

## SUCCESSION BY ESTOPPEL: HONG KONG'S SUCCESSION TO THE ICCPR

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On July 1, 1997, China resumed sovereignty over Hong Kong under the “one country, two systems” framework. Under this unprecedented framework, Hong Kong retains for fifty years its economic, social, political, and legal systems, which are distinctively different from those practiced in other parts of China.<sup>1</sup> Driven in large measure by the need to preserve Hong Kong’s

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<sup>1</sup> See YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 139 (1997) (stating that Hong Kong is “distinctive from the rest of China, in its economy, political institutions and values, legal system, and world view”); see also Jerome A. Cohen, *Foreword* to RODA MUSHKAT, ONE COUNTRY, TWO LEGAL PERSONALITIES: THE CASE OF HONG KONG, at vii (1997) (arguing that Hong Kong and China possess distinctively different “assumptions, values, customs, experiences and underlying philosophy”). Professor Gong explained the difference between China and the West as follows:

In China, it is the state that comes first, the collective second, and *the individual the last*. If any conflict should occur, the collective benefit (such as that of the family, the school and the union) should be sacrificed for the state’s interest; similarly, *the individual’s personal interest should give way to the interest of the collective’s and the state*. The proposition has been consistently maintained from the time of Sun Yatsen to that of Mao Zedong: it has its historical background too. *Old China was a country oppressed by the great Powers—the imperialists*. For example, Hong Kong island was ceded to the United Kingdom under the unequal Treaty of Nanking. *Therefore, the first objective of the revolution was to attain independence and liberation of the nation*. Although great changes have taken place since 1949, and the Chinese people are now standing up, independently and equally, among the nations, the above beliefs remain the same. A popular saying is that under socialism the interest of the state, of the collective, and of the individuals are in general harmony. If any conflict arises, the interests of the individual are subject to those of the collectives and the state. Putting the individual first is sometimes called individualism, and sometimes condemned as ‘bourgeois-liberalization’. To hold otherwise is not only incompatible with socialism, but also dangerous, if it is pushed to the extreme. So goes the saying, the slightest mistake results in the greatest loss.

Gong Xiang Rui, *Constitutional Protection of Human Rights: The Chinese View Under the Notion of One Country, Two Systems*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 489, 492 (Johannes Chan & Yash Ghai eds., 1993) [hereinafter HONG KONG BILL OF RIGHTS] (emphasis added). For overviews of human rights in China, see generally R. RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA (1986); YUAN-LI WU ET AL., HUMAN RIGHTS IN THE PEOPLE’S REPUBLIC OF CHINA (1988); Albert H.Y. Chen, *Human Rights in China: A Brief Historical Review*, in HUMAN RIGHTS IN HONG KONG 176 (Raymond Wacks ed., 1992); Albert H.Y. Chen, *Developing Theories of Rights and Human Rights in China*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 134-46 (Raymond Wacks ed., 1993) [hereinafter HONG KONG, CHINA AND 1997] (tracing the development of Chinese scholarship on human rights);

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distinctiveness while at the same time accommodating China's sovereignty,<sup>2</sup> the one country, two systems framework allows China to experiment with federalism.<sup>3</sup> As with other federal systems, tension arises when the interests of the central government conflict with those of the local government.<sup>4</sup> Given China's disappointing human rights record and the fact that China has yet to ratify the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"),<sup>5</sup> the succession of the ICCPR in Hong Kong poses one of the most vexatious questions since Hong Kong's reunification with China.<sup>6</sup>

Even though China's recent accession to the ICCPR<sup>7</sup> undoubtedly alleviates some of the tension posed by the uncertainty over the succession issue, a number of questions still remain. While China acceded to the ICCPR without making any reservations, Britain included several reservations when it ratified the ICCPR in 1976.<sup>8</sup> In addition, the Sino-British Joint Declaration<sup>9</sup> ("Joint Declaration") provides only for the continuation of the ICCPR as applied to Hong Kong. Thus, it is questionable whether the ICCPR applies to Hong Kong subject to those reservations previously adopted by Britain.<sup>10</sup> Furthermore, conflicts with respect to the interpretation and enforcement of the Covenant may arise in the future, for "the ethos and the scope of the ICCPR sit

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Zhu Feng, *Human Rights and the Political Development of Contemporary China, 1979-1994*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 116 (Michael C. Davis ed., 1995) [hereinafter HUMAN RIGHTS AND CHINESE VALUES]; Ann Kent, *Human Rights: The Changing Balance Sheet*, in CHINA IN THE NINETIES: CRISIS MANAGEMENT AND BEYOND 64 (David S.G. Goodman & Gerald Segal eds., 1991) [hereinafter CHINA IN THE NINETIES]. See HUMAN RIGHTS AND CHINESE VALUES, *supra*, for a collection of essays discussing the conflict between human rights and Chinese cultural values.

<sup>2</sup> See GHAI, *supra* note 1, at 139.

<sup>3</sup> See Cohen, *supra* note 1, at vii; see also Edward Friedman, *A Democratic Chinese Nationalism*, in CHINESE NATIONALISM 169 (Jonathan Unger ed., 1996) ("Unless China constructs a decentralized federalism or a confederated system, regional conflict will explode." *Id.* at 177).

<sup>4</sup> For an excellent discussion of how other countries resolve the state-federal issues, see generally GHAI, *supra* note 1, at 442-49. See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 8.1-9.6 (5th ed. 1995) (discussing constitutional restrictions on state regulatory powers and federal preemption); Peter K. Yu, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 367-75 (1998) (discussing the conflict between federal copyright law and state right of publicity law).

<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR]. For a comprehensive overview of the ICCPR, see generally THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis B. Henkin ed., 1981) [hereinafter INTERNATIONAL BILL OF RIGHTS].

<sup>6</sup> See GHAI, *supra* note 1, at 425 ("The future of human rights in Hong Kong is problematic."). The succession issue became even more baffling when the new Hong Kong administration repealed part of the Hong Kong Bill of Rights Ordinance in July 1997, thus eliminating the superior status the ordinance conferred upon the Bill of Rights and the ICCPR. Although commentators may argue that much of the protection covered by the ICCPR has become customary international law, the ICCPR is significant for its reporting obligations and its interstate complaints jurisdiction. See *infra* note 235.

<sup>7</sup> China signed the ICCPR on October 6, 1998. See *As China Signs Rights Treaty, It Holds Activist*, N.Y. TIMES, Oct. 6, 1998, at A13; see also *China Is Not for Hustling*, STRAITS TIMES (Sing.), Oct. 7, 1998, at 36 (analyzing the implications of China's accession to the ICCPR). China has yet to ratify the ICCPR.

<sup>8</sup> See *infra* Part I.

<sup>9</sup> Joint Declaration of 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, Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1366, 1371 [hereinafter Joint Declaration]; see also Roda Mushkat, *The Future of Hong Kong's International Legal Personality: Does International Law Matter? A Post-Handover Snapshot*, 22 S. ILL. U. L.J. 275, 283-84 (1998) [hereinafter Mushkat, *Future of Hong Kong's International Legal Personality*] ("As an agreement between the People's Republic of China and the United Kingdom governments, the [Joint] Declaration is not legally binding on the HKSAR."); Paul Vitrano, Note, *Hong Kong 1997: Can the People's Republic of China Be Compelled to Abide by the Joint Declaration?*, 28 GEO. WASH. J. INT'L L. & ECON. 445, 455-56 (1995) (discussing the reasons why China is unlikely to abide by the Joint Declaration). Unlike a devolution agreement, which is binding upon the independent state and the predecessor state, see P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS 5 (1991), the Joint Declaration is binding upon Britain and China, a third party other than the independent state and the predecessor state.

<sup>10</sup> Although the ICCPR requires that protection under the ICCPR extend to all parts of a federal state without any limitation or exception, see ICCPR, *supra* note 5, art. 50, 999 U.N.T.S. at 167, "China is technically not a federal state." Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights*, 45 INT'L & COMP. L.Q. 928, 940 (1996) [hereinafter Chan, *State Succession to Human Rights Treaties*]. The Basic Law further reinforces this argument by stating that treaties to which China becomes a party after the transition do not automatically apply to Hong Kong. See *infra* Part III.A.

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uneasily with the Chinese concept of rights.”<sup>11</sup> Whenever such conflicts arise, it is necessary to determine whether Hong Kong succeeded to the Covenant. In fact, the resolution of the succession question will determine whether Hong Kong has an obligation to submit an independent report to the United Nations Human Rights Committee (“HRC”).<sup>12</sup>

This Article argues that Hong Kong succeeded to the ICCPR and the reporting obligations under the Covenant. Part I of the Article traces the development of the ICCPR in Hong Kong before 1997.<sup>13</sup> This development is important because the Joint Declaration provides only for the continuation of the ICCPR as applied to Hong Kong before the transition. Parts II and III examine whether Hong Kong succeeded to the ICCPR. Since the Covenant is ambiguous as to whether the contracting parties are limited to sovereign states, Part II evaluates whether Hong Kong satisfies the membership requirement as stipulated in Article 48(1) of the Covenant.<sup>14</sup> By examining Hong Kong’s statehood under both the declaratory and constitutive theories, this Part argues that Hong Kong has a very strong claim to statehood, thus satisfying the membership requirement of the Covenant.

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<sup>11</sup> GHAI, *supra* note 1, at 425. Believing in cultural relativism, China argues that it is an exception to *Western* tenets of human rights, which are unsuited to peculiar conditions in China. See James V. Feinerman, *Chinese Participation in International Legal Order: Rogue Elephant or Team Player?*, in CHINA’S LEGAL REFORMS 201 (Stanley Lubman ed., 1996). The rationales used to justify a disparate treatment of China’s violations of internationally established norms of human rights include:

[t]he difference in ethical tradition—China’s Confucianism in contrast to the West’s Judaeo—Christianity—the difference in economic conditions—the highly developed West and Japan as opposed to a poor country such as China—and the difference in information availability—the open society as compared to the closed system which continues in China.

*Id.* But see Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 119-31 (1998) (critiquing the cultural relativist theories); Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT’L L. 215, 218-20 (1996) (discussing contemporary constitutionalism and human rights theories); Du Ganjian and Song Gang, *Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New theory of Benevolence*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1, at 35 (discussing the resemblance between modern concept of human rights and Confucian principles); Margaret Ng, *Are Rights Culture-bound?*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1, at 59 (arguing that the fact that “the concept of rights is generally ‘alien’ to the Chinese tradition in its past and present state . . . does not make out the case that rights are alien to Chinese society by nature” or establish that “it is . . . legitimate to exclude Chinese society from application of human rights”). *Id.* at 67. For excellent discussions on Chinese cultural values and human rights, see generally CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1. See THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999), for a collection of essays on the cultural relativist debate.

<sup>12</sup> See ICCPR, *supra* note 5, art. 28(1), 999 U.N.T.S. at 179 (“There shall be established a Human Rights Committee . . .”). According to commentators:

One of the most effective means for the implementation of human rights is a commission of human rights. . . . [Such a committee] would provide an informal and inexpensive way to resolve disputes and to help in the enforcement of standards necessary to give effect to various rights. It can empower groups who are not easily able to obtain access to courts. It can play a particularly useful role in supervising affirmative action policies. It can, through co-operation with non-governmental organizations, involve the community in the safeguarding of human rights.

Johannes Chan & Yash Ghai, *A Comparative Perspective on the Bill of Rights*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 10; see also Peter Bailey, *Human Rights Commissions: Reflections on the Australian Experience*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 253 (discussing Human Rights Commissions in Australia); Torkel Opsahl, *The Practice of the Human Rights Committee Under the ICCPR—The Potential Impact of International Human Rights Law: A Presentation and Assessment*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 429 (discussing how the Hong Kong Bill of Rights has given the ICCPR a unique impact on the domestic legal system). The Human Rights Committee has no powers of direct enforcement. Thus, “its main contribution is through the interpretation and elaboration of ICCPR rights, either in general terms or through its consideration of laws and practices which have been challenged.” GHAI, *supra* note 1, at 380. Nevertheless, because the Committee is composed of human rights experts, its interpretations are highly respected. See ICCPR, *supra* note 5, art. 28(2), 999 U.N.T.S. at 179 (“The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.”). Indeed, “several states have revised their laws following an adverse finding by the committee.” GHAI, *supra* note 1, at 380.

<sup>13</sup> See *infra* text accompanying notes 18-74.

<sup>14</sup> See *infra* text accompanying note 75-160.

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Part III then examines the three dominant state succession theories that may be applicable to Hong Kong.<sup>15</sup> Due to the one country, two systems framework, none of these theories adequately addresses Hong Kong's unique situation.<sup>16</sup> Utilizing the estoppel theory, this Part argues that Hong Kong succeeded to the ICCPR by virtue of the international community's recognition of the legitimacy of the Joint Declaration and the HRC's insistence that the Covenant continues in Hong Kong after 1997.

Based on the premise that Hong Kong succeeded to the ICCPR, Part IV analyses Hong Kong's reporting obligations under the Covenant.<sup>17</sup> This Part concludes that Hong Kong, by virtue of its succession to the ICCPR, has an obligation to submit an independent report to the HRC regardless of China's policy. If China does not allow Hong Kong to submit a separate and independent report, Hong Kong should assume this obligation under the name "Hong Kong, China."

### I. DEVELOPMENT OF THE ICCPR IN HONG KONG

The ICCPR, which the General Assembly of the United Nations adopted on December 16, 1966,<sup>18</sup> came into force on March 23, 1976.<sup>19</sup> The overriding principle of the Covenant is self-determination.<sup>20</sup> Article 1 of the ICCPR provides: "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."<sup>21</sup> In addition to the right to self-determination, the ICCPR includes the following rights: the right to life;<sup>22</sup> protection from torture or cruel, inhuman, or degrading punishment or treatment;<sup>23</sup> the right to liberty and security of person;<sup>24</sup>

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<sup>15</sup> See *infra* text accompanying notes 161-233.

<sup>16</sup> Professor Mushkat described Hong Kong's unique situation as follows: "[Hong Kong] is not a 'state'—yet possesses 'stately attributes;' not 'sovereign'—yet 'highly autonomous;' not a 'conventional' member of the international community—yet a most respectable 'actor on the international stage.'" MUSHKAT, *supra* note 1, at 1; see also GHAI, *supra* note 1, at 137 (describing the "uniqueness" of the "one country, two systems" framework); Roda Mushkat, *Preface* to MUSHKAT, *supra* note 1, at ix ("The concept of 'one country-two systems' is without direct parallel in international law and there is an obvious need to determine its formal parameters and examine its practical implications."); Roda Mushkat, *Hong Kong and Succession of Treaties*, 46 INT'L & COMP. L.Q. 181, 191 (1997) ("It is a truism that the Hong Kong case defies easy categorisation."); Shawn B. Jensen, *International Agreements Between the United States and Hong Kong Under the United States-Hong Kong Policy Act*, 7 TEMP. INT'L & COMP. L.J. 167, 167 (1993) ("Hong Kong will become a legal entity with a treaty regime which is unique in international law.")

<sup>17</sup> See *infra* text accompanying notes 234-84.

<sup>18</sup> G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

<sup>19</sup> This Covenant has been ratified by over 140 states and is one of the most widely ratified international instruments. See Status of Ratifications of the ICCPR (visited Nov. 23, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/-iv\\_boo/iv\\_4.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/-iv_boo/iv_4.html)>; see also GHAI, *supra* note 1, at 376.

<sup>20</sup> See GHAI, *supra* note 1, at 376; see also LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 302-08 (3d ed. 1993) (discussing the right to self-determination); REIN MULLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS 58-91 (1994) (same); Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988) (examining the tension between sovereignty and the right to self-determination); Malvina Halberstam, *Self-Determination in Law and Practice*, 16 N.Y.U. J. INT'L LAW & POL. 475, 477 (1984) ("No general agreement exists as to the rights of the 'self' under the rubric of self-determination."); Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465, 465 (1989) (arguing that self-determination has never been applied as an objective universal principle, but rather as a political tool used by states against their opponents).

<sup>21</sup> ICCPR, *supra* note 5, art. 1(1), 999 U.N.T.S. at 173.

<sup>22</sup> See *id.* art. 6(1), 999 U.N.T.S. at 174 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); see also The Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991) (H.K.) [hereinafter Bill of Rights Ordinance], § 8 [hereinafter Bill of Rights], art. 2(1), 30 I.L.M. 1310, 1319 (same), reprinted in HONG KONG BILL OF RIGHTS, *supra* note 1. For a discussion of the right to life, see generally Athena Liu, *Right to Life*, in HUMAN RIGHTS IN HONG KONG, *supra* note 1, at 264. The Basic Law does not expressly provide the right to life.

<sup>23</sup> See ICCPR, *supra* note 5, art. 7, 999 U.N.T.S. at 175 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); see also Bill of Rights, *supra* note 22, art. 3, 30 I.L.M. at 1314 (same); Basic Law of the Hong Kong Special

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freedom of movement;<sup>25</sup> the equal protection of the law and rights in relation to criminal trials;<sup>26</sup> the right not to be compelled to testify against oneself;<sup>27</sup> compensation for miscarriage of justice;<sup>28</sup> freedom from double jeopardy;<sup>29</sup> the right to privacy;<sup>30</sup> freedom of thought, conscience, and religion;<sup>31</sup> the right to hold opinions without interference and freedom of expression;<sup>32</sup> prohibition

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Administrative Region of the People's Republic of China, Apr. 4, 1990, art. 28, 29 I.L.M. 1511, 1525 (1990) [hereinafter Basic Law] ("Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.").

<sup>24</sup> See ICCPR, *supra* note 5, art. 9(1), 999 U.N.T.S. at 175 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of this liberty except on such grounds and in accordance with such procedure as are established by law."); *see also* Bill of Rights, *supra* note 22, art. 5(1), 30 I.L.M. at 1315 (same); Basic Law, *supra* note 23, art. 28, 29 I.L.M. at 1525 ("The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment."). For an overview of the right to liberty and security of person and habeas corpus in Hong Kong, see generally David Clark, *Liberty and Security of the Person: Habeas Corpus*, in HUMAN RIGHTS IN HONG KONG, *supra* note 1, at 301.

<sup>25</sup> See ICCPR, *supra* note 5, art. 12(1), 999 U.N.T.S. at 176 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."); *id.* art. 12(2), 999 U.N.T.S. at 176 ("Everyone shall be free to leave any country, including his own."); *id.* art. 12(4), 999 U.N.T.S. at 176 ("No one shall be arbitrarily deprived of the right to enter his own country."); *see also* Bill of Rights, *supra* note 22, art. 8(1), 30 I.L.M. at 1315 ("Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence."); *id.* art. 8(2), 30 I.L.M. at 1315 ("Everyone shall be free to leave Hong Kong."); *id.* art. 8(4), 30 I.L.M. at 1316 ("No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong."); Basic Law, *supra* note 23, art. 31, 29 I.L.M. 1526 ("Hong Kong residents shall have freedom of movement within Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region.").

<sup>26</sup> See ICCPR, *supra* note 5, art. 14, 999 U.N.T.S. at 176 ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); *see also* Bill of Rights, *supra* note 22, art. 10, 30 I.L.M. at 1316 (same); Basic Law, *supra* note 23, art. 87, 29 I.L.M. at 1534 ("Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.").

<sup>27</sup> See ICCPR, *supra* note 5, art. 14(3)(g), 999 U.N.T.S. at 177 ("Not to be compelled to testify against himself or to confess guilt."); *see also* Bill of Rights, *supra* note 22, art. 11(2)(g), 30 I.L.M. at 1316 (same). The Basic Law does not specify any protection against self-incrimination. *See* GHAI, *supra* note 1, at 403. Nonetheless, protection against self-incrimination "would no doubt be read into the Basic Law through art. 87, with its general requirement of 'fair trial.'" *Id.*; *cf.* Daphne Huang, Comment, *The Right to a Fair Trial in China*, 7 PAC. RIM L. & POL'Y J. 171, 171 (1998) (discussing the obstacles leading to China's failure in protecting the right to a fair trial).

<sup>28</sup> See ICCPR, *supra* note 5, art. 14(6), 999 U.N.T.S. at 177. Article 14(6) provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

*Id.*; *see also* Bill of Rights, *supra* note 22, art. 11(5), 30 I.L.M. at 1316 (same). The Basic Law does not provide for any compensation for miscarriage of justice.

<sup>29</sup> See ICCPR, *supra* note 5, art. 14(7), 999 U.N.T.S. at 177 ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."); *see also* Bill of Rights, *supra* note 22, art. 11(6), 30 I.L.M. at 1316 ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."). The Basic Law does not specify any protection against double jeopardy; nevertheless, such protection can be read into the Basic law through Article 87, which provides for "fair trial." *See supra* note 27.

<sup>30</sup> See ICCPR, *supra* note 5, art. 17(1), 999 U.N.T.S. at 177 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); *see also* Bill of Rights, *supra* note 22, art. 14(1), 30 I.L.M. at 1317 (same); Basic Law, *supra* note 23, art. 29, 29 I.L.M. at 1525 ("The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."). For an overview of the right to privacy in Hong Kong, see generally Raymond Wacks, *Privacy*, in HUMAN RIGHTS IN HONG KONG, *supra* note 1, at 319.

<sup>31</sup> See ICCPR, *supra* note 5, art. 18(1), 999 U.N.T.S. at 178 ("Everyone shall have the right to freedom of thought, conscience and religion."); *see also* Bill of Rights, *supra* note 22, art. 15(1), 30 I.L.M. at 1317 (same); Basic Law, *supra* note 23, art. 32, 29 I.L.M. at 1526 ("Hong Kong residents shall have freedom of conscience. Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public."). For an overview of freedom of religion in Hong Kong, see generally Anne Carver, *Freedom of Religion*, in HUMAN RIGHTS IN HONG KONG, *supra* note 1, at 350.

<sup>32</sup> See ICCPR, *supra* note 5, art. 19(1), 999 U.N.T.S. at 178 ("Everyone shall have the right to hold opinions without interference."); *id.* art. 19(2) ("Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); *see also* Bill of Rights, *supra* note 22, art. 16(1), 30 I.L.M. at 1317 (same as ICCPR art. 19(1)); *id.* art. 16(2), 30 I.L.M. at 1317 (same as ICCPR art. 19(2)); Basic Law, *supra* note 23, art. 27, 29 I.L.M. at 1525 (providing "freedom of speech, of the press and of

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of propaganda for war or advocacy of national, racial, or ethnic hatred;<sup>33</sup> the right of peaceful assembly;<sup>34</sup> the right to freedom of association;<sup>35</sup> protection against discrimination on grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status;<sup>36</sup> the right of a child to a name and a nationality;<sup>37</sup> and protection for cultural, religious, and linguistic rights of minorities.<sup>38</sup> Notwithstanding these expansive rights, the ICCPR is open to different interpretations by different states, since “most of the rights in the Covenant are not absolute.”<sup>39</sup>

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publication”). For an overview of freedom of expression in Hong Kong, see generally Yash Ghai, *Freedom of Expression, in HUMAN RIGHTS IN HONG KONG*, *supra* note 1, at 369. See also Kevin Boyle, *Freedom of Opinion and Freedom of Expression, in HONG KONG BILL OF RIGHTS*, *supra* note 1, at 299 (discussing Article 16 of the Bill of Rights); Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 765 (1998) [hereinafter Foster, *The Illusory Promise*] (arguing that China’s promise of freedom of the press is a fiction based on Western mistranslations of the Joint Declaration and The Basic Law); Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113, 118 (1998) (discussing how China will interpret the freedom of the press guarantee stipulations in the Basic Law); Peter K. Yu, *One Radio, Two Competing Interests: The Problem of Radio Television Hong Kong*, POST-SOVIET MEDIA L. & POL’Y NEWSL., June 15, 1998, at 48 [hereinafter Yu, *One Radio, Two Competing Interests*] (discussing the dilemma the public broadcaster in Hong Kong is facing).

<sup>33</sup> See ICCPR, *supra* note 5, art. 20(1), 999 U.N.T.S. at 178 (“Any propaganda for war shall be prohibited by law.”); *id.* art. 20(2), 999 U.N.T.S. at 178 (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”). Britain reserved the right not to legislate on Article 20, see *infra* text accompanying note 49. Thus, there is no equivalent provision in the Bill of Rights.

<sup>34</sup> See ICCPR, *supra* note 5, art. 21, 999 U.N.T.S. at 178 (“The right of peaceful assembly shall be recognized.”); see also Bill of Rights, *supra* note 22, art. 17, 30 I.L.M. at 1317 (same); Basic Law, *supra* note 23, art. 27, 29 I.L.M. at 1525 (providing freedom of assembly). For an overview of the right to peaceful assembly in Hong Kong, see generally Roda Mushkat, *Peaceful Assembly, in HUMAN RIGHTS IN HONG KONG*, *supra* note 1, at 410.

<sup>35</sup> See ICCPR, *supra* note 5, art. 22, 999 U.N.T.S. at 178 (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”); see also Bill of Rights, *supra* note 22, art. 21, 30 I.L.M. at 1318 (same); Basic Law, *supra* note 23, art. 27, 29 I.L.M. at 1525 (providing “freedom of association . . . and the right and freedom to form and join trade unions” (emphasis added)). The *Basic Law* states specifically that Hong Kong residents shall have the right, not just freedom, to form and join trade unions. For an excellent discussion between the use of the term *right* and *freedom*, see Foster, *The Illusory Promise*, *supra* note 32, at 773. For an overview of trade union organization and labor legislation in Hong Kong, see generally Anne Carver, *Employment and Trade Union Law, in THE FUTURE OF THE LAW IN HONG KONG* 366 (Raymond Wacks ed., 1989); Ng Sek-Hong, *Trade Union Organization and Labour Legislation, in HUMAN RIGHTS IN HONG KONG*, *supra* note 1, at 439.

<sup>36</sup> Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 5, art. 26, 999 U.N.T.S. at 179; see also Bill of Rights, *supra* note 22, art. 22, 30 I.L.M. at 1318 (same); Basic Law, *supra* note 23, art. 25, 29 I.L.M. at 1525 (“All Hong Kong residents shall be equal before the law.”). For an overview of equal protection before the law in Hong Kong, see generally Andrew Byrnes, *Equality and Non-Discrimination, in HUMAN RIGHTS IN HONG KONG*, *supra* note 1, at 225. See also Justice Walter S. Tarnopolsky, *Equality and Discriminatory Practices, in HONG KONG BILL OF RIGHTS*, *supra* note 1, at 399 (discussing equal protection of the law in Canada, Australia, New Zealand, Britain, and the United States).

<sup>37</sup> See ICCPR, *supra* note 5, art. 24(1), 999 U.N.T.S. at 179 (“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”); *id.* art. 24(3) (“Every child has the right to acquire a nationality.”); see also Bill of Rights, *supra* note 22, art. 20(1), 30 I.L.M. at 1318 (same as ICCPR art. 24(1)). For an overview of the right to a nationality in Hong Kong, see generally Johannes Chan, *Nationality, in HUMAN RIGHTS IN HONG KONG*, *supra* note 1, at 470. See also Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1145 (1998) (arguing that the convergence of the principle of effective nationality, the individual right to a nationality, the duty of states to prevent statelessness, and the norm of nondiscrimination impose on successor states a duty to secure an effective nationality for their inherited populations); James Townsend, *Chinese Nationalism, in CHINESE NATIONALISM*, *supra* note 3, at 1 (examining the rise of nationalism in modern China).

<sup>38</sup> See ICCPR, *supra* note 5, art. 27, 999 U.N.T.S. at 179 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”); see also Bill of Rights, *supra* note 22, art. 23, 30 I.L.M. at 1318 (“Persons belonging to [such] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”); Basic Law, *supra* note 23, art. 41, 29 I.L.M. at 1525 (“Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in [Chapter III of the Basic Law].”).

<sup>39</sup> LOUIS HENKIN, *Introduction to INTERNATIONAL BILL OF RIGHTS*, *supra* note 5, at 21-22. As Professor Henkin explained:

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On July 20, 1976, Britain ratified the ICCPR for itself and Hong Kong.<sup>40</sup> However, the ratification included some reservations.<sup>41</sup> For example, Britain declared that “in so far as the obligations under the ICCPR were inconsistent with the United Nations Charter (particularly art. 103 which referred to ‘progressive development of their free political institutions’), the charter would overrule the covenant.”<sup>42</sup> In addition, Britain reserved:

[the] right not to establish an elected executive or legislature despite the ICCPR provisions for political rights; to confine nationality entitlements to persons having a connection with the UK or any of its dependent territories; to recognize each of its territories as separate units for the purposes of the right of movement; to give itself considerable latitude in immigration matters and in the maintenance of discipline among members of armed forces service and of custodial discipline among prisoners.<sup>43</sup>

Britain also reserved the right not to legislate on Article 20, because of the article’s relationship to Articles 19 and 21 and other legislation “in matters of practical concerns in the interests of public order.”<sup>44</sup> Thus, even though the ICCPR applies to Hong Kong by virtue of Britain’s ratification, the ICCPR applies with the above reservations.<sup>45</sup>

These reservations are important because China intended these reservations to remain in force after 1997 when it ratified the Joint Declaration. The Joint Declaration provides that “the

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The freedom of expression, in the classic reference, does not permit one falsely to cry “fire” in a crowded theater; the most libertarian societies do not permit slander; all countries impose some limits on freedom of movement in some circumstances to protect national security or public order. In the rights jurisprudence of the United States these permissible limitations are not expressed in the Constitution, although sometimes read into general phrases: search and seizure is forbidden only if “unreasonable,” punishment only if “cruel and unusual,” infringements on liberty only if they deny “due process of law.”

*Id.* at 21-22.

<sup>40</sup> Professor Jayawickrama pointed out that Britain has always treated Hong Kong as the “human rights exception”:

In 1953, when the United Kingdom extended the European Convention on Human Rights to 42 overseas dependent territories for whose international relations it was responsible, Hong Kong was a significant omission. In 1967, when the United Kingdom recognized the right of individual petition to the European Commission on Human Rights from, and the compulsory jurisdiction over, its dependent territories, Hong Kong was again excluded. Periodic renewals of these facilities, even as recently as in 1991, did not recognize the existence of Hong Kong, whose population was 15 times the aggregate population of all the other British dependent territories. At the international level, the United Kingdom specifically declined to undertake obligations in respect of the inhabitants of Hong Kong under conventions relating to the elimination of discrimination against women and the prohibition of torture; and excluded Hong Kong from the application of the convention relating to the treatment of refugees. Britain also refrained from acceding to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) in the knowledge that the only tangible effect of such accession would have been to accord to the people of Hong Kong the right of access to an international human rights monitoring body, namely the UN Human Rights Committee. Apart from having failed to take any action for more than a decade to incorporate the relevant provisions of the Covenant in the domestic law of Hong Kong, the people of Hong Kong—unquestionably the inhabitants of a non-self-governing colony—were denied the right of self-determination in violation of what was perhaps a peremptory norm of contemporary international law.

Nihal Jayawickrama, *The Hong Kong Bill of Rights: A Critique*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 55-56.

<sup>41</sup> See GHAI, *supra* note 1, at 377-78. A reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.” HENKIN ET AL., *supra* note 20, at 444-45; *see id.* at 444-62 (discussing reservations); 2 OPPENHEIM’S INTERNATIONAL LAW §§ 614-19 (9th ed. 1992) (same). The ICCPR does not expressly permit such declarations and reservations. *See* Yash Ghai, *Derogations and Limitations in the Hong Kong Bill of Rights*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 165; *see also* Rosalyn Higgins, *Derogations Under Human Rights Treaties, 1976-1977* BRIT. Y.B. INT’L L. 281 (1978) (discussing derogation from human rights obligations enunciated in international treaties).

<sup>42</sup> GHAI, *supra* note 1, at 377. “This ‘reservation’ was primarily intended to delay the application of the right to self-determination, and implied that the covenant was not a mandate for Hong Kong’s independence.” *Id.* Indeed, “the principle of self-determination became even less relevant once, at the request of China, the UN removed Hong Kong from the UN list of dependencies whose progress to independence was to be supervised by the UN.” *Id.* at 377-78 n.5.

<sup>43</sup> *Id.* at 378.

<sup>44</sup> *Id.* (internal quotations omitted). This declaration “reflects general opposition of Western states to art. 20, which was considered to infringe the right of expression.” *Id.* at 378 n.6. As Professor Ghai pointed out, this declaration is more a comment than a reservation, for the statement does not necessarily exclude the relevant provisions. *See id.* at 376.

<sup>45</sup> *See id.* at 379.

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provisions of the International Covenant on Civil and Political Rights . . . *as applied to Hong Kong* shall remain in force.”<sup>46</sup> Although the phrase “as applied to Hong Kong” is ambiguous, the general consensus is that the phrase refers to “the actual provisions of the treaties, subject to interpretations of the specific provisions and minus any reservations made at the time the treaties were extended to Hong Kong.”<sup>47</sup> This consensus is consistent with the history of the Joint Declaration negotiations and the language of both the Joint Declaration and Article 39 of the Basic Law.<sup>48</sup> By continuing Britain’s reservations, the Basic Law significantly weakened the ICCPR as a safeguard against human rights violations during the transitional period.<sup>49</sup>

In 1991, Hong Kong enacted the Bill of Rights Ordinance<sup>50</sup> (“Ordinance”) “to reassure the people of Hong Kong as they contemplated the transfer of sovereignty to China in 1997[] and to restore investment confidence in the territory” after the Tiananmen Square incident in June 1989.<sup>51</sup> This ordinance included the Hong Kong Bill of Rights (“Bill of Rights”),<sup>52</sup> which incorporated the ICCPR into Hong Kong law.<sup>53</sup> Although the ICCPR does not necessitate the enactment of the Bill of Rights,<sup>54</sup> “absent [such] incorporation . . . it was not possible to challenge legislation for violation

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<sup>46</sup> Joint Declaration, *supra* note 9, Annex I, § XIII, 23 I.L.M. at 1377 (emphasis added); *see also* Basic Law, *supra* note 23, art. 39, 29 I.L.M. at 1526 (“The provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”).

<sup>47</sup> GHAI, *supra* note 1, at 386. Professor Ghai explained the two different views regarding the ambiguity of the phrase:

Some Chinese officials have argued that “as applied” referred to laws which had already implemented the treaties in Hong Kong, rather than directly to the provisions of the treaties themselves. As Britain had long asserted that the treaties did not require explicit incorporation since the then existing laws covered the treaty guarantees, Chinese officials may have understood at the time of the Joint Declaration that no further legislative initiatives were necessary. China has also argued that the date for the laws referred to in art. 39 is the time of the signing of the Joint Declaration . . . . The contrary interpretation is that the reference is to the actual provisions of the treaties, subject to interpretations of specific provisions and minus any reservations made at the time the treaties were extended to Hong Kong.

*Id.* at 386 (footnote omitted).

<sup>48</sup> *See id.* As Professor Ghai explained:

Contemporaneous explanations of the Joint Declaration refer clearly to the provisions of the treaties, rather than Hong Kong laws. The history of the expression “as applied,” given above, reinforces this view. Moreover, if the intention in the Joint Declaration or the Basic Law were to refer to laws, the expression “as implemented” rather than “as applied” would have been more appropriate. Article 39 makes a distinction between applying (when referring to the provisions of treaties) and implementing (when referring to laws). The effect of art. 39 is therefore to both continue in force the applied treaty obligations and require their implementation through the laws, so that the rights under the treaties exist in two forms.

*Id.* (citation omitted).

<sup>49</sup> *See id.* at 379 (“By excluding key democratic principles, [Britain] weakened one of the foundations of rights and freedoms, and introduced an element of opportunism in the approach to rights.”).

<sup>50</sup> Bill of Rights Ordinance, *supra* note 22. For a collection of essays discussing the Ordinance, see HONG KONG BILL OF RIGHTS, *supra* note 1. For an excellent account of the origin of the Bill of Rights, see Philip Dykes, *The Hong Kong Bill of Rights 1991: Its Origin, Content and Impact*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 39.

<sup>51</sup> Chan & Ghai, *supra* note 12, at 2. As one observer described:

Morale generally in Hong Kong has fallen sharply since June 1989. The Hong Kong Bank has suggested that one consequence has been that the outflow of portfolio capital rose tenfold, to HK \$ 24 billion in 1989-90, although they later qualified this, and the Hong Kong government denies that the available evidence demonstrates any net capital outflow. More important, the “brain drain” from Hong Kong has undoubtedly become worse, running at a rate of some 1,000 per week in 1990. Resignations from the civil service have increased, although this has partly been due to the tight labour market, which has caused the government to plan to bring in 15,000 foreign workers to ease the labour shortage.

Michele Ledic, *Hong Kong and China: Economic Interdependence*, in CHINA IN THE NINETIES, *supra* note 1, at 216 (footnotes omitted); *see also* Michael C. Davis, *International Commitments to Keep: Hong Kong Beyond 1997*, 22 S. ILL. U. L.J. 293, 296 (1998) [hereinafter Davis, *International Commitments to Keep*] (“The 1989 crackdown on prodemocracy demonstrators in China and the vitriolic Chinese attacks on Hong Kong’s supporting role gave rise to considerable concern in Hong Kong.”).

<sup>52</sup> Bill of Rights, *supra* note 22.

<sup>53</sup> *See* GHAI, *supra* note 1, at 376.

<sup>54</sup> According to Britain’s position, the common law and legislation already ensured the rights covered by the ICCPR. *See* GHAI, *supra* note 1, at 376 & n.4; *see also* *First Periodic Report of the United Kingdom of Great Britain and Northern Ireland Relating to Hong Kong*, U.N. Doc. CCPR/C/1/Add.37 (1978), *quoted in* GHAI, *supra* note 1, at 376 n.4 (“The obligation assumed under art. 2(2) . . . is fulfilled there by the provision of safeguards of different kinds operating in the [legal system], *independently of the Covenant but in full conformity with it.*” (emphasis added)).



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of these rights, and there was no way to test the British claims in the courts.”<sup>55</sup> Thus, the Ordinance ensures that “internationally agreed minimum standards regarding the protection of fundamental rights and freedoms will be recognized and applied by courts and tribunals in Hong Kong.”<sup>56</sup>

In addition, the Ordinance accorded the Bill of Rights and the ICCPR a superior status to that of other legislation.<sup>57</sup> Not only did the Ordinance repeal all existing law that was inconsistent with the ICCPR,<sup>58</sup> it required courts to construe all subsequent legislation in light of the ICCPR.<sup>59</sup> Because of the superior status of the Bill of Rights, Chinese authorities have been critical of the Ordinance since its creation.<sup>60</sup> They argued that the Bill of Rights was inconsistent with the Basic Law of the Hong Kong Special Administrative Region<sup>61</sup> (“Basic Law”), which provides that “any laws [that] are later discovered to be in contravention of [the Basic] Law . . . shall be amended or cease to have force in accordance with the procedure as prescribed by [the Basic] Law,”<sup>62</sup> and should therefore be repealed.<sup>63</sup>

However, even with the superior status accorded to the Bill of Rights, the Ordinance is “little more than a rule of construction[,] and does not by itself invalidate subsequent legislation.”<sup>64</sup> Indeed, the Bill of Rights and the ICCPR were not entrenched until the Letters Patent,<sup>65</sup> which

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<sup>55</sup> GHAI, *supra* note 1, at 376. *But see* Justice Sir Derek Cons, *The Hong Kong Bill of Rights: A Judicial Perspective*, in HONG KONG BILL OF RIGHTS, *supra* note 1, at 51-54. Justice Cons argues that the common law is “peculiarly apt for dealing with human rights, for human rights are at bottom individual rights, and the common law is predicated upon the individual” *Id.* at 51.

<sup>56</sup> Dykes, *supra* note 50, at 47.

<sup>57</sup> *See* GHAI, *supra* note 1, at 390-92.

<sup>58</sup> *See* Bill of Rights Ordinance, *supra* note 22, § 3(2), 30 I.L.M. at 1313 (repealed 1997) (“All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.”).

<sup>59</sup> *See id.* § 4, 30 I.L.M. at 1313 (repealed 1997) (“All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.”).

<sup>60</sup> *See* GHAI, *supra* note 1, at 418.

<sup>61</sup> Basic Law, *supra* note 23, 29 I.L.M. 1511.

<sup>62</sup> *Id.* art. 160, 29 I.L.M. at 1546.

<sup>63</sup> *See* GHAI *supra* note 1, at 418. As Professor Ghai recounted:

The Preliminary Working Committee “PWC” (which appears to have the support of the Preparatory Committee) stated that the Bill of Rights has an “adverse effect on the implementation of the Basic Law”. In its view, sec. 2(3) of the Bill of Rights which deals with its principles and purposes and secs. 3 and 4 (which deal, respectively, with the interpretation of previous and subsequent legislation) are inconsistent with arts. 8, 11 and 39 of the Basic Law. Consequently, it recommended that they should be repealed by the [Standing Committee of the National People’s Congress] under art. 160. It also recommended that various amendments to other laws which were made to bring them in conformity with the Bill of Rights should likewise be repealed. Its report does not provide an analysis of its conclusion on incompatibility; but from other general statements made at various times by Chinese officials or members of the PWC, the following reasons can be adduced. In its view, the ordinance confers a special status on the Bill of Rights, superior to other laws, whereas the Basic Law treats all laws as of the same status. A further reason is that the Bill of Rights and the legislative amendments contravene the “principle under the Joint Declaration and the Basic Law that the laws previously in force in Hong Kong shall remain basically unchanged”. Underlying this reasoning is the assumption that the ICCPR (and other international instruments) had been effectively implemented in local law by 1984 Window. Moreover, the amendments “will weaken the administration of Hong Kong and are not conducive to the maintenance of stability of Hong Kong.” A more elaborate version of this argument is that the weakening of the administration contravenes the Basic Law provision of an “executive led” system in the HKSAR.

*Id.* at 418-19 (footnote omitted). *But see* MUSHKAT, *supra* note 1, at 153 (“The ‘incorporation’ of the ICCPR in the Bill of Rights Ordinance clearly accords with the Joint Declaration’s ‘object and purpose’ . . . . Equally legitimate are the legislative measures undertaken to ensure the effectiveness of the [Ordinance] as the mechanism through which the controlling function of the ICCPR is facilitated.”) (footnote omitted).

<sup>64</sup> GHAI, *supra* note 1, at 391; *see also id.* at 419 (“So far as the special status of the Bill of Rights is concerned, secs. 3 and 4 do not confer it, being merely a codification of the common law rules of interpretation.”); Jayawickrama, *supra* note 40, at 55-57.

<sup>65</sup> The Hong Kong Letters Patent 1991 (No. 2), *reprinted in* HONG KONG BILL OF RIGHTS, *supra* note 1, at 539-40 [hereinafter Letters Patent]. The first Letters Patent of 1843 established both the office of the Governor and the Legislative Council and was supplemented by Instructions to the Governor on the exercise of certain of his powers. *See* GHAI, *supra* note 1, at 14-15.

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formed the basis of the Hong Kong government, was amended to limit the lawmaking capacity of the Legislative Council.<sup>66</sup> The Letters Patent, as amended, stated:

The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.<sup>67</sup>

Even though courts looked to the Bill of Rights when examining legislation, it was the Letters Patent that invalidated any law that was inconsistent with the ICCPR.<sup>68</sup>

On July 1, 1997, the Letters Patent lapsed, and the Provisional Legislature repealed sections 2(3), 3, and 4 of the Ordinance.<sup>69</sup> Despite this repeal,<sup>70</sup> the ICCPR still retains its special status under Article 39 of the Basic Law.<sup>71</sup> Article 39 provides:

The provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.<sup>72</sup>

Article 39 therefore incorporates the ICCPR into the Basic Law. Unless the ICCPR conflicts with the Basic Law or the Constitution of the People's Republic of China, "the ICCPR should, as far as possible, govern the provisions of the Basic Law."<sup>73</sup>

## II. CAN HONG KONG BE A CONTRACTING PARTY TO THE ICCPR?

Even though the Basic Law incorporates the ICCPR, the Covenant is ambiguous as to whether a nonsovereign state can be a contracting party to such a covenant.<sup>74</sup> Article 48(1) provides:

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<sup>66</sup> See GHAI, *supra* note 1, at 391. *But see* Regina v. Sin Yau Ming, 1 H.K. CRIM. L. REP. 127, 154 (1991) ("The Bill of Rights is effectively entrenched unless the Letters Patent were materially amended before, or Art. 39 of the Basic Law amended after, 30 June 1997.").

<sup>67</sup> Letters Patent, *supra* note 65, art. VII(3) at 539.

<sup>68</sup> See GHAI, *supra* note 1, at 391.

<sup>69</sup> See *id.* at 493-97.

<sup>70</sup> Professor Ghai discussed the repealed sections as follows:

It is unclear what the reason for (or impact of) the repeal [of section 2(3)] is. It may be intended to eliminate an expansive view of human rights or references to international case law. It would probably not achieve that purpose (although we can argue that with possible decreasing independence of the judiciary, some judges may be tempted to rely on the repeal to argue for a narrow and less purposive interpretation of the Bill of Rights). It may also be reflective of China's dislike of the ICCPR and the wish to delink the ordinance from art. 39 of the Basic Law. . . .

. . . [The repeal of section 3] would have little effect, since sec. 3 merely reproduces the common law rules of interpretation. Those rules would presumably continue to apply as part of the common law, but it is not inconceivable that some judges might take the view that its repeal was intended to disapply these rules, in which case the Bill of Rights becomes pretty meaningless, and acquires a status inferior to other ordinances!

. . . [The reference of section 4 to the consistency with the ICCPR, entrenched in the Letters Patent] shows that the ordinance as such does not have a superior status, contrary to Chinese claims, and their justification for these repeals. Again, the repeal may have little effect, for the common law will provide the replacement.

*Id.* at 493-94.

<sup>71</sup> See *id.* at 419-20.

<sup>72</sup> Basic Law, *supra* note 23, art. 39, 29 I.L.M. at 1526.

<sup>73</sup> GHAI, *supra* note 1, at 420.

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The present Covenant is open for signature by any state Member of the United Nations or *member of any of its specialized agencies*, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.<sup>75</sup>

Although Hong Kong is a member of several United Nations “specialized agencies,”<sup>76</sup> Article 48(1) does not indicate whether such membership is sufficient. Indeed, the drafting history of Article 48 indicates otherwise, suggesting that the founding parties to the Covenant intended to limit ICCPR membership to *sovereign states*.<sup>77</sup> Nonetheless, “during the drafting process it had been anticipated that there would be entities whose status as a State would be ambiguous, and the responsibility of determining the status of any such entity as a State was vested in the General Assembly.”<sup>78</sup> Thus, this Part examines whether the General Assembly can include Hong Kong as a contracting party to the ICCPR. In determining Hong Kong’s statehood,<sup>79</sup> this Part considers both the declaratory<sup>80</sup> and constitutive theories.<sup>81</sup>

### A. Declaratory Theory

“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to

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<sup>74</sup> See ICCPR, *supra* note 5, art. 48(1), 999 U.N.T.S. at 185.

<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> See *infra* text accompanying note 149.

<sup>77</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 941-42. According to Professor Chan:

The drafting history of Article 48 revealed that the main controversy about the Article was whether the ICCPR should be open to accession and ratification by all States, irrespective of whether they were members of the United Nations, as proposed by the Ukrainian Soviet Socialist Republic. The Eastern European States argued that acceptance of the Covenant was not a privilege but an undertaking which no State should be prevented from assuming. Therefore, any clause denying or restricting the right of all States to become parties to the Covenant would be discriminatory and inconsistent with the objectives of the Covenant. The Western States, particularly the United States, France, Belgium and Ireland, were at first in favour of the “all States clause,” but then changed their views when it became a matter of concern of the socialist States. They argued that it was advisable for the United Nations to exercise some control over the selection of non-member States which would be entitled to become parties to the Covenant. The principle of universality was said to have been taken into account by providing for the possibility of the General Assembly inviting a State to become a party to the Covenant, even though such State was not a member of the United Nations. This latter view eventually prevailed and became the present Article 48(1), which was criticised by the socialist States for being discriminatory and in conflict with the universal character of the Covenant.

It was against this background that the phrase “any Member State of any specialized agency of the United Nations” was proposed. It appeared that this phrase was added to enlarge the number of eligible States so that States which were members of a specialised agency of the United Nations but not of the United Nations itself might accede to the Covenant. *This phrase was not intended to allow ratification or accession by a non-State entity.*

*Id.* at 941-42 (footnotes omitted) (emphasis added).

<sup>78</sup> *Id.* at 942.

<sup>79</sup> See MUSHKAT, *supra* note 1, at 3 (“An assessment of international legal status/personality should be conducted with reference to a *range* of factors, including: factual ‘statelike’ attributes (such as permanent population, defined territory, government); international recognition and ‘legitimacy’; international legal entitlements (e.g., right to self-determination); membership in the ‘international civil society’; and *sui generis* qualities.”).

<sup>80</sup> The declaratory theory holds that “the existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law. Accordingly, a state may exist without being recognized.” HENKIN ET AL., *supra* note 20, at 244; see also Charter of the Organization of American States, Apr. 30 1948, art. 6, 2 U.S.T. 2416, 2418, 119 U.N.T.S. 3, 54, *amended* by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607 (“States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the *mere fact of its existence as a person under international law.*” (emphasis added)); The Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 3, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention] (adopting the declaratory theory); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 41, § 34 (articulating the concept of the state).

<sup>81</sup> The constitutive theory states that “the act of recognition by other states confers international personality on any entity purporting to be a state. . . . On this ‘constitutive’ theory an observer or a court need only look at the acts of recognition to decide whether an entity is a state.” HENKIN ET AL., *supra* note 20, at 244.

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engage in, formal relations with other such entities.”<sup>82</sup> Despite its minuteness,<sup>83</sup> Hong Kong satisfies these traditional criteria of statehood.

Since 1842,<sup>84</sup> Hong Kong’s territorial existence has been well established by law and by fact.<sup>85</sup> Even though Hong Kong became “an inalienable part” of China in 1997,<sup>86</sup> it still remains a separate entity by virtue of the one country, two systems framework. As of 1997, Hong Kong consists of over six million inhabitants, who live together as a community<sup>87</sup> and who are capable of governing themselves.<sup>88</sup> Thus, there is no dispute that Hong Kong has a defined territory<sup>89</sup> and a permanent population.<sup>90</sup>

The Basic Law provides that “no department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which Hong Kong . . . administers on its own in accordance with [the Basic] Law.”<sup>91</sup>

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<sup>82</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) [hereinafter RESTATEMENT]; see also Montevideo Convention, *supra* note 80, art. 1, 49 Stat. St 3100, 165 L.N.T.S. at 25; HENKIN ET AL., *supra* note 20, at 246-55.

<sup>83</sup> Even though Vatican has the smallest population of any entity claiming to be a state, it is generally accepted as a state. See RESTATEMENT, *supra* note 82, § 201 reporter’s note 7; HENKIN ET AL., *supra* note 20, at 247.

<sup>84</sup> Britain acquired Hong Kong through the Treaty of Nanking in 1842. See Treaty Between China and Great Britain, Signed at Nanking, Aug. 29, 1842, China-Gr. Brit., reprinted in GHAI, *supra* note 1, at 504-07. Since then, the territory of Hong Kong has expanded to include Kowloon Peninsula and the New Territories. See Convention of Friendship Between Great Britain and China Signed in Peking, Oct. 24, 1860, China-Gr. Brit., reprinted in GHAI, *supra* note 1, at 508-10; Convention Between Great Britain and China Respecting an Extension of Hong Kong Territory Signed at Peking, June 9, 1898, China-Gr. Brit., reprinted in GHAI, *supra* note 1, at 511-12; see also GHAI, *supra* note 1, at 3-9 (explaining the basis of British jurisdiction in Hong Kong). For an excellent early history of Hong Kong, see G.B. ENDACOTT, A HISTORY OF HONG KONG (rev. ed. 1973).

<sup>85</sup> See MUSHKAT, *supra* note 1, at 4.

<sup>86</sup> Basic Law, *supra* note 23, art. 1, 29 I.L.M. at 1521.

<sup>87</sup> See MUSHKAT, *supra* note 1, at 4 (“[Hong Kong] is populated by a community of permanent inhabitants whose ordinary place of residence is Hong Kong.”); Roda Mushkat, *Hong Kong’s Quest for Autonomy: A Theoretical Reinforcement*, in HONG KONG, CHINA AND 1997, *supra* note 1, at 323 (“There is empirical evidence to suggest that a distinct Hong Kong identity has evolved and that it manifests itself in specific attitudes and modes of behavior.”); see also 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 41, § 34, at 121 (“A people is an aggregate of individuals who live together as a community though they may belong to different races or creeds or cultures, or be of different colour.”). One commentator described the unique characteristics of the people of Hong Kong as follows:

This person was quick-thinking, flexible, tough for survival, excitement-craving, sophisticated in material tastes, and self-made in a strenuously competitive world. He operated in the context of a most uncertain future, control over which was in the hands of others, and for this as well as for historical reasons lived “life in the short term.”

MICHAEL YAHUDA, HONG KONG: CHINA’S CHALLENGE 59 (1996) (quoting Hugh Baker, *Life in the Cities: The Emergence of the Hong Kong Man*, 95 CHINA Q. 469, 478-79 (1983)). Indeed, in a recent opinion poll taken by the Hong Kong University, 62.5 percent of those participants between the ages of fifteen and twenty-four do not consider themselves Chinese, preferring to think of themselves as “Hong Kong people.” Only thirty percent said they were Chinese, and 6.6 percent said they were both. See WILLEM VAN KEMENADE, CHINA, HONG KONG, TAIWAN, INC. 101 (Diane Webb trans., 1998). Professor Leung explained this phenomenon as follows:

Inherent in the Hong Kong identity is an identification with China’s past which enables the Hong Kong people to recognize themselves as Chinese in the cultural sense but, perhaps, not in the social and political sense. Political realities aside, their claim to be “Hongkongese” rather than Chinese is based also on their sense of superiority over their compatriots across the border.

BENJAMIN K.P. LEUNG, PERSPECTIVES ON HONG KONG SOCIETY 68 (1996). See generally LEUNG, *supra*, for a comprehensive discussion of the Hong Kong society.

<sup>88</sup> See Basic Law, *supra* note 23, art. 21, 29 I.L.M. at 1524 (“Chinese citizens who are residents of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law.”).

<sup>89</sup> As the *Third Restatement of Foreign Relations Law* states:

An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state. An entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily.

RESTATEMENT, *supra* note 82, § 201 cmt. b.

<sup>90</sup> See *id.* § 201 cmt. c (“To be a state an entity must have a population that is significant and permanent.”).

<sup>91</sup> Basic Law, *supra* note 23, art. 22, 29 I.L.M. at 1524; see also John Ridding, *Hong Kong: Governing with a Light Touch*, FIN. TIMES, Dec. 8, 1997, (China Supplement), at iv (“The Chinese Government appears to be taking seriously President Jiang Zemin’s pledge at the handover that no mainland government officials ‘may or will be allowed to interfere in the affairs which Hong Kong should administer on its own.’”); Simon Beck, “So Far, So Good” *Transition Verdict*, S. CHINA MORNING POST, Nov. 23, 1997, at 2 (“Far from being heavy-handed or insensitive, Beijing appears to have absented itself from active involvement in Hong Kong affairs . . . .” (quoting H.R. Rep. No. 105-159, at E2323 (1997))).

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Hong Kong shall “exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication.”<sup>92</sup> Hong Kong shall also retain its capitalistic system and way of life,<sup>93</sup> the rule of law,<sup>94</sup> and independent finances until at least 2047.<sup>95</sup> Because its legislative and executive authorities are composed of local permanent residents,<sup>96</sup> Hong Kong “is effectively ruled by a local government which exercises jurisdiction over the population and territory.”<sup>97</sup>

As the Basic Law expressly states, the fundamental governmental functions reserved to the Hong Kong government include the following: management, use, and development of land and natural resources;<sup>98</sup> maintenance of public order;<sup>99</sup> promulgation of laws;<sup>100</sup> dispensation of justice;<sup>101</sup> collection of taxes;<sup>102</sup> regulation of economic and trade practices;<sup>103</sup> formulation of monetary and financial policies;<sup>104</sup> development of economic and trade relations with other states

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<sup>92</sup> Basic Law, *supra* note 23, art. 2, 29 I.L.M. at 1521.

<sup>93</sup> See *id.* art. 5, 29 I.L.M. at 1521 (“The Socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.”); *id.* art. 6, 29 I.L.M. at 1521 (“The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.”).

<sup>94</sup> See, e.g., *id.* art. 8, 29 I.L.M. at 1521 (“The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene [the Basic] Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”); *id.* art. 39, 29 I.L.M. at 1526 (“The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.”); *id.* art. 83, 29 I.L.M. at 1534 (“The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.”); *id.* art. 98, 29 I.L.M. at 1535 (“The powers and functions of the district organizations and the method for their formation shall be prescribed by law.”); *id.* art. 110, 29 I.L.M. at 1537 (“The monetary and financial systems of the Hong Kong Special Administrative Region shall be prescribed by law.”); *id.* art. 111, 29 I.L.M. at 1537 (“The system regarding the issue of Hong Kong currency and the reserve fund system shall be prescribed by law.”); *id.* art. 139, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall, on its own, . . . protect by law achievements in scientific and technological research, patents, discoveries and inventions.”); *id.* art. 140, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall, on its own, . . . protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.”); see also GHAI, *supra* note 1, at 238-40 (discussing the rule of law).

<sup>95</sup> See *id.* art. 106, 29 I.L.M. at 1537 (“The Hong Kong Special Administrative Region shall have independent finances.”); *id.* art. 7, 29 I.L.M. 1521 (“The revenues derived [from lease or grant for use or development of land and natural resources] shall be exclusively at the disposal of the government of the Region.”).

<sup>96</sup> See *id.* art. 3, 29 I.L.M. at 1521.

<sup>97</sup> MUSHKAT, *supra* note 1, at 4.

<sup>98</sup> See Basic Law, *supra* note 23, art. 7, 29 I.L.M. at 1521 (“The land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development.”).

<sup>99</sup> See *id.* art. 14, 29 I.L.M. at 1522 (“The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.”).

<sup>100</sup> See *id.* art. 17, 29 I.L.M. at 1523 (“The Hong Kong Special Administrative Region shall be vested with legislative power.”).

<sup>101</sup> See *id.* art. 19, 29 I.L.M. at 1523 (“The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.”); *id.* art. 63, 29 I.L.M. at 1531 (“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”); *id.* art. 95, 29 I.L.M. at 1535 (“The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.”).

<sup>102</sup> See Basic Law, *supra* note 23, art. 108, 29 I.L.M. at 1537 (“The Hong Kong Special Administrative Region shall practise an independent taxation system.”).

<sup>103</sup> See *id.* art. 109, 29 I.L.M. at 1537 (“The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.”); *id.* art. 118, 29 I.L.M. at 1538 (“The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries.”); *id.* art. 119, 29 I.L.M. at 1538 (“The Government of the Hong Kong Special Administrative Region shall formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment.”).

<sup>104</sup> See *id.* art. 110, 29 I.L.M. at 1537 (“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law.”); *id.* art. 112, 29 I.L.M. at 1538 (“No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region.”).

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and regions;<sup>105</sup> issuance of certificates of origin for locally manufactured products;<sup>106</sup> regulation of shipping and maintenance of shipping register;<sup>107</sup> management and regulation of civil aviation;<sup>108</sup> and conduct of social affairs.<sup>109</sup> In addition, Hong Kong retains the policy of free trade,<sup>110</sup> free movement of goods and capital,<sup>111</sup> and a freely convertible currency.<sup>112</sup> Hong Kong also remains a free port<sup>113</sup> and a separate customs territory,<sup>114</sup> thus entitling the region to separate export quotas and tariff preferences.<sup>115</sup>

Despite satisfying the first three criteria, “an entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.”<sup>116</sup> Although Hong Kong retains its own economic, social, political, and legal systems, it does not have sovereign independence<sup>117</sup> or

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<sup>105</sup> See *id.* art. 116, 29 I.L.M. at 1538 (“The Hong Kong Special Administrative Region may, using the name ‘Hong Kong, China’, participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.”).

<sup>106</sup> See *id.* art. 117, 29 I.L.M. at 1538 (“The Hong Kong Special Administrative Region may issue its own certificates of origin for products in accordance with prevailing rules of origin.”).

<sup>107</sup> See Basic Law, *supra* note 23, art. 124, 29 I.L.M. at 1539 (“The Government of the Hong Kong Special Administrative Region shall, on its own, define its specific functions and responsibilities in respect of shipping.”); *id.* art. 125, 29 I.L.M. at 1539 (“The Hong Kong Special Administrative Region shall be authorized by the Central People’s Government to continue to maintain a shipping register and issue related certificates under its legislation, using the name ‘Hong Kong, China’.”).

