



# **COUNTDOWN TO 1997**

**Report of a Mission to Hong Kong**

**INTERNATIONAL COMMISSION OF JURISTS  
Geneva, Switzerland**

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# **COUNTDOWN TO 1997**

**Report of a Mission to Hong Kong**

by

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on behalf of

**THE INTERNATIONAL COMMISSION OF JURISTS**

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## Preface

On 1 July 1997, sovereignty over Hong Kong will be transferred from the United Kingdom to the People's Republic of China. The six million people of Hong Kong have never been asked to give their consent to this transfer. They will be transferred to a regime whose record on human rights is a cause for great concern.

Most of the missions appointed by the International Commission of Jurists (ICJ) have been sent to investigate current abuses of human rights. That is not the case with this mission. Apart from the problems of the Vietnamese "boat people" (which were outside the terms of reference of the mission), there is relatively little cause for concern about human rights in Hong Kong at present. The problem lies in the future. Will the Chinese Government in fact allow Hong Kong the high degree of autonomy which it has promised? Will the Chinese Government allow the people of Hong Kong to exercise the rights and freedoms which it has denied so far to its own citizens?

These questions cannot be answered until 1997. However, we are already more than halfway through the transitional period between the signing of the agreement for the return of Hong Kong to China and the date when the agreement will come into operation. The ICJ therefore decided that it was timely to send a mission, both to study any evidence from which China's intentions can be forecast (in particular, the terms of the Basic Law promulgated by the People's Republic in 1990, which is the post-1997 Constitution of Hong Kong) and to make it clear that the outside world will closely monitor human rights in Hong Kong.

The mission, appointed in April 1991, consisted of four distinguished jurists: Sir William Goodhart, Q.C. (U.K.), Y.M. Raja Aziz Addruse (Malaysia), The Hon. John Dowd, A.O., Q.C. (Australia) and Professor Hans-Heiner Kuehne (Germany). It visited Hong Kong in June 1991 to take evidence and hear the views of Hong Kong people. The ICJ is grateful to the government of Hong Kong and to the many organisations and individuals within Hong Kong who were willing to meet the mission. The ICJ regrets that no similar co-operation was obtained from any representative of the People's Republic.

The Report which follows is disturbing. The mission is critical of the Basic Law, which represents in many respects an evasion by China of the terms which it had agreed with the United Kingdom to apply to Hong Kong. The Report is also critical of the British government for its failure to allow the people of Hong Kong to exercise a right of self-determination and for its failure to object to the unsatisfactory provisions of the Basic Law.

It is clear that international vigilance will have a vital role in protecting human rights in Hong Kong. The ICJ hopes that this Report will help in ensuring that vigilance is maintained.

Geneva, March 1992

**Adama Dieng**  
Secretary General

## CHAPTER I

### INTRODUCTION

The years since the end of the Second World War have seen the end of colonialism. The French and Portuguese empires have all but vanished. So now has the Soviet empire. And the British Empire - once the mightiest of them all - has shrunk to a handful of "dependent territories". Most of them are insignificant islands with tiny populations.

Hong Kong is a dependent territory but it is very far from being insignificant. It is one of the world's greatest financial centres. Its international trade puts it among the top dozen trading nations of the world. It is home to six million people - a population larger than many member states of the United Nations.

Yet Hong Kong's amazing economic development since 1945 has been accompanied by fear and uncertainty about its future. Ever since the troops of the People's Liberation Army reached the border of Hong Kong in 1949, it has been clear that Hong Kong was at the mercy of China. Britain could never have put up more than token resistance to a Chinese military invasion. What has preserved Hong Kong from being seized by China, as India seized Goa from the Portuguese, has been its value to China as a separate entity. First, it served China as the main channel for trade with the rest of the world, and as a means of avoiding the American embargo on trade with the mainland. More recently, Hong Kong has become a major source for investment and employment in Guangdong province and other parts of South China. Conversely, it has also become the object of massive outward investment from the mainland - symbolised by the new Bank of China building, Hong Kong's tallest. And so, Hong Kong has maintained its colonial status through the Revolution, the Great Leap Forward, the Cultural Revolution, and the more pragmatic (if no more democratic) times which have followed in China.

Colonial status was acceptable to the people of Hong Kong. Many people had gone to Hong Kong to escape from the People's Republic, and preferred British rule to Chinese. Those who would have preferred Chinese rule accepted the Chinese Government's position. But a price had to be paid. Fearing the reaction of an authoritarian China, the Government of Hong Kong allowed only the most timid of steps to be taken towards representative democracy. Thus Hong Kong became a paradox - a rich, well-educated, sophisticated society enjoying a high degree of personal and economic freedom, yet governed with little dissent by an alien and authoritarian (if well-meaning) administration and with only the most rudimentary of democratic institutions.

Hong Kong's colonial status has become an increasing



anomaly in the closing years of the twentieth century. China has always made it clear that its tolerance of the British presence in Hong Kong is temporary. And handing over Hong Kong has been the knowledge that the New Territories - which make up most of its land area and are home to many of its people - are only held on lease and must in any event be returned to China when that lease expires in 1997.

The British Government took advantage of the more pragmatic attitude of the Chinese leadership following the death of Mao Tse-Tung to enter into negotiations with the Chinese Government over the future of Hong Kong. These negotiations resulted in the Joint Declaration on the Question of Hong Kong, signed by the British and Chinese Governments on the 19th December 1984.

The basis of the Joint Declaration was that the British Government agreed to return to China on the 1st July 1997 not just the New Territories but the whole of Hong Kong. In return, the Chinese Government agreed that for the following fifty years Hong Kong would be allowed to retain a capitalist economic system and would have a high degree of autonomy.

A strong case can be made for saying that the Joint Declaration represented the best available solution to a complex and very difficult problem. It is, however, impossible to say that that solution has received the binding and legitimate endorsement of the people of Hong Kong. It is true that, before the signature of the Joint Declaration, the Hong Kong Government conducted an elaborate assessment process to find out whether it was acceptable to the people of Hong Kong. It concluded that the Joint Declaration was acceptable. There is no reason to doubt the correctness of this conclusion. Nevertheless, the assessment procedure - however accurate - can not be a replacement for a proper democratic endorsement.

By signing and ratifying the Joint Declaration the United Kingdom undertook to hand over Hong Kong and its people to the People's Republic of China. The People's Republic of China was then - as it is now - an authoritarian state whose nominally democratic constitution is a sham. Its record on human rights, though not as bad as under the leadership of Mao Tse-Tung, was then - as it is now - dreadful. For the British Government to have handed over the people of Hong Kong to the People's Republic of China without first obtaining their consent is widely seen as a grave breach of Britain's obligations as the colonial power.

Unfortunately, things have got worse since 1984. The brutal repression of student unrest in Tien an men Square on 4th June 1989 has shown that the Chinese leadership is unwilling to allow any progress towards democracy in the People's Republic. The collapse of Communism in Eastern Europe and the Soviet Union is likely to make the leadership even more defensive and intolerant. And the willingness of the Chinese Government to carry out its full obligations under the Joint Declaration is cast into serious doubt by the terms of the

Basic Law for the Hong Kong Special Administrative Region, promulgated on the 4th April 1990. The Basic Law, which is to be the post-1997 Constitution for Hong Kong, fails to fulfil in a number of important respects the undertakings which the Chinese Government gave by entering into the Joint Declaration.

Pressure to give greater protection to human rights before 1997 has led to one important and welcome development, the incorporation of the International Covenant on Civil and Political Rights into the domestic law of Hong Kong through the Bill of Rights Ordinance 1991. While the Ordinance is flawed by the continuance of the reservations made applicable to Hong Kong when the United Kingdom ratified the Covenant in 1976, it represents a very significant step forward in human rights law in Hong Kong.

It is against this background that the International Commission of Jurists decided to send a Mission to Hong Kong, with the terms of reference set out in Annex I to this Report. We, the members of the Mission, received our Ordres de Mission in April 1991. We spent ten days in Hong Kong at the end of June, during which we attended an important and interesting conference on the Hong Kong Bill of Rights organised by the Law Faculty of the University of Hong Kong on the 20th-22nd June. From then until the 28th June we conducted an intensive series of hearings and meetings, both formal and informal.

We received full cooperation from the Government of Hong Kong though there were obviously limitations on the extent of the disclosures which public servants were able to make. The Mission held meetings with the Chief Justice and several senior members of the Hong Kong Government, and the Chairman of the Mission had a meeting with the Governor, who was out of Hong Kong for most of the period of the Mission. We also met the British representatives on the Joint Liaison Group. We met representatives of the legal profession, the press, the business community, human rights organisations, political parties and other groups. The Chairman of the Mission met representatives of the U.K. Foreign and Commonwealth Office in London before the start of the Mission.

There was, however, one major gap in our coverage of the situation in Hong Kong. We received no cooperation from anyone who directly or indirectly represented the People's Republic of China. Despite repeated requests, we were not able to meet any spokesman from the New China News Agency (which is the de facto representative in Hong Kong of the Government of the PRC) or from the Chinese representatives on the Joint Liaison Group. In view of the possibility that the Chinese Government might find it more appropriate to discuss questions relating to Hong Kong outside the territory itself, the Chairman of the Mission wrote to the Amabassador of the PRC to the UK to suggest a meeting in London, but received no reply.

We very much regret the failure of representatives of the PRC to accept our invitations. It necessarily makes our picture of the situation in Hong Kong incomplete. We have

been very critical in this Report of the PRC; it may be that its representatives could have persuaded us that some of our criticisms were based on a misunderstanding of the intentions of the PRC. Above all, however, the failure to meet us reinforces our fear that China regards the future of human rights in Hong Kong after 1997 as a matter for China alone and of no concern to the outside world.

To return to our own proceedings, we were glad to find, at our closing discussions before leaving Hong Kong, that all four members of the Mission were in total agreement in our views both about the current situation in Hong Kong and about the issues raised by our Terms of Reference. Thanks to the hospitality of Prof. Kuehne, the members of the Mission were able to meet again on October 12 and 13 in Trier, Germany, to consider progress on the draft Report, which we have now been able to complete.

We have divided the Report into a series of chapters, of which this Introduction forms the first. Chapter 2 sets out the historical and factual background. Chapter 3 contains a fairly detailed analysis of the main documents - the Joint Declaration, the Basic Law and the Bill of Rights Ordinance - and more briefly of the Constitution of the PRC. Chapter 4 outlines our procedure and sets out our findings of fact - or perhaps it would be more accurate to say, of states of opinion - in relation to Hong Kong at present.

The remaining chapters set out our conclusions and proposals on the issues raised by our terms of reference, and the thinking behind them. Chapter 5 reviews the international law of self-determination and its specific application to Hong Kong. Chapter 6 deals with questions of nationality and rights of abode for the people of Hong Kong. Chapter 7 deals with past, present and future shortcomings of the democratic process in Hong Kong. Chapter 8 deals with the accountability of the executive under the Basic Law. Chapters 9 and 10 deal with the judicial system and the judiciary. Chapter 11 covers the issues of public order and emergencies. Chapter 12 discusses the Bill of Rights Ordinance as an expression of human rights, and Chapter 13 deals with the enforcement and monitoring of human rights, both internally and externally. Finally, Chapter 14 contains a summary of our specific criticisms of the Basic Law, and Chapter 15 summarises our other conclusions and recommendations.

We are most grateful to all those who helped us in Hong Kong, and in particular to JUSTICE Hong Kong, the Hong Kong section of the International Commission of Jurists. We are specially indebted to Ruy Barretto and Jonathan Shaw of the Hong Kong Bar, who devoted a great deal of time out of their busy lives to arranging our programme, and to Dr. Nihal Jayawickrama of the University of Hong Kong Law Faculty, who has helped us greatly by assisting us in drafting the sections of this Report on the historical and factual background and on the international law of self-determination. We are also very grateful to Linda Penrose for word-processing this Report.

What we say in this Report shows that we are gravely concerned for the future of human rights in Hong Kong. It is essential that the outside world is made aware of the dangers, of the need for monitoring what happens in Hong Kong, and of the need to take action if abuses occur. We hope that this Report will contribute to that process. Our own views can not be better summarised than in the concluding remarks of Prof. Gong Xiang Rui of Beijing University in the lecture which he wrote for the Hong Kong Bill of Rights Conference but was not allowed by his Government to deliver in person:

"There are some rights, however, which are inherent in a system of democracy, whether it is capitalist or socialist. So long as there are free elections based upon public opinion, it is always possible to compel the Government not to overstep the boundaries of its powers, for there is a minority who would give attention to any abuses, and persuade the electorate to oppose those abuses. And if the government is not responsive, it may be turned out. There will be no democracy if minority opinions cannot be expressed, or if people cannot meet together to discuss their opinions and their actions, or if those who think alike on any subject cannot associate for mutual support and for the propagation of their common ideas. Yet these rights are vulnerable and they are most likely to be subject to attack. Therefore the fundamental liberty is not only of free election but also of limitation of government powers."

## CHAPTER II

### HISTORICAL AND FACTUAL BACKGROUND

#### 1. The Colonization of Hong Kong

British sovereignty over Hong Kong is founded on three treaties entered into between the United Kingdom and China:

- (a) By the Treaty of Peace and Friendship signed in Nanking on 29 August 1842, the island of Hong Kong was ceded in perpetuity. By Letters Patent dated 5 April 1843, Hong Kong and its Dependencies were constituted a colony.
- (b) By the Convention of Peace and Friendship signed in Peking on 24 October 1860, "a portion of the township of Kowloon" including Stonecutters Island (which a few months previously had been leased in perpetuity at an annual rental of 500 taels of silver) was ceded in perpetuity. By an Order in Council dated 4 February 1861, this new acquisition was declared to be part and parcel of the Colony of Hong Kong.
- (c) By a Convention signed in Peking on 9 June 1898, it was agreed that "the limits of British territory shall be enlarged under lease" to the extent indicated on a map, the term of the lease - for which no rent was demanded or paid - being 99 years. Thereby, about 350 square miles of Chinese mainland and about 235 islands were brought under sole British jurisdiction. By two orders in Council dated 20 October 1898 and 27 December 1899, the New Territories (as the newly leased territories became known) were declared to be "part and parcel of Her Majesty's Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony". The effect of these two Orders in Council was to formally vest sovereignty in and dominion over the New Territories in the Crown.

#### 2. Current Constitutional Arrangements

During 150 years of British colonial rule, the system of government in Hong Kong has changed very little. This is in sharp contrast to the other remaining British colonies, all of which have progressed considerably towards self-government. Despite its population of 5.8 million, which is fifteen times the aggregate population of all the other British dependent territories today; its comparatively high literacy rate and the active presence of a vibrant middle class; and its rapid economic development which has transformed it into one of the world's largest financial centres, Hong Kong's constitutional structure remains relatively authoritarian, unrepresentative and undemocratic.

Under Letters Patent and Royal Instructions, which together form the present constitution of Hong Kong, power is centralised in the hands of the Governor, subject to control by the Foreign and Commonwealth Office in London. He is advised by an Executive Council (whose advice he is not bound to follow) which consists of five officials and nine unofficials chosen by him. The principal law-making body in the colony is the Legislative Council of whose 60 members only 18 are now (since September 1991) directly elected on the basis of universal adult suffrage. Of the others, 21 are elected on a restricted franchise by "functional constituencies", 18 are appointed by the Governor, and three are senior officials sitting ex-officio. Laws may also be made by the Queen in the exercise of her prerogative power and by the Parliament of the United Kingdom.

In practice, however, the United Kingdom has rarely exercised the full extent of its overriding powers. Accountable as they are to Parliament at Westminster, recent Governors have ensured that the inhabitants of Hong Kong enjoy a high degree of individual freedom. Undemocratic though it be in form and structure, the actual decision-making process is usually based on consultation with selected community leaders, and often results in compromise and consensus.

### 3. Steps Towards Handover to China

With the establishment of the United Nations, and in particular its special committees to monitor progress towards decolonization, the British government furnished these bodies with regular information on constitutional developments in the territory. From 1947 to 1972, Hong Kong was classified as one of several colonial territories moving towards self-government. In that year the Chinese Ambassador to the United Nations requested the Decolonization Committee to delete Hong Kong from its list of colonial territories in respect of which annual reports were sought on the ground that Hong Kong was part of Chinese territory occupied by Britain on the basis of unequal treaties. According to him, "the settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and does not fall under the ordinary category of colonial territories". With no recorded objection from Britain, the Chinese request was granted.

On 26 September 1984, in Beijing, representatives of the British and Chinese governments initialled a draft text of an agreement on the future of Hong Kong. That agreement - the Joint Declaration - provided for the transfer of sovereignty over Hong Kong. In it the Chinese government stated that it had long been "the common aspiration of the entire Chinese people" to recover "the Hong Kong area"; and the British government declared that it would accordingly "restore" Hong Kong to China with effect from 1 July 1997. Negotiations on the agreement had been conducted in secret, and the inhabitants of Hong Kong had not been consulted either prior to the commencement of, or in the course of, those negotiations.

On the same day (26 September 1984), the Joint Declaration was published in Hong Kong in the form of a White Paper, and the people of the colony were invited to comment on the overall acceptability of the arrangements described in it. An Assessment Office was set up to analyse and assess opinion, and two monitors were appointed to report whether that function had been properly, accurately, and impartially discharged. The British government warned, however, that "there is no possibility of an amended agreement". The alternative to acceptance of the draft agreement was to have no agreement at all. And whether or not there was an agreement, the British government intended that not only the New Territories but also Hong Kong Island, Kowloon, and Stonecutters Island would all revert to China on 1 July 1997.

On 18 October 1984, the Legislative Council (at that stage, a body consisting entirely of the Governor's nominees) endorsed the draft agreement and recommended it to the people of Hong Kong. On 29 November 1984, the Assessment Office reported that "most of the people of Hong Kong find the draft agreement acceptable". Thereupon, the Joint Declaration was debated in the British Parliament and, on 19 December 1984, it was signed in Beijing by the Prime Ministers of the two participating countries. On 30 June 1985, instruments of ratification were exchanged, and the agreement entered into force. No referendum was held to seek the views of the people of Hong Kong. Indeed, even in the admittedly superficial consultation exercise, they had not been offered any real choice.

Meanwhile, the National People's Congress of China (NPC) resolved on 10 April 1985 to establish a committee to draft the Basic Law of the future Hong Kong Special Administrative Region (SAR), and on 18 June 1985 the Standing Committee of the NPC appointed a Basic Law Drafting Committee (BLDC). It comprised 59 members of whom a minority - 23 - were from Hong Kong. The Hong Kong residents included bankers, businessmen, clergymen, educationists, publishers and lawyers, none of whom had been authorised by the people of Hong Kong to represent them on that committee. Their number was reduced during the five-year drafting exercise by deaths, resignations and two expulsions, but the vacancies thereby created were not filled.

When the first draft of the Basic Law was published in April 1988 for "solicitation of opinions", the large majority of the people of Hong Kong showed little or no interest in it. An opinion survey conducted at the end of the five-month consultation period revealed that of those who were interviewed only one per cent claimed to have read the draft from cover to cover. But by 4 April 1990 when the final draft was adopted by the NPC, Hong Kong was no longer politically apathetic. A territory frightened by the brutal crackdown in June 1989 - the Beijing massacre - had been shaken out of its complacency. Efforts to obtain a reasonable measure of democracy, an effective Bill of Rights, and judicial autonomy had all failed. Instead, curbs on "subversion" and restrictions on those who had obtained foreign passports, were included. Within three

hours of its adoption in Beijing, Hong Kong's reconstituted legislature voted to reject it. In a more dramatic gesture, the 170,000-strong Hong Kong Federation of Students dumped hundreds of torn copies of the draft Basic Law on the steps of the New China News Agency (China's unofficial embassy in Hong Kong) and condemned the drafting exercise as a "shameful sell-out of Hong Kong's interests by Beijing and London".



### CHAPTER III

#### THE MAIN DOCUMENTS

The main documents with which we are concerned, in accordance with our terms of reference are: (A) the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong ("the Joint Declaration"), signed on the 19th December 1984 and ratified on the 27th May 1985; (B) the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, ("the Basic Law") adopted by the Seventh National People's Congress of the People's Republic of China on the 4th April 1990; and (C) the Hong Kong Bill of Rights Ordinance 1991 ("the Bill of Rights Ordinance") enacted on 6 June 1991 and coming into force on 8 June 1991. Each of the three will need to be examined in some detail.

#### THE JOINT DECLARATION

The Joint Declaration was negotiated between the Governments of the United Kingdom and the PRC in circumstances described elsewhere in this Report. It has the status of a treaty between the two countries and has been registered as such with the United Nations. The failure by either party to carry out its obligations under the Joint Declaration would therefore be a breach of its treaty obligations to the other.

The Joint Declaration has a complex structure which is dictated by the need to reconcile the Chinese view that the decision when to resume sovereignty over Hong Kong is a matter for the unilateral decision of the PRC with the British view that Hong Kong Island and Kowloon (though not the New Territories) are British territory which can only be transferred to China as the result of an agreement with the Chinese Government. Thus, paragraph 1 of the Joint Declaration defines "Hong Kong" as including Hong Kong Island, Kowloon and the New Territories and goes on to declare that the Government of the PRC has decided to resume the exercise of sovereignty over Hong Kong with effect from the 1st July 1997. In para.2, the Government of the UK declares that it will restore Hong Kong to the PRC with effect from the 1st July 1997.

In a lengthy para.3 of the Joint Declaration, the Government of the PRC declares its basic policies regarding Hong Kong. These are elaborated in Annex I to the Joint Declaration, which is still longer. Together, para.3 and Annex I contain the fundamental rules of the "one country - two systems" principle which the PRC has adopted for the future of Hong Kong.

Sub-paras (1) to (4) of para.3 and Articles I to IV of Annex I contain the basic constitutional framework for Hong Kong after the transfer of sovereignty. The framework can be summarised as follows:

- (1) the PRC will establish, in accordance with Article 31 of its Constitution, the Hong Kong Special Administrative Region ("the SAR") on the resumption of the exercise of sovereignty;
- (2) the National People's Congress of the PRC will enact a Basic Law of the SAR stipulating that the socialist system and socialist policies shall not be practised in the SAR and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years;
- (3) the SAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are reserved to the Central People's Government, and will be vested with executive, legislative and independent judicial power, including that of final adjudication;
- (4) the Government and legislature of the SAR will be composed of local inhabitants;
- (5) the Chief Executive of the SAR will be selected through elections or local consultations and will be appointed by the CPG; principal officials will be nominated by the Chief Executive and appointed by the CPG;
- (6) the executive will be accountable to the legislature;
- (7) the laws previously in force in Hong Kong will remain in force save in so far as they contravene the Basic Law or are amended by the legislature;
- (8) the legislative power of the SAR will be vested in its legislature, which will be constituted by elections; it may on its own authority enact laws which are in accordance with the Basic Law;
- (9) the previous judicial system will be maintained, except for changes consequent on the vesting in the courts of the SAR of the power of final adjudication;
- (10) judges will be appointed by the Chief Executive acting in accordance with the recommendation of an independent commission composed of local judges and lawyers and other eminent persons; judges may be recruited from other common law jurisdictions;
- (11) a judge may only be removed for inability to discharge the functions of the office, or for misbehaviour, by the Chief Executive acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal;

- (12) the power of final judgement will be vested in the court of final appeal, which may as required invite judges from other common law jurisdictions to sit;
- (13) the SAR will have an independent prosecuting authority;
- (14) public servants in all government departments will be allowed to remain in employment after the 1st July 1997;
- (15) the SAR may employ British and other foreign staff at all except the most senior levels of public service;
- (16) the appointment and promotion of public servants will be on the basis of qualifications, experience and ability.

Para.3(5) of the Joint Declaration and Article VI of Annex I provide that the current social and economic systems in Hong Kong and its lifestyle will remain unchanged. Private property, the ownership of enterprises, rights of inheritance and foreign investment will be protected by law. Compensation for lawful deprivation of property will correspond to its real value and will be paid without undue delay.

Para.3(5) of the Joint Declaration and Article XIII of Annex I protect human rights. Rights and freedoms to be ensured by law include those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of demonstration, of choice of occupation, of academic research, of religious belief, inviolability of the home, the freedom to marry and the right to raise a family freely. Every person will have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, to obtain judicial remedies, and to challenge the actions of the executive in the courts. Religious organisations may maintain relations with organisations elsewhere and may continue to run existing schools, hospitals and welfare organisations. The provisions of the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights as applied to Hong Kong (i.e. subject to the reservations made by the UK when ratifying the Covenants in respect of Hong Kong) will remain in force.

Much of the rest of para.3 of the Joint Declaration and Annex I concerns arrangements relating to finance, customs, the monetary system, shipping, civil aviation, and foreign affairs. These are highly important but outside the scope of our mission and we do not, therefore, need to summarise them. We do, however, call attention to the following:

- (1) under Article X of Annex I, the SAR will have power to decide its own policies in the fields of culture, education, science and technology. Existing institutions will retain their autonomy and will be allowed to continue to recruit staff and use teaching

materials from outside the SAR. Students will enjoy freedom of choice of education and freedom to pursue their education outside the SAR;

- (2) under para.3(11) of the Joint Declaration and Article XII of Annex I, the maintenance of public order in the SAR will be the responsibility of its government. Military forces of the CPG stationed in the SAR will not interfere in its internal affairs;
- (3) under Article XIV of Annex I, the persons who have the right of abode in the SAR consist of:
  - (a) Chinese nationals who were born in Hong Kong or who have ordinarily resided there for a continuous period of seven years
  - (b) all other persons who have ordinarily resided in Hong Kong for a continuous period of seven years and have taken it as their place of permanent residence
  - (c) any other persons who had the right of abode only in Hong Kong on the 30th June 1997.

Under the Nationality Law of the PRC, all Hong Kong residents who are "compatriots" (including British Dependent Territory Citizens) are Chinese nationals. (The expression "compatriots" includes Hong Kong residents of Chinese descent who do not hold nationality of a third country);

- (4) Under Article XIV of Annex I, the Government of the SAR will be authorised to issue passports to Chinese nationals with rights of abode in the SAR and travel documents to other persons lawfully resident there. Such passports and documents will be valid for all states and will include the right to return. Unless restrained by law, holders will be free to leave the SAR without special authorisation.

By para.5 of the Joint Declaration, the two Governments agreed to set up a Sino-British Joint Liaison Group ("the JLG") in order to ensure a smooth transfer of government in 1997. The terms of reference of the JLG are set out in Annex II to the Joint Declaration. The JLG is described as "an organ for liaison and not an organ of power". Matters on which there is disagreement are to be referred to the two Governments for solution through consultation. Matters for consideration by the JLG include the action to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong.

