

ABHANDLUNGEN

The Legal Status of Hong Kong after 1997

The Consequences of the Transfer of Sovereignty according to the Joint Declaration of December 19, 1984

*Georg Ress**

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* Dr.iur., Dr.rer.pol., o.Professor für öffentliches Recht, Völkerrecht und Europarecht; Direktor des Europa-Instituts an der Universität des Saarlandes, Saarbrücken.

Abbreviations: AJIL = American Journal of International Law; BayVGH = Bayerischer Verwaltungsgeschichtshof; BDTC = British Dependent Territories Citizens; BNO = British Nationals (Overseas); BYIL = The British Year Book of International Law; CMLR = Common Market Law Review; EEC = European Economic Community; EPIL = Encyclopedia of Public International Law, ed. by R. Bernhardt; FBIS = Foreign Broadcast Information Service; GA = General Assembly; GATT = General Agreement on Tariffs and Trade; H.C. = House of Commons; H.C. Debs. = House of Commons, Standing Committees, Parliamentary Debates; ICJ Reports = International Court of Justice. Reports of Judgments, Advisory Opinions and Orders; ILM = International Legal Materials; ILR = International Law Reports; NJW = Neue Juristische Wochenschrift; NPC = National People's Congress; PRC = People's Republic of China; RoC = Republic of China; SAR = Special Administrative Region; VCLT = Vienna Convention on the Law of Treaties; YILC = Yearbook of the International Law Commission.

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1. Preliminary Remarks

The Joint Declaration of the Government of the United Kingdom (UK) of Great Britain and Northern Ireland and of the Government of the People's Republic of China (PRC) on the Question of Hong Kong of December 19, 1984 (ratified on May 27, 1985)¹, providing for the "transfer of governance"² of Hong Kong, is an international treaty with interesting and even unique elements which might also serve as a model treaty for other non-self-governing territories such as Gibraltar or the Falkland Islands. According to the Preamble it was concluded as a "settlement of the question of Hong Kong", which was considered to be conducive to the "maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis". According to the British view the agreement "met the needs of the people of Hong Kong"³ providing for the establishment of a Hong Kong Special Administrative Region (SAR) under

¹ Treaty Series No.26 (1985), Cmnd.9543. The Joint Declaration and Annexes (hereafter quoted as the Hong Kong Agreement) were initiated on September 26, 1984 and entered into force on May 27, 1985. A German translation can be found in *Europa-Archiv* 1984, Folge 22, D 630ff. An evaluation of this treaty also from a legal point of view is given by: L.W. Pye, *The International Position of Hong Kong*, *The China Quarterly* 1983, p.457ff.; A.G. Kühn, *Hongkong - Gegenwart und Zukunft in Fernost, Außenpolitik*, vol.36 (1985), p.438ff.; M.D. Landry, *Commentary*, *Harvard International Law Journal*, vol.26 (1985), pp.249-263; T.L. Tsim, *Blick auf 1977: Pekings Strategie in der Hongkong-Frage*, *Europa-Archiv* 1984, Folge 1, pp.23-30; A. Dicks, *Treaty, Grant, Usage or Suffrance? Some Legal Aspects of the Status of Hong Kong*, *The China Quarterly* 1983, p.427ff.; on the military consequences cf. R.N. Kaul, *The Hong Kong Sino-British Accord: An Analysis*, *Foreign Affairs Reports*, vol.34 (1985), p.1ff. There has been, already before 1983/84, a quite intensive debate on the guarantees which had to be included in an agreement between the UK and China on the question of Hong Kong, cf. G. Newsham, *Rethinking Hong Kong: A Blueprint for the Future*, *UCLA Pacific Basic Law Journal*, vol.1 (1982), pp.247ff. (263f.).

² Landry, *ibid.*, p.249. Whether a "transfer of sovereignty" occurred, is a disputed question (see *infra*).

³ Sir Geoffrey Howe, Secretary of State for Foreign and Commonwealth Affairs, House of Commons, 21 January 1985 (Hansard, vol.71, p.733).

Chinese sovereignty as from July 1, 1997, the date on which the lease of the New Territories⁴ would end, and for the fifty years following the transfer. At least during the period⁵ until 2047 the social and economic system and even the "life style" of Hong Kong which has become the world's third largest financial and gold trading centre⁶ shall be preserved. The agreement consists of the text itself (a preamble and eight paragraphs) and of three Annexes: one on the elaboration by the Government of the PRC of its basic policy regarding Hong Kong until the year 2047 (Annex I), a second on a Sino-British Joint Liaison Group (Annex II), and a third on land leases (Annex III). According to Art.8 of the Joint Declaration, this declaration and its annexes shall be equally binding.

For an evaluation of the consequences it is necessary also to consider the provisions of the British Hong Kong Act of 1985⁷ together with the forthcoming Orders in Council mentioned in the Schedule of sect.2 (2) of that Act. Furthermore, on the very day of the signature of the Joint Declaration two Memoranda⁸ related to the status after 1997 of persons who are now British Dependent Territories Citizens (BDTCs) were exchanged explaining the respective positions of the two governments.

The Joint Declaration fails to mention or to define the legal status of these Memoranda. In the light of Art.31, sect.2, *lit.b*, of the Vienna Convention on the Law of Treaties (VCLT) they can be looked upon as instruments which form part of the context of the treaty besides the text, the Preamble and the Annexes and which have to be taken into account for the interpretation of the treaty⁹. As a consequence, the Memoranda may clarify on which point no agreement was reached so that the Joint Declara-

⁴ In the Second Peking Convention (between Great Britain and China Regarding an Extension of Hong Kong Territory) of June 9, 1898 (cf. P. Wesley Smith, *British Dependent Territories: Hong Kong; Constitutions of Dependencies and Special Sovereignties* [1978], p.10) the New Territories (376 square miles of land on the mainland opposite Hong Kong Island – that is 92 per cent of the whole land area of Hong Kong) were leased for 99 years, a term which will end on June 30, 1997.

⁵ Landry (note 1), p.250.

⁶ Cf. Lohr, *Peking Ready to Negotiate but Hong Kong is Still Jittery*, *New York Times*, September 26, 1982 at E 3, col.1 (quoted from Landry, p.252).

⁷ Hong Kong Act 1985 (1985 c.15) of April 4, 1985.

⁸ Cf. The White Paper of the British Government of September 26, 1985, p.31 (United Kingdom Memorandum), and p.33 (Chinese Memorandum) – with explanatory notes on p.45f.

⁹ As to the relevance of such instruments cf. T.O. Elias, *The Modern Law of Treaties* (1974), p.75f., and G. Röss, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.71) (1978), p.121ff.

tion and the Annexes themselves cannot be interpreted in such a way as to suggest that an agreement was reached.

2. *Self-Determination*

What is the impact on international law of this Joint Declaration? One of the first questions, since it relates to Hong Kong as a Crown Colony¹⁰, would be: How does this agreement fit into the framework of international resolutions on decolonization and to what extent is it in accordance with the international public law rules on self-determination? It is somewhat amazing that the UK which fought for the self-determination of the Falkland inhabitants¹¹ and regards the Gibraltar question largely to be dependent on the will and opinion of the inhabitants of Gibraltar¹², concludes an agreement, according to her own interpretation on the transfer of sovereignty and a cession of territory, without a referendum. Can the Joint Declaration therefore be regarded as a model for specific cases of decolonization? The British Government considered the situation of Hong Kong "of course *sui generis*" incomparable with any other cases where the UK divests herself of sovereignty over territory. "In this case we are entering

¹⁰ Hong Kong is ruled by a Governor who is appointed by the Crown. The power of the Governor is subject to the Letters Patent, to any Royal Instructions (cf. Hong Kong Letters Patent 1917 to 1976, Arts. I and II). He must consult an appointed Executive Council (five *ex officio* members and regularly nine other members). For the enactment of laws by the Governor, the advice and consent of an appointed Legislative Council, the size of which has steadily increased since World War II (1980 official members 22, unofficial ones 27) are necessary. Cf. N. Miners, *The Government and Politics of Hong Kong* (1981), pp.81, 126; Landry (note 1), p.252; Hook, *China Quarterly* 1983, p.491f.

¹¹ The UK voted against Res. of the GA on negotiations on sovereignty "because it made no reference to the right of self-determination" (H.C. Debs., vol.977, Written Answers, vol.242: January 28, 1981), BYIL vol.52 (1981), p.386. Cf. also Denis Healy in the H.C., January 21, 1985, p.742: "... in the Falklands ... experience with Hong Kong would prove of vital importance and set interesting precedents". Whether the Falkland case is a case of the self-determination of this population is doubtful (cf. M.A. Sanchez, *Self-Determination and the Falkland Islands Dispute*, *Columbia Journal of Transnational Law*, vol.21 [1983], p.577ff.). On the differences between Hong Kong, the Falklands and Gibraltar in this respect cf. S.C. Roy, *The Hong Kong Agreement: An Assessment*, *China Report*, vol.21 (1985), p.169f.

¹² Lisbon Statement of April 10, 1980 (Parliamentary Papers, H.C. 1980-1, Paper 166 i, p.4): "The British Government will fully maintain its commitment to honour the freely and democratically expressed wishes of the people of Gibraltar as set out in the preamble to the Gibraltar Constitution". Cf. also Lord Carrington, Secretary of State for Foreign and Commonwealth Affairs, H.C. Debs., vol.416, col.766: January 28, 1981 (BYIL vol.52 [1981], p.386).

into an agreement with another power to terminate sovereignty as from a certain specific date"¹³. Does there exist a "people of Hong Kong" as a subject of a (defensive) right to self-determination¹⁴ or is the Hong Kong people's right to self-determination only a part of the right to self-determination of the entire Chinese people¹⁵? For those who consider also the (defensive) right to self-determination as a rule of *jus cogens* the question might arise whether the Joint Declaration is not null and void in the light of Art.53 VCLT. Nevertheless it is doubtful whether in the case of Hong Kong such a (defensive) right to self-determination exists because Hong Kong has never been a "State" and the UK is under the obligation to restore at least the New Territories to China in 1997. The British Government has also acknowledged that the remaining portion of Hong Kong will "not be viable alone". The Government of the PRC insisted that the settlement of the question of Hong Kong was a matter of Chinese sovereign right and that, as a consequence, Hong Kong should not be included in the list of colonial territories referred to in the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples.

However, even if the situation of Hong Kong was considered in the light

¹³ Sir Geoffrey Howe (note 3), p.753. Although the Hong Kong Act is "different from an independence Act", similar provisions are necessary.

¹⁴ Cf. on these questions the systematic study by D. Murswiek, *Offensives und defensives Selbstbestimmungsrecht. Zum Subjekt des Selbstbestimmungsrechts der Völker*, *Der Staat*, vol.23 (1984), p.523 ff.

One may argue that the UK was under the duty to restore the New Territories, but only within the limits of public international law. If public international law grants to the people of colonies a right of self-determination on the question whether it should become independent, or part of the sovereign who has leased the territory or even remain under the jurisdiction of the lease-holder then one might well query the legality of the whole agreement. The right of self-determination is considered to be the right of the "people" of a distinct territorial unity or even of individuals (human right) in the light of Art.1 sect.1 of the UN Covenant on Civil and Political Rights and of the UN Covenant on Economic, Social and Cultural Rights of December 19, 1966. This right is considered as *jus cogens* (cf. J.A. Frowein, *Jus Cogens*, in: *EPIL*, Instalment 7 [1984], p.328). If a "unity" as e.g. Berlin is considered as being a sufficiently objective element to create a right of self-determination of the population of Berlin or even Berlin (West) (cf. K. Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts* [1974], p.44 ff.), it cannot be refused to the population of colonies like Hong Kong. This is all the more true if the right of self-determination as a human right gives individuals the right to "constitute" a "people" (the right to be "apart") and to exercise thereby the most elementary form of self-determination (cf. W. Wengler, *Das Selbstbestimmungsrecht der Völker als Menschenrecht*, in: *Vorträge, Reden und Berichte aus dem Europa-Institut*, No.76 [1986], p.10 ff.).

¹⁵ This is the view of the Government of the PRC (part 1 of the Joint Declaration) according to which the recovering of the Hong Kong area is the common aspiration "of the entire Chinese people".

of the UN Decolonization Resolution 1514 (XV), the conflict between the two principles of self-determination and territorial integrity remains obvious. According to para.5 of this Resolution "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 people of those territories, without any conditions or reservations in accordance with their freely expressed will and desire ...". But para.6 states that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". Para.6 was applied to Gibraltar (Res.2353 (XXII))¹⁶ and it is obvious that the argument would also apply to Hong Kong. The point is that the UK insisted to hold a referendum in Gibraltar and that the General Assembly of the UN declared this referendum to be in contravention of its Res.2231 (XXI). But the fact remained "that the Gibraltarians had been given an opportunity to exhibit their aspirations and desires to the view of the entire world and that they had done so in an unmistakable fashion"¹⁷.