<sup>108</sup> See *id.* art. 128, 29 I.L.M. at 1539 (“The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.”); *id.* art. 130, 29 I.L.M. at 1540 (“The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation . . . .”); *id.* art. 133, 29 I.L.M. at 1540 (permitting Hong Kong to “renew or amend air service agreements and arrangements previously in force” and to “negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong” and “provisional arrangements with foreign states or regions with which no air service agreements have been concluded”); *id.* art. 134, 29 I.L.M. at 1540 (authorizing Hong Kong to “issue licences to airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong . . . [and] permits to foreign airlines for services other than those to, from or through the mainland of China”).

<sup>109</sup> See *id.* art. 136, 29 I.L.M. at 1541 (“On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education . . . .”); *id.* art. 138, 29 I.L.M. at 1541 (“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies to develop Western and traditional Chinese medicine and to improve medical and health services.”); *id.* art. 139, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology . . . .”); *id.* art. 140, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.”); *id.* (“The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.”); *id.* art. 143, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on sports.”); *id.* art. 145, 29 I.L.M. at 1543 (“On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.”); *id.* art. 147, 29 I.L.M. at 1543 (“The Hong Kong Special Administrative Region shall on its own formulate laws and policies relating to labour.”).

<sup>110</sup> See *id.* art. 115, 29 I.L.M. at 1538 (“The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.”).

<sup>111</sup> See *id.* art. 112, 29 I.L.M. at 1538 (“The Government of the Hong Kong Special Administrative Region shall safeguard the free flow of capital within, into and out of the Region.”).

<sup>112</sup> See *id.* art. 111, 29 I.L.M. at 1537 (“The Hong Kong dollar, as the legal tender in the Hong Kong Special Administrative Region, shall continue to circulate. The authority to issue Hong Kong currency shall be vested in the Government of the Hong Kong Special Administrative Region.”); *id.* art. 112, 29 I.L.M. at 1538 (“The Hong Kong dollar shall be freely convertible.”).

<sup>113</sup> See *id.* art. 114, 29 I.L.M. at 1538 (“The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff unless otherwise prescribed by law.”).

<sup>114</sup> See Basic Law, *supra* note 23, art. 116, 29 I.L.M. at 1538 (“The Hong Kong Special Administrative Region shall be a separate customs territory.”).

<sup>115</sup> See *id.* (“Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or which were obtained or made and remain valid, shall be enjoyed exclusively by the Region.”).

<sup>116</sup> RESTATEMENT, *supra* note 82, § 201 cmt. e.

<sup>117</sup> See Basic Law, *supra* note 23, art. 1, 29 I.L.M. at 1521 (“The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China.”).

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autonomy over foreign affairs<sup>118</sup> and defense.<sup>119</sup> In addition, the Chief Executive of Hong Kong is appointed by, and accountable to, the Central People's Government.<sup>120</sup> The Standing Committee of the National People's Congress may add or delete laws after consulting with the Hong Kong government,<sup>121</sup> and the National People's Congress retains the power to interpret<sup>122</sup> or amend the Basic Law.<sup>123</sup>

Nevertheless, Hong Kong is authorized to conduct "external affairs"<sup>124</sup> and "possesses a degree of latitude to engage in international action autonomously."<sup>125</sup> Under the name of "Hong Kong, China," Hong Kong may "participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles."<sup>126</sup> Hong Kong may also pursue relations and enter into agreements with other countries and international organizations in areas such as trade, shipping, tourism, and financial dealings.<sup>127</sup>

Furthermore, Hong Kong "may . . . establish official or semi-official economic and trade missions in foreign countries,"<sup>128</sup> and may maintain consular relationships with countries that have formal diplomatic relations with China, as well as countries that have no diplomatic ties to China, depending on the circumstances.<sup>129</sup> Representatives of Hong Kong may participate in international organizations or conferences, whether or not those organizations or conferences are limited to states.<sup>130</sup> "International agreements to which People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in [Hong Kong]."<sup>131</sup> Thus, on balance, Hong Kong has both the competence and capacity to conduct international relations with

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<sup>118</sup> See *id.* art. 13, 29 I.L.M. at 1522 ("The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.").

<sup>119</sup> See *id.* art. 14, 29 I.L.M. at 1522 ("The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region."). An expansive interpretation of the defense power would include seizure of property, detention without trial, banning of societies and organizations, price controls or regulation of housing, and economic sanctions. See GHAI, *supra* note 1, at 448-49 & n.11.

<sup>120</sup> See Basic Law, *supra* note 23, arts. 43, 45, 29 I.L.M. at 1527. Nevertheless, the Chief Executive must be a Chinese citizen who has resided in Hong Kong for over 20 years, see *id.* art. 44, 29 I.L.M. at 1527, and must be "selected by election or through consultations held locally . . ." *Id.* art. 45, 29 I.L.M. at 1527. The Chief Executive is also subject to the checks and balances provided by the Basic Law. Examples of these checks and balances include the requirement that the Chief Executive "consult the Executive Council before dissolving the Legislative Council[.]" *id.* art. 50, 29 I.L.M. at 1529, the Legislative Council's power to impeach the Chief Executive, see *id.* art. 73(9), 29 I.L.M. at 1532, and the requirement that judges' appointment be based "on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors." *Id.* art. 88, 29 I.L.M. at 1534.

<sup>121</sup> See *id.* art. 18, 29 I.L.M. at 1523 ("The Standing Committee of the National People's Congress may add to or delete from the list of laws . . . after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region.").

<sup>122</sup> See Basic Law, *supra* note 23, art. 158, 29 I.L.M. at 1545 ("The power of interpretation of [The Basic] Law shall be vested in the Standing Committee of the National People's Congress.").

<sup>123</sup> See *id.* art. 159, 29 I.L.M. at 1545 ("The power of amendment of [The Basic] Law shall be vested in the National People's Congress.").

<sup>124</sup> GHAI, *supra* note 1, at 433. For an excellent discussion of the distinction between foreign affairs and external affairs, see GHAI, *supra* note 1, at 433-41.

<sup>125</sup> MUSHKAT, *supra* note 1, at 4.

<sup>126</sup> Basic Law, *supra* note 23, art. 116, 29 I.L.M. at 1539.

<sup>127</sup> See *id.* art. 151, 29 I.L.M. at 1543 ("The Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields."); see also GHAI, *supra* note 1, at 434 (discussing the need to define "the appropriate fields").

<sup>128</sup> Basic Law, *supra* note 23, art. 156, 29 I.L.M. at 1544.

<sup>129</sup> See *id.* art. 157, 29 I.L.M. at 1544.

<sup>130</sup> See *id.* art. 152, 29 I.L.M. at 1543.

<sup>131</sup> *Id.* art. 153, 29 I.L.M. at 1544.

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other states.<sup>132</sup> “Compared with other autonomous entities, Hong Kong’s formal authority to conduct [these] relations and to take part in international organizations is . . . unparalleled.”<sup>133</sup>

Recently, new criteria of statehood emerged when the United States<sup>134</sup> and the European Community<sup>135</sup> determined whether they should recognize the new states formed as a result of the disintegration of the former Soviet Union and the former Yugoslavia.<sup>136</sup> These criteria include the rule of law, democracy, and protection of human rights. Hong Kong’s legal system has been in place for more than 150 years. In collaboration with the newly instituted Bill of Rights, this system has been particularly effective in protecting universally recognized human rights and fundamental individual freedoms.<sup>137</sup> Although democracy was very limited under British colonial rule, Hong Kong has made tremendous improvement in the last twenty years.<sup>138</sup> Thus, even though customary international law does not necessitate the satisfaction of these additional requirements, which are arguably tailored to fit the interests of the recognizing governments,<sup>139</sup> Hong Kong satisfies these additional requirements and has a very strong claim to statehood under the declaratory theory.<sup>140</sup>

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<sup>132</sup> Cf. RESTATEMENT, *supra* note 82, § 201 cmt. e (“An entity that has the capacity to conduct foreign relations does not cease to be a state because it voluntarily turns over to another state control of its foreign relations, as in the ‘protectorates’ of the period of colonialism, the case of Liechtenstein, or the ‘associated states’ of today.”); *id.* § 201 reporters’ note 4 (discussing the special circumstances in Liechtenstein).

<sup>133</sup> YAHUDA, *supra* note 87, at 41 (quoting James T.H. Tang, *Hong Kong’s International Status*, 6 PAC. REV. 205, 208 (1993)).

<sup>134</sup> See Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, Oct. 17, 1991, FOREIGN POL’Y BULL., Nov./Dec. 1991, at 39, 41-42.

<sup>135</sup> See Declaration on “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,” Dec. 16, 1991, 31 I.L.M. 1486 (1992).

<sup>136</sup> See HENKIN ET AL., *supra* note 20, at 250-55.

<sup>137</sup> See MUSHKAT, *supra* note 1, at 6 (“Hong Kong is a free society with most individual freedoms and rights protected by law and custom.” (quoting REPORT TO CONGRESS ON CONDITIONS IN HONG KONG AS OF MARCH 31, 1995 AS REQUESTED BY SECTION 301 OF THE UNITED STATES-HONG KONG POLICY ACT OF 1992, at 12 (1995))).

<sup>138</sup> See Brian Hook, *Political Change in Hong Kong*, in GREATER CHINA: THE NEXT SUPERPOWER? 188 (David Shambaugh ed., 1995); see also Mushkat, *Future of Hong Kong’s International Legal Personality*, *supra* note 9, at 279-82 (discussing democracy in Hong Kong after 1997). Nonetheless, some critics still remarked on Hong Kong’s “democratic deficit.” MUSHKAT, *supra* note 1, at 6. This remark is particularly true in light of the evasiveness of the Article 68 of the Basic Law, which provides:

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

Basic Law, *supra* note 23, art. 68, 29 I.L.M. at 1531 (emphasis added). As Professor Ghai explained:

The reluctance with regard to democratization in Hong Kong highlights a number of paradoxes. The problem of democratization is generally that of establishing social and economic conditions in which democracy may flourish. Here, where these conditions already exist, democracy is seen instead as a threat to them. The market economy, with a bourgeois class wedded to rights, is widely regarded elsewhere as the guarantee of democracy. Here the need to sustain the market economy is used as an argument against the introduction of democracy and the bourgeoisie emerges as the champion of authoritarianism. Democracy has been valued in recent times as an invaluable support for the rule of law, but here it is said that the rule of law will be stronger in the absence of democracy.

These notions are not dissimilar to views of democracy held by some other Asian governments (particularly in Malaysia, Singapore and Indonesia . . .). But they flourish in Hong Kong because of the peculiar position of the business community. The *raison d’être* of Hong Kong is, uniquely, commerce and trade. It is widely perceived that without economic success it loses all importance. This has given the business community a special purchase on the political system, and has not only enabled it to maintain many features of nineteenth century capitalism, but also to deflect pressures for political reform. The political institutions that will be established on the transfer of sovereignty over which the business leaders have had a key influence, will not only retard democratization, but will also threaten the liberal politics and culture that Hong Kong has long enjoyed.

GHAI, *supra* note 1, at 270-71.

<sup>139</sup> One commentator observed as follows:

This extensive catalog of criteria, far in excess of traditional standards for recognition of statehood, confirms that the Community was not applying general international law in the determination of its position. Although some of the requirements reflected objective criteria that must be fulfilled if there is to be a well-founded claim to statehood, the more specific conditions were *hand tailored to fit EC interests*.

Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT’L L. 569, 588 (1992) (footnotes omitted) (emphasis added).

<sup>140</sup> See *supra* note 132 (arguing that Hong Kong should be treated as a “quasi-state”).



B. *Constitutive Theory*

Because of “the emerging pattern of shifting alliances, proliferation of new forms of identity, multiple tiers of jurisdiction, and escalation in the volume of transnational interactions on the part of a variety of non-state actors,” traditional criteria of statehood are increasingly challenged.<sup>141</sup> Indeed, the admission practices of the United Nations,<sup>142</sup> its membership,<sup>143</sup> and state sovereignty<sup>144</sup> can be misleading in determining statehood. In view of that, this article examines Hong Kong’s statehood with reference to the international recognition it has received.

By virtue of its extensive involvement in international activities, whether as a member of international organizations or as a party to multilateral treaties, “Hong Kong has received a considerable measure of recognition as an autonomous entity.”<sup>145</sup> For example, the United States-Hong Kong Policy Act of 1992<sup>146</sup> provides that the United States “should continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory which is fully autonomous from the People’s Republic of China” in accordance with the Joint Declaration.<sup>147</sup> In addition, other states have positively received Hong Kong’s official representatives, government offices, and permanent missions in

<sup>141</sup> MUSHKAT, *supra* note 1, at 1 (“The validity of traditional notions of ‘statehood’ and ‘sovereignty’ is increasingly questioned in light of fundamental continuing changes in the structure of international relations.”); *see also* RESTATEMENT, *supra* note 82, § 201 cmt. a (“While the definition in this section is generally accepted, each of its elements may present significant problems in unusual situations.”).

<sup>142</sup> *See* MUSHKAT, *supra* note 1, at 2 n.6 (“Significant inconsistencies have been displayed particularly with regard to enforcement of requirements stipulated under Art 4 of the UN Charter . . . .”); *see also* U.N. CHARTER art. 4 (“Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” (emphasis added)).

<sup>143</sup> *See* MUSHKAT, *supra* note 1, at 2 n.7 (“Members include Caribbean pinpoints such as Saint Christopher and Nevis or Saint Lucia, as well as other microentities like Vanuatu in the Pacific or San Marino in Europe—but not Taiwan . . . .”); *see also* Fredrick F. Chien, *UN Should Welcome Taiwan*, FAR E. ECON. REV., Aug. 5, 1993, at 23. *But see* RESTATEMENT, *supra* note 82, § 201 cmt. h (“Since membership in the principal international organizations is constitutionally open only to states, admission to membership in an international organization such as the United Nations is an acknowledgment by the organization, and by those members who vote for admission, that the entity has satisfied the requirements of statehood.”); Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of Its Credentials*, 78 AM. J. INT’L L. 179 (1984) (examining the legality of excluding a member state from the General Assembly by refusing to accept its representatives’ credentials).

<sup>144</sup> Professor Mushkat explained the inadequacy of the “sovereignty” test:

[T]he position of the state as the central actor in the international community is being eroded, while “non-sovereign” actors are increasingly assuming a prominent role in shaping the norms that order and maintain the international community. Analysts of contemporary global politics invariably note that the inefficacy of states to manage grave problems with ramifications beyond national frontiers (e.g. pollution), as well as formidable scientific and technological developments, have forced states to concede power to international regulatory organs and surrender to regional organizations control over numerous areas previously within the exclusive domain of individual states. It is also clear, in light of an extensive body of human rights law, that states can no longer erect barriers in the name of sovereign/domestic jurisdiction and are subject to international scrutiny and judgment.

MUSHKAT, *supra* note 1, at 2-3 (footnote omitted).

<sup>145</sup> *Id.* at 5.

<sup>146</sup> 22 U.S.C. §§ 5701-5732 (1994).

<sup>147</sup> *Id.* § 5713(3); *see also* I.R.S. Notice 97-40, 1997-2 C.B. 287 (treating Hong Kong as a separate country for tax purposes); Jensen, *supra* note 16 (discussing the United States’ Hong Kong Policy Act of 1992); Christopher K. Costa, Comment, *One Country-Two Foreign Policies: United States Relations with Hong Kong After July 1, 1997*, 38 VILL. L. REV. 825, 828 (1993) (analyzing how the Act effectuates a U.S.—Hong Kong policy, which may be different from the existing U.S.-China policy). Unlike the United States, Canada stated that it does not need special legislation to treat Hong Kong as a separate entity, given its established bilateral ties and accords with Hong Kong. *See* Susan Furlong, *Canada Ties “Not Affected by 1997,”* S. CHINA MORNING POST, Dec. 8, 1991, at 2. Despite the well-intended purpose, the Act’s sanction is not “likely to be particularly effective, other than by putting China on notice.” GHAI, *supra* note 1, at 461. As Professor Ghai explained:

The suspension of laws would harm Hong Kong, which is intended to be the beneficiary of the act. The US administration was less than enthusiastic about the legislation and managed to water down several provisions during its passage. The language of the act suggests less hard law than exhortations to the administration, within whose jurisdiction fall many matters covered by it.

*Id.* at 461.

major cities such as Brussels, Geneva, London, Tokyo, Toronto, San Francisco, and Washington, D.C.

Furthermore, Hong Kong participates in more than forty international organizations and associations,<sup>148</sup> including United Nations’ “specialized agencies,”<sup>149</sup> key international trade and financial institutions,<sup>150</sup> and regional economic associations.<sup>151</sup> “Hong Kong is . . . under the regime of over two hundred multilateral treaties [and even more numerous bilateral treaties] in fields such as customs, conservation, health, trade, transport, marine pollution, drugs, international crime, science and technology and private international law.”<sup>152</sup> Hong Kong also participates extensively in nongovernmental organizations<sup>153</sup> and serves as a “regional headquarters to close to one thousand multinational corporations.”<sup>154</sup>

Although commentators do not agree on whether international recognition is sufficient to constitute statehood, “the practical relevance of the ‘recognition factor’ in the calculus of international legal personality is rarely disputed,”<sup>155</sup> especially when collective recognition is involved.<sup>156</sup> Thus, Hong Kong’s international recognition further strengthens the region’s claim to statehood. In fact, if one may utilize the subsequent conduct of ICCPR parties to clarify the ambiguity of Article 48(1),<sup>157</sup> one may, based on the collective recognition Hong Kong has received, infer that the international community is willing to extend Article 48(1) to include Hong Kong as a contracting party.<sup>158</sup>

<sup>148</sup> See MUSHKAT, *supra* note 1, at 8-9.

<sup>149</sup> These agencies include: International Labor Organization, International Civil Aviation Organization, World Health Organization, United Nations Environment Program, United Nations Development Program, International Atomic Energy Agency, Universal Postal Union, International Telecommunications Union, International Telecommunications Satellite Organization, World Meteorological, International Maritime Organization and Economic and Social Commission for Asia and the Pacific. See *id.* at 9 n.39.

<sup>150</sup> These institutions include World Bank, International Monetary Fund, Asia Development Bank, and World Trade Organization. See *id.* at 9 n.40.

<sup>151</sup> These associations include: Pacific Economic Cooperation Conference and Asia-Pacific Economic Cooperation. See *id.* at 9 n.41.

<sup>152</sup> *Id.* at 9.

<sup>153</sup> “Hong Kong participates in 884 non-governmental organizations.” MUSHKAT, *supra* note 1, at 9 n.43; see also Basic Law, *supra* note 23, art. 144, 29 I.L.M. at 1542 (“The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work.”).

<sup>154</sup> MUSHKAT, *supra* note 1, at 9 (internal quotations omitted).

<sup>155</sup> *Id.* at 4; see also RESTATEMENT, *supra* note 82, § 201 cmt. a (“In the absence of judicial or other means for authoritative and consistent determination, issues of statehood have been resolved by the practice of states reflecting political expediency as much as logical consistency.”); HENKIN ET AL., *supra* note 20, at 244-45 (discussing the effect of recognition on statehood); *supra* text accompanying note 78 (discussing the constitutive theory).

<sup>156</sup> See MUSHKAT, *supra* note 1, at 5 & n.15 (“Note . . . the admission to the UN of former Yugoslav republics and the apparent acceptance of the statehood of Bosnia-Herzegovina by the ICJ, notwithstanding lack of factual prerequisites such as an effective government, and regardless of ‘legality’ of creation.” (citing Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 3 (Apr. 8))); see also P.E. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 61 (1951) (“If a number of important States had recognized a given community, either by explicit declaration or by the implication of their relations with it, this recognition created at least a rebuttable presumption of statehood and personality.”).

<sup>157</sup> See Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, art. 31(3), 8 I.L.M. 679, 692 (1969); see also *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972) (“[A] prime canon of treaty construction is to look to the subsequent action of the parties for the interpretation of the treaty in areas clearly unanticipated at the time.”); RESTATEMENT, *supra* note 82, § 325(2) (“Any subsequent agreement between the parties regarding the interpretation of the agreement, and *subsequent practice between the parties in the application of the agreement*, are to be taken into account in its interpretation.” (emphasis added)).

<sup>158</sup> Based on Hong Kong’s international recognition, commentators can also argue based on Hong Kong’s international recognition, that the international community is estopped from denying Hong Kong’s capacity as a contracting party to the ICCPR. See generally I.C. MacGibbon, *Estoppel in International Law*, 7 INT’L & COMP. L.Q. 468, 473-75 (1958) (discussing recognition as estoppel). See also *infra* Part III.D (discussing the estoppel theory); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (relying on subsequent conduct as evidence of the intent of the parties).

## SUCCESSION BY ESTOPPEL

In sum, Hong Kong not only possesses the traditional stately attributes and the competence and capacity to fulfill the ICCPR obligations, but is also a well-respected actor in the international community.<sup>159</sup> Under both the declaratory and constitutive theories, Hong Kong has a very strong claim to statehood, thus satisfying the membership requirement of the ICCPR.<sup>160</sup>

### III. THEORIES OF STATE SUCCESSION

To determine whether Hong Kong succeeded to the ICCPR, this Part examines the dominant state succession theories that may be applicable to Hong Kong.<sup>161</sup> Throughout history, states have disintegrated, separated, merged, and annexed, thus giving rise to a series of legal questions regarding inheritance or devolution of rights and obligations with respect to treaties.<sup>162</sup> In response to these difficult questions and the lack of customary international law in this area,<sup>163</sup> the Vienna Convention on the Succession of States in Respect of Treaties<sup>164</sup> (“Vienna Convention”) was adopted in 1978. This convention applies to treaties between states,<sup>165</sup> constituent instruments of international organizations, and treaties adopted within such organizations.<sup>166</sup> Because the Vienna Convention has neither entered into force nor become part of customary international law,<sup>167</sup> “state practice has remained unsettled and full of inconsistencies.”<sup>168</sup>

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<sup>159</sup> See United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5701(4) (1994) (“Hong Kong plays an important role in today’s regional and world economy.”).

<sup>160</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 942 (“It is open to the General Assembly to regard the Hong Kong SAR as a ‘State’ for the purpose of the third sentence of Article 48(1) and invite the Hong Kong SAR to become a party to the Covenant.”); *id.* at 946 (“For the international community, legal technicalities are unlikely to be a matter of great concern . . . . The possibility . . . of luring China eventually to ratify the ICCPR for the rest of the country is probably too strong a temptation to resist.”); *cf.* *Statement by the Chairperson on Behalf of the Human Rights Committee Relating to the Consideration of the Part of the Fourth Periodic Report of the United Kingdom Relating to Hong Kong* [hereinafter *Statement Relating to the Fourth Periodic Report*], in Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland Relating to Hong Kong*, U.N. Doc. CCPR/C/79/Add.57 (1995) (visited Nov. 30, 1999) <<http://heiwwww.unige.ch/humanrts/hrcommittee/UK-E.htm>> [hereinafter *Concluding Observations on the Fourth Periodic Report*] (“The Committee is ready to give effect to the intention of the parties to the Joint Declaration so far as Hong Kong is concerned, and to cooperate fully with the parties to the Joint Declaration to work out the necessary modalities to achieve these objectives.”); Jensen, *supra* note 16, at 175 (“Multilateral agreements are designed to increase the number of states which can become parties. Since the purpose is to increase the number of signatories to include as many parties as possible, other states should not take issue with China and Hong Kong participating in agreements as separate parties.”).

<sup>161</sup> For comprehensive overviews of state succession theories, see generally MENON, *supra* note 9, at 1-74; DANIEL O’CONNELL, *THE LAW OF STATE SUCCESSION* (1956); DANIEL O’CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* (1967); 1 OPPENHEIM’S *INTERNATIONAL LAW*, *supra* note 41, §§ 60-64; OKON UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* (1972); *Treaties*, 2 *Whitman DIGEST* § 10 (1963).

<sup>162</sup> See HENKIN ET AL., *supra* note 20, at 530; Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT’L L. 253, 253-54 (1993) (arguing that state succession is one of the oldest subjects of international law); Andrew M. Beato, Note & Comment, *Newly Independent and Separating States’ Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT’L L. & POL’Y 525, 528 (1994) (“State succession law explores the implications that mutations of sovereignty have upon a state’s international obligations.”).

<sup>163</sup> See MUSHKAT, *supra* note 1, at 27.

<sup>164</sup> Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 23, 1978, 17 I.L.M. 1488 (1978).

<sup>165</sup> *Id.* art. 1, 17 I.L.M. at 1489.

<sup>166</sup> See *id.* art. 4, 17 I.L.M. at 1491-92.

<sup>167</sup> China has not ratified the Vienna Convention.

<sup>168</sup> MUSHKAT, *supra* note 1, at 31 (internal quotations omitted); see also RESTATEMENT, *supra* note 82, § 208 reporters’ note 1 (“The international law and the practice of states as to succession have been uncertain and confused.”); Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 929 (“The law on State succession of treaties is at this stage still contentious and uncertain.”); Edwin D. Williamson & John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 VA. J. INT’L L. 261, 261 (1993) (International law governing treaty succession is, at best, ambiguous.”); Beato, *supra* note 162, at 527 (“International law provides few clear answers to some of the critical legal issues arising from the dismantling of the Soviet State.”). Even though “it would be wise not to place too much emphasis on the provisions of the [Vienna] Convention . . . [that] Convention remains the only normative guide states have in the rocky waters of state succession.” Jan Klabbers, *State Succession and*

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### A. Moving Treaty Frontiers Rule

Article 15 of the Vienna Convention provides that, upon a change of sovereignty, “the international agreements of the predecessor state cease to have effect in respect of that territory and the international agreements of the successor state come in force there.”<sup>169</sup> Even though the Convention has not entered into force, states have widely regarded Article 15 as a codification of customary international law,<sup>170</sup> known as the “moving treaty frontiers rule.” This rule applies when part of the territory of a state becomes the territory of another state.<sup>171</sup> The rule allows a territory undergoing a change of sovereignty to transition from “the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign.”<sup>172</sup> For example, “when the United States absorbed Texas and Hawaii, both of which had been independent states, U.S. treaties displaced Texan and Hawaiian treaties.”<sup>173</sup> Nonetheless, such a rule cannot be displaced by either a devolution agreement between the predecessor state and the successor state<sup>174</sup> or a unilateral declaration by the successor state.<sup>175</sup>

Because of the unprecedented one country, two systems framework, the application of the moving treaty frontiers rule to Hong Kong is problematic. Article 153 of the Basic Law provides that “international agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.”<sup>176</sup> Article 153 uses the term “may” instead of “shall” and does not specify

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*Reservations to Treaties*, in *ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG* 108 (Jan Klabbers & Rene Lefeber eds., 1998) [hereinafter *ESSAYS ON THE LAW OF TREATIES*]; see also Schachter, *supra* note 162, at 257 (“Although the Vienna Convention has not come into force, it has not been without influence. For example, the State Department Legal Adviser expressed the opinion in 1980 that the rules of the Vienna Convention were ‘generally regarded as declarative of existing customary international law [by the United States].’” (quoting 1980 DIG. U.S. PRAC. INT’L L. 1041 n.43)).

<sup>169</sup> RESTATEMENT, *supra* note 82, § 210(1); see also Vienna Convention, *supra* note 164, art. 15, 17 I.L.M. at 1496. One commentator explained the mechanism of the moving treaty frontiers rule as follows:

The rationale behind the Rule is that when one government assumes sovereignty over a territory previously held by another state, there has been a change in the government itself over that territory. This change in government may create a condition that makes it impossible for the treaty obligations to be performed, or this change may be inconsistent with the purpose of those obligations. From this principle it follows that when a territory loses its identity by its incorporation into another state, the treaty obligations applicable to that territory are terminated due to impossibility of performance. Impossibility of performance arises because that territory surrenders its sovereignty to the incorporating state. This Rule applies automatically, unless otherwise specifically provided, because the territory can no longer perform its treaty obligations freely and can only perform them at the direction of the incorporating state. Since the incorporating state remains free to perform its treaty obligations, it simply performs those obligations with respect to all of its territory, including the newly incorporated territory.

Jensen, *supra* note 16, at 181-82.

<sup>170</sup> See GHAI, *supra* note 1, at 453; see also RESTATEMENT, *supra* note 82, § 210 cmt. i (“A new state is subject to duties and entitled to rights under customary international law. Each new state takes customary law as it finds it . . .”).

<sup>171</sup> See *International Law Commission Report*, [1974] 1 Y.B. INT’L L. COMM’N 157, 208 [hereinafter *ILC Report*]. Article 15 of the Vienna Convention states the moving frontiers rule as follows:

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and

(b) treaties of successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation.

Vienna Convention, *supra* note 164, art. 15, 17 I.L.M. at 1496; see also HENKIN ET AL., *supra* note 20, at 535-36.

<sup>172</sup> *ILC Report*, *supra* note 171, at 208; see also Vienna Convention, *supra* note 164, art. 15, 17 I.L.M. at 1496.

<sup>173</sup> Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588, 593 (1990) [hereinafter *Taking Reichs Seriously*]. Other examples include France’s annexation of Algeria and Madagascar, Britain’s annexation of Upper Burma and the Boer Republics, and Japan’s annexation of Korea. See *id.*

<sup>174</sup> See Vienna Convention, *supra* note 164, art. 8, 17 I.L.M. at 1493.

<sup>175</sup> See *id.* art. 9, 17 I.L.M. at 1493.

<sup>176</sup> Basic Law, *supra* note 23, art. 153, 29 I.L.M. at 1544 (emphasis added).

whether China or Hong Kong would decide if an existing treaty continues.<sup>177</sup> Thus, treaties that are in force before the transition do not automatically apply to Hong Kong after the transition.<sup>178</sup> By contrast, with respect to treaties to which China is or becomes a party, China alone shall decide their application to Hong Kong in accordance with Hong Kong’s “circumstances and needs” and after consultation with the Hong Kong government. Once again, treaties do not automatically apply to Hong Kong after the transition. Thus, the moving treaty frontiers rule “is not applicable in light of Hong Kong’s special autonomous status.”<sup>179</sup>

### B. *Clean Slate Theory*

Unlike the moving treaty frontiers rule, the clean slate theory<sup>180</sup> allows a newly independent state to “start afresh, with neither rights nor obligations under the agreements of its predecessor state.”<sup>181</sup> Under this theory, “the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce.”<sup>182</sup> This theory is “consistent with the principle of right to self-determination and sovereign equality of States . . . and is in conformity with customary international law.”<sup>183</sup> Examples of states succeeding under this theory include Bukina Faso, Israel,<sup>184</sup> Pakistan,<sup>185</sup> and the United States.<sup>186</sup>

However, the clean slate theory has “no direct relevance” to Hong Kong because Hong Kong is not gaining *full* independence.<sup>187</sup> This theory mainly was designed for newly independent states that were undergoing decolonization.<sup>188</sup> The theory’s main justification is that “a state should

<sup>177</sup> See GHAI, *supra* note 1, at 454.

<sup>178</sup> See *id.* (“The Basic Law does not automatically continue these treaties.”).

<sup>179</sup> *Id.*; see also Mushkat, *Hong Kong and Succession of Treaties*, *supra* note 16, at 192 (“Similarly inapplicable is the ‘moving treaty frontiers’ rule . . . given Hong Kong’s highly autonomous status (distinguished from total absorption/integration with another State).”).

<sup>180</sup> For overviews of the clean slate theory, see generally HENKIN ET AL., *supra* note 20, at 536-40; MENON, *supra* note 9, at 23-46.

<sup>181</sup> RESTATEMENT, *supra* note 82, § 210 cmt. f; see also ILC Report, *supra* note 171, at 239 (“The metaphor of the clean slate is a convenient way of expressing the basic concept that a newly independent state begins its international life free from any *obligation* to continue in force treaties previously applicable with respect to its territory simply by reason of that fact.” (emphasis added)).

<sup>182</sup> RESTATEMENT, *supra* note 82, § 210(3); see also Vienna Convention, *supra* note 164, art. 16, 17 I.L.M. at 1496 (“A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the Succession of States relates.”); *id.* art. 17(1), 17 I.L.M. at 1497 (“[A] newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.”); ARNOLD D. MCNAIR, THE LAW OF TREATIES 601 (1961) (“Newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate . . .”). By contrast, Professor Mullerson argued that the so-called new-states are not completely new entities:

In cases of the emergence of new states in international law, . . . these states always conserve some elements of their predecessor states. There is necessarily a certain *de facto* continuity in cases of state succession. A predecessor state simply cannot completely disappear, except in cases like that of the legendary Atlantis. Of the three elements of statehood—population, territory and authority—parts of the population and territory remain the same in cases of the emergence of new states resulting from the secession or dissolution of existing states. Their newness, therefore, is always relative. Although new subjects of international law, they are not at the same time completely new entities.

MULLERSON, INTERNATIONAL LAW, *supra* note 20, at 139.

<sup>183</sup> MENON, *supra* note 9, at 23; see also Beato, *supra* note 162, at 535 (“Conventional international law provides that a dependent successor state, as a newly independent entity, is not legally required to inherit a predecessor state’s treaties because independence transforms its identity.”); *Taking Reichs Seriously*, *supra* note 173, at 604 (“The clean slate rule establishes a presumption in favor of autonomy.”).

<sup>184</sup> See Beato, *supra* note 162, at 539-40 (discussing Israel and Burkina Faso).

<sup>185</sup> See Williamson & Osborn, *supra* note 168, at 263.

<sup>186</sup> See RESTATEMENT, *supra* note 82, § 210 reporters’ note 3.

<sup>187</sup> MUSHKAT, *supra* note 1, at 28.

<sup>188</sup> See RESTATEMENT, *supra* note 82, § 210 cmt. f (rejecting the dependent colonies distinction); *id.* § 210 reporters’ note 6 (considering the distinction unworkable and unfair); see also MULLERSON, INTERNATIONAL LAW, *supra* note 20, at 137 (arguing that the Vienna

not be held answerable to treaties that it neither helped create nor ratified, but that nevertheless were imposed on its territory.”<sup>189</sup> Because Hong Kong does not have sovereign independence and China has assumed most of Britain’s existing colonial obligations with respect to Hong Kong, the clean slate theory is not only irrelevant, but also inconsistent with the strong presumption of continuity embodied in the Joint Declaration.<sup>190</sup>

Furthermore, the clean slate theory is inconsistent with the strong presumption of continuity that is prevalent in existing international law.<sup>191</sup> In today’s constantly changing world,<sup>192</sup> a presumption of continuity would maintain the stability of legal rights and obligations,<sup>193</sup> thus promoting confidence<sup>194</sup> and expectations under the international legal regime.<sup>195</sup> Such a

Convention was created “under the influence of the then latest wave of the emergence of new states and concentrated too much on the succession of states emerging in the wake of decolonization”); Beato, *supra* note 162 (arguing that the distinction is unpersuasive).

<sup>189</sup> Beato, *supra* note 162, at 540-41; *see also* RESTATEMENT, *supra* note 82, § 210 reporters’ note 3 (“Most newly independent states sought a rule under which they would not be bound by agreements made by the former colonial regimes. They pointed to the example of the United States, which, upon achieving independence, did not accept the obligations of British international agreements.”); Detlev F. Vagts, *State Succession: The Codifiers’ View*, 33 VA. J. INT’L L. 275, 287 (1993) (“The peoples of India, Burma or Tanzania, for example, had no voice in the creation or negotiation of the extradition, dual taxation, and other treaties to which they would have fallen heir under the traditional continuity approach to treaties.”); Williamson & Osborn, *supra* note 168, at 262-63 (“The basis for this distinction is that truly dependent colonies are unlikely to have participated in the making of treaties and the conduct of foreign policy, and so ought not be expected to abide by their terms following separation from their former mother-state.”).

<sup>190</sup> *Cf.* Vagts, *supra* note 189, at 282 (“Newly-reconstructed states would be unjustly treated if they were deprived of benefits for which their predecessor states had bargained and paid.”).

<sup>191</sup> *See* Schachter, *supra* note 162, at 258 (“It seems probable that a general presumption of continuity of the obligations of a predecessor state will be accepted for new states that have come into being by secession or by dissolution of existing states.”); *id.* (“It is unlikely that the Restatement’s rule of a clean slate for all new states will prevail in practice or theory.”); *id.* at 259 (“I am inclined to predict that most such treaties of a general ‘legislative’ character will be treated in the future as automatically binding on new states on the basis of adherence by their respective predecessor states.”); Williamson & Osborn, *supra* note 168, at 264 (“The better legal position was to presume continuity in treaty relations.”); Beato, *supra* note 162, at 542-43 (“The tendency of newly independent states is to reject the rigidity of absolute treaty discontinuity in an effort to minimize disruptions in international relations.”). As Professor Vagts explained:

There is little persuasive force to a state’s claim that it is entitled to free itself from such an obligation because of a state succession problem. There is little or no chance that the convention in question will be rewritten to suit the preferences of a single new state, and the consequence of the new state’s abandoning the treaty will be to leave it in an “outlaw” status. . . . Since there is also little likelihood that special circumstances arising out of the succession will make application of the convention specially onerous for the new nation, there seems little equity in permitting it to escape its obligation.

Vagts, *supra* note 189, at 290; *see also* MULLERSON, INTERNATIONAL LAW, *supra* note 20, at 158 (“Even if new states do not consider themselves to be automatically bound by all their predecessors’ treaties, they cannot simply unilaterally renounce their predecessors’ obligations.”); *Taking Reichs Seriously*, *supra* note 173, at 601 (“Behind the value of continuity is a concern about the danger of states’ determining for themselves when they should uphold or terminate treaties.”).

<sup>192</sup> *See* Schachter, *supra* note 162, at 258-59 (“As a matter of policy, the case for presuming continuity makes sense today when the state system is increasingly fluid.”); Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 937 (“Such a presumption in favour of continuity of human rights treaty obligations is of singular importance at a time of political instability typical at the moment of transfer, peaceful or otherwise, of sovereignty of a territory.”). As Professor Schachter explained: “Nation-states no longer appear immortal. Many seem likely to split or to be absorbed by others. Autonomous regions are likely to increase, central governments may even disappear for a time (as in Somalia or Cambodia), and mergers and integration will probably occur.” Schachter, *supra* note 162, at 259.

<sup>193</sup> *See* Williamson & Osborn, *supra* note 168, at 264 (“U.S. interests in maintaining the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force.”); *see also* Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 937 (“[A] presumption rather than a mandatory obligation to succeed to human rights treaties preserves the consensual basis of treaty obligations in international law.”).

<sup>194</sup> As Professor Vagts explained:

There are always costs to an unscheduled and unpredicted termination of commitments solemnly made and the sum total of satisfied reliance plays a role in the general trust and confidence of states in the international legal system. Even occasional declarations that a treaty is merely a “scrap of paper” can serve to undermine seriously the confidence of states in the reliability of the established treaty network and the key international law principles upon which that network is founded.

Vagts, *supra* note 189, at 281.

<sup>195</sup> *See* Mushkat, *Hong Kong and Succession of Treaties*, *supra* note 16, at 184 (arguing that “the absence of sanctions and inability of the contracting State legally to enforce . . . a legitimate treaty may encourage other states flagrantly to breach their obligations,” thus creating a “chilling effect”); Vagts, *supra* note 189, at 281 (“States in their relations with each other are entitled to rely on each other’s commitments.”); Schachter, *supra* note 162, at 259 (“In this predictably pluralist world of kaleidoscopic change, stability in expectations will matter; it becomes more important than would be the case in a more settled period.”). As Professor Vagts explained:

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presumption would not only be helpful to the administration of treaties and other international legal relations of new states,<sup>196</sup> but would also “foster respect for the rule of law around the world”<sup>197</sup> and the creation of an international community with shared interests and values.<sup>198</sup>

### C. Automatic Succession to Human Rights Treaties

The automatic succession theory was most recently applied by the HRC to determine the succession to human rights treaties by the former Yugoslavian republics.<sup>199</sup> The HRC held that human rights treaties are “‘universal’ in nature and hence should not be deemed inapplicable by reason of changes of sovereignty.”<sup>200</sup> The HRC also stated that human rights treaties are not merely obligations between states but are designed primarily to protect the rights of individuals.<sup>201</sup> According to the HRC:

Human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or *its coming within the jurisdiction of another State* or of more than one State.<sup>202</sup>

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States incur costs in arriving at and committing themselves to treaties, including foregoing opportunities to make other arrangements. For example, a state that enters into an arms control treaty gives up various opportunities to strengthen its own defense, because it believes it can count on the other state’s corresponding sacrifice. In other cases, the individual citizens do the relying—they make investments in the territory of the other state because of the assurance (often contained in a treaty of friendship, commerce and navigation or bilateral investment treaty) that they have a right to establish themselves and that their investment will not be taken from them except upon prompt, adequate and effective compensation.

Vagts, *supra* note 189, at 281.

