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HONG KONG'S LOST RIGHT TO SELF-DETERMINATION: A DENIAL OF DUE PROCESS IN THE UNITED NATIONS

I. INTRODUCTION

The end of the Cold War and the resolution of the Persian Gulf Crisis have enhanced the status of the United Nations from simply a forum for discussion to an international peacekeeping organization capable of coordinated action. In accord with its new role, the 46th United Nations General Assembly in September, 1991, welcomed seven new member states, whose admission would have been unthinkable during the days of the Cold War; namely, the two Koreas, the Baltic states of Estonia, Latvia and Lithuania, and the two Pacific Island nations (previously Trusts under the U.N. Charter) of the Federated States of Micronesia and the Republic of the Marshall Islands.¹ One hopes that the entrance into the world community of these nations, so long deprived of their right to self-determination by the insecurities and suspicions of the Cold War, represents the end of the dominance of outmoded historical animosities and divisions over the right of a people to determine their own social, economic and political status. The renewed commitment of peoples throughout the world to the principles of democratization and self-determination, set free by the sweeping changes of the past three years, and the enhanced role of the United Nations in the international politics compel us to take another look at Hong Kong.

The international drive toward the complete decolonization of all territories, especially those designated "Trust"² or "Non-Self-Governing"³ under Chapters XI and XII of the United Nations Charter,

1. *The U.N.'s Renaissance*, JAPAN TIMES WKLY. INT'L EDITION, Sept. 30, 1991, at 10.

2. Trust territories were those (1) held under mandates established by the League of Nations after World War I; (2) detached from Axis Powers in World War II; and (3) voluntarily placed under the United Nations Trusteeship System by States responsible for their administration. U.N. DEP'T. OF PUB. INFO., BASIC FACTS ABOUT THE U.N. at 119-20, U.N. Sales No. E.88.I.3 (1987) [hereinafter BASIC FACTS ABOUT THE UN]. The United Nations took over the supervision and administration of these territories under chapter XII of the UN Charter for the purpose of promoting the political, economic, and social advancement of these territories toward self-government. See U.N. CHARTER art. 75-77; BASIC FACTS ABOUT THE UN, *supra*, at 119-120.

3. Non-self-governing territories are those territories under the administration of United Nations Member States, which were not included in the Trusteeship System, but which have not yet reached full self-government. See U.N. CHARTER art. 73; BASIC FACTS ABOUT THE UN, *supra* note 2, at 121. In 1946, seventy-two Territories were designated Non-Self-

culminated in United Nations General Assembly Resolution 1514, The Declaration on the Granting of Independence to Colonial Countries and Peoples.⁴ Resolution 1514 states:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . . Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.⁵

Passed unanimously in 1960⁶ and consistently re-affirmed by the General Assembly, the International Court of Justice, and major international treaties,⁷ Resolution 1514 has come to be recognized as an authoritative expression of international customary law, which is binding, at least with respect to the Trust and Non-Self-Governing Territories covered by Articles 73 and 74 of the United Nations Charter.⁸ Hong Kong was designated as a Non-Self-Governing Territory in 1946 and administered by

Governing by their Administering States. *Id.*

4. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter *Declaration on Independence*].

5. *Id.* at 67.

6. The actual vote on Resolution 1514 was 89 in favor; zero against; and eight abstentions (the colonial countries, including the U.S., Great Britain, and France abstained). ENCYCLOPEDIA OF THE U.N. AND INT'L AGREEMENTS 749 (Edmund Jan Osmanczyk ed., 1985) [hereinafter ENCYCLOPEDIA OF THE UN].

7. *E.g.*, G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, at 2, U.N. Doc. A/6316 (1966) (terminating the Mandate of South Africa over Namibia because of apartheid policy); Legal Consequences for States of the Continued Presence of S. Africa in Namibia (South West Africa); 1970 I.C.J. 16, 31 (June 21) (expressly confirming the principle of self-determination as expressed in the *Declaration on Independence*); Western Sahara (Morocco v. Mauritania), 1975 I.C.J. 3, 32 (Order of Jan. 3) (referring to the Declaration on Independence as providing the basis for the process of decolonization); Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, U.S.-Vietnam, art. 9, 24 U.S.T. 4, 8-9 (expressly recognizing the South Vietnamese people's right to self-determination).

8. MYRES MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 164 (1981); see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 93 (1979).

Great Britain. In 1972, however, despite the clear mandate of The Declaration on Independence, Hong Kong was stripped of its status as a Non-Self-Governing Territory at the request of the People's Republic of China,⁹ without discussion or debate in the General Assembly.¹⁰ In 1984, The Peoples Republic of China and Great Britain concluded an agreement¹¹ that will effectively return the sovereignty of Hong Kong to China on July 1, 1997.¹² No representative of the people of Hong Kong took any part in the negotiations or drafting of this agreement.¹³ As a result of the action taken by the United Nations in 1972, Hong Kong today faces a political, social and economic destiny decided with complete disregard for the will of the people who inhabit the territory. This note will explain how the people of Hong Kong lost their right to self-determination under international law and will explore ways in which that right may be recovered.

II. HISTORY OF HONG KONG AS A NON-SELF-GOVERNING TERRITORY

The history of Hong Kong as a colonial territory began when Great Britain wrestled the island from a defeated China after the Opium War.¹⁴ Under the 1842 Treaty of Nanking, China ceded the Island of Hong Kong to Great Britain in perpetuity.¹⁵ This was followed in 1860 with an outright cession to Britain of the Kowloon Peninsula (where the modern city of Kowloon is now located) under the Convention of Peking.¹⁶

9. *See Other Questions Relating Non-Self-Governing Territories*, 1972 U.N.Y.B. 625, U.N. Sales No. E.74.I.1 [hereinafter *Questions Relating Territories*] ("With the adoption of resolution 2908 (XXVII) on 2 November 1972, the General Assembly among other things approved the report of the Special Committee, which contained a recommendation that Hong Kong and Macao and dependencies be excluded from the list of territories to which the Declaration on the granting of independence was applicable.").

10. *Id.*

11. A Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366 [hereinafter 1984 Agreement].

12. *Id.* at 1371.

13. *See* Lucian W. Pye, *The International Position of Hong Kong*, 95 CHINA Q. 456, 465 (1983).

14. *See* Anthony Dicks, *Treaty, Grant Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 CHINA Q. 427, 441-442 (1983).

15. Treaty Between China and Great Britain, Signed at Nanking, Aug. 29, 1842, China-Great Britain, in 93 CONSOLIDATED TREATY SERIES 465, 467 (Clive Parry ed., 1842) [hereinafter Treaty of Nanking].

16. Convention of Friendship between China and Great Britain, signed at Peking, Oct. 24,

Since this treaty came into force, that part of modern Kowloon lying to the south of Boundary Street, together with Stonecutters Island and one or two other small inlets, have been treated for most legal purposes as part and parcel of what, in the British view, is the ceded Crown Colony.¹⁷ The territory under British rule was further enlarged in 1898 under a second Convention of Peking, but the "New Territories," as they were named by the Hong Kong legislature shortly after their acquisition, were not ceded but leased to Great Britain for ninety-nine years.¹⁸

The New Territories Lease was one of a series of international leases of Chinese territory to occupying European powers in 1898.¹⁹ The Chinese have since charged that the leases were granted because of intense and unfair political pressure (in the case of the Nanking Treaty, even military pressure). Thus, these treaties were one-sided and unconscionable.²⁰ In fact, China's position on all three treaties has consistently been that they are unequal and invalid, and therefore have no effect on China's sovereignty.²¹ China further contends that it has the right to demand the reversion of the entire territory of Hong Kong "when conditions are ripe."²² This view is contrary to both the British view of the absolute validity of the treaties and to the generally accepted principles of international law.²³

The concept of unequal treaties has received some support in the international community, especially among third world nations—many of whom were saddled with commitments forced upon them by colonial powers.²⁴ Nevertheless, the doctrine of *pacta sunt servanda* (treaties

1860, in 123 CONSOLIDATED TREATY SERIES 71 (Clive Parry ed., 1860).

