international financial and investment center would not be maintainable if divided. *How Britain Fell for the Peking Game Plan*, FAR E. ECON. REV., June 21, 1984, at 44. Hong Kong is currently one of the world's largest financial centers. It is maintained as a free port and gold trading center that supplies the PRC with approximately one-third of its foreign trade. Lohr, *The Cloud Over Hong Kong*, N.Y. Times, Aug. 14, 1983, sec. VI, at 26.

This Article will discuss four issues with regard to the Joint Declaration: first, the significance of these events for the concept of self-determination in international law; second, the precedents for this type of treaty; third, what can be learned about China's attitudes towards sovereignty and unequal treaties; and fourth, the possibility that the status quo in Hong Kong could have been preserved after 1997 without resort to a treaty at all.<sup>4</sup>

### I. SELF-DETERMINATION

The people of Hong Kong were not consulted during negotiations which resulted in the Joint Declaration.<sup>5</sup> Even the Hong Kong Government, in which citizens had no electoral participation, was denied any role in the treaty-making process. The Governor played a part, but solely as a member of the British negotiating team. Any suggestion that he "represented" the people of Hong Kong was firmly denounced by Chinese spokesmen.<sup>6</sup> There was to be no "three-legged stool." The future of Hong Kong was settled by the governments of China and the United Kingdom alone. The terms of the Joint Declaration were debated in the territory's Legislative Council, the members of which were all *ex officio* or appointed. An "assessment office" then reported on the responses of the Hong Kong public. But there was no referendum, poll or direct vote, and inhabitants were presented with the draft on a "take it or leave it" basis. Thus, six million people were delivered from British colonial rule to Chinese communist rule without any formal voice in the process.

The International Covenant on Economic, Social and Cultural Rights declares in Article 1 that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine

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4. Other issues are considered in Mushkat, *The Transition from British to Chinese Rule in Hong Kong*, 14 DEN. J. INT'L LAW & POL'Y 171 (1986).

5. The agreement itself consists of a Joint Declaration and three annexes, accompanied by two brief memoranda. The Joint Declaration is a general outline of the parties' intent for the future of Hong Kong. The annexes specify means for the implementation of the plan while the memoranda deal with the citizenship of those presently residing in Hong Kong. See Blaustein & Blaustein, *supra* note 1.

6. Hong Kong, as a Crown Colony, presently continues to be ruled by the Governor who is appointed by the Crown. HONG KONG LETTERS PATENT 1917-1976, art. 1. The Governor appoints an Executive Council which enacts laws with the aid and consent of the Legislative Council. The Executive Council of four *ex officio* members and a number of official or unofficial members, all of whom are appointed by the Crown or the Governor. HONG KONG ROYAL INSTRUCTIONS 1917-1977, art. II. The Governor also appoints the Legislative Council which is of a similar structure to that of the Executive Council. *Id.* art. XIII, ¶ 1. See Blaustein & Blaustein, *supra* note 1, at 31-51.

their political status and freely pursue their economic, social and cultural development.” These same words appear in the International Covenant on Civil and Political Rights.<sup>7</sup> Declarations made by the United Kingdom relevant to Hong Kong regarding these covenants reserve the right not to acknowledge various paragraphs relating to an elected legislature, employment of married women, deportation of aliens and so on. However, no reservations are expressed concerning the right of the people of Hong Kong to self-determination. Section XIII of annex I to the Joint Declaration confirms that the provisions of the covenants “as applied to Hong Kong shall remain in force.”<sup>8</sup> Yet the right to self-determination obviously has been excluded.

There can be no doubt that the inhabitants of Hong Kong make up a distinct community. Hong Kong Island has been occupied by the British since 1841, Kowloon since 1860 and the New Territories since 1899.<sup>9</sup> The influence of Chinese government has been rigorously excluded in each portion of the territory since the date of British occupation.<sup>10</sup> The political, constitutional and legal systems in Hong Kong have scarcely changed since the beginning of British rule. The boundaries of the territory are clearly defined. The economic system—a rather unabashed form of *laissez-faire*—unmistakably differentiates the colony from its mainland neighbor.

Many inhabitants are refugees from poverty or an uncongenial government across the border and, while attached culturally and psychologically to China, the inhabitants have no desire to become subject to the political and economic systems currently prevailing in

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7. See International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

8. Section XIII of the Joint Declaration guarantees the continued freedoms of “the person, of speech, of the press, of assembly, of association, to form and to join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and right to raise a family freely.” Also guaranteed is the right to confidential legal advice and free access to the court system. Not only is freedom of religion permitted, but this section specifies that the “relationship between religious organizations in the . . . [SAR] and those in other parts of . . . China shall be based on the principles of non-subordination, non-interference and mutual respect.”

9. In 1841, British forces occupied Hong Kong Island and a civil administration was established although the Treaty of Nanjing was not signed until 1842 and not ratified until 1843. Kowloon was ceded by the Convention of Beijing 1860. The New Territories was leased by the Convention of Beijing 1898, though the district was not formally occupied by the British until April, 1899.