<sup>196</sup> See Vagts, *supra* note 189, at 281. As Professor Schachter explained:

International lawyers in the United States probably do not realize how difficult it is for new states to cope with the hundreds, even thousands, of treaties to which their predecessor states were parties. Lacking adequate documentation, severely limited in legally trained personnel and administrative resources, they cannot examine most treaties afresh and pick or choose among them. . . . A presumption of continuity would enable them to maintain rights and obligations generally. In the absence of that presumption, they may forego their rights and be heedless of obligations that call for action. For this reason, among others, it makes good sense for states to accept *prima facie* continuity as a basic premise, leaving room for adjustment or exceptions when they appear necessary or desirable in a particular case.

Schachter, *supra* note 162, at 260.

<sup>197</sup> Williamson & Osborn, *supra* note 168, at 264.

<sup>198</sup> As one commentator explained:

International society exists when states are conscious of shared interests and values, consider themselves bound by common rules, and participate in common institutions. . . . The conflict between continuity and autonomy is bounded by international society’s requirement that promises, once made, are performed. Although international society does not disintegrate with every violation of an agreement, it cannot exist without at least a presumption that agreements will be honored.

*Taking Reichs Seriously*, *supra* note 173, at 601-02.

<sup>199</sup> See generally Shabtai Rosenne, *Automatic Treaty Succession*, in *ESSAYS ON THE LAW OF TREATIES*, *supra* note 168, at 97, for a discussion of the automatic succession theory. See generally Klabbers, *supra* note 168, at 107, for the automatic succession theory on reservations to treaties. One commentator explained the need for the automatic succession theory as follows:

Because great social upheavals, and the peaceful break-up of states, are . . . very painful events, it becomes especially urgent for the international community to monitor closely the human rights situation in various countries. The non-extension of the international human rights obligations of a predecessor state to its successor states would weaken considerably the possibility of such a control. . . .

Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT’L L. 299, 320 (1993).

<sup>200</sup> MUSHKAT, *supra* note 1, at 29.

<sup>201</sup> See *id.* at 129-30; cf. *Taking Reichs Seriously*, *supra* note 173, at 602-03 (“Conflicts of interest exist only at the superficial and transient level of states, which are incidental to the development of a universalist community. International society is not a society of states but a society of individuals.”).

<sup>202</sup> *HRC Statement Regarding the Fourth Periodic Report*, *supra* note 160 (emphasis added).

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Furthermore, the successor government does not need to declare or confirm its succession to the Covenant.<sup>203</sup> Otherwise, there would be “a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework, which open and close depending on the break-up of the old political authorities and the emergence of the new.”<sup>204</sup>

Despite the persuasiveness of the HRC statements, states have not widely accepted this practice. Thus, such practice has not been incorporated into customary international law.<sup>205</sup> Even worse, China “opposes the expansionary views of the role of the international community in the promotion and protection of human rights and humanitarian intervention.”<sup>206</sup> According to China, state sovereignty is “the most fundamental principle of international law and society.”<sup>207</sup> Since China regards Hong Kong as part of its “internal affairs,”<sup>208</sup> China is very unlikely to accept the automatic succession theory as the basis for Hong Kong’s succession to the ICCPR,<sup>209</sup> for such a theory contradicts the 1982 Constitution of the People’s Republic of China (“1982 Constitution”), the Joint Declaration, and the Basic Law.

Moreover, unlike Bosnia-Herzegovina, Hong Kong does not have sovereign independence. The Basic Law expressly mandates that Hong Kong is “an inalienable part” of China.<sup>210</sup> The ICCPR requires the extension of protection under the Covenant to all parts of a federal state without any limitation or exception.<sup>211</sup> Therefore, the automatic succession of the ICCPR obligations would necessarily mean the extension of the ICCPR to all individuals within China, a state that has not yet ratified the Covenant. Such an extension contradicts the principles of state sovereignty and self-

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<sup>203</sup> See MUSHKAT, *supra* note 1, at 30; *Succession of States in Respect of International Human Rights Treaties, Report of the Secretary-General*, Comm’n on Human Rights, ECOSOC, U.N. Doc. No. E/CN.4/1995/80, at 4 (1994) [hereinafter *Succession of States in Respect of International Human Rights Treaties*] (“Observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.”). Indeed, the HRC stated that it has jurisdiction over Hong Kong even in the absence of a Chinese declaration or full ratification of the ICCPR. See GHAI, *supra* note 1, at 388.

<sup>204</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 654-55 (July 11) (Weeramantry, J.).

<sup>205</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 936 (“It is too early to conclude that, as a matter of general international law, a successor State will automatically succeed to the obligations of a human rights treaty (and in particular the reporting obligation) assumed by the predecessor States.” (emphasis added)).

<sup>206</sup> GHAI, *supra* note 1, at 432; see also Davis, *International Commitments to Keep*, *supra* note 51, at 302 (“Chinese official pronouncements emphasize the foundational role of sovereignty even in the protection of human rights. In this conception, rights are not a limit on the state, but rather the state is a limit on rights.”). China has not accepted the compulsory jurisdiction of the International Court of Justice. See GHAI, *supra* note 1, at 432.

<sup>207</sup> GHAI, *supra* note 1, at 432. As Professor Ghai explained:

Three of the five principles of peaceful coexistence that China claims are the foundation of international relations and its own foreign policy (now enshrined in the preamble to the 1[9]82 national constitution) are based on state sovereignty and ‘mutual non-interference in internal affairs’, while the other two are contingent on national sovereignty. *Id.*; see also XIANFA pmb. (1982) (“China adheres to an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.”). One commentator differentiated China’s position respecting state sovereignty from that of the other Western countries:

In the case of [China], unusually insistent upon absolute sovereignty as the basis for international relations, national interest is the paramount consideration influencing international legal behaviour. Although it is worth noting that every state acts in what it considers to be its national interest, China’s concept of it is perhaps unusually broad. It includes such essential interests as territory, security and sovereignty; but as [China] views itself, especially vis-à-vis developed nations, as a “weak” state, it has a heightened sensitivity to anything threatening its national interest. Territorial claims have embroiled China in disputes with practically every country on its borders. Exaggerated perceptions of dangers to security have been used in recent years to justify ever-increasing military expenditures and deployments.

Feinerman, *supra* note 11, at 189.

<sup>208</sup> See Davis, *International Commitments to Keep*, *supra* note 51, at 302 (“Post-1997 Hong Kong is defined as an internal affair.”).

<sup>209</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 944 (“Extending the ICCPR to the whole of China seems a remote possibility in the light of the current political climate in Beijing.”).

<sup>210</sup> Basic Law, *supra* note 23, art. 1, 29 I.L.M. at 1521.

<sup>211</sup> See ICCPR, *supra* note 5, art. 50, 999 U.N.T.S. at 185.



determination of peoples, which are the overriding principles of the ICCPR and which many regard as concepts of *jus cogens*.<sup>212</sup> Even the HRC decision conceded that “the new state cannot rely *only* on theories of automatic succession but must manifest its undertaking to be bound by a given treaty in some formal way.”<sup>213</sup>

#### D. Succession by Estoppel

“Old formulas may not meet current needs.”<sup>214</sup> So far, none of the dominant state succession theories adequately addresses the succession question arising from the unprecedented one country, two systems framework.<sup>215</sup> This framework is, indeed, a “pragmatic” compromise whereby Hong Kong retains its international treaty regime regardless of China’s position.<sup>216</sup> Such retention is vital to maintain “confidence that Hong Kong would remain basically the same after 1997 and would continue to benefit from existing international treaties applicable to it.”<sup>217</sup>

The Joint Declaration provides explicitly that “the provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force.”<sup>218</sup> Even though this provision is only binding upon Britain and China, third party states can consent to the arrangement postulated if they are willing to accept new parties within their treaty relations.<sup>219</sup> Thus, this Article utilizes the estoppel theory<sup>220</sup> to argue that Hong Kong succeeded to the ICCPR

<sup>212</sup> The International Law Commission acknowledges that “there was in fact no way of reconciling any concept of automatic succession to treaty rights and obligations with the fundamental principle of the self-determination of peoples . . . .” Rosenne, *supra* note 199, at 99.

<sup>213</sup> *Id.* at 105 (emphasis added). The new state can manifest its undertaking by an official intimation to the depositary or formal participation in its deliberations that are relevant to the issue. *Id.*

<sup>214</sup> Schachter, *supra* note 162, at 254; *see id.* at 260 (“[State succession theories] offer little guidance to the solution of actual problems. Our hope for a more orderly and equitable adjustment to political change lies in practical wisdom rather than in abstract theory.”); *cf. Taking Reichs Seriously*, *supra* note 173, at 588 (“German unification appeared to present a significant challenge to international legal doctrine because no legal category seemed to capture fully the particular form of union the FRG and the GDR pursued.”).

<sup>215</sup> *Cf.* Daniel P. O’Connell, *Reflections on State Succession Convention*, 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 726 (1979) (“State succession is a subject altogether unsuited to the processes of codification.”); Klabbers, *supra* note 168, at 120 (“The topic of state succession defies attempts at generalization to begin with.”); *Taking Reichs Seriously*, *supra* note 173, at 589 (“The value of [state succession laws] may lie not in its capacity to determine solutions, but in its reflection of conflicts between irreconcilable values that underlie the international legal system.”). As one commentator explained:

Textbooks on international law afford very little help on the problem of succession to treaties; in the writings of older jurists little or no stress was laid upon the question. Each writer vents his own views. What is said by jurists is, however, not strictly the law; it only consists of suggestions for the formulation of certain legal norms. Except that they are suggestions, they have no more value and it depends upon the States concerned to accept them or not. Moreover, most of the important textbooks and reference works in the field are written by Western jurists, who are essentially expounding legal principles from their own country’s point of view. The newly independent states, today, live on borrowed knowledge and this borrowed knowledge need not always coincide with the protection of their own interests.

MENON, *supra* note 9, at vi-vii.

<sup>216</sup> MUSHKAT, *supra* note 1, at 28; *see also* GHAI, *supra* note 1, at 462 (“Britain had made clear that it would be willing to give up sovereignty *only if* adequate guarantees for Hong Kong were provided.” (emphasis added)); YAHUDA, *supra* note 87, at 13 (“It has been in the interests of both sides to reach a negotiated settlement, recognising that this was the best means of safeguarding the territory’s stability, prosperity and the way of life that has underpinned them.”).

<sup>217</sup> *See* Andrew Byrnes, *Hong Kong and the Continuation of International Obligations Relating to Human Rights After 1997* [hereinafter *Hong Kong and the Continuation of International Obligations*], in HONG KONG SAR: IN PURSUIT OF DOMESTIC AND INTERNATIONAL ORDER 135, 135-36 (Beatrice Leung & Joseph Cheng eds., 1997) [hereinafter HONG KONG SAR].

<sup>218</sup> Joint Declaration, *supra* note 9, Annex I, § XIII, 23 I.L.M. at 1377; *see also* Basic Law, *supra* note 23, art. 39, 29 I.L.M. at 1527 (“The provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”).

<sup>219</sup> *Cf.* MUSHKAT, *supra* note 1, at 28 (arguing that “third party states must consent to the arrangements postulated since they are not obliged to accept new parties within their treaty relations”); Byrnes, *Hong Kong and the Continuation of International Obligations*, *supra* note 217, at 138-39 (arguing that the Joint Declaration, which was entered without reference to other state parties, cannot “substitute China for Britain in each and every multilateral context” unless there is a bilateral agreement or acquiescence by third parties).

<sup>220</sup> For comprehensive discussions of the estoppel theory in international law, *see generally* D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT’L L. 176 (1957) (discussing the use of the estoppel theory in international

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by virtue of the international community's recognition of the legitimacy of the Joint Declaration and the HRC's insistence that the Covenant continues in Hong Kong after 1997.

The estoppel theory "has a historic basis both in Anglo-American common law and in the European civil law systems, which have an analogous concept of 'preclusion' or 'foreclusion.'"<sup>221</sup> Grounded on the considerations of good faith,<sup>222</sup> this theory is "rooted in the continuing need for . . . a modicum of stability and for some measure of predictability in the pattern of State conduct."<sup>223</sup> By preventing states from acting inconsistently to the detriment of others, the estoppel theory "promotes consistency in international relations."<sup>224</sup>

To invoke estoppel, a party must satisfy three requirements:

First, the statement creating the estoppel must be clear and unambiguous; second, the statement must be voluntary, unconditional, and authorized; and finally, there must be good faith reliance upon the representation of one party by the other party either to the detriment of the relying party or to the advantage of the party making the representation.<sup>225</sup>

Hong Kong satisfied these three requirements with respect to its succession to the ICCPR. First, by recognizing the legitimacy of the Joint Declaration and the continuation of the ICCPR in Hong Kong,<sup>226</sup> the international community has made a clear and unambiguous statement.<sup>227</sup>

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tribunals); MacGibbon, *supra* note 158; Christopher Brown, Comment, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369 (1996); Megan L. Wagner, Comment, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777 (1986). See also George Schwarzenberger, *Equity in International Law*, 1972 Y.B. WORLD AFF. 362 (discussing the rule of equity in international jurisprudence). Numerous cases have invoked the estoppel theory. See, e.g., *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6 (June 15); *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192 (Nov. 18); *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6); *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 15); *Shufeldt Claim (U.S. v. Guat.)*, 2 R.I.A.A. 1083 (July 24, 1930); *Payment of Various Serbian Loans Issued in France (Serbia v. Fr.)*, 1929 P.C.I.J. (ser. A) Nos. 20/21, at 38 (July 12); *Tinoco (U.K. v. Costa Rica)*, 18 AM. J. INT'L L. 147 (Oct. 18, 1923); *Corvaia (Italy v. Venez.)*, 10 R.I.A.A. 609 (1903).

<sup>221</sup> Wagner, *supra* note 220, at 1777-78; see also Brown, *supra* note 220, at 383 ("The existence—at least nominally—of a theory or theories of estoppel in international jurisprudence can hardly be questioned.")

<sup>222</sup> See Bowett, *supra* note 220, at 176; MacGibbon, *supra* note 158, at 469.

<sup>223</sup> MacGibbon, *supra* note 158, at 468-69. As one commentator explained:

In international law, unlike the municipal context, no higher government reigns over the parties; each sovereign stands on an equal footing with every other. Since no super-government can keep international relations smooth and stable, it is important for states to act in ways that conform to their previous positions. The World Court has noted: "Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."

Before one nation will rely on the pronouncements of another, it must believe that what is said today will not be denied tomorrow.

Wagner, *supra* note 220, at 1779 (footnotes omitted) (quoting *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20)).

<sup>224</sup> Wagner, *supra* note 220, at 1779.

<sup>225</sup> *Id.* at 1779-80. While "the first two elements have sparked little controversy[,] the third . . . has occasioned much debate." *Id.* at 1780; see also Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L.J. 563, 566-68 (1993) (surveying the development of equity in the international system in the twentieth century). Compare *Tinoco Claims Arbitration (Gr. Brit. v. Costa Rica)*, 1 R.I.A.A. 369, 383-84 (1923) ("An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him."), with *Nuclear Tests*, 1974 I.C.J. at 268 (suggesting that unilateral declarations can be binding even without detrimental reliance).

<sup>226</sup> See Davis, *International Commitments to Keep*, *supra* note 51, at 297 ("Countries around the world have formalized this process by renewing international commitments regarding Hong Kong, by hosting Hong Kong's international representatives, by accepting Hong Kong travel documents, and in the United States, by enacting formal legislation acknowledging and supporting Hong Kong's autonomous status."); see also United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701(1)-(2) (1994). The Act provides, in pertinent part:

(1) The Congress recognizes that under the 1984 Sino-British Joint Declaration:

(A) The People's Republic of China and the United Kingdom of Great Britain and Northern Ireland have agreed that the People's Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. Until that time, the United Kingdom will be responsible for the administration of Hong Kong.

(B) The Hong Kong Special Administrative Region of the People's Republic of China, beginning on July 1, 1997, will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs.

(C) There is provision for implementation of a "one country, two systems" policy, under which Hong Kong will retain its current lifestyle and legal, social, and economic systems until at least the year 2047.

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Second, the statement made is voluntary, unconditional, and authorized. Indeed, the statement was motivated by the self-interests of the international community. Third, by submitting reports to the HRC and subjecting itself to the HRC's interstate complaints jurisdiction, Hong Kong has made a good faith reliance upon the asserted statement to its own detriment. Thus, the international community is estopped from denying Hong Kong its succession to the ICCPR.<sup>228</sup>

Estoppel also applies with respect to the HRC's insistence that the ICCPR continues in Hong Kong after 1997. In the United Kingdom's Fourth Periodic Report on Hong Kong, the HRC stated that "the Committee is ready to give effect to the intention of the parties to the Joint Declaration so far as Hong Kong is concerned, and to cooperate fully with the parties to the Joint Declaration to work out the necessary modalities to achieve these objectives."<sup>229</sup> In addition, the HRC "asserted categorically without explanation that the Committee would be 'competent to receive and consider reports that must be submitted in relation to Hong Kong.'"<sup>230</sup> Since the HRC has voluntarily and unconditionally made a clear and unambiguous statement that Hong Kong relied upon to its own detriment, the HRC is estopped from denying Hong Kong's succession to the ICCPR.<sup>231</sup> Hong Kong's position is even further strengthened when the HRC "affirmed its earlier pronouncements on the continuity of the reporting obligations in relation to Hong Kong."<sup>232</sup>

In sum, Hong Kong succeeded to the ICCPR by virtue of the international community's recognition of the legitimacy of the Joint Declaration and the HRC's insistence that the Covenant continues in Hong Kong after 1997.

### IV. THE REPORTING OBLIGATIONS

Even though Hong Kong succeeded to the ICCPR, neither the Joint Declaration nor the Basic Law indicates whether Hong Kong or China should undertake the ICCPR obligations.<sup>233</sup> The

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(D) The legislature of the Hong Kong Special Administrative Region will be constituted by elections, and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as applied to Hong Kong, shall remain in force.

(E) Provision is made for the continuation in force of agreements implemented as of June 30, 1997, and for the ability of the Hong Kong Special Administrative Region to conclude new agreements either on its own or with the assistance of the Government of the People's Republic of China.

(2) The Congress declares its wish to see full implementation of the provisions of the Joint Declaration.

*Id.* In June 1997, both Britain and China have notified the U.N. Secretary-General and other treaty depositories about the substitution of their obligations with respect to Hong Kong. See Byrnes, *Hong Kong and the Continuation of International Obligations*, *supra* note 217, at 140. So far, no state party has objected to such arrangement.

<sup>227</sup> See George Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 191, 253 (1955) ("The legal effect of every act of recognition is to create an estoppel."); see also *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22, 68-69 (Apr. 15) ("Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland.").

<sup>228</sup> See GHAI, *supra* note 1, at 385.

<sup>229</sup> HRC Statement Regarding the Fourth Periodic Report, *supra* note 160.

<sup>230</sup> Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 938 (quoting Human Rights Committee, *Concluding Observations on the Fourth Periodic Report*, *supra* note 160, P4).

<sup>231</sup> Cf. Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 946 ("The Human Rights Committee is prepared to adopt an accommodating attitude; it is likely that legal technicalities will be sidestepped or even ignored.").

<sup>232</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Fifth Periodic Report of the Hong Kong Special Administrative Region* P5, U.N. Doc. CCPR/C/79/Add.117 (1999) (visited Nov. 30, 1999) <<http://hkhrm.org.hk/database/english/iccpr99co.html>> [hereinafter *Concluding Observations on the Fifth Periodic Report*].

<sup>233</sup> In addition to refraining from instituting laws that would contradict the ICCPR, these obligations include the submission of a report to the HRC on measures taken to implement the ICCPR rights and to ensure their enjoyment, and the recognition of "the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the [ICCPR]." ICCPR, *supra* note 5, art. 41(1), 999 U.N.T.S. at 182. Even though "there has been no opportunity for the Human Rights Committee to comment on the compatibility of Hong Kong laws with the ICCPR through the examination of particular cases"

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Joint Declaration only specifies that the Chinese government shall, as necessary, authorize or assist the Hong Kong government “to make appropriate arrangements” for the application to Hong Kong of international agreements that are implemented in Hong Kong but are not ratified by China.<sup>234</sup> Originally, both Britain and China intended China to assume Hong Kong’s ICCPR obligations.<sup>235</sup> China even entered into discussions with Britain on the mode of reporting in the Sino-British Joint Liaison Group,<sup>236</sup> the body responsible for the implementation of the Joint Declaration.<sup>237</sup> Unfortunately, “China . . . subsequently denied any such obligation as it had not signed the ICCPR.”<sup>238</sup> Nevertheless, China’s recent accession to the ICCPR greatly alleviates the uneasiness with respect to Hong Kong’s reporting obligations.