17. Dicks, *supra* note 14, at 443.

18. Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory, Signed at Peking, August 6, 1898, in 186 CONSOLIDATED TREATY SERIES 310 (Clive Parry ed., 1897-98). The choice of a limited lease arrangement may have been due to the fact that by the time of this Convention, the Chinese had translated the first Western book on international law (*H. Wheaton's Elements of English Law*, translated by a missionary in 1864) and had gained a better understanding of Western ways and legal terms. Dicks, *supra* note 14, at 446.

19. Dicks, *supra* note 14, at 447.

20. Katherine A. Greenberg, Note, *Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?*, 7 FORDHAM INT'L L.J. 534, 535 (1983-84).

21. Dicks, *supra* note 14, at 428 n.7.

22. *Id.*

23. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, POLICY-ORIENTED PERSPECTIVE 90 (1989).

24. *Id.* at 28-29, 276. For arguments for and against the invalidation of unequal treaties,

must be observed) is a fundamental tenet of traditional (albeit Western based) international law, which has been embodied in the Vienna Convention on the Law of Treaties.²⁵ Western jurists generally reject the concept of unequal treaties as vague and elusive and tending toward the destabilization of international expectations.²⁶ Under *pacta sunt servanda*, even unequal treaties are upheld because the retrospective invalidation of treaties due to the inequality of the parties at the time of creation would destabilize the international world order by inviting a return of the world to its pre-war territorial status.²⁷ The concept of unequal treaties would also raise difficult questions about tolerable degrees of inequality. How unequal would the parties have to be to declare the treaty invalid? Furthermore, many treaties that are undoubtedly "unequal" may be advantageous to both parties, who happily adhere to them. Are these to be invalidated as well?

The Vienna Convention on the Law of Treaties created an exception to the *pacta sunt servanda* rule with regard to treaties obtained by force.²⁸ Article 52 of the Convention states that "[a] treaty is void if its conclusion has been procured by threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."²⁹ Under article 4, however, the Vienna Convention is not to be applied retroactively.³⁰

Proponents of invalidating treaties as "unequal" also base their theory on a broader philosophical exception to the *pacta sunt servanda* rule.³¹ Under this theory, new successor states should be able to abrogate all unequal treaties, whether or not achieved through military force; because of their coercive and predatory nature, such treaties are not deserving of the application of the *pacta sunt servanda* rule.³²

see LUNG-FONG CHEN, STATE SUCCESSION TO UNEQUAL TREATIES 42-48 (1974).

25. LUNG-CHU CHEN, *supra* note 23; Vienna Convention on the Law of Treaties, art. 26, U.N. Conference on the Law of Treaties, 1st & 2nd Sess. (1969), U.N. Doc. A/CONF. 39/27, reprinted in JOSEPH MODEST SWEENEY, et al., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 237, 246 (Doc. Supp. 1988) [hereinafter Vienna Convention] ("Every treaty in force is binding upon the parties to it and must be performed in good faith.").

26. LUNG-CHU CHEN, *supra* note 23, at 276.

27. *See id.* at 267-268, 276.

28. Vienna Convention, *supra* note 25, at 254, art. 52.

29. *Id.*

30. *Id.* at 239, art. 4.

31. LUNG-FONG CHEN, *supra* note 24, at 44-46.

32. *Id.* 3

Were the Chinese to make such a claim with regard to Hong Kong, however, it would sound somewhat hollow in view of the century and a half of acquiescence under the present treaty arrangement.³³ China has also readily accepted the economic benefits that association with Hong Kong, under the British regime, has afforded her.³⁴ In any case, this theory, though proposed, did not gain acceptance as a rule of international law under the Vienna Convention.³⁵

In 1946, the United Kingdom, as a Member State of the newly formed United Nations, listed those territories under their administration that they considered to be Non-Self-Governing.³⁶ The United Kingdom also regularly submitted information on these territories to the Secretary General in fulfillment of its obligations under article 73 of the U.N. Charter.³⁷ Britain included Hong Kong with its submissions.³⁸ As a Non-Self-Governing Territory under article 73, Hong Kong was officially recognized by the international community as an incipient state in the process of evolution toward a "full measure of Self-government."³⁹ Later, through the United Nations decolonization effort, the concept of self-determination for Non-Self-Governing Territories embodied in the U.N. Charter evolved into a full-fledged right of international law.⁴⁰

33. Although the PRC has consistently asserted that Hong Kong is part of Chinese territory, China has never actually made a demand, formal or otherwise, for the return of Hong Kong to the administration of the PRC. Dicks, *supra* note 14, at 428.

34. China earns between 25-40% of her foreign exchange from trading with Hong Kong. See Pye, *supra* note 12, at 461-62; Christopher Howe, *Growth, Public Policy and Hong Kong's Economic Relationship with China*, 95 CHINA Q. 512, 530-31 (1983) ("as a market for Hong Kong, China has moved from nowhere in 1978 to eighth largest in 1980 and fourth largest in 1982 [and] is the net beneficiary to the value of over HK\$21 billion or approximately US\$3.5 billion What China is looking for from Hong Kong in the longer run is not simply foreign exchange, but organic links with economic dynamism of a kind that China conspicuously lacks.").

35. Dicks, *supra* note 14, at 435.

36. BASIC FACTS ABOUT THE UN, *supra* note 2, at 121.

37. *Id.*

38. UNITED NATIONS AT FORTY at 67, U.N. Doc. DPI/85-41471, U.N. Sales No.E.85.I.24 (1985) [hereinafter UN AT FORTY].

39. U.N. CHARTER art. 73; see *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter*, G.A. Res. 1541, U.N. GAOR, 15th Sess., Annex 29, at 153, U.N. Doc. A/4684 (1960) [hereinafter Resolution 1541]. ("Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government.'").

40. See *supra* notes 6, 7, 8 and accompanying text.

III. EVOLUTION OF THE PRINCIPLE OF SELF-DETERMINATION

Self-determination was traditionally conceptualized under the natural law view as the right of a people to overthrow a tyrannical ruler.⁴¹ In the latter half of the 1800s, when the peoples of Western Europe began to organize into States based on nationality, the concept of self-determination expanded to encompass a more general right of a people to choose their own economic and political destiny.⁴² At this time, the right of self-determination became linked with the collectivist concept of nationality (e.g., the German idea of "volk"), so that only those "people" belonging to an identifiable bio-social group had the right to self-determination.⁴³

Parallel to these ideas was the Anglo-American view of the nation as "a community of organization, of life, and of tradition, rather than the German collectivist concept of the Volk" as a community of blood and of origin.⁴⁴ Not until the Versailles Peace Conference, due to the exigencies of World War I, was the idea of nationality combined with the more atomistic,⁴⁵ Wilsonian concept of self-determination as the right of a people to "choose the sovereignty under which they shall live, to be free of alien master, and not to be handed about from sovereign to sovereign as if they were property."⁴⁶

Under the League of Nations, territories left under colonial domination after World War I were designated "Trust Territories," to be administered by their colonial powers only until they were ready for a political destiny more attuned to their individual aspirations.⁴⁷ Even in the aftermath of World War II, the principle of self-determination was among the lofty ideals enunciated by the newly formed United Nations in the Declaration of Human Rights⁴⁸ and the United Nations Charter.⁴⁹ Still, self-determination remained more of a moral tenet until the new

41. Sumida, *The Right of Revolution: Implication for International Law and Order*, reprinted in MCDUGAL & REISMAN, *supra* note 8, at 167-169.

42. MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 1 (1982).

43. *Id.* at 1-2.

44. POMERANCE, *supra* note 42, at 2 (citing HARLEY NOTTER, *THE ORIGINS OF THE FOREIGN POLICY OF WOODROW WILSON* 104 (1937)).

45. *Id.* at 1-2.

46. POMERANCE, *supra* note 42, at 1 (quoting 3 *PUBLIC PAPERS OF WOODROW WILSON* 187, 389, 411, 414 (R. Baker & W. Dodd eds. 1925-27)).

47. *See supra* note 1.

48. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

49. U.N. CHARTER art. 1, ¶ 2.

community of nations, brought into existence by the decolonization efforts of the United Nations, forged the concept of self-determination into a principle of international law.⁵⁰ Moreover, at least with regard to United Nations' Trust and Non-Self-Governing territories, this principle is binding.⁵¹

The United Nations Charter makes the principle of self-determination one of its purposes and principles; that is, to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"⁵² In addition, the provisions of Chapter XI of the Charter contain binding international obligations concerning Non-Self-Governing Territories.⁵³ Article 73 of the Charter provides:

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

. . .⁵⁴

To this end, the Charter enumerates the administering Member States' obligations, including:

- a. to ensure, with due respect for the culture of the peoples, their political, economic, social and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement⁵⁵

50. See *supra* notes 5, 6, 7 and accompanying text.

51. *Id.*

52. U.N. CHARTER art. 1, ¶ 2.

53. *Id.* art. 73-74.

54. *Id.* art. 73.

55. *Id.* art. 73(a)-(b).

Article 73(e) also requires administering states to transmit information regularly to the Secretary General.⁵⁶ In addition, self-determination for the peoples of Trust and Non-Self-Governing Territories has been unequivocally reaffirmed by resolutions of the General Assembly as well as in bilateral treaties of United Nations Member States.⁵⁷ Many of the resolutions that ultimately led to the affirmation and establishment of the legal principle of self-determination for territories under Chapters XI and XII of the Charter were generated by the controversy over the requirement to transmit information on these territories under article 73.⁵⁸ The Communist bloc countries argued that political, as well as economic and social information,⁵⁹ should be reported on dependent territories by their Administering States because the absence of self-government was the chief cause of the economic underdevelopment.⁶⁰ The Administering States opposed this because they feared it would open the door to mandatory status reports on the progress of their Territories toward self-governance.⁶¹ Support for the transmittal of political information, as well as for a more activist decolonization policy, increasingly gained ground over the years as United Nations membership expanded to include many former colonies.⁶²

In 1960, impatient with the way in which Charter principles were being applied to the remaining Trust and Non-Self-Governing Territories, the General Assembly passed Resolution 1514. The Declaration on the Granting of Independence to Colonial Countries and Peoples passed by an almost unanimous vote.⁶³ Resolution 1514 required the reporting of political information, but more importantly, it established the principle of

56. *Id.* art. 73(e).

57. *See supra* notes 3, 6.

58. Although resolution 673 was the first unequivocal affirmation of the right of colonial peoples to self-determination, it was passed over the opposition of the colonial states because it failed to prescribe mandatory progress reports by Administering States on their Non-Self-Governing Territories. *ENCYCLOPEDIA OF THE UN*, *supra* note 6, at 749; G.A. Res. 673, U.N. GAOR 7th Sess., Supp. No. 20, at 26, U.N. Doc. A/2361 (1952).

59. Article 73(e) of the UN Charter requires the Administering States of Non-Self-Governing Territories to regularly submit information on economic, social and educational conditions in the Territories. U.N. CHARTER art. 73(e).

60. UMOZURIKE OJI UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 66 (1972).

61. *Id.*

62. By 1960, 30 Trust and Non-Self-Governing Territories had attained self-government or independence. In 1960, 16 new African States and Cyprus were admitted to the United Nations. *BASIC FACTS ABOUT THE UN*, *supra* note 2, at 63.

63. *Declaration on Independence*, *supra* note 4.

self-determination for the peoples of Trust and Non-Self-Governing Territories as a principle of international law.⁶⁴ Resolution 1514 declares:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁶⁵ Immediate steps shall be taken in Trust and Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire⁶⁶

Resolution 1514 is considered to be the most authoritative expression of the modern concept of the right to self-determination and the legal basis for the decolonization policy of the United Nations.⁶⁷ Through an overwhelmingly affirmative vote, the General Assembly established the principle of self-determination as a legal right for Trust and Non-Self-Governing Territories under international law.⁶⁸ In addition to enunciating the modern legal principle of self-determination, Resolution 1514 enables the creation of special institutions and procedures for the implementation of its policy, such as the formation of a special committee to oversee the implementation of its principles and the use of plebiscites and elections to determine the will of peoples.⁶⁹

64. The Resolution obliges Member States to observe the Resolution on par with the U.N. Charter. *See Declaration on Independence, supra* note 4, ¶ 7; MCDUGAL & REISMAN, *supra* note 8.

65. *Declaration on Independence, supra* note 4, ¶ 2.

66. *Id.* ¶ 5.

67. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa). Notwithstanding Security Council Resolution 276 (1970) 1970 I.C.J. 16, 31 (June 21) (referring to the *Declaration on Independence* as providing the basis for the process of decolonization); *see also* MCDUGAL & REISMAN, *supra* note 8, at 164.

68. General Assembly resolutions are considered "recommendatory" to Member States and not binding (except for those on the budget and personnel of the organization). U.N. AT FORTY, *supra* note 38. When a resolution enjoys the overwhelming support of the Member States, however, it is considered to be a reflection of international consensus, which confirms the existence of a customary international law. *Texaco Overseas Petroleum/California Asiatic Oil Co. v. Libyan Arab Republic*, 17 I.L.M. 1 (1978) (Arbitration Decision considering the legal force of U.N. Resolutions); *Western Sahara*, 1975 I.C.J. 120 (order of Jan. 3); (request for Advisory Opinion); *see* LUNG-CHU CHEN, *supra* note 23, at 364-65; UMOZURIKE, *supra* note 60, at 73-74.

69. *Declaration on Independence, supra* note 4, ¶ 5 ("Immediate steps shall be taken . . . to transfer all powers to the peoples . . .").