10. See Wesley-Smith, *The Proposed Establishment of a “China Office” in Hong Kong*, 19 J. ORIENTAL STUD. 42 (1984).

the People's Republic. Although ninety-eight per cent of Hong Kong's population is Chinese, the inhabitants are in some ways culturally distinct from most mainlanders.<sup>11</sup> For example, they are predominately Cantonese, their ability to speak putonghua (Mandarin) is limited, they retain some traditional cultural ideas which have been suppressed in China proper, and at the same time they have acquired some Western notions due to their greater exposure to the outside world. In addition, the colony has proven to be a viable economic entity on its own. It plays a significant role in the world economy and, while small geographically, it is much larger than many independent states in terms of population.<sup>12</sup>

There would thus seem to be ample grounds for according to the people of Hong Kong the right to determine for themselves the future status of their territory. The choice would be among independence, free association or integration with an existing independent state, or some other arrangement. By General Assembly Resolution 1514 (XV) of 1960, integration should only be permitted in accordance with the freely expressed wishes of the people after they have attained an advanced stage of self-government. General Assembly Resolution 1514 (XV) confers a right on peoples suffering from alien subjugation, domination and exploitation to obtain complete independence. The United Nations Special Committee on Colonialism has in practice strongly favored independence among the various options for colonial peoples.<sup>13</sup> The International Court of Justice has stated that decolonialization, in particular "automatic retrocession," must not derogate the genuine desires of the people whose right of self-determination takes priority over claims to historic title.<sup>14</sup> Some scholars claim that this is a clear rule—*jus cogens* no less<sup>15</sup>—in a decolonialization situation.<sup>16</sup> Yet the non-self-governing community of Hong Kong was allowed absolutely no say in the determination of the territory's status after the cessation

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11. See Baker, *Life in the Cities: The Emergence of Hong Kong* Man 95 CHINA Q. 469 (1983).

12. Lohr, *supra* note 3.

13. See M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 25 (1982).

14. *Advisory Opinion on Western Sahara*, 1975 I.C.J. 12. See Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 698, 709-11 (1976).

15. *Jus cogens* denotes "a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Jus cogens* is cogent or compelling law as distinguished from *jus dispositivum*, that is, yielding law. GAMBOA, A DICTIONARY OF INTERNATIONAL LAW AND DIPLOMACY 164 (1973).

16. See, e.g., J.N. SAXENA, SELF-DETERMINATION: FROM BIAFRA TO BANGLA DESH 15-21 (1978).

of British jurisdiction.

This type of situation was accepted in 1972 when the Chinese Ambassador to the United Nations objected to the topic of Hong Kong (and Macao) being on the agenda of the Special Committee. He stated:

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

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.

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

With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions.<sup>17</sup>

The Special Committee thereupon deleted Hong Kong and Macao from its list of subjects to be discussed.

The right of self-determination thus proved illusory for the people of Hong Kong. As a right in international law, it is, of course, controversial and ambiguous. It states the problem but provides no solution.<sup>18</sup> Sir Ivor Jennings said the debate over self-determination is ridiculous because "the people cannot decide until somebody decides who are the people."<sup>19</sup> Identification of the "self" is the primary issue: There are no objective criteria with the result that other claims, such as historic title, the territorial integrity of a contiguous state or the illegality of the previous cession, can overwhelm "self-hood" asserted by residents of a political and territorial unit. Additionally, the precedents did not favor Hong Kong: Goa, Belize, Gibraltar, Western Sahara, Falklands/Malvinas and even (eventually, it seems) the brutal Indonesian annexation of East Timor, all

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17. Reprinted in J. COHEN & CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 384 (1974).

18. Toynbee, *Self-Determination*, 484 Q. REV. 319, quoted in M. POMERANCE, *supra* note 13, at 5.

19. I. JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55-56 (1956), quoted in Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 16 (1976).

demonstrate that the sympathies of the United Nations tend to be with neighboring States where small colonial territories are concerned.<sup>20</sup>

Michla Pomerance concludes her recent study entitled *Self-Determination in Law and Practice* by recognizing the necessity of a flexible approach to self-determination claims, one which balances conflicting principles, maximizes rights and provides a plethora of possible solutions. "Such alternatives as federal schemes, autonomy, minority rights, guarantees of non-discrimination, and the right of 'option' may present themselves as forms of self-determination best suited to the particular circumstances."<sup>21</sup> This is borne out by the Hong Kong experience. The independence option was precluded, but the Hong Kong people have been promised a high degree of autonomy, the continuation of the territory's economic, social and legal systems, a guarantee of basic rights and the maintenance of links with the outside world. Whether this is ultimately satisfactory remains to be seen. As a solution to the predicament in which Hong Kong found itself, the Joint Declaration is perhaps the best—at least on paper—which could be expected.<sup>22</sup>

20. See J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 377-84 (1979).

21. M. POMERANCE, *supra* note 13, at 74.

22. The Joint Declaration consists of eight paragraphs which set out the common understandings of the parties. In brief, the document makes the following provisions: The first paragraph indicates China's desire to regain sovereignty of Hong Kong. The second paragraph indicates Great Britain's willingness to restore China's sovereignty. Paragraph three sets out China's twelve basic policies regarding Hong Kong. In brief they are:

1) To uphold "national unity and territorial integrity." This is to be satisfied by the establishment of a Hong Kong Special Administrative Region (SAR).

2) To allow the "region" to "enjoy a high degree of autonomy, except in foreign and defense affairs."

3) To allow the "region" to be "vested with executive, legislative and independent judicial power, including that of final adjudication." (Hong Kong law as it currently exists is to remain basically unchanged.)

4) To allow the government positions to remain intact and to continue to be filled by local inhabitants.

5) To allow the current "life style" and personal rights to remain unchanged.

6) To allow the "region" to "retain the status of a free port and a separate customs territory."

7) To allow the financial status of the "region" to remain unchanged, including the currency.

8) To allow taxes and governmental finances to remain unchanged.

9) To allow the "region" to be able to establish "mutually beneficial economic relations" with other countries (the United Kingdom being specifically mentioned).

10) To allow the "region" to be known as "Hong Kong China" and to be free to develop economic and cultural relations with other countries as well as issue its own travel permits.

11) To allow Hong Kong to maintain its own internal police power.

12) To allow these policies to become part of the "Basic Law" of Hong Kong and remain unchanged for fifty years.

Paragraph four declares that until the change in 1997, the United Kingdom is to remain in

The Joint Declaration is not, however, what is normally understood by self-determination.<sup>23</sup> It is not the exercise of a right of "external" self-determination, meaning the right to choose freedom from an imposed sovereignty. Nor does it involve "internal" self-determination, meaning a free choice of the form of government. The Joint Declaration indicates in outline how the post-1997 government will be chosen, but important details are not provided; these will be decided by the Basic Law Drafting Committee, whose members include a minority of Hong Kong people selected by China. No elections were held even for the Basic Law Consultative Committee which advises the drafting body. And, in any event, the final Basic Law will be enacted by the National People's Congress of the People's Republic of China. Thus, while the resulting form of government might indeed be in accordance with the freely expressed wishes of the Hong Kong people, the Hong Kong people have not freely expressed their wishes. Even democratic self-government, the third and minimal strand of meaning which self-determination embraces, may not in practice be achieved.

## II. PRECEDENTS

The Joint Declaration is remarkable for the detail in which China promises to maintain the existing way of life in Hong Kong. In a treaty with the imperialist power that illegally occupied sacred Chinese soil and instituted a repressive exploitative regime over Chinese compatriots, the People's Republic solemnly declares that, while resuming the exercise of sovereignty over Hong Kong, for the next fifty years it will do virtually nothing to disturb the status quo. The territory will become a Special Administrative Region enjoying a high degree of autonomy with full powers of government.<sup>24</sup> Only foreign and defense affairs are to be the responsibilities of the Central People's Government.<sup>25</sup> The new Hong Kong authorities will

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control and that China will aid it in maintaining Hong Kong's current status. Paragraph five provides for the creation of a Sino-British Joint Liaison Group "to ensure a smooth transfer of governments." Paragraphs seven and eight declare that the Annexes are to be implemented by the parties and are to be equally binding.

23. Brownlie grants the concept "a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives." *An Essay in the History of the Principle of Self-Determination*, in GROTIAN SOCIETY PAPERS 1968: STUDIES IN THE HISTORY OF THE LAW OF NATIONS 90 (C. Alexandrowicz ed. 1979). By this standard, there is arguably self-determination for the citizens of Hong Kong despite the lack of consultation or referendum.

24. See Joint Declaration, *supra* note 1, ¶ 3.

25. *Id.*

retain the ability to maintain and develop economic and cultural relations and to conclude agreements with states, regions and international organizations. The Joint Declaration provides the following: Rights and freedoms are guaranteed; the Hong Kong dollar will remain the basic unit of currency; the territory will continue to be a separate unit for customs, immigration and passport purposes; Hong Kong courts will possess the power of final adjudication;<sup>26</sup> and capitalism will continue to flourish. Thus, China simultaneously reclaims sovereign powers and drastically limits her future exercise of them.