3. Some Open Questions

There arise some questions in relation to problems of public international law for which there exist no ready-made answers. First question: Is this Joint Declaration a kind of model treaty with respect to so-called unequal treaties? It is obvious that the technique altogether of the agreement – declarations on both sides – is but a means to rule out different views on fundamental legal questions such as the validity of the unequal treaties. At least since 1949¹⁸ China has ever again asserted that the three

¹⁶ "Any colonial situation which partially or completely destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the U.N. and specifically with paragraph 6 of GA Res.1514 (XV)". This argument has played also some role in the discussion of the Falkland question; cf. J. H o u b e r t, *The Falklands: A Hiccup of Decolonization, Current Research on Peace and Violence* (1982), p.8: "It is ironic that a Colonial Power is able to use the very principle of self-determination, the weapon of the nationalists, to perpetuate a colonial situation".

¹⁷ Howard S. L e v i e, *The Status of Gibraltar* (1983), p.113. It is interesting to compare the suggested solution of Levie for the Gibraltar question (p.117ff.) with the solution in the Joint Declaration on Hong Kong. On the forms of "participation" of the population of Hong Kong in treating their own affairs after 1997 cf. K a u l (note 1), p.2; L. R a y n e r, *ASEAN and Hong Kong, The Round Table*, No.292 (1984), pp.383 ff., 388.

¹⁸ Cf. D i c k s (note 1), p.427f.

treaties with Britain¹⁹ are unequal and not binding her. In 1982 the PRC stated: "Hong Kong is part of Chinese territory. The treaties concerning the Hong Kong area signed between the British Government and the Government of the Qing dynasty of China in the past are unequal treaties which have never been accepted by the Chinese people. The consistent position of the Government of the PRC has been that China is not bound by these unequal treaties and that the whole Hong Kong area will be recovered when conditions are ripe"²⁰. The doctrine of the legal invalidity of unequal treaties has not been generally accepted as a rule of public international law²¹. It is impossible to classify treaty conditions, in particular those in peace treaties, according to the equality or inequality in the bargaining power of the parties and the benefits and burdens created by the treaty itself. Despite the opposite view of some Chinese and Soviet jurists²², there is no such rule in public international law demanding that

¹⁹ The Treaty of Nanking, signed on August 29, 1842 (ratified on June 26, 1843). The full text in: *Treaties, Conventions etc. between China and Foreign States: China, the Maritime Customs III – Miscellaneous Series, No.30, vol.1* (2nd ed. 1971), pp.351–356. According to Annex III of the Treaty of Nanking, the "Emperor of China cedes to ... the Queen of Great Britain ... the island of Hongkong, to be possessed in perpetuity by the Britannic Majesty, Her Heirs and Successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain shall see fit to direct".

In the first Convention of Peking of October 24, 1860 the Emperor of China "agrees to cede ... that portion of the township of Cowloon, in the Province of Kwang-tung of which a lease was granted in perpetuity ..." (text in *Customs, vol.1*, pp.429–434). The acquisition of the New Territories (lease for 99 years) took place in the second Convention of Peking of June 9, 1898 (cf. Dicks [note 1], p.446).

²⁰ Quoted in Dicks, *ibid.*, p.428. Cf. also S.L. Karamanian, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, *Texas International Law Journal*, vol.20 (1985), p.185f.

²¹ For a discussion see W. Morvay, *Unequal Treaties*, in: *EPIL, Instalment 7* (1984), p.514 with further references; P. Wesley Smith, *Unequal Treaty 1898–1997, China, Great Britain and Hong Kong's New Territories* (1980); H.G. Tanneberger, *Das Verhältnis der Volksrepublik China zum Völkerrecht – unter besonderer Berücksichtigung der historischen Erfahrungen des Landes mit den sog. »ungleichen Verträgen« seit dem Frieden von Nanking (1842) und der eigenen Vertragspraxis gegenüber den sechs asiatischen Staaten (Afghanistan, Birma, Ceylon, Indonesien, Nepal, Pakistan)* (1974); A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd ed. 1984), p.479. Cf. also K.A. Greenberg, *Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?* *Fordham International Law Journal*, vol.7 (1984), p.534; *News-ham* (note 1), p.253ff.

²² Cf. the references in H. Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in: *China's Practice of International Law* (1972), pp.239–267; A.N. Talalaev/V.G. Boyrshinov, *Unequal Treaties as a Mode of Prolonging the Colonial Dependence of the New States of Asia and Africa*, *Soviet Yearbook of International Law* 1961, pp.156–170 (in Russian with English summary). Further references in Dicks (note 1), p.434; Landry (note 1), p.253, and Tso, *The Legal Implications of*

there must be a "balance" or "equality" of the treaty obligations for both sides. Therefore unequal treaties do not become invalid on account of the "unequality" of rights and duties of the contracting parties but on account of the conditions that actually lead to such material inequalities, e.g. coercion of a State by the threat or use of force, this being admitted in Art.52 of the VCLT²³ which does not use the term "unequal treaties". Any discussion of the problem along the lines of the VCLT should keep in mind that the VCLT does not have a retroactive effect and that in the 19th century threat – and even war – was considered a legally admissible instrument of national policy. This legal situation was changed only by the Covenant of the League of Nations and, in particular, by the Briand-Kellogg Pact²⁴.

As no agreement could be reached on the question of the invalidity of the treaties, the legal technique resorted to (diverging declarations of each party in a joint document) did not settle the dissent which also includes the question whether there is a "transfer" of sovereignty at all²⁵. In Germany the controversy on the validity of the Munich Agreement of 1938²⁶ led to the Treaty of Prague of December 11, 1973²⁷ which settled the question of the invalidity only "under the present Treaty" between the Federal Republic of Germany and Czechoslovakia leaving e.g. nationality unaffected²⁸. No agreement was reached as to a retroactive nullity of the Munich Agreement. The same is true for the Joint Declaration. It becomes clear from the text that for the PRC the measures taken by the authorities of the Crown

the Sino-British Treaties Regarding Hong Kong, *Loyola of Los Angeles International and Comparative Law Annual*, vol. 4 (1981), pp.111–136.

²³ If Art.52 of the VCLT had been in force in 1842 or in 1860 two of the three treaties from which the British claim to sovereignty over Hong Kong is derived would have been – according to Dicks, *ibid.*, p.435 – null and void.

²⁴ Landry, (note 1), p.253. On the question of the non-retroactive effect of the VCLT cf. Art.4 VCLT and Greenberg (note 21), p.549; cf. also L.A. Castle, *The Reversion of Hong Kong to China: Legal and Practical Questions*, *Willamette Law Review*, vol.21 (1985), pp.327ff. (330).

²⁵ Landry (note 1), p.253 note 22.

²⁶ The Four Power Munich Agreement (Hitler, Mussolini, Chamberlain, Daladier) of September 30, 1938 on the cession from Czechoslovakia to Germany of the »Sudeten« territory, initiated by a German ultimatum, was communicated to the Czechoslovak Government which replied that it would comply with the terms agreed upon "without us and against our will". Cf. T. Schieder, *Munich Agreement*, in: EPIL, Instalment 3 (1982), p.285.

²⁷ Treaty of Prague of December 11, 1973, ILM vol.13 (1974), p.19ff.; cf. D. Blumenwitz, *Der Prager Vertrag* (1985), with further references.

²⁸ On the consequences of this "agreed and limited" nullity of the Munich Agreement see Blumenwitz, *ibid.*, p.63ff.

Colony are valid and so are the legal rights and attained positions despite the argument of the "invalidity" of the three treaties.

Other questions are: Is the Joint Declaration a model for the unification of Taiwan with China²⁹? Is this treaty a kind of model of a "one-country – two-systems" approach, a kind of "special joint venture" of capitalism and communism with an international commitment in relation to the internal structure of this region? The RoC rejected this prospect and the underlying idea of "one country, two systems" from the beginning as a "political plot" of the Chinese Communists³⁰. Since both Chinese Governments, the Government of the Republic of China (Taiwan) and the Government of the PRC claim to be the Government of the one and only country, the question may arise whether the UK – from a legal point of view and viewed through the eyes of the Government of the RoC – concluded this treaty with the legitimate Government of China.

What is – from a political point of view – the actual significance of sovereignty if essential parts of the internal order are, in connection with the "transfer of sovereignty", withheld from the disposal of the sovereign? The practice of international agreements can substantiate by more than one example that despite the solemn declaration of sovereignty by one of the parties full sovereignty was not granted or was not achieved³¹. Nevertheless from a legal point of view it is fairly likely that the PRC will have full sovereignty over the entire Hong Kong area as from July 1, 1997, as after that date "Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong"³². For this reason the legal situation cannot be compared to that where "certain rights and responsibilities" are retained or preserved in relation to the restoration of "full" sovereignty to the other party³³. If the PRC fails to fulfil the obligations concerning the future internal order of Hong Kong, this would simply be a breach of an international treaty such as the Joint Declaration, but no interference with the UK's internal sphere implying that some sovereignty of the UK is preserved.

²⁹ Cf. Hungdah Chiu, *The 1984 Sino-British Agreement on Hong Kong and its Implications on China's Unification, Issues and Studies*, April 1985, pp.13 ff., 19ff.

³⁰ FBIS, China, October 5, 1984, p.5 (quoted by Chiu, *ibid.*, p.14 note 4).

³¹ A well known example of such a recognition of "sovereignty" without full legal substance was the British-Egypt Treaty of August 28, 1936. Cf. W. Kewenig, *Grenzen der Souveränität*, in: *Außenpolitische Perspektiven des westdeutschen Staates. Das Ende des Provisoriums*, vol.1 (1971), p.144.

³² Art.1 para.1 of the Hong Kong Act 1985.

³³ Cf. Art.2 of the Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952 (October 23, 1954), *AJIL* vol.49 (1955) Suppl. p.57.

What will be the consequences then if the PRC does not comply with Part 3 of the Joint Declaration concerning the elements of the basic policies regarding Hong Kong, especially the maintenance of the current social and economic systems and the guarantee of rights and freedoms laid down in sect.5 of Part 3? It is obvious that this kind of treaty – as e.g. also the Treaty on the Basis of Relations between the Two German States³⁴ – leaves hardly any possibility for suspension or termination of the treaty in case of breach³⁵, nor for the automatic recovery of sovereignty (*status quo ante*) through the UK³⁶. Executed treaties (*traités exécutés*) may be terminated if a material breach of their provisions becomes evident, but this termination does not change the territorial status nor sovereignty of the ceded territory³⁷. On the other hand neither the PRC nor the UK could refer to a fundamental change of circumstances after the date of the conclusion of the treaty in support of a termination or suspension of the Hong Kong Agreement. As this is a territorial treaty which establishes a boundary (Art.62, sect.2, *lit.* a VCLT) and a territorial status³⁸ until the year 2047, it is not possible for the PRC to argue in the future that by reason of a fundamental change of circumstances (whatever these may be) the clauses of the Joint Declaration, in particular Part 3 related to the internal structure of the

³⁴ Of December 21, 1972, ILM vol.12 [1973], p.16ff.; cf. B. Simma, *Der Grundvertrag und das Recht der völkerrechtlichen Verträge*, Archiv des öffentlichen Rechts, vol.100 (1975), p.4ff. The situation can be compared with the recognition of a State by treaty. If the State violates provisions of the treaty; the suspension or termination does not revoke the recognition.

³⁵ Suspension and termination are legally possible if a material breach of the treaty occurs (cf. E. Klein, *Statusverträge im Völkerrecht*, Rechtsfragen territorialer Sonderregime [Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.76] [1980], p.254ff.) but State practice demonstrates that often such a breach was tolerated due to the factual situation (Klein, *ibid.*, p.257).

³⁶ Cf. Klein, *ibid.*, p.239 note 220. Even under those circumstances it is doubtful, in the light of the principle of self-determination whether the UK could ever regain a title for the recovery of sovereignty over the Crown Colony (except the New Territories).

³⁷ According to Art.70 sect.1 (b) VCLT the termination of a treaty “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. Evrigenis pointed out, that the words “legal situation of the parties created through the execution of the treaty” applied to any legal situation all the conditions of which had been fulfilled by the execution of the treaty prior to the termination, and that “subsequent non-execution of the treaty ... did not have the automatic effect of reversing that situation” (A/CONF.39/11, p.447, quoted in Klein [note 35], p.302).

³⁸ Whether also for treaties “establishing territorial status” the application of *rebus sic stantibus* is excluded, is a matter of dispute. The inclusion in Art.62 sect.2 was rejected because of the vagueness of the notion “territorial status” (cf. Klein, *ibid.*, p.289ff.).

SAR Hong Kong, must be renegotiated or changed in the light of Art.62 VCLT³⁹.

Another question of some importance in this context is whether in the Hong Kong Agreement there are any elements of a guarantee treaty under public international law. There are many examples of international guarantees concerning domestic legal circumstances⁴⁰. The legal history of Germany reveals e.g. that parts of its internal constitutional structure have often been regulated and in some way been guaranteed by external powers⁴¹. The Quadripartite Agreement on Berlin of September 3, 1971 may also be regarded as a kind of collective guarantee of a complicated legal situation in that city⁴². Can the Joint Declaration be compared with these agreements?