At the same session, the General Assembly passed Resolution 1541⁷⁰ as a response to jurisdictional problems, which had arisen in the decolonization process.⁷¹ When Spain and Portugal joined the United Nations in 1955, both countries refused to transmit article 73(e) information on their overseas possessions.⁷² Although Spain eventually agreed to transmit information, Portugal continued to contend that its territories were not under the jurisdiction of article 73 because they were not colonies, but were all part of a single state spread over four continents.⁷³ Several other administering powers unilaterally discontinued the transmission of information to the United Nations, claiming that their Territories had become self-governing.⁷⁴ Resolution 1541 set principles for determining which territories qualified as Non-Self-Governing, when a Non-Self-Governing Territory could be said to have achieved a state of full self-governance, and therefore, when the legal obligations of an Administering State must continue or terminate.⁷⁵ Principle II of the Resolution states:

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government." As soon as a territory and its peoples attain a full measure of self-government, the obligation [of the Administering State] ceases. Until this comes about, the obligation to transmit information under Article 73(e) continues.⁷⁶

Under Resolution 1541, a Non-Self-Governing Territory could achieve full self-governance in three ways: (1) emergence as a sovereign independent state; (2) free association with an independent state; or (3) integration with an independent state.⁷⁷ The Resolution does not elaborate on the status of independence, but leaves it to its own self-evident definition.⁷⁸ Free association and integration, however, are

70. G.A. Res. 1541, *supra* note 39, at 153.

71. See BASIC FACTS ABOUT THE UN, *supra* note 2, at 62-63.

72. *Id.* at 120-23.

73. *Id.*

74. *Id.*

75. G.A. Res. 1541, *supra* note 39, at 153.

76. *Id.*

77. *Id.* Principle VI.

78. *Id.*

further qualified to ensure their basis in self-determination.⁷⁹ Both free association and integration, the Resolution states, "should be the result of a free and voluntary choice by the peoples of the Territory concerned, expressed through informed and democratic processes."⁸⁰ In addition, the freely associating Territory must also retain the freedom to modify its status.⁸¹ Furthermore, integration with an independent state must be on the basis of complete equality;⁸² that is, integration should only come about after the integrating Territory has attained an "advanced stage of self-government with free political institutions so that its peoples would have the capacity to make a responsible choice through informed and democratic processes."⁸³

Under Resolution 1541, then, Non-Self-Governing status cannot be terminated.⁸⁴ Rather, Non-Self-Governing status automatically ceases, but only upon the free choice of the people of the dependent territory to become an independent state, to associate freely with another state, or to integrate with an independent state.⁸⁵

In 1961, the General Assembly established The Special Committee of Twenty-Four (the "Special Committee")⁸⁶ to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514). The Special Committee was given wide-ranging powers to study and investigate all colonial situations and recommend action regarding the progress and extent of implementing the Declaration.⁸⁷ Pursuant to these duties, the Special Committee compiled a list of sixty-four dependent territories, which it confirmed as Non-Self-Governing under the guidelines set forth under the Charter and Resolution

79. *Id.* Principle VII(a), Principle IX(b).

80. *Id.* Principle VII(a).

81. *Id.*

82. *Id.* Principle VIII.

83. *Id.* Principle IX(a).

84. This is the natural interpretation of Chapter XI of the U.N. Charter, which provides for no termination functions to be exercised by any United Nations organs with respect to the status of Non-Self-Governing Territories. See U.N. CHARTER art. 73-74; CRAWFORD *supra* note 8, at 368-69.

85. G.A. Res. 1541, *supra* note 39, at 153.

86. The Special Committee on the Situation with Regard to the Implementation of The Declaration on the Granting of Independence to Colonial Countries and Peoples was established pursuant to General Assembly Resolution 1654 on Nov. 27, 1961. *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 9th Sess., Supp. No. 23, at 5, U.N. Doc. A/8723/Rev.1 (1975) [hereinafter *Report of the Special Committee*].

87. *Questions Relating Territories*, *supra* note 9, at 638-39.

1541.⁸⁸ Hong Kong was included on this list.⁸⁹ In 1972, despite the fact that Hong Kong had not achieved self-governance in any of the ways prescribed by Resolution 1541, the General Assembly removed it from the list of Non-Self-Governing Territories as a result of a letter to the Special Committee from the People's Republic of China.⁹⁰

IV. REMOVAL OF HONG KONG FROM THE LIST OF NON-SELF-GOVERNING TERRITORIES UNDER THE PROTECTION OF THE UNITED NATIONS

The creation of the Special Committee was a major expansion of the United Nations' role in decolonization.⁹¹ The Special Committee was created by the General Assembly to be, in effect, the United Nations watchdog for decolonization. The Special Committee could receive petitions, hold its meetings anywhere within or outside the Secretariat, and request information additional to that required by article 73(e).⁹² On December 20, 1972, at its 2028th meeting, the General Assembly appointed the People's Republic of China to fill one of the four vacancies of the Special Committee.⁹³ The final Report of the Special Committee to the General Assembly in October of 1972 contained these words of welcome by the Chairman:

The Special Committee was fortunate to have three new members, all with long and outstanding histories of anticolonial struggles The membership of China had a special significance. Not only did it add one more permanent member of the Security Council to the Committee, immediately after the restoration of its rightful place within the United Nations, it also

88. UN AT FORTY, *supra* note 38, at 64.

89. *See id.*

90. With the adoption of G.A. Res. 2908, the General Assembly, among other things, approved the Report of the Special Committee, which contained a recommendation that Hong Kong be excluded from the list of territories to which the Declaration on the Granting of Independence was applicable. *Questions Relating Territories, supra* note 9, at 625, 643.

91. UN AT FORTY, *supra* note 38, at 64.

92. *Questions Relating Territories, supra* note 9, at 539.

93. *Report of the Special Committee, supra* note 86, at 11. This appointment occurred less than a year after the People's Republic of China replaced Taiwan at the U.N. under General Assembly Resolution 2758. *See* 8 U.N. MONTHLY CHRONICLE No. 10, at 61 (1971) (reprinted text of G.A. Res. 2758, recognizing the People's Republic of China as "the only lawful representative of China to the United Nations," and "expelling the representative of Chiang Kai-shek . . .").

demonstrated China's genuine interest in the struggle for freedom and independence of all colonial peoples.⁹⁴

In March of 1972, China sent a letter to the Special Committee reiterating its long held position on the status of Hong Kong (and Macau) as belonging entirely within China's sovereign right.⁹⁵ The letter further requested the removal of Hong Kong from the category of "so-called colonial Territories" in the documents of the Special Committee and all other United Nations' documents.⁹⁶ The Special Committee referred the letter to its Working Group for consideration and recommendation.⁹⁷ Other items referred for consideration were the inclusion of the Comoro Archipelago on the list and Cuba's annual submission (contrary to the

94. *Report of the Special Committee, supra* note 86, at 14 (statement by the Chairman).

95. *Letter from the Permanent Representative of China to the United Nations to the Chairman of the Special Committee* (March 8, 1972), Annex 1, U.N. Doc. A/AC.109/396 [hereinafter *Letter from the Permanent Representative of China*], reprinted in *Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of to Colonial Countries and Peoples*, 66th Report of the Working Group at 3, U.N. Doc. A/AC.109/L.795 (1972) [hereinafter *Report of the Working Group*]. The letter states in part:

In connexion with the questions of Hong Kong and Macau, I have the honour to state the following:

As is known to all, the questions of Hong Kong and Macau belong to the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists imposed on China. Hong Kong and Macau are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and does not at all fall under the ordinary category of "colonial territories." Consequently, they should not be included in the list of colonial Territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples. With regard to the questions of Hong Kong and Macau, the Chinese Government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss those questions. For the above reasons, the Chinese delegation is opposed to including Hong Kong and Macau in the list of colonial Territories covered by the Declaration and requests that the erroneous wording that Hong Kong and Macau fall under the category of so-called "colonial Territories" be immediately removed from the documents of the Special Committee and all other United Nations documents.

Id.

