and Peoples, placed Hong Kong on the 'Colonial List',[10] according to which the UK was under obligