

ESSAY

Selling Hong Kong to China: What Happened to the Right of Self-Determination?

John W. Head *

I was teaching law in Beijing in June 1994, at the five-year anniversary of the Tian'anmen Square massacre. As I reported following that experience, I felt a chill in Beijing then, prompted by official repression of any "inappropriate" discussion of that incident.¹ Earlier this year I spent several weeks in Hong Kong as a visiting lecturer at the University of Hong Kong. I felt the same chill, but this time it was prompted by anxiety, with some bitterness, about the transfer of political control over Hong Kong from Great Britain to the People's Republic of China.

I wish to offer in this brief Article some observations about the legal character of the transfer of sovereignty over Hong Kong on July 1, 1997. Specifically, I address the question of whether that transfer is consistent with the "right of self-determination" as it currently stands in international law. I conclude with two competing propositions. Either the Hong Kong case shows a blatant disregard for the right of self-determination, or the Hong Kong case illustrates a fundamental limitation—perhaps fatal limitation—to which the right of self-determination is subject. In either event, I agree with the handful of commentators who have criticized both the British government and the United Nations for not openly addressing the issue of self-determination in the context of Hong Kong.

I. THE RIGHT OF SELF-DETERMINATION

There is already a rich body of literature on the notion of self-determination.² This Article does not undertake a detailed review and

* Professor of Law, University of Kansas. I wish to thank Christine Ohlen for her assistance in preparing this article. My thanks also go to the students in my International Law Seminar for helping me explore the right of self-determination, and to the University of Kansas Center for East Asian Studies for arranging a faculty exchange with Hong Kong University. Support from the University of Kansas General Research Fund is also gratefully acknowledged.

1. See John Head, *A Fulbright Lecturer's Experience Teaching International Law in China*, ASIL NEWSL. (Am. Society of Int'l Law), Sept.-Oct. 1994, at 8.

2. See, e.g., IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 595-98 (4th ed. 1990); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 131-37 (1986) [hereinafter CASSESE 1986]; ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* (1995) [hereinafter CASSESE

critique of the views expressed in that literature. For purposes of my analysis of the Hong Kong transfer, it will be sufficient to provide a thumbnail sketch of the historical foundation of self-determination, the key applicable legal provisions that refer to it, and the generally accepted interpretation of those provisions.

A. From "Mandates" to Decolonization

The history of the notion of self-determination might be said to stretch back to the American and French Revolutions, or even before that,³ but its modern formulation took shape around the time of World War I. It was then that United States President Woodrow Wilson and the leader of Soviet Russia, V. I. Lenin, both endorsed the notion of self-determination for colonial possessions.⁴ One of Wilson's famous Fourteen Points that guided the post-war negotiations at Versailles called for

[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon the principle that in determining all such questions of sovereignty the interests of the populations concerned must be given equal weight with the equitable claims of the government whose title is to be determined.⁵

1995]; LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 31-39 (1989); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990); DEREK HEATER, NATIONAL SELF-DETERMINATION: WOODROW WILSON AND HIS LEGACY (1994); ISSUES OF SELF-DETERMINATION (William Twining ed. 1991); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed. 1993); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS (1982). In addition to these texts, many journal articles cited herein also provide overviews of the principle of self-determination. See, e.g., sources cited *infra* note 70.

3. See, e.g., R. S. Bhalla, *The Right of Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION, *supra* note 2, at 93 (stating that the American, French, and Russian Revolutions "established the idea of self-determination"); CHEN, *supra* note 2, at 32 (stating that "[t]he modern principle of self-determination originated in the sixteenth century when nation-states first emerged"); HANNUM, *supra* note 2, at 27 (asserting that the principle of self-determination "developed as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries"); HEATER, *supra* note 2, at 1-3 (noting the development of the notion of self-determination, though not so named, in Europe in the latter part of the eighteenth century, and urging that "[w]e must take care . . . not to give the impression that the concept of national self-determination had a particular moment of birth"); James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9, 12 (1991) (stating that the origin of self-determination "lies in critiques of sovereignty by Grotius and Pufendorf and in the libertarian movements of the eighteenth century").

4. See CASSESE 1986, *supra* note 2, at 131-32; Nafziger, *supra* note 3, at 12.

5. HEATER, *supra* note 2, at 41 (quoting President Wilson's address to a joint session of the United States Congress in January 1918 enumerating the Fourteen Points). Heater explains that Wilson was in fact rather tentative at first on the notion of self-determination but warmed up to it and used the term "self-determination" in later speeches. See *id.* at 43-45.

Lenin's view of self-determination differed markedly from Wilson's. While Wilson would take into account the claims of the colonial powers, Lenin called for the "unconditional and immediate liberation of the colonies without compensation."⁶ Both formulations—Wilson's and Lenin's—were open to criticism because of the threat that some thought they posed to the established legal order of the day.⁷

Notwithstanding such inconsistencies and objections, the notion of self-determination appeared, albeit in only a limited and implicit form, in the Covenant of the League of Nations created at the Versailles conference. Article 22 of the Covenant provided for a "mandate" system under which the colonial possessions of Germany and the Ottoman empire, until they were "able to stand by themselves,"⁸ would be placed under the political control of certain countries appointed as "mandatory powers" with the understanding that "the well-being and development of such peoples form a sacred trust of civili[z]ation."⁹

The next milestone in the development of the notion of self-determination was the establishment of the United Nations (U.N.) in 1945. The U.N. Charter expressly refers to self-determination, stating that one of the purposes of the U.N. is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹⁰ In addition, the U.N. expanded on the "mandate" exercise begun by the League of Nations by establishing a "trusteeship" system under which territories held under mandate, plus the colonies of "enemy

6. CASSESE 1986, *supra* note 2, at 131 (quoting V.I. Lenin, *Theses on the Socialist Revolution and the Right of Nations to Self-Determination* (Jan.-Feb. 1916)).

7. See, e.g., CASSESE 1986, *supra* note 2, at 132 (quoting views expressed by United States Secretary of State that Lenin's program menaced "the stability of the future world," and that the notion of local self-government generally ran counter to "the necessities of preserving an orderly world" with national governments controlling communities within national borders); HEATER, *supra* note 2, at 45 (reprinting a quotation from Walter Lippmann, secretary to a group of Wilson's advisors, stating that those advisors "tried to slow the President down on self-determination").

8. LEAGUE OF NATIONS COVENANT art. 22, para. 1, reprinted in ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW, 1918-1935*, 522 (1939).

9. *Id.* For a description of the mandate system, see generally QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* (1930). See also Nafziger, *supra* note 3, at 12 ("The Covenant of the League of Nations established a measure of self-determination for mandated territories, but did not articulate a general principle.").