96. *Id.*

97. *Id.* at 2.

position of the United States) that Puerto Rico be reinstated as a Non-Self-Governing Territory.⁹⁸

A comparison of the Working Group's recommendations on the three issues is interesting. On the issue of Puerto Rico, the Working Group agreed by consensus to recommend that "in view of the involved nature of the matters raised in these communications, the questions might most appropriately be discussed at the plenary meetings of the Special Committee where all the members of the Committee and such other non-members of the Committee as might wish to do so would have the opportunity to participate"⁹⁹ Likewise, the Working Group deferred consideration of the Comoro Archipelago¹⁰⁰ until a study of the situation including the views of the peoples directly concerned became available.¹⁰¹ On the issue of Hong Kong, however, the Working Committee "agreed to recommend [that] the Special Committee should recommend to the General Assembly that Hong Kong and Macau and dependencies be excluded from the list of Territories to which The Declaration is applicable."¹⁰²

On June 6, 1972, at its 873rd meeting, the Special Committee adopted the recommendations of the Working Group.¹⁰³ Although there were no formal objections to the recommendation to remove Hong Kong from the list of Territories, some members of the Special Committee reserved the position of their governments on the issue of Hong Kong.¹⁰⁴ In making their reservations, the Representatives expressed concern about the propriety of precluding the Hong Kong issue from debate in the General

98. *Id.* The issue of whether Puerto Rico should be designated as a Non-Self-Governing Territory was introduced by Cuba for debate both in the General Assembly and the Special Committee in 1966, 1967, and annually since 1972, despite the submission in 1953 to the General Assembly by the United States that Puerto Rico had exercised its right to self-determination by choosing (by referendum) to become a commonwealth of the United States with its own constitution. See UN AT FORTY, *supra* note 38, at 64; CRAWFORD *supra* note 8, at 371-72.

99. *Report of the Working Group, supra* note 95, at 2.

100. The Comoro Archipelago was a small island group in the Indian Ocean between the African mainland (Mozambique coast) and Madagascar, with a total land area of 2,236 sq. km. and a population of approximately 400,000 inhabitants (1980 census), as opposed to the near 4 million inhabitants of Hong Kong (1976 census). ENCYCLOPEDIA OF THE UN, *supra* note 6, at 165, 348.

101. *Report of the Working Group, supra* note 95, at 3.

102. *Id.* at 1-2. Reservations on the issue of Hong Kong were expressed by the Representative of Sweden. *Id.*

103. *Report of the Special Committee, supra* note 86, at 27-28.

104. *Id.* at 16-20.

Assembly by a Committee's formulation of an explicit recommendation to remove Hong Kong from the list of Non-Self-Governing Territories.¹⁰⁵

Indeed, statements made on both sides of the Hong Kong issue are reflective of what some see as a conflict in the Declaration on Independence itself.¹⁰⁶ Article 2 of the Declaration provides: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁰⁷ On the other hand, article 6 states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter" ¹⁰⁸

The Representatives of Afghanistan, the USSR, and Mali made statements of support for the Working Group's recommendation that Hong Kong be removed from the list of Territories, basing their position on China's territorial right of sovereignty over Hong Kong.¹⁰⁹ On the other side, the Representative of Venezuela stated that it would be preferable for the Special Committee to refer the issue to the General Assembly for a substantive decision.¹¹⁰ The Representative of Fiji reminded the

105. *Id.*

106. CRAWFORD, *supra* note 8, at 377.

107. *Declaration on Independence*, *supra* note 4, ¶ 2.

108. *Id.* ¶ 6.

109. SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLE, VERBATIM RECORD OF THE 873RD MEETING at 17-20, U.N. Doc. A/AC.109/PV.873 (1972) [hereinafter *Verbatim Record of the 873rd Meeting*]. The Representative of Mali also contended that the request of the People's Republic of China could be a reflection of the intentions of the administering powers, themselves. More disturbingly, Representative Dao concluded that, in the absence of certainty regarding the intentions of the Administering State, the Committee should "divest itself of [the] question and ask the General Assembly to exclude [the] Territory from the list of Territories to which the Declaration is applicable." *Id.* at 17-18. In supporting China's position, the Representative of the U.S.S.R. also confirmed his Government's view on unequal treaties. *Id.* at 19.

110. *Id.* at 16, 18 (statement by Representative Artega of Venezuela). The text of Mr. Artega's remarks is as follows:

As regards the question of Hong Kong and Macau and dependencies we think that the Special Committee should just refer the matter to the General Assembly for a substantive decision without there being any need for us to formulate a recommendation that [these territories] be excluded from the list of Territories to which the Declaration is applicable.

Committee that Hong Kong was a Non-Self-Governing Territory and that there were important legal and juridical implications involved, which required the most careful consideration.¹¹¹ The Representative of Sweden noted that her government's representative in the Working Group did not associate itself with the Group's recommendation on Hong Kong and asked to have the record of the Special Committee show that the Swedish Government reserved its position on this issue.¹¹²

The apparent conflict between self-determination and territorial integrity in articles 2 and 6 of the Declaration on Independence was an issue in the *Western Sahara Opinion*, a landmark case regarding the development of the legal right of self-determination.¹¹³ Western Sahara was a Non-Self-Governing Territory, administered by Spain, and bordered by Morocco, Mauritania, and Algiers.¹¹⁴ Although Spain expressed its willingness to decolonize Western Sahara, Morocco and Mauritania pressed their respective territorial claims.¹¹⁵ The General Assembly asked the International Court of Justice to determine what legal ties, if

Id. at 16. In answer to a question from the Chairman as to whether he was making a suggestion and not a formal proposal, Mr. Artega replied:

I should just like to reserve the position of my delegation as regards paragraph 4 (a). We think it would have been preferable for the Special Committee to refrain from making any recommendation to the General Assembly. We think that it would have been better to refer the matter to the General Assembly for a decision.

Id. at 18.

111. *Id.* at 17 (statement by Representative Nandan of Fiji). The text of Mr. Nandan's remarks are as follows:

My delegation would like to express its reservations with regard to paragraph 4 of the 66th report of the Working Group dealing with the Non-Self-Governing Territories of Hong Kong and Macau. The Fiji delegation feels that there is an important matter of principle involving legal and juridical implications in the Working Group's recommendation which requires the most careful consideration. My delegation is also mindful of the fact that as the situations exist today in Hong Kong and Macau those two Territories are in fact non-self-governing.

Id.

112. *Id.* at 17 (statement by Representative Skottsberg-Ahman of Sweden).

113. CRAWFORD, *supra* note 8, at 378.

114. 12 *New Encyclopedia Britannica* 602 (1985); *see also* *Western Sahara*, 1975 I.C.J. at 128-30 (Judge DeCastro quoting Prof. Lazrak of the University of Rabat).