The signature of the Joint Declaration was accompanied by an exchange of memoranda. These memoranda (unlike the Annexes) do not form part of the Joint Declaration and, as we understand it, have effect only as statements of intent rather than as

treaty obligations. The U.K. memorandum declares that British Dependent Territories Citizens in Hong Kong on the 30th June 1997 will cease to have that status but, if holding British passports issued before that date, will be entitled to continue to use and renew passports issued by the U.K. which will confer the right to British consular services and protection in third countries. The Chinese memorandum states that it will allow such persons to use such passports, but that they will not be entitled to British consular protection in the SAR or elsewhere in China.

Given the assumption - which we do not share - that it was a proper course of action to negotiate the transfer of sovereignty over Hong Kong to the People's Republic of China over the heads of the people of Hong Kong, the Joint Declaration can be regarded as fairly satisfactory. It reflects some credit on the efforts of the British negotiating team to protect the interests of the people of Hong Kong. It does, however, suffer from one defect which is so serious as to undermine much of its virtue in other respects. This is its failure to ensure that the Chief Executive or the Government will be elected by a democratic process and accountable to a democratic body. We discuss this in more detail in Chapter VIII.

#### THE BASIC LAW

The Basic Law will form the constitution of the SAR after the 1st July 1997. It was enacted and promulgated pursuant to para. 3(12) of the Joint Declaration, which provided: "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". A similar provision appears in Article I of Annex I.

After lengthy and contentious negotiations, the history of which is briefly outlined elsewhere in this Report, the Basic Law was enacted by the National People's Congress on the 4th April 1990 and promulgated by the President of the PRC on the same day.

The Basic Law repeats many of the provisions set out in para.3 of the Joint Declaration. However, it contains a number of important extensions and variations. We believe that in several respects, described in detail in Chapter XIV, it departs from the policies declared by the PRC in the Joint Declaration and Annex I. In this Chapter, we simply note the more important provisions of the Basic Law, with particular reference to those which do not appear in the Joint Declaration.

Chapter I sets out the general principles of the Basic Law, in conformity with the Joint Declaration. The Chapter includes a statement that the Hong Kong SAR is an inalienable part of the PRC (Article 1). It provides that the Hong Kong SAR shall exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, "in accordance with the provisions of this law" (Article 2). It provides that the SAR shall safeguard the rights and freedoms of the residents of the SAR and of other persons in the Region in accordance with law (Article 4). It provides that the socialist system and policies shall not be practised in the SAR, that the previous capitalist system and way of life shall remain unchanged for fifty years, and that the right of private ownership of property shall be protected (Articles 5 and 6).

Chapter II defines the relationship between the Central Authorities and the SAR. Provisions which have no counterpart in the Joint Declaration include the following:

- under Article 14, the Government of the SAR may ask the Central People's Government for assistance from the military garrison in Hong Kong in the maintenance of public order or in disaster relief.
- under Article 17, if the Standing Committee of the National People's Congress considers that any law enacted by the legislature of the SAR is not in conformity with the Basic Law regarding affairs within the responsibility of the central authorities or regarding the relationship between the Central authorities and the SAR, the Standing Committee may invalidate it.
- Article 18 provides that national laws shall not be applied to the SAR except for those listed in Annex III. The national laws so listed mostly concern national symbols, such as the flag and anthem, but also include the nationality law of the PRC. The Standing Committee is given power to add further laws to Annex III "relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law".

Article 18 also provides that if the Standing Committee declares a state of war or if it decides that, by reason of turmoil within the SAR which endangers national unity or security and is beyond the control of the government of the SAR, the SAR is in a state of emergency, the Central People's Government may issue an order applying national laws in the SAR.

- Article 19 provides that the courts of the SAR shall have no jurisdiction over "acts of state such as defence and foreign affairs". Whenever questions of fact concerning such acts of state arise in the course of litigation, the courts of the SAR must obtain a

certificate from the Chief Executive, who in turn must obtain a "certifying document" from the CPG.

- Under Article 22, the number of persons entering the SAR from other parts of China for the purpose of settlement is to be determined by the CPG.
- Under Article 23, the SAR is required to enact laws "to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies".

Chapter III sets out the fundamental rights and duties of the residents. In certain respects it extends the rights specifically guaranteed under the Joint Declaration. Thus Article 28 confers a right not to be subjected to arbitrary or unlawful arrest, detention, imprisonment, or body search, and prohibits torture and the arbitrary or unlawful deprivation of life. Article 36 confers a right to social welfare. Article 39 repeats the provision in Annex I to the Joint Declaration that the two International Covenants "as applied to Hong Kong" shall remain in force and extends this provision to international labour conventions. It directs that the Covenants and conventions "shall be implemented through the laws" of the SAR. Article 40 provides that the lawful traditional rights and interests of the indigenous inhabitants of the New Territories shall be protected by the SAR.

Chapter IV provides for the political structure of the SAR. Section 1 deals with the Chief Executive. Provisions not appearing in the Joint Declaration include the following:

- under Article 43, the Chief Executive of the SAR is accountable to the CPG and the SAR "in accordance with the provisions of this Law".
- under Article 44, the Chief Executive must be a Chinese citizen, not under the age of 40, who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.
- Article 45 declares that "the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." The actual method of selection is prescribed in Annex I to the Basic Law. This provides that the Chief Executive is to be elected by a "broadly representative" Election Committee and is to be appointed by the CPG. The Committee is to be composed of 800 members drawn equally from four "sectors" (industrial, financial and commercial; the professions;

labour, social services, and religious; and members of elected official bodies). The Hong Kong SAR is to enact a law prescribing the organisations in each sector entitled to return members, the number of members to be returned by each of them, and the method of election. Candidates must be nominated by at least 100 members of the Election Committee, and are to be elected by secret ballot. Amendment of the method of selection requires the endorsement of two thirds of the members of the Legislative Council of the SAR and the consent of the current Chief Executive.

For the selection of the first chief Executive, a special procedure is constituted. In 1996, the National People's Congress will establish a Preparatory Committee whose members are to be appointed by the Standing Committee and which may include up to 50 per cent of members from mainland China. The Preparatory Committee will in turn establish a Selection Committee of 400 members, who must be Hong Kong residents. The Selection Committee is to be drawn from the same sectors as the Election Committee referred to above. The method of electing or appointing the Selection Committee is not specified and is presumably a matter for the Preparatory Committee to decide. The Selection Committee is to recommend the candidate for the office of Chief Executive through local consultations or through nomination and election after consultations and is to report the recommended candidate to the CPG for appointment.

It is not clear to us whether the requirement that the Chief Executive should be appointed by the CPG is a mere formality or whether the CPG is intended to have a right of veto. There may be a distinction between the first Chief Executive (who is merely "recommended" by the Selection Committee) and subsequent Chief Executives (who are "elected" by the Election Committee). There is no express provision for a veto or for a reference back to the relevant Committee for further proceedings if a veto is exercised.

- under Article 46, the Chief Executive's term of office is five years, and he or she may not serve for more than two consecutive terms.
- Article 48 spells out the powers and functions of the Chief Executive. The effect of these is to constitute the Chief Executive as executive president of the SAR. Thus he or she will have the power or duty to decide on government policies and to issue executive orders; to nominate and to report to the CPG for appointment the principal government officials; to recommend to the CPG the removal of such officials; to appoint and remove judges and other holders of public office in accordance with legal procedures; to implement the directives of the CPG in respect of matters reserved to it by the



Basic Law; to conduct external affairs so far as authorised by the central authorities; and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council.

- under Article 48, the Chief Executive is empowered to sign bills passed by the Legislative Council. Under Article 49, if the Chief Executive considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she may return it for reconsideration. If the Legislative Council passes the bill again with the vote of at least two thirds of its members, the Chief Executive must either sign it or dissolve the Legislative Council under Article 50. Under Article 52, if the new Legislative Council passes the bill by a similar majority, the Chief Executive must resign. Under Articles 50 and 52, if the Legislative Council refuses to pass a Budget or an important bill introduced by the government, the Chief Executive may dissolve the Legislative Council and must resign if the new Council continues the refusal.
- under Article 54, the Executive Council is an organ for assisting the Chief Executive in policy-making. It is an advisory body and not a Cabinet in the British sense. It has a right to be consulted on important matters (Article 56) and, if the Chief Executive does not accept its advice, he or she must record reasons for rejecting it. It may include principal officials, but does not have to do so and may include people outside government (Article 55).

Section 2 of Chapter IV deals with the Executive Authorities. It provides (Articles 59 and 60) that the Government of the SAR shall be the "executive authorities" of the SAR, and that the Chief Executive shall be its head. The "executive authorities" are not expressly defined but, by implication, appear to be the principal officials identified in Article 48(5). The principal officials must be Chinese citizens who are permanent residents of the SAR with no right of abode in any foreign country and who have continuously resided in Hong Kong for not less than fifteen years.

The distinction between the functions of the Chief Executive and the Government as a whole is not clear. Thus there appears to be an overlap between the power of the Chief Executive under Article 48 "to decide on government policies and to issue executive orders" and the power of the Government under Article 62 "to formulate and implement policies". There is a similar overlap in relation to external affairs. The Government (but not the Chief Executive) has power to draw up and introduce budgets and legislation. The Government is stated to be accountable to the Legislative Council (Article 64) and is required to implement laws which are in force; to present policy addresses to the Council; to answer questions raised by members of the Council; and to obtain approval from

the Council for taxation and public expenditure.

Since the Government is clearly not the same body as the Executive Council, it is not clear whether and, if so, how the Government is to take collective decisions as a body. It is also not clear how far - if at all - individual members of the Government are accountable to the Chief Executive personally or are obliged to comply with directions given by the Chief Executive. As noted above, the Chief Executive can only recommend to the CPG the removal of an official and has no personal power of removal. It is also not clear what the accountability of the Government of the SAR to the Legislative Council means in practice or how it could be enforced.

Section 3 of Chapter IV concerns the legislature. Provisions not appearing in the Joint Declaration include the following:

- under Article 67, the Legislative Council must be composed of Chinese citizens who are permanent residents of the SAR with no right of abode in any foreign country, except that up to 20 per cent of the Council may consist of members who are not Chinese citizens or who have rights of abode elsewhere.
- Article 68 declares that "the ultimate aim is the election of all the members of the Legislative Council by Universal Suffrage". The actual method of election is prescribed in Annex II to the Basic Law. This provides that the Council shall have 60 members. For the first term (which is a two-year term from 1997 to 1999) 20 members are to be directly elected from geographical constituencies, 10 members are to be returned by an election committee, and 30 members are to be returned by "functional constituencies". The method for forming the first council is to be prescribed by the Preparatory Committee referred to above in connection with the first Chief Executive. However, if the last elections under the present regime in Hong Kong, due to be held in 1995, are held on the same basis as is proposed for the first Council of the SAR, those of its members who uphold the Basic Law, pledge allegiance to the SAR, and meet the requirements of the Basic Law, will, if confirmed by the Preparatory Committee, become members of the first Council of the SAR without re-election. This process was described to us as "the through train".

In the second Legislative Council of the SAR (elected for a four-year term in 1999) the number of members directly elected will be increased to 24 and the number returned by the election committee will be reduced to 6. In the third Council (due to be elected for a four-year term in 2003) the election committee will disappear and 30 members will be directly elected. On both occasions, 30 members will be returned from functional constituencies. The process will be

regulated by an election law passed by the Council. After 2007, any amendment to the composition of the Council requires a two thirds majority of all members of the Council (i.e. 40 affirmative votes) and the consent of the Chief Executive).

Annex II also provides that ordinary government bills require a simple majority of members present. Private members' bills will normally require a simple majority both among the members returned by functional constituencies present and among other members present.

- Articles 71 and 72 provide for the office of President of the Legislative Council and define his or her functions.
- Article 73 provides for the powers and functions of the legislature. These include the enactment of laws; the approval of budgets, taxation, and public expenditure; the questioning of the Government; the endorsement of the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court.

Article 73 also provides for an impeachment procedure. On the motion of 15 members of the Legislative Council charging the Chief Executive with breach of law or dereliction of duty, the Council may direct the Chief Justice of the Court of Final Appeal to form an investigation committee. If the Committee considers the charges to be substantiated, the Council may by 40 affirmative votes pass a motion of impeachment.

- Article 74 confers powers on individual members to introduce bills not relating to public expenditure, political structure or the operation of the Government. Bills relating to government policies can not be introduced without the consent of the Chief Executive.
- Article 79 provides for the removal from office of members of the Council.

Section 4 of Chapter IV concerns the legal system. Much of this section repeats the provisions of the Joint Declaration. Some of the new provisions are welcome; for example, Article 86, which maintains the principle of jury trial, and Article 87, which confers on arrested persons a right to a fair trial without delay and the presumption of innocence. Article 90 requires the two senior judges - the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court - to be permanent residents of the SAR with no right of abode in a foreign country. Under Article 94, the Government of the SAR may make provision for local lawyers and lawyers from outside Hong Kong to work and practise in the SAR "on the basis of the system previously operating".

Section 5 of Chapter IV deals with District Organisations and does not call for comment. Section 6 deals with public

servants and contains provisions concerning the employment of foreign nationals in the public service which echo the Joint Declaration, except that Chinese citizens who have a right of abode in a foreign country are excluded from service in the key positions.

Chapter V deals with the economy. Chapter VI deals with education, science, culture, sports, religion, labour and social services. A number of provisions are to be welcomed. For example, under Article 142 existing professional organisations are to be allowed to continue to assess and confer professional qualifications, and under Article 149 the right to maintain relations with counterpart organisations in foreign countries, which under the Joint Declaration is specifically conferred only on religious organisations, is extended to non-governmental organisations in many other fields. Chapter VII deals with external affairs and does not call for comment.

Chapters VIII and IX contain three important Articles which must be referred to in some detail. Article 158 vests the power to interpret the Basic Law in the Standing Committee of the National People's Congress. The courts of the SAR have delegated authority to interpret the Basic Law in the course of proceedings, but they must refer to the Standing Committee the interpretation of any provision concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the central authorities and the SAR before giving a final judgment.

Under Article 159, the power to amend the Basic Law is vested in the National People's Congress. No amendment is to contravene the "established basic policies" of the PRC towards Hong Kong (a reference to para.3 of the Joint Declaration and Annex I). The power to propose amendments is vested in the Standing Committee, the State Council and the SAR. Amendments proposed by the SAR must have the support of the Chief Executive, two thirds of the members of the Legislative Council, and two thirds of the SAR deputies to the National People's Congress.

Under Article 160, the laws previously in force in Hong Kong are to continue as laws of the SAR, except for those which the Standing Committee declares to be in contravention of the Basic Law. Laws which are later "discovered" to be in contravention of the Basic Law will be amended or cease to have effect.

By a decision of the National People's Congress taken at the time of the promulgation of the Basic Law, a sub-committee of the Standing Committee will be set up to study questions arising from the implementation of Articles 17, 18, 158 and 159, upon the implementation of the Basic Law itself. The committee will consist of six mainland members and six members from the SAR, who must be Chinese citizens with no right of abode abroad.

Finally, we draw attention to the terms of the decision of the National People's Congress on the establishment of the SAR. This records the decision - also taken on the 4th April 1990 - to establish the Hong Kong SAR as of the 1st July 1997. It provides that the area of the Hong Kong SAR "covers the Hong Kong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction." It also provides that "the map of the administrative division of the Hong Kong SAR will be published by the State Council separately".

There is an alarming ambiguity in the terms of this decision. The New Territories and Kowloon form a peninsula which could be very broadly described as "the Kowloon Peninsula". However, it appears to us that this expression could be used to describe Kowloon on its own, to the exclusion of much or all of the New Territories. The map which would clarify this question has not been published.

The Joint Declaration expressly covers the New Territories as well as Hong Kong Island and Kowloon. The Basic Law does not itself define the territory of the SAR, but Article 40, which preserves the traditional rights and interests of the indigenous inhabitants of the New Territories, necessarily implies that the New Territories (though not necessarily the whole of them) will be part of the SAR.

While we were present in Hong Kong we, and everybody to whom we spoke, assumed that the New Territories would be included in the SAR. It was only at a later stage that one of our members noticed the ambiguity in the terms of the decision of the National People's Congress. It may be that because of political sensitivities in China the National People's Congress preferred not to use the expression "New Territories" as part of the definition of the SAR and that there is no sinister intent. However, any attempt to exclude the New Territories from the SAR would be an extremely grave breach of the Joint Declaration and would, we believe, have utterly disastrous effects on the future of Hong Kong.(1)

In our view, the decision on the area of the Hong Kong SAR requires immediate clarification. If there is in fact no problem, and no intent by the PRC to exclude any part of the New Territories, this should be made clear at once. Once the question has been raised, it is bound to cause serious concern in Hong Kong and elsewhere, given that the new airport will be well outside Kowloon proper, as are many of the satellite new towns. We believe that the definitive map should be published as a matter of urgency.

### THE BILL OF RIGHTS

In 1976 the United Kingdom ratified the International Covenant on Civil and Political Rights and extended it to Hong Kong, with certain reservations. The purpose of the Hong Kong Bill of Rights Ordinance 1991, enacted on the 8th June 1991 and coming into force immediately, is to incorporate into the law of Hong Kong the provisions of the ICCPR, subject to the existing reservations. It is assumed that readers of this Report will be aware of, or have access to, the terms of the ICCPR and they are therefore not outlined here.

Section 2 of the Ordinance states the purpose of the Ordinance and incorporates Article 5 of the ICCPR. Section 3 provides that all existing legislation will be interpreted in a manner consistent with the Ordinance and, if that is not possible, is repealed to the extent of the inconsistency. Section 4 provides that all subsequent legislation shall, so far as possible, be construed so as to be consistent with the ICCPR as applied to Hong Kong. Section 5 contains a right of derogation based upon Articles 4.1 and 4.2 of the ICCPR though its application gives rise to problems discussed in Chapter XII. Section 6 provides that courts and tribunals may grant such remedy or relief, or make such order, in respect of a violation or threatened violation of the Bill of Rights as they have power to grant or make and consider appropriate and just.

Section 7 provides that the Ordinance binds only the Government, other public authorities and other persons acting on their behalf. Earlier drafts of the Ordinance provided for the Bill of Rights to create rights directly enforceable between private persons. This would, for example, probably have enabled women to take proceedings directly against employers for sex discrimination in employment under Article 22 of the Hong Kong Bill of Rights (Article 26 of the ICCPR). However, the usual practice is to make constitutional Bills of Rights enforceable only against public authorities and we do not think that any objection can be taken to the final form of Section 7.

Section 8 sets out the Hong Kong Bill of Rights in 23 Articles, generally corresponding to Part III of the ICCPR. There are some minor alterations to make the provisions of the ICCPR appropriate for incorporation into domestic law but they do not call for comment.

Sections 9 to 13 incorporate the reservations entered into by the United Kingdom when extending the ICCPR to Hong Kong. The relevant reservations are:

Section 9: restrictions may be authorised by law for the preservation of discipline over the armed forces and in prisons.

Section 10: juveniles under detention need not always be accommodated separately from adults.

Section 11: the Bill of Rights does not apply to immigration legislation applying to persons not having the right to enter and remain in Hong Kong.

Section 12: the Bill does not confer a right to a review of a decision to deport a person not having a right of abode in Hong Kong.

Section 13: the Bill does not require the establishment of an elected Executive or Legislative Council in Hong Kong.

Section 14 excludes six important Ordinances from the operation of the Bill of Rights for one year, with power for the Legislative Council to extend the exclusion for a further year. The excluded Ordinances relate to Immigration; Societies; Crimes; Prevention of Bribery; the Commission Against Corruption; and the Police Force.

The Bill of Rights Ordinance is entrenched by an amendment to the Hong Kong Letters Patent which form the fundamental constitution of Hong Kong. The Letters Patent provide that no law of Hong Kong shall be made that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the ICCPR as applied to Hong Kong. Since the Bill of Rights Ordinance mirrors the ICCPR it follows that any restriction of the rights granted by the Bill of Rights Ordinance would fall foul of the Letters Patent and hence would be outside the competence of the Legislative Council. However, the entrenchment of the Ordinance by this means will end on the 1st July 1997 when the Letters Patent themselves will cease to have effect.

Our comments on shortcomings in the Bill of Rights appear in Chapter XII.

THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

Certain provisions of the Constitution of the People's Republic of China are relevant and should be referred to.

Article 1 declares that the PRC is a socialist state and the socialist system is the basic system of the PRC. "Sabotage" of the system is prohibited.

Article 2 provides that the people exercise state power through the National People's Congress and local people's congresses.

Article 5 provides that no law or administrative or local rules shall contravene the Constitution.

Article 31 provides that the state may establish special administrative regions. The systems to be instituted in such regions shall be prescribed by law enacted by the National People's Congress.

Other articles of Chapter I (Articles 1-32) lay down the principles of the socialist system.

Chapter II contains a statement of the fundamental rights and duties of citizens. Much of the content is admirable but many of the rights - such as freedom of the press, of assembly and of demonstration (Article 35) - are clearly not recognised in practice. Some concern may be expressed over the scope of Article 53 (which requires citizens to observe labour discipline and public order and respect social ethics), Article 54 (which directs citizens not to commit acts detrimental to the security, honour and interests of the motherland) and Article 55 (which makes it the duty of citizens to perform military service).

Chapter III sets out the structure of government. Legislative power is exercised by the National People's Congress and its Standing Committee. The Congress meets once a year; the Standing Committee is a permanent body. Powers of the Congress (Article 62) include the power to amend the Constitution (by a two thirds majority of all deputies) and to supervise its enforcement, and the power to decide on the establishment of special administrative regions and the systems to be instituted there. Powers of the Standing Committee (Article 67) include the power to interpret the Constitution and to supervise its enforcement.

Under the Constitution of the PRC, the validity of the "one country - two systems" concept is doubtful. The capitalist system contravenes Article 1 of the Constitution. By virtue of Article 5, no law or administrative or local rules may contravene the Constitution. It is difficult to see, therefore, how a special administrative region set up under Article 31 can adopt the capitalist system without being in breach of the constitution. To eliminate doubts, the Constitution of the PRC requires amendment.



CONCLUSIONS AND RECOMMENDATIONS

- (1) The Joint Declaration, though creditable in other respects, is seriously defective in failing to ensure that the Chief Executive will be democratically elected by and democratically accountable to the people of Hong Kong.
- (2) The decision of the National People's Congress on the establishment of the SAR should be clarified urgently by the publication of the map to which it refers, to eliminate the possibility that some or all of the New Territories may be excluded from the SAR.
- (3) There are serious doubts as to the validity of the "one country - two systems" principle under the Constitution of the PRC as it now exists; these doubts can only be removed by amendment of the PRC Constitution.

(Our conclusions on the Basic Law and the Bill of Rights are set out in other Chapters).

FOOTNOTE

- (1) It has been suggested in the Press (Far Eastern Economic Review, 5 Dec. 1991) that the PRC may extend the SAR to include the Shenzhen Special Economic Zone. If this is in fact under consideration (which we doubt) there would be different but almost equally serious problems for Hong Kong.

CHAPTER IVFINDINGS OF FACT

We arrived in Hong Kong when the Hong Kong Bill of Rights Conference which was organised by the Faculty of Law, University of Hong Kong, was being held. All of us were invited to attend the Conference, and the papers presented and the views expressed at the Conference helped us gain an insight into some of the problems we needed to address.

Wide publicity was given in the local press to the Mission and its terms of reference. Anyone wishing to present views on any of the matters covered by the terms of reference was asked to come forward to give evidence. On the invitation of certain business leaders, we took the opportunity to meet some members of the business community privately, to obtain their views. The Attorney General of Hong Kong and the Chief Secretary of Hong Kong, with whom we discussed the various issues involved, gave us their official views.

The Mission was not able to get the views of anyone representing the People's Republic of China. Attempts made to contact its de facto representative in Hong Kong and its representative in the Joint Liaison Group were unsuccessful. A letter written to the Ambassador of the People's Republic of China in London, seeking the views of his government, was not responded to.

Ms. Liu Yiu Chu, a resident of Hong Kong who is a member of the National People's Congress of the People's Republic of China, initially accepted an invitation to appear before us. However, she was for various reasons unable to do so at the appointed time nor at the new time fixed.

We took evidence between 22nd and 28th of June 1991. There were obvious limitations on the time available to each delegation appearing before us to make its representations. But as most of the delegations had submitted their written submissions to us earlier, we feel that the time we allotted to those who wanted to give evidence was appropriate.

We set out in Annex II a list of the organisations and persons who gave evidence at our public hearings and of those others whose views we obtained at our meetings with them. The list does not include the names of those with whom we discussed the issues on informal occasions or who requested (in one case) that their name should not be disclosed.

On the evidence we have received and obtained we make the following findings of fact:

## 1. Self-Determination

There is no evidence of any demand on the part of the people for Hong Kong to be fully independent. Hong Kong is and has been a homogeneous society with 98% of the population being of Chinese origin. They have generally believed that they were part of China and have been conditioned to thinking that they would go back to China. Because of Hong Kong's close proximity to China and the attitudes of successive Chinese governments no one considered that China would tolerate Hong Kong becoming an independent state. The majority of the people of Hong Kong acknowledge Chinese sovereignty and do not believe that there would be support for any call for Hong Kong to be given a full independent status. The feeling generally is that it is, in any case, too late for such a call to be made having regard to the Joint Declaration. There might well, however, be support for independence if it were a viable option.

The common view nevertheless is that the 1982-1984 negotiations between the British and Chinese governments should not have been held in secrecy. The people of Hong Kong should have been consulted before the negotiations began as their future well-being was being affected.

There is no reason to doubt the correctness of the report of the Assessment Office that most of the people of Hong Kong found the draft Joint Declaration acceptable but the assessment survey could not in any way constitute a referendum designed to obtain the views of the people of Hong Kong. As is common with all such surveys, the niceties of the Joint Declaration and the implications of its terms were not explained to nor appreciated by the people of Hong Kong: no practical analysis of the Joint Declaration was made available to them.

## 2. Local Views of China

Until 4th June 1989 there was relatively little overt evidence of concern over the transfer of sovereignty over Hong Kong to China, though worries about the future can be inferred from the brain drain (which became evident from 1985 onwards) and the public debate in 1987-88 about direct elections. There was also concern about the negotiations over the drafting of the Basic Law, in which China's intention to renege on some of its commitments under the Joint Declaration was apparent from the beginning. It was, however, in general accepted that China would want Hong Kong to continue to thrive and prosper as a financial centre and that it would be in the interest of China to implement the 'one country: two systems' concept

devised for Hong Kong under the Joint Declaration.

But the events which occurred in Beijing on 4th June 1989 and the belligerent attitude of the Chinese government towards the support shown in Hong Kong for the student-led 'pro-democracy' movement powerfully reinforced the doubts of the people of Hong Kong about the goodwill of China and its willingness to act in accord with the spirit of the Joint Declaration. Its subsequent high-profile involvement with the internal affairs of Hong Kong (by its intervention in the airport project and in the appointment of the members of the Final Court of Appeal) suggested that it was not prepared to permit Hong Kong to have that high degree of autonomy envisaged by the concept.