10. U.N. CHARTER art. 1, para. 2. Another reference to self-determination appears in a later article, which provides that the United Nations shall promote certain specified values "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." *Id.* art. 55.

states," would be temporarily administered in a way that would recognize their right to move toward self-government.¹¹

Moreover, the U.N. Charter placed obligations on the remaining colonial powers to develop self-government within their colonial territories. Article 73 provides in pertinent part as follows:

Article 73. Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- (c) to further international peace and security;
- (d) to promote constructive measures of development, . . . ; and
- (e) to transmit regularly to the Secretary-General for information purposes, . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible¹²

Enthusiasm for self-determination, especially as a rallying cry for decolonization, grew quickly in the 1960s and 1970s. One author (a fan of self-determination) has described that growth as follows:

Step by step, the somewhat loose formula of Article 1, paragraph 2 of the Charter became enriched with hard substance, creating rights for colonial peoples and imposing corresponding duties on administering powers. A tremendous step forward was the adoption in 1960 of resolution 1514 (XV) by the General Assembly. . . . [T]hat resolution proclaimed a right of self-determination of "all peoples" As the abstention by all of the then colonial powers indicates, States were at that time far from agreeing on the existence of a true right of self-determination. Essentially, self-determination was viewed as a political claim, asserted on grounds of solidarity by all third world nations Very quickly, however, the situation changed. In 1966, self-determination was inserted in Article 1 of the two International Covenants on human rights Four years later, the principle of self-determination and

11. See generally *id.* arts. 75-77. Article 76 states that one of the basic objectives of the trusteeship system is "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned." *Id.* art. 76, para. b. The U.N. Charter also establishes a Trusteeship Council to oversee the trusteeship system. See *id.* arts. 86-91.

12. *Id.* art. 73.

equal rights of peoples made its appearance in the famous Friendly Relations Declaration (General Assembly resolution 2625 (XXV)), which drew no objections from any member State, riding instead into life on the swell of consensus. It is on the basis of these dramatic moves that the International Court of Justice felt entitled to give its blessing to self-determination as a legal right. Both in its legal opinion on Namibia as well as in the later opinion on Western Sahara it clearly stated that self-determination was more than a guiding principle to be heeded and promoted by the United Nations, but a full-fledged right that could be invoked by its holders to claim separate statehood and sovereign independence.¹³

To me, the most persuasive evidence of the existence of a right of self-determination comes from the two human rights treaties that author referred to: the International Covenant on Civil and Political Rights (ICCPR)¹⁴ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁵ Both of these treaties are binding on states that have ratified them,¹⁶ whereas U.N. General Assembly Resolutions are generally regarded as non-binding in and of themselves.¹⁷ The ICCPR and the ICESCR begin with strong assertions about the right of self-determination:

All Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁸

Most states in the world have now ratified the ICCPR and the ICESCR.¹⁹ Of pertinence to the Hong Kong transfer is the fact that the United Kingdom ratified them both in 1976.²⁰ The People's Republic of

13. Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 2, at 1-2 (citations omitted). For a similar enumeration of international legal instruments and International Court of Justice caselaw bearing on the notion of self-determination, see Nafziger, *supra* note 3, at 12-16.

14. International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

15. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, U.N. Doc. A/6316, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

16. The rule that treaties are binding on parties to them is considered a fundamental principle of international law, as reflected in Article 26 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980).

17. See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 37-38 (5th ed. 1984); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2-5 (1963), *excerpt reprinted in* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 134-36 (2d ed. 1990).

18. ICCPR, *supra* note 14, art. 1(1); ICESCR, *supra* note 15, art. 1(1).

19. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL—STATUS AS AT 31 DEC. 1995 at 111-12, 121-22, U.N. Doc. ST/LEG/SER.E/14, U.N. Sales No. E.96.V5 (1996) (noting that as of 1995, 132 states were parties to the ICCPR and 133 states were parties to the ICESCR).

20. See *id.* at 922.

China (PRC) has not ratified either one,²¹ although recent reports suggest that it might do so soon.²² Some commentators would claim that the PRC (or any other country that had not yet ratified the ICCPR or the ICESCR) is nevertheless obligated to recognize and respect the right of self-determination because it has “ripened” now into a rule of customary international law, or maybe even into a “peremptory norm” of international law binding on all states.²³ While I regard that claim with suspicion, the fact remains that the ICCPR, the ICESCR, and the U.N. Charter clearly establish rules of *treaty* law binding on all parties to respect the right of self-determination, especially in a colonial context.

B. *The Right of Self-Determination Today*

The details of the right of self-determination have been the subject of extensive debate since the time of the ICCPR and the ICESCR.²⁴ Numerous political events during the past several years, including the culmination of efforts to bring Namibia to independence from South Africa, the dissolution of the Soviet empire, and ethnic fighting in eastern and southeastern Europe, have fueled the debate. At the risk of omitting many significant points of that debate, I offer the following summary of some key elements of the right of self-determination as widely accepted today:²⁵

- (1) to whom it applies (that is, who are the “holders” of the right?)
 - (a) the inhabitants of a non-self-governing territory, including the inhabitants of a colony.²⁶

21. See *id.* at 921-22.

22. See, e.g., *China to Sign UN Treaty*, BEIJING REV., Apr. 28, 1997, at 1.

23. See, e.g., CASSESE 1986, *supra* note 2, at 136 (asserting that, “States have clearly expressed the view that the principle is part and parcel of *jus cogens*.”). But see POMERANCE, *supra* note 2, at 13 (questioning the assertion that the right of self-determination is “in the nature of *jus cogens*”).

24. See *supra* note 2 for a partial list of books and articles on the subject.

25. For this summary, I have drawn generally from various sources. See, e.g., CASSESE 1986, *supra* note 2; HANNUM, *supra* note 2; Tomuschat, *supra* note 2; Twining, *supra* note 2. In the following notes I have given only a few specific citations and identified some supplemental sources of authority.

26. See Nihal Jayawickrama, *The Right of Self-Determination*, in HONG KONG'S BASIC LAW—PROBLEMS AND PROSPECTS 85, 87 (Peter Wesley-Smith ed. 1990) [hereinafter Jayawickrama 1990]. Jayawickrama's views also appear in Nihal Jayawickrama, *The Right of Self-Determination—A Time for Reinvention and Renewal*, 57 SASKATCHEWAN L. REV. 1 (1993) [hereinafter Jayawickrama 1993]. See also Anna Michalska, *Rights of Peoples to Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION, *supra* note 2, at 71, 78 (noting that the right of self-determination of colonial peoples has been widely accepted). See generally *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) (noting in its preamble “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”). Some commentators claim that the right of self-determination applies *only* “to the liberation of colonial

- (b) a people, usually construed as being a group related by strong ties of all or most of the following types: language, history, culture, geography, religion, and social circumstances.²⁷
- (2) what the right entails (that is, what does it give to the “holders” of the right?)
 - (a) external self-determination—the right of the “holders” to choose, free from foreign interference, their status within the international community, including the status of an independent state, free association with an independent state, integration with an independent state, or some other status.²⁸
 - (b) internal self-determination—the right of the “holders” to choose freely the form of government under which they shall live.²⁹

territories.” Bhalla, *supra* note 3, at 91.

27. See CHEN, *supra* note 2, at 33. There is some disagreement as to whether the right of self-determination extends to all “peoples,” notwithstanding the broad formulation of Article 1 in the ICCPR and the ICESCR. See *supra* text accompanying note 18. Compare, e.g., Tomuschat, *supra* note 13, at 3 (“[S]elf-determination is a right of all peoples.”), with Michalska, *supra* note 26, at 78 (“According to the widely adopted, present-day view only peoples under colonial rule have the right to self-determination . . .”), and Bhalla, *supra* note 3, at 91 (“[T]he principle of self-determination is acceptable . . . only in its application to the liberation of colonial territories.”). See also Nafziger, *supra* note 3, at 17 (asking whether the right of self-determination applies “only in non-self-governing territories, that is, primarily in the process of decolonization,” or also in other circumstances). Cassese asserts that the right of self-determination applies only to three groups: people under colonial domination, people under alien domination, and people under racist domination. See CASSESE 1986, *supra* note 2, at 134. Pomerance takes a similar position, saying that the right of self-determination is confined to those who are still “dependent” (because they inhabit trust territories or other non-self-governing territories), and those subjected to alien subjugation and domination. See POMERANCE, *supra* note 2, at 14.