4. *The Legal Nature of the Joint Declaration*

Although the document is called a "Declaration" there is no doubt that it is an international agreement as any other international treaty between States. The international juridical effect of a treaty does not depend on the name given to the document⁴³. Nevertheless, the agreement which is composed of different unilateral declarations of the parties and which in substance is but a promise of each respective party in relation to the other, represents a fairly special technique. Irrespective of the fact that it is a joint declaration and that all declarations in this agreement are connected in a

³⁹ Cf. Waldock, YILC 1966, vol.1 part I, p.86: "... treaties of that type were intended to create a stable position. It would be inconsistent with the very nature of those treaties to make them subject to the *rebus sic stantibus* rule". Further references in Klein (note 35), p.292ff.

⁴⁰ As to the notion of guarantee, cf. G. Röss, Guarantee Treaties, in: EPIL, Instalment 7 (1984), p.109ff.

⁴¹ H. Steinberger, Einflüsse der Ostverträge auf Deutschland als Ganzes, in: «Finis Germaniae?» (eds. v. Münch/Oppermann/Stödter) (1977), p.265; cf. also A.M. de Zayas, Peace Treaty of Westphalia 1648, in: EPIL, Instalment 7 (1984), p.536.

⁴² Cf. para.4 of the Final Protocol of June 3, 1973, to the Agreement. The three Western Powers and the Soviet Union undertook "to ensure the observance of the commitments undertaken on behalf of the Federal Republic of Germany and the German Democratic Republic, respectively". Cf. H. Schiedermaier, Der völkerrechtliche Status Berlins nach dem Viermächte-Abkommen vom 3. September 1971 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.64) (1975), p.185ff.

⁴³ Cf. Chiu (note 29), p.14, who cites in this respect Art.4 of the Harvard Research in International Law. Cf. also Kaul (note 1), p.3; S.L. Karamanian, Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong, Texas International Law Journal, vol.20 (1985), pp.167ff. (181).

synallagmatic form, this special technique, which has also been resorted to by the Soviet Union and the three Western Powers in the Berlin Agreement of 1971, gives each party the opportunity to reserve its particular legal opinion in drafting its respective declaration⁴⁴. The reason for this technique may also be seen in the fact that in the first three parts the unilateral declarations are to be found, whereas the substance of the Declaration is only at the disposal of one party (as e.g. the restoration of Hong Kong to the PRC through the Government of the UK with effect from July 1, 1997).

In this respect the wording of the first two parts of the Joint Declaration is of some interest. The different legal status of the three parts of Hong Kong, i.e. the Hong Kong Island, Kowloon and the New Territories, is in no way mentioned in the declarations. The Island of Hong Kong and Kowloon were ceded by China to Great Britain for all times in the Treaty of Nanking and the first Peking Convention, whereas the New Territories were leased in the second Peking Convention of 1898 for 99 years until 1997. In Part 1 of the Joint Declaration the Government of the PRC declared that it had decided "to resume the exercise of sovereignty"⁴⁵ over Hong Kong, i.e. of all three parts, with effect from July 1, 1997. This declaration is an expression of the Chinese view of the validity or better: invalidity of the unequal treaties of Nanking and Peking⁴⁶. Although the UK does not recognize this legal view by its declaration in Part 1, it is surprising that in the text of the declaration the UK refers to the "restoration" of Hong Kong to the PRC rather than to a transfer of sovereignty. The UK has to restore on that date only the New Territories. The use of one single term in relation to Hong Kong as a whole could be considered as in some way slightly recognizing the well-foundedness of the PRC's claims in relation to the so-called unequal treaties. However, in my view it appears more consistent to interpret this in such a way that both declarations, Parts I and II, reflect the underlying and continued dissent on the

⁴⁴ On this special technique cf. Schiedermaier (note 42), p.64ff.

⁴⁵ Also according to Landry (note 1), p.253, the words "upon resuming the exercise of sovereignty" appear to be a diplomatic solution to the problem of avoiding either the British or the Chinese position regarding the history and legal status of Hong Kong. On the historical background cf. Karamanian (note 43), p.168f.; Greenberg (note 21), p.535f. On the economic situation and effects cf. L. Dunn, *Hong Kong after the Sino-British Declaration*, International Affairs, vol.61 (1985), p.197ff.

⁴⁶ Dicks (note 1), pp.427ff., 441f.

legal question of whether a real "transfer"⁴⁷ of sovereignty or only a re-surrender of the exercise of a still existing sovereignty is stipulated⁴⁸. There can be no doubt that with effect from July 1, 1997, the sovereignty of China over the entire Hong Kong area will be restored and, as the British Hong Kong Act of 1985 puts it, British sovereignty and jurisdiction over Hong Kong will be ending. In this respect the Hong Kong Act is more precise than the Hong Kong Agreement. It provides for the termination of British sovereignty over ceded parts of Hong Kong and the termination of

⁴⁷ The word "cession", which was used in the Nanking Treaty and the first Peking Convention is carefully avoided, even if the whole legal procedure can only be interpreted as being a cession of the Island of Hong Kong and of Kowloon to the PRC. The idea that the UK renounces unilaterally on the exercise of sovereignty (cf. Art.1 sect.1 of the Hong Kong Act 1985: "As from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong") thus leaving for a logical second a *terra nullius* before the PRC establishes its own sovereignty does not meet the substance of the procedure because the UK "restores" the Hong Kong area to the PRC.

⁴⁸ Nevertheless, the PRC has for all practical purposes not objected to the exercise of British sovereignty of Hong Kong. The Chinese attitude may therefore be described "as one of acquiescence" (Dicks [note 1], p.439). The relationship between Hong Kong and the UK is of domestic character. The UK has not only concluded treaties and other international agreements which apply to Hong Kong but where Hong Kong as a separate territory has specifically been mentioned (GATT). The Hong Kong Government, acting with the "consent" of the UK Government directly has concluded not only agreements with foreign States but also with the Provincial Government of Guangdong (water supply etc.). The legislation of the PRC for certain fiscal and administrative purposes has treated the boundary between Hong Kong and China "as an international boundary" (Dicks, *ibid.*). Air traffic rights and regulations, rules on the flying of ship flags, legal and judicial acts under the law of Hong Kong "are recognized in the normal way in China" (Dicks, *ibid.*). On the other hand the Chinese legislation has to avoid to refer to Hong Kong as a foreign country. Dicks, *ibid.*, p.440, gives an example from the field of monetary law, of particular importance to the relationship between China and Hong Kong. The status of the currency issued by or on behalf of the British administration in Hong Kong has been recognized in Chinese legislation ever since 1949. At the same time, in China's foreign exchange control legislation, Hong Kong as a territory, although "external" to China, is separately mentioned together with Macao in such a way as to make it clear that it is not a "foreign country". In other matters, the PRC has enacted legislation "which appears to be applicable to Hong Kong or is at least equivocal in this respect". "The most important example is the Law on Nationality of the People's Republic of China, which contains provisions relating to persons born in foreign countries while making no mention of Hong Kong, leaving it to be inferred, in the light of the more usual legislative practice, that Hong Kong is to be included into China. If this is correct, the provision of Art.3, whereby China makes it clear that dual nationality is not recognized in relation to any Chinese national, appears to create a direct conflict with the British law of nationality as it has always been applied in Hong Kong (including the New Territories)" (Dicks, *ibid.*, p.440f.).

British jurisdiction over the whole territory⁴⁹. Is this sovereignty perhaps limited in so far as the Government of the PRC promised in Part 3 of the Joint Declaration to follow and implement specific elements of basic policies in relation to Hong Kong, policies which concern the internal legal structure of this area? There is no evidence in the Joint Declaration to the fact that the UK has retained parts of the sovereignty over the area of Hong Kong. The UK has only an obligatory right against the PRC, but has waived any further exercise of sovereignty. Therefore it is doubtful whether the UK could ever demand the re-restoration of sovereignty, even if the PRC does not comply with the obligation which it entered in Parts 2 and 3 of the Joint Declaration. The PRC would argue that even a termination of the agreement would not imply a restoration of sovereignty to the UK, as the UK was under all circumstances bound to restore sovereignty over all parts of Hong Kong to the PRC. The UK on the other hand would of course argue that this holds only for the New Territories and not for the other parts of the Hong Kong area and that there is no valid argument in international public law in favour of revising the results of so-called unequal treaties.

Therefore, the ending of the UK's sovereignty and the resuming of the exercise of sovereignty over Hong Kong by the PRC is definite and not limited. Treaty commitments do not limit sovereignty itself (the legal capacity to act), but simply are the expression of the sovereign's right to limit himself (the freedom to act within a State's capacity).

The technique used in the Joint Declaration is not new to an international lawyer because it has been resorted to often in the process of decolonization. The characteristic feature in this special case under consideration is however that Hong Kong does not become a new independent State with some obligations towards the mother country enshrined in a treaty of independence, but that a kind of treaty of cession (or in the eyes of the Chinese Government: a treaty of resumption of sovereignty) with another State was concluded. The value of such entrenched clauses as Part 3 of the Joint Declaration is a rather disputed one.

⁴⁹ The British position in the part has been quite clear. In September 1982 in connection with the meeting in Peking, the Prime Minister told the public that the UK "had not yet conceded sovereignty to China". She continued: "There are treaties in existence. We stick by our treaties unless we decide on something else. At the moment we stick by our treaties" (quoted in Dicks [note 1], p.427). On September 27, 1982 the Prime Minister, in Hong Kong, concluded: "But one point about the treaties, I believe they are valid at international law, and if countries try to abrogate treaties like that, then it is very serious indeed, because if a country will not stand by one treaty it will not stand by another treaty, and that's why you enter into talks ..." (Dicks, *ibid.*, p.428).

5. *The Hong Kong Special Administrative Region (SAR)*

a) The establishment of the Hong Kong SAR (in accordance with the provisions of Art.31 of the Constitution of the PRC⁵⁰) upon resuming the exercise of sovereignty over Hong Kong (i.e. as from July 1, 1997), has to be interpreted in the light of the maintenance of national unity and territorial integrity (Part 3 of the Joint Declaration). "National unity" means that there will be no special population or special nation of Hong Kong. For the PRC the "people of Hong Kong" is part of the "entire Chinese people" (Part 1 of the Joint Declaration). If the Hong Kong population enjoys nevertheless a special legal status, this raises the particular question of nationality which is dealt with in the two Memoranda and in the British Hong Kong Act of 1985. The Government of the PRC has declared in its Memorandum that under the nationality law of the PRC "all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories Citizens passport' or not, are Chinese nationals. Nevertheless, they may use travel documents issued by the Government of the U.K. for the purpose of travelling to other states and regions". The Chinese Memorandum made it quite clear that these Chinese nationals "will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the PRC on account of their holding of British travel documents"⁵¹. On the other hand, the UK Memorandum (item d) made it clear that those who have obtained or been included in passports issued by the Government of the UK "will be entitled to receive, upon request, British consular services and protection when in third countries". Since it becomes clear from the Chinese Memorandum that the PRC is not a third country in this respect⁵², it must

⁵⁰ PRC Constitution (adopted by the Fifth National People's Congress on December 4, 1982), cf. T. Hsia/K. Haun/C. Johnson, *People's Republic of China*, in: A. Blaustein/G. Flanz, *Constitutions of the World* (1983). A German translation is reproduced in *China Aktuell*, February 1983, p.121 ff. According to Art.31 of the Constitution of the PRC (*ibid.*) the State can, if necessary, establish special administrative regions. The systems in the SAR's shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions (cf. also Art.62 para.13 of the Constitution).

⁵¹ White Paper (note 8), p.31 ff. The two Memoranda only relate to physical, not to juridical persons.

⁵² Cf. on the question of diplomatic and consular protection in cases of dual nationality G. Röss, *Diplomatischer Schutz*, in: I. Seidl-Hohenveldern, *Lexikon des Rechts, Völkerrecht* (1985), p.54 ff. The principle of effective nationality has been generally recognized (cf. *Mergé Claim*, ILR vol.22 [1955], p.443).

be concluded that the British Government admitted that in relation to the PRC the effective nationality of these people is the Chinese one. Since the Chinese Memorandum only precludes the British consular protection in the Hong Kong SAR and other parts of the PRC, it is obvious that the PRC conceded that the UK will protect these Chinese nationals upon request in third countries. The respective third country may decide at its own discretion whether to admit the consular protection of the UK or of the PRC in regard to these persons⁵³. Since there is no mention of "diplomatic protection", it is not quite clear whether the same rules apply also to that kind of protection. It appears that there is no reason in this respect to differentiate between diplomatic and consular protection.

b) The Hong Kong SAR is incorporated in the "up-holding of territorial integrity". The Hong Kong SAR, therefore, is a part of the territory of the PRC despite the fact that the history of Hong Kong and its realities and the special exercise of executive, legislative and judicial powers in the Hong Kong SAR renders it a kind of territory with a special status. The Hong Kong SAR is not "an internationalized territory"⁵⁴, nor are sovereignty and territorial jurisdiction in the hands of different States. The Hong Kong SAR is part of the national territory of the PRC with effect from July 1, 1997, though with a special legal status according to the binding effect of the Joint Declaration. Although the Hong Kong SAR is not an independent entity under international public law, it will enjoy limited powers to conduct foreign relations⁵⁵. These limited powers have to be looked upon in the light of the clause according to which foreign

⁵³ A quite similar question is discussed in relation to those German nationals residing in the German Democratic Republic and seeking diplomatic protection by the Federal Republic of Germany in third countries; cf. Ress (note 9), p.212ff.