Uncertainty about the future political developments in China has added to this loss of confidence. There is a belief that the next six years will see considerable changes in leadership in China due to elderly leaders being replaced. No one is presently able or prepared to indicate the direction of these changes as that may even depend on the order in which the elderly leaders are replaced.

The general lack of confidence in the future of Hong Kong is not wholly shared by the business community which, unlike the lawyers, and human rights and other groups, sees the continuing prosperity and stability of Hong Kong as a financial centre as very much the primary consideration and is less concerned with human rights issues. China has a self-interest in the success of the economy of Hong Kong considering that there is already a close economic integration between Hong Kong and the various regions of the People's Republic of China, including the adjoining areas of south China (Guangdong). There is also the fact of China's large investments in Hong Kong through its investment arm. As put to us, the issue "turns on the question of economic prosperity". Human rights in Hong Kong on the other hand is not an issue in which China has any positive interest. Indeed the reverse is the case, because the Chinese government may regard human rights in Hong Kong as an infection which could spread to other parts of China.

Since our visit to Hong Kong a certain measure of business confidence has been restored as a result of the resolution of the Hong Kong airport issue.

### 3. Internal Self-Government

Calls for representative government had originally come primarily from the British residents of Hong Kong, who considered that they had been disenfranchised as a result of living in the colony. Such calls did not

have wide public support for a number of reasons. Firstly, the large majority of the population, who had come from China, did not want to be involved in politics because of their fear of China which had publicly expressed its determination to recover Hong Kong and to eliminate the legacy of the "unequal treaties". The successful request made by China in March 1972 for the removal of Hong Kong from the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted by the United Nations General Assembly in 1969) showed China's, and to some extent the British government's intention towards Hong Kong. There was the further fear that agitation for political reform could turn Hong Kong into a battleground between surrogates of the Chinese Communist Party and of the Kuomintang (KMT or the Nationalist Party), the ruling party in Taiwan, which could adversely affect the economy and well-being of Hong Kong. Secondly, the people had been conditioned to be content with the way Hong Kong was administered. Though authoritarian, the government had managed to avoid political controversy by giving the people of Hong Kong a high degree of personal and economic freedom. Decisions on important issues were usually made by the government after consultation with selected community leaders. By this strategy, the government successfully managed to resist such calls as were made for democratisation. It was generally believed that Hong Kong's spectacular economic progress after World War II would not have been possible if democratisation had been allowed to develop. Under this form of government Hong Kong emerged as a highly a-political society content to leave the business of government to the colonial administrators while occupying itself with the more immediate business of making money. Thirdly, being a small territory and lacking the most basic resources, such as water, and given its geographical location, it needed the co-operation of China, and the people never saw Hong Kong as having an independent future. The question of Hong Kong having any form of relationship with China other than as part of its sovereign territory was never thought of and never came into any public agenda.

A promise that Hong Kong would be allowed internal self-government was made by the British government even before the initialling of the Joint Declaration in 1984. This conformed with the assurance given by the Chinese government that "Hong Kong people will rule Hong Kong". The Joint Declaration itself provides for an elected legislature to which the executive is to be accountable, and states that the territory is to enjoy 'a high degree of autonomy' over its internal affairs. The then Minister with special responsibility for Hong Kong, Richard Luce, stated on 5 December 1984 during the Parliamentary debate on the Joint Declaration, "we

all fully accept that we should build up a firmly-based democratic administration in Hong Kong in the years between now and 1997".

The Hong Kong Government 1987 Green Paper ("The 1987 Review of Developments in Representative Government"), issued for the purpose of consulting the people of Hong Kong on the form and degree of democratisation of Hong Kong, dampened the incipient democratic expectations of the Hong Kong people. By its presentation of the many models and options for public consideration, the 1987 Green Paper focussed attention away from the central issue of early democratisation through a representative government, and withdrew from the promise made in 1984 of direct elections starting in 1988. But except for small groups, there is no evidence of great disquiet over the government's actions.

The movement for democracy strengthened demonstrably after the events in Beijing of June 1989, when Hong Kong reacted swiftly and in large numbers in expressing its sympathy for the "pro-democracy" movement in China. In this, Hong Kong surprised itself.

#### 4. The Electoral System

The executive power of Hong Kong is vested in the Governor who is responsible to the British government. He is advised by an Executive Council which consists of five officials of the government of Hong Kong and nine others (not being officials) chosen by him. Up to the time of our visit to Hong Kong, the Legislative Council consisted of fifty-seven members of whom only twenty-six were elected. Of the twenty-six, twelve were elected by an electoral college consisting of all the members of the District Boards, the Urban Council and the Regional Council (totalling 468 electors) while the remaining fourteen were elected by "functional constituencies" representing designated interests, namely, commercial, industrial, labour, finance and accountancy, and medical and health care (each returning two members), and social services, the teaching profession, the legal profession and the engineering profession (each returning one member). Those electors eligible to vote in functional constituencies number approximately 100,000. In all, therefore, less than 3% of the adult population of Hong Kong enjoyed direct franchise.

A number of the persons who appeared before us expressed their dissatisfaction over the system of election by functional constituencies, contending that "everyone has a function and should belong to a functional constituency". The system, which is regarded as unfair, is no longer acceptable and may well be inconsistent with the International Covenant on

Civil and Political Rights and with Article 21 of the Hong Kong Bill of Rights Ordinance 1991, which requires elections to be "by universal and equal suffrage". Under the rules for the elections to the Legislative Council in September 1991, 18 seats out of 60 were elected directly and 21 by functional constituencies. Thus some three per cent of the electorate, in addition to entitlement to vote in the direct elections, were entitled to a second vote which elected 35 per cent of the Council members.

The system is, however, supported by the business interests. While accepting reluctantly that in principle there must ultimately be full democracy in Hong Kong, they, like the government, do not consider Hong Kong to be capable of coping with full democracy suddenly: democracy needs to be introduced by stages. Such an attitude gives credibility to the allegation made by those who do not enjoy the right to vote that the system is a mask for the preservation of vested interests. But there can be no getting away from the fact that Hong Kong has not had a democratic tradition and that its political system is still very much in an embryonic stage, with the United Democrats of Hong Kong standing out as the most politically developed. Yet even they, strongly opposing as they do elections by functional constituencies, are not prepared to move for full direct elections immediately.

At the time of our visit, Hong Kong was about to have its first direct elections in respect of eighteen seats in the Legislative Council. In the elections since held the United Democrats of Hong Kong, which campaigned for more democracy in Hong Kong and a firm stand against interference in Hong Kong's affairs by the People's Republic of China, took twelve of the seats contested. Four other seats were won by candidates having links with the United Democrats.

The number of voters who registered was quite small in spite of government encouragement through advertisements in the media for them to enrol. Of those who enrolled only about 40% turned out at the elections. But other than observing that the turn-out was relatively low in relation to the number eligible to vote, we do not see that any inference can easily be drawn from this. The small turn-out might have been due partly to the electors' not attaching that much importance to the elections considering the small number of seats being contested (representing only 30% of the number of members of the Legislative Council) and the limited impact those elected would have on control of the Council. Comparison with turn-outs in general elections in other countries, held to elect a government, is, accordingly, not valid.

### Attitudes towards the United Kingdom

There is a strong feeling among the people of Hong Kong that they have been betrayed by the British government. They were not allowed to take any part in the 1982-1984 negotiations over their future. The draft agreement (which subsequently became the Joint Declaration) was presented to them as a fait accompli. They were not given any real choice but to accept: the alternative to acceptance was for them to have no agreement at all. If they rejected it they did so at their peril. Understandably, no one was prepared to say positively that the people would have rejected the Joint Declaration had a referendum been held.

We find the cause of this feeling of betrayal to have been due to the following:

#### (1) Denial of Citizenship

There are estimated to be about 3.25 million of the 6 million residents of Hong Kong who, by virtue of their connection with Hong Kong, are British Dependent Territory Citizens (BDTC), having acquired that status by birth, naturalisation or registration in Hong Kong. The Commonwealth Immigration Act 1962 radically changed the status of the BDTCs by withdrawing their right of admission to, or settlement in, the United Kingdom, free of immigration controls. By a Memorandum attached to the Joint Declaration and entitled Chinese Memorandum, all BDTCs who are ethnic Chinese will become Chinese nationals on the transfer of sovereignty over Hong Kong in 1997, but will be permitted to use travel documents issued by the British government for the purpose of travelling to other states and regions. By way of reciprocity, the United Kingdom Memorandum (also attached to the Joint Declaration) provides, inter alia, that BDTCs will cease to have that status but, subject to specified exceptions, will be eligible to retain a new status which will entitle them to use passports issued by the British Government. The new status was subsequently termed "British Nations (Overseas)" [BN(O)], but the new status and the passports do not carry with it the right of abode in the United Kingdom or in any of its territories and colonies. It is significant that even the Assessment Office (which conducted the assessment survey on the acceptability of the draft Joint Declaration) was moved to comment in its report that:

"The statement in the United Kingdom Memorandum that all Hong Kong British Dependent Territories Citizens (BDTCs) would cease to be



recognised as such from 1 July 1997 attracted strong adverse comments from those affected who feel bitter at the change in prospect for them. A feeling that the United Kingdom had failed in its moral obligations towards the two million Hong Kong BDTCs led to expressions of frustration and sometimes anger, particularly from those who recalled their pledges of loyalty on naturalisation."

(2) British Failure to Stand Up to China

There is a wide belief that the Hong Kong government's plans for political reform towards a more representative government in Hong Kong (by the White and the Green Papers published in 1984) were revised by the British government by the Green Paper of 1987, and considerably slowed down, due to pressure in part brought to bear by China on Britain. The Chinese government regarded the proposed political reforms as an attempt on the part of the British government to give Hong Kong its independence and as being in conflict with its own plans for the future of Hong Kong which it was in the course of embodying in the Basic Law to be promulgated. When the Basic Law, which was promulgated on 4 April 1990, contained a number of departures from the Joint Declaration on important issues, the British government was seen by the people of Hong Kong as not standing up to China in defence of Hong Kong's interest.

The small number of seats affected by the direct elections of 1991 did little to allay fears that the British government intended that power should continue to be in the hands of the executive, to be eventually transferred to the Chinese government in 1997 with hardly any say being given to the Hong Kong people in the interim.

Many believe that it was this sense of abandonment, more than the Beijing events of June 1989, which caused the large number of people to leave Hong Kong mostly for Canada, Australia and the United States and to arrange to have foreign passports issued to them. Evidence shows that there is little interest shown by the Hong Kong people in the United Kingdom as a place in which to settle, with the result that some categories of applicants eligible to citizenship under the British Nationality (Hong Kong) Act 1990, are found to be undersubscribed. Many take 'parachute' citizenship to safeguard their future in case they need another country of abode, but with no intention of leaving Hong Kong right away. We have been told that the people of Hong

Kong would prefer to live in Canada or Australia, to join relatives or friends who have already settled there or because of the more favourable climate and economic conditions or the better prospect of employment there.

The number seeking to leave Hong Kong will be large only if conditions in Hong Kong in the lead up to and after 1997 are found to be unacceptable. Most have every desire to stay if things work out.

6. Attitudes to Human Rights

Hong Kong has a nebulous attitude to human rights. Except for those who are involved with and concerned in the legal and the political system, such as students and churches, there is very little broad-based support for, and hardly any evidence of public interest on, the issue. Those who showed concern did so because of their experience through encounters with the authorities when holding demonstrations and peaceful processions and assemblies. Even among lawyers, there was at the time of our Mission a lack of appreciation of the full potential implications of the Bill of Rights which had only just been passed in Hong Kong. There was an apparent unawareness of the possibility of testing the validity of executive actions by reference to the provisions of the Bill. Suggestions made by us that certain acts complained of might now be questioned in court as being contrary to the provisions of the Bill of Rights seemed to cause some surprise. Subsequent decisions of the courts of Hong Kong, however, show that there has been an increase in awareness of the Bill of Rights both among lawyers and the population. It is not therefore surprising that the people of Hong Kong, who support a strong line on law and order and were agitating for the re-imposition of the death penalty for certain offences, did not see the irony of their demand. The death penalty is not seen as a human rights issue by the general population, though during our mission the Legislative Council passed a motion calling for the formal abolition of the death penalty. (The death penalty remains formally in force but all death sentences have for many years been commuted by the Governor).

7. Difficulties of Recruiting the Judiciary

The Supreme Court of Hong Kong comprises the Court of Appeal and the High Court. Sitting in the Supreme Court are the Chief Justice of Hong Kong, who is the head of the Judiciary, nine Justices of Appeal and twenty High Court Judges. Only the Chief Justice and three of the judges of the High Court are Chinese.

Most of the expatriate judges were recruited from outside Hong Kong but a few have been from the Hong Kong Bar. In the past, recruitment to the High Court has been mainly from the Government Legal Department.

Most of those who are involved in the legal profession accept that there is a need to increase the proportion of judges who are permanent residents of Hong Kong but acknowledge that there is difficulty in recruiting them for a number of reasons. Firstly, recruitment to the High Court Bench is mainly from the Bar. A solicitor is not eligible for appointment unless he has served as a District Judge for a period of time. The local Bar, from which judges are mainly recruited, is small in size with its members being relatively young. Secondly, there has lately been a strong resentment at the disparity of treatment accorded between the new and the previous appointees; the introduction of a rent allowance for new judges in place of the free Government housing previously provided for judges is seen as unfair to the new judges. Thirdly, potential appointees fear that they would not be able to return to practice at the Bar if they were removed or forced to resign from the Bench when the transfer of sovereignty over Hong Kong takes place in 1997. Fourthly, the Bench in Hong Kong enjoys less prestige than that in the United Kingdom and is not sufficiently attractive to those who, particularly in Hong Kong, earn a very high income at the local Bar.

Of less concern to the Bar than expected is the possible difficulty in the continued use of English as the language of the law. The right to use English in the courts of the SAR is written in to the Joint Declaration.

#### 8. Confucian Philosophy

There has been doubt expressed as to the relevance of human rights in Hong Kong. It is said by some that western notions of human rights are not observed in the People's Republic of China as they are seen to conflict with the traditional Chinese approaches to law, the individual and society, according to Confucian teaching.

However, we found no real evidence of fundamental cultural and philosophical objection to the concepts of human rights and the rule of law. On the whole, the evidence is to the contrary. There is undoubtedly a lack of interest in human rights among the general public, but in this respect Hong Kong is not significantly different from most other countries, including the United Kingdom.

9. Post 1997

The rule of law is not seen as a guarantee of Hong Kong's future as it is felt that there is no certainty that it will be observed by China after 1997. There is a feeling that no one will come to Hong Kong's aid if China should disregard the rule of law: going by what had happened after the June 1989 Beijing incidents, the world is perceived to practise a double standard when dealing with China. It has been suggested to us that one way of ensuring to an extent that China would act properly in relation to its obligations to Hong Kong under the Joint Declaration is to keep Hong Kong in the international light in order that the international community may be constantly aware of what is happening in Hong Kong.

There is, however, ground for optimism that the resolution of the airport issue recently will result in Hong Kong having the planned new airport as scheduled and will contribute towards Hong Kong's improving its position as a world financial centre. With the economic integration of Hong Kong and the People's Republic of China continuing it is most probable that China's vulnerability to any loss of international confidence or to any collapse of business in Hong Kong will increase. Likewise, China will be very concerned with any potential collapse of the Hong Kong Dollar. It is felt that the separate investments of the provinces of China and indeed China's investments through its investment arm (as trading ventures) will be bound to inhibit its capacity to impose sanctions, whether legal, military or otherwise, upon Hong Kong.

In spite of its high level of education, its consciousness of its business acumen and of its unique economic place in the world, Hong Kong has little awareness of its own sophistication.

10. The Boat People

A number of delegations and individuals have expressed deep concern over breaches of human rights said to have been committed against the Vietnamese boat people. The Hong Kong Bar Association, among others, highlighted the problems and plight of the boat people very extensively in its Written Submission. At the hearings conducted, we heard allegations that the authorities did not regard the boat people as being entitled to human rights, and of their not being accorded the right to express their opinion or the right of access to legal assistance, even though the Hong Kong government claims to afford them the right of first asylum according to a screening procedure.

There can be no question but that these allegations

must be given serious consideration. Conscious of this we made it a point to visit one of the camps in Hong Kong, to ascertain for ourselves the conditions under which the Boat People are held.

We regret, however, that the subject does not fall within the main issue defined by our terms of reference. With the limited time available and having regard to our terms of reference, it is not appropriate or possible for us to undertake the task of enquiring into these allegations.

11. Discrimination Against Women

Consciousness of women's rights is still relatively undeveloped. Complaints of discrimination against women were made to us by the Hong Kong Council of Women. Most of the leading members of that organisation are expatriates, though there are other less prominent groups advocating women's rights which are largely Chinese.

Examples of discrimination against women brought to our attention have been the treatment of foreign domestic help (largely maids from the Philippines), the payment of lower wages to women for the same jobs done by male employees, the reservation of managerial and senior posts only to males. Even where employers specifically seek women applicants for managerial or professional positions, the sex-specific advertisements indicate that the jobs offered are those which are regarded in Hong Kong as suitable for women to perform, such as conveyancers, and trust and estate lawyers.

One other area of complaint of discrimination against women concerned land inheritance practised in that part of Hong Kong known as the New Territories and sanctioned by the New Territories Ordinance, by which inheritance of clan land and of 'small houses' passes through the male line in the event of intestacy. The injustice to women caused by such discrimination was highlighted to us and we have no doubt that these complaints should be given serious consideration.

Although the discriminations referred to above are normally non-governmental and will not be directly prohibited by the Hong Kong Bill of Rights Ordinance 1991 (which binds only the government, public authorities and persons acting on their behalf), the women in Hong Kong might nonetheless be able to use that Ordinance to persuade the government to promulgate the necessary anti-discrimination legislation.

The student delegation which appeared before us was led by a woman, but surprisingly little concern was shown by the students for women's rights.

12. Unions

The rights of trade unions are poorly protected. There is no trade union legislation to protect the interests of labour, and those that exist operate only as registered societies.

The small number of trade unions are divided into groups representing the interests of the PRC, the KMT and other non-aligned groups. There is no machinery provided for collective bargaining by labour with employers, and unions do not, therefore, have any collective force.

CHAPTER VTHE RIGHT TO SELF-DETERMINATION  
UNDER INTERNATIONAL LAWThe Charter of the United Nations and the Resolutions of the  
General Assembly

The origin of the right of self-determination is probably the Atlantic Charter of 14 August 1941, in which the President of the United States and the Prime Minister of the United Kingdom made known "certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world". These principles included the following:

1. They desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.
2. They respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.

These principles were affirmed in the Declaration by United Nations, originally signed in Washington on 1 January 1942 by 26 nations, and later adhered to by a further 21.

The Charter of the United Nations declares that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".(1) The Charter also contains a pledge from member states "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" that, since "the interests of the inhabitants of these territories are paramount", they will, inter alia, "develop self-government".(2)

In a series of resolutions which were thereafter adopted, often unanimously, the United Nations General Assembly defined the right of self-determination and emphasized its pre-eminent position.

- (a) Resolution 637A (VII) of 16 December 1952 recommended that, in promoting the realization of the right of self-determination, the wishes of the people of non-self-governing territories be ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations. The resolution also recommended that, pending the realization of the right of self-determination, and in

preparation thereof, practical steps be taken to ensure the direct participation of indigenous populations in the legislative and executive organs of government, and to prepare them for complete self-government or independence.

- (b) Resolution 742 (VIII) of 27 November 1953 identified the factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government. It added that it is primarily through the attainment of independence that a territory can become fully self-governing.
- (c) Resolution 1514 (XV) of 14 December 1960 (3) proclaimed the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations. It declared that all peoples have the right of self-determination, and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. It expressed the view that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence, and it required that immediate steps be taken in non-self-governing territories to transfer all powers to the people of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom.
- (d) Resolution 1541 (XV) of 15 December 1960 declared that a non-self-governing territory can be said to have reached a full measure of self-government by emergence as a sovereign independent state, free association with an independent state, or integration with an independent state.

The resolution stressed that free association should be the result of a free and voluntary choice by the peoples of the territory concerned, expressed through informed and democratic processes. The people would retain the freedom to modify that status. The associated state will have the right to determine its internal constitution without outside interference.

Integration with an independent state should be on the basis of complete equality, and should be the result of the freely expressed wishes of the people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage, if necessary under United Nations supervision. The resolution also requires the integrating territory to have attained an advanced stage of self-government with free political institutions before taking the decision to integrate.



- (e) Resolution 2131 (XX) of 21 December 1965 (4) reiterated that all states shall respect the right of self-determination and independence of peoples and nations, to be fully exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms.
- (f) Resolution 2160 (XXI) of 30 November 1966 (5) reaffirmed the right of peoples under colonial rule to exercise their right of self-determination and independence and the right of every nation, large and small, to choose freely and without any external interference its political, social and economic system. It also reaffirmed that any forcible action, direct or indirect, which deprived peoples under foreign domination of their right of self-determination and freedom and independence and of their right to determine freely their political status, constituted a violation of the Charter of the United Nations.
- (g) Resolution 2625 (XXV) of 24 October 1970 (6) proclaimed that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law. Elaborating that principle, it explained that the territory of a colony or other non-self-governing territory has a status separate and distinct from the territory of the state administering it, and such separate and distinct status exists until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the United Nations Charter.

The resolution identified four modes of implementing the right of self-determination: the establishment of a sovereign and independent state; the free association or integration with an independent state; or the emergence into any other political status freely determined by a people.

The resolution stressed, however, that the right of self-determination should not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The resolution concluded by declaring that the principles embodied in it constitute basic principles of international law.

- (h) Resolution 2734 (XXV) of 16 December 1970 (7) declared

that in the event of a conflict between the obligations of member states under the Charter of the United Nations and their obligations under any other international agreement, their obligations under the Charter shall prevail. It called upon states to desist from any forcible or other action which deprived peoples, in particular those still under colonial or any other form of external domination, of their inalienable right to self determination. It urged that legal disputes should as a general rule be referred to the International Court of Justice.

- (i) Resolution - (XXXI) of 14 December 1976 (8) called for respect for the inalienable rights of all peoples to determine their own destiny freely and without outside interference, coercion or pressure.

#### U.N. Human Rights Covenants

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were adopted by the United Nations General Assembly in 1966 and came into operation in 1976, contained identical provisions(9) to the following effect:

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

When ratifying these Covenants the United Kingdom made the following declaration:

"The Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail."

#### Judicial Interpretation

In two recent cases, the International Court of Justice has been called upon to examine and pronounce upon the scope and content of the right of self-determination.

In Namibia(10), the Court observed that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them".

In a separate opinion, Judge Ammoun agreed that the right of self-determination "has made its entry into positive international law". He observed further that,

"If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1(b) of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle. This struggle continues for the purpose of asserting . . . the right of self-determination . . . Indeed, one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of peoples, in the finally awakened conscience of humanity".(11)

In Western Sahara(12), the Court's advice was sought by the General Assembly on two questions:

- (1) Was Western Sahara at the time of colonization by Spain a territory belonging to no-one (terra nullius)?
- (2) What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

The background to this reference was that:

1. In 1957, Morocco protested against the inclusion of Mauritania, Spanish Sahara and the Ifni enclave among non-self-governing territories, on the ground that they were integral parts of Moroccan territory.
2. In 1960, in the United Nations, Morocco opposed the declaration of the independence of Mauritania.
3. In the same year, i.e. 1960, Mauritania was recognized as an independent state and admitted as a member of the United Nations.
4. In 1966, Spain and the United Nations agreed to consider Western Sahara as "non-self-governing" and thus subject to decolonization by means of a referendum. Morocco too expressed the wish that the territory should accede to independence, and insisted that Spain should grant independence to Western Sahara.
5. In 1974, Morocco argued that the principle of self-determination was not always applicable in matters of decolonization; and that for Morocco the decolonization of the two Saharan provinces implied reintegration into the Moroccan state. Morocco claimed the territory of Western Sahara on the grounds of Morocco's historic titles or ties.

The Court held that:

- (a) The principle of self-determination applies to all non-self-governing territories.

- (b) The principle of self-determination as a right of peoples has been enunciated in Resolution 1514 (XV).
- (c) The application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.
- (d) Resolution 1541 (XV), which provides the basis for the process of decolonization, read with resolution 2625 (XXV), contemplates for non-self-governing territories other possibilities besides independence, association or integration.(13)

In a separate opinion, Judge Nagendra Singh explained that:

- (a) the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence.
- (b) Even if integration of territory was demanded by an interested state, it could not be had without ascertaining the freely expressed will of the people - the very sine qua non of all decolonization.
- (c) The principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary.(14)

In a separate opinion, Judge Dillard observed that the pronouncements of the Court indicated that "a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations."(15)

Dealing with another aspect of the case, Judge De Castro cited the view of the court in the Minquiers and Ecrehous case (ICJ Reports 1953, p.56) that the original title ceases to be valid if there are new facts to be considered on the basis of new law. He observed, therefore, that

"When a legal system by virtue of which the title has been validly created disappears, the right can no longer be claimed under the new legal system unless it conforms to the conditions required by that system".

He concluded that changes of facts and changes in the law to be applied cannot be ignored. "Just before colonization by Spain, the territory had a status which was governed by the law in force at that time. But that status had not crystallized and was not fixed ad aeternum. It was subject to changes in the times." He referred to colonization which "is now condemned to die out", but which created ties and rights that

must be judged in accordance with the law in force at the time; the entry into force of the United Nations Charter, when Western Sahara became a "non-self-governing territory" and the administering power had a "duty to recognize the principle that the interests of the inhabitants of the territory are paramount, and to develop self-government"; Resolution 1514 (XV) in consequence of which the administering power was urged to take the necessary measures to put an end to colonial domination of the territory; and the subsequent development of international law in regard to non-self-governing territories, which made the principle of self-determination applicable to all of them.

Accordingly, the advisory opinion of the Court was that:

"Whatever the existing legal ties with the territory may have been at the time of colonization by Spain, legally those ties remain subject to intertemporal law and that, as a consequence, they cannot stand in the way of the application of the principle of self-determination".(16)

Judge Gros added that "if the Government of Spain had agreed to support the claim of the Government of Morocco, such an attitude would have been without any legal effect in the international sphere".(17)

Who, then, are entitled to exercise the right of self-determination?

There does not appear to be any general or widely-held view as to the meaning of the word "peoples". Aureliu Cristescu, special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his 1981 study on the right of self-determination (18), suggested that from discussions on the subject at the United Nations the following elements of a definition had emerged:

- (a) a social entity possessing a clear identity and its own characteristics;
- (b) a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population.

He thought that a "people" should not be confused with ethnic, religious, or linguistic minorities whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political Rights, and who are subject to the principle developed in UNGA resolution 2625 (XXV) that the principle of equal rights and self-determination shall not be construed as authorising or encouraging any action which would

dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states. However, UNGA resolution 2625 does go on to suggest that even such a minority may be entitled to exercise its right of self-determination in exceptional circumstances: namely, if such state is not conducting itself in compliance with the principle of equal rights and self-determination and is therefore not possessed of a government representing the whole people belonging to that state without distinction as to race, creed or colour.

Whether or not "peoples" include minorities, and whether or not the right to self-determination extends to secession from a self-governing territory, it is evident from the series of international resolutions which articulate this right that it was primarily intended to afford the inhabitants of non-self-governing colonial territories an opportunity of terminating their state of political tutelage. Indeed, that the term "peoples" encompasses all such inhabitants is not, and has never been, the subject of any dispute or argument except in the very limited circumstances referred to below.

The principle that seeks to prohibit the partial or total disruption of the territorial integrity and political unity of a sovereign state appears sometimes to have been invoked to justify the denial of the right of self-determination to inhabitants of so-called colonial enclaves. These are small colonial units located within the territory of sovereign states. For example, in 1962 India invaded and annexed Goa, and in 1969 Spain ceded to Morocco the territory of Ifni. (19)

It is doubtful whether the principle relied upon furnishes a legal basis for failing to consult the inhabitants of the so-called colonial enclaves. It is significant that neither a right to, nor the principle of, retrocession of territory as such has been recognized in any UN instrument or resolution. But even if there does exist an exception to the fundamental right of self-determination in the form of "colonial enclaves", as James Crawford explains.

"international practice supports its application only in the most limited circumstances: that is, to minute territories which approximate, in the geographical sense, to 'enclaves' of the claimant state, which are ethnically and economically parasitic upon or derivative of that state, and which cannot be said in any legitimate sense to constitute separate territorial units". (20)

Do the People of Hong Kong Have a Right to Self-Determination?

We now turn from considering the general principles governing the right to self-determination of non-self-governing territories to considering the application of those principles to the specific circumstances of Hong Kong. In doing this, we will be carrying out our duty to report on the matters covered by para.1 of our Terms of Reference:

"The nature and extent of the rights to self-determination of the people of Hong Kong before or upon the termination of the colonial status of Hong Kong under international law, as evidenced in the United Nations Charter, International Human Rights Covenants and relevant resolutions of the United Nations General Assembly, and the extent to which the United Kingdom has fulfilled its obligations to implement such rights".

The views of the People's Republic of China, as we understand them, are clear and uncompromising. According to the government of the PRC, the people of Hong Kong have no right of self-determination. Indeed, there is no such thing as a "people" of Hong Kong. Hong Kong is Chinese territory and its permanent residents of Chinese descent are Chinese citizens. Residents of Hong Kong are therefore no more a separate "people" and no more entitled to exercise a right of self-determination than are, for example, the residents of Shanghai. Hong Kong was seized from China by the United Kingdom by force in 1841, and although this seizure was ratified by the Treaty of Nanking the present government of China regards that treaty as being one of the so-called "unequal treaties" forced on China by Western nations in the 19th and early 20th Centuries. The unequal treaties are not binding on China, says the PRC.

The practice of the PRC has been somewhat less uncompromising than the theory. The PRC has recognised the fact of British administration of Hong Kong and has made no attempt to occupy it by force. Indeed, the Joint Declaration may be regarded as giving something more than de facto recognition to the status of the U.K. in Hong Kong until the 30th June 1997. Nevertheless, the Chinese position has always been that Hong Kong is a part of China governed by the UK rather than an entity in its own right. Hence the fact that the Chinese mission in Hong Kong disguises itself as "the New China News Agency" and pretends to have no official standing. On the same principle, the Joint Liaison Group set up under the Joint Declaration to facilitate the transfer of power, although based in Hong Kong, consists of representatives of the governments of the PRC and the UK and contains no representatives of the government of Hong Kong. The government of Hong Kong was not formally represented in the negotiation of the Joint Declaration though the then Governor, Sir Edward Youde, was present, nominally as a member of the UK delegation.

The attitude of the British government to self-

determination for the people of Hong Kong can be charitably described as pragmatic. The government has taken the view that it is not and never has been practicable to grant a right of self-determination to the people of Hong Kong and it is therefore pointless to consider whether, as a matter of law, such a right exists. We find it difficult to believe that there is not, somewhere in the files of the Foreign and Commonwealth Office, an expression of the views of the Office's legal advisers on this issue. However, the publication of the legal advisers' views, if they exist, would inevitably be embarrassing to the British government. If the view had been taken that a right of self-determination existed, the government would come under severe pressure both within the UK and abroad because of its refusal to allow the right to be exercised. If, on the other hand, the view had been taken that no right of self-determination existed, there would be serious implications for other British Dependent Territories which are claimed by other states - in particular Gibraltar, which is far smaller in terms of size (even if the New Territories are disregarded), population and commercial importance than Hong Kong (21) and the Falkland Islands. The British government therefore prefers to evade the issue by having (at least publicly) no view on it.

We have concluded, without hesitation, that the people of Hong Kong are entitled to the right of self-determination under international law. It is, of course, true that the words: "All peoples have the right of self-determination", which open Article 1 of both the International Covenant on Civil and Political Rights and its twin Convention on Economic, Social and Cultural Rights, appear to make the right to self-determination dependent on the question whether those who claim the right constitute a separate "people". In the case of Hong Kong, it is not clear whether its inhabitants can be regarded as a "people" in the sense of a group having an identity sufficiently distinct from those who live in China. The great majority of the inhabitants of Hong Kong come from the ethnic group (Han) which constitutes the bulk of the people of China. They speak the same version of the Chinese language (Cantonese) as those who live in adjoining districts of China. They share much of the historic culture of China. On the other hand, the economic and social structure of Hong Kong is profoundly different from that of mainland China, and the sharing of a common culture is not necessarily inconsistent with separate national identity.

We believe, however, that this difficult question is not as important as it seems, because the rights of self-determination set out in the two Covenants have to be interpreted in the light of other documents - notably, General Assembly Resolutions 1514, 1541 and 2625 - and the relevant literature on the subject. These make it clear that the bald statement that "All peoples have the right of self-determination" is a very considerable oversimplification. In particular, as pointed out above, there is a very marked distinction between the right of a "people" to secede from a state of which it forms a constituent part and the right of the



inhabitants of a non-self-governing territory to decide their own future. The international community of states is very reluctant to recognise a right of secession, which in the case of many states might threaten their own unity. By contrast, every encouragement is given to colonial territories to decide their own future. This distinction is shown clearly by the terms of General Assembly Resolution 2625. Under Resolution 2625 it seems clear that the inhabitants of any non-self-governing territory constitute a "people" for the purpose of the right to self-determination. Resolution 2625 states: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of Self-Determination in accordance with the Charter, and particularly its purposes and principles."

If there is any restriction on this rule, it arises from the possible existence of a principle known as "the revindication of colonial enclaves" (discussed above) which may authorise the transfer back of small colonial enclaves to the states from which they derive without the consent of their inhabitants. As already mentioned, the existence of any such principle is open to doubt. The clearest example of a transfer of sovereignty in this manner is the return of the Spanish enclave of Ifni to Morocco in 1969 (22). The legitimacy of this transfer was to some extent recognised by the International Court of Justice in the Western Sahara case (23). However, even if such a principle exists, we believe that it is applicable only to territories such as Ifni (with a few thousand inhabitants and no economic significance) and can not possibly be extended to a territory such as Hong Kong, with a population larger than many member countries of the U.N. and whose overseas trade ranks it eleventh or twelfth among the trading nations of the world. We note that in June 1972 the Decolonization Committee of the United Nations, acting at the request of the People's Republic of China (which had just been admitted to the United Nations) and without objection from the United Kingdom deleted Hong Kong from its list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples. The request was made on the footing that Hong Kong was Chinese territory occupied by the United Kingdom. We find it impossible, however, to accept that the action of the Decolonization Committee had the effect in international law of removing from the people of Hong Kong (who had not been consulted on the Chinese request) their right of self-determination.

We are of course aware of the difficulties for Hong Kong presented by the expiry of the lease of the New Territories. We have read articles which argue that the United Kingdom was not, prior to the Joint Declaration, bound to hand over the New Territories to the People's Republic of China on the expiry of the lease (24). The proposition is a bold and interesting one, but we are unable to agree that it represents the true legal position. We accept that the United Kingdom is and has always

been under a duty to return the New Territories to China and that the People's Republic of China is the "landlord" to whom the New Territories must be yielded up.

We also recognise the enormous problems which Hong Kong Island and Kowloon would have in surviving as a separate entity if severed from the New Territories. The New Territories constitute 92 per cent of the land area of Hong Kong and are home to nearly 30 per cent of its population. The New Territories include the container port, part of Kai Tak airport, and Hong Kong's reservoirs. While it is possible that steps could have been taken to reduce the dependence of the rest of Hong Kong on the New Territories and the mainland - for example, by constructing water desalination plants - such measures would have been extremely expensive and would have been unable to save Hong Kong from economic disaster if China had imposed a trade embargo on it. Furthermore, since the inhabitants of the New Territories are not tied to the land, Hong Kong would have been bound to accept any inhabitants of the New Territories who wished to move into Hong Kong before the lease of the New Territories expired. The number would probably have been very large and would have exacerbated the already serious overcrowding problem on Hong Kong Island and in Kowloon.

Nevertheless, we do not see the problems resulting from the prospective loss of the New Territories as a reason why the people of Hong Kong should not have been given a right of self-determination. The post-lease problems give strong support to the argument that the integration of the whole of Hong Kong into the People's Republic of China in 1997 is in the best interests of the people of Hong Kong. However, the people of Hong Kong are perfectly capable of understanding the strength of that argument and should in our view have been given the right to endorse or reject it. The British Government has expressly promised the people of Gibraltar that it will not without their consent transfer sovereignty to Spain - a democracy with a high standard of human rights. Yet the British Government is willing to transfer nearly 6 million people in Hong Kong - a population some 200 times the size of Gibraltar's (and 3,000 times the population of the Falkland Islands) - to the People's Republic of China without having given them any formal say in the matter whatever.

It follows, of course, that we do not accept the Chinese Government's view that Hong Kong is simply part of China which should be returned to Chinese control with or without the consent of its inhabitants. While the Chinese hostility to the "unequal treaties" is understandable, the treaties can not simply be disregarded. There neither is nor could be any rule of international law that a treaty which has been entered into at the conclusion of a war in which one side has been defeated is ipso facto invalid. Hong Kong has maintained an existence politically separate from China for 150 years. However close the ethnic and linguistic links there are profound differences between the economic, social, legal and political systems in Hong Kong and those in China.

### The Exercise of the Right of Self-Determination

It is of course true that the Government of Hong Kong carried out a quite elaborate process for the assessment of public opinion in Hong Kong towards the Joint Declaration in the autumn of 1984, between the conclusion of negotiations over the final draft of the Declaration and its formal signature. Having read the Report of the Assessment Office and the independent monitoring team (25) we accept that the exercise constituted a genuine and well-executed attempt to ascertain public opinion in Hong Kong, at least among those groups which had the capacity to respond to the appeal for the expression of views (26). We have no reason to doubt the conclusion of the Assessment Office (27) that the Joint Declaration was acceptable to most of the people of Hong Kong (28). This conclusion does not surprise us; as we explain elsewhere (29) the Joint Declaration is in many ways a highly creditable achievement and constitutes, on paper, a much better deal for Hong Kong than it would have been reasonable to expect before the start of negotiations. Furthermore, the British Government made it clear that in its view there was no alternative to acceptance of the Joint Declaration and that it would not allow Hong Kong to retain its colonial status after 1997. In the White Paper (30) accompanying the release of the draft Joint Declaration the Government said: "there is no possibility of an amended agreement. The alternative to acceptance of the present agreement is to have no agreement. In this case the Chinese Government has made it plain that negotiations could not be reopened and that it would publish its own plan for Hong Kong ..... Her Majesty's Government are satisfied that there is no possibility of dividing the New Territories which revert to China on 1 July 1997 from the remainder. The choice is therefore between reversion of Hong Kong to China under agreed, legally binding international arrangements or reversion to China without such arrangements". Under this degree of pressure, acceptance of the Joint Declaration is not surprising. However, neither the British Government nor anyone else has claimed that the response to the assessment exercise constituted in law an exercise of the right to self-determination. Clearly it did not.

There are, in principle, two ways in which the right of self-determination can be exercised by a community. The first is through the vote of a democratically elected legislative body; the second is through a referendum. Since there has never been a democratically elected legislature in Hong Kong, this means that the approval of any fundamental change in the status of Hong Kong should have been sought through a referendum.

Questions arise as to what the timing and content of any referendum should have been. Would it have been sufficient to have conducted a referendum asking for approval or rejection of the draft Joint Declaration in the autumn of 1984? Should the referendum have offered other options, including independence? Should a referendum have been conducted

earlier - perhaps in order to authorise the British Government to enter into negotiations with China in 1982?

There is a common but false belief that self-determination means simply a right to independence. This is clearly not the case. General Assembly Resolution 1541, for example, recognises that self-determination may take the form of free association with another state or of integration into another state. In any event, self-determination must include the right to decide on the continuation of the status quo.

Looking at the situation in the early 1980's, we think it was reasonable for the British and Hong Kong Governments to discount the possibility of independence for Hong Kong as a city-state. Such a state might have been as viable as Singapore, given either the right to retain the New Territories or the goodwill of the People's Republic; but as neither of these conditions appeared likely to be operative after 1997, independence was not a realistic alternative. Furthermore, we are satisfied that there was not at the time any significant support for independence among the population of Hong Kong. This was no doubt partly due to the recognition that it was pointless to seek independence, since China would never allow it to happen; partly to a feeling (which a number of our witnesses shared) that Hong Kong is in truth a Chinese city and that the ideal solution is not independence but incorporation into a democratic China;(31) and partly to the factors, discussed elsewhere (32), which resulted in a low level of political activism and the absence until very recent times of serious public pressure for the creation of democratic institutions. In the circumstances, therefore, we do not think that there was any obligation on the Government of Hong Kong to have included independence as an option in any referendum. "Free association" with China was clearly not on offer.

We believe that the British Government should have obtained the authority of a referendum conducted by the Hong Kong Government before entering into the negotiations which led up to the Joint Declaration. The British Government was negotiating not only on its own behalf but on behalf of the people of Hong Kong, and in the absence of a democratically elected legislature capable of speaking for the people of Hong Kong we believe that the British Government should have obtained popular approval for the opening of negotiations of such importance for the future of Hong Kong. However, the approval of the result of negotiations was even more important than the giving of authority for the opening of negotiations. If the people of Hong Kong had been invited simply to approve by referendum the adoption of the Joint Declaration it would have been difficult to conclude that they had not been given the opportunity to exercise the right of self-determination even if there had been no prior approval of the negotiations.

There has been considerable criticism of the British Government for not consulting the people of Hong Kong during the course of the negotiations. The extent of consultation is described in paras. 15-18 of the White Paper

accompanying publication of the Draft Joint Declaration (33); consultation was limited to the Executive Council (the "cabinet" of Hong Kong) and, to a lesser extent, OMELCO (the office of the unofficial members of the Executive and Legislative Councils of Hong Kong). While consultation was clearly very limited, we do not think that criticism of this aspect is justified. The negotiation of the Joint Declaration inevitably involved complex and interlocking issues, and public debate about these issues during negotiation would have tended to crystallise the opposing positions. The real problem was not that the negotiations were confidential but that they were being carried out by a government unrepresentative of Hong Kong. For this reason, the British Government should have received the authority of the people of Hong Kong through a referendum before starting to negotiate and a fortiori should have sought that authority before signing the Joint Declaration. We have no doubt that, in 1984, the level of education and political awareness of the people of Hong Kong was sufficiently high to enable them to make a proper decision on the issues.

Why was no such authority sought? It was suggested to us that the main reason was that a referendum would have been unacceptable to the Chinese Government. We have no doubt that the Chinese Government would have objected to a referendum. In the absence of access to the records of either the British or the Chinese Governments, however, we have no reason to suppose that the Chinese would have pressed their objection to the point of refusing to negotiate if the British Government had made it clear that they would require the consent of a referendum before signing a treaty. While the Chinese Government would clearly not themselves have accepted the validity of a referendum, they could quite consistently with their official attitude have taken the view that it was a matter for the British Government to decide whether it needed the support of a referendum in Hong Kong before signing the Joint Declaration. While we recognise the seriousness of the argument, we believe that the British Government underestimated the critical importance of allowing the people of Hong Kong to exercise a right of self-determination through a referendum asking for endorsement of the final draft of the Joint Declaration. Other arguments against a referendum, such as the absence of any democratic tradition in Hong Kong, do not seem to us to carry any real weight. The territory's educational and economic standards were clearly sufficient to enable an informed decision to be made by voters.

### What Can be Done Now?

Since the right of self-determination has not yet been exercised it must, in principle, still exist. Regretfully, however, we have concluded that in present circumstances a meaningful exercise of the right of self-determination is simply not possible. While it would, in theory, be possible to hold a referendum on the future status of Hong Kong, it is obvious to all that the Government of China would disregard it and, whatever the outcome of the referendum would hold the British Government to its obligations under the Joint Declaration to hand over Hong Kong on the 1st July 1997. It is equally obvious that the British Government would comply, rather than face the use of force or the cutting off of supplies of food and water which would ensue. It is likely that many people eligible to vote would regard a referendum at this stage as a charade and would stay at home. Many of the voters who supported the Joint Declaration in a referendum would be voting for it out of fear of the consequences of rejection rather than out of any belief that it represented the best available option. The same would be true of a vote of the Legislative Council. An affirmative vote would therefore not amount to a genuine exercise of the right of self-determination.

We do not rule out the possibility of a change in circumstances which would make it possible for the people of Hong Kong to exercise a genuine choice before the 1st July 1997. If such circumstances arise, a choice should clearly be offered. That choice could offer other solutions in addition, or as an alternative, to a straight choice between the Basic Law and full independence. However, a meaningful choice could in practice only be made if there was a fundamental change in the attitude of the Chinese Government towards Hong Kong. There are no signs of that at present, though developments in the former USSR illustrate that when change comes it can come very quickly.

We are, therefore, facing a situation in which the British Government has committed itself to transferring sovereignty over Hong Kong to the People's Republic of China on the 1st July 1997. It has, it is fair to say, negotiated terms of transfer which, if adhered to by China, are by and large favourable to Hong Kong and might well have been endorsed at the time by a referendum. However, no such endorsement was sought at the time and no meaningful endorsement is now possible. As we point out elsewhere (34), the Basic Law fails to comply with the terms of the Joint Declaration in many respects, some of them of fundamental importance. That, coupled with the events in Beijing on the 4th June 1989, casts grave doubt on China's willingness to recognise and protect the human rights of the people of Hong Kong. China's own record on human rights is bad. Serious breaches have been documented by Amnesty International and other organisations.

We regard it as intolerable for the British Government to transfer British citizens in Hong Kong to the jurisdiction of the People's Republic of China without their own consent and without any opportunity having been given to them to participate in deciding on their own future. It is this aspect of the agreement with the PRC which stands out, in the Report of the Assessment Office, (36) as having attracted the strongest adverse criticism. We repeat, from the Report, the statement that: "Those who commented adversely on these provisions sought to make the points that the United Kingdom had deliberately distanced herself from Hong Kong and had failed to provide an alternative right of residence either in Britain or elsewhere for those who were looking for an escape route should the situation in Hong Kong after 1997 demand this".

This feeling of bitterness was frequently reflected in the evidence available to us. We believe that it is justified. In our view, it is an obligation of the United Kingdom to provide for Hong Kong BDTs' rights of residence in the United Kingdom itself or in third countries acceptable to them. We can see no other way in which the United Kingdom can do anything to compensate its Hong Kong citizens for having been deprived of the right of self-determination.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) The people of Hong Kong are entitled to the right of self-determination under international law.
- (2) The British Government should have obtained the authority of a referendum of the people of Hong Kong both before entering into the negotiations which led up to the Joint Declaration, and before signing the Joint Declaration.
- (3) The people of Hong Kong have not been allowed to exercise the right to self-determination.
- (4) In present circumstances a meaningful exercise of the right of self-determination is impracticable.
- (5) The only way in which the United Kingdom can now compensate BDTs in Hong Kong for the loss of the right to self-determination is by the provision of rights of residence in the UK itself or acceptable third countries.

FOOTNOTES

- (1) Article 1 (2). See also Article 55.
- (2) Article 73. See also Article 76.
- (3) Declaration on the Granting of Independence to Colonial Countries and Peoples.
- (4) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.
- (5) Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination.
- (6) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.
- (7) Declaration on the Strengthening of International Security.
- (8) Implementation of the Declaration on the Strengthening of International Security.
- (9) Article 1.
- (10) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports, 1971, p.4.
- (11) p.74.
- (12) Western Sahara, ICJ Reports 1975, p.12.
- (13) pp.31-32.
- (14) p.81.



- (15) p.121.
- (16) pp.168-171.
- (17) p.71.
- (18) Cristescu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments. (New York, United Nations, 1981), para 279.
- (19) While a majority of the members of the Security Council took the view that India's action violated the UN Charter (the resolution itself was vetoed by USSR), the General Assembly appears to have endorsed the Spanish-Moroccan treaty.
- (20) Crawford, The Creation of States in International Law, (Oxford, Clarendon Press, 1979), p.384.
- (21) Hong Kong has an area of 1074 sq. km. (92 per cent of that being the New Territories) and a population of 5,859,000 (at the end of 1990). It makes exports (1990) of 640 billion Hong Kong dollars (about £43 billion). Gibraltar has an area of 6 sq. km., a population of 30,000, and exports (1989) of £42 million. There are some distinctions the other way - Gibraltar has been under British control for over a century longer and its people are more culturally and linguistically distinct from the Spanish than are the people of Hong Kong from the mainland Chinese. Nevertheless, it is difficult to see how Gibraltar could be regarded in international law as entitled to self-determination if Hong Kong is not. Other territories subject to adverse claims are the Falkland Islands (by Argentina) and Belize (by Guatemala) but the circumstances are so different that Hong Kong could form no precedent.
- (22) The seizure of Goa by India in 1961 provides a closer comparison in terms of population (the population of Goa at the time being about 700,000) but is a precedent of little value, since it involved military seizure rather than a voluntary return by the colonial power.
- (23) [1975] ICJR 12; see in particular p.33.
- (24) See for example, Nihal Jayawickrama, "Hong Kong: The Gathering Storm", Bulletin of Peace Proposals, Vol. 22(2) (1971) p.157 at pp. 166,167.

- (25) "Hong Kong - Arrangements for testing the acceptability in Hong Kong of the draft agreement on the future of the territory" (1984) Cmnd 9407.
- (26) Responses were received from 430 organisations, 249 groups of individuals, and 1815 individual members of the public. However, neither the Bar Association nor the Law Society submitted responses as they were unable to arrive at a collective viewpoint or thought it inappropriate to do so.
- (27) Para. 3.1 of the Assessment Officer's Report. 334 of the 430 responding organisations including all the public representative bodies regarded the Joint Declaration as acceptable, and 33 rejected it.
- (28) The conclusion of the monitoring team (Sir Patrick Nairne and Mr. Justice Simon Li) was that "the verdict of acceptance implies neither positive enthusiasm nor passive acquiescence. The response to the Assessment Office has demonstrated the realism of the people of Hong Kong". (para.24 of their Report). This conclusion corresponds with the results of the Opinion Surveys mentioned in para.3.16 of the Assessment Officer's Report.
- (29) Chapter III.
- (30) (1974) Cmnd 9352, para.29.
- (31) Attitudes may be changing; an opinion poll published in the Sunday Morning Post on 30 June 1991 showed 29 per cent of respondents choosing full independence and a further 19 per cent preferring self-government within the Commonwealth.
- (32) Chapter IV.
- (33) Cmnd 9352.
- (34) Chapter XIV.
- (35) See for example, the Amnesty International Report "The People's Republic of China - Trials and Punishments since 1989" (April 1991).
- (36) Paras.4.65-71.

CHAPTER VIRIGHTS OF ABODE IN THE U.K.The Present Law

Until 1962, citizens of Commonwealth countries or of colonies of the United Kingdom had unrestricted rights to enter and reside in the United Kingdom. However, high rates of immigration into the United Kingdom in the late 1950's and early 1960's, principally from the Caribbean and the Indian sub-continent, caused public resentment which led to the enactment of the Commonwealth Immigrants Act 1962. This imposed immigration control on all Commonwealth citizens except those born in the UK or those who held UK passports issued by the government of the UK (as opposed to the government of a colony). As a result, the great majority of Hong Kong residents who were citizens of the United Kingdom and Colonies lost the right of unrestricted entry to and residence in the U.K.

In general, the Commonwealth Immigrants Act 1962 can not be said to have involved a breach by the United Kingdom of its obligations under international human rights law. All countries exercise control over immigration, and the removal of rights of residence from the citizens of independent Commonwealth countries (many of which did not give reciprocal rights to UK citizens) does not in itself involve an infringement of the human rights of those citizens. Nor can serious objection be taken to extending similar controls to the inhabitants of territories progressing towards independence.

The principal statute which now governs British citizenship is the British Nationality Act 1981. Under that Act, citizenship is divided into three categories:

- (i) full British citizenship
- (ii) British Dependent Territory citizenship
- (iii) British Overseas citizenship.

Of these, only the first category carries a right of abode in the United Kingdom. British Dependent Territory citizens (BDTCs) are those who have a connection with (and are, in effect, citizens of) a dependent territory. (1) The overwhelming majority of BDTCs are residents of Hong Kong. British Overseas citizens are those who have British Nationality but are not British citizens and do not qualify as BDTCs.

There are about 17,000 British citizens living in Hong Kong, mostly as expatriates rather than permanent residents. They have no citizenship problems (though some of their dependents will have problems). The great majority of the population of Hong Kong consists of BDTCs of Chinese descent or

immigrants from China who have not acquired British nationality. More than half the population - about 3.2 million - are BDTCs. Almost all the BDTCs in Hong Kong are of Chinese descent and will if present arrangements are fulfilled have Chinese nationality after the 1st July 1997 (under Chinese law, the overwhelming majority of them are already Chinese nationals). However, a small number of Hong Kong residents - thought to be about 11,000 - are not of Chinese descent, have no right of abode elsewhere and will not be regarded as Chinese nationals after the incorporation of Hong Kong into the People's Republic of China. (2)

Under the Hong Kong (British Nationality) Order 1986, made under the Hong Kong Act 1985, persons who are BDTCs solely by connection with Hong Kong are entitled to register as British Nationals (Overseas). The main benefit of BNO status is that it will confer the right (which will be recognised by China (3)) to travel abroad on British rather than Chinese travel documents. However, BNO status will not confer any additional rights of citizenship, will carry no right to UK consular protection within China itself, and will give no right of abode in the UK.