28. See Jayawickrama 1990, *supra* note 26, at 86; see also YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS—SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 18 (1994) (defining external self-determination as “enabl[ing] the population of a territory to decide freely whether to join, or not, an existing state, or whether it will become an independent and sovereign state”); John T. Paxman, *Minority Indigenous Populations and Their Claims for Self-Determination*, 21 CASE W. RES. J. INT’L L. 185, 193 (1989) (accepting a definition of external self-determination as “the right of a people to be free from alien rule”); POMERANCE, *supra* note 2, at 24 (defining external self-determination as “determination of international status”); Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 2, at 225, 230 (referring to external self-determination as being “the right of a people to be free from ‘foreign’ domination”). For a discussion of the various possible “end results” of external self-determination (i.e., independence, “association,” integration, etc.), see POMERANCE, *supra* note 2, at 10 and CASSESE 1986, *supra* note 2, at 134.

29. Jayawickrama 1990, *supra* note 26, at 86. For a discussion of the disagreement that exists on this point, see Rosas, *supra* note 28, at 228. Rosas defines the right of internal self-determination as the right of a people “to determine its constitution” and “to govern, that is to a democratic system of government.” *Id.* at 230; see also BEIGBEDER, *supra* note 28, at 18 (defining internal self-determination as “enabl[ing] the people of a country to choose their political system, their political, economic and social institutions and their political leaders, or to make important constitutional or political decisions”); POMERANCE, *supra* note 2, at 24 (defining internal self-determination as the

- (3) how the right is to be realized (that is, how is the “determination” to be made?)
- (a) external self-determination—by an effective means of expressing the free and voluntary preference of the “holders,” usually through a referendum based on universal adult suffrage.³⁰
 - (b) internal self-determination—a continuous process of selection, with regular opportunities of the “holders” to choose their government in accordance with participatory rights of the types laid out in the ICCPR.³¹

It is worth emphasizing two points that are pertinent to the Hong Kong transfer and that are implicit in the division of the right of self-determination into two parts: external and internal. First, it is entirely possible for the holders of the right of self-determination (for example, the population of a colony) to exercise their right of external self-determination by choosing to associate with, or merge into, an independent state. To be legitimate, however, such a decision-making process must involve broad participation by the members of the population. Second, once the holders of the right take such a step, the right of internal self-determination would still require that further opportunities to choose government leaders, presumably through genuinely free elections, continue on a regular basis.

“selection of a form of government”).

30. Jayawickrama 1990, *supra* note 26, at 87. This formulation draws heavily from a U.N. General Assembly Resolution discussed in POMERANCE, *supra* note 2, at 31-32. See also ROSAS, *supra* note 28, at 235 n.31 (noting that external self-determination is associated with democracy, and quoting another author as saying that “[w]here a self-determination unit is not already a State,” its right to choose its political status “is to be exercised by the people of the relevant unit without coercion and on a basis of equality (‘one man, one vote’)”). For references to the use of plebiscites or referenda for these purposes, see BEIGBEDER, *supra* note 28, at 18 (noting that “[b]oth external and internal self-determination imply a democratic process, i.e., a free and clear choice by the population of the territory or country through a plebiscite, referendum, or through elections”), Sushma Soni, *Regimes for Namibia’s Independence: A Comparative Study*, 29 COLUM. J. TRANSNAT’L L. 563, 572 (1991) (citing a U.N. General Assembly Resolution for the proposition that any choice made by a people having the right of self-determination is valid “as long as free and fair elections take place”), and see also CHEN, *supra* note 2, at 34 (noting that the choice involved in self-determination should be “genuinely and freely made by the people concerned”). For a reference to the difficulties inherent in using elections for these purposes, see POMERANCE, *supra* note 2, at 29.

31. See Jayawickrama 1990, *supra* note 26, at 86. Jayawickrama quotes a United Kingdom representative’s 1986 statement at the U.N.: “[E]ach individual must be able to exercise the other rights set out in the [ICCPR and the ICESCR], such as the rights to freedom of thought and expression, the rights of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections.” *Id.* As indicated above, see *supra* note 30, at least one author holds that internal self-determination, like external self-determination, involves public participation, as through elections. See BEIGBEDER, *supra* note 28, at 18.

One might question whether in fact the rules of self-determination place as much emphasis as suggested above on participatory decision-making—elections, referenda, plebiscites, and the like—as the means by which the right of self-determination (both external and internal) is to be exercised. Such an emphasis might be challenged as reflecting a Western bias toward democratic and representative government.³² After all, at least a fifth of the world's people live in a country where the political system does not purport to adhere to democratic and representative government of the type that Western countries typically espouse.³³ However, the sources of law on the right of self-determination are fairly clear on this point. In referring to the means by which the right of self-determination is to be achieved, the sources consistently use such language as “freely expressed will and desire,”³⁴ “political status freely determined by a people,”³⁵ and “free and voluntary choice . . . expressed through informed and democratic processes.”³⁶

II. THE TRANSFER OF SOVEREIGNTY IN HONG KONG

The history of Britain's involvement with Hong Kong is fully recounted elsewhere,³⁷ so I shall only summarize it here. The story centers on the rising and falling fortunes of three political entities: Britain, China, and Hong Kong itself.

32. For a cautionary note on this point, see Brad R. Roth, *Letter to the Editor*, INTEREST GROUP ON INTERNATIONAL ORGANIZATIONS NEWSLETTER (Am. Society of Int'l Law), Spr. 1996, at 3. Roth cites a 1990 U.N. General Assembly resolution, supported by “the Western liberal democracies,” that “reaffirmed the right of each State to choose its own political, economic, social and cultural system without foreign interference.” *Id.* Roth relies on this and other grounds in advising caution about asserting international acceptance of a “right to democratic elections.” *Id.* But see Jayawickrama 1993, *supra* note 26, at 3 (asserting that the essence of the right of self-determination “is choice: a free, genuine and voluntary choice expressed through informed and democratic processes”). See also *infra* text accompanying note 36.

33. See, e.g., MARK ROBERTI, THE FALL OF HONG KONG—CHINA'S TRIUMPH AND BRITAIN'S BETRAYAL 117 (1994) (noting the differences between what the notion of “elections” means in Britain and what it means in the PRC, where the Communist Party approves one candidate to run for each seat).

34. G.A. Res. 1514, *supra* note 26, art. 2.

35. *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

36. *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, G.A. Res. 1541, U.N. GAOR, 15th Sess., Annex 29, at 153, U.N. Doc. A/4684 (1960).

37. See, e.g., HANNUM, *supra* note 2, at 129-50; Jayawickrama 1990, *supra* note 26; ROBERTI, *supra* note 33; HONG KONG—IN SEARCH OF A FUTURE (Joseph Y.S. Cheng ed. 1984) [hereinafter CHENG]; James T. H. Tang, *From Empire Defence to Imperial Retreat: Britain's Postwar China Policy and the Decolonization of Hong Kong*, 28 MOD. ASIAN STUD. 317, 317-37 (1994).

A. *A Colony Plus a Leasehold*

Great Britain's exercise of sovereignty over Hong Kong arose from three nineteenth-century treaties. In 1842, by the Treaty of Nanking, China's Qing Dynasty ceded Hong Kong Island, with a territory of about seventy-six square kilometers, to Britain.³⁸ In 1860, by the (First) Treaty of Peking, the Chinese authorities ceded to Britain an additional area of about eleven square kilometers, comprising Stonecutters Island and a portion of the Kowloon Peninsula, just north of Hong Kong Island.³⁹ These two tracts of land—Hong Kong Island and Kowloon—are what most people think of when they hear the name "Hong Kong." The cluster of big buildings, Victoria Peak, the Star Ferry, and the shopper's paradise, are all located in these areas. However, this is only a small portion of what was, until July 1, 1997, governed by Britain. In 1898, by the Second Treaty of Peking, the Chinese authorities leased to Britain, for a period of ninety-nine years, what are commonly referred to as the New Territories, an additional 965 square kilometers of territory, most of it north of the Kowloon Peninsula but also including numerous islands surrounding Hong Kong Island.⁴⁰ Britain regarded these three legally separate tracts of land—Hong Kong Island, Kowloon, and the "New Territories"—as one unit, the "Colony of Hong Kong."⁴¹

During the twentieth century the British Empire declined,⁴² China recovered its power,⁴³ and the fortunes of Hong Kong soared.⁴⁴ When the

38. See CHENG, *supra* note 37, at 26 n.1; HANNUM, *supra* note 2, at 129 (citing Sino-British Treaty of Nanking, Aug. 29, 1842, 93 Consol. T. S. 467); Jayawickrama 1990, *supra* note 26, at 89.

39. See HANNUM, *supra* note 2, at 129 (citing Convention of Friendship between China and Great Britain, Oct. 24, 1860, 123 Consol. T. S. 73); Jayawickrama 1990, *supra* note 26, at 90. For a discussion of Britain's strength and China's weakness at the time of the 1842 and 1860 treaties, see ROBERTI, *supra* note 33, at xii.

40. See CHENG, *supra* note 37, at 26 n.1; HANNUM, *supra* note 2, at 130 (citing Convention between China and Great Britain respecting an Extension of Hong Kong Territory, June 9, 1898, 186 Consol. T. S. 310); Jayawickrama 1990, *supra* note 26, at 90; ROBERTI, *supra* note 33, at xii.

41. Jayawickrama 1990, *supra* note 26, at 90 (referring to Orders in Council by which Britain declared the New Territories "to be part and parcel of the Colony of Hong Kong, ignoring any claim of the existence of a lease"). Hong Kong Island and Kowloon are now not viable without the New Territories. CHENG, *supra* note 37, at 3-4; ROBERTI, *supra* note 33, at xii-xiii.

42. See Tang, *supra* note 37, at 318-19 (discussing the decline in Britain's ability to maintain an empire following World War II), and at 336 (noting the "acceptance of a diminished British world role" by the 1970s).

43. For surveys of China's reemergence in the closing years of the twentieth century—following a terrible century marked by the collapse of the Qing Dynasty, warlordism, civil war, Japanese occupation, civil war, economic disaster, and the Cultural Revolution—see chapters 3-10 in JUNE GRASSO ET AL., MODERNIZATION AND REVOLUTION IN CHINA (1991), chapters 2-9 in EDWIN E. MOISE, MODERN CHINA (2d ed. 1994), and chapters 5-17 in LUCIAN W. PYE, CHINA: AN INTRODUCTION (4th ed. 1991).

44. See ROBERTI, *supra* note 33, at xii (noting that by the late 1970s, Hong Kong "had been

People's Republic of China took control of the China seat in the United Nations in the early 1970s, the PRC apparently considered the time ripe for pressing Britain for the return of Hong Kong. In 1972, China was able to push through the U.N. General Assembly an action that had the effect of changing Hong Kong's legal characterization: whereas until then Hong Kong had been classified as a colony of Great Britain for purposes of Article 73 of the U.N. Charter,⁴⁵ Hong Kong was thenceforth removed from the list of colonies.⁴⁶

This 1972 action was a turning point in Britain's relinquishment of sovereign control over Hong Kong. One commentator has suggested that Britain raised no objection to the change in status because Britain considered other aspects of its relations with the PRC more important than its interests in Hong Kong.⁴⁷ Unquestionably, the 1972 action set the stage for what was to follow in the 1980s and 1990s.

B. *The British Retreat*

In September 1982 Prime Minister Margaret Thatcher visited Beijing, in part to discuss the status of Hong Kong with Deng Xiaoping, the PRC's paramount leader.⁴⁸ Although she apparently argued for continued British administration of the entire territory of Hong Kong after 1997 (the year in which the ninety-nine year lease of the New Territories was to expire), Deng was adamant that control over all of Hong Kong, including those portions ceded to Britain in 1842 and 1860, must revert to the

transformed from a barren rock into a major commercial center and economic powerhouse," ranking 21st in world trade, and that by 1993 it ranked tenth in world trade); see also HANNUM, *supra* note 2, at 129 (noting that Hong Kong "is a major trading and manufacturing hub and the world's third largest financial center," and that it has a per capita income many times greater than that of the PRC). Indeed, the standard of living in the mid-1990s was about on par with that in Britain and Canada. See ROBERTI, *supra* note 33, at 306. A recent source says Hong Kong now "boasts the planet's eighth-largest trading economy." Kristin Choo, *Zero Hour for Hong Kong*, A.B.A.J., May 1997, at 70, 71.

45. For the text of Article 73, see *supra* text accompanying note 12. From 1947 to 1972, British authorities had furnished information pursuant to Article 73(e). See Jayawickrama 1990, *supra* note 26, at 90.

46. See Jayawickrama 1990, *supra* note 26, at 91-92. For a detailed account of this action, see Patricia A. Dagati, *Hong Kong's Lost Right to Self-Determination: A Denial of Due Process in the United Nations*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 153, 165-69 (1992). See also HANNUM, *supra* note 2, at 130 n.437. For the text of the Chinese letter on this subject, see CHENG, *supra* note 37, at 2. For a description of the U.N. committee responsible for such affairs, see BROWNLIE, *supra* note 2, at 568.

47. See Jayawickrama 1990, *supra* note 26, at 92-93. For another reference to the "political and pragmatic reasons" Britain apparently had for not protesting the decision, see Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105, 114 (1992).

48. See ROBERTI, *supra* note 33, at xiii.

PRC.⁴⁹ He stated, however, that the PRC's administration of Hong Kong would be subject to the policy of "one country, two systems," under which Hong Kong could retain some or all of its own political and economic character notwithstanding its inconsistency with the character of the rest of the PRC.⁵⁰

Deng's position prevailed. In 1984, following negotiations between British and PRC officials, a Joint Declaration was issued.⁵¹ It provided that all of Hong Kong—Hong Kong Island, the Kowloon Peninsula, and the New Territories—would pass to PRC control as of July 1, 1997, but that this control would take the form of a Special Administrative Region (SAR) in which the economic and legal systems would remain basically unchanged for fifty years, until 2047.⁵²

More specifically, the Joint Declaration included these key promises:⁵³

- (a) The Hong Kong SAR government shall be composed of local inhabitants. The chief executive, who will nominate principal officials, shall be appointed by the central authorities in Beijing after elections or consultations held locally.
- (b) The legislature, to whom the executive authorities shall be accountable, shall be constituted by elections.
- (c) Judicial power, which shall be exercised independently, shall be vested in the SAR courts, and these courts shall possess the power of final adjudication.
- (d) The rights and freedoms of inhabitants shall be protected. Every person shall have the right to freedom of speech, of the press, of assembly, and of religious belief, the right to judicial remedies, the right to confidential legal advice, and the right to challenge in court the actions of the executive branch of government.
- (e) The social and economic systems in Hong Kong and the lifestyle of inhabitants shall remain unchanged for at least fifty years.

49. See HANNUM, *supra* note 2, at 135; ROBERTI, *supra* note 33, at xiii.

50. According to statements by Deng in 1984, the Chinese Government was "pursuing a policy of 'one country, two systems.' . . . [T]his means that within the People's Republic of China, the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system." *One Country, Two Systems*, in DENG XIAOPING, ON THE QUESTION OF HONG KONG 6 (1993) (summarizing Deng's talks with prominent Hong Kong figures).

51. See ROBERTI, *supra* note 33, at xiii; see also HANNUM, *supra* note 2, at 134 n.454 (identifying the several instruments that constitute the Joint Declaration and the sources where those documents may be found). According to Hannum, the Joint Declaration is, despite its "rather unusual form," a binding international agreement. See HANNUM, *supra* note 2, at 136.

52. See CHENG, *supra* note 37, at 4; HANNUM, *supra* note 2, at 137 (describing key points of the Joint Declaration).

53. This list is drawn from PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 8-9 (2d ed. 1993), from Choo, *supra* note 44, at 70-71, and from HANNUM, *supra* note 2, at 137-43.

Immediately following the issuance of the Joint Declaration, many people were relieved that Hong Kong apparently would, according to these and other promises, retain a substantial degree of autonomy for a half-century.⁵⁴ As time went on, however, many people lost confidence in the PRC's promises as set forth in the Joint Declaration, in part because of ambiguities or weaknesses in some of the provisions themselves—including those supposedly guaranteeing "elections" and "autonomy"⁵⁵—and in part because of moves by the Beijing authorities that threw doubt on their sincerity. The most galvanizing of these was Beijing's bloody crackdown on student demonstrators in Tian'anmen Square in June 1989.⁵⁶

Nor were these uncertainties laid to rest at the next stage of the process of prescribing Hong Kong's future: the enactment of the Basic Law by the PRC's National People's Congress in 1990. That law incorporated key provisions of the Joint Declaration.⁵⁷ Like the Joint Declaration,

54. See HANNUM, *supra* note 2, at 135-36 (noting relief felt by many in Hong Kong at the issuance of the Joint Declaration); ROBERTI, *supra* note 33, at 116; *see also* Choo, *supra* note 44, at 71.

55. *See, e.g.*, HANNUM, *supra* note 2, at 138-39 (noting that the Joint Declaration (i) does not indicate what the term "elections" means in this context, and (ii) is unclear as to which body has the power to determine whether a law adopted in the Hong Kong SAR is consistent with the Basic Law), and at 145 (writing in 1990 that Hong Kong's "conservative climate has been disturbed" by some democratic activists complaining about these issues); ROBERTI, *supra* note 33, at xiv (noting ambiguity of the terms "elections" and "accountable" in the Joint Declaration), and at 117 (suggesting that the vagueness of the Joint Declaration on the term "elections" was intentional, to mask unresolved differences between the PRC and British negotiators). For a discussion of the ambiguity surrounding the provisions on autonomy, *see* Brian Z. Tamanaha, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy,"* 20 CAL. W. INT'L L.J. 41 (1989).

56. *See, e.g.*, GEORGE L. HICKS, *HONG KONG COUNTDOWN IV* (1988) (stating that several events by 1988, including the publication of the draft Basic Law, had proven that "any hope of meaningful future autonomy is now dead"). According to one author, the Beijing government's crackdown against student demonstrators at Tian'anmen Square in June 1989 shocked many people in Hong Kong into a realization that Chinese promises were suspect. *See* Choo, *supra* note 44, at 71 ("The heady optimism about [Hong Kong's] future under Chinese rule evaporated overnight."). For a detailed account of the reaction in Hong Kong to the events surrounding the Tian'anmen massacre, *see* Wendy Dullea Bowie, Comment, *The Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region*, 8 DICK. J. INT'L L. 245 (1990). *See also* Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667, 688-89 (1991) (noting the pessimism that followed the Tiananmen Square incident). Another author claims that the skepticism of Beijing's promises was present from the very beginning, when the Joint Declaration was issued in 1984. *See* ROBERTI, *supra* note 33, at xiii ("Many doubted China's willingness to stick to the terms.").

57. *See* WESLEY-SMITH, *supra* note 53, at 9. For details on the Basic Law, *see* YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER* (1997) and *THE HONG KONG BASIC LAW* (Ming K. Chang & David J. Clark eds., 1991). *See also* Daniel R. Fung, *Foundation for the Survival of the*

however, it was ambiguous on certain issues bearing on Hong Kong's post-1997 autonomy, such as the form of "elections," the true independence of the judiciary, and legal autonomy.⁵⁸ Also like the Joint Declaration, the Basic Law's drafting and adoption took place with almost no direct input from the people of Hong Kong.⁵⁹

What were the views of the people of Hong Kong? Opinion surveys conducted there at the time the negotiations were in progress indicated that an overwhelming majority did not want the administration of Hong Kong to pass to the PRC.⁶⁰ As an illustration of public sentiment, one author gives this description of reactions in Hong Kong to the adoption of the Basic Law by the Beijing authorities in April 1990:

Within three hours of its adoption, even Hong Kong's non-elected legislature voted overwhelmingly to reject it. In a more dramatic gesture, the 170,000-

Rule of Law in Hong Kong—The Resumption of Chinese Sovereignty, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 294-306 (1996-97) (providing an overview of the Basic Law).

58. See HANNUM, *supra* note 2, at 147 (stating that the draft Basic Law paralleled the Joint Declaration, "including the latter's ambiguities"); HICKS, *supra* note 56, at xii (quoting from a British legal expert whose assessment of the terms of the draft Basic Law showed that Hong Kong's supposed autonomy would in fact be illusory); see also Choo, *supra* note 44, at 72 (explaining that the power of interpreting provisions of the Basic Law "is vested in the Standing Committee of the [PRC's] National Peoples [sic] Congress"), and at 72-74 (quoting a member of the Hong Kong University law faculty as saying that other provisions in the Basic Law will probably alter the Hong Kong legal system "to make it conform in large measure to the Chinese system").

59. See HANNUM, *supra* note 2, at 134 (noting that negotiations on the Joint Declaration "were secret"), at 135 (noting that despite British assertions to the contrary, "there was no formal consultation with or participation by Hong Kong residents" in the negotiation of the Joint Declaration, and that once adopted it could not be altered by Hong Kong), and at 149 (stating that the Joint Declaration regime was "essentially imposed upon the Hong Kong population, without formal consultation or provision for a referendum"); IAN SCOTT, *POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 2* (1989) (noting that at the time leading up to the Joint Declaration, "[t]he idea of a referendum, or any kind of vote, was rejected"); see also Dagati, *supra* note 46, at 173-74 (noting that the people of Hong Kong were not represented in the secret negotiations on the Joint Declaration); Jayawickrama 1990, *supra* note 26, at 95-96 (noting that the Basic Law was drafted by a committee appointed by the PRC's National People's Congress, in which the nominees from Hong Kong were in a minority—and none of whom had been elected by the people of Hong Kong—and that the Basic Law was enacted by the National People's Congress, in which the people of Hong Kong were not represented); ROBERTI, *supra* note 33, at 304 (stating that "[t]here were no elected representatives on the Basic Law Drafting Committee").

60. See CHENG, *supra* note 37, at 14 (reporting that in a mid-1982 poll, 95% opted for retaining the status quo and only 26% "thought a return to China was acceptable"), and at 15 (noting that in a poll following Prime Minister Thatcher's 1982 visit to Beijing, when people "gradually realized that the status quo could not be maintained for long," about 42% still preferred retaining the status quo, another 42% indicated a preference for either (i) "self-administration under Chinese sovereignty," or (ii) "British administration under Chinese sovereignty," and only about 5% preferred a "return to China, under direct Chinese administration"). Writing in 1984, Cheng concluded that "the people of Hong Kong are naturally unwilling to see Hong Kong returned to China" in 1997. *Id.* at 9. According to another author, writing a decade later, "Beijing knows that the majority of Hong Kong people would prefer to remain under British rule." ROBERTI, *supra* note 33, at 308.

strong Hong Kong Federation of Students burnt a model of the Basic Law and dumped hundreds of torn copies on the steps of the New China News Agency, China's unofficial embassy in the territory.⁶¹

Despite these sentiments, it now seems clear that the PRC has ensured that the administration of Hong Kong is fully within its own control. Evidence of this comes in several forms:

- * The Basic Law calls for only a portion of the legislators to be "elected," whatever that term may mean.⁶²
- * In any event, the Basic Law places most political power in Hong Kong not with the legislature but instead with the governor, who is to be handpicked by the Beijing authorities.⁶³
- * Even before the July 1 transfer of Hong Kong to the PRC, the prospective governor announced that Hong Kong's existing, partially-elected legislature would be disbanded and replaced with a provisional legislature consisting of pro-PRC officials.⁶⁴
- * Also before the July 1 transfer, the Beijing authorities announced that the PRC's National People's Congress was repealing key provisions of Hong Kong's bill of rights and reinstating the more restrictive laws the bill of rights had replaced.⁶⁵
- * The Basic Law requires the Hong Kong SAR to enact laws prohibiting, among other things, "subversion against the Central People's Government, or theft of state secrets" laws that are likely to undermine basic civil and political freedoms, including freedom of the press.⁶⁶
- * The PRC's National People's Congress has the power to amend the Basic Law unilaterally.⁶⁷

These and other factors have led some observers to conclude that "[e]verything is in place to enable the Chinese [government authorities in Beijing] to control Hong Kong in every material way,"⁶⁸ and that "Beijing has ensured that it will control every facet of Hong Kong's affairs."⁶⁹

61. Jayawickrama 1993, *supra* note 26, at 17.

62. See ROBERTI, *supra* note 33, at xiv. As noted above, the definition of "elected" for these purposes is uncertain. See *supra* notes 57, 59.

63. See ROBERTI, *supra* note 33, at 307.

64. See *Hong Kong: Tung-twisters*, ECONOMIST, Apr. 19, 1997, at 39-40.

65. See Choo, *supra* note 44, at 72.

66. See *id.*

67. See HANNUM, *supra* note 2, at 149.

68. Choo, *supra* note 44, at 74 (quoting Martin Lee, one of the most outspoken pro-democracy politicians in Hong Kong).

69. ROBERTI, *supra* note 33, at xi. Roberti notes in particular that "Beijing will be able to influence any business decision made in Hong Kong," as well as "political decisions and court cases." *Id.* at 309.

In sum, the transfer of sovereignty from Britain to the PRC in July 1997 represents the culmination of a process in which full political, legal, and administrative control over Hong Kong will pass to the Beijing government, against the wishes of most people in Hong Kong and in sharp contrast to the promises of autonomy appearing in both the Joint Declaration and the Basic Law.

III. WHAT HAPPENED TO SELF-DETERMINATION IN HONG KONG?

I have now summarized the rules involved in the “right of self-determination” in international law and provided a brief account of the transfer of political control over Hong Kong from Britain to the PRC. According to some critics, there is a mismatch between the law and the facts, making the transfer of Hong Kong invalid. I explore that argument in the following paragraphs, and then offer my own views.

A. A Critic's Analysis

Of the several commentators who have examined the case of Hong Kong in the context of the right of self-determination,⁷⁰ one stands out as being closest to the action and most persistent in his criticism of both British and PRC behavior toward Hong Kong. He is Professor Nihal Jayawickrama, a member of the law faculty at the University of Hong

70. See, e.g., Dagati, *supra* note 46, at 155-58 (recounting “how the people of Hong Kong lost their right to self-determination under international law”); Robert M. McGee & Danny Kin-Kong Lam, *Hong Kong's Option to Secede*, 33 HARV. INT'L L.J. 427, 427, 429 (1992) (concluding “that the citizens of Hong Kong should be given the option of freely choosing their future” and “that Hong Kong's transfer to the PRC is *prima facie* illegitimate”); Eric M. Amberg, Comment, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839 (1985) (writing just after the Joint Declaration that the people of Hong Kong are entitled to the right of self-determination and that discussions on this issue should be raised within the U.N. General Assembly). For discussions of related topics, see John K. Kwok, *The Hong Kong Special Administrative Region Under “One Country, Two Systems”: Design for Prosperity or Recipe for Disaster?*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 107, 113 (1994) (stating that Hong Kong is changing from a colony of the United Kingdom “into a ‘colony’ of the PRC”); Mark F. McElreath, “*Degrading Treatment*”—*From East Africa to Hong Kong: British Violations of Human Rights*, 22 COLUM. HUM. RTS. L. REV. 331, 357-59 (1991) (noting that with the completion of the Joint Declaration it became impracticable for the people of Hong Kong to exercise a right of self-determination, but that the British government should extend the rights of citizenship to the people of Hong Kong); Mushkat, *supra* note 47, at 112-17 (discussing differing views about the applicability of the right of self-determination to the people of Hong Kong), and at 143 (asserting that the people of Hong Kong do have the right of internal self-determination, based on Article 73 of the U.N. Charter); Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309, 323-24 (1992) (stating that the removal of Hong Kong from the list of colonies for purposes of the U.N. “meant that any right of self-determination of Hong Kong was foreclosed for all practical purposes”).

Kong.⁷¹ He argued in 1990 that the transfer of sovereignty over Hong Kong from Britain to the PRC would violate the right of self-determination belonging to Hong Kong's inhabitants unless the arrangements for such transfer were validated "by means of an informed referendum, held at the appropriate stage, on the basis of universal adult suffrage."⁷² His analysis included the following key points.