This kind of arrangement is not unprecedented in treaties whereby Great Britain has ceded territory to other powers. For example, when Guadeloupe was ceded to Sweden in 1813, the Swedish King engaged to preserve and maintain "all the privileges, rights, benefices, and prerogatives" of the inhabitants and grant to them the same protection and advantages enjoyed by other Swedish subjects. The slave trade was to be outlawed, Britain's enemies were to be excluded and British subjects were to be granted every protection and security.<sup>27</sup> A treaty in 1860 between Great Britain and Nicaragua recognized Nicaraguan sovereignty over territory claimed by the Mosquito Indians; however, the Indians were to govern the territory according to their own customs consistent with the sovereign rights of the Republic of Nicaragua with no interference from Nicaraguan authorities. Greytown (San Juan del Norte) was to be declared a free port, trial by jury and religious freedom were to be guaranteed and Mosquito land rights were to be confirmed.<sup>28</sup> By an Anglo-German agreement in 1890, existing native laws and customs in the ceded island of Heligoland were, as far as possible, to remain undisturbed and rights of property maintained.<sup>29</sup> Similar provisions were made in arrangements for the cession of Newfound-

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26. The judicial system will remain as it is currently found in Hong Kong, including its common law basis, except that there will be a final court of appeal in the SAR replacing the Judicial Committee of Privy Council. Joint Declaration, *supra* note 1, annex I. Annex I goes into great detail and displays a high regard for keeping the integrity and current method of adjudication intact.

Article 31 of the PEOPLE'S REPUBLIC OF CHINA CONSTITUTION provides that: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions [SAR] shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." The only changes in the existing law of Hong Kong will be those that contravene the Basic Law; the Law of England will not apply in the SAR. Joint Declaration, *supra* note 1, at annex I.

27. 2 HERTSLET'S COMMERCIAL TREATIES 337.

28. 11 HERTSLET'S COMMERCIAL TREATIES 446.

29. See Anglo-German Agreement Act, [1890] 53 & 54 Vict., ch. 32.



land to France in 1904<sup>30</sup> and of various East African territories to Italy in 1925.<sup>31</sup>

The most interesting precedent for the Hong Kong agreement is the Convention for the Rendition of Weihaiwei.<sup>32</sup> Weihaiwei, a territory in northern China, was leased to Britain in 1898 at the same time that the New Territories convention was negotiated.<sup>33</sup> The terms of the two 1898 agreements were very similar, but the New Territories lease was for ninety-nine years, whereas Weihaiwei was to be British "for so long a period as Port Arthur shall remain in the occupation of Russia."<sup>34</sup> The departure of the Russians from Port Arthur in 1905 in fact was not followed by the immediate evacuation of Weihaiwei; rendition had to wait until 1930. In the convention for rendition signed in 1930, the National Government of the Republic of China agreed, *inter alia*, to maintain the existing regulations including land and house tax, sanitary and building regulations, and policy; to recognize the validity of all British documents of title to land issued to Chinese owners, all leases and all decisions of the British Weihaiwei courts; to pay fair compensation to expropriated foreigners; to maintain existing public services and aids to navigation; and, unless the port were closed for naval purposes, to continue it as an area for international residence and trade.<sup>35</sup>

In 1977, when speculating about the future of Hong Kong, Dick Wilson referred almost prophetically to the Weihaiwei precedent and concluded:

Any such arrangements come to in the 1980s about the rendition of the New Territories of Hong Kong, or of Hong Kong as a whole, would take place in a very different climate, one in which the Chinese would not feel obliged to give anything away that they did not desire. Nevertheless the Weihaiwei Agreement of 1930 underlines the capacity of a Chinese government to concede

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30. Anglo-French Convention Act, [1904] 4 Edw. 7, ch. 33.

31. Anglo-Italian Treaty (East African Territories Act), [1925] 15 & 16 Geo. 5, ch. 9.

32. Convention for the Rendition of Weihaiwei, Apr. 18, 1930, Great Britain-China, 112 L.N.T.S. 49 (No. 2607). This Convention abrogated the Convention for the Lease of Weihaiwei which was signed on July 1, 1898. *Id.* art. 2.

33. See P. ATWELL, *BRITISH MANDARINS AND CHINESE REFORMERS* 6-11 (1985); P. WESLEY-SMITH, *UNEQUAL TREATY, 1898-1997: CHINA, GREAT BRITAIN, AND HONG KONG'S NEW TERRITORIES* 26-28 (1983). I am grateful to Dr. Atwell for making a copy of the typescript available prior to publication of her book.

34. Convention between China and Great Britain respecting Weihaiwei, July 1, 1898, China-Great Britain, *reprinted in* 186 PERRY, *THE CONSOLIDATED TREATY SERVICE* 354.

35. P. ATWELL, *supra* note 33, at 6-11.

de facto if it can be seen as winning de jure.<sup>36</sup>

Despite the contrasting circumstances of 1985, the Chinese Government was still capable of compromising its resumption of sovereignty in an agreement with the British. The later concessions were much more detailed and comprehensive, but they differed only in degree, not in kind; the Joint Declaration ought not to be regarded as *sui generis*.<sup>37</sup> The obvious question arises: Will China respect the promises made? It is often asserted that China's record in obeying the letter of treaties freely entered into (and even of unequal treaties like those ceding and leasing Hong Kong) is very good. In relation to Weihaiwei, China's initial compliance with the rendition agreement could not be seriously faulted.<sup>38</sup> When the port was closed to foreigners and converted into a naval base, a possibility envisaged by the convention, several of the concessions legitimately lapsed. In any event, occupation of Weihaiwei by Japanese forces in 1938 and the eventual establishment of the People's Republic of China meant that circumstances were sufficiently changed to render strict observance of the Sino-British treaty unrealistic. Nevertheless, a foundation of specialized treaties exists on which the Joint Declaration can rest; however, the question of China's exercise of past and future sovereignty over Hong Kong is not as easily answered.