Following the events in China in June 1989, the British Government gave way to pressure to a limited extent by enacting the British Nationality (Hong Kong) Act 1990. Under that Act, 50,000 heads of household will be registered as British citizens with the right of abode. Their spouses and their children under the age of 18 will also be granted British citizenship, raising the total number of persons entitled to rights of abode under the Act to an estimated 225,000. There is a complicated scheme for the division of applicants into classes and for the selection of those who are to qualify for registration, involving a considerable degree of discretion by the Governor. We do not think it is necessary to set out details of the selection process (4). The purposes of the 1990 Act were to encourage key people to remain in Hong Kong after the 1st July 1997 by giving them the right to take up residence in the United Kingdom after that date if things go wrong for them, and also to protect people whose role in, for example, the civil service or the security service might have exposed them to persecution or prosecution by the government of the Hong Kong SAR after the 1st July 1997.

The figures for applications for the first tranche of registrations have recently been published. It is to be noted that, although the total number of applications exceed the quota, two classes are undersubscribed (5) and the numbers of applicants are not as large as might have been expected. It is not clear whether this is because there is limited demand for British citizenship or because many people who would have liked to register did not apply because they felt that they had no hope of being selected or because they feared that an unsuccessful application might prejudice their position in Hong Kong after 1997.

### Our Proposals

We have already stated our conclusion that, because of its failure to allow the people of Hong Kong to exercise a right of self-determination, the United Kingdom has an obligation to provide for those BDTCs in Hong Kong who want them rights of residence in the UK itself or in third countries acceptable to them. The British Nationality (Hong Kong) Act 1990, though a step in the right direction, falls far short of meeting this obligation, providing rights of residence for less than ten per cent of the BDTCs in Hong Kong.

There is a precedent for the granting of rights of abode in the UK to inhabitants of former dependent territories. The precedent is, unfortunately, not a happy one. When the United Kingdom granted independence to the East African territories of Tanganyika, Uganda and Kenya, it gave the substantial Asian minorities in those territories the option to retain citizenship of the United Kingdom rather than becoming citizens of the countries of their residence. (6) Because of fears of discrimination against them by the African majorities after independence, some 200,000 of them took up the option. Since their citizenship of the United Kingdom carried with it the right to a passport issued by the UK government, their rights of abode in the UK were not affected by the Commonwealth Immigrants Act 1962. However, when substantial numbers of East African Asians began to enter the United Kingdom because of economic and political pressures against those who had not taken local citizenship, the United Kingdom enacted the Commonwealth Immigrants Act 1968 which subjected them to immigration control. This action was condemned by the International Commission of Jurists (7) and was held by the European Court of Human Rights to be in breach of the European Convention (8). The East African Asians were eventually admitted to the UK over a period of years.

We recognise that the unrestricted admission of Hong Kong BDTCs for residence in the UK poses potentially serious problems for the UK government. The numbers concerned far outweigh the number of East African Asians or the numbers who will qualify for admission under the British Nationality (Hong Kong) Act 1990.

What are the numbers? As mentioned above, there are about 6 million people in Hong Kong, of whom 3.25 million are BDTCs. We believe that the right of self-determination belongs to all those who are lawful permanent residents in Hong Kong, and not just to BDTCs. Nevertheless, we also believe that the UK owes a higher duty to those whom it has admitted to British citizenship than it does to Chinese or other foreign nationals who have become permanent residents of Hong Kong. We do not think that the UK is under an obligation to grant rights of abode to residents of Hong Kong who are not BDTCs.

The number of BDTCs is almost certain to fall between now and 1997. Emigration from Hong Kong to countries other than

the UK is now running at about 60,000 a year and this figure is unlikely to fall before 1997, though there may not be much increase as the numbers are limited by the willingness of the recipient countries to admit immigrants. Assuming that almost all emigrants are BDTCS rather than non-BDTC residents, the number of BDTCS in Hong Kong may therefore fall by up to 400,000 before the 1st July 1997 as a result of continuing emigration to countries other than the UK.

This still leaves the enormous number of 2.8 million. Some people say that no more than a small proportion of these would ever contemplate leaving Hong Kong for the United Kingdom because of their social, cultural and economic links with Hong Kong. This may be correct. We were also struck by the fact that the United Kingdom appears to come very low on the list of preferred destinations for those thinking of leaving Hong Kong. There are a number of reasons for this, which may include: resentment at the treatment of Hong Kong by the UK; the absence so far of a significant entrepreneurial community of Chinese descent in the UK; the British climate; high rates of unemployment in the UK; and a preference for locations not quite so distant. Nevertheless, we believe it is possible that, faced with the alternative of remaining in Hong Kong under Chinese control or emigrating to the UK, a large number of BDTCS would prefer emigration. This would be particularly likely if confidence in the economic future of Hong Kong (which remains fairly high and has even improved since our visit to Hong Kong as a result of agreement over the construction of the new airport) begins to fail. As we have mentioned above (9), the relatively small number of applications for places under the British Nationality (Hong Kong) Act 1990 is not necessarily an indication that there is no great potential demand for emigration to the UK.

If all the Hong Kong BDTCS wished to come to the UK, the numbers would be too great for the UK to absorb, unless they were spread over a timescale so long as to be unrealistic. The Government of the United Kingdom owes obligations to its own people as well as to those of Hong Kong, and can not be expected to accept immigration at a level which would cause critical problems in fields such as employment and housing. However, we believe that many of the Hong Kong BDTCS would stay in Hong Kong in any event - even if, for example, the PRC denounced the Joint Declaration and the Basic Law and imposed a socialist system on Hong Kong. We believe that the numbers who would wish to come to the UK would be within the capacity of the UK to absorb in the longer term. However, over a shorter time scale the numbers seeking admission to the UK could exceed the capacity of the UK to deal with them in an orderly and humane manner. We accept, therefore, that there will need to be some form of quota system to limit the number of annual admissions.

Given that a quota system will be necessary, we believe that there are two categories - one small and the other minute - which should be exempted from it and given immediate British citizenship. The first category is BDTCS of non-Chinese

descent with no other right of abode, of whom there are about 11,000. As they will not be regarded as Chinese citizens by the People's Republic of China they will become effectively stateless in 1997. Given the small numbers involved and the particularly serious consequences to them of the transfer of Hong Kong, we can see no case for withholding from them immediate rights of residence in the UK.

The second group consists of only a few hundreds. A number of people from Hong Kong acquired permanent rights of abode in the UK as a result of five years' continuous residence there, and subsequently returned to Hong Kong. Under the law in force up to the 31st December 1982, children born to such persons in Hong Kong (or elsewhere outside the UK) became citizens of the United Kingdom and Colonies but did not acquire a right of abode in the UK. As a result of changes in the law introduced by the British Nationality Act 1981 and coming into force on the 1st January 1983, children born on or after that date to a parent who had acquired a right of abode in the UK by residence have a right of abode in the UK themselves irrespective of the place of their birth. As a result, some people in Hong Kong who have the right of abode in the UK (and are therefore British citizens under the British Nationality Act 1981) have children, some of whom are also British citizens but others of whom (still under the age of 18) are BDTCS with no right of abode in the UK (10). In order to obtain a right of abode in the UK for such children, a parent has to take them back for resettlement in the UK, sometimes leading to split families with other members of the family remaining in Hong Kong. This is an unfortunate anomaly affecting a very small number of people (11). We believe that all children under 18 who, if born after the end of 1982, would have acquired British citizenship at birth should be given it now.

Conversely, we think there is a group of BDTCS whose claim to a right of abode in the UK is relatively weak and who therefore should be given lower priority given the size of the potential burden on the UK. This group consists of those who acquired British Dependent Territory Citizenship by naturalisation after the signature (12) of the Joint Declaration. They acquired citizenship of a territory which was already the subject of an agreement for its return to China, and the obligation on the UK government to protect them from the consequences of that agreement is much weaker than the obligation to those who were already BDTCS at the date of the agreement.

We also think that any right of abode given to BDTCS should not remain open for an unlimited time. At some point, BDTCS will have to choose between Hong Kong and the UK. It would be wrong to require the choice to be made before the 1st July 1997, as this would encourage all those with doubts about the future to leave before the transfer rather than give the new administration a chance. The right of abode should therefore remain open for a period long enough to enable residents to see how the new regime is developing and to decide whether they can live with it. This could be a period of about

six years. It might be necessary to defer actual admissions for a further period in order to achieve an orderly process of admission to the UK. The limits should not apply to the members of the two categories which we have recommended for immediate British citizenship.

We accept that our proposals are inconsistent with the Memorandum which the UK Government exchanged with the Chinese Government simultaneously with the signature of the Joint Declaration. The Memorandum stated that all Hong Kong BDTCs "will cease to be BDTCs with effect from 1 July 1997, but will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom". Our proposals involve not only continuing the status of BDTC for a further period of years but strengthening it by adding a right of abode in the UK. However, it must be noted that the Memorandum (and the corresponding memorandum from the Chinese government) are not annexed to the Declaration and do not form part of any treaty or other agreement between the United Kingdom and the People's Republic of China. As a matter of law, therefore, the United Kingdom would not be acting improperly by altering the proposals contained in the Memorandum.

It is also clear that our proposals would meet with strong objection from the Chinese government, which has already shown its hostility to the much more limited provisions of the British Nationality (Hong Kong) Act 1990. It is possible that the Chinese government might try to frustrate the aim of our proposals by restricting the right of Hong Kong residents to travel abroad, despite the guarantee of such rights in the Joint Declaration and the Basic Law. The Chinese will, however, have to bear in mind that Hong Kong will not remain an attractive centre for the international financial and commercial community if its own people are not free to travel.



CONCLUSIONS AND RECOMMENDATIONS

- (1) Whatever the practical problems may be the United Kingdom has an obligation in principle to provide rights of abode in the UK, or in third countries acceptable to them, for all Hong Kong BDTCs.
- (2) Immediate British citizenship and a right of abode in the UK should be granted to Hong Kong BDTCs of non-Chinese descent with no right of abode outside Hong Kong, and to Hong Kong BDTCs under 18 who would have been British citizens if born on or after the 1st January 1983.
- (3) For other Hong Kong BDTCs, the UK should grant a right of abode but would be entitled to impose a reasonable quota system for admission. Those who became BDTCs by naturalisation after the date of signature of the Joint Declaration (19th December 1984) would have a lower priority.
- (4) Hong Kong BDTCs (except those given immediate citizenship) should be required to exercise their right to take up an abode outside Hong Kong before a date about six years after the transfer, subject to any further delay imposed by the quota system.

FOOTNOTES

- (1) Inhabitants of the Falkland Islands are treated as British citizens (British Nationality (Falkland Islands) Act 1983) and BDTs in Gibraltar can acquire British citizenship by registration.
- (2) Hong Kong Government's Annual Report 1990 pp.344-347.
- (3) See the Memoranda exchanged between the United Kingdom and China on 19 December 1984.
- (4) See the British Nationality (Hong Kong) (Selection Scheme) Order 1990.
- (5) Sensitive Service Class, quota (to date) 3,850, applications 1,705; Entrepreneurs Class, quota 500, applications 273. One or two sub-classes within the General Occupational Class are also undersubscribed.
- (6) See the Tanganyika Independence Act 1961; the Uganda Independence Act 1962; the Kenya Independence Act 1963.
- (7) Bulletin No. 34 p.36,37.
- (8) East African Asians v. UK (1981) 3EHRR 76.
- (9) Chapter IV.
- (10) Under s.3 of the British Nationality Act 1981 the Secretary of State has wide discretionary powers to register a minor as a British citizen but we understand that in practice this power is only exercised after the minor has settled in the UK.
- (11) Dr. C. H. Leong, who is leading a campaign for the removal of this anomaly, has been contacted by 135 families with 209 children affected by it.
- (12) The date of signature (19 December 1984), which represents the agreement of the two governments subject to formal ratification, seems more appropriate than the previous initialling (which merely identifies the text as the authentic result of negotiations by the representatives of the parties) or the subsequent ratification.

CHAPTER VIITHE DEMOCRATIC DEFICIT(I) THE BACKGROUND

One of our main concerns has been the extreme slowness of the development of democracy in Hong Kong. Under present plans, the Legislative Council will be very far from being a democratically elected body even by 1997. There will be no time for the concept of democracy to take root or for politicians to obtain experience of the working of a democratic system.

We accept that there has been little pressure from the people of Hong Kong for democratic institutions, despite the relatively high levels of income and education. The reasons for this are discussed elsewhere in this Report (1). It is also clear that the British Government has taken advantage of the absence of local pressure to delay and limit the introduction of democracy. We do not believe that this is due to a reluctance in principle to introduce democratic institutions into a dependent territory; the United Kingdom has a good record for introducing democratic institutions into its former colonies. The motive, no doubt, was a reluctance by Britain to do anything that would alienate the government of China.

Ironically, the Joint Declaration itself can be seen as the starting point for the development of democracy in Hong Kong, through the acceptance of the principle that "the legislature of the Hong Kong SAR shall be constituted by elections" (2). Development in the years since has, however, been slow.

The first step towards democracy was taken in 1973, when the Urban Council for Hong Kong and Kowloon became the first government body with elected members to be given executive responsibility and financial autonomy (3). The Urban Council was composed of 12 appointed members and 12 directly elected on a limited franchise.

In 1981, District Boards were created in all the administrative districts of Hong Kong Island, Kowloon and the New Territories. In 1982, some members of the District Boards were elected from local constituencies on a broad franchise. Since 1985 the elected members have formed a small majority of the total, the balance being made up of appointed and ex-officio members (4).

The franchise for the Urban Council has been widened and its elected members are now elected from 15 geographical constituencies. The Urban Council also has 15 appointed members and one member representing each of the ten District

Boards within the area covered by Urban Council. In 1986, the Government set up a Regional Council covering the New Territories, which now consists of 12 members directly elected from geographical constituencies, 9 elected by the District Boards in the New Territories, 12 appointed members and three members representing the Heung Yee Kuk, the association of the indigenous inhabitants of the New Territories.

## (II) THE LEGISLATIVE COUNCIL

Until 1985 the Legislative Council itself consisted entirely of officials together with "unofficial" members appointed by the Governor after consultations. In 1985, a limited form of election was introduced following the publication of a Government Green Paper in July 1984 and a White Paper in November 1984 (by which date the text of the Joint Declaration had been initialled and published though not yet signed and ratified). The White Paper proposed that the Legislative Council should consist of 12 members elected by an electoral college, 12 members elected by "functional constituencies", 22 members appointed by the Governor and 10 official members. These proposals became law as a result of amendments to the Letters Patent and the enactment of the Legislative Council (Electoral Provisions) Ordinance (c.381).

The electoral college did not in fact consist of a single college but was divided into twelve separate electorates each electing one member. The electorates comprised the members of the Urban Council, the members of the Regional Council, and ten bodies comprising the members of one or more District Boards. In each case appointed as well as elected members were entitled to vote, so that the electoral colleges can not be regarded as having been properly democratic (5).

The functional constituencies created in 1985 represented the formalisation of previous practice, under which the Governor had appointed the representatives of certain economic, social and professional interests as unofficial members of the Legislative Council. This was justified on the basis that "full weight should be given to representation of the economic and professional sectors of Hong Kong society which are essential to future confidence and prosperity".(6) Nine functional constituencies were created. Three of them - the commercial, industrial and trade union constituencies - returned two members. The other six constituencies - financial, social services, medical, education, legal, and engineering - returned one member. The electorate in each case consisted of the members of relevant trade associations, trade unions and professional bodies (7). In the case of some of the functional constituencies, votes may be cast by corporate bodies.

The November 1984 White Paper commented on the prospect for direct elections to the Legislative Council as follows:

"The relative merits of direct and indirect elections attracted considerable public interest and comment. However there was little evidence of support in public comment on the Green Paper for any move towards direct elections in 1985. With few exceptions the bulk of public response from all sources suggested a cautious approach with a gradual start by introducing a very small number of directly elected members in 1988 and building up to a significant number of directly elected members by 1997. Proposals that the Legislative Council's Unofficial members should all be returned by direct elections were in the minority. There was considerable general public concern that too rapid progress towards direct elections could place the future stability and prosperity of Hong Kong in jeopardy." (8)

In 1987 the Government published a Green Paper reviewing developments in representative government. As a Green Paper, this was a discussion document putting forward various options rather than a preferred solution. On the subject of functional constituencies, the Green paper said: "The concept of functional constituencies has been criticised as elitist and unduly advantageous to the groups represented. On the whole, however, comments on the system have been favourable and there have been suggestions that the number of seats should be increased to enable other significant sectors of the community to be thus represented." (9) On direct elections, the Green Paper said: "Those who favour the introduction of a directly elected element into the Legislative Council believe that it would produce Members who are able to speak directly for the people of Hong Kong, and thus better ensure that the views and interests of Hong Kong people are being taken into account when important decisions are made. They see direct elections as the best means of securing a government which is truly representative and accountable, and thus able to carry out its policies with the support of the majority of Hong Kong people.

"Others, however, believe that direct elections might be manipulated by small, highly-motivated groups to secure the election of candidates not generally representative of the whole community, especially if the turnout of voters were low. Some point out that direct elections might lead to confrontational politics, and perhaps also to the emergence of political parties. In their view such developments could undermine internal stability as well as overseas confidence in the territory's future, thus endangering its economic prosperity.

"Timing. Some have argued that, since the present systems for elections to the Legislative Council have been in place for less than two years, it is premature to contemplate introducing another form of election even if changes are to be made later. Some have also argued that no change should be made until the system to be used for elections after 1997 is clarified by the Basic Law. Others, however, have argued that, if a stable system of representative government is to continue to develop, and if the momentum of such continued development is not to be lost, then a small proportion of directly elected Members

should be introduced into the Legislative Council in 1988. Only a very few have suggested that there should be a rapid move towards having a substantial proportion of Legislative Council Members directly elected. Rather, there has been a wide measure of agreement on the importance of maintaining a carefully considered approach."(10)

For the 1988 election of the Legislative Council, the approach towards democracy was so carefully considered as to be almost imperceptible. There were no direct elections. The number of appointed members was reduced by two, and the number of members elected by functional constituencies was increased by two (11).

### (III) DEVELOPMENTS SINCE 1988

The events in Beijing and other parts of mainland China in May and June 1989 greatly increased political awareness in Hong Kong and pressure for moves towards democracy. The Government responded by introducing the Legislative Council (Electoral Provisions) (Amendment) Ordinance, which was enacted in November 1990 and (together with corresponding amendments to the Letters Patent) introduced for the first time a directly elected element into the Legislative Council. For the 1991 elections, 18 members were to be directly elected from geographical constituencies on a broad franchise. The electoral colleges were abolished, though the Urban Council, the Regional Council and the Heung Yee Kuk were converted into functional constituencies. The total number of members from functional constituencies was increased to 21 and the number of appointed members was reduced to 18, with the number of ex officio members remaining at three, making a total of 60. (12) The Legislative Council's term was extended to four years.

The 1991 elections were pending at the time of our visit to Hong Kong. A number of political parties had been formed (bearing out the worst fears of the 1987 Green Paper), though their structure and organisation were rudimentary compared with political parties in established democracies. The United Democrats, led by Mr. Martin Lee Q.C., appeared to us to be the largest, best-organised and most active of the parties, though it appeared to have funding problems because of its limited support from the business community.

We were concerned at the fact that Hong Kong residents wishing to vote in the election to the Legislative Council had to apply for entry on the register of electors, as this involved an extra step which was likely to reduce the number of voters. We were told that the records kept by the Hong Kong Government did not contain enough information about residents' addresses to make it possible to draw up an electoral register for geographical constituencies without a registration process. Others have challenged this view; we are not able to resolve this disagreement.

In the elections held on September 15th the United Democrats won 12 of the directly elected seats and four others were won by their associates. The turnout was rather disappointing, amounting to 39 per cent of the registered electorate and approximately 20 per cent of the total adult population of Hong Kong. This may be due to apathy, but it may also be due to a perception that the Legislative Council will have only a limited role to play in the next few years and that in any event direct elections provide only 30 per cent of its members; experience from other countries suggests that turnout is greatly affected by the importance attached to the body to be elected (13). Despite the overwhelming victory of the United Democrats, the Governor has not appointed any member of that party to his advisory Executive Council.

#### (IV) THE BASIC LAW

Under the Basic Law, the first Legislative Council will run from 1997 to 1999, and thereafter the term of each Council will be four years (14). Under provisions contained in Annex II to the Basic Law and a decision of the National People's Congress contemporaneous with the adoption of the Basic Law, the number of members elected by functional constituencies will be increased to 30 out of a Legislative Council which will continue to have 60 members. The functional constituencies and the method of electing their members will be identified in an electoral law to be passed by the Legislative Council.

The number of members directly elected by geographical constituencies will be 20 in 1997, 24 in 1999 and 30 in 2003. There will be no appointed or official members, but the remaining vacancies (ten in 1997 and six in 2003) will be filled by an election committee. The Election Committee will consist of 400 members in 1997 and 800 members in 1999, and will be drawn in four equal blocks from the industrial, commercial and financial sectors; the professions; the labour, social services, "grass-roots", religious and similar sectors; and from the members of certain public bodies (such as the Hong Kong deputies to the National People's Congress). The 1997 Election Committee will be selected by, or in accordance with rules made by, a Preparatory Committee to be set up by the National People's Congress. The 1999 Election Committee will be constituted under an electoral law of the SAR.

Although the Basic Law states that "the ultimate aim is the election of all the members of the Legislative Council by universal suffrage" (15), the Basic Law in fact imposes considerable difficulties in the way of a move towards universal suffrage. Any amendment to alter the composition of the Legislative Council after 2003 would require a two-thirds majority of all the members of the Council and the consent of the Chief Executive (16). Thus the replacement of functional by geographical constituencies after 2003 would require the votes of at least ten of the functional constituency members

even if all the directly elected members supported it.

The decision of the National People's Congress referred to above contains an ingenious provision to allow some of the members elected by the 1995 elections to continue to serve in the Legislative Council through the transfer of sovereignty up to 1999, instead of being replaced by a new election in 1997. This system is known as "the through train". It is provided that: "If the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong SAR is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong SAR, those of its members who uphold the Basic Law of the Hong Kong SAR of the PRC and pledge allegiance to the Hong Kong SAR of the PRC, and who meet the requirements set forth in the Basic Law of the Region, may upon confirmation by the Preparatory Committee become members of the first Legislative Council of the Region."

As we understand it, this means that if the Legislative Council elected in 1995 contains 20 members elected by geographical constituencies and 30 members elected by functional constituencies, those members will if confirmed by the Preparatory Committee continue to hold office in the new Legislative Council. We assume that it is not anticipated that an Election Committee will be set up in 1995, so that in any event the ten members to be selected by the Election Committee will be selected in 1997.

#### (V) CRITICISMS

Our main criticism of both the present and future systems relates to the functional constituencies. The appointed members (whether, as now, appointed by the Governor or, as after 1997, appointed by an Election Committee) will at least be phased out by 2003. The number of members returned by functional constituencies, by contrast, will increase from 21 to 30.

We regard the functional constituencies as a parody of democracy. We understand that the number of persons entitled to vote in the elections for functional constituencies represents only about 3 per cent of the number entitled to vote in the direct elections. Some of the voters in the functional constituencies are not individuals but corporate bodies. Those who are individuals will all have votes in the direct elections. Thus at present some 3 per cent of those eligible to vote in direct elections which return 18 members have a second vote which entitles them to return 21 members. Within the functional sector, the number of votes needed to return a member varies widely between constituencies. Even if, after 1997, the electorate for functional constituencies is widened, there is likely to be a very substantial disproportion between the numbers eligible to vote in geographical constituencies and functional constituencies. The scales are weighted heavily in



favour of business leaders and members of professions and against the poor, the unskilled and women.

Furthermore, we believe that the functional constituencies are contrary to Article 25 of the ICCPR and Article 21 of the Hong Kong Bill of Rights, which confer on citizens the right "to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage". Under a reservation made by the Government of the UK on its acceptance of the ICCPR in relation to Hong Kong, Article 25 is not to be taken to require the establishment of an elected Legislative Council in Hong Kong. There is a corresponding exception in s.13 of the Bill of Rights Ordinance. We have expressed the view elsewhere (17) that the reservation and exception should be withdrawn. Even under the present law, however, we believe that Article 21 of the Bill of Rights requires that any elections to the Legislative Council which do take place should be held on the basis of universal and equal suffrage. Elections to functional constituencies are held on the basis of a suffrage which is far from universal and grossly unequal.

While some of the political parties in Hong Kong must have been aware of this argument - if only because we questioned their representatives about it - none of them was prepared to challenge the electoral legislation under the Bill of Rights Ordinance. This is understandable; we appreciate that the parties, even if hostile to the concept of functional constituencies, would have preferred to get on with the 1991 elections even in an unsatisfactory form rather than cause a constitutional crisis (and a probable delay in the elections) by challenging the functional constituencies under the Bill of Rights Ordinance. However, they may not take the same attitude towards the 1995 elections. Since no challenge was made to the constitutionality of functional constituencies before the 1991 elections, we think that the members should be allowed to retain their seats until 1995.

In our view, quite apart from the possibility of challenging the functional constituencies under the Bill of Rights Ordinance, it is of the highest importance that Hong Kong should be given a fully democratic Legislative Council before 1997. Although the Bill of Rights Ordinance will no longer be entrenched after 1997 and the Government of the PRC could insist on the implementation of the Basic Law as it now stands, such action would involve a breach of the ICCPR. It would be visibly anti-democratic in a way that would not be the case if the Basic Law simply continues the status quo at the time when it comes into force - indeed the Basic Law can be seen as involving a modest extension of democracy as compared with the present situation.

In our view, therefore, the UK Government should ensure that in 1995 all members of the Legislative Council are elected from geographical constituencies, and that functional constituencies are abolished.(18) Further, in order to speed up the process of democratisation, we believe that the terms of the 18 current appointed members should be ended in 1993 and

that they should be replaced by 18 members representing the existing geographical constituencies, so that directly elected members will constitute a majority of the Legislative Council from 1993 to 1995 and the whole of it from 1995 to 1997.