In 1999, under a special arrangement between China and the United Nations, Hong Kong submitted a periodic report to the HRC for the first time since the handover.<sup>239</sup> This report was prepared and drafted by the Hong Kong government “after extensive consultation with [nongovernmental organizations] and the general community in Hong Kong.”<sup>240</sup> Committed to the hands-off approach under the one country, two systems framework, China not only submitted the report on Hong Kong’s behalf without further alteration,<sup>241</sup> but also allowed Hong Kong to send a delegation, which consisted of ten local officials,<sup>242</sup> to Geneva to participate in the hearing before the HRC. Indeed, the Hong Kong delegation even furnished the HRC with updates<sup>243</sup> on incidents

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under the interstate complaints jurisdiction, GHAI, *supra* note 1, at 380, “[the HRC’s] review of periodic reports has provided indications of how the law or practice might be made more consistent with it.” *Id.* at 380-81; *see also* Anna Wu, *Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1, at 185 (arguing for a statutory human rights commission in Hong Kong). The Human Rights Committee has repeatedly emphasized “the essential role of the monitoring procedure and . . . that any reservation on the obligation to submit periodic reports is contrary to the object and purpose of the ICCPR.” Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 938.

<sup>234</sup> *See* Joint Declaration, *supra* note 9, Annex I, § XI, 23 I.L.M. at 1377; *see also* Basic Law, *supra* note 23, art. 153, 29 I.L.M. at 1544 (“The Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”).

<sup>235</sup> *See* GHAI, *supra* note 1, at 387; MUSHKAT, *supra* note 1, at 129 (“The UK’s stand is that the pledge by the Government of the PRC under the Sino-British Agreement . . . means that China must accept not only the substantive legal provisions . . . but also follow the relevant reporting procedures.”). This original understanding was reiterated in the Third Periodic Report in Respect of Hong Kong, U.N. Doc. CCPR/C/SR 1050, para. 61.

<sup>236</sup> “The functions of the Joint Liaison Group shall be: (a) to conduct consultations on the implementation of the Joint Declaration; (b) to discuss matters relating to the smooth transfer of government in 1997; (c) to exchange information and conduct consultations on such subjects as may be agreed by the two sides.” Joint Declaration, *supra* note 9, Annex II, § 3, 23 I.L.M. at 1379; *see also* GHAI, *supra* note 1, at 71-72. “The Joint Liaison Group shall be an organ for liaison and not an organ of power,” Joint Declaration, *supra* note 9, annex II, § 6, 23 I.L.M. at 1379, and will continue its work until January 1, 2000. *See id.* § 8, 23 I.L.M. at 1379.

<sup>237</sup> *See* GHAI, *supra* note 1, at 387.

<sup>238</sup> *See id.* at 387 n.17; *see* Byrnes, *supra* note 217, at 147; *see also* Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 938-39; *id.* at 945 (“It has also been said that [China] entered into the Joint Declaration only on an express promise made by the British Government during the Sino-British negotiation that it would be unnecessary for the Chinese Government to become a party to the ICCPR or to introduce any implementation legislation such as a Bill of Rights.”).

<sup>239</sup> *Report of the HKSAR of the People’s Republic of China in the Light of the International Covenant on Civil and Political Rights (ICCPR)*, U.N. Doc. CCPR/C/HKSAR/99/1 (1999) (visited Nov. 30, 1999) <[http://www.info.gov.hk/hab/top\\_issue/prc.htm](http://www.info.gov.hk/hab/top_issue/prc.htm)>.

<sup>240</sup> SHA’s Speech at UN Human Rights Hearing (Nov. 1, 1999) (press release of the Hong Kong government) (visited Nov. 30, 1999) <<http://www.info.gov.hk/hab/press/110199.htm>> [hereinafter SHA’s Speech].

<sup>241</sup> *See id.*; Audrey Parwani, *Rights Reports “to Stay Unaltered by Beijing,”* S. CHINA MORNING POST, Dec. 3, 1998, at 4 (stating that China will not alter the report submitted to the Human Rights Committee).

<sup>242</sup> The ten delegation members are: David Lan, Secretary for Home Affairs; Robert Allcock Acting Solicitor General; Stephen Wong, Deputy Solicitor General; Diana Lam, Senior Government Counsel; John Dean, Principal Assistant Secretary (Home Affairs); Bassanio So, Principal Assistant Secretary (Constitutional Affairs); Cathy Chu, Principal Assistant Security (Security); Eliza Yau, Principal Assistant Security (Security); Jenny Chan, Chief Labour Officer; Patrick Wong, Chief Information Officer. *See* HKSAR Government Team to Attend UN Hearing Rights Hearing (Oct. 26, 1999) (press release of the Hong Kong government) (visited Nov. 30, 1999) <<http://www.info.gov.hk/hab/press/102699.htm>>.

<sup>243</sup> *See* Hong Kong Delegation Supplies Updated Report to UN Committee (Oct. 30, 1999) (press release of the Hong Kong government) (visited Nov. 30, 1999) <<http://www.info.gov.hk/hab/press/103099.htm>>; *see also* *Concluding Observations on the Fifth Periodic Report*, *supra* note 232, P1 (stating that the HRC has considered supplementary information submitted by the Hong Kong government).

that implicate the implementation of the ICCPR and occurred after the submission of the periodic report.<sup>244</sup> Hong Kong also permitted delegates from nongovernmental organizations to appear informally before the HRC.<sup>245</sup> In sum, the existing reporting arrangement effectively avoids the tension between Hong Kong's statehood and China's sovereignty over the region. In addition, the reporting arrangement protects the integrity of the reporting process, and provides Hong Kong with the necessary autonomy that makes the one country, two systems framework successful.

Some critics may argue that allowing Hong Kong to prepare and draft its own report and to send representatives to the HRC hearing is dangerous. These critics are concerned that the "subversive elements" in Hong Kong may usurp this opportunity to "internationalize" the Hong Kong question,<sup>246</sup> which is part of China's "internal affairs."<sup>247</sup> Since the inception of the Sino-British negotiation, and most notably after the Tiananmen Square incident, Chinese authorities have been sensitive to international assistance. Article 23 of the Basic Law specifically provides that "the Hong Kong Special Administration Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, . . . and to prohibit political organizations or bodies of the Region from establishing ties with foreign political

<sup>244</sup> These events include the dissolution of the two municipal councils, *see* Grace Loo, *UN Hearing Awaited on Shake-up of District Organizations*, H.K. STANDARD, Jan. 22, 1999, the contemplation of the establishment of a press council, *see* SHA's Speech, *supra* note 240, and the request by the Chief Executive for a reinterpretation of the Basic Law by the Standing Committee of the National People's Congress following upon an unfavorable decision by the Court of Final Appeal. *See* Mark Landler, *Beijing Overturns a Hong Kong Court Ruling on the Residency Status of Immigrants*, N.Y. TIMES, June 27, 1999; *see also* TUNG CHEE HWA, CHIEF EXECUTIVE, GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, REPORT ON SEEKING ASSISTANCE FROM THE CENTRAL PEOPLE'S GOVERNMENT IN SOLVING PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (1999) (visited Nov. 30, 1999) <[http://www.info.gov.hk/basic\\_law/english/CE-01.doc](http://www.info.gov.hk/basic_law/english/CE-01.doc)>. As reflected in its concluding observations on the Fifth Periodic Report, the HRC was deeply concerned about the serious implications of this request:

The Committee is seriously concerned at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24(2)(3) of the Basic Law by the Standing Committee of the National People's Congress (NPC) (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the Ng Ka Ling and Chan Kam Nga cases, which placed a particular interpretation on article 24(2)(3). The Committee has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains concerned that a request by the executive branch of government for an interpretation under article 158 (1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14.

*Concluding Observations on the Fifth Periodic Report*, *supra* note 232, P10; *see also* Basic Law, *supra* note 23, art. 158, 29 I.L.M. at 1545 ("The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.").

<sup>245</sup> These delegates include legislators Emily Lau Wai-hing of The Frontier, James To Kun-sun and Albert Ho Chun-yan of the Democratic Party and non-affiliated legislator Ambrose Cheung Wing-sum. *See* Angela Li, *Delegates Brief UN Body on Rights*, S. CHINA MORNING POST, Oct. 30, 1999, at 6. As the Secretary for Home Affairs of the Hong Kong government explained: "The [nongovernmental organizations] have an important role in these hearings, as it ensures the committee will be presented with a wide range of views and perspectives." SHA's Speech, *supra* note 240; *see also* Jimmy Cheung, *UN Rights Meeting to "Hear All Sides,"* S. CHINA MORNING POST, Oct. 11, 1999, at 4 (stating that the Human Rights Committee will hear dissenting views on Hong Kong's human rights record); *see also* HUMAN RIGHTS MONITOR, SUBMISSIONS TO THE UNITED NATIONS: HUMAN RIGHTS COMMITTEE REGARDING THE SAR GOVERNMENT'S ICCPR REPORT 1999 (1999) (report prepared by the Human Rights Monitor in Hong Kong) (visited Nov. 30, 1999) <<http://hkhrm.org.hk/english/reports/99ICCPRa.html>>; *Joint Submissions of NGOs to the Human Rights Committee on the Report of the HKSAR in the light of the ICCPR*, U.N. Doc. CCPR/C/HK/99/1 (1999) (report jointly submitted by various nongovernmental organizations) (visited Nov. 30, 1999) <<http://hkhrm.org.hk/english/reports/ICCPRJoi1.HTML>>.

<sup>246</sup> Brian Bridges, *Europe, Hong Kong and the 1997 Transition*, in HONG KONG SAR, *supra* note 217, at 259, 260 ("Some Chinese leaders fear that Hong Kong can act more negatively, as a source of "subversive" ideas which could ultimately undermine communist party power inside the rest of China."); Jane C.Y. Lee & Gerald Chan, *Hong Kong's Changing International Relations Strategy*, in HONG KONG SAR, *supra* note 217, at 177, 180 ("[China's] leaders remain extremely sensitive to the process of 'internationalization' of the Hong Kong issues, especially in the political arena. China is often conscious that over-emphasizing Hong Kong's international position and autonomy has the danger of encouraging independent sentiments in the territory." (footnote omitted)).

<sup>247</sup> *See* Davis, *International Commitments to Keep*, *supra* note 51, at 297 ("China has more recently taken a tougher stand that undermines the strength of the original commitment, arguing that the status of Hong Kong should not be internationalized and asserting that Hong Kong will be totally an internal matter after 1 July 1997."); *id.* at 300 ("Internal affairs were deemed matters of sovereignty. Sovereignty was said to signify 'independence in regard to a portion of the globe.'"); Lee & Chan, *supra* note 246, at 180 ("The internationalization of the Hong Kong issue is a potential challenge to China's foreign policy.").

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organizations or bodies.”<sup>248</sup> The severe penalties China has recently handed out to dissidents enlisting foreign help underscore the importance of Article 23.<sup>249</sup>

However, these critics overlook the one country, two systems framework, which Deng Xiaoping developed and President Ziang Jemin has endorsed.<sup>250</sup> By its nature, the framework allows Hong Kong to take positions that are different from China as long as sovereignty, foreign affairs, and defense are not involved.<sup>251</sup> These positions include those concerning human rights. Granting Hong Kong’s autonomy over the reporting process strongly indicates China’s intention to strictly adhere to the one country, two systems framework embodied in the Joint Declaration.<sup>252</sup> Such adherence would not only win the loyalty of the people of Hong Kong,<sup>253</sup> who are concerned about China’s fulfillment of its promises made in the Joint Declaration, but would also provide them needed confidence during this critical transitional period.<sup>254</sup> Indeed, permitting Hong Kong to independently report to the HRC strongly indicates that the actions of the new Hong Kong government can stand up to independent scrutiny by members of the international community.<sup>255</sup>

Moreover, since China resumed sovereignty over Hong Kong, the people of Hong Kong have been less willing to exercise their rights. Self-censorship in the media has been widespread,<sup>256</sup> and self-restraint has spread to other areas, such as universities, commerce, and the judiciary, which “has shown a strong tendency to narrow the ambit of rights.”<sup>257</sup> Even worse, “politicians who have struggled to advance the cause of rights are likely to be marginalized in the new political and administrative system.”<sup>258</sup> Thus, allowing Hong Kong autonomy over its report to the HRC is very important to the maintenance of a healthy political environment in Hong Kong.

In fact, granting Hong Kong autonomy in undertaking its ICCPR obligations would also benefit China.<sup>259</sup> Since “human rights . . . serve as a basis for Hong Kong’s continued economic prosperity,”<sup>260</sup> guaranteeing to the people of Hong Kong the protection of the ICCPR is crucial to

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<sup>248</sup> Basic Law, *supra* note 23, art. 23, 29 I.L.M. at 1524; *see also* GHAI, *supra* note 1, 420-23 (discussing Article 23).

<sup>249</sup> *See* Erik Eckholm, *Beijing Sends Potential Dissidents a Message: Don't*, N.Y. TIMES, Dec. 25, 1998, at A3.

<sup>250</sup> *See Chinese President's Views on Criticism of RTHK*, Mar. 13, 1998, available in LEXIS, News Library, BBCSWB File.

<sup>251</sup> *See* Lee & Chan, *supra* note 246, at 180 (“Its baseline is that its political supremacy should not be threatened by the practice of ‘one country, two systems.’”).

<sup>252</sup> *See* Editorial, *All to the Good*, S. CHINA MORNING POST, Nov. 23, 1997 (“China’s decision to submit reports on Hong Kong to the United Nations Human Rights Commission is a welcome token of a commitment both to maintaining the SAR’s existing rights and freedoms and to the concept of one country, two systems.”); Chris Yeung, *Beijing Vow on Rights Reports; UN to be Advised on Hong Kong*, S. CHINA MORNING POST, Nov. 23, 1997 (“Chief Executive Tung Chee-hwa . . . said the arrangement had reflected the strong determination of Beijing to fully implement the one country, two systems policy.”).

<sup>253</sup> *See* GHAI, *supra* note 1, at 471.

<sup>254</sup> Byrnes, *Hong Kong and the Continuation of International Obligations*, *supra* note 217, at 158 (“Undertaking to report will . . . bolster confidence in Hong Kong . . .”).

<sup>255</sup> *See* *Public Service*, S. CHINA MORNING POST, Apr. 3, 1998; Yu, *One Radio, Two Competing Interests*, *supra* note 32, at 51.

<sup>256</sup> *See* GHAI, *supra* note 1, at 426 (noting that “self censorship in the media is facilitated by the fact that the key sections of the media are under the ownership and control of tycoons anxious to placate China for commercial reasons.”); *see also* Philip Bowring, *What's Changing in Hong Kong*, INT’L HERALD TRIB., Aug. 27, 1997, at 10 (“Although there was an evident increase in media self censorship in the months leading up to the handover, the situation has not become worse. Indeed, there are signs of greater determination now to exercise old freedoms and test the new limits.”); Ridding, *supra* note 91, at iv (“Perhaps the most significant threat to the territory’s autonomy comes from within . . . opinion is divided over the extent to which self censorship in the media has increased since the handover.” (footnote omitted)).

<sup>257</sup> Ridding, *supra* note 91, at iv.

<sup>258</sup> *Id.*

<sup>259</sup> *See* Davis, *International Commitments to Keep*, *supra* note 51, at 293 (“Hong Kong may play an important role both independently and in relation to China.”).

<sup>260</sup> United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5701(6) (1994).

“[a] fully successful transition in the exercise of sovereignty over Hong Kong.”<sup>261</sup> Because China’s economy is interdependent with that of Hong Kong,<sup>262</sup> economic stability in the region would lead China to an easy transition during the critical modernization period, where the central authorities must grapple with the tensions built up by economic reforms and democratic movements.<sup>263</sup> China may even benefit from Hong Kong’s experience through adaptation<sup>264</sup> and through the region’s connection to the global economy.<sup>265</sup>

A display of tolerance for an autonomous Hong Kong would even pave the way for China’s reunification with Taiwan<sup>266</sup> and would consolidate its new relations with the Chinese communities

<sup>261</sup> *Id.*; see Davis, *International Commitments to Keep*, *supra* note 51, at 294 (“Nothing less than the strongest commitment to human rights, the rule of law and local, highly autonomous, democratic self-rule was considered sufficient to [assure the confidence of the people of Hong Kong].”); Ridding, *supra* note 91, at iv (“[A] restrained stance is vital to maintain confidence in its newly acquired capitalist territory, viewed by China as economic motor for the mainland . . . [China’s] commitment to the one country, two systems is an important factor in Sino-U.S. relations and in reassuring international investors.”).

<sup>262</sup> The following statistics indicate the interdependence between the economies of the two regions:

Of total PRC foreign trade in 1990, 48 percent of exports went to or through Hong Kong and 38 percent of imports were obtained from or through Hong Kong. Though the PRC’s direct trade balance with Hong Kong is in deficit, the PRC gained more than 16 percent of its 1988 foreign exchange surplus through all trade (including entrepot) with the territory, which further provided 61 percent of direct foreign investment in the PRC between 1979 and 1990. Of commercial loans made to the PRC in 1989, 42 percent were either borrowed from Hong Kong investors or syndicated in Hong Kong.

David Campbell, *Economic Ideology and Hong Kong’s Governance Structure After 1997*, in HONG KONG, CHINA AND 1997, *supra* note 1, at 87, 103; see also Robert F. Ash & Y.Y. Kueh, *Economic Integration Within Greater China: Trade and Investment Flows Between China, Hong Kong and Taiwan*, in GREATER CHINA, *supra* note 138, at 59; Joseph Y.S. Cheng, *Towards the Establishment of a New Order*, in HONG KONG, CHINA AND 1997, *supra* note 1, at 271, 282; Ledic, *supra* note 51.

<sup>263</sup> As Professor Yahuda explained:

China is in the process of undergoing a series of massive transformations: from being a continental country to becoming one with a greater maritime orientation; from being a command economy to becoming a market one; from being a totalitarian state to evolving into a more pluralist one; from being a lawless state to one that is acquiring the rudiments of the rule of law; and from being a unitary state to one that is developing federal characteristics. The retrocession of sovereignty over Hong Kong provides China and its people the opportunity to ease their transition that could otherwise be painful and traumatic not only for China, but also for its neighbours and, indeed, for the international community as a whole.

YAHUDA, *supra* note 87, at 19; *id.* at 3 (arguing that the success of Hong Kong’s transition would “enhance political stability at home”); see also *id.* at 5-6 (describing the difficulties confronting China during the transitional period); GHAI, *supra* note 1, at 471 (“An adherence to legal norms and consultative and democratic procedures would ultimately also benefit the Central Authorities as they grapple with the difficult task of managing affairs on the mainland as economic reforms and the movement for democracy generate renewed tensions.”); Campbell, *supra* note 262, at 104 (stating that some commentators have argued that the resumption of sovereignty in Hong Kong is “another step in Hong Kong’s gradual annexation of China” (quoting Andrew Scobell, *Hong Kong’s Influence on China: The Tail That Wags the Dog?*, 28 ASIAN SURV. 612 (1988))).

<sup>264</sup> See VAN KEMENADE, *supra* note 87, at 151 (“For the liberal, well-educated Chinese on the mainland, Hong Kong and Taiwan were ‘models’ (and for some even the ‘ideal type’) of a reconstructed Chinese society of the future.”); YAHUDA, *supra* note 87, at 1 (“The return of Hong Kong provides China with a unique opportunity to adapt to the special challenges it faces both at home and abroad.”); *id.* at 142 (arguing that China’s tolerance of Hong Kong’s autonomy would “facilitate the negotiation of the great transformations by a process of adaptation”); Bridges, *supra* note 246, at 260 (“[Hong Kong] has acted and would continue to act as an agent of modernization by being a source of and a conduit for inflows of technology and capital, whether from Europe or elsewhere.”).

<sup>265</sup> As Professor Davis stated:

While . . . states no longer control the global economy, they do provide a venue for its functioning. Those developed economies with reliable and open legal and political systems secure the lion’s share of this global economy and enjoy the highest standards of living. If China wants a bigger share in this, it should keep its commitments to Hong Kong and preserve Hong Kong’s distinct status.