### III. SOVEREIGNTY AND UNEQUAL TREATIES

Clearly, the People's Republic of China has regarded national sovereignty as a fundamental principle of international law.<sup>39</sup> It is less clear quite what is meant by sovereignty. Is sovereignty conceived of as indivisible and can it exist where it is not exercised?

The following four propositions can be discerned from Chinese literature: First, the theory of the divisibility of sovereignty is a bourgeois plot to serve imperialism's quest to control foreign peoples; second, unequal treaties,<sup>40</sup> being unequal, are invalid and of

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36. Wilson, *New Thoughts on the Future of Hong Kong*, 8 PAC. COMMUNITY 588, 597 (1977).

37. This answers the question posed by Lucian Pye: "When before has there been an established date of termination of colonial rule set by treaty?" See *The International Position of Hong Kong*, 95 CHINA Q. 456 (1983).

38. Dr. Pamela Atwell, in a personal communication to the author, refers to favorable comments by British officials in 1931, 1932 and 1933 concerning China's compliance with the convention. (Copy on file at offices of CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL.)

39. See J. COHEN & CHIU, *supra* note 17, at 106-19.

40. Unequal treaties are "[t]reaties which are not concluded on the basis of mutual

no legal effect; third, accordingly, sovereignty over Hong Kong vests in China and has always done so; and fourth, sovereignty is inseparable from its exercise.<sup>41</sup> After their first hopes of continued British sovereignty had been dashed, the British negotiators in Beijing adopted a fall-back position and suggested recognition of Chinese sovereignty in return for the maintenance of British administration in Hong Kong. As a result, Chinese polemicists asserted this fourth proposition. At the same time, however, Chinese leaders have spoken of Hong Kong's *return* to China and the need to *recover* or *regain* sovereignty, implying that sovereignty or a portion of sovereignty does not now belong to China.<sup>42</sup> Similarly, some statements on the unequal treaties appear to concede their validity while proclaiming China's unilateral right of abrogation at any time.<sup>43</sup> Both Portugal, which administers Macao, and China agree that sovereignty over Macao vests in China. The Joint Declaration announces that the Chinese people aspire to the *recovery* of Hong Kong and their government has decided to *resume the exercise of sovereignty* over Hong Kong effective July 1, 1997—a date which could have no conceivable significance unless the New Territories treaty were effective and so expired on that exact date. Yet the Chinese memorandum on nationality which accompanied the Joint Declaration implies that “Hong Kong Chinese compatriots” have been born in China even if born in the British colony.

The Chinese position on these issues thus seems to be equivocal. It has previously been observed that, in international affairs, Hong Kong can act as an “independent” factor in Chinese policy, China being “at times forced to react to situations on an ad hoc basis in a manner that may be out of tune with the general drift of policy.”<sup>44</sup> This is because Hong Kong is “at once a foreign policy problem and a domestic problem.”<sup>45</sup> Negotiations for settlement of the

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recognition of the equality and sovereignty of the contracting states, and which do not contain the crucial element of reciprocity where rights are conferred and obligations imposed . . .” P. WESLEY-SMITH, *supra* note 33, at 3.

41. In a recent review of Zhou Gengsheng's *INTERNATIONAL LAW* (1981), Chen Tiquang condemns the book's separation of sovereignty from its exercise and maintains that the best way to encourage the struggle of subjugated peoples against oppression is to tell them they have been deprived of their sovereignty. See CHEN TIQIANG, *SELECTED ARTICLES FROM CHINESE YEARBOOK OF INTERNATIONAL LAW* 240, 251 (Chinese Soc. Int'l L. ed. 1983).

42. See Dicks, *Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 *CHINA Q.* 427, 437 (1983); P. WESLEY-SMITH, *supra* note 33, at 7-9.

43. P. WESLEY-SMITH, *supra* note 33, at 184-87.

44. Catron, *Hong Kong and Chinese Foreign Policy, 1955-60*, 51 *CHINA Q.* 405, 423 (1972).

45. *Id.*

Hong Kong question in 1982-1984 reveal the same lack of consistency in China's notions of international law.

#### IV. THE ACT OF STATE DOCTRINE AND POST-1997 HONG KONG

If the above statement by China to the Special Committee in 1972<sup>46</sup> is taken at face value, China apparently reserved the right to settle the question of Hong Kong at any time, whenever conditions were ripe. Since the unequal treaties were considered invalid, they did not inhibit the free determination of Chinese policy towards Hong Kong. There could be no reason to suppose that 1997, the date of expiry of the British lease over the New Territories, was of any significance to the Chinese government. The British government, however, regarded that date as crucial, believing that without a new treaty the Hong Kong authorities would have to withdraw from the leasehold. If that were to happen, Hong Kong and Kowloon would have to be abandoned, for the economic stability of the region could not be maintained without the New Territories. Thus, in 1982, the British Prime Minister journeyed to Beijing and requested a formal extension of British jurisdiction beyond 1997. The Chinese response was entirely predictable: For political and ideological reasons, the Chinese government could agree to nothing less than the return to China of the whole colony, the ceded as well as leased portions. Negotiations then began for the settlement which was announced in the Joint Declaration.