⁵⁴ The notion of "internationalization" is not very clear, cf. R. Wolfrum, *Die Internationalisierung staatsfreier Räume (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.85)* (1984), p.10f. Forms of co-imperium and condominium have been qualified as "internationalization" (cf. U. Nussbaum, *Rohstoffgewinnung in der Antarktis* [1985], p.58f.). The Hong Kong Agreement establishes neither the one nor the other. The UK does not continue to exercise territorial jurisdiction, but only a limited form of personal jurisdiction (BDTCs – now BNO).

⁵⁵ Cf. part 3 sects.9 and 10. According to sect.9, the Hong Kong SAR may establish "mutually beneficial" economic relations with the UK and other countries, whose economic interests in Hong Kong will be given due regard. It is obvious that the PRC can control the "mutual benefit" of any "relation" through the chief executive who will be appointed – and also recalled – by the Central People's Government. Sect.10 does not only provide the capacity to conclude agreements but also to issue on its own travel documents for entry into and exit from Hong Kong (immigration control; "present practice" of entrance regulations in relation to other parts of China – cf. Annex I Art.XIV). Landry (note 1), p.254 note 26,

affairs of the SAR in general are under the responsibility of the Central People's Government. Nevertheless, under the name of "Hong Kong China" it has a status which is similar to or even goes beyond that of States within a federal State⁵⁶ – e.g. the right to conduct its own relations and agreements with States, regions and international organizations in "appropriate" fields including the economic, trade, financial and monetary areas⁵⁷, participation in international organizations and conferences which are not limited to States⁵⁸. Whether international organizations will recognize these special capacities of "Hong Kong China" is doubtful, or at least cannot be automatically derived from the Joint Declaration (*pacta tertiū nec nocent nec prosunt*). The exceptions to the "moving treaty frontiers rule" (see below) require acceptance by the other parties. It will depend on a careful analysis of every international treaty and international organization whether Hong Kong, after having changed its legal status from a British Crown Colony to a Chinese SAR, is able to continue participation or to maintain its former legal status⁵⁹. It makes a great difference for all parties of a treaty as e.g. of GATT whether under British responsibility the treaty applies to Hong Kong as a British Crown Colony or under Chinese responsibility to a Chinese SAR. Meanwhile, in accordance with these regulations, Hong Kong has become on April 23, 1986 a contracting party under Art. XXVI, 5 (c) GATT, by declaration of the UK. The same day, the People's Republic of China notified to the GATT Secretariat that Hong Kong shall remain a member of GATT after July 1, 1997 since "the Hong Kong Special Administrative Region will meet the requirements for a customs territory to be deemed to be a CONTRACTING PARTY as prescribed in GATT Article XXVI, 5 (c), to be deemed to be a contracting

evaluates these powers as being "substantially comparable to those currently enjoyed by Hong Kong"; cf. also *Miners* (note 10), p.283.

⁵⁶ Cf. the respective provisions of the Constitution of the Federal Republic of Germany (Art.32 Basic Law).

⁵⁷ Cf. Joint Declaration, Part 3 sect.10 Annex I Art.XI. The capacity to maintain treaty relations shall include "participation in the GATT through which Hong Kong enjoys most-favored-nation status in its major markets" (*Landry* [note 1], p.254 note 27). Cf. also Annex I Art.3.

⁵⁸ Annex I Art.XI.

⁵⁹ This is true at least for all those treaties implemented in Hong Kong but to which the PRC is not a party. These treaties "may remain implemented in the SAR" (Annex I Art.XI) – but this does not only depend on the PRC but also on the decision of the parties to the treaty. On the renewal or amendment of Air Service Agreements actually in force in Hong Kong see Annex I Art. IX (renewal only "in principle" and bound to "specific authorisations from the Central People's Government). Cf. *Karamanian* (note 43) p.177s.

party to the General Agreement on Tariffs and Trade"⁶⁰.

The establishment of the Hong Kong SAR as a part of the basic policies "will remain unchanged for 50 years" (Part 3, sect.12). Therefore in 2047 China will be free from internationally binding commitments in relation to the internal legal structure of that region⁶¹. This situation may also have its bearing on the decision of third States to grant Hong Kong China the continuation of treaty relationships.

c) During these 50 years the Hong Kong SAR will "enjoy a high degree of autonomy" (except in foreign and defence affairs which are the responsibilities of the Central People's Government) (Part 3, sect.2). The Hong Kong SAR will have its own executive, legislative and independent judicial power including that of final adjudication, and the laws currently in force in Hong Kong will remain basically unchanged. Moreover, the current social and economic systems in Hong Kong will remain unchanged, and so will, according to sect.5 of Part 3, "the life style". The rights and freedoms, and even private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by the law. It is obvious that parts of the Western "capitalist" approach to individual fundamental rights and freedoms have been accepted for this part of the Chinese territory by the PRC.

⁶⁰ Cf. the declaration of the UK in GATT Press Release, April 4, 1986 (GATT/1384) and the communication from the PRC in GATT: L/5987, April 24, 1986. The GATT regulations have been applied to Hong Kong by the UK since 1948, and representatives of Hong Kong have participated for a long time as part of the British delegation in GATT meetings. The procedure under Art.XXVI, 5 (c) GATT is the more attractive as it does not involve any new negotiations and does not presuppose a "sovereignty" of Hong Kong. Since the PRC is negotiating now to "resume" its status as a contracting party (the membership of China came to an end 1950 by declaration of the Chinese Government in Taiwan), and since Portugal could issue a similar declaration with respect to Macao, it cannot be excluded that the PRC will be represented in the near future three times in the GATT, for the procedure according to Art.XXVI, 5 (c) provides: "If any of the customs territories, in respect of which a contracting party has accepted this agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement, such territory shall, upon sponsorship to a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party". Cf. also *infra* note 82.

⁶¹ Landry (note 1), p.253, advocates that the capitalist structure of the Hong Kong SAR will operate "at least" until June 30, 2047. The continuation might be possible, but there exists until now no legal obligation for the PRC to do so. A continuation of the capitalist status of the Hong Kong SAR after 2047 on the own initiative of the PRC without any international agreement or commitment would hardly attract foreign investors in the same way as before. The situation would perhaps be different if after 2047 the PRC entered an international commitment by a unilateral act addressed to the UK or to the GA of the UN.

For the period of transition until June 30, 1997, the Government of the UK is responsible for the administration of Hong Kong "with the object of maintaining and preserving its economic prosperity and social stability". The Government of the PRC has promised to give its co-operation in this connection (Part 4 of the Joint Declaration). To ensure "a smooth transfer of government in 1997", a Sino-British Joint Liaison Group is set up according to Annex II of the Joint Declaration.

6. *Some Specific Problems*

It is not possible to enter into all details of the interpretation of each of the clauses of the Joint Declaration, especially of all sub-sections of Part 3 and of Annex I of the Declaration. I will deal only with some basic problems of the whole arrangement.

a) Continuation of West-European liberalism?

First of all it is rather unusual for a socialist or communist State to declare that "the socialist system and socialist policies shall not be practiced" in a part of its national territory, i.e. "in the Hong Kong SAR and ... Hong Kong's previous capitalist system and life style shall remain unchanged for 50 years". According to Art.1 of the Constitution the PRC is a socialist State "under the people's democratic dictatorship". The socialist system is the basis of the PRC and any sabotage of the socialist system by an organization or individual is forbidden. Which guarantee is there for the legal system of the Hong Kong SAR to preserve its specific West-European liberal elements?

b) No specific provision for the settlement of disputes

Other international agreements as e.g. the Quadripartite Agreement on Berlin of 1971 contain clauses on the establishment of special committees or special procedures for the event of disputes relating to the implementation of the agreement. It is one of the striking facts that the Joint Declaration does not contain any such particular rules for the settlement of disputes or for the establishment of some sort of observatory commission until the year 2047. The Joint Liaison Group whose main task is to ensure a smooth transfer of government in 1997 and only at a second stage "the effective implementation of this Joint Declaration" (Part 5) shall continue its work only until January 1, 2000 (Part 8 of Annex II). Even though the PRC may have a particular interest in demonstrating that it is not only law-

abiding and a trustworthy party to international agreements, but also that the Hong Kong Agreement can serve as a model treaty for a solution to the "Question of Taiwan", it is nevertheless obvious that "in case of negotiating a settlement on a dispute relating to the application or interpretation of the Joint Declaration, the U.K. is in an unfavourable position". This is so because, despite the lengthy content of the documents, the Declaration contains certain subtle grey areas, weak in nature, that would allow the PRC to manoeuvre its application without literally violating the Declaration⁶².

The PRC seems to reject third party adjudication in the settlement of international disputes, at least in relation to inherited commitments from previous Chinese governments. It does not accept the jurisdiction of the International Court of Justice and refuses to recognize the validity of the Republic of China's acceptance of this Court's jurisdiction in 1946⁶³. Therefore it appears highly expedient for the UK and the PRC to agree to the continued existence of the Sino-British Joint Liaison Group beyond January 1, 2000. The question may be raised which specific interest the PRC might have in seeing such a mixed commission continue its work, as it does not have any obligation to do so. The main reason is presumably that the PRC has an interest in demonstrating its readiness to fulfil promptly and strictly all the terms of the Joint Declaration until the year 2047. It is also conceivable that third States or international organizations in which Hong Kong China's membership is considered expedient might require the establishment of such procedures to ensure the fulfilment of the obligations through Hong Kong China⁶⁴. Another reason may be that the establishment of such a commission especially with respect to boundary treaties is a common institution to resolve disputes⁶⁵ and may be regarded as an expression of the obligation under the Charter of the UN.

The existing regulation is characterized by a step-by-step diminishing influence of the UK also with respect to the Joint Declaration and its Annexes. Until 1997 there is the Sino-British Joint Liaison Group which has to ensure a "smooth transfer of government" in 1997 (with the regulation in Part 4 of Annex II which provides for an intensification of the

⁶² Chiu (note 29), p.15.

⁶³ Cf. the references by Chiu; *ibid.*

⁶⁴ The UK perhaps might not be interested in such an arrangement because she would be brought in a kind of guarantor position.

⁶⁵ Cf. the examples in G. Ress, *The Delineation of Frontiers in International Treaties and Maps*, in: *National and International Boundaries, Thesaurum Acroasium*, vol.14 (1985), p.433ff.

Chinese influence after the first half of the period between the establishment of the Joint Liaison Group and July 1, 1997)⁶⁶. After that date during the post-transitory phase the Joint Liaison Group will continue to work until January 1, 2000. From the expiry of that date until the end of the 50 years period there is no instrumentalized British influence on the implementation of the Joint Declaration.

It becomes obvious (not only from sect.12 of Part 3 of the Joint Declaration, but also from the regulation in Annex III on land leases) that June 30, 2047 is the date where all obligations relating to the internal structure of Hong Kong come to an end. After that date the PRC is free to change all the basic policies set forth in Part 3 of the Joint Declaration, even to abolish Hong Kong as a SAR. Nevertheless the establishment of such a unit with a specific, though limited foreign relations power may – and probably will – create international obligations towards third States which may call for a further transitory period provided that there is no explicit limitation to the year 2047 of all specific rights and obligations in agreements concluded by Hong Kong China.

c) The “high degree of autonomy”

Although granting a “high degree of autonomy” is an international obligation of the PRC⁶⁷, it has also to be interpreted with a view to the regulations of the Joint Declaration itself. It has been argued⁶⁸, that the Joint Declaration itself contains many regulations which may raise serious doubt concerning the durability and credibility of such autonomy. The Basic Law of the Hong Kong SAR will be stipulated by the National People’s Congress of the PRC⁶⁹. In this NPC of the PRC, Hong Kong will have only some 40 delegates from a total of 3,400 delegates. The Standing Committee of the NPC has the power “to interpret statutes”. The high degree of autonomy therefore does not embrace neither the competence to legislate nor to interpret the elements of the basic policy contained

⁶⁶ Within the period up to 1997 para.3 of the Schedule of the Hong Kong Act 1985 allows Hong Kong to adopt local laws to replace those UK enactments which currently form part of the law of Hong Kong, e.g. civil aviation and shipping. Hong Kong may make laws “having extra-territorial operation”, for instance in connection with air piracy and regulations for shipping. In 1997 Hong Kong laws must be “self-contained” (Sir Geoffrey Howe [note 3], p.740).

⁶⁷ Part 3 sect.2 Joint Declaration.

⁶⁸ Chiu (note 29), p.17.

⁶⁹ Joint Declaration, Part 3 sect.12.

in the Basic Law of the Hong Kong SAR. Chiu has concluded that under such circumstances the so-called "high degree of autonomy" is at the mercy of the NPC and thus without credible guarantee⁷⁰. The term "autonomy" does not mean that the Hong Kong SAR, being vested with executive, legislative and independent judicial power, including that of final adjudication, will have the competence of final decisions in all legislative matters. This also applies to the laws previously in force in Hong Kong which will be preserved except those that eventually are contrary to the Basic Law⁷¹. If they are in contrast to the Basic Law, the Standing Committee of the NPC can annul them⁷². A quite interesting question in this context is: What are the relationships between the power of the Standing Committee to interpret the statutes and the competence of the Hong Kong courts for final decision? Since there is a commitment of the PRC to regard final adjudication really as final, there is no supervisory power of the judiciary. Therefore the Standing Committee cannot annul judicial decisions.