1. *The inhabitants of Hong Kong have the right of self-determination because Hong Kong is a colony.*⁷³ The eighteenth-century transfers of sovereignty over the various portions of Hong Kong were valid at the time they were made,⁷⁴ and the claim of the PRC authorities to the contrary, on grounds that those transfers arose from "unequal treaties,"⁷⁵ is unsupportable.⁷⁶ Indeed, the International Court of Justice (ICJ) has held, in similar circumstances, "that whatever the legal ties may have been at the time of colonization, they cannot now stand in the way of the application of the principle of self-determination."⁷⁷ Moreover, Hong Kong has been generally regarded as a colony, notwithstanding the PRC's sleight-of-hand in the U.N. in 1972.⁷⁸

2. *The inhabitants of Hong Kong also have the right of self-determination because they constitute a "people," that is, a cohesive national group.*⁷⁹ "Hong Kong is home to nearly six million inhabitants who have assiduously [*sic*] developed not only their own economic and social

71. Professor Jayawickrama is an Associate Professor in Law at Hong Kong University and Hong Kong chair of the International Commission of Jurists. Formerly Secretary for Justice in the Government of Sri Lanka, he received his doctorate from the University of London for research in the field of international human rights law. Before joining the Hong Kong University law faculty, Professor Jayawickrama was the Ariel F. Sallows Professor of Human Rights, College of Law, University of Saskatchewan. His views on the transfer of control over Hong Kong appear in Jayawickrama 1990 and Jayawickrama 1993, both *supra* note 26, and in Nihal Jayawickrama, *Hong Kong: The Gathering Storm*, 22 BULL. OF PEACE PROPOSALS 157 (1991). He has been widely quoted on various matters relating to the transfer of Hong Kong to the PRC. See, e.g., Choo, *supra* note 44, at 71-72; Edward A. Gargan, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A1.

72. Jayawickrama 1990, *supra* note 26, at 97-98.

73. See *id.* at 94.

74. See *id.* at 90, 93.

75. For references to the "unequal treaties" argument, see HANNUM, *supra* note 2, at 130; CHENG, *supra* note 37, at 1-3; Tang, *supra* note 37, at 320.

76. Jayawickrama 1990, *supra* note 26, at 93. For another analysis concluding that China's "unequal treaties" argument is without merit, see Dagati, *supra* note 46, at 156-58.

77. Jayawickrama 1990, *supra* note 26, at 94 (citing the ICJ's 1975 decision in the *Western Sahara* case).

78. See *id.* at 91-93; see also *supra* text accompanying notes 45-47.

79. See Jayawickrama 1993, *supra* note 26, at 15; Jayawickrama 1990, *supra* note 26, at 94.

systems, but also a distinct and unique cultural identity⁸⁰ during “a century and a half of existence as a separate legal entity” with “clearly defined historical boundaries.”⁸¹ During that century and a half, Hong Kong has “been a sanctuary for people from southern China who sought refuge during times of tumult and disturbance on the mainland.”⁸²

3. *Therefore, the PRC’s assertion of sovereignty over Hong Kong can be valid only if the people of Hong Kong determine freely that this should happen.*⁸³ The principle of self-determination, as established in the U.N. Charter, U.N. General Assembly resolutions, and the international human rights covenants, has conferred on the people of Hong Kong “the right to decide what its future should be.”⁸⁴ Judging from a similar case decided by the ICJ, Britain cannot legally make that determination on behalf of the people of Hong Kong.⁸⁵

4. *But the people of Hong Kong were not permitted to make a free determination about their future, since no effective participation by them, or consultation with them, ever took place.*⁸⁶ The Joint Declaration “was a treaty negotiated between the colonial power and another sovereign state without any prior consultation with the people of Hong Kong,”⁸⁷ and “at no stage in the events leading up to the enactment of the Basic Law were the people of Hong Kong given an opportunity of expressing their acceptance of that document.”⁸⁸

5. *Hence, the Joint Declaration and the Basic Law lack legitimacy,⁸⁹ and “the inhabitants of Hong Kong continue to enjoy the right of self-determination.”⁹⁰* The transfer of Hong Kong to the PRC “can be validated only by means of an informed referendum, held at the

80. Jayawickrama 1990, *supra* note 26, at 94.

81. *Id.*

82. Jayawickrama 1993, *supra* note 26, at 14; *see also* Amberg, *supra* note 70, at 842 (citing a British government source as stating that three-quarters of a million people “left China and fled to Hong Kong when the communists came to power”).

83. *See* Jayawickrama 1990, *supra* note 26, at 95-98.

84. *Id.* at 94. For a discussion of the principle of self-determination as addressed in the international legal instruments referred to here, *see* Part I.A. of this article.

85. *See id.* at 96-97, referring to the ICJ’s 1975 decision in the *Western Sahara* case.

86. *See id.* at 96; *see also supra* note 59.

87. Jayawickrama 1990, *supra* note 26, at 95-96.

88. *Id.* at 96.

89. *See id.* at 98.

90. *Id.* at 97 (emphasis added).

appropriate stage, on the basis of universal adult suffrage, and conducted fairly and impartially, preferably by the United Nations.”⁹¹

Professor Jayawickrama closes with a warning: “no people anywhere in the world will suffer colonial domination, in whatever form, forever.”⁹² The Hong Kong transfer, he says, represents colonial domination; it is “a unique manifestation of neo-colonialism in an age when colonialism has all but been laid to rest.”⁹³ In order to avoid turmoil and tragedy, he says, it is imperative that the people of Hong Kong be permitted to exercise their right of self-determination.⁹⁴

B. Was Self-Determination Denied, or Is It Merely a Secondary Right?

Although I agree with most of the specific points in Professor Jayawickrama’s argument, I wish to propose an alternative to his ultimate conclusion. Perhaps the right of self-determination is in fact subsidiary in character, playing second fiddle to a more fundamental principle: avoiding a serious threat to international peace. In this concluding section I shall explain this alternative analysis of the Hong Kong transfer, along with a few other points on which my own views differ somewhat from Professor Jayawickrama’s.

As for the first two points in Professor Jayawickrama’s argument, as I have summarized it above, I believe it is uncontroversial that the people of Hong Kong have a right of self-determination—at least a right of “internal” self-determination as defined earlier.⁹⁵ It seems reasonable to characterize the people of Hong Kong as either (or both) the inhabitants of a colony or a “people.” These are the two characterizations on which Professor Jayawickrama relies. However, this assessment overlooks another important point about the right of self-determination: it applies to the residents of all *non-self-governing territories* (not just those territories that could be considered on their own merits to be either colonies or homelands of separate “peoples”), and there surely can be no doubt that Hong Kong was a non-self-governing territory under British administration. As noted above, Article 73 of the U.N. Charter sets forth requirements of countries (such as Britain) that are responsible for administering non-self-governing territories. These include the obligation to assist the territory in moving toward self-government.⁹⁶

91. *Id.* at 97-98.

92. *Id.* at 98.

93. *Id.* at 96.

94. *See id.* at 98.

95. *See supra* text accompanying note 29.

96. *See supra* text accompanying note 12 for the pertinent text of Article 73.