This proposal, if adopted, would of course derail the through train, and an entirely new Legislative Council would have to be formed in 1997. This matters only if the train is worth boarding. In our view it is not. In our view it is far more important to ensure that a fully democratic Legislative Council has been brought into existence before 1997 than to ensure that some members of the Council elected in 1995 remain in office until 1999. This is the more true because, in any event, the power of the Preparatory Committee to prevent the continuance in office of individual members of the Legislative Council means that members of parties unacceptable to the PRC, such as the United Democrats, are unlikely to be allowed to retain their seats after 1997. In any event, if fair elections are held, a number of members of the previous Legislative Council are likely to be re-elected in 1997.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) The Legislative Council to be elected in 1995 should be elected solely from geographical constituencies.
- (2) Functional constituencies, since they do not provide for universal and equal suffrage, involve a breach of Article 21 of the Hong Kong Bill of Rights, notwithstanding the exception in section 13 of the Bill of Rights Ordinance. Since no challenge was made before their election, the present members should however be allowed to remain in office until 1995.
- (3) The term of office of the 18 appointed members should be brought to an end in 1993, when they should be replaced by further elections in the 18 geographical constituencies.
- (4) The "through train" will be of little benefit to Hong Kong and does not justify a refusal to hold fully democratic elections in 1995.

FOOTNOTES

- (1) Chapter IV
- (2) Annex I Article I
- (3) Details of early steps towards democracy are taken from Chapter II of the Hong Kong Government's Green Paper "The 1987 Review of Developments in Representative Government".
- (4) At the time of the Green Paper the total number of members of the 19 District Boards was 237 elected, 132 appointed and 57 ex officio.
- (5) For details see Schedule 1 to the Legislative Council (Electoral Provisions) Ordinance.
- (6) White Paper "The Further Development of Representative Government in Hong Kong", November 1984, para.12.
- (7) For details see Schedule 2 to the Legislative Council (Electoral Provisions) Ordinance.
- (8) para.25
- (9) para.84
- (10) paras.104-106
- (11) Seats were added for the accountancy profession and for members of health care professions other than doctors (who were already represented).
- (12) Additional "functional" seats were given to financial services; architecture and surveying; real estate and construction; and tourism.
- (13) In the United Kingdom, turnout for elections to the U.K. Parliament is normally 75 to 80 per cent while turnout for local elections is about 40 per cent and for elections to the European Parliament little over 30 per cent.

- (14) The Basic Law also contains provisions (Article 50) for the dissolution of the Legislative Council and new elections in the event of deadlock between the Council and the Chief Executive: see Chapter III.
- (15) Article 68
- (16) Annex II Part III
- (17) Chapter XII
- (18) It should be considered whether, to ensure a reasonable spread of opinion within the Legislative Council, elections should be by proportional representation.

CHAPTER VIIIACCOUNTABILITY OF THE EXECUTIVE

We believe that the accountability of the executive to the people is a vital element in the protection of the rule of law.

The one serious defect of the Joint Declaration is its failure to provide for a democratically elected Head of Government. The Joint Declaration creates a presidential system, with a Chief Executive outside the legislature, rather than a parliamentary system with a Prime Minister who must be able to command the support of a parliamentary majority. There is, of course, nothing inherently undemocratic in a presidential system, but a democratic method for the election of the Chief Executive is essential if a presidential system is to have democratic validity. The Joint Declaration, however, provides that "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." (para.3(4); also Annex I Article I). This means that the key post of Chief Executive is within the gift of the Central People's Government and that the people of Hong Kong have no right to be involved in the process of selection. The Chief Executive will, in effect, simply be a Governor appointed in Beijing rather than London.

The method of selection of the Chief Executive and the powers and duties of the office are laid down in Section 1 of Chapter IV of the Basic Law (Articles 43-58) and Annex I which are outlined in Chapter III above. Article 45 declares that "the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures". However, the method of selection provided for by the Basic Law is election by an Election Committee (1). The Election Committee will not itself be democratically elected and will consist mainly of representatives of "functional" groups. The Election Committee responsible for the election of the first Chief Executive in 1997 will be appointed by a Preparatory Committee which will itself have been appointed by the Standing Committee of the National People's Congress. Progress towards the "ultimate aim" of universal suffrage is handicapped by the fact that any alteration in the method of selection will require the endorsement of two thirds of the members of the Legislative Council and the consent of the current Chief Executive.

Under Article 44, the Chief Executive must be a Chinese citizen who is a permanent resident of the SAR "with no right of abode in any foreign country". The exclusion of citizens who have a right of abode in another country is contrary to Article 25 of the ICCPR, which guarantees to citizens the right to take part in the conduct of public affairs and to have

access to public service (2).

The fact that the Joint Declaration and Basic Law do not provide for democratic elections make it even more important that the Chief Executive should be accountable to the legislature. The Joint Declaration does indeed provide that "the executive authorities shall abide by the law and shall be accountable to the legislature" (3). However, Article 43 of the Basic Law states: "The Chief Executive of the Hong Kong SAR shall be accountable to the Central People's Government and the Hong Kong SAR in accordance with the provisions of this law."

Article 43 of the Basic Law replaces the simple principle of the accountability of the Chief Executive to the legislature of the SAR with a dual accountability. First, the Chief Executive is made accountable directly to the Central People's Government - a principle which is inconsistent with, and is not authorised by, the Joint Declaration. Second, the concept of accountability to the legislature of the SAR is replaced with the nebulous concept of accountability to the Region itself. Accountability must be to an identified body capable of applying sanctions for failure to account. Article 64 provides that the government of the SAR shall be accountable to the Legislative Council, but it is not clear whether this accountability goes beyond the specific obligations listed in Article 64 itself (i.e. to implement laws in force; to present policy addresses; to answer questions; and to obtain approval for taxation and expenditure).

Article 73 provides for an impeachment procedure on the ground of serious breach of law or dereliction of duty by the Chief Executive.

The result is that the nature and extent of the accountability of the executive to the legislature under the Basic Law is profoundly unsatisfactory. The Chief Executive's accountability to the Central People's Government emphasises that the office is seen as a continuance of the present governorship. The apparent distinction between the accountability of the Chief Executive to the SAR, and of the Government to the Legislative Council is extremely confusing. The extent of this accountability, and the means of its enforcement by steps short of impeachment, is far from clear.

We believe that these provisions of the Basic Law should be replaced by a system which will ensure the democratic election of the Chief Executive, either through a presidential system of direct popular election or by a "Westminster" system under which the leader of a party or coalition with a parliamentary majority becomes the Chief Executive. In either case, the accountability of the Chief Executive to the legislature should be strengthened and clarified.

CONCLUSIONS AND RECOMMENDATIONS

- (1) The provisions of the Basic Law relating to the appointment of the Chief Executive should be replaced by provisions ensuring the direct popular election of the Chief Executive, or an alternative system ensuring that the Chief Executive or Government is selected by a democratic process.
- (2) The Chief Executive should report to but should not be made accountable to the Government of the PRC, the Chief Executive's accountability to the legislature of the SAR should be clarified and strengthened.

FOOTNOTES

- (1) The composition of the Committee is summarised in Chapter III above. The same Committee will be responsible for the election of ten members of the Legislative Council in 1997 and six in 1999.
- (2) There are similar restrictions on members of the Executive Council (Article 55), principal civil service officials (Article 61), the President of the Legislative Council (Article 71) and the Chief Justice of the Court of Final Appeal and Chief Judge of the High Court (Article 90).
- (3) Annex I Article I.

CHAPTER IXCONSTITUTIONAL POSITION  
OF THE JUDICIARY AFTER 1997A. The Role of the Judiciary

Under the terms of paragraph 3(3) of the Joint Declaration and Article I of Annex I the independent judicial power of the Hong Kong Special Administrative Region (Hong Kong SAR), including the power of final adjudication, will, except in respect of foreign and defence affairs, be vested in the courts of Hong Kong after July 1997. That paragraph is, in our view, quite clear in its purport that the courts of Hong Kong will, even after the handing over of sovereignty by the British government to the People's Republic of China, continue to function as they do save only in regard to foreign and defence affairs. We find, however, that that intention has not been given effect to by the Basic Law, in that some of its provisions either render nugatory, or are so worded as to be capable of being construed in a way inconsistent with, the terms of paragraph 3(3). The following are the provisions we refer to:-

(1) Article 19 of the Basic Law

While the first two paragraphs of the Article have re-emphasised the terms of paragraph 3(3) of the Joint Declaration, the further provisions in the third paragraph of the Article (that the courts shall have "no jurisdiction over acts of state such as defence and foreign affairs and that they shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs") have created uncertainty in relation to the courts' jurisdiction. Firstly, an "act of state", insofar as it is relevant to the jurisdiction of the courts, is well defined (1) and understood by the courts and would have been covered by the second paragraph of the Article as being part of the current restrictions imposed on the courts' jurisdiction. Secondly, while an act of state has been regarded as being essentially an exercise of sovereign power, (2) not to be challenged, controlled, or interfered with by municipal courts, the expression "such as" used in Article 19 gives rise to misgivings that the question or questions of fact which require the Chief Executive's certificate may not necessarily be confined to foreign and defence affairs. We consider the provisions of the third paragraph unacceptable as tending to create an unnecessary ambiguity. If the expression "acts of state" is intended to apply only to the acts of sovereign power above referred to, then the



provisions of the third paragraph are superfluous. If the expression is, on the other hand, intended to have a wider application, then those provisions are clearly at variance with the terms of the Joint Declaration and ought to be rejected.

(2) Articles 8, 18 and 158

Two issues need to be addressed if the courts of Hong Kong are to continue to function as they currently do, after 1997. The first concerns the laws to be applied to the Hong Kong SAR and the second, the power and the jurisdiction of those courts.

- (a) As regards the first issue, the Basic Law by Article 8 provides that the laws to be in force in the Hong Kong SAR will be the Basic Law, the laws currently in force in Hong Kong and the laws enacted by the legislature of the Hong Kong SAR. The laws currently in force in Hong Kong have been defined in Article 8 to mean the common law, rules of equity, ordinances, subordinate legislation and customary law, except for any that contravenes the Basic Law and subject to any amendment made thereto by the legislature of the Hong Kong SAR.

It is our view that the Basic Law has contradicted the terms of the Joint Declaration in certain important respects, particularly insofar as it purports to assume power over the Hong Kong SAR in relation to matters not related to foreign and defence affairs. For this reason, the application to the Hong Kong SAR of the Basic Law as it now stands and the exclusion from application to the Hong Kong SAR of current laws which contravene the Basic Law would, in our view, enable the People's Republic of China to apply to, and enforce in, the Hong Kong SAR its national laws on matters not necessarily confined to foreign or defence affairs. The third paragraph of Article 18, in its statement that the laws which may be added to the list in Annex III to the Basic Law "shall be confined to those relating to foreign and defence affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law", strongly points to an intention to apply national laws on other matters, especially having regard to the discretion conferred by Article 18 on the Standing Committee of the National People's Congress to declare a state of emergency as hereinafter referred to in greater detail.

- (b) On the second issue, Article 158 vests the power of interpretation of the Basic Law in the

Standing Committee of the National People's Congress but provides that the courts of the Hong Kong SAR would be authorised, in adjudicating cases, to interpret on their own the provisions of the Basic Law "which are within the limits of the autonomy of the Region". In relation to cases which require the interpretation of the provisions of the Basic Law "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship of the Central Authorities and the Region", the courts will need to seek an interpretation of the provisions in question from the Standing Committee before making their decisions.

Even assuming it to be practicable for the courts to be given the power of interpretation over some only of the provisions of the Basic Law, we do not consider Article 158 workable. It clearly contravenes the Joint Declaration. As already mentioned, the Basic Law purports to confer upon the Government of the People's Republic of China wider powers than were permitted by the Joint Declaration. A good example of this is Article 18 of the Basic Law which empowers the Standing Committee of the National People's Congress to declare a state of emergency on the ground of turmoil within the Hong Kong SAR which endangers national unity or security and which is beyond the control of the government of the Region. It is evident from the very prerequisites specified in the Article that the People's Republic of China is arrogating to itself a power which is outside the ambit of foreign or defence affairs. Given that as a fact, is a court of the Hong Kong SAR, adjudicating a claim which requires an interpretation of Article 18 (as to whether a state of emergency had been properly declared) under an obligation to seek the interpretation of that Article from the Standing Committee? Article 158 would seem to make it obligatory, since the provisions of the Article to be interpreted would concern "affairs which are the responsibility of the Central People's Government", namely, the decision to declare the state of emergency, even though the matter does not involve foreign or defence affairs.

This usurpation of "responsibility" by the Central People's Government" brings about a consequential difficulty in relation to the power of interpretation to be delegated to the courts of the Hong Kong SAR under Article 18. It is no longer clear what provisions of the Basic Law are or are not "within the limits of the autonomy" of the Hong Kong SAR.

Much would depend on the approach taken by the People's Republic of China in construing the provisions of the Basic Law. If the Basic Law were construed so as to bring it in accord with the Joint Declaration all should be well. But the provisions of the Basic Law it has promulgated indicate that the People's Republic of China has no intention of adhering to the terms of the Joint Declaration in regard to the vesting of independent judicial power in the Hong Kong SAR. The vague qualifications imposed by the Basic Law leave little room for optimism that the courts of Hong Kong will be able to continue to play their present role in the Hong Kong SAR, as envisaged in the Joint Declaration.

We recommend that the terms of paragraph 3(3) of the Joint Declaration be strictly implemented. Except for the national laws relating to foreign and defence affairs, which might be applied by the People's Republic of China pursuant to the terms of the Joint Declaration, the laws to apply to the Hong Kong SAR and to be administered by its courts should be the existing laws of Hong Kong (subject to amendments made thereto by the legislature of the Hong Kong SAR) and all such laws as the said legislature shall promulgate.

It is essential that the courts be given the power of interpretation of all laws, including the Basic Law, in their application to the Region. This power of interpretation is an inherent power of the courts in all countries which have accepted the rule of law and should continue to be exercised by the courts of Hong Kong even after 1997. There can be no independence in a judiciary which has to look to the government for the interpretation of the laws relevant to matters under its adjudication.

We, therefore, find Article 158 unacceptable. For the same reason, we also consider unacceptable Article 160 of the Basic Law, which confers upon the Standing Committee of the National People's Congress, the power to decide whether existing laws contravene the Basic Law. Such a decision, involving as it does also the interpretation of laws, is judicial in nature and ought to be left to the courts to make.

#### B. Procedure For Appointment of Judges

Article 88 of the Basic Law provides for Judges of the courts of the Hong Kong SAR to be appointed by the Chief Executive of the SAR on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

Under existing procedures, judges are appointed by the Governor of Hong Kong upon the advice of a commission known as the Judicial Services Commission which was established by law in the early 1970s. Until the beginning of this year the

Judicial Services Commission comprised the Chief Justice, the Attorney-General, the Chairman of the Public Service Commission and three members appointed by the Governor, namely, a High Court Judge, a barrister and a solicitor, and its resolutions had to be unanimous to have effect. As so constituted, the Commission was largely independent of any Executive control though the presence of the Attorney-General on the Commission is regarded by some as incompatible with the independence of the Commission (3). Amendments made to the Judicial Services Commission Ordinance early this year have however caused concern to a number of those who appeared before us, who considered the changes made to the composition of the Commission and the abolition of the unanimity requirement for arriving at its decisions as seriously affecting the Commission's independence. By the amendments the Commission is to comprise the Chief Justice, the Attorney-General and seven members appointed by the Governor. The seven appointed members consist of two judges, a practising barrister, a practising solicitor and three persons who need have no connection with the practice of the law. The appointment of the three lay members was seen by the Hong Kong Bar Association as an indication that the Executive was seeking to have more control of the Commission: together with the Attorney-General, the Executive now has a greater representation than it previously had. A change made in the quorum of the Commission, enabling seven out of its nine members to constitute a meeting and to come to an effective decision by a majority of votes, would mean that the advice tendered to the Governor could be based on a decision made in the absence of the two judges or of the two legal practitioners.

Conflicting reasons given by government officials for the amendments have managed only to increase fears. A statement made by the Chief Secretary of Hong Kong that the unanimity requirement previously in force had not caused any difficulty was contradicted by a reference made by the government during the debate on the amendments, to the possibility of the unanimity requirement being a hindrance to the future Chief Executive of the Hong Kong SAR in cases of difficult appointments. As observed by the Bar Association the Basic Law itself does not require the abolition of the previous practice of choosing by consensus those to be recommended for judicial appointment.

We note that no procedure has been provided by Article 88 with regard to the independent commission. It is, in our view, necessary that there be put in place a proper mechanism to regulate the working of the commission. Since the independent commission will in all respects perform the function of the Judicial Services Commission we recommend that such function be undertaken by the existing Judicial Services Commission by its continuing to carry on with its present advisory role in the appointment of judicial officers after 1997.

We, however, consider it imperative that the Judicial Services Commission must not only be, but must be seen to be, independent of any Executive control if public confidence in

the independence of the courts of the Hong Kong SAR is to be maintained. We are in agreement with the views expressed by the Bar Association of Hong Kong that the Judicial Services Commission is no longer regarded or seen to be independent of Executive control arising from the recent changes made to its composition. We therefore also recommend that the Judicial Services Commission Ordinance be further amended to restore it to its previous state insofar as the composition of the Commission is concerned. If that is done the selection of appointees to judicial office will once more be left in the hands of the profession. But in that event the need for the unanimity requirement becomes less important and we suggest that the Judicial Services Commission be entitled to recommend appointments by five affirmative votes.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) Article 19 of the Basic Law should be modified so as to limit the exclusion of the jurisdiction of the Hong Kong courts to defence and foreign affairs only.
- (2) The power of interpreting the Basic Law in its application to the SAR and the power of deciding whether existing laws contravene the Basic Law should be transferred from the Standing Committee of the National People's Congress to the courts of Hong Kong.
- (3) The Judicial Services Commission should be restored to its previous form, but with selection by five affirmative votes.

#### FOOTNOTES

- (1) "An act of state is an act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state unless they are temporarily within the allegiance of the state so performing the act" - Wade's "Act of State in English Law" (15 British Yearbook of International Law 98, at p.103).
- (2) Examples are the making and performance of treaties, the declaration of war, and acts of foreign governments and of their authorised agents.
- (3) See the Hong Kong Law Journal, 1976, p.1.

CHAPTER XJUDICIARY:  
APPOINTMENT AND RECRUITMENT TO  
THE HIGH COURT AND THE COURT OF FINAL APPEALA. The High Court

It is crucial that there be in place in 1997 a judiciary capable of exercising the independent judicial power which will be vested in the Hong Kong SAR pursuant to the terms of the Joint Declaration. The importance of an independent judiciary to maintain confidence in Hong Kong as a prosperous financial centre and as a place where human rights are observed and the rule of law applies after 1997 cannot be over-emphasised.

There is, therefore, an urgent need for a larger number of able and honest local lawyers to be appointed as judges of the High Court pending the surrender of sovereignty over Hong Kong. The present recruitment to the High Court, which relies too heavily on expatriates for appointment, is not satisfactory. The fact that only the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong SAR must be Chinese citizens with no right of abode in any foreign country (Article 90 of the Basic Law), does not detract from the need for more involvement by local lawyers in whose interest it must be to carry into the Hong Kong SAR the traditions of an independent judiciary and an independent Bar. Unless local lawyers accept offers of appointment as judges, there is a real danger that expatriates will continue to dominate the judiciary and of the judicial and legal system collapsing when the change-over of sovereignty takes place.

We see a number of reasons for the reluctance of local barristers to be judges. The tradition of appointment from the local profession to the bench is of recent origin: the first local appointment to the bench was made only in 1977. Appointment to the High Court Bench has not been regarded in Hong Kong as prestigious. With the comparatively high income they are able to earn at the Hong Kong Bar, barristers do not consider a career on the Bench sufficiently attractive. A change in housing allowance recently introduced by the government to apply to newly appointed judges (to their financial disadvantage) has made serving on the Bench even more unattractive.

The imminence of 1997 has compounded the difficulty. The provisions of Article 158 (which provides for a very limited power of interpretation of the Basic Law to be delegated to the courts of the Hong Kong SAR) and Article 160 (which confers upon the Standing Committee of the National People's Congress the power to decide whether any existing law contravenes the Basic Law), by compromising the independence of the courts of the Hong Kong SAR, act as a further disincentive. No one is

likely to be prepared to accept appointment as a judge with the constraints he will be subjected to by these provisions. As we have stated in Chapter 9, these Articles of the Basic Law are unacceptable.

The Basic Law does not guarantee the security of tenure of judges. Such a provision is necessary for assuring judges that they may discharge their duties with complete independence and without fear or favour. Security of tenure up to a specified retiring age is a basic condition of service of judges of the superior courts of most, if not all, countries exercising similar jurisdiction and should be provided for the judges of the Hong Kong SAR. Provisions contained in the Basic Law designed to prevent arbitrary removal of judges from office serve little purpose where those judges are serving on fixed-term contracts and therefore have no security of tenure in the first place.

It is necessary for a re-assessment to be made of the conditions of service of judges. Strategies adopted by other countries for attracting candidates by the provision of a judicial package to cover housing and other allowances, should be considered. Such a strategy has been found to be successful in the State of New South Wales in Australia, for example.

Initially there is bound to be difficulty in getting a satisfactory response. To make up the number required, it may be necessary to draw on talented members of the District Courts to serve in the High Court through promotions. Gradually, improved conditions of service and terms of appointment should help overcome the reluctance of local lawyers to serve on the Bench.

One other solution to the initial difficulty may be for members of the Bar accepting appointment as judges, to be offered the incentive of returning to the Bar in the event that they find it intolerable to remain on the Bench after 1997. It is not permissible for barristers to come back to the Bar under the rules presently governing practice at the Bar, which, in line with the practice in England, forbid it for good reasons. But there might be justification for relaxing the application of the rule by reason of the circumstances faced by the Hong Kong Judiciary: it is a question of the lesser of two evils.

Since our visit, the Chairman of the Hong Kong Bar Association has conducted a survey of senior members of the Hong Kong Bar to find out how many of them would consider taking judicial appointments and what factors might deter them from doing so. Of those who replied, only a small proportion were prepared to accept an immediate appointment. Concern over the independence of the judiciary after 1997 was the greatest deterrent. For appointments to the High Court, pay was not regarded as a deterrent by many potential appointees but the arrangements for housing were regarded as unsatisfactory, as were levels of pay in the District Court. The most encouraging fact was that many members of the Bar were prepared to accept part-time appointments as Recorders or Deputy Judges for four

to six weeks a year. (1) Barristers (and in recent years solicitors) are given similar appointments in England, where the system has been found helpful in assessing their suitability for full-time appointments and training them for such posts. It may also encourage those who find judicial work interesting to accept subsequent full-time appointments. We would welcome the creation in Hong Kong of a formal system of appointment of part-time Recorders and Deputy Judges.

It is self-defeating for the People's Republic of China not to want an independent judiciary in the Hong Kong SAR. Public confidence in the future of Hong Kong after 1997 must depend largely on the judiciary's being able to function independently of governmental control or pressure. Should there be loss of confidence in the Hong Kong SAR, the People's Republic of China itself will stand to suffer substantial losses on its large investments.

Many people to whom we spoke in Hong Kong identified the quality and independence of the judiciary as the most crucial of all the problems facing Hong Kong after 1997. It is also the problem where the interests of the business community and concerns for human rights most clearly coincide. The business community can live - however reluctantly - with restrictions on the press or on political activity. It can not live with a judiciary which takes orders from the government.

#### B. The Court of Final Appeal

The Joint Declaration provides for the establishment of a Court of Final Appeal to replace the Privy Council which is the present Final Court of Appeal for Hong Kong. The new Court of Final Appeal will be vested with the power of final judgment in the Hong Kong SAR (Annexe I, Pt.III). In conformity with the 'one country - two systems' concept, it was agreed that the Court "may as required invite judges from other common law jurisdictions to sit" on the Court. The purpose of this was, no doubt, to give to the Court the stature and prestige necessary to command confidence in its independence and in the independence of the Judiciary of the Hong Kong SAR. These provisions of the Joint Declaration were repeated in Article 82 of the Basic Law.

At the time the Mission was in Hong Kong there had been no decision reached by the Sino-British Joint Liaison Group (JLG) on the composition of the Court. Though unable to explain the delay, the Hong Kong Bar Association expressed concern that it might have been due to an attempt by the People's Republic of China to interfere with the appointments to be made to the Court. If this was so, the Bar Association clearly had a genuine cause for concern, as questions affecting the composition of the Court and appointments to it should be left to the independent commission mentioned in Article 88 of the Basic Law.



Since then an agreement has been reached by the JLG. The communique it issued gave no details, but subsequent statements made by the senior British member of the JLG suggest that the Court would be made up of five judges comprising the Chief Justice, three other Hong Kong judges, and a fifth who might be a serving or retired local judge or someone chosen from an overseas country with a common law system.

We are informed that, as with the Joint Declaration, the agreement by the JLG was arrived at without consulting interested parties and that the Legislative Council of Hong Kong, which opposes it, has threatened that it would not pass the necessary legislation to give effect to its terms.

The JLG's proposals for the composition of the Court of Final Appeal have been condemned by the Bar Committee and the Council of the Law Society of Hong Kong. They claim that the provisions of the Joint Declaration and the Basic Law would have made it possible to create a court of comparable stature to the Privy Council, while allowing the natural development of Hong Kong's judicial expertise. The JLG proposals, they say, will frustrate their purpose and create little more than the existing Court of Appeal under another name. We agree with these views. (2)

On the basis of the statements of the JLG, we find the agreement to have breached the terms of the Joint Declaration and contravened Article 82 of the Basic Law because:-

- (a) it purports to restrict the number of judges "from other common law jurisdictions" to just one; and
- (b) it purports to usurp the power of the Court of Final Appeal which, under the Basic Law, is the proper body to decide whether any of such judges is required to be invited and the number required.

We note that this view is shared by Britain's most distinguished constitutional lawyer, Professor Sir William Wade Q.C. In an opinion given to the Bar Association and the Law Society, Sir William has concluded that the JLG proposals are inconsistent with the Joint Declaration and the Basic Law, which in his view are evidently intended to allow the Court of Final Appeal to invite overseas judges at its own discretion and without any greater restriction than can fairly be inferred from those basic documents themselves. The powers granted to the Court of Final Appeal by Article 82 of the Basic Law cannot be altered by any intergovernmental agreement or by any local law of Hong Kong. Sir William says that, since the Final Court's power to invite overseas judges is part of the basic policy of the PRC set out in the Joint Declaration, that power is "as firmly entrenched as words can make it. There is simply no power to alter or reduce it without violating the fundamental constitutional law of Hong Kong and the treaty which the Joint Declaration represents". (3)

We are compelled to express our own concern at the manner

in which the JLG has dealt with this issue. It should have foreseen that its further modification to what had previously been regarded as settled provisions in the Joint Declaration and in the Basic Law was bound to give rise to a renewed loss of confidence in Hong Kong and the Hong Kong SAR as a commercial centre. We recommend that the terms of the Joint Declaration and the provisions of the Basic Law relating to the Court of Final Appeal be strictly adhered to by the parties. Unless this is done, there will be no confidence in the independence of the Judiciary after 1997.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) The maintenance of an independent judiciary in Hong Kong after 1997 is of the highest importance both for the preservation of business confidence and for the protection of human rights.
- (2) There is an urgent need to recruit local lawyers of ability and integrity to the bench and reduce the dependence of the bench on expatriate lawyers.
- (3) Judges of the superior courts should be appointed with tenure to retiring age rather than fixed-term contracts.
- (4) Terms of service of the judiciary (particularly in relation to housing) should be improved and judges should be allowed to return to practice after resignation from the bench.
- (5) A formal system of appointing local lawyers to serve as part-time Recorders or Deputy Judges should be adopted.
- (6) The agreement reached by the Joint Liaison Group on the composition of the Court of Final Appeal is contrary to the Joint Declaration and the Basic Law and is constitutionally invalid; the Court of Final Appeal itself should be allowed to determine the number and identity of foreign judges to sit as temporary members.