It has been argued that the Standing Committee of the NPC which has the power "to annul those local regulations or decisions of the organs of state power of ... autonomous regions ... that contravene the constitution, the statutes or the administrative rules and regulations" has therefore also the power to annul laws and regulations of the Hong Kong legislative. This is true, but on the other hand, the Standing Committee of the NPC has also to interpret the provisions of the Basic Law (which is not yet promulgated) in the light of the Joint Declaration. The Joint Declaration has incorporated fundamental rights and freedoms according to the Western liberal approach (separation of State and society instead of their socialist identity)⁷³. The interpretation of the Basic Law by the Standing

⁷⁰ Ibid., p.17.

⁷¹ Annex I Art.II para.1; in Hong Kong various sources of law are in force, e.g. common law, ordinances, subordinate legislation etc. Cf. Penlington, *Law in Hong Kong* (1978), p.14.

⁷² Cf. Chiu (note 29), p.18. The Standing Committee can also annul new laws of the Hong Kong SAR. According to Annex I Art.II para.2 the Hong Kong legislation may on its own authority enact laws "in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid".

On the question of the superiority of final judicial decisions in Hong Kong cf. Castle (note 24), p.340.

⁷³ Cf. Art.XIII of Annex I. Even the provision of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

Committee has to be guided by this conception if the PRC is prepared to implement Part 3 of the Joint Declaration. It cannot be argued that the Standing Committee can annul all local Hong Kong regulations or decisions of the organs of State power just because they contravene, assessed formally and in an isolated manner, the Basic Law, any Chinese law or administrative rules or regulations. The point is that the Standing Committee itself has to take into account the provisions of the Joint Declaration. The same is true with respect to the power of the PRC's State Council (Cabinet) under Art.98 para.14. The State Council can interfere with the Hong Kong Government's administrative functions, because it has the power "to alter or annul inappropriate orders and decisions issued by local organs of state administration at different levels"⁷⁴. However, it cannot interfere on a merely discretionary basis, but only having regard to the Joint Declaration. In my view the expediency and appropriateness of the decisions and orders are part of the autonomy of the Hong Kong Government. The Standing Committee of the NPC has the power to exert a legal supervision (*Rechtsaufsicht*), but not a control of expediency (*Fachaufsicht*).

The status of the Hong Kong SAR differs in one respect considerably from the status of a State in a federal country. Art.I para.3 of Annex I of the Joint Declaration provides that the "chief executive of the Hong Kong SAR shall be selected by election or through consultation held locally and be appointed by the Central People's Government". This way of selection gives indeed the Central People's Government the final decision⁷⁵. The high degree of autonomy therefore is rather limited, which becomes clear from the text of the Joint Declaration and Annex I itself. However, the change of the status of this special administrative region is not only "an

Rights as applied to Hong Kong shall remain in force (para.4). Cf. the White Paper (note 8), p.42, on the reservation made by the UK in order to take account of Hong Kong's particular conditions. The conclusion that the Basic Law has to be interpreted in the light of the Joint Declaration – and therefore in the light of these guaranties of human rights – cannot be outweighed by the fact that Art.II of Annex I of the Joint Declaration itself refers to the Basic Law as the governing maxim. This reference does not put the Basic Law on an independent level; it remains submitted to an interpretation in the light of all the principles agreed upon between the parties in the Joint Declaration. Cf. on this question S. E. F i n e r, *Hong Kong 1997: When the Kissing has to Stop*, *The Political Quarterly*, vol.56 (1985), pp.262ff. (264); K a u l (note 1), p.6; C a s t l e (note 24), p.336.

⁷⁴ C h i u (note 29), p.18.

⁷⁵ C h i u, *ibid.*; cf. F i n e r (note 73), p.265f.; C a s t l e (note 24), p.338 note 77.

internal affair of China"⁷⁶ but, since this status is fixed in the Joint Declaration and in Annex I, it is an international affair of China and, as such, part of the bilateral relations between the UK and the PRC.

d) The military presence of the PRC

The defence of the Hong Kong SAR is the responsibility of the Central People's Government. Sect.12 of Annex I provides that military forces sent by the Central People's Government to be stationed in the Hong Kong SAR for the purpose of defence shall not interfere in the internal affairs of the Hong Kong SAR. The garrison of British armed forces will be withdrawn upon the transfer of governance⁷⁷. Chiu⁷⁸ has compared the development of Tibet under the PRC between 1950 and 1959 with the eventual development of Hong Kong. This historical background may raise doubts whether the military forces sent by the Central People's Govern-

⁷⁶ Chiu, *ibid.*, p.19, concludes from an article in the "People's Daily" that the Special Administrative Region and the high degree of autonomy are all "special favors" granted by the PRC's central authorities and there is no credible guarantee that it will not be changed in "appropriate time". The text in the People's Daily (Renmin Ribao on Special Administrative Regions, FBIS China, October 2, 1984, p.K 19, cited by Chiu, *ibid.*, p.18f.) may indicate this conclusion, because it states: "First of all, to safeguard China's sovereignty, unity, and territorial integrity is a basic principle we should adhere to in establishing special administrative regions. Our country should be a unified country. There is only one China in the world, and that is the People's Republic of China. It exercises sovereignty over its special administrative regions. Ours is a socialist country with the unitary system. It is not a federal country. The NPC is the supreme power organ of the state and its permanent body is the NPC Standing Committee. Both exercise the legislative power of the state. The State Council, that is central people's government, is the executive body of the supreme power organ of the state and the highest organ of state administration. The special administrative regions are local administrative regions under the unified central leadership. They are not member states. The relationship between the special administrative regions and the central authorities is one between localities and central authorities. They must exercise their powers within the limits of their authority as prescribed by the laws enacted by the NPC". Nevertheless, from a legal point of view, China is bound to observe the specific regulations in the Joint Declaration, and it would be a breach of treaty obligations if the NPC would enact laws contrary to Part 3 of the Joint Declaration. These elements are in any view no "special favors" but the fulfilment of international obligations. It is true that no credible "guarantee" (or any guarantee at all) in the legal sense of that notion exists. There is no third power guaranteeing the fulfilment of the Joint Declaration.

⁷⁷ The costs of the Chinese forces will be borne by the PRC. There is no indication in the Joint Declaration whether Hong Kong's inhabitants may be required to serve as conscripts in the People's Liberation Army.

⁷⁸ Chiu (note 29), p.19f.

ment will really abstain from interfering in the internal affairs of the Hong Kong SAR.

e) The position of the judges and common law

Another remarkable regulation is that although the executive and the administration should be composed of local inhabitants, this does not apply to the judiciary. According to Art.3 of Annex II "the power of final judgment of the Hong Kong SAR shall be vested in the court of final appeal in the Hong Kong SAR, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal".

This is the replacement of the jurisdiction of the Privy Council which so far has dealt with Hong Kong judicial affairs in the final instance. Up to now British common law was one of the main sources of law in Hong Kong. It was accepted by the Chinese Government that the courts "shall decide cases in accordance with the laws of the Hong Kong SAR and may refer to precedents in other common law jurisdictions". These precedents in other common law jurisdictions are – according to the legal history of the Hong Kong area – precedents especially of British courts. The common law system with its acceptance of the main features of a liberal, capitalist legal system, the freedom of contract, the freedom to sell and buy, the freedom to choose labour relations etc., could not be abolished without abolishing the main features of the "current social and economic system in Hong Kong" (sect.5 of Part 3 of the Joint Declaration). For the survival of the system for the next 50 years after 1997 it is therefore vital not to exclude the participation of judges trained in the application of the common law system⁷⁹.

f) International treaties: The "moving treaty frontiers rule"

It is commonly accepted as a rule of customary international law that apart from some exceptions territorial changes alter the treaty frontiers; but the régime of already existing treaties is itself not affected. If a territory undergoes a change of sovereignty for whatever reason, it passes from the

⁷⁹ The judges will be appointed by the chief executive who will act in accordance with the recommendation of an independent Commission, composed of local judges, persons from the legal profession and other eminent persons (Annex I Art.III). The removal of judges is made rather difficult (cf. L and ry [note 1], p.257).

treaty régime of the preceding State to that of the acquiring one⁸⁰. As H. Waldock⁸¹ stated the rule on moving treaty frontiers has two aspects: "The positive aspect is that the treaties of the successor state begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor state, in turn, cease automatically to apply in respect of the territory". Therefore it could normally be expected that treaties concluded by the UK and applicable in the Hong Kong area would automatically cease to be in force in this area as from July 1, 1997, which is the date of the transfer of governance, and that all treaties concluded by the PRC would be extended to Hong Kong. The moving treaty frontiers rule only provides for an exception in the case of those treaties which are specifically localized (e.g. granting fishery or navigation rights on a river or lake in the region). However, the parties to the Joint Declaration excluded (at least until 2047) some of the consequences from the succession of States. The rule on moving treaty frontiers does not form part of *jus cogens*, which means that States may agree otherwise. Furthermore, according to State practice and the prevailing doctrine, the moving treaty frontiers rule does not automatically apply to the acquisition of territorial sovereignty over dependent territories. The normal procedure is to settle this problem in the treaties themselves. This procedure has been followed in the Joint Declaration (Annex I, Art.XI, para.2). Nevertheless, third States parties to the treaties are not obliged automatically to accept new parties within their treaty relations. The Joint Declaration uses rather vague formulations (appropriate arrangements for the application to the Hong Kong SAR of international agreements to which the PRC is not a party) and refers to the participation in "an appropriate capacity" of Hong Kong in international organizations. Since the provisions of Art.XI of Annex I of the Joint Declaration do not have an effect *erga omnes* but require acceptance by third States there is a rather large field for complications and influence of third States in the future development of Hong Kong⁸².

⁸⁰ E. Klein, *Treaties, Effects of Territorial Changes*, in: EPIL, Instalment 7 (1984), p.473f.

⁸¹ H. Waldock, *Third Report on the Law of Treaties*, YILC 1969 Part II, p.52.

⁸² E.g. the question of the participation of "Hong Kong China" as a contracting party in the GATT after 1997 deserves some attention. The rule in Art.XXVI, 5 (c) (cf. note 60) clearly differentiates between the "responsible contracting party" and "customs territories" which acquire full autonomy in the conduct of their external commercial relations. Upon declaration the latter are deemed "to be a contracting party". By this declaration the customs territory acquires the right "*de iure* and/or *de facto* to act on its own behalf and to fulfill its

obligations" (F.K. Liebig, *Das GATT als Zentrum der internationalen Handelspolitik* [1971], p.51 note 44). The formulation "to be deemed" was chosen in order to clarify that these customs territories may also be represented by the "responsible contracting party" apart from a representation on their own rights. The whole procedure according to Art.XXVI, 5 (c) GATT is based on a relation between a responsible contracting party and a separate customs territory possessing full autonomy in the conduct of its external commercial relations. The question remains, whether "Hong Kong China" after 1997 may continue "to be deemed a contracting party" when the People's Republic of China itself does not become a member of the GATT (on the question of membership of China cf. GATT Newsletter/Focus, No.40 [July, August, September 1986], p.6). There can be no doubt that a government becoming a contracting party under Art.XXVI, 5 (c) GATT does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question. The conditions under which Hong Kong is now to be deemed a contracting party of GATT are those which previously have been negotiated by the United Kingdom. The question remains, whether "Hong Kong China" may continue to be deemed a contracting party after 1997 although it becomes part of the People's Republic of China. It is clear, that Art.XXVI, 5 (c) applies also when the customs territories become an independent State (cf. T. Kunugi, *States Succession in Framework of GATT*, AJIL vol.59 [1965], p.285 note 65). But in the case of "Hong Kong China" the customs territory does not gain independence but becomes a dependent part of the People's Republic of China as a Special Administrative Region. The reason for the doubt, whether under Art.XXVI, 5 (c) GATT "Hong Kong China" may continue to be deemed a contracting party after 1997 is the fact, that after that date the responsible government for this territory changes and is not (for the time being) a contracting party of the GATT. For the other contracting parties of the GATT it makes quite a difference, whether a British crown colony, i.e. a territory for which the United Kingdom is and has been responsible and for which the relevant conditions have been negotiated, or a territory for which the People's Republic of China is responsible becomes automatically a contracting party or is "deemed to be a contracting party" without a new negotiation of the conditions. The Joint Declaration itself does not have any effect *erga omnes* and does not oblige third States and therefore no contracting party of the GATT to agree to such a continuation after 1997. It is therefore the question whether in this case after 1997 Art.XXXIII GATT in connection with the Protocol of Annex of October 10, 1949 on the conditions of accession becomes applicable or not. Art.XXXIII reads: "A government not party to this agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement, may accede to this agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the contracting parties. Decisions of a contracting party under this paragraph shall be taken by a two third majority". The article starts on the presumption, that a government acting on behalf of a separate customs territory like the People's Republic of China for "Hong Kong China" after 1997 may become a contracting party only for such a separate customs territory. But there is no such regulation in the whole GATT saying that a separate customs territory, which does not gain independence, may continue to be deemed a contracting party, when it changes its dependence from the former "responsible contracting party" to a State, which itself is not a contracting party of the GATT. Therefore the declaration of the People's Republic of China, that "Hong Kong China" will continue to be deemed a contracting party after 1997 refers without any justification to Art.XXVI, 5 (c) GATT. If the GATT Secretariat accepted this statement and if all the other contracting parties accepted it in the same way, it might be considered as fulfilling the conditions of Art.XXXIII GATT, but it is by way of the procedure under Art.XXXIII GATT, that after 1997 "Hong Kong China" could remain to be deemed a contracting party.