Events might have been very different had the British Government not forced Beijing's hand. In terms of the exercise of "China's sovereign right," 1997 might have been considered an entirely premature time for settlement of the Hong Kong question. It is generally agreed that, as supported by the extraordinary promises regarding preservation, stability and prosperity of the territory made in the Joint Declaration, Hong Kong is too valuable in economic terms to be sacrificed to ideological consistency. China had developed a successful rationale for Hong Kong's survival as a British colony: It was a problem left over from history and would be dealt with at an appropriate time. The Hong Kong issue could have been ignored until it no longer served the national interest and, with China attempting to modernize, that could have been many decades into the next century. Instead, the Joint Declaration was

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46. See *supra* note 17 and accompanying text.

written, causing great uncertainty and jeopardizing the prosperity of Hong Kong which China so values.

However, her Majesty's Government may not have been powerless to act in the New Territories after 1997 without a formal extension of authority.<sup>47</sup> The Act of State doctrine in relation to the acquisition of territory could have been relied upon. Accordingly, despite the lapse of the Convention of Beijing 1898 and the Order in Council which confirmed it, the Hong Kong Government could have continued to administer the New Territories as though nothing had happened. No new treaty, Order in Council, Act of Parliament nor colonial ordinance was required; the mere existence of the government would have been sufficient. This would have been of no concern to China for which the British occupation of Hong Kong has always been illegal. It would have been of no concern to the colonial courts which would have accepted the policy of the executive branch of government in this matter. Thus, instead of arranging to surrender Hong Kong, the British could have simply reassured residents that business would be carried on as usual in the future, 1997 notwithstanding.

An Act of State, according to Lord Justice Fletcher Moulton in *Salaman v. Secretary of State for India*,<sup>48</sup> is essentially an exercise of sovereign power which the courts must accept without question. It is normally accompanied by a declaration by the Crown and such a statement is regarded as conclusive. The statement authoritatively determines the status of a body claiming to be a foreign government,<sup>49</sup> the individual sovereign<sup>50</sup> or a diplomat,<sup>51</sup> whether a

47. See Wilson, *supra* note 36, at 598-99:

Another possibility for Britain would be simply to ignore the expiry of the lease, and to continue after July 1997 to administer the same territory as before, pending the Chinese government's decision to take up a bilateral resolution of the question. The Chinese, after all, already regard the whole of Hong Kong as their own territory, albeit under temporary administration by Britain, regardless of the distinction between cession and lease, although through its own voluntary courtesy and magnanimity it respects the situation as if Britain's rights were legally valid. But for all this to be left until the last moment would be too much of a cliff-hanger from the point of view of the brain drain and investment confidence, and it would be better for Britain to begin tackling the question of its own legal system's view of the status of Hong Kong after 1997 well before 1997.

48. [1906] 1 K.B. 613, 639 (Moulton, L.J.).

49. Taylor v. Barclay, [1828] 2 Sim. 213, 220, 57 Eng. Rep. 769, 771; Duff Dev. Co., Ltd. v. Kelantan Gov't, 1924 A.C. 797, 805-06; Gov't of Spain v. Arantzazu Mendi, 1939 A.C. 256; *In re Amand*, [1942] 1 K.B. 445; Carl Zeiss Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1967] 1 A.C. 853, 901-02.

50. Mighell v. Sultan of Johore, [1894] 1 Q.B. 149, 158; Statham v. Statham, 1912 P. 92; Sayce v. Ameer Ruler, [1952] 2 Q.B. 390.

51. Engelke v. Musmann, 1928 A.C. 433, 443, 451. The Crown may also conclusively

state of war<sup>52</sup> or a case for reprisals exists;<sup>53</sup> the boundaries of foreign states<sup>54</sup> or the extent of British territory;<sup>55</sup> and the appropriate entity named in a treaty.<sup>56</sup> The usual course, if an issue of this nature arises in judicial proceedings, is for the court to address an inquiry to the appropriate department of government,<sup>57</sup> inviting a direct response. But indirect documentary evidence of the Crown's decision is also acceptable.<sup>58</sup> A proper statement cannot be challenged;<sup>59</sup> if it is ambiguous or insufficient, however, the court must interpret the certificate and decide for itself what it means.<sup>60</sup>

In the event that there is no authorized declaration by the executive government for the purposes of a particular case, alternative documents will be relied upon.<sup>61</sup> An Order in Council, for example, might clearly determine a matter of state. In the Hong Kong case of *Re Wong Hon*,<sup>62</sup> the issue arose whether the Hong Kong courts had jurisdiction over the Walled City of Kowloon, an enclave which seemed to be excluded from the lease of the New Territories in the Convention of Beijing 1898. More specifically, the issue was whether the courts could properly convict a defendant of murder whose violent act occurred within the Walled City. Two Orders in

recognize a ship as the public ship of a foreign sovereign. *The Parlement Belge*, [1880] 5 P. 197 (C.A.).