115. 12 *New Encyclopedia Britannica*, *supra* note 114, at 603. Morocco and Mauritania had been in accord with Spain regarding self-determination for the Sahara, even voting for independence for Western Sahara in General Assembly Resolution 3292, until gold deposits were discovered in that territory and Morocco's political relationships with Mauritania and Algeria became problematic. *Id.* *See also* *Western Sahara*, 1975 I.C.J. at 128-30 (Judge De Castro quoting Prof. Lazrak of the University of Rabat).

any, existed between Western Sahara and Morocco and Mauritania at the time of Spanish colonization of the Territory in 1884.¹¹⁶ In their presentations to the Court, Morocco, Mauritania, and Algeria each adopted distinct positions on the relations between articles 2 and 6 of the Declaration on Independence.¹¹⁷ Morocco's position was that the General Assembly had not yet settled the apparent conflict and was therefore in a position "to choose from among a wide range of solutions," while keeping in mind the two principles of self-determination and territorial integrity.¹¹⁸ Mauritania's position was that "the principle of self-determination [could] not be dissociated from that of respect for national unity and territorial integrity," and that the General Assembly must examine each question in the context of the individual situations surrounding it.¹¹⁹ Mauritania noted that the General Assembly had in several instances given "priority to territorial integrity, particularly in situations where the Territory has been created by the colonizing Power to the detriment of a State or country to which the territory belonged."¹²⁰ Algeria maintained that under the United Nations Charter and Resolution 1514, as well as under successive resolutions passed by the General Assembly, the self-determination of peoples was the fundamental principle governing decolonization.¹²¹

After examining the historical material presented, the Court concluded that, although legal ties did exist between the Western Sahara and Morocco and Mauritania before colonization, they were not of such a character as to affect the exercise by the Western Sahara of its right to self-determination under Resolution 1514, which required a free and genuine expression of the will of the peoples concerned.¹²² More explicitly, Judge Dillard stated that self-determination remains in all cases the "cardinal" principle, and that "ancient legal ties," such as those found in *Western Sahara*, "can have only a tangential effect on the ultimate choices available to the people [of a Non-Self-Governing Territory]."¹²³

116. *Western Sahara*, 1975 I.C.J. 3.

117. *Id.* at 29-30.

118. *Id.* at 29.

119. *Id.*

120. *Id.* at 29-30.

121. *Id.* at 30.

122. *Id.* at 68. The actual majority opinion with regard to legal ties was divided: Judges Ruda and de Castro dissenting in the case of Morocco; Judge de Castro dissenting in the case of Mauritania. Judges Ammoun and Forster regarded both ties as amounting to territorial sovereignty, and Judges Gros, Ignacio-Pinto, Petren, and Dillard regarded both ties as insubstantial. CRAWFORD, *supra* note 8, at 379 n.115.

123. *Western Sahara*, 1975 I.C.J. 122.

Judge Singh's opinion suggested that only dismemberment of a pre-colonial State by the colonizer would justify reintegration rather than self-determination.¹²⁴ Judge Petren, however, considered that the precise legal relation between the principles of self-determination and territorial integrity remained undeveloped.¹²⁵ In the end, however, the majority opinion expressly avoided Morocco's assertion that the General Assembly has the option of choosing between self-determination and territorial integrity.¹²⁶ Rather, the *Western Sahara* opinion came out firmly on the side of self-determination as the fundamental principle. The views of Morocco and Mauritania were considered relevant in influencing the General Assembly only as to the form or procedure by which a people might freely choose their own destiny.¹²⁷

The discussion which ensued in the Special Committee over the Working Committee's recommendation to remove Hong Kong from the list of Non-Self-Governing Territories shows that Committee members on both sides were aware of the serious issues of international law involved, but for some reason the majority of members¹²⁸ were unwilling to allow the General Assembly to address them.¹²⁹ As a result, the Special Committee presented its Report to the General Assembly without referring the issue of Hong Kong's status for individual discussion.

The General Assembly summarily approved the Report of the Special Committee with the adoption of Resolution 2908, and as a result, Hong Kong was excluded from the list of Territories to which the Declaration of the Granting of Independence was applicable.¹³⁰ As previously discussed, the General Assembly is not empowered to terminate the status of a Non-Self-Governing Territory because that status ceases only upon the achievement of a full measure of self-governance under Resolution 1541.¹³¹ United Nations' supervision and surveillance, however, is necessary to ensure that the people of a Territory claimed by others is

124. *Id.* at 80.

125. *Id.* at 110.

126. CRAWFORD, *supra* note 8, at 380; *see* *Western Sahara* 1975 I.C.J. at 68, 122.

127. *Western Sahara*, 1975 I.C.J. at 122.

128. As of January 1972, the Special Committee was composed of the following 22 members: Afghanistan, Bulgaria, China, Czechoslovakia, Ecuador, Ethiopia, Fiji, India, Indonesia, Iran, Iraq, Ivory Coast, Mali, Sierra Leone, Sweden, Syrian Arab Republic, Trinidad & Tobago, Tunisia, U.S.S.R., United Rep. of Tanzania, Yugoslavia, and Venezuela. *Report of the Special Committee*, *supra* note 86, at 11.

129. *Verbatim Record of the 873rd Meeting*, *supra* note 109, at 16.

130. G.A. Res. 2908, U.N. GAOR, 27th Sess., Supp. No. 23, at 1, U.N. Doc. A/PV.2074 (1972); *see* *Questions Relating Territories*, *supra* note 10, at 625.

131. *See supra* text accompanying notes 75, 76.

allowed to exercise free choice.¹³² In withdrawing Hong Kong from the jurisdiction of the Special Committee, therefore, the General Assembly's action effectively denied the people of that Territory any future possibility of self-determination.

The only input the British Government had on the issue of Hong Kong appears to have been through a letter sent to the Secretary General after the passage of Resolution 2908.¹³³ The letter stated that the British Government would discontinue transmitting article 73 information on Hong Kong as this would serve no practical purpose in light of the action taken by the General Assembly under Resolution 2908.¹³⁴ Nevertheless, the British Government insisted that the action of the General Assembly in no way affected the legal status of Hong Kong.¹³⁵

V. THE 1984 AGREEMENT BETWEEN GREAT BRITAIN AND CHINA

Unfortunately, the views expressed in the British representative's letter on the legal status of Hong Kong did not translate into any substantive support for self-determination for the people of that territory. To the contrary, in 1984, the United Kingdom and the People's Republic of China concluded an agreement that mandates the return of the

132. See CRAWFORD, *supra* note 8, at 368.

133. *Implementation of the Declaration on the Gravity of Independence to Colonial Countries and Peoples; Letter from the Permanent Representative of the United Kingdom of Great Britain to the Secretary General of the United Nations, (December 19, 1972)*, U.N. Doc. No. A/8989 (1972). The text of the letter is as follows:

I have the honour to refer to General Assembly resolution 2908 (XXVII) of 2 November 1972 and in particular to paragraph 3, which approved the report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples covering its work during 1972. My Government has asked me to inform Your Excellency that, in view of paragraph 73 of chapter 1 of the report of the Special Committee, they have decided that no useful practical purpose would be served by continuing to transmit information on Hong Kong under Article 73(e) of the United Nations Charter. My Government has also asked me to state that the action of the General Assembly in no way affects the legal status of Hong Kong. The views of my Government about this status are well known. They are unable to accept any differing views which have been expressed or may hereafter be expressed by other Governments.

I should be grateful if you would circulate this letter as a General Assembly document.

Id.

134. *Id.*

135. *Id.*

sovereignty of Hong Kong to China in 1997.¹³⁶ Representative of the people of Hong Kong did not take any part in the secret negotiations for this agreement.¹³⁷ Rather, the people of Hong Kong, as well as the international community at large, remained passive in the hope of bridging the political, economic, and social chasm that had widened between Hong Kong and China over the past century and a half while Hong Kong was under British rule.¹³⁸ Encouraged by the emergence of China into the world community after its admittance into the United Nations, as well as by Deng Xiao Peng's liberalization of China's economic policies, the international community convinced themselves that China was developing the flexibility and internationalism necessary to accomplish the delicate task of incorporating into the communist motherland a society which had, over the course of almost 150 years, become an internationally recognized bastion of free-market, capitalist activity.¹³⁹ The reactionary and violent response of the Chinese Government to peaceful student and worker protests in June of 1989 has, at the very least, shaken such optimism or naiveté.¹⁴⁰

The 1984 agreement, itself, is not a source of optimism. The agreement only assures the continuance of Hong Kong's current legal, political, and economic systems for fifty years.¹⁴¹ After the year 2047, Hong Kong's future is completely in China's hands.¹⁴² The term "self-

136. 1984 Agreement, *supra* note 11, at 1371.