Other experts have also confirmed the applicability of the right of self-determination to the people of Hong Kong. Hurst Hannum, author of a key treatise on autonomy and self-determination,⁹⁷ addressed the issue in a panel discussion held at the 1986 annual meeting of the American Society of International Law:

If one looks at the situation objectively, there is no question whatsoever that the people of Hong Kong have the right to self-determination. The United Kingdom ruled Hong Kong as a colonial power. The treaties under which the United Kingdom ruled Hong Kong were certainly as valid as every treaty under which the United Kingdom ruled states in Africa, Asia, or Ireland. I am not sure whether it is good or bad that self-determination has not been addressed in the context of Hong Kong, but it does stand out as one of the very few examples where reality has overcome dedication to theoretically principled norms that in many cases tend to cause more trouble than they provide solutions.⁹⁸

The last sentence quoted above raises a question about Professor Jayawickrama's conclusion. He asserts that the PRC's exercise of sovereignty over Hong Kong can be valid only if the people of Hong Kong freely determine that this should happen.⁹⁹ This would be the case if the right of self-determination were the subject of a peremptory norm of international law, or if it were at least on an equal footing with other pertinent principles of international law. As noted above, some commentators have suggested that the right of self-determination has developed to that extent.¹⁰⁰ If so, Professor Jayawickrama's conclusion would seem inescapable. Britain would have to be judged to have violated international law in disregarding its obligation to respect the right of self-determination of the people of Hong Kong—both the right of external self-determination (because those people had no effective opportunity to choose their status within the international community) and the right of internal self-determination (because the takeover by the PRC obviously promises no continuous opportunity to select their government through

97. See HANNUM, *supra* note 2.

98. Remarks by Hurst Hannum, *Panel Session, The Hong Kong Accord as a Model for Dealing with Other Disputed Territories*, 80 AM. SOC'Y INT'L LAW PROC. 348, 366 (1986) [hereinafter *Panel Session*]. In discussing Hong Kong's right of self-determination, Hannum noted that even if "associated statehood" or "integration" were to be the new status of Hong Kong, such a change in status would be legitimate only as a result of the freely expressed wishes of the people through elections. *Id.*

99. See Jayawickrama 1990, *supra* note 26, at 95-98; see also *supra* text accompanying notes 83-85.

100. See *supra* note 23. Indeed, Jayawickrama himself suggests that the right to self-determination might be regarded as a peremptory norm of international law. See Jayawickrama 1993, *supra* note 26, at 18. He states that "[t]he importance and significance of the right of self-determination cannot . . . be overemphasized," and was conceived of as the most fundamental of all human rights. *Id.* at 4.

a participatory system).¹⁰¹ Put bluntly, Britain would, under that analysis, have to be seen as having illegally sold Hong Kong and its people to the PRC in return for stable and profitable relations with the Beijing regime.

However, an alternative analysis is also possible. The right of self-determination may be regarded as being secondary in importance to a more fundamental principle, that of preserving international peace and friendly relations. If so, a different conclusion emerges. The following paragraphs summarize that analysis, based on pertinent treaty provisions.

The key treaty rules regarding self-determination are those appearing in the U.N. Charter, the ICCPR, and the ICESCR. The pertinent U.N. Charter provisions all suggest a secondary role for the right of self-determination. Article 1(2) implies that respect for the self-determination of peoples is only one of several "appropriate measures to strengthen universal peace."¹⁰² Article 55 refers to the "peaceful and friendly relations among nations" as an intended outgrowth of a respect for self-determination of peoples.¹⁰³ Article 73, in addressing states responsible for administering non-self-governing territories, asserts that they have a sacred trust "to promote to the utmost, *within the system of international peace and security established by the present Charter*, the well-being of the inhabitants of these territories."¹⁰⁴

In short, the U.N. Charter provisions that relate to the right of self-determination can reasonably be construed as establishing that right as a means to a larger end: peace, security, and friendly relations. Under this construction, the right of self-determination can in some circumstances be "trumped." If the exercise of the right of self-determination would imperil international peace, security, and friendly relations, that right must give way—even if, as in the case of Hong Kong, the threat to international peace comes from the PRC itself.

Indeed, one author has identified this as one of the key weaknesses in the U.N. Charter's treatment of self-determination: "[S]elf-determination was conceived of [in the U.N. Charter] as a means for ensuring peace and friendly relations—it was not considered an independent value—with the obvious consequence that it was to be set aside whenever its fulfillment gave rise to tension and conflict between States."¹⁰⁵

101. For definitions of external self-determination and internal self-determination, and explanations of how each is to be realized, see *supra* text accompanying notes 28-31.

102. U.N. CHARTER art. 1, para. 2. For a more complete excerpt from this provision, see *supra* text accompanying note 10.

103. *Id.* art. 55. For a more complete excerpt from this provision, see *supra* note 10.

104. *Id.* art. 73 (emphasis added); see also *id.* art. 73, para. c (mentioning the need "to further international peace and security"). Likewise, the U.N. Charter provisions on the trusteeship system are based on the objective of furthering "international peace and security." *Id.* art. 76, para. a.

105. CASSESE 1986, *supra* note 2, at 133.

The key ICCPR and ICESCR provision on self-determination—appearing in the opening articles of each of those covenants—appears at first glance to be more potent and unconditional than the U.N. Charter provisions, since it makes no reference to peace, security, and friendly relations as overriding principles.¹⁰⁶ However, in describing the obligations of states with respect to the right of self-determination, those opening provisions go on to incorporate by reference the limitations the U.N. Charter imposed: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, *in conformity with the provisions of the Charter of the United Nations.*”¹⁰⁷

Therefore, it seems reasonable to construe the ICCPR and ICESCR provisions—like those in the U.N. Charter—as establishing self-determination as a secondary or conditional right.¹⁰⁸ The conclusion from this analysis would be that Britain’s transfer of Hong Kong to the PRC did not violate the right of self-determination if that course of action avoided a breakdown in international peace, security, or friendly relations.

Neither of these two alternative conclusions is appealing. Under the first one (Professor Jayawickrama’s), Britain is to be damned for having violated the right of self-determination of the people of Hong Kong at the behest of the PRC and with the acquiescence of the U.N. General Assembly. Under the second possible conclusion, the right of self-determination itself is damned, or at least sharply diminished in importance. If the rising fortunes of the PRC can empower it to force Britain to transfer title to Hong Kong without reference to the wishes of the Hong Kong people, then of what value is the right of self-determination?

Maybe the Hong Kong case is, as Hurst Hannum said, one in which “reality has overcome dedication to theoretically principled norms.”¹⁰⁹ However, I find it tragic and reprehensible that those norms—that is, the international rules of self-determination—were not even discussed openly among the parties involved. Considering the completeness with which the PRC has now taken control over Hong Kong, I doubt those norms will be discussed in Hong Kong anymore. The chill is there to stay.

106. For the text of Article 1(1) of the ICCPR and the ICESCR, see *supra* text accompanying note 18.

107. ICCPR, *supra* note 14, art. 1(3) (emphasis added); ICESCR, *supra* note 15, art. 1(3) (emphasis added).

108. Even if the opening provisions in the ICCPR and the ICESCR made no explicit reference to the U.N. Charter, the obligations of parties under the ICCPR and the ICESCR would presumably be subject to the provisions of the U.N. Charter anyway, since Charter obligations are to take priority over any inconsistent obligations appearing in other treaties. See U.N. CHARTER art. 103.

109. *Panel Session, supra* note 98, at 366 (remarks of Hurst Hannum).