7. Questions of Nationality

a) The Joint Declaration only regulates the right of abode in the Hong Kong SAR⁸³, but fails to regulate citizenship. The right of abode is vested in all "Chinese nationals" born in Hong Kong or who have ordinarily resided there continuously for seven years, and their children, if of Chinese nationality; and in all other persons having resided in Hong Kong for seven years and having taken it as their place of permanent residence and children under 21 years born in Hong Kong and, finally, any other persons who had the right of abode in Hong Kong before the establishment of the SAR⁸⁴.

b) International law contains some rules on the effects of moving frontiers on the nationality of the population. Generally speaking, the population loses the nationality of the State who cedes a certain territory and acquires the nationality of the State who resumes the exercise of sovereignty on this territory⁸⁵. The acquisition of the new nationality is a legal obligation of the successor State because otherwise the population living on the territory which changes sovereignty becomes stateless.

It is questionable whether under international public law the population is entitled to opt for retaining the former nationality. This kind of option has often been combined with the duty for those wishing to retain their former nationality to leave the territory⁸⁶. The regulation in the Joint Declaration and especially in the two Memoranda and the British Hong Kong Act of 1985 in relation to nationality is particularly interesting. The British Hong Kong Act of 1985, stating that as from July 1, 1997, "Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong" (Art.1, sect.1) contains a Schedule which shall affect specific matters, such as nationality, which are considered as "consequential on or connected with" the ending of sovereignty or jurisdiction. The regulation

⁸³ Annex I Art.XIV; on the questions of nationality of the Hong Kong population cf. Tun-Ri Chen, *The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia*, New York Law School Journal of International and Comparative Law, vol.5 (1984), p.281 ff.

⁸⁴ These persons will obtain permanent identity cards by the SAR. "Passports" of the Hong Kong SAR are restricted to Chinese nationals who hold permanent identity cards. Other persons lawfully residing in Hong Kong may receive travel documents of the Hong Kong SAR.

⁸⁵ A.N. Makarov, *Staatsangehörigkeit*, in: K. Strupp/H.-J. Schlochauer, *Wörterbuch des Völkerrechts*, vol.3 (2nd ed. 1962), p.328.

⁸⁶ Makarov, *ibid.*

of nationality is therefore completely in accordance with general rules of public international law, regarded as a matter which is consequential on the transfer of territory. According to Art.2 of the Schedule, the nationality of the Hong Kong population may be regulated by Order in Council, whereby (a) British Dependent Territories Citizenship cannot be retained or acquired on or after the relevant date by virtue of a connection with Hong Kong; and (b) persons who are British Dependent Territories Citizens (BDTCs) by virtue of any such connection may before that date (or before the end of 1997 if born in that year before the relevant date) acquire a new form of British nationality the holders of which shall be known as British Nationals (Overseas) (BNO).

c) The Hong Kong Act of 1985 thus creates a new form of British nationality. For those parts of the Hong Kong population having now the British Dependent Territories Citizenship, this kind of citizenship will automatically end in 1997. These persons "may" before July 1, 1997⁸⁷, acquire the new form of British nationality. The Order in Council will not only regulate the procedure (and discretion) of how to acquire the new British nationality, but also may "require applications in respect of the new status ... to be made before such time or times as are specified in the Order" (Art.2 para.2 of the Schedule). In the Hong Kong (British Nationality) Order 1986 which has been approved by Parliament and shall come into operation on July 1, 1987, the Government defined in Art.2 the cases where a connection with Hong Kong is established. According to Art.4 para.2 of the Order any person who is a British Dependent Territories Citizen by virtue (wholly or partly) of his having a connection with Hong Kong and who, but for his having a connection with Hong Kong would not be such a citizen (cf. Art.3 of the Order), shall be entitled before July 1, 1997 (or before the end of 1997 if born in that year before that date) to be registered as a British National (Overseas) and to hold or be included in a passport appropriate to that status⁸⁸.

⁸⁷ White Paper (note 8), p.31 *lit. b.* The use of the word "may" rather than "shall" raised considerable concern in Hong Kong (cf. H.C., January 21, 1985, p.736). The problem has been solved in the Hong Kong (British Nationality) Order 1986, Art.4 sect.2 (cf. White Paper on the Draft Hong Kong [British Nationality] Order 1986 [published October 17, 1985]).

⁸⁸ The connection with Hong Kong is defined in relation to birth or registration of the person or its parents (father or mother) in Hong Kong, and in the case of registration outside of Hong Kong, descentance from a person born in Hong Kong or having its residence there, Crown service under the Government of Hong Kong etc. are relevant. The date of January 1, 1983 is decisive as for registration in Hong Kong. A person born in Hong Kong on or after January 1, 1983 shall not be taken to have a connection with Hong Kong unless one of

The rule that no person can retain the former British Dependent Territories Citizenship by virtue of a connection with Hong Kong may be regarded as deriving from the fact that the transfer of sovereignty is definite; there is no intermediate status of mixed sovereignty between 1997 and 2047.

The fact that no person born after 1997 in the Hong Kong area can acquire the new form of British nationality is a clear cutting of the *jus sanguinis* relationship. As the White Paper of October 17, 1985 states, the status "that Hong Kong BDTCs will be eligible to retain" – i.e. the status of a British National (Overseas) – "will not be transmissible to any subsequent generation and that only those people who are already BDTCs by virtue of a connection with Hong Kong on 30 June 1997 may retain it". It can be anticipated that after 2047 there will remain only a small number of persons having the status of British Nationals (Overseas) in Hong Kong. This is a clear result of the UK Memorandum's provision that "no person born on or after 1st July, 1997, will acquire this status of a British Dependent Territories Citizen or of a British National (Overseas)".

Is this new type of British nationality, i.e. a nationality without continued connection to Hong Kong and without the right to reside and live in the UK, a nationality at all⁸⁹? The procedure is a transfer of jurisdiction over a population of more than 6 million people, the descendants of these people born after 1997, if they are Chinese nationals will be exclusively Chinese nationals and not continue to have dual nationality⁹⁰.

his parents was settled in Hong Kong or a BDTC by virtue of having a connection with Hong Kong as specified.

The Order regulates *inter alia* the removal of Hong Kong from the list of dependent territories. The British Nationality Act 1981 and the British Nationality (Falkland Islands) Act 1983 are amended and the "British National (Overseas)" is inserted as a new category besides the BDTCs.

⁸⁹ The British announcements are somewhat euphemistic. The title "British National (Overseas)" "makes clear that we are dealing with a form of British nationality. Nothing less than that would be acceptable in Hong Kong. On the other hand, it is essential that the title ... must clearly carry no implication of a continuing constitutional relationship between Britain and Hong Kong after 1997" (Sir Geoffrey Howe [note 3], p.735). Who is eligible to acquire the new form of nationality is now regulated in the Hong Kong (British Nationality) Order 1986. "For technical reasons" it was deemed not possible to rely on the words "by virtue of a connection with Hong Kong" in the title of the "new form of British nationality" (cf. Art.4 para.1 of the Order).

⁹⁰ The British Government told Parliament that the Order in Council will include any measures that are necessary to ensure "that no British national or any child born after 1st July 1997 to a British national is made stateless as a result of the agreements (H.C. 21st Jan.1985, p.736)". They may acquire the British Overseas Citizenship. (continued)

Will the regulation lead to an exodus of many "Chinese nationals in Hong Kong who were previously called British Dependent Territories Citizens"⁹¹ and who can afford using their travel documents issued by the UK Government to travel abroad, in particular to the UK? The British Hong Kong Act of 1985 with its Schedules does not indicate whether by the new form of citizenship "British Nationals (Overseas)" are entitled to entry and residence in the UK. The title suggests that this will not occur and the British White Paper of September 26, 1985⁹² states that the new status "will not give them the right to abode in the U.K. which they do not possess at present, but will carry benefits similar to those enjoyed by BDTs at present including the entitlement to use British passports and to receive British consular services and protection in third countries".

d) These arguments reveal that the Hong Kong BDTs do not enjoy the right to opt when acquiring the new status. They lose their right to live under British protection in Hong Kong without obtaining the right to opt for a real or effective British nationality. The new form of nationality is a form of "transitional" nationality, valid for the present and the next generation, fixed to their holders and not transferable. Furthermore, it is a "nationality" with rather weak relationships to the UK⁹³ and it may well be argued that for diplomatic (and even consular) protection the genuine link in the sense of the *Nottebohm* case⁹⁴ does not exist and therefore a third State could refuse to accept the UK's protection. The White Paper

Art.6 of the Order sets out the provisions for avoiding or reducing statelessness. The underlying principle is that no one who loses his BDT status as a result of the Order nor any child born on or after July 1, 1997 to such a person, should be stateless as a result of the Joint Declaration. The principle was extended to the grandchildren of former BDTs if they are born stateless (cf. White Paper of October 17, 1985 [note 87], p.6f.).

⁹¹ Cf. this definition in the Chinese Memorandum, White Paper (note 8).

⁹² *Supra* note 8, Explanatory Notes, p.45. Cf. also the questions in the British Parliament (H.C. 1985, p.736). The same statement is to be found in the White Paper of October 17, 1985 (note 87), p.2: "Her Majesty's Government ... state that all those who on 30 June 1997 are BDTs by virtue of a connection with Hong Kong will cease to have that status with effect from 1 July 1997, and will not be possible to acquire BDT citizenship by virtue of a connection with Hong Kong on or after 1 July 1997. But those who will lose BDT citizenship will be eligible to retain an appropriate status (not to be acquired by anyone born on or after 1 July 1997) which will enable them to continue to use British passports before 1 July 1997 (or up to 31 December 1997 if born in the first six months of that year). Arrangements will be made for the renewal and replacement of those passports by United Kingdom Consular Officers, and for the holders of such passports to receive British consular protection when in third countries".

⁹³ The only real relationship being the fact of having been formerly a British Dependent Territories Citizen.

⁹⁴ ICJ Reports 1955, p.4.

does not expressly mention this questionable position, but indirectly refers to it. According to the White Paper the UK Government "will do all they can to secure for holders of these British passports the same access to other countries as that enjoyed at present by holders of British Dependent Territories Citizens passports"⁹⁵. This careful wording indicates that third countries might refuse access to these people who are Chinese nationals and will be only more or less virtually British nationals. A BDTC was entitled, if not to abide in the UK, at least to abide and to stay in a specific British Dependent Territory. The British National (Overseas) will have no right of abode on British territory at all⁹⁶. The procedure chosen in the Hong Kong Act and in the Memorandum is not that of a right to opt, but a kind of transformation of nationality, and for "all Hong Kong Chinese compatriots" (formulation of the Chinese Memorandum) who are Chinese nationals pursuant to the Nationality Law of the PRC, this is just a procedure to deprive them of their former British nationality⁹⁷. The rather problematic position of the former BDTCs is reflected in the negotiations on the new passports (BNO passports) for the population of Hong Kong, in particular for those persons who are not ethnically Chinese, but of other Asian origin. These persons are neither Chinese nor "real" British nationals, they are – or will be – mere holders of a BNO passport, enabling them eventually to obtain access to other countries. But it remains doubtful whether they have a right to re-enter Hong Kong. The Government of the PRC refuses to recognize that there is any indication in the present Hong Kong passport of the right of residence in Hong Kong⁹⁸. If these persons are not granted the right of residence in Hong Kong and if there is no legal basis for extradition to Hong Kong after all, third countries will be

⁹⁵ Note 8, p.45.

⁹⁶ Nevertheless, a nationality without the basic rights of a national is a contradiction in itself. Where is "his" country to which a BNO has the human right to return (cf. Art.13 para.2 of the General Declaration of Human Rights)? Where is "his" country in which he has the right of access to public functions according to Art.25 (c) of the UN Covenant on Civil and Political Rights? The British Government is responsible at least to grant to its "nationals", whatever form of nationality they may have, access to one of its territories. This problem may not only be of importance in relation to the BNOs, but also to third countries which want to extradite a BNO.

⁹⁷ Those inhabitants of Hong Kong being British Dependent Territories Citizens but not "Chinese Compatriots", will or can become BNOs, but their dependents will become stateless if not falling under the categories of Art.6 of the Order (cf. note 90).