137. See Pye, *supra*, note 13, at 458, 465 ("Beijing has already said that it will not tolerate an elected government in Hong Kong because of fear of 'interference' from Taiwan. Officials of the People's Republic probably have other reasons for wanting to suppress Hong Kong public opinion . . . the people would most likely vote for the continuation of the status quo under foreign rule in preference to living under Chinese rule.").

138. See Margaret Scott, *Hong Kong on Borrowed Time*, N.Y. TIMES, Oct. 22, 1989, §6 (Magazine), at 31, 34; Lee Yee, *Fear and Loathing in Hong Kong*, WALL ST. J., June 28, 1989, at A15.

139. Scott, *supra* note 138, at 31. After 1984, the British and Chinese governments cleverly invoked patriotism to sell the Joint Declaration and blunt any talk of democracy. Deng's 'opening' was going so well, Hong Kong's people were told, and your return to the Chinese Motherland will only help his reforms. But it is a delicate affair—don't rock the boat. Democracy is not what China wants; don't displease China. *Id.* at 56; see also Brian Hook, *The Government of Hong Kong: Change Within Tradition*, 95 CHINA Q. 491, 511 (1983) ("Encouraged by statements from China, individuals and local groupings showed signs of reconciling themselves to and rationalizing the prospect of a changed relationship with China . . . the strengthening of the symbiotic relationship between Hong Kong and China and a continuing contribution by Hong Kong to the modernization of China.").

140. Yee, *supra* note 138.

141. 1984 Agreement, *supra* note 11, at 1372.

142. *Id.*

determination," with regard to the six million inhabitants of Hong Kong, is not used in the agreement.¹⁴³ To the contrary, the provisions of the 1984 agreement effectively prevent the people of Hong Kong from exercising any option of self-determination as outlined in Resolution 1541. Under the agreement, on July 1, 1997, China will resume sovereignty and establish a Hong Kong Special Administrative Region ("SAR") of the People's Republic of China.¹⁴⁴ This will not achieve self-governance through Free Association or Integration with China under Resolution 1541 because it will not be the result of a free and voluntary choice by the people of the territory, as expressed through an informed and democratic process.¹⁴⁵

Although paragraph 33 in the introduction to the agreement invites comment by the people of Hong Kong on the Draft Agreement,¹⁴⁶ no referendum, plebiscite, or vote of any kind was held by which the people of Hong Kong could express their will.¹⁴⁷ Rather, upon the expiration of the New Territories Lease in 1997, the agreement grants the inhabitants of Hong Kong a new lease of sorts under which they will be allowed to continue for an additional fifty years the social and economic way of life that they have developed over the past century and a half.¹⁴⁸ After that their fate is in the hands of the Central People's Government of the People's Republic of China, who will appoint the chief executive of the new Hong Kong Special Administrative Region on the basis of local "elections or consultations."¹⁴⁹ Principal officials will be nominated by the chief executive for appointment by the Central People's Government.¹⁵⁰ Conspicuously absent from the agreement is a specific description of the Legislature of Hong Kong SAR.¹⁵¹

143. *Id.* Compare with the Vietnam Peace Treaty devoted to the "exercise of the South Vietnam People's Right to Self-Determination," which states that, "The South Vietnamese people shall decide themselves the political future of South Viet-Nam through genuinely free and democratic general elections under international supervision." Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, U.S.-Vietnam, art. 9, 24 U.S.T. 4, T.I.A.S. No. 7542.

144. 1984 Agreement, *supra* note 11, at 1373.

145. G.A. Res. 1541, *supra* note 39; see *supra* text accompanying notes 74-76.

146. 1984 Agreement, *supra* note 11, at 1371.

147. Pye, *supra* note 13.

148. 1984 Agreement, *supra* note 11, at 1371-72.

149. *Id.*

150. *Id.* at 1372.

151. The "Elaboration by the Government of the People's Republic of China," annexed to the 1984 Agreement does contain the following description: "The government and legislature

VI. ALTERNATIVE TO THE 1984 AGREEMENT

Is there no alternative for Hong Kong? Must the people of this territory submit to being "handed about from sovereignty to sovereignty as if they were property"¹⁵² with absolutely no say in the matter whatsoever? The International Court of Justice has spoken on this issue in unequivocal terms in the *Western Sahara Advisory Opinion*: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people."¹⁵³

Hong Kong is a territory of international importance in the area of trade and finance.¹⁵⁴ A disruption of this society will have implications beyond the boundaries of China or Hong Kong itself, and is, therefore, not simply an issue of domestic concern as China would have us accept.¹⁵⁵ It is, therefore, the responsibility of the international community through the United Nations to assure the people of Hong Kong their right under the United Nations Charter and the Declaration on Granting Independence to freely determine their political status and freely pursue their economic, social, and cultural development. The mechanism for such intervention exists.

In view of the flawed procedures followed by the United Nations in removing Hong Kong from the list of Non-Self-Governing Territories, the first step should be for any Member State to propose that Hong Kong be re-listed with the Special Committee as a Non-Self-Governing Territory. Because under Resolution 1541, Hong Kong retains its Non-Self-Governing status until, and only until, it achieves self-governance through the expression of the free will of its people, the re-listing of Hong Kong with the Special Committee is only a procedural formality. It will not bestow the right to self-determination on Hong Kong because this right was never lost. Re-listing, however, will re-establish the surveillance and supervisory power of the United Nations over Hong Kong so that, for example, a plebiscite can be held.

of the Hong Kong Special Administrative Region shall be composed of local inhabitants
 . The legislature of the Hong Kong SAR shall be constituted by elections." 1984 Agreement, *supra* note 11, at 1373.

152. 3 PUBLIC PAPERS OF WOODROW WILSON, *supra* note 46.

153. *Western Sahara*, 1975 I.C.J. 122 (Judge C. Hardy Dillard).

154. See Pye, *supra* note 13, at 456 (Hong Kong . . . [is] the world's third largest financial centre, indeed, a vital force in generating the prosperity of the N.I.C.'s (Newly Industrialized Countries) of East Asia.); see generally Howe, *supra* note 34, at 512, 517, 519, 520 (discusses Hong Kong's extraordinary economic growth).

155. Letter from the Permanent Representative of China, *supra* note 95.

Equally important, the introduction of the issue will give the General Assembly a chance finally to discuss it fully—an opportunity it was denied in 1972, when Hong Kong was removed, without discussion in the General Assembly, from the list of Non-Self-Governing Territories.¹⁵⁶ A reintroduction of this issue would not be unprecedented. The Cuban Government annually proposed a review of Puerto Rico's status by the General Assembly for more than ten years.¹⁵⁷ Since the British must bear much of the responsibility for Hong Kong's present dilemma, that government would be the appropriate one to make the proposal, but any Member State can do so.¹⁵⁸

The Hong Kong situation is a chance for the United Nations to further develop the principle of self-determination into a modern vehicle more suited to the contemporary needs and aspirations of the international community. Essentially, every demand for self-determination involves some countervailing demand or claim since the recognition of the rights of one "self" usually entails a denial of another. China's claim of historical sovereignty, versus the claim of the people of Hong Kong to the free exercise of their right to self-determination, represents such a conflict.