FOOTNOTES

- (1) The results of the survey are summarised in letters dated 18th September 1991 from the Chairman of the Bar Association (Anthony Rogers Q.C.) to the Chief Justice and the Chief Secretary.
- (2) Position Paper on the Court of Final Appeal, published by the Hong Kong Bar Association and the Law Society of Hong Kong on the 18th October 1991.
- (3) Opinion of Professor Sir William Wade Q.C. dated 24th October 1991.

CHAPTER XIPUBLIC ORDER AND EMERGENCY

The system of government devised for Hong Kong by the parties to the Joint Declaration was indeed unique and in all probability would have been found to be acceptable by the people of Hong Kong had their views been sought in a properly conducted referendum. But the viability of the system hinges on one fundamental condition being observed, namely, that except in matters relating to foreign and defence affairs, the Government of the People's Republic of China will not interfere with the 'high degree of autonomy' promised for the SAR during the fifty year period.

The Basic Law subsequently promulgated has cast grave doubt on the good faith of the Government of the People's Republic of China with respect to its declared basic policies. We have, in Chapter IX, Part A, examined those Articles of the Basic Law which we considered are incompatible with the policy concerning the Judiciary of the SAR. Of more serious import is the threat posed by Article 18 to the basic concept underlying the agreements of the parties as embodied in the Joint Declaration. That Article, read with Article 158, confers upon the Standing Committee of the National People's Congress the discretion to decide whether the SAR is in a state of emergency by reason of turmoil therein which endangers national unity or security and is beyond the control of the government of the SAR. With the power of interpretation of the Basic Law being vested in itself under Article 158, the Standing Committee's discretion to decide on whether a state of emergency exists is absolute.

It is the general rule that it is for the government directly affected by turmoil to decide whether or not it has lost control and in consequence has to proclaim a state of emergency. The decision is the last legal resort of a government shaken by a breakdown of public order. It is a formal acknowledgment of the government's inability to cope with its problems by means of normal legal procedures. It is quite wrong for an outside body to impose its own decision as to the existence of a state of turmoil beyond the control of the legitimate government of a territory if that government does not itself conclude that it has lost control.

The potential for abuse of Article 18 cannot be ignored. In very many cases states of emergency have been declared in order to perpetuate certain regimes which, on the purported ground of national self-protection, arrogate to themselves wide political powers. Under the pretext of preserving national security, states of emergency have been used to undermine or destroy democracy. Favourite targets for oppression have been the press, trade unions and opposition parties - the objectives, invariably, being to deprive large numbers of

citizens of their most fundamental rights, to curb the freedom of the press and to exempt governmental abuse of power from any form of control.

Article 18 appears to us to be Draconian. By conferring upon the Standing Committee the discretion to determine whether an incident constitutes turmoil, it renders completely nugatory the assurances the basic policies were intended to provide to the people of Hong Kong. It is not unknown for governments to self-induce turmoil for the specific purpose of invoking the emergency provisions of their constitutions in order to "legally" assume dictatorial powers; and a state of emergency, once declared, can be prolonged indefinitely, as happened in Greece where a state of emergency kept the regime of the Colonels in power from 1968 till 1974. Germany's Weimar Constitution, which contained a typical emergency provision permitting rule by ordinances in states of emergency, was invoked from 1919 and helped Hitler to come into power in 1933: he established himself as a dictator through "Emergency Ordinance for the protection of People and State" (Notverordnung zum Schutze von Volk und Staat) the day after the burning of the Reichstag on 28 February of that year. Other examples of governments invoking states of emergency are to be found in the study of the International Commission of Jurists, States of Emergency: Their Impact on Human Rights, published in 1983.

Paragraph 3(11) of the Joint Declaration provides that the responsibility for the maintenance of public order shall be with the Government of the SAR. This was reiterated in Article 14 of the Basic Law. That responsibility would require the Government of the SAR to deal with activities such as those specified under Article 23 (for example, acts of treason, secession, sedition and subversion against the Central People's Government) and must necessarily confer upon it the exclusive right to determine whether any given situation in the SAR would so affect the maintenance of public order as to warrant the declaration of a state of emergency in the SAR. Article 18, in conferring this right to the Standing Committee is, in our view, repugnant to the Joint Declaration and to Article 14.

A decision made under Article 18, that a state of emergency exists, would entitle the Central People's Government to issue an order applying the relevant national laws in the SAR. What these relevant laws are has not been stipulated. But going by emergency rule in other countries, it is more than likely that the application of the 'relevant laws' would negate the basic policies and make the very basis for the Joint Declaration a mere illusion.

The subjection of residents of Hong Kong to the discipline of service in the People's Liberation Army is in our view inconsistent with the autonomy promised to Hong Kong. Although there has been nothing provided in the Basic Law to prohibit it, the conscription of Chinese citizens resident in the SAR into the army of the People's Republic would, in our view, be contrary to the spirit of the Joint Declaration. The high

degree of autonomy to be enjoyed by the SAR in virtually all matters of regional concern and the 'one country: two systems' concept cannot be realised if the citizens of the SAR are liable to be conscripted.

We recommend that the Basic Law be amended to make this point clear.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) Articles 18 and 158 of the Basic Law should be amended to confer on the Government of the SAR the exclusive power to declare a state of emergency in the SAR.
- (2) The Basic Law should be amended to make it clear that permanent residents of the SAR are not subject to conscription.

CHAPTER XIIHUMAN RIGHTS UNDER THE BILL OF RIGHTSPreliminary

The Hong Kong Bill of Rights Ordinance incorporates in domestic law the International Convention on Civil and Political Rights (ICCPR). It follows very closely the structure and wording of the ICCPR. Although this verbatim adoption of the Convention can give rise to serious problems of interpretation (1), there can be little doubt that the Ordinance provides a clear legal basis for the protection of human rights in Hong Kong.

The ICCPR is now regarded by some human rights experts as already somewhat archaic, particularly in relation to the extensive grounds which it allows for restriction of the primary rights which it declares. However, we do not think it is appropriate for this Report to consider criticisms of the ICCPR. In any event, given the specific references to the ICCPR in the Joint Declaration and the Basic Law, we think that the Governments of Hong Kong and the UK had no practical alternative to the incorporation of the ICCPR into the law of Hong Kong without significant amendment.

Section 5 of the Bill of Rights Ordinance contains a right of derogation which is based on Articles 4.1 and 4.2 of the ICCPR. However, its reference to "public emergency which threatens the life of the nation" as the basis for derogation, while literally following the wording of the ICCPR, causes problems. The nation, in this context, must be China. However, it has been argued (we think justifiably) that so long as China is not a party to the ICCPR the existence of a state of public emergency, and hence of the power of derogation, should be looked at in the context of Hong Kong alone, and not of the PRC as a whole. Furthermore, it is anomalous that the Government of the PRC, so long as it is not a party to the ICCPR, should have any power to derogate from the ICCPR in respect of Hong Kong.

Part III of the Ordinance, which derogates from some of the rights (through the provision of exceptions and savings), has, however, seriously undermined the purpose of the legislation. While the exceptions enacted in sections 9 to 13 apply to those affected, without any limitation of time, the saving of certain existing written laws of Hong Kong from the application of the Ordinance, under section 14, has effect initially only for a period of one year, with a possible extension for another year if so resolved by the Legislative Council. Those written laws, which confer upon law enforcement agencies powers such as those of search, arrest, detention and seizure and contain provisions which are incompatible with human rights, are listed in the Schedule to the Ordinance.

Their exemption from the application of the Ordinance notwithstanding their inconsistency with the provisions of the ICCPR is unfortunate. It tends to create the impression in the public mind that the Bill of Rights Ordinance, in spite of the provisions of its section 3 (which states that pre-existing legislation not admitting of a construction consistent with the Ordinance, is to the extent of the inconsistency, repealed), occupies a relatively insignificant and inferior status within the Hong Kong legal system (2).

The continued application of the savings provisions beyond the one year period is undesirable and not in the interest of the colony. Such extension will only serve to show that in relation to certain matters the Government of the United Kingdom itself does not believe that it should observe human rights standards. It is, therefore, our view that the one year period should not be extended and that the Legislative Council should repeal section 14(3) of the Ordinance at the end of that period by invoking the provisions of paragraph (c) of that section. There can be no justification for not applying in full the provisions of the Convention to the agencies concerned.

We do not think that any of the permanent reservations in Sections 9 to 13 of the Ordinance is justified. They vary in importance, but we are particularly concerned by the reservation in Section 13 which prevents the Bill of Rights being used to require the establishment of an elected Legislative Council. We would like to see the United Kingdom Government withdrawing the reservations before 1997 and the Bill of Rights Ordinance being amended accordingly.

#### Application of the Bill of Rights Ordinance

Three important issues arise from the promulgation of the Ordinance. The first relates to the effect of the Ordinance on other legislation of the colony; the second, whether the Ordinance is capable of being amended from time to time so as to abrogate the rights it has now conferred on the people of Hong Kong; and the third whether its provisions will remain in force in the SAR after 1997.

With regard to the first, section 3 of the Ordinance, as earlier pointed out, provides that all pre-existing legislation which is inconsistent with the Ordinance is, to the extent of the inconsistency, repealed. A repealing Clause drafted in such general terms will theoretically serve its legal purpose without any further action having to be taken: all such pre-existing legislation is regarded as having been legally repealed and of no effect upon the Ordinance coming into force on 8 June 1991. In practice, uncertainty and confusion is bound to arise due to the inability of the public to know or appreciate exactly which statutes, and to what extent their provisions, are no longer in force. Until authoritatively identified, and expressly pronounced to have been repealed, these offending statutes and provisions will continue, perhaps



unwittingly, to be invoked by the law enforcement agencies concerned.

To avoid unnecessary violations of human rights, we had suggested to the Attorney-General of Hong Kong that steps be taken immediately to identify the inconsistent statutes and provisions and that, subject to the savings made by section 14 of the Ordinance, they be repealed as soon as possible. We were informed that the task of identification had, in fact, started and that action would be taken speedily to effect the repeals.

On the second issue, it is true that the Ordinance is legislation which has been promulgated by the Legislative Council. But unlike any other legislation, its provisions cannot be amended or modified if the effect of such amendment or modification is to restrict those provisions of the ICCPR which it has applied to Hong Kong. Although embodied only in ordinary legislation, those provisions of the ICCPR have become entrenched in the laws of Hong Kong and have assumed a dominant position over other laws by virtue of Article VII(3) of the Letters Patent, which came into force on the same day as the Ordinance. That Article reads:

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

The expression "as applied to Hong Kong" has given rise to some discussion as to its exact meaning. It has been suggested that since the British Government had made reservations in regard to its obligations under the Covenant in relation to Hong Kong, those provisions must be taken to have "applied to Hong Kong" subject to those reservations and that, apart from the exceptions and savings specified in the Ordinance itself, the provisions of the ICCPR being "implemented" by the Ordinance must also be subject to those reservations. It will not be proper for us to express any view on this as it is a matter which falls squarely within the province of the Judiciary. Whatever the position may be, we are clear in our mind that no law can henceforth be made by the Legislative Council if its effect is in any way to restrict those rights and provisions of the ICCPR as they now apply to Hong Kong pursuant to the Ordinance.

Whether the Ordinance and, therefore, the provisions of the ICCPR, will continue to be applied to the SAR after 1997 (which is the third issue mentioned above) was a question which concerned the people of Hong Kong at the time of our visit. The Chinese authorities, which had first voiced their opposition to the proposed enactment of a Bill of Rights, in

December 1989, had threatened to repeal the Ordinance after 1997 on the ground that it was inconsistent with the Basic Law. In early June 1991, a spokesman of the Chinese Foreign Ministry was reported to have said:

"The Chinese side regrets [the Bill of Rights] and reserves the right to examine at an appropriate time after 1997 the laws currently in force in Hong Kong, including this Bill of Rights, in accordance with the relevant provisions of the Basic Law.

But the Chinese side reiterates that the guarantee of the rights and freedoms of Hong Kong residents constitutes an important component of the basic guiding principles and policies of the Chinese government towards Hong Kong." (3)

The answer to the question must depend on the willingness of the Government of the People's Republic of China to observe those guiding principles and policies which it had expressly undertaken to apply to Hong Kong, in the Joint Declaration. In Part XIII of Annex I to the Joint Declaration ("Basic Rights and Freedoms"), it had, *inter alia*, stated that the provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights "as applied to Hong Kong shall remain in force". This has been repeated in more elaborate terms in Article 39 of the Basic Law, which reads:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

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

The Ordinance (read in conjunction with Article VII(3) of the Letters Patent) is, in our view, consistent with the provisions of Article 39 of the Basic Law. Those provisions of the ICCPR, as adopted for Hong Kong by the Ordinance, will have become provisions "as applied to Hong Kong" as at the date of the transfer of sovereignty in 1997, and should continue to remain in force and be implemented through the laws of the SAR. Any attempt by the Government of the People's Republic of China to repeal or to modify the provisions of the Ordinance as to restrict the application of any of those provisions to the SAR will be a breach of the express undertaking given by the Government of the People's Republic of China in the Joint Declaration and in the Basic Law.

Omission of Other Rights

The Ordinance has not provided for intercitizen rights. The Hong Kong Council of Women, particularly, expressed to us their concern at such a serious omission.

The traditional view, evidenced by European history for the last two centuries, has been that constitutional rights granted to citizens are to protect them against abuse of the State's exercise of its powers. This view has, however, lately not always been followed. More and more modern constitutional documents now tend to embody additional general social and human rights principles which touch on relationships between citizens, discarding the conservative narrow view. The question whether to provide for intercitizen rights in the Ordinance was intensely debated but the traditional view obviously prevailed, as is evident from section 7 of the Ordinance. It is not within our terms of reference to decide whether or not the Ordinance should have included provisions relating to intercitizen rights. This is an issue which the Government of Hong Kong itself is in the best position to, and can, make a decision on between now and 1997.

A few persons expressed to us their disappointment that the Ordinance did not include the provisions of the International Covenant on Economic, Social and Cultural Rights, which the Government of the United Kingdom ratified and applied to Hong Kong. Those provisions, "as applied to Hong Kong", are also to remain in force in the SAR by virtue of Part XIII of Annex I of the Joint Declaration and Article 39 of the Basic Law (already referred to above). Since Article 2 of the Covenant obliges member states to realise the rights under those provisions by all appropriate means, particularly the adoption of legislative measures, it is argued that these provisions should be likewise adopted into the domestic law of Hong Kong. As has been pointed out, the Bill of Rights Ordinance, if it is not to become a charter to serve a legal profession dominated by market and monetary considerations, needs to be balanced by social and economic rights of groups and communities (5). There is, in our view, substance in this argument and it merits serious consideration. However, we think that the issues involved go beyond our terms of reference and we therefore make no formal recommendation about the incorporation of the ICESCR into the law of Hong Kong.

CONCLUSIONS AND RECOMMENDATIONS

- (1) Section 5 of the Bill of Rights Ordinance should be amended to restrict the power of derogation to emergencies which threaten the life of Hong Kong.
- (2) The power to extend the exemption of certain Ordinances from the Bill of Rights Ordinance for a second year should not be exercised.
- (3) The permanent reservations in Sections 9 to 13 of the Bill of Rights Ordinance should be repealed and the UK should withdraw its corresponding reservations to the ICCPR.
- (4) Immediate steps should be taken to identify and expressly repeal or amend existing Ordinances which are wholly or in part inconsistent with the Bill of Rights Ordinance.
- (5) The Bill of Rights Ordinance is consistent with the Basic Law and its repeal or restriction after 1997 would involve a breach of the undertakings given by the Government of the PRC in the Joint Declaration.

FOOTNOTES

- (1) see Nowak "Interpreting the Hong Kong Bill of Rights: Techniques and Principles", The Faculty of Law, University of Hong Kong, 1991, p.4
- (2) see Dr Nihal Jayawickrama "The Hong Kong Bill of Rights Ordinance, 1991: A Critique", The Faculty of Law, University of Hong Kong, 1991, p.4
- (3) Hong Kong Standard, 7 June 1991, "China Threat to Rights"
- (4) see Yash Ghai "Derogations and Limitations in the Hong Kong Bill of Rights", Faculty of Law, University of Hong Kong, 1991, p.23
- (5) see Yash Ghai, op. cit. passim.

CHAPTER XIIITHE BILL OF RIGHTS -  
ENFORCEMENT AND MONITORING

The enactment of the Bill of Rights Ordinance is a step of the highest importance for the future of human rights in Hong Kong. Although we have been critical of many of the actions of the Governments of Hong Kong and the United Kingdom, they deserve full praise for their decision to write the International Covenant on Civil and Political Rights into the domestic law of Hong Kong by means of the Bill of Rights Ordinance. Although the reported reaction of the PRC to the Bill of Rights can be described as falling somewhere between cool and hostile, (1) the terms of Article 39 of the Basic Law expressly direct that the provisions of the ICCPR "shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region." This is exactly what the Ordinance is doing, and any attempt by the Government of the SAR to repeal or restrict the operation of the Bill of Rights after the 1st July 1997 would be a clear signal that the protection of human rights written in to the Basic Law was being destroyed, as we have pointed out in Chapter XII.

However, a Bill of Rights is no more than meaningless words on paper unless it is honoured and enforced. This was emphasised by many speakers at the Bill of Rights Conference held in Hong Kong on the 20th to 22nd June 1991, which we attended as observers. We quote from two of the papers given at the Conference. First, Professor Manfred Nowak (2): "The effectiveness of human rights enforcement depends in my opinion primarily on two factors: the power of a democratically elected parliament vis a vis the executive branch and the power of an independent judiciary vis a vis both the executive and the legislative branch . . . . If the democratic principle and political rights of the people are restricted to such an extent as in the case of the Special Administrative Region of Hong Kong after 1997, the protection of human rights by independent courts and similar institutions becomes of utmost importance. Experience shows that special constitutional courts or other high courts with the authority of judicial review of legislative acts and ordinances are best equipped for such a delicate task".

Our second quotation comes from a remarkable paper written by Professor Gong Xiang Rui (3) of Beijing University. Professor Gong was refused permission by his Government to attend the Conference and his paper was read on his behalf. In it he said: "... much remains to be done, such as developing a human rights culture in Hong Kong, creating human rights consciousness within the next six years, and amending, to the extent of inconsistency with the Bill of Rights, those six ordinances which are subject to a "freeze period" of one year after the Bill comes into operation, and so on. The Bill is

neither a device to oppose China nor just "a fake Rolex watch", on the contrary, its proper role should be to strengthen the foundation of the existing legal system and thereby to reassure ordinary people that their rights will be protected. So much so good, and so we hope. It is right to hold that only if the Bill and the values it stands for are brought into contact with the lives of ordinary people, and are supported by them will the system survive."

These two quotations identify two key elements in the protection and development of human rights in Hong Kong - an independent judiciary and the growth of a human rights culture. But what happens outside Hong Kong is also crucial. It is essential for the international community to monitor human rights in Hong Kong, both before and after 1997. The next two sections of this Chapter look first at what needs to be done inside Hong Kong and second at what needs to be done outside it.

#### INTERNAL ENFORCEMENT AND MONITORING

The Bill of Rights only came into effect on the 8th June 1991. However, it is clearly already having a significant effect in Hong Kong.

The first case in which the Bill of Rights was applied was Tam Hing-Yee v. Wu Tai-Wai (4), a decision of the District Court. In that case it was held that s.52E(1)(a) of the District Court Ordinance, which empowers the Court to make a prohibition order preventing a debtor from leaving Hong Kong, was inconsistent with Article 8 of the Bill of Rights (liberty of movement) and therefore had been repealed by it. The decision was, however, reversed by the Court of Appeal (5) in a decision which has unfortunate implications for the Bill of Rights. The decision of Judge Downey was reversed on two grounds - first, that the Bill of Rights did not apply to legislation which was invoked by one private individual in litigation against another, and second, that the section was a provision necessary for the protection of the rights of others within the meaning of Article 8(3) of the Bill of Rights. The latter ground seems dubious. The first of these grounds is a dangerous and unjustified restriction of the Bill of Rights. It is of course true that the Ordinance is binding only on the Government and other public authorities, but if the Government is enforcing a prohibition order it is difficult to see that it makes any difference whether the order was sought by a private individual or by another public authority. A private litigant surely can not call on the Government to take steps which contravene the Bill of Rights.

In a much more welcome decision (6) a differently constituted Court of Appeal held, by a majority, that the presumption under the Dangerous Drugs Ordinance that anyone in

possession of more than 0.5 of a gram of heroin has it for the purpose of trafficking was contrary to the presumption of innocence in Article 11 of the Bill of Rights. Following that decision, challenges have been made to a number of statutory presumptions of other kinds, with successful results in several cases. (7)

There is obviously by now a wide consciousness of the Bill of Rights among lawyers in Hong Kong and a willingness to make use of it. It also appears that the requirement in Article 11 that a defendant in a criminal case is entitled "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" is leading to substantial increases in the provision of legal aid in criminal cases.

The attitude of the Court of Appeal in Tam Hing-Yee v. Wu Tai-Wai gives some cause for concern as to whether the courts of Hong Kong may be unduly restrictive in their interpretation of the Bill of Rights (8). However, we believe that the judiciary are likely to enforce the Bill of Rights with reasonable vigour.

The effectiveness of the Bill of Rights after 1997 will depend crucially on the continuing independence of the judiciary. Given that it will be both right and necessary to reduce the number of expatriate judges, this means that independent-minded Hong Kong lawyers who commend the respect of their colleagues must be prepared to accept appointments to the bench. It means that the appointment system must ensure their appointment. And it means that the Government of the SAR must be willing to refrain from putting pressure on the judiciary to come to pro-government decisions and must be willing to implement decisions of the courts even if they are not to the liking of the government. All these matters cause us concern.

In the meantime, it is important to build up as large as possible a body of case law on the Bill of Rights. While we understand the reasons for the exemption of six key ordinances from the operation of the Bill of Rights until the 8th June 1992, we would be strongly opposed to any exercise of the power under section 14 of the Bill of Rights Ordinance to extend the exemption for a further year. This would leave only four years between the end of the exemption period and the transfer of power, which would make it difficult to take cases through the Court of Appeal before the transfer.

An independent and energetic judiciary is not enough, however. As Professor Gong pointed out, it is necessary to develop a human rights culture in Hong Kong. Clearly, consciousness of human rights issues is now considerably higher than it was before 1989. The debates on the Bill of Rights Ordinance and on previous drafts of the Ordinance will have had an impact, as will the continuing flow of judicial decisions on the Bill. Nevertheless, more needs to be done. It is necessary to convince the population of Hong Kong that the Bill of Rights

is a potential shield for their protection, even if some of the decisions taken under it (for example, the abolition of the statutory presumption of trafficking in drug cases) are unpopular with sections of the community. We believe that the most effective step which could be taken for this purpose would be the formation of a strong Human Rights Commission.

We do not think that the Commission should operate as a tribunal with judicial powers. The Bill of Rights should be enforced through the ordinary courts and not through a separate tribunal. The role of the Commission, in our view, should be to inform and educate the public on human rights issues; to provide free advice to those who believe that their rights may have been infringed; to support legal claims for redress by individuals whose rights under the Bill of Rights appear to have been infringed; and, where appropriate, to bring proceedings in their own name on behalf of groups within the community. Such a Commission should be appointed as soon as possible in order to give it at least five years of operation before the transfer of power. We accept that the Government of the SAR would be under no constitutional duty to maintain a Human Rights Commission in existence after the transfer of power. However, if a Commission is now appointed, its continuance after the transfer of power would do much to maintain confidence in the genuineness of the SAR's acceptance of its human rights obligations. Conversely, the abolition of the Commission would threaten this confidence.

It is also essential to ensure the independence of the Legal Aid Department, which at present funds much of the human rights litigation. It is a Government Department, headed by a Director of Legal Aid. Consideration should be given to making the Legal Aid Department an independent Board rather than a Government Department.

#### EXTERNAL MONITORING

There are two matters (apart from the prospect of ideological change within China itself) which give some hope for human rights in Hong Kong after 1997. One is the economic self-interest of China in the prosperity of Hong Kong, which would be damaged if abuses of human rights reached a level which was unacceptable to the international business community in Hong Kong. The other is the pressure of international public opinion.

This makes it of the highest importance that the outside world should keep a close watch on Hong Kong for so long as human rights within it can be regarded as under threat. It is of course true that serious abuses of human rights in Hong Kong will be difficult to conceal so long as Hong Kong remains a major world trading and financial centre. Nevertheless, we believe that there should be a formal system for monitoring



human rights in Hong Kong.

The principal forum for the monitoring process should be the UN Human Rights Committee. This Committee is established under Part IV of the International Covenant on Civil and Political Rights. Under Article 40, the States Parties to the Covenant are obliged "to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights" whenever the Committee so requests. The Committee studies the reports and transmits its own reports in reply to the States Parties.

The Government of the United Kingdom ratified the Convention in 1976 and extended it to Hong Kong and other dependent territories, subject to reservations discussed above. (9) The Government has subsequently been called upon to submit a report to the Human Rights Committee on three occasions; the third report on Hong Kong was submitted in October 1989 and an update was submitted in March 1991. Representatives of the United Kingdom Government (including Mr. Frank Stock, the Solicitor General of Hong Kong) appeared before the Committee on the 1st, 2nd and 3rd April 1991. On those days they were questioned on the whole of the United Kingdom's report, including its report on human rights in the United Kingdom itself and its other dependent territories. However, the transcript shows that the issue which caused by far the most concern to the members of the Committee was the question of human rights in Hong Kong.