⁹⁸ Cf. Frankfurter Allgemeine Zeitung, November 7, 1985, p.7. The right of residence is restricted to holders of permanent identity cards of the SAR (Annex I Art.XIV), and this fact may be stated in the "travel documents" of the SAR.

even more reluctant to give them access to their own territory⁹⁹, be it only on a temporarily limited basis. The position of non-Chinese people from Hong Kong who live abroad – somewhere in South-East Asia – can be even worse. They could be, as a member of the British Parliament put it, in “a ghastly limbo of lostness”¹⁰⁰. With a view to the fact, however, that China herself is a multinational country and that free access of skilled labour – even though workers are of other ethnic origin – is a basic principle of developed “capitalist” systems (cf. the free movement of workers in the EEC)¹⁰¹, there is no reason why the PRC should not handle this matter generously. This could be achieved by giving these persons at least the right of residence. International public law could be quoted in support of the fact that a transfer of territory automatically implies a change of nationality. If this – controversial – rule of general customary international law is applied, not only the persons who under the PRC’s Nationality Law are considered as Chinese nationals, but all former holders of a Hong Kong BDTIC passport would have to be considered as Chinese citizens. This implication might be in contrast with these persons’ interests. Therefore the question remains whether the inhabitants of Hong Kong who are not Chinese nationals should not be granted at least a right to opt for an effective British nationality. Even if in the past the option of nationality

⁹⁹ Even if there does not exist an international obligation of third States to recognize the BNO passports or to grant access to their holders, some Western governments have declared their willingness to recognize them. Switzerland has come to an agreement with Britain to accept the new Hong Kong Passports and to grant access to their holders (cf. *Frankfurter Allgemeine Zeitung*, December 26, 1986, p.5).

¹⁰⁰ H.C., January 12, 1985, p.739. The Home Secretary D. Hurd has rejected a plea for 11.500 non-ethnic Chinese citizens of Hong Kong to be granted full British citizenship (cf. *The Times*, April 4, 1986). However, he has given “an amber light” for 270 Hong Kong veterans of the Second World War to acquire British citizenship or to settle in Britain. The new British National (Overseas) passport (for 3,5 million Hong Kong Chinese) will carry an endorsement that the holder does not need a visa or entry certificate to visit Britain.

¹⁰¹ Cf. Art.48 EEC Treaty. On these provisions cf. G. Röss, *Free Movement of Persons, Services and Capital*, in: *Thirty Years of Community Law* (ed.: The Commission of the European Communities, *The European Perspectives Series*) (1983), p.285ff. However, the right to free movement under Art.48 EEC Treaty is granted only to British citizens, not to BDTICs (with some exceptions). Hong Kong is not mentioned in Annex IV to the EEC Treaty (cf. Art.227 para.3 subpara.2 EEC Treaty). Hong Kong is not part of the EEC territory; therefore holders of a “British Passport Hong Kong” are not entitled to the right of free movement of workers (cf. BayVGH, NJW 1985, p.1304; E. Grabitz, *Kommentar zum EWG-Vertrag*, Art.48 marginal note 9 [Randelzhofer]). Cf. also K.R. Simmonds, *The British Nationality Act 1981 and the Definition of the Term “National” for Community Purposes*, CMLR 1984, p.675.

was not regarded as a generally accepted rule of public international law¹⁰², it appears at least as a substitute to the right of self-determination, or better: as an expression of its human rights elements. Considering that sovereignty over the population of a territory is transferred together with the territory without the population's consent and that the population cannot obstruct the transfer, the least consequence should be to grant them a right to opt for the nationality of the country which is transferring the territory. It is not Hong Kong that is transferring itself to the PRC, but the UK, and therefore it is the UK's responsibility to grant such a right. The right of self-determination is rooted in the concept of human rights¹⁰³ and so is the right to option of nationality in the case of a transfer of territory. Bernhardt wrote that today's idea of the human being may suggest or even demand such rights (»das heutige Menschenbild derartige Rechte nahelegen oder gar fordern mag«)¹⁰⁴.

8. Concluding Remarks

a) The Joint Declaration is another example of a treaty providing for an objective territorial régime¹⁰⁵. The Hong Kong treaty-régime contains a large number of provisions which require the consent and recognition of third parties. The Joint Declaration does not have an effect *erga omnes* as such. Only if this arrangement was made "in the general interest of the international community" and if it is intended to be valid for parties other than the parties concluding the treaty, it may receive the specific recognition as an objective status treaty. There are many provisions to be found in the Hong Kong agreements which point to the fact that the new régime should be respected by third States. Third States may subject themselves independently to the order asserted by the parties of the treaty and may do so even tacitly in the form of acquiescence or implied recognition. It will largely depend on the conduct of third States whether they accept such a temporarily limited régime or whether they insist on certain commitments on the part of the PRC as to continuation after 2047.

b) The status of Hong Kong between 1997 and 2047 as a SAR of the

¹⁰² H. Hecker, Staatsangehörigkeit, in: Lexikon des Rechts/Völkerrecht (1985), p.262; Makarov (note 85), p.328; Verdross/Simma (note 21), p.788 (§ 1193).

¹⁰³ Cf. Art.1 para.1 of the International Covenant on Civil and Political Rights of December 19, 1966.

¹⁰⁴ R. Bernhardt, Option, in: Strupp-Schlochauer, Wörterbuch des Völkerrechts, vol.2, p.663; cf. also K.M. Meessen, Die Option der Staatsangehörigkeit (1966).

¹⁰⁵ Cf. Klein (note 35), p.191 ff.

PRC under special international law obligations is another example of a region whose status is internationally fixed in the interest of peaceful relations between the East and the West¹⁰⁶. It is undeniable that it serves a general interest of this kind. Whether the Joint Declaration will succeed in achieving a feasible solution for the future of Hong Kong "will ultimately depend in considerable measure on the will and good faith of its signatories"¹⁰⁷. Recent declarations of the PRC concerning elections in Hong Kong raise doubts as to the PRC's position and gave rise to some criticism¹⁰⁸. When the British Government received from "Chinese leaders at the highest level" the "solemn assurances of China's commitment to full implementation of the agreement"¹⁰⁹ and their "intention to consult Hong Kong's opinion on the drafting of the Basic Law on a wide basis"¹¹⁰, could it foresee these difficulties? Why did the UK not strengthen the "representative government" in Hong Kong earlier – or hold a referendum of the "people of Hong Kong"? Isn't it too late to give support to the representative government in Hong Kong until 1997¹¹¹ when it is obvious that the PRC is not really interested in such a government in Hong Kong in the 50 years after 1997? "Hong Kong has been 'straight jacketed'"¹¹², was one of the comments on the PRC's warnings that the democratic development in Hong Kong (election of 24 representatives of the population of Hong Kong to the Council) deviates from the Joint Declaration. What is the legal background of the dispute? In 1990 the NPC will enact the Basic Law which will be in force in the SAR Hong Kong after July 1, 1997. Had Hong Kong a democratically elected representative organ by that time, the PRC would have to choose between either accepting this Western type of representative government or curtailing these freedoms and introducing a

¹⁰⁶ Cf. the remarks of U. Scheuner on the Question of Berlin and Hong Kong, in: *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts* (Berichte der Deutschen Gesellschaft für Völkerrecht, vol.14) (1974), p.61.

¹⁰⁷ Landry (note 1), p.263.

¹⁰⁸ *Frankfurter Allgemeine Zeitung*, November 7, 1985, p.7: "If the PRC already one year after the conclusion of the Joint Declaration attempts to interpret it in her own way, the prospects for Hong Kong look rather dark. The result is that the more wealthy Hong Kong Chinese people continue to establish a second position in western countries". Cf. also »Die Welt«, October 10, 1985, p.5.

¹⁰⁹ This formula of "full implementation" is well known from the dispute between the USSR and the three Western Powers on the Berlin Agreement of 1971. The USSR urges the strict application, the three Western Powers the full application and implementation.

¹¹⁰ Sir Geoffrey Howe (note 3), p.734.

¹¹¹ Sir Geoffrey Howe, *ibid.*, p.741.

¹¹² »Der Spiegel« No.49 (vol.39), December 2, 1985, p.146, referring to a commentary in the "South China Morning Post".

more authoritative system and thereby taking the risk to discredit itself in the eyes of Western States. But as Hong Kong did not have really democratic institutions until September 1985 whereas the "capitalist economic and commercial systems" flourished nevertheless, it may have been the PRC's idea that the "two-systems – one-country" concept applied only to the economic, but not to the political field¹¹³. The Joint Declaration does not provide for an autonomous representative type of government. Only the legislature of the Hong Kong SAR "shall be constituted by elections". The chief executive and all principal officials will be appointed by the Central People's Government (Annex I Part I). This clearly indicates the rather limited role of democratic institutions in the Hong Kong SAR¹¹⁴.

Annex

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 Kong¹

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China have reviewed with satisfaction the friendly relations existing between the two Governments and peoples in recent years and agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis. To this

¹¹³ According to a Chinese representative on the question of Hong Kong, Mr. Xu, it would be "ideal if both systems would be in concordance. It would be a misfortune for China and the U.K. if one of both would try to implement its own political system in Hong Kong" (quoted in »Der Spiegel«, *ibid.*).

¹¹⁴ It has been noted that "on its face" the Joint Declaration appears to establish an executive branch predominantly under the NPC influence, a legislative branch responsive to the demands of the Hong Kong population and a judiciary with special ties to the UK (Landry [note 1], p.261). – The Joint Declaration does not give any indication of the manner in which the election will be conducted. Landry, *ibid.*, p.262, rightly concludes that the method employed "could have crucial implications, since the legislature of the Hong Kong SAR will be able to enact laws on its own authority, without the assent of the chief executive".

¹ Treaty Series No.26 (1985), Cmnd.9543.

end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.

3. The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

(4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government. Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain public posts in government departments of the Hong Kong Special Administrative Region.

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.

(7) The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible.

(8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy taxes on the Hong Kong Special Administrative Region.

(9) The Hong Kong Special Administrative Region may establish mutually beneficial economic relations with the United Kingdom and other countries, whose economic interests in Hong Kong will be given due regard.

(10) Using the name of "Hong Kong, China", the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations.

The Government of the Hong Kong Special Administrative Region may on its own issue travel documents for entry into and exit from Hong Kong.

(11) The maintenance of public order in the Hong Kong Special Administrative Region will be the responsibility of the Government of the Hong Kong Special Administrative Region.

(12) The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

4. The Government of the United Kingdom and the Government of the People's Republic of China declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection.

5. The Government of the United Kingdom and the Government of the People's Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up when this Joint Declaration enters into force; and that it will be established and will function in accordance with the provisions of Annex II to this Joint Declaration.

6. The Government of the United Kingdom and the Government of the People's Republic of China declare that land leases in Hong Kong and other related matters

will be dealt with in accordance with the provisions of Annex III to this Joint Declaration.

7. The Government of the United Kingdom and the Government of the People's Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration.

8. This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985. This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 19 December 1984 in the English and Chinese languages, both texts being equally authentic.

For the Government of the United
Kingdom of Great Britain and North-
ern Ireland

[Margaret Thatcher]

For the Government of the People's
Republic of China

[Zhao Ziyang]

ANNEX I

ELABORATION BY THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OF ITS BASIC POLICIES REGARDING HONG KONG

The Government of the People's Republic of China elaborates the basic policies of the People's Republic of China regarding Hong Kong as set out in paragraph 3 of the 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 as follows:

I

The Constitution of the People's Republic of China stipulates in Article 31 that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions." In accordance with this Article, the People's Republic of China shall, upon the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, establish the Hong Kong Special Administrative Region of the People's Republic of China. The National People's Congress of the People's Republic of China shall

enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years.

The Hong Kong Special Administrative Region shall be directly under the authority of the Central People's Government of the People's Republic of China and shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication. The Central People's Government shall authorise the Hong Kong Special Administrative Region to conduct on its own those external affairs specified in Section XI of this Annex.

The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.

In addition to Chinese, English may also be used in organs of government and in the courts in the Hong Kong Special Administrative Region.

Apart from displaying the national flag and national emblem of the People's Republic of China, the Hong Kong Special Administrative Region may use a regional flag and emblem of its own.

II

After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (*i.e.* the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.

The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature

which are in accordance with the Basic Law and legal procedures shall be regarded as valid.

The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above.

III

After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication.

Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions. The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions.

Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions. A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (*i. e.* those of the highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People's Congress for the record. The system of appointment and removal of judicial officers other than judges shall be maintained.

The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.

A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.

On the basis of the system previously operating in Hong Kong, the Hong Kong Special Administrative Region Government shall on its own make provision for

local lawyers and lawyers from outside the Hong Kong Special Administrative Region to work and practise in the Hong Kong Special Administrative Region.

The Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

IV

After the establishment of the Hong Kong Special Administrative Region, public servants previously serving in Hong Kong in all government departments, including the police department, and members of the judiciary may all remain in employment and continue their service with pay, allowances, benefits and conditions of service no less favourable than before. The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

The Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public servants at all levels, except as heads of major government departments (corresponding to branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments. The Hong Kong Special Administrative Region Government may also employ British and other foreign nationals as advisers to government departments and, when there is a need, may recruit qualified candidates from outside the Hong Kong Special Administrative Region to professional and technical posts in government departments. The above shall be employed only in their individual capacities and, like other public servants, shall be responsible to the Hong Kong Special Administrative Region Government.

The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service (including special bodies for appointment, pay and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained.

V

The Hong Kong Special Administrative Region shall deal on its own with financial matters, including disposing of its financial resources and drawing up its budgets and its final accounts. The Hong Kong Special Administrative Region shall report its budgets and final accounts to the Central People's Government for the record.