52. *The Pelican*, [1809] Edw. (App.) iv, 165 Eng. Rep. 1160, 1161; *Esposito v. Bowden*, [1857] 7 El. & Bl. 763, 781, 119 Eng. Rep. 1430, 1437; *Sanday v. British & Foreign Marine Ins. Co.*, [1915] 2 K.B. 781, 801-02, *aff'd sub nom.* *British & Foreign Marine Ins. Co. v. Sanday*, [1916] 1 A.C. 650, 665, 669; *Rex v. Bottrill ex parte Kuechenmeister*, [1947] 1 K.B. 41, 50.

53. *The Zamora*, [1916] 2 A.C. 77; *The Stigstad*, 1919 A.C. 279 (P.C.).

54. *Foster v. Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811, 813-15.

55. *The Fagernes*, 1927 P. 311, 324, 329. *But see* Holdsworth, *The History of Acts of State in English Law*, 41 COLUM. L. REV. 1313, 1331 (1941).

56. *Re Chung Sau-nam*, [1914] 9 H.K.L.R. 26, 40-42, 2 C.I.L.C. 477, 484-86; *Re Un Kin and Un Fat*, [1928] 23 H.K.L.R. 34, 41.

57. The appropriate department is often the Foreign Office, but it might also be the Colonial Office (*Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149), the Commonwealth Relations Office (*Sayce v. Ameer Ruler*, [1952] 2 Q.B. 390), the Attorney General's Chambers (*Engelke v. Musmann*, 1928 A.C. 433), the India Office (*Statham v. Statham*, 1912 P. 92) or others (e.g., a British Consul (*Ober v. Shui Kee Co.*, [1919] 14 H.K.L.R. 39, 41, 2 C.I.L.C. 487, 489)).

58. *In re Suarez*, [1918] 1 Ch. 176 (Foreign Office letter to the plaintiff's solicitors); *Sultan of Johore v. Abubakar Tunku Aris Bendahar*, 1952 A.C. 318, 340 (letter from the Secretary of State for the Colonies to the Rulers of the Malay States).

59. *Rex v. Secretary of State for Foreign and Commonwealth Affairs ex parte Trawnik*, *The Times*, Apr. 18, 1985 (executive certificates are not subject to judicial review).

60. *The Gagara*, [1919] P. 95, 102-04 (C.A.); *Luther v. Sagor*, [1921] 1 K.B. 456, 477; *Gdynia Ameryka v. Boguslawski*, 1953 A.C. 11, 43.

61. *Duff Dev. Co. v. Kelantan Gov't*, 1924 A.C. 797, 825; *Lyons, The Conclusiveness of Foreign Office Certificate*, 23 BRIT. Y.B. INT'L L. 240, 271 (1946). *See also* *Mellenger v. New Brunswick Dev. Corp.*, [1971] 1 W.L.R. 604, 608 (C.A.).

62. 1959 H.K.L.R. 601. *See* P. WESLEY-SMITH, *supra* note 33, at 169-71.

Council followed the Convention of Beijing 1898. They first recited the treaty provision that "the Chinese officials now stationed within the City of Kowloon shall continue to exercise jurisdiction therein except insofar as may be inconsistent with the military requirements for the defense of Hong Kong."<sup>63</sup> The second revoked this clause and announced:

The City of Kowloon shall be, and the same is hereby declared to be, for the term of the lease in the said Convention mentioned, part and parcel of Her Majesty's Colony of Hong Kong, in like manner and for all intents and purposes as if it had originally formed part of the said Colony.<sup>64</sup>

This was treated as conclusively affirming the jurisdiction of the Hong Kong courts over events within the City. The use of Orders in Council as Acts of State is a means, said Viscount Haldane in *Sobhuza II v. Miller*,<sup>65</sup> of "peacefully extending British dominion," and it "may well be as little generally understood as it is, where it can operate, in law unquestionable."<sup>66</sup>

If there is no relevant Order in Council, a colonial ordinance might be accepted as an authoritative statement by the Crown as to a matter of state. In a dispute regarding title to property in Lagos, the Privy Council declined to construe the treaty of cession but regarded a recital contained in a Nigerian ordinance as conclusive of the treaty's effect.<sup>67</sup> In the absence of an executive certificate in the form of a letter from the Government, a statement made in court, an Order in Council or an ordinance, the judicial approach to a matter of state will be determined by purely factual considerations. This is the aspect most relevant to the case of Hong Kong and the New Territories in 1997. The New Territories Order in Council expires with the convention and it would have been politically and diplomatically difficult to extend it. For the same reason, an Act of Parliament was not a feasible means of providing for British jurisdiction in the New Territories after 1997 and a colonial ordinance could not have validly defined colonial boundaries without infringing on the rule of extraterritorial legislative incompetence.<sup>68</sup> But, jurisdiction could have been continued in the formerly leased terri-

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63. KOWLOON CITY ORDER IN COUNCIL app. IV; LAWS OF HONG KONG 1964 reprinted in Blaustein & Blaustein, *supra* note 1, at 29-30.