Davis, *International Commitments to Keep*, *supra* note 51, at 304; *id.* at 301 (“Regaining Hong Kong represents an extraordinary opportunity for China. As in effect a denationalized community, Hong Kong has proved very effective at operating in the nonterritorial global economic space and at connecting China’s economy to that space.”); YAHUDA, *supra* note 87, at 1 (arguing that a successful transition would allow China to “continue to benefit from the enormous economic contribution the territory makes to its modernisation and its deepening engagement with the international economy”); *id.* at 3 (arguing that a successful transition would “increase foreign investment in China”); *id.* at 21 (“Hong Kong plays a vital role in providing China with a gateway to the economies of the Asia-Pacific and beyond that to the global international economy.”); Bridges, *supra* note 246, at 260 (“[Hong Kong] serves as a gateway to the ‘Greater China’ network of overseas Chinese entrepreneurs, to other Asia-Pacific traders and to the wider world, including Europe.”); Lee & Chan, *supra* note 246, at 185 (“Hong Kong is seen as catalyst in China’s economic modernization and development.”).

<sup>266</sup> See Bridges, *supra* note 246, at 261 (“Most European companies, especially the small and medium-sized companies, see joint ventures with Hong Kong companies as a useful way into the China market.”); Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at

outside China.<sup>267</sup> Being a model for coexistence, the one country, two systems framework provides a master plan for China's reunification with Taiwan.<sup>268</sup> The success of the framework would not only convince the Taiwanese people of the feasibility of the model, but also of China's commitment to the continuation of Taiwan's social, economic, political, and legal systems. Indeed, many Taiwanese people have closely monitored the development of the Hong Kong model to determine the timing of the reunification.<sup>269</sup>

Finally, allowing Hong Kong's autonomy over its reporting obligations would demonstrate China's recognition of international law,<sup>270</sup> which is important to the country's strategy of economic development, foreign investment, and interstate relations. Such allowance would not only show China's willingness to honor its international legal obligations,<sup>271</sup> but would also allow China to assert an increasingly active role in international politics.<sup>272</sup> Since its adoption of an open door policy in the 1980s, China has a "broad acceptance . . . of traditional sources of international law, including appropriate resolutions of international organizations,"<sup>273</sup> and "has played an active role in conferences formulating new rules of international law in areas such as the law of the sea and the protection of the environment."<sup>274</sup> Allowing Hong Kong to fulfill its ICCPR obligations would not only be consistent with China's current approach toward international law,<sup>275</sup> but would also foster China's role as a team player within the international community.<sup>276</sup> Such a policy may even change the perception of Western countries on China's human rights protection,<sup>277</sup> alleviate the

945 (stating that Hong Kong may be a "showcase for Taiwan"); Lee & Chan, *supra* note 246, at 190 ("Hong Kong has been playing an important role in bridging the relations between China and Taiwan. Taiwan will monitor closely the working of 'one country, two systems' in Hong Kong and Macau."); *China HK Reunion Formula to Work Well for Taiwan*, CHINA DAILY, Aug. 20, 1997, at 4; Ridding, *supra* note 91, at iv ("Success with regard to Hong Kong could ease the process of peaceful unification with Taiwan."). *But see* John Phipps, *Linking Hong Kong's and Taiwan's Future*, in ONE COUNTRY, MANY SYSTEMS: POLITICS IN THE REUNIFICATION OF CHINA 195, 205 (Donald H. McMillen & Michael E. DeGolyer eds., 1993) (arguing that the "one country, two systems" formula "does not offer a workable arrangement for linking Taiwan to the Mainland for it is not responsive to the realities of developments on either side of the Straits."); Timothy Wong Kaying, *Evolution of the State in Taiwan and Uncertainty Across the Taiwan Strait*, in HONG KONG SAR, *supra* note 217 at 201 (indicating the differences between leaders in China and Taiwan over their unification plans).

<sup>267</sup> See YAHUDA, *supra* note 87, at 1.

<sup>268</sup> See Lee Lai To, *Taiwan and the Reunification Question*, in CHINA IN THE NINETIES, *supra* note 1, at 183, 195-96.

<sup>269</sup> Zhu, *supra* note 1, at 116 ("Interactions between Hong Kong, Taiwan, and mainland China have also largely revolved around human rights in Hong Kong.")

<sup>270</sup> China has ratified the following United Nations human rights instruments: Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (1966); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 19 I.L.M. 33 (1980); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 23 I.L.M. 1027 (1984), *modified by* 24 I.L.M. 535 (1985); Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448 (1989), *modified by* 29 I.L.M. 1340 (1990).

<sup>271</sup> See GHAI, *supra* note 1, at 431.

<sup>272</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 945.

<sup>273</sup> GHAI, *supra* note 1, at 431. In 1981 the first Chinese textbook on international law was published, and universities have since promoted international law studies. Instead of being skeptical of the economic ties to international law, Chinese scholars try to "divorce the analysis of international law from remnants of Marxian ideology." *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> See Mushkat, *Future of Hong Kong's International Legal Personality*, *supra* note 9, at 285 ("The PRC prides itself on abiding by all its international agreements and commitments, and that it enjoys a reasonably good record of compliance with treaties.")

<sup>276</sup> See YAHUDA, *supra* note 87, at 150 (arguing that the success of China's "one country, two systems" experiment "will be tested not only in terms of the well-being of Hong Kong, but in terms of the capacity of China to adapt still further to the norms and practices of international society"); Byrnes, *Hong Kong and the Continuation of International Obligations*, *supra* note 217, at 158 ("Undertaking to report will . . . help China to further build its image as a responsible and significant member of the world community."). See generally Feinerman, *supra* note 11, for a discussion of China's participation in the international legal order.

<sup>277</sup> See Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 945 ("Hong Kong may even be used as a showcase for China's human rights record at international forums after 1997 . . ."). This change is important because "today, practically no state can afford not to participate in some form of human rights diplomacy. REIN MULLERSON, HUMAN RIGHTS DIPLOMACY 5 (1997). As Professor Mullerson explained:



concerns of China's neighboring countries regarding its territorial ambitions,<sup>278</sup> and consolidate China's foreign relations with the international community, in particular with the United States.<sup>279</sup>

Nevertheless, if China changes its policy and refuses to submit a separate report to the HRC on Hong Kong's behalf and restricts the autonomy of the Hong Kong government over the reporting process, Hong Kong should fulfill its reporting obligations under the name "Hong Kong, China."<sup>280</sup> Under international law, "every international agreement in force is binding upon the parties to it and must be performed by them in good faith."<sup>281</sup> Since Hong Kong succeeded to the ICCPR, it must perform, in good faith, the obligations arising from the Covenant.

Human rights are discussed and voting often takes place on human rights issues in the UN (e.g., in the Commission on Human Rights, the General Assembly, even in the Security Council) and other international fora. . . . Different international organizations whose mandate may seem to be unrelated to human rights, such as the European Union or international financial institutions, often become engaged in human rights diplomacy, since certain human rights situations may have significant impact on issues which these organizations are dealing with.

*Id.*; see also *id.* at 71-72 ("Human rights is one of the issues constantly moving between the international system and the domestic affairs of states, affecting inter-state relations and influencing internal developments, having a stabilizing or destabilizing effect on international relations and domestic societies."); Claude Lefort, *Human Rights Today*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1, at 27, 29 ("Human Rights have played an increasingly important role in international discussions."); Yu Haocheng, *On Human Rights and Their Guarantee by Law*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 1, at 93, 94 (arguing that "the issue of human rights cannot be avoided in international settings"); Zhu, *supra* note 1, at 116 ("Since 4 June 1989, human rights in China have become an issue of increasing world concern. . . . Human rights have become the basic standard for measuring and judging trends in contemporary Chinese politics.").

<sup>278</sup> A good example of those countries that are concerned with China's territorial ambitions is Japan. As Professor Yahuda pointed out: Japan has a special interest in the stability of the region as a whole and in the emergence of a less bellicose China able and willing to become constructively engaged in the region. Its current problems with the Chinese government over nuclear and military issues allied to some of the deeper causes of mutual misapprehensions would be deepened by a failure over Hong Kong. It would exacerbate Japanese underlying fears and increase anxieties about Beijing's approach to Taiwan. A manifest failure in Hong Kong would probably damage the economic relations with China which have been central to the Sino-Japanese relationship. Any pressure from Japan will necessarily be discrete rather than bombastic, but it is one that China's leaders would not readily discount YAHUDA, *supra* note 87, at 133. Indeed, many have rightly linked human rights violations with territorial ambitions. See MULLERSON, HUMAN RIGHTS DIPLOMACY, *supra* note 277, at 21 ("The most important reason for the post-Second World War rapid development of international human rights law was the link, real or perceived, between massive human rights violations and threats to international peace and security."). According to George Marshall, the former U.S. Secretary of State, "governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force." *Id.* (statement of George Marshall). Critics have argued that "the human rights situation in a country is usually only one element in the complex web of causes and conditions which may eventually lead to a breach of the peace, act of aggression, intervention, regional conflict, or to the creation of tension and friction with other states." *Id.* at 22. Nonetheless, as Professor Mullerson explained:

[I]f there are territorial problems, unsatisfied imperial ambitions, simmering passions to remedy historical grievances, offences or perceived injustices, then an undemocratic and human rights-hostile regime may, more easily than a democratic state, choose violent means of resolving the problem. Such states are also more prone to engage in foolhardy external policies in an attempt to distract criticism from domestic problems.

*Id.*

<sup>279</sup> See YAHUDA, *supra* note 87, at 21 ("Hong Kong has become an important element in China's foreign relations as a whole."); Tony Walker, *Beijing Takes Expansive Role*, FIN. TIMES, Dec. 8, 1997, (China Supp.), at iv ("China's (competent) handling of post-handover affairs in the territory is also seen as part of a 'more expansive foreign policy aimed both at calming concerns about regional ambitions and consolidating its relations with the U.S.'").

By contrast, if China were not able to honor the "one country, two systems" framework:

Japan and especially the United States would be greatly troubled by the damage to Hong Kong and would be anxious about the fate of Taiwan. At the minimum they would seek to strengthen the resolve of its people and to bolster its defences. The Southeast Asian countries would find less merit in their policy of engagement with China, and the various Chinese communities in the region would have to readjust their ties with the land of their fathers. China would probably retreat into a new kind of isolationism which might threaten the stability of the Asia-Pacific region as a whole.

YAHUDA, *supra* note 87, at 4.

<sup>280</sup> See MUSHKAT, *supra* note 1, at 131 (arguing that allowing Hong Kong to undertake the required reporting on human rights is consistent with Hong Kong's legal personality).

<sup>281</sup> RESTATEMENT, *supra* note 82, § 321; see also Vienna Convention on the Law of Treaties, *supra* note 164, art. 26 at 690, 8 I.L.M. 679 (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 41, § 584. "Views vary as to the significance of the requirement of 'good faith.' Some [scholars] regard it as 'only . . . an admonition to be of good behavior.' Others see it as having substantive importance, particularly as a basis for avoiding excessive literalness in interpretation of an agreement." RESTATEMENT, *supra* note 82, § 321 reporters' note 1 (citation omitted).

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To understand whether Hong Kong has the capacity to fulfill its ICCPR obligations by itself, one must look at the Basic Law in its entirety. The Basic Law clearly distinguishes between “foreign affairs” and “external affairs.”<sup>282</sup> While foreign affairs include matters of state and international diplomacy and carry connotations of sovereignty, external affairs are mainly concerned with economic, social, and cultural matters.<sup>283</sup> Where the management of certain affairs is important to the economic, social, and cultural growth of Hong Kong and has serious implications for China’s foreign policy and state sovereignty, the Basic Law requires Hong Kong to seek China’s authorization.<sup>284</sup>

Nevertheless, matters that are important to maintain Hong Kong’s international economy and its status as an international city<sup>285</sup> are always considered external affairs and are reserved to the Hong Kong government.<sup>286</sup> For example, to maintain its status as a center of international and regional aviation,<sup>287</sup> Hong Kong not only keeps its *own* aircraft register but is responsible for “routine business and technical management of civil aviation . . . and the discharge of other responsibilities allocated to it under the regional air navigation procedures of the International Civil Aviation Organization.”<sup>288</sup> Since “human rights . . . serve as a basis for Hong Kong’s continued economic prosperity”<sup>289</sup> and are imperative to “[a] fully successful transition in the exercise of

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<sup>282</sup> See GHAI, *supra* note 1, at 433-41 (distinguishing between foreign and external affairs); Lee & Chan, *supra* note 246 (exploring the strategy of the Hong Kong government that enables it to achieve the greatest possible extent of autonomy); compare Basic Law, *supra* note 23, arts. 13-14, 29 I.L.M. at 1522, with *id.* arts. 150-157, 29 I.L.M. at 1543-44.

<sup>283</sup> See GHAI, *supra* note 1, at 433.

<sup>284</sup> See, e.g., Basic Law, *supra* note 23, art. 126, 29 I.L.M. at 1539 (requiring China’s special permission for access or foreign warships); *id.* art. 129 (requiring China’s special permission for access of foreign state aircraft); *id.* art. 150, 29 I.L.M. at 1543 (providing that Hong Kong government representatives may participate in negotiations at the diplomatic level as members of delegations of China); *id.* art. 154, 29 I.L.M. at 1544 (requiring China’s authorization for issuance of passports and travel documents); *id.* art. 155, 29 I.L.M. at 1544 (requiring China’s assistance or authorization for conclusion of visa abolition agreements with foreign states or regions); *id.* art. 156, 29 I.L.M. at 1544 (requiring reports regarding Hong Kong’s establishment of official or semi-official economic and trade missions in foreign countries); *id.* art. 157, 29 I.L.M. at 1544 (requiring approval for the establishment of foreign consular and other official or semi-official missions in Hong Kong). See also GHAI, *supra* note 1, at 433-34 (“When the powers of HKSAR transgress beyond the economic or cultural, some degree of specific authorization or permission from the [Central People’s Government] is necessary, so that Central Authorities are able to control their exercise . . . .”); *id.* at 448 (“The Basic Law seeks to limit the scope of conflict between the exercise of China’s foreign powers and Hong Kong’s exercise of external relations by requiring specific permission of [China] for the exercise of some of its external relations, and in some other cases providing for joint delegations.”).

<sup>285</sup> Professor Ghai described the international aspects of Hong Kong as follows:

[Hong Kong] has extensive trade, business and cultural links with the rest of the world. Its economy necessitates a myriad of international contacts, the negotiation and maintenance of agreements, and membership of regional and global organizations. Hong Kong is a major centre for migration, primarily to the West and Australasia, and there is considerable movement in and out of Hong Kong, for short or long term residence. There is a significant Hong Kong diaspora, particularly in Europe, North America and Australasia, with which the resident community maintains close connections, while over 400,000 expatriates (nearly 7% of the population) live in Hong Kong. Hong Kong is a cosmopolitan city, a place where cultures and peoples mix; this also affects Hong Kong’s international position. It is a key player in the world economy. It is the world’s eighth largest trading economy, the value of its trade amounting to US\$ 36.7 billion (in 1995). In early 1996 its foreign reserves stood at US\$ 57 billion, the world’s seventh largest. It is a major financial centre, with some 565 banks and deposit taking companies from over 40 countries, including 85 of the world’s top 100 in terms of assets. Its stock market is the eighth largest in terms of capitalization and its foreign exchange market ranks fifth with a daily turnover of US\$ 91 million. It has the world’s busiest container port and its airport is the world’s second busiest in terms of international cargo and third busiest in terms of passengers.

GHAI, *supra* note 1, at 429.

<sup>286</sup> Lee & Chan, *supra* note 246, at 180 (“In principle, China accepts the importance of maintaining Hong Kong’s international economic position.”).

<sup>287</sup> See Basic Law, *supra* note 23, art. 128, 29 I.L.M. at 1539.

<sup>288</sup> *Id.* art. 130, 29 I.L.M. at 1541.

<sup>289</sup> United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5701(6) (1994); see also Mushkat, *Hong Kong and Succession of Treaties*, *supra* note 16, at 195-96 (“There is little doubt that the preservation of Hong Kong’s prosperity and its status as a major international commercial centre hinges on the continuation of its external ties and international agreements.”).

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sovereignty over Hong Kong,<sup>290</sup> the undertaking of the ICCPR obligations fits within the definition of external affairs.<sup>291</sup> With the use of the name “Hong Kong, China,” and the HRC’s acknowledgement of China’s sovereignty over Hong Kong, such an undertaking would not pose any serious implications on foreign policy or state sovereignty.<sup>292</sup> Therefore, Hong Kong does not need China’s authorization with regard to its reports to the HRC or its submission to the HRC’s interstate complaints jurisdiction.

This arrangement is consistent with the 1982 Constitution. Article 31 of the 1982 Constitution authorizes the establishment of special administrative regions<sup>293</sup> and “grants the widest possible discretion to the [National People’s Congress] in designing the powers and structures of special regions, which is to be exercised *in ‘the light of specific conditions.’*”<sup>294</sup> With respect to Hong Kong, these specific conditions are economic, political, and social systems that are distinctively different from systems in other parts of China.<sup>295</sup> Because protection of minimum international human rights, as stipulated in the ICCPR, is important to the effectiveness of the complex economic and social system in Hong Kong, allowing Hong Kong to undertake its ICCPR obligations would be consistent with the 1982 Constitution.

In sum, Hong Kong, by virtue of its succession to the ICCPR, has an obligation to submit an *independent* report to the HRC regardless of China’s policy. If China does not allow Hong Kong to submit a separate and independent report, Hong Kong should assume this obligation under the name “Hong Kong, China.”

## V. CONCLUSION

Due to the change in sovereignty over Hong Kong and the differing positions on the ICCPR taken by China and Britain before China’s accession in 1998, it is unclear whether Hong Kong succeeded to the ICCPR after 1997. Although China’s subsequent accession to the ICCPR alleviates some of the tension posed by such uncertainty, several questions still remain. In fact, any conflict between China and Hong Kong with respect to the interpretation and implementation of the ICCPR requires a determination of whether Hong Kong succeeded to the ICCPR. Because none of the dominant state succession theories adequately addresses the succession question arising from the unprecedented one country, two systems framework, this Article utilizes the estoppel theory to argue that Hong Kong succeeded to the ICCPR based on the international community’s recognition

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<sup>290</sup> Cf. Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 943 (“It seems desirable for the Hong Kong SAR government to prepare and submit the report, especially in the light of the possibility of the reporting obligation being confined to Hong Kong.”).

<sup>291</sup> *But see* Jensen, *supra* note 16, at 178 (“The difficulty in distinguishing between foreign and defense affairs, over which China has authority, and relevant external affairs, over which the Hong Kong SAR has authority, will be especially problematic in the context of human rights conventions . . . because these areas could directly involve foreign and defense affairs.”).

<sup>292</sup> *But see* Chan, *State Succession to Human Rights Treaties*, *supra* note 10, at 942 (“In any event, [invitation by the General Assembly to become a party to the ICCPR] is politically unacceptable to the People’s Republic of China, which is not prepared to tolerate any claim for sovereignty from any part of its territory.”).

<sup>293</sup> Special administrative regions are different from special economic zones. “The special economic zones provide at first sight a middle ground; their rationale is experiments with new economic forms, providing a substantial role for foreign investment in the private economy, but within the framework of ‘socialist modernization’. However, the autonomy they exercise is limited.” GHAI, *supra* note 1, (footnote omitted) at 117-18; *see also* VAN KEMENADE, *supra* note 87, at 160-168 (describing the special economic zones in Guangdong province); Campbell, *supra* note 262, at 106 (“The main purpose of the creation of the SEZs and the entire purpose of the creation of the SAR from the perspective of the PRC is the growth of the SEZs and the SAR and of the PRC as a whole.”); George T. Crane, ‘*Special Things in Special Ways*’: *National Economic Identity and China’s Special Economic Zones*, in CHINESE NATIONALISM, *supra* note 3, at 148 (exploring China’s economic identity as revealed in debates surrounding the establishment and expansion of special economic zones).

<sup>294</sup> GHAI, *supra* note 1, at 216 (quoting XIANFA, art. 31 (1982)) (emphasis added).

<sup>295</sup> *See id.* at 217.

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of the legitimacy of the Joint Declaration and the HRC's insistence that the ICCPR continues in Hong Kong after 1997.

Because Hong Kong succeeded to the ICCPR, it has to fulfill its reporting obligations. While it is encouraging that China's existing policy allows Hong Kong to prepare and draft its own report and to send representatives to fully explain the report during the HRC hearing, Hong Kong, by virtue of its succession to the ICCPR, has an obligation to submit an independent report to the HRC regardless of China's policy. If China does not allow Hong Kong to submit a separate and independent report, Hong Kong should assume this obligation under the name "Hong Kong, China." By doing so, Hong Kong would not only provide its people with some minimum international human rights protection and needed confidence during the critical transitional period, but would also benefit China by promoting its modernization efforts, increasing its chance of reunification with Taiwan, and allowing China to demonstrate its willingness to be part of the international legal community.