The Joint Declaration states, in Article XIII, that "the provisions of the International Covenant on Civil and Political Rights .... as applied to Hong Kong shall remain in force." Those provisions include, of course, the reporting obligations under Article 40 of the Covenant. However, since the PRC has not adhered to the Covenant, it is difficult to see how the reporting obligation can be implemented. This was a matter which caused concern to the members of the Human Rights Committee (10). Mr. Beamish, on behalf of the United Kingdom, could only say: "The Joint Declaration was a legally binding treaty which provided that all the provisions of the Covenant, including reporting obligations, would remain in force after 1997. The precise modalities would be discussed in due course." (11)

In an intervention during the Human Rights Conference in Hong Kong, Mr. Anthony Lester Q.C. said that the reporting obligation was self-implementing and that the PRC would automatically succeed to the United Kingdom's reporting obligations in relation to Hong Kong on the transfer. We find this view difficult to accept. While a failure to establish reporting procedures would, as between the PRC and the United Kingdom, clearly involve a breach by the PRC of the Joint Declaration, we think that, so long as the PRC is not a party to the Convention it can not be required to report to the Human Rights Committee on the situation in Hong Kong. It follows that the PRC can not fulfil its obligations under the Joint

Declaration unless it adheres to the Covenant. We believe that it should do so before the 1st July 1997. The PRC could, if it wished to do so, ratify the Covenant while entering a reservation limiting its application to Hong Kong alone. This would enable it to fulfil its obligations under the Joint Declaration, though it would emphasise the failure of the Government of the PRC to recognise human rights norms within the rest of its territory. Even if it was within the powers of the Human Rights committee to accept an undertaking by the PRC to report on human rights in Hong Kong without adhering to the Covenant (which we doubt) we would not regard this as an acceptable alternative. We also believe that it would not be possible either in practice or in theory for the Government of the United Kingdom to remain responsible for reporting to the Human Rights Committee on the situation in Hong Kong after 1997.

We believe that in any event the role of the U.N. Human Rights Committee should be supplemented by the setting up of an independent body specifically committed to the monitoring of human rights in Hong Kong. Such a body could be set up (subject to the availability of funds) under the auspices of the International Commission of Jurists or as a joint operation by the ICJ and other international human rights organisations. We do not think that a large establishment is needed; we believe that the monitoring operation could be carried out by a single person reporting to a volunteer committee and having access to administrative facilities. It would need to be decided whether the operation should be based inside or outside Hong Kong; location in Hong Kong would obviously make access to sources of information much quicker and easier but might expose the operation to harassment after 1997. Finally, we believe that the monitoring body should be set up as soon as possible. Although the main concern relates to what may happen after 1997, we believe that there is considerable scope for monitoring and reporting on developments before then. It is important to keep a watch, for example, on litigation under the Bill of Rights Ordinance; on progress (or the lack of progress) towards democracy; and on the work of the Joint Liaison Group.

We also recommend that the United Kingdom should, on behalf of Hong Kong, accept the Optional Protocol to the ICCPR which would enable citizens of Hong Kong to make direct representations to the Human Rights Committee. While it would be difficult to guarantee the continuance of this right after 1997, it is always more difficult to abolish an existing right than to refuse to grant a new one. The case for accepting the Optional Protocol in relation to Hong Kong is far stronger than for accepting it in relation to citizens of the U.K., who have the right of individual petition to the European Commission of Human Rights.

CONCLUSIONS AND RECOMMENDATIONS

- (1) The Bill of Rights Ordinance is likely to have a significant effect on the application of human rights in Hong Kong and will be vigorously applied by the judiciary up to 1997.
- (2) The value of the Ordinance for the protection of human rights after 1997 will depend on
  - (i) the continuance of an independent judiciary
  - (ii) the willingness of the Government of the SAR to abide by the decisions of the courts and
  - (iii) the development of a human rights culture in Hong Kong.
- (3) A strong Human Rights Commission should be set up for the purposes of
  - (i) informing and educating the public on human rights issues
  - (ii) advising and assisting claimants or potential claimants for redress under the Bill of Rights Ordinance and
  - (iii) bringing proceedings in their own name under the Ordinance.
- (4) The independence of the Legal Aid Department must be ensured.
- (5) The Government of the PRC will be obliged by the Joint Declaration to report to the UN Human Rights Committee under Article 40 of the ICCPR on human rights in Hong Kong after 1997.
- (6) The foregoing obligation can only be implemented if the PRC ratifies the ICCPR, at least in relation to Hong Kong.
- (7) An independent body should be set up as soon as possible, either by the ICJ or by a consortium of human rights organisations, to monitor human rights developments in Hong Kong.
- (8) The United Kingdom should accept on behalf of Hong Kong the Optional Protocol to the ICCPR.

FOOTNOTES

- (1) See Hong Kong Standard, 7 June 1991, "China Threat to Rights"
- (2) Professor of the Faculty of Law, University of Vienna; former Director of the Netherlands Institute of Human Rights
- (3) Professor of Comparative Constitutional Law, Beijing University
- (4) Judge Downey, 8 July 1991
- (5) 28 November 1991 (Cons V-P, Clough & MacDougall JJA)
- (6) R v. Sin Yau Ming, 30 Sept. 1991 (Silke V-P, Kempster & Penlington JJA)
- (7) R v. Lau Ting-Man, District Court, 15 Nov. 1991 (Firearms and Ammunition Ordinance); R v. Lee Kwong-Yut, Magistrate's Court, 28 Oct. 1991 (Summary Offences Ordinance); R v. Lau Shiu-Wah, District Court, 1 Nov. 1991 (Theft Ordinance). See the Bill of Rights Bulletin, edited by Andrew Byrnes and Johannes Chan
- (8) See also A-G v. Osman (High Court, 28 October 1991, in which Jones J reached the startling conclusion that a person not present in Hong Kong could not invoke the Bill of Rights).
- (9) Chapter III
- (10) See the comments of Mr. Al-Shafei (1045th meeting, 1 April, para.32) and Mr. Mavromattis (1045th meeting, para.47)
- (11) (1046th meeting, 1 April, para.44).

CHAPTER XIVDEFECTS IN THE BASIC LAW

One theme which runs through this Report is the extent to which the Basic Law fails to comply with the obligations which the People's Republic of China accepted by its signature and ratification of the Joint Declaration. Although many provisions of the Basic Law have been considered elsewhere in this Report, we believe it would be useful to summarise all our objections in a single Chapter. We therefore list below the provisions of the Basic Law which cause us particular concern:

Article 17 This confers on the Standing Committee of the National People's Congress the power to invalidate any law enacted by the legislature of the SAR which it considers not to be in conformity with the provisions of the Basic Law "regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region".

The power to determine whether a law of the SAR is consistent with the Basic Law is a judicial power which, under Article III of Annex I to the Joint Declaration, should ultimately be vested in the court of final appeal of the SAR.

Article 18 This applies to the SAR the national laws listed in Annex III (which relate to national symbols, territorial waters, nationality and diplomatic immunity). While these appear to be appropriate matters for national legislation, objection can be taken to the power of the Standing Committee to add further laws to the list in Annex III. The requirement that any such laws "shall be confined to those relating to defence and foreign affairs as well as other matters outside the limit of the autonomy of the Region as specified by this Law" extends the competence of the central government to legislate for the SAR beyond that allowed by Article I Annex I to the Joint Declaration, which vests legislative power in the SAR except for foreign and defence affairs.

Article 18 confers on the Standing committee of the National People's Congress power to decide that the SAR is in a state of emergency "by reason of turmoil within the Hong Kong SAR which endangers national unity or security and is beyond the control of the government of the Region." In such an event, the Central People's Government "may issue an order applying the relevant national laws in the Region". This power is clearly inconsistent with para.3(11) of

the Joint Declaration and Annex I Article XIII, which provide that the maintenance of public order in the SAR will be the responsibility of the Government of the SAR. It should be for the government of the SAR to decide when turmoil is beyond its control.

Article 19 This provides that the courts of the SAR "shall have no jurisdiction over acts of state such as defence and foreign affairs". It also requires the courts to obtain and accept as conclusive a certificate from the Chief Executive on any question of fact concerning such "acts of state" which arises in the course of adjudication. This goes beyond the exclusion of foreign and defence affairs from the judicial power of the SAR, as provided by Article I of Annex I to the Joint Declaration, both by treating defence and foreign affairs as merely examples of excluded "acts of state" and by making the certificate of the Chief Executive binding on issues of fact.

Article 23 This requires the SAR to prohibit, among other matters, "subversion against the Central People's Government" and to prohibit political organisations or bodies from establishing ties with foreign political organisations or bodies. Such prohibitions would be contrary to the Articles of the International Covenant on Civil and Political Rights relating to freedom of expression and freedom of association and therefore to Article XIII of Annex I to the Joint Declaration. "Subversion" could easily be interpreted as including the kind of pressure for a change in the ideology or system of government which is a legitimate exercise of the democratic process.

Article 43 This provides that the Chief Executive of the SAR "shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this law". This conflicts with Article I of Annex I to the Joint Declaration, which provides: "The executive authorities shall abide by the law and shall be accountable to the legislature". See the discussion of this issue in Chapter VIII above.

Article 44 This requires the Chief Executive to be a Chinese citizen who is a permanent resident of the SAR "with no right of abode in any foreign country". The exclusion of citizens with a right of abode in another country is contrary to Article 25 of the ICCPR, which guarantees to citizens the right to take part in the conduct of public affairs and to have access to public service. Similar restrictions are imposed by Articles 55 (membership of the Executive Council), 61 (principal officials of the SAR), 71 (President of the Legislative Council) and 90 (Chief Justice of the Court of Final Appeal and Chief Judge of the High Court). Article 67 requires at least 80 per cent of the members of the

Legislative Council to be Chinese citizens with no right of abode elsewhere.

Article 45 This, together with Annex I to the Basic Law, provides for the election of the Chief Executive by a "broadly representative" Election Committee composed of 800 members drawn equally from four "sectors" (industrial, financial and commercial; the professions; labour, social services and religious; and members of elected official bodies). This does not remotely resemble a true democratic election. Although this process can be regarded as consistent with the Joint Declaration, we regard it as wholly inappropriate.

Articles 49-52 These lay down an elaborate procedure by which the Chief Executive can block legislation. If the Chief Executive considers that a bill "is not compatible with the overall interests of the Region", the bill is returned for reconsideration. If the Legislative Council then passes the bill again with a two thirds majority of all the members, the Chief Executive must either sign it or dissolve the Legislative Council and hold new elections. If the new Legislative Council again passes the bill with a two thirds majority, the Chief Executive must either sign the bill or resign. Even then, however, the bill does not become law and it appears that the new Chief Executive could insist on the process being repeated. This is inconsistent with Article II of Annex I to the Joint Declaration, which provides: "The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures".

Article 68 Article I of Annex I to the Joint Declaration provides that the legislature of the SAR "shall be constituted by elections". Article 25 of the ICCPR requires elections to be "by universal and equal suffrage". However, Article 68 of the Basic Law, together with Annex II of the Basic Law and the decision of the National People's Congress on the Formation of the First Legislative Council, means that directly elected members will constitute only 20 out of 60 members of the first Council (taking office in 1997), 24 out of 60 members of the second Council (taking office in 1999), and 30 out of 60 members of the third Council (taking office in 2003). Functional constituencies will elect 30 members to each of the three Councils and the balance in the first and second Councils will be returned by an "election committee". Despite the statement in Article 68 that "the ultimate aim is the election of all the members of the Legislative Council by universal suffrage", any subsequent change in the electoral system will require the endorsement of two thirds of all the members of the Legislative Council and the consent of the Chief Executive. Since the functional constituencies are elected by a suffrage which is neither universal nor

equal, the retention of these constituencies is inconsistent with the ICCPR and therefore with the Joint Declaration. See the discussion of this issue in Chapter 7 above.

Article 158 This provides that the power of interpreting the Basic Law "shall be vested in the Standing Committee of the National People's Congress". The courts of the SAR are authorised, when any question of interpretation of the Basic Law arises in the course of proceedings, to decide the question themselves unless the question concerns affairs which are the responsibility of the Central People's Government or concerns the relationship between the SAR and the Region. However, this delegation does not override the general power of the Standing Committee to rule on the interpretation of the Basic Law.

We believe that the interpretation of legislation is essentially a judicial function. Consequently the vesting of this power in the Standing Committee is a breach of paragraph 3(3) of the Joint Declaration and Article III of Annex I, which confer on the courts of the SAR independent judicial power, including the power of final adjudication.

Article 159 This provides that the power of amendment of the Basic Law shall be vested in the National People's Congress. Although the SAR may propose an amendment to the Basic Law, the consent of the SAR is not required if the amendment is proposed by the Standing Committee or by the State Council of the PRC. It is, however, provided that no amendment to the Basic Law "shall contravene the established basic policies of the People's Republic of China regarding Hong Kong."

The Joint Declaration does not specify how the Basic Law is to be amended. The basic principle, no doubt, is that the body that enacts a law should also have power to amend it. It is therefore difficult to object in principle to the fact that the consent of the SAR is not required to the amendment of the Basic Law, though we would have welcomed the requirement of consent. The protection of the SAR must depend on the prohibition of amendments which contravene "the established basic policies".

In the context, this is clearly a reference back to paragraph 3(12) of the Joint Declaration, which provides: "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." This means that no amendment



to the Basic Law can validly be made during that period if it would contravene any provision of para.3 of the Joint Declaration or Annex I to it.

Our confidence in the protection given to the SAR by the restriction on the power of amendment in Article 159 is greatly reduced by the fact that the Basic Law itself departs in important respects from the "basic policies" set out in the Joint Declaration. Articles 158 and 159, taken together, also have the highly unsatisfactory result that the Standing Committee is both the body entitled to interpret the Basic Law and one of the bodies entitled to propose amendments to it - so that it will be judge in its own cause in deciding whether any amendment which it proposes will contravene the Joint Declaration.

Article 160 This provides that, on the establishment of the SAR, the laws previously in force shall remain in force "except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law." The Article goes on to state: "If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force".

As in the case of interpretation of the Basic Law, the power to decide whether existing laws are in contravention of the Basic Law is a judicial function which should be vested in the courts and not in the Standing Committee. We believe that there is, in any event, adequate time to review the laws in Hong Kong before the 1st July 1997 and to identify those which contravene the Basic Law. This would make it possible to publish, in advance, an authoritative and final list of the legislation which would cease to have effect on the 1st July 1997. This would be an appropriate matter for consultations within the Joint Liaison Group.

It is therefore our conclusion that the Basic Law is inconsistent, in the respects outlined above, with the obligations which the PRC accepted by its signature and ratification of the Joint Declaration. Having regard to the number and importance of these inconsistencies, the Basic Law has to be seen as a deliberate attempt by the PRC to renege on its obligations. To take only the most important points, Hong Kong will not, even after 2007, have a democratically elected legislature or Chief Executive. Its courts will not have the power of final adjudication on the constitutional validity of its own laws or on the interpretation of the Basic Law. Its executive will not have the sole power to decide when a state of emergency exists and will be required to prohibit whatever the Standing Committee considers to be "subversion". Its legislature will be unable to legislate without the consent of a Chief Executive who is not elected by a democratic process.

All this casts grave doubts on the commitment of the Government of the PRC to fulfil its obligation to allow genuine autonomy to Hong Kong after 1997.

Meanwhile, the attitude of the British Government to the promulgation of the Basic Law has, at least in public, been one of supine acquiescence. This is typified by the statement of a spokesman for the United Kingdom (Mr. Beamish) to the U.N. Human Rights Commission on 4 April 1991 that "the Government of the United Kingdom had satisfied itself that the Basic Law was on the whole consistent with the basic principles enshrined in the Joint Declaration and corresponded with its intention to resume the continued application of the Covenant beyond 1997". The accuracy of that view can be judged in the light of our own analysis of the Basic Law.

#### CONCLUSIONS AND RECOMMENDATIONS

- (1) The Basic Law is inconsistent in many important respects with the obligations accepted by the PRC by its signature and ratification of the Joint Declaration; in the case of the method of election of the Chief Executive, although not inconsistent with the Joint Declaration, the Basic Law fails to provide an acceptable system.
- (2) The PRC should modify the Basic Law accordingly.
- (3) The Government of the United Kingdom, as the other party to the Joint Declaration, should use all means within its power to press the PRC to make the necessary amendments to the Basic Law.

CHAPTER XVCONCLUSIONS AND RECOMMENDATIONS

- (1) The Joint Declaration, though creditable in other respects, is seriously defective in failing to ensure that the Chief Executive will be democratically elected by and democratically accountable to the people of Hong Kong.
- (2) The decision of the National People's Congress on the establishment of the SAR should be clarified urgently by the publication of the map to which it refers, to eliminate the possibility that some or all of the New Territories may be excluded from the SAR.
- (3) There are serious doubts as to the validity of the "one country - two systems" principle under the Constitution of the PRC as it now exists; these doubts can only be removed by amendment of the PRC Constitution.
- (4) The people of Hong Kong are entitled to the right of self-determination under international law.
- (5) The British Government should have obtained the authority of a referendum of the people of Hong Kong both before entering into the negotiations which led up to the Joint Declaration, and before signing the Joint Declaration.
- (6) The people of Hong Kong have not been allowed to exercise the right to self-determination.
- (7) In present circumstances a meaningful exercise of the right of self-determination is impracticable.
- (8) The only way in which the United Kingdom can now compensate BDTCS in Hong Kong for the loss of the right to self-determination is by the provision of rights of residence in the UK itself or acceptable third countries.
- (9) Whatever the practical problems may be the United Kingdom has an obligation in principle to provide rights of abode in the UK, or in third countries acceptable to them, for all Hong Kong BDTCS.

- (10) Immediate British citizenship and a right of abode in the UK should be granted to Hong Kong BDTCS of non-Chinese descent with no right of abode outside Hong Kong, and to Hong Kong BDTCS under 18 who would have been British citizens if born on or after the 1st January 1983.
- (11) For other Hong Kong BDTCS, the UK should grant a right of abode but would be entitled to impose a reasonable quota system for admission. Those who became BDTCS by naturalisation after the date of signature of the Joint Declaration (19th December 1984) would have a lower priority.
- (12) Hong Kong BDTCS (except those given immediate citizenship) should be required to exercise their right to take up an abode outside Hong Kong before a date about six years after the transfer, subject to any further delay imposed by the quota system.
- (13) The Legislative Council to be elected in 1995 should be elected solely from geographical constituencies.
- (14) Functional constituencies, since they do not provide for universal and equal suffrage, involve a breach of Article 21 of the Hong Kong Bill of Rights, notwithstanding the exception in section 13 of the Bill of Rights Ordinance. Since no challenge was made before their election, the present members should however be allowed to remain in office until 1995.
- (15) The term of office of the 18 appointed members should be brought to an end in 1993, when they should be replaced by further elections in the 18 geographical constituencies.
- (16) The "through train" will be of little benefit to Hong Kong and does not justify a refusal to hold fully democratic elections in 1995.
- (17) The provisions of the Basic Law relating to the appointment of the Chief Executive should be replaced by provisions ensuring the direct popular election of the Chief Executive, or an alternative system ensuring that the Chief Executive or Government is selected by a democratic process.

- (18) The Chief Executive should report to but should not be made accountable to the Government of the PRC, and the Chief Executive's accountability to the legislature of the SAR should be clarified and strengthened.
- (19) Article 19 of the Basic Law should be modified so as to limit the exclusion of the jurisdiction of the Hong Kong courts to defence and foreign affairs only.
- (20) The power of interpreting the Basic Law in its application to the SAR and the power of deciding whether existing laws contravene the Basic Law should be transferred from the Standing Committee of the National People's Congress to the courts of Hong Kong.
- (21) The Judicial Services Commission should be restored to its previous form, but with selection by five affirmative votes.
- (22) The maintenance of an independent judiciary in Hong Kong after 1997 is of the highest importance both for the preservation of business confidence and for the protection of human rights.
- (23) There is an urgent need to recruit local lawyers of ability and integrity to the bench and reduce the dependence of the bench on expatriate lawyers.
- (24) Judges of the superior courts should be appointed with tenure to retiring age rather than fixed-term contracts.
- (25) Terms of service of the judiciary (particularly in relation to housing) should be improved and judges should be allowed to return to practice after resignation from the bench.
- (26) A formal system of appointing local lawyers to serve as part-time Recorders or Deputy Judges should be adopted.
- (27) The agreement reached by the Joint Liaison Group on the composition of the Court of Final Appeal is contrary to the Joint Declaration and the Basic Law and is constitutionally invalid; the Court of Final Appeal itself should be allowed to determine the number and identity of foreign judges to sit as temporary members.

- (28) Articles 18 and 158 of the Basic Law should be amended to confer on the Government of the SAR the exclusive power to declare a state of emergency in the SAR.
- (29) The Basic Law should be amended to make it clear that permanent residents of the SAR are not subject to conscription.
- (30) Section 5 of the Bill of Rights Ordinance should be amended to restrict the power of derogation to emergencies which threaten the life of Hong Kong.
- (31) The power to extend the exemption of certain Ordinances from the Bill of Rights Ordinance for a second year should not be exercised.
- (32) The permanent reservations in Sections 9 to 13 of the Bill of Rights Ordinance should be repealed and the UK should withdraw its corresponding reservations to the ICCPR.
- (33) Immediate steps should be taken to identify and expressly repeal or amend existing Ordinances which are wholly or in part inconsistent with the Bill of Rights Ordinance.
- (34) The Bill of Rights Ordinance is consistent with the Basic Law and its repeal or restriction after 1997 would involve a breach of the undertakings given by the Government of the PRC in the Joint Declaration.
- (35) The Ordinance is likely to have a significant effect on the application of human rights in Hong Kong and will be vigorously applied by the judiciary up to 1997.
- (36) The value of the Ordinance for the protection of human rights after 1997 will depend on
  - (i) the continuance of an independent judiciary
  - (ii) the willingness of the Government of the SAR to abide by the decisions of the courts and
  - (iii) the development of a human rights culture in Hong Kong.
- (37) A strong Human Rights Commission should be set up for the purposes of

- (i) informing and educating the public on human rights issues
  - (ii) advising and assisting claimants or potential claimants for redress under the Bill of Rights Ordinance and
  - (iii) bringing proceedings in their own name under the Ordinance.
- (38) The independence of the Legal Aid Department must be ensured.
- (39) The Government of the PRC will be obliged by the Joint Declaration to report to the UN Human Rights Committee under Article 40 of the ICCPR on human rights in Hong Kong after 1997.
- (40) The foregoing obligation can only be implemented if the PRC ratifies the ICCPR, at least in relation to Hong Kong.
- (41) An independent body should be set up as soon as possible, either by the ICJ or by a consortium of human rights organisations, to monitor human rights developments in Hong Kong.
- (42) The United Kingdom should accept on behalf of Hong Kong the Optional Protocol to the ICCPR.
- (43) The Basic Law is inconsistent in many important respects with the obligations accepted by the PRC by its signature and ratification of the Joint Declaration; in the case of the method of election of the Chief Executive, although not inconsistent with the Joint Declaration, the Basic Law fails to provide an acceptable system.
- (44) The PRC should modify the Basic Law accordingly.
- (45) The Government of the United Kingdom, as the other party to the Joint Declaration, should use all means within its power to press the PRC to make the necessary amendments to the Basic Law.

ANNEX I

TERMS OF REFERENCE

1. The nature and extent of the rights to self-determination of the people of Hong Kong before or upon the termination of the colonial status of Hong Kong under international law, as evidenced in the United Nations Charter, International Human Rights Covenants and relevant resolutions of the United Nations General Assembly, and the extent to which the United Kingdom has fulfilled its obligations to implement such rights;
  
2. The extent to which after the transfer of sovereignty over Hong Kong from the United Kingdom to the Peoples' Republic of China in 1997 the Joint Declaration, agreed between the United Kingdom and the Peoples' Republic of China and the Basic Law enacted by the National Peoples' Congress of the Peoples' Republic of China, adequately protect the rule of law and the fundamental human rights of the people of Hong Kong as recognised by international law;
  
3. The extent to which the draft Hong Kong Bill of Rights Ordinance adequately protects the rule of law and the fundamental human rights of the people of Hong Kong as recognised by international law, including the extent to which the Ordinance conforms to international human rights law;
  
4. The steps, if any, that are necessary to ensure:
  - (a) that any default in complying with international law, including international human rights law, is rectified before the transfer of sovereignty over Hong Kong is effected in 1997; and
  - (b) that the observance of human rights in Hong Kong, including of the relevant human rights instruments is monitored after the transfer of sovereignty is effected in 1997; and
  
5. Any other related matter.



ANNEX II

LIST OF WITNESSES AND MEETINGS

I The following organisations and individuals gave evidence (in most cases accompanied by written submissions) to us in public hearings:

the Law Society of Hong Kong  
the Hong Kong Journalists Association  
Amnesty International (Hong Kong section)  
the Hong Kong Council of Women  
Ms. Emily Lau  
the Law Society Legal Aid Scheme  
Ms. Gladys Li, Q.C.  
the Hong Kong Confederation of Trade Unions  
the Hong Kong Democratic Foundation  
Mr. Raymond Lau  
the United Democrats of Hong Kong  
the Hong Kong Human Rights Commission  
the Justice and Peace Commission, Hong Kong  
the Hong Kong Federation of Students  
the Legal Aid Department  
the Hong Kong Bar Association  
Mr. John Walden  
Ms. Margaret Ng  
the Hong Kong Christian Institute  
JUSTICE Hong Kong

II We had discussions with the following persons in meetings not open to the public:

the Chief Justice  
the Attorney General and members of his Department  
the Chief Secretary  
the Secretary for Constitutional Affairs and members of his Branch  
Mr. Anthony Galsworthy and Mr. Charles Garrett (Joint Liaison Group)  
OMELCO (Mr. Andrew Wong, Mr. Tam Yiu-Chung, Ms. Elsie Tu, Mr. R. J. Arculli)  
Mr. Martin Barrow  
Members of the Law Faculty, Hong Kong University  
Sir Jack Cater  
Dr. Maurice Brousseau

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President, European Committee for the Prevention of Torture, Italy  
Advocate; former Chairman of the Standing Committee on Human Rights, Int'l Bar Association, Malaysia

ROBERT DOSSOU

Practicing advocate; former President of the Benin Bar Association; Professor of Law and Dean of the Law Faculty, University of Benin

HENRY DE B. FORDE

Member of Parliament and former Att.-Gen., Barbados

BERTRAND G. RAMCHARAN

Chief of the UN Secretary-General's Drafting Service; Adjunct Professor, Columbia University's School of Int'l Affairs, New York

DIEGO GARCIA-SAYAN

Executive Director, Andean Commission of Jurists, Peru

P. TELFORD GEORGES

Former Chief Justice of the Bahamas

RAJSOOMER LALLAH

Supreme Court Judge, Mauritius; Member, UN Human Rights Committee

NIALL MACDERMOT, CBE, QC

Former Secretary-General, ICJ; former Minister of State for Planning and Land, UK

J.R.W.S. MAWALLA

Advocate of the High Court, Tanzania

FRANCOIS-XA VIER MBOUYOM

Advocate, Cameroon

DORAB PATEL

Former Supreme Court Judge, Pakistan

NICOLE QUESTIAUX

Member, Council of State of France; former Minister of State

ADELA RETA SOSA DIAZ

President, Criminal Law Institute; Minister, Uruguay Gov't

LORD SCARMAN

Former Lord of Appeal and Chairman, Law Commission, UK

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