64. *Id.*

65. 1926 A.C. 518 (P.C.).

66. *Id.* at 525. See also *Post Office v. Estuary Radio, Ltd.*, [1968] 2 Q.B. 740, 753.

67. *Oyekan v. Adele*, [1957] 2 All E.R. 785, 788-89.

68. See Wesley-Smith, *Extraterritoriality and Hong Kong*, PUB. L. 150 (1980).

tory simply by the Hong Kong Government declining to withdraw.

In *Blackburne v. Thompson*,<sup>69</sup> Chief Justice Lord Ellenborough considered whether certain parts of St. Domingo were “in a hostile relation” to Great Britain. The court being unable to “decide adversely to the declaration of the Sovereign upon the point . . .”<sup>70</sup> held that this was for the government to determine. But “in the absence of any express promulgation of the will of the Sovereign in that respect, it may be collected from other acts of the State.”<sup>71</sup> An “Order of Council” had been issued legalizing trade with St. Domingo:

There is no doubt great convenience in the Crown making such a general declaration as is contained in the subsequent Order of Council, since it saves much difficulty in ascertaining the character of such foreign places, as have been rescued from the enemy, or have fallen under their dominion; . . . [b]ut Courts and juries cannot do otherwise than decide *secundum allegata et probata* in each particular case. . . .<sup>72</sup>

Lord Justice Fletcher Moulton stated in *Salaman v. Secretary of State for India*<sup>73</sup> that “[a]n act of State need not rest upon or be expressed in documents. It may be evidenced by the nature of the acts done, and the circumstances under which they were done.”<sup>74</sup> And Lord Sumner, in *In re Southern Rhodesia*,<sup>75</sup> said:

No doubt a Proclamation annexing a conquered territory is a well-understood mode in which a conquering Power announces its will *urbi et orbi*. It has all the advantages (and the disadvantages) of publicity and precision. But it is only declaratory of a state of fact. In itself it is no more indispensable than is a declaration of war at the commencement of hostilities.<sup>76</sup>

Thus, if the Kowloon City Order in Council had not been made, the court in *Re Wong Hon*<sup>77</sup> could have come to the same conclu-

69. [1812] 15 East 81, 104 Eng. Rep. 775.

70. *Id.* at 91, 104 Eng. Rep. at 779.

71. *Id.* at 90, 104 Eng. Rep. at 779 (emphasis added).

72. *Id.* at 93, 104 Eng. Rep. at 779-80. In this case, other orders were construed, but the sense of the judgment would permit evidence of actual hostilities or their cessation to decide the point.

73. [1906] 1 K.B. 613.

74. *Id.* at 644. “In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown.” *Oyekan v. Adele*, [1957] 2 All E.R. 785, 788 (P.C.). See also *Nyali, Ltd. v. Attorney General*, [1956] 1 Q.B. 1, 15.

75. 1919 A.C. 211 (P.C.).

76. *Id.* 239-40. See also *Ex parte Mwenya*, [1960] 1 Q.B. 241, 297.

77. 1959 H.K.L.R. 601.



sion but in reliance on the prior act of the Hong Kong government in expelling the Chinese officials from the fort. In the same way, in the absence of a suitable document expressing the will of Her Majesty's Government, the fact of a continued British presence in the post-1997 New Territories would have been a conclusive declaration that expiry of the Convention and the Order in Council was of no consequence. The New Territories could therefore have remained under the control of the Hong Kong Government without a new treaty. If the "appropriate time" for China's intervention had not arrived, China could not have objected, since the mysteries of British constitutional law could be of no concern, nor interest, to Beijing. And the Prime Minister's approach to the Chinese Government, which compelled the result it was designed to avoid, would have been unnecessary.<sup>78</sup>

### CONCLUSION

By exercising her right of self-determination of the entire Chinese people, China will repair one breach in her territorial integrity and sovereignty in 1997. The treaty follows the precedent created by the return of Britain's other leased territory in China, but it goes further in guaranteeing to Hong Kong residents the maintenance of a life-style unknown to their compatriots over the border. The process is not easily explicable in terms of Chinese approaches to international law, at least if theoretical consistency is required. If not provoked by the United Kingdom Government, China could have waited until the arrival of the appropriate moment in history before re-absorbing Hong Kong, without becoming entangled in conflicting notions of sovereignty. But the treaty has been signed and ratified and, when it is fully implemented, the question of Hong Kong will have been finally settled.

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78. An alternative to relying on the Act of State doctrine would have been to invoke the Foreign Jurisdiction Acts. See Dicks, *supra* note 42, at 453-55.