The reconciliation of such important competing claims, however, should not be decided on a rigid formula of race or history. Freedom from an ethnically alien sovereign is less than meaningful if there is no continuance of the political, social, and economic life that a people have developed and chosen for themselves. The last century and a half of a peoples' history is not less important than prior centuries. Furthermore, in a world where self-determination is both a pre-emptory norm and a principle of international law, a claim for integration of a people without their free consent, based simply on ethnicity and history, such as China proposed in 1972, cannot be summarily accepted as it was by the General Assembly with regard to Hong Kong. Such a claim must be weighed with regard to its effect on a people who, through a historical, political, and economic process, have moved so far from their earlier history that reintegration with a former sovereign can only be experienced as rule by an alien master. The people of Hong Kong have, at the very least, a right to be heard.

The 1984 Agreement between China and Great Britain is not a bar to Hong Kong's exercise of self-determination. The Vienna Convention on the Law of Treaties allows for the withdrawal, termination, or suspension

156. See *Questions Relating Territories*, *supra* note 9, at 625.

157. UN AT FORTY, *supra* note 38 at 64.

158. U.N. CHARTER, arts. 10, 11.

of a treaty on the basis of a fundamental change in circumstance.¹⁵⁹ The conditions for using these grounds are that: (a) the original circumstances constituted an essential basis for the consent of the parties bound by the treaty; and, (b) the effect of the change radically transforms the extent of obligations still to be performed under the treaty.¹⁶⁰ The changed circumstances in which Hong Kong now finds itself fulfill these conditions. While the June 4, 1989 massacre by the Chinese Government of peaceful student demonstrators in Beijing shocked the world, it had a much more immediate and devastating meaning for the people of Hong Kong.¹⁶¹ The events of June 4th seriously undermined the reliability of the Chinese government to account for the very different way of life in Hong Kong, or to encourage the process of self-determination for the people of Hong Kong. China's leaders did not bother to consult the country's limited institutions before the crackdown.¹⁶² The Standing Committee of the National People's Congress was not convened; tanks were dispatched without the agreement of the Minister of Defense; no debate was allowed in the State Council.¹⁶³ If the massacre had occurred before 1984, the agreement may never have been signed, or at least not ratified by the British Parliament.¹⁶⁴

When the agreement was signed in 1984, Hu Yaobang and Zhao Ziyang were prominent among China's ruling elite. The British Government had often expressed its reliance on the pledge of Zhao Ziyang as Communist Party Chief that Beijing would implement the agreement without modification.¹⁶⁵ The deposing of Zhao Ziyang,¹⁶⁶ whose political flexibility encouraged British faith in China's ability to follow through on the agreement, represents a fundamental change in the nature and goals of China's Government. Even in social and economic terms, the events of 1989 have already had their effects on Hong Kong. More than 45,000 people emigrated from Hong Kong in 1989,¹⁶⁷ and investment capital is fleeing the colony at an ever increasing rate.¹⁶⁸ All

159. Vienna Convention, *supra* note 25, at 257, art. 62.

160. *Id.*

161. Yee, *supra* note 138.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Scott, *supra* note 138, at 31, 32.

168. David E. Sanger, *As Hong Kong Elite Are Leaving, Japanese Investors Are Moving In*, N.Y. TIMES, May 29, 1990, at 1 ("As the countdown continues to 1997 . . . money is

of these effects amount to the type of fundamental "change in circumstances" that would qualify for termination of the 1984 Agreement. If the agreement were terminated, or even suspended, a much belated effort could be made toward the exercise of self-determination for Hong Kong.

Some commentators argue that Hong Kong cannot be independent because it depends on China for most of its food and one third of its petroleum and water.¹⁶⁹ These conditions are not so different, however, from that of Singapore. Dependent on Malaysia for water, and no fuel resources of its own, Singapore has achieved a thriving and viable status as an independent City-State.¹⁷⁰ Hong Kong's dependence on China for water or fuel would not prevent the exercise of Hong Kong's right of self-determination under the options of Free Association or even Integration, as long as these were based on full equality and the expression of the free will of the people of Hong Kong.¹⁷¹ In any case, though Integration or Free Association with China is certainly a viable option for Hong Kong, the political fate of this territory should not be decided on the basis of an agreement concluded without any input from the very people whose fate the Agreement is being decided. A treaty based on a true reflection of the will of the people of Hong Kong and the Government of China would also undoubtedly be a more realistic and secure way of effecting a working alliance between the two countries. Each would be able to safeguard its interests through the agreement. In the long run, the stability created by such an alliance would be of greater benefit to China and Hong Kong as well as to all the investing nations and individuals concerned.

VII. CONCLUSION

With its designation as a Non-Self-Governing Territory, Hong Kong obtained the status of an independent entity and thus the right to determine its own political, social, and economic destiny.¹⁷² Though China may

rapidly flowing out of the colony. Economic growth this year, the government said last week, has slowed to just above zero A recent study of the Hongkong Shanghai Banking Corp. showed that the transfer of capital abroad last year increased 10-fold"); see Barbara Basler, *Capital Flees an Edgy Hong Kong*, N.Y. TIMES, June 15, 1989, at D1.

169. Kerris Tso, Note, *Legal Implications of the Sino-British Treaties Regarding Hong Kong*, 4 LOY L.A. INT'L. & COMP. L.J. 111, 116 (1981).

170. 10 New Encyclopedia Britannica 831-32 (1985). Singapore achieved independence from Malaysia in 1965. *Id.* at 832.

171. G.A. Res. 1541, *supra* note 39.

172. See MCDUGAL & REISMAN, *supra* note 8 at 164; CRAWFORD, *supra* note 8 and accompanying text.

argue that the designation should never have been made, and thus the right never granted, basic jurisprudence demands that a legal right once given cannot be taken away without due process of law.¹⁷³ Furthermore, under the United Nations Charter and Resolution 1541, Hong Kong is still, *de jure* and *de facto*, a Non-Self-Governing Territory until it achieves a full state of self-governance determined by the freely expressed will of its people. The right of the people of Hong Kong to self-determination, therefore, is a legal right, which must be protected by the United Nations.

The issue of Hong Kong's status involves important and evolving concepts of international law and should be reintroduced in the General Assembly for debate and resolution. Important questions, such as whether China can abrogate its treaties with England under the unequal treaty doctrine; whether historical and geographical factors should be the only determinants of the fate of a people who have developed so differently from their economic and political origins; and whether a people can still, in this day and age, be handed about between sovereigns as though they were property, should be considered openly and under the principles of international law. There is no better way to further define and formulate the principle of self-determination than through open debate of the issues in an international forum. And the people of Hong Kong need a chance to be heard, so that a more comprehensive, humane, and stable solution to the Hong Kong question can be worked out under contemporary international norms, rather than solely under the criteria of historic and ethnic territoriality.

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173. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that the statutory entitlement of welfare payments, although not a fundamental right, cannot be taken away without due process of law, i.e. a hearing at which all parties are present). American Constitutional principles such as those relied upon in *Goldberg* are applicable in international situations. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1)(c), *reprinted in*, SWEENEY, OLIVER & LEECH, *supra* note 25, at 29 (providing that "general legal principles recognized by civilized nations" constitute one of the sources of international law).