The Central People's Government shall not levy taxes on the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People's Government. The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.

VI

The Hong Kong Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall decide its economic and trade policies on its own. Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.

The Hong Kong Special Administrative Region shall retain the status of a free port and continue a free trade policy, including the free movement of goods and capital. The Hong Kong Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.

The Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organisations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Hong Kong Special Administrative Region shall be enjoyed exclusively by the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

The Hong Kong Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment of such missions to the Central People's Government for the record.

VII

The Hong Kong Special Administrative Region shall retain the status of an international financial centre. The monetary and financial systems previously practised in Hong Kong, including the systems of regulation and supervision of deposit taking institutions and financial markets, shall be maintained.

The Hong Kong Special Administrative Region Government may decide its monetary and financial policies on its own. It shall safeguard the free operation of financial business and the free flow of capital within, into and out of the Hong Kong Special Administrative Region. No exchange control policy shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.

The Hong Kong dollar, as the local legal tender, shall continue to circulate and remain freely convertible. The authority to issue Hong Kong currency shall be vested in the Hong Kong Special Administrative Region Government. The Hong Kong Special Administrative Region Government may authorise designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of the currency. Hong Kong currency bearing references inappropriate to the status of Hong Kong as a Special Administrative Region of the People's Republic of China shall be progressively replaced and withdrawn from circulation.

The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.

VIII

The Hong Kong Special Administrative Region shall maintain Hong Kong's previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen. The specific functions and responsibilities of the Hong Kong Special Administrative Region Government in the field of shipping shall be defined by the Hong Kong Special Administrative Region Government on its own. Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.

The Hong Kong Special Administrative Region shall be authorised by the Central People's Government to continue to maintain a shipping register and issue related certificates under its own legislation in the name of "Hong Kong, China".

With the exception of foreign warships, access for which requires the permission of the Central People's Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Hong Kong Special Administrative Region.

IX

The Hong Kong Special Administrative Region shall maintain the status of Hong Kong as a centre of international and regional aviation. Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate. The Hong Kong Special Administrative Region shall continue the previous system of civil aviation management in Hong Kong, and keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft. The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, including the management of airports, the provision of air traffic services within the flight information region of the Hong Kong Special Administrative Region, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organization.

The Central People's Government shall, in consultation with the Hong Kong Special Administrative Region Government, make arrangements providing for air services between the Hong Kong Special Administrative Region and other parts of the People's Republic of China for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and other airlines of the People's Republic of China. All Air Service Agreements providing for air services between other parts of the People's Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People's Republic of China shall be concluded by the Central People's Government. For this purpose, the Central People's Government shall take account of the special conditions and economic interests of the Hong Kong Special Administrative Region and consult the Hong Kong Special Administrative Region Government. Representatives of the Hong Kong Special Administrative Region Government may participate as members of delegations of the Government of the People's Republic of China in air service consultations with foreign governments concerning arrangements for such services.

Acting under specific authorisations from the Central People's Government, the Hong Kong Special Administrative Region Government may:

- renew or amend Air Service Agreements and arrangements previously in force; in principle, all such Agreements and arrangements may be renewed or amended with the rights contained in such previous Agreements and arrangements being as far as possible maintained;
- negotiate and conclude new Air Service Agreements providing routes for airlines

incorporated and having their principal place of business in the Hong Kong Special Administrative Region and rights for overflights and technical stops; and

- negotiate and conclude provisional arrangements where no Air Service Agreement with a foreign state or other region is in force.

All scheduled air services to, from or through the Hong Kong Special Administrative Region which do not operate to, from or through the mainland of China shall be regulated by Air Service Agreements or provisional arrangements referred to in this paragraph.

The Central People's Government shall give the Hong Kong Special Administrative Region Government the authority to:

- negotiate and conclude with other authorities all arrangements concerning the implementation of the above Air Service Agreements and provisional arrangements;
- issue licences to airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region;
- designate such airlines under the above Air Service Agreements and provisional arrangements; and
- issue permits for foreign airlines for services other than those to, from or through the mainland of China.

X

The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications. Institutions of all kinds, including those run by religious and community organisations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.

XI

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in negotiations at the diplomatic level directly affecting the Hong Kong Special Administrative Region conducted by the

Central People's Government. 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 states, regions and relevant international organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields. Representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in international organisations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organisation or conference concerned, and may express their views in the name of "Hong Kong, China". The Hong Kong Special Administrative Region may, using the name "Hong Kong, China", participate in international organisations and conferences not limited to states.

The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorise or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements. The Central People's Government shall take the necessary steps to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organisations of which the People's Republic of China is a member and in which Hong Kong participates in one capacity or another. The Central People's Government shall, where necessary, facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organisations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member.

Foreign consular and other official or semi-official missions may be established in the Hong Kong Special Administrative Region with the approval of the Central People's Government. Consular and other official missions established in Hong Kong by states which have established formal diplomatic relations with the People's Republic of China, may be maintained. According to the circumstances of each case, consular and other official missions of states having no formal diplomatic relations with the People's Republic of China may either be maintained or

changed to semi-official missions. States not recognised by the People's Republic of China can only establish non-governmental institutions.

The United Kingdom may establish a Consulate-General in the Hong Kong Special Administrative Region.

XII

The maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region Government. Military forces sent by the Central People's Government to be stationed in the Hong Kong Special Administrative Region for the purpose of defence shall not interfere in the internal affairs of the Hong Kong Special Administrative Region. Expenditure for these military forces shall be borne by the Central People's Government.

XIII

The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.

Every person shall have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, and to obtain judicial remedies. Every person shall have the right to challenge the actions of the executive in the courts.

Religious organisations and believers may maintain their relations with religious organisations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organisations may be continued. The relationship between religious organisations in the Hong Kong Special Administrative Region and those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

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.

XIV

The following categories of persons shall have the right of abode in the Hong Kong Special Administrative Region, and, in accordance with the law of the Hong Kong Special Administrative Region, be qualified to obtain permanent identity cards issued by the Hong Kong Special Administrative Region Government, which state their right of abode:

- all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals;
- all other persons who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region, and perhaps under 21 years of age who were born of such persons in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region.

The Central People's Government shall authorise the Hong Kong Special Administrative Region Government to issue, in accordance with the law, passports of the Hong Kong Special Administrative Region of the People's Republic of China to all Chinese nationals who hold permanent identity cards of the Hong Kong Special Administrative Region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Hong Kong Special Administrative Region. The above passports and documents shall be valid for all states and regions and shall record the holder's right to return to the Hong Kong Special Administrative Region.

For the purpose of travelling to and from the Hong Kong Special Administrative Region, residents of the Hong Kong Special Administrative Region may use travel documents issued by the Hong Kong Special Administrative Region Government, or by other competent authorities of the People's Republic of China, or of other states. Holders of permanent identity cards of the Hong Kong Special Administrative Region may have this fact stated in their travel documents as evidence that the holders have the right of abode in the Hong Kong Special Administrative Region.

Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.

The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions.

Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorisation.

The Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to conclude visa abolition agreements with states or regions.

ANNEX II

SINO-BRITISH JOINT LIAISON GROUP

1. In furtherance of their common aim and in order to ensure a smooth transfer of government in 1997, the Government of the United Kingdom and the Government of the People's Republic of China have agreed to continue their discussions in a friendly spirit and to develop the co-operative relationship which already exists between the two Governments over Hong Kong with a view to the effective implementation of the Joint Declaration.

2. In order to meet the requirements for liaison, consultation and the exchange of information, the two Governments have agreed to set up a Joint Liaison Group.

3. 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.

Matters on which there is disagreement in the Joint Liaison Group shall be referred to the two Governments for solution through consultations.

4. Matters for consideration during the first half of the period between the establishment of the Joint Liaison Group and 1 July 1997 shall include:

(a) action to be taken by the two Governments to enable the Hong Kong Special Administrative Region to maintain its economic relations as a separate customs territory, and in particular to ensure the maintenance of Hong Kong's participation in the General Agreement on Tariffs and Trade, the Multifibre Arrangement and other international arrangements; and

(b) action to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong.

5. The two Governments have agreed that in the second half of the period between the establishment of the Joint Liaison Group and 1 July 1997 there will be need for closer co-operation, which will therefore be intensified during that period. Matters for consideration during this second period shall include:

- (a) procedures to be adopted for the smooth transition in 1997;
- (b) action to assist the Hong Kong Special Administrative Region to maintain

and develop economic and cultural relations and conclude agreements on these matters with states, regions and relevant international organisations.

6. The Joint Liaison Group shall be an organ for liaison and not an organ of power. It shall play no part in the administration of Hong Kong or the Hong Kong Special Administrative Region. Nor shall it have any supervisory rôle over that administration. The members and supporting staff of the Joint Liaison Group shall only conduct activities with the scope of the functions of the Joint Liaison Group.

7. Each side shall designate a senior representative, who shall be of Ambassadorial rank, and four other members of the group. Each side may send up to 20 supporting staff.

8. The Joint Liaison Group shall be established on the entry into force of the Joint Declaration. From 1 July 1988 the Joint Liaison Group shall have its principal base in Hong Kong. The Joint Liaison Group shall continue its work until 1 January 2000.

9. The Joint Liaison Group shall meet in Beijing, London and Hong Kong. It shall meet at least once in each of the three locations in each year. The venue for each meeting shall be agreed between the two sides.

10. Members of the Joint Liaison Group shall enjoy diplomatic privileges and immunities as appropriate when in the three locations. Proceedings of the Joint Liaison Group shall remain confidential unless otherwise agreed between the two sides.

11. The Joint Liaison Group may by agreement between the two sides decide to set up specialist sub-groups to deal with particular subjects requiring expert assistance.

12. Meetings of the Joint Liaison Group and sub-groups may be attended by experts other than the members of the Joint Liaison Group. Each side shall determine the composition of its delegation to particular meetings of the Joint Liaison Group or sub-group in accordance with the subjects to be discussed and the venue chosen.

13. The working procedures of the Joint Liaison Group shall be discussed and decided upon by the two sides within the guidelines laid down in this Annex.

ANNEX III

LAND LEASES

The Government of the United Kingdom and the Government of the People's Republic of China have agreed that, with effect from the entry into force of the Joint Declaration, land leases in Hong Kong and other related matters shall be dealt with in accordance with the following provisions:

1. All leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this Annex, and which extend beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognised and protected under the law of the Hong Kong Special Administrative Region.

2. All leases of land granted by the British Hong Kong Government not containing a right of renewal that expire before 30 June 1997, except short term tenancies and leases for special purposes, may be extended if the lessee so wishes for a period expiring not later than 30 June 2047 without payment of an additional premium. An annual rent shall be charged from the date of extension equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter. In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the property is granted to, a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line. Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region.

3. From the entry into force of the Joint Declaration until 30 June 1997, new leases of land may be granted by the British Hong Kong Government for terms expiring not later than 30 June 2047. Such leases shall be granted at a premium and nominal rental until 30 June 1997, after which date they shall not require payment of an additional premium but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with changes in the rateable value thereafter, shall be charged.

4. The total amount of new land to be granted under paragraph 3 of this Annex shall be limited to 50 hectares a year (excluding land to be granted to the Hong Kong Housing Authority for public rental housing) from the entry into force of the Joint Declaration until 30 June 1997.

5. Modifications of the conditions specified in leases granted by the British Hong Kong Government may continue to be granted before 1 July 1997 at a premium equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions.

6. From the entry into force of the Joint Declaration until 30 June 1997, premium income obtained by the British Hong Kong Government from land transactions shall, after deduction of the average cost of land production, be shared equally between the British Hong Kong Government and the future Hong Kong Special Administrative Region Government. All the income obtained by the British Hong Kong Government, including the amount of the above mentioned de-

duction, shall be put into the Capital Works Reserve Fund for the financing of land development and public works in Hong Kong. The Hong Kong Special Administrative Region Government's share of the premium income shall be deposited in banks incorporated in Hong Kong and shall not be drawn on except for the financing of land development and public works in Hong Kong in accordance with the provisions of paragraph 7(d) of this Annex.

7. A Land Commission shall be established in Hong Kong immediately upon the entry into force of the Joint Declaration. The Land Commission shall be composed of an equal number of officials designated respectively by the Government of the United Kingdom and the Government of the People's Republic of China together with necessary supporting staff. The officials of the two sides shall be responsible to their respective governments. The Land Commission shall be dissolved on 30 June 1997.

The terms of reference of the Land Commission shall be:

- (a) to conduct consultations on the implementation of this Annex;
- (b) to monitor observance of the limit specified in paragraph 4 of this Annex, the amount of land granted to the Hong Kong Housing Authority for public rental housing, and the division and use of premium income referred to in paragraph 6 of this Annex;
- (c) to consider and decide on proposals from the British Hong Kong Government for increasing the limit referred to in paragraph 4 of this Annex;
- (d) to examine proposals for drawing on the Hong Kong Special Administrative Region Government's share of premium income referred to in paragraph 6 of this Annex and to make recommendations to the Chinese side for decision.

Matters on which there is disagreement in the Land Commission shall be referred to the Government of the United Kingdom and the Government of the People's Republic of China for decision.

8. Specific details regarding the establishment of the Land Commission shall be finalised separately by the two sides through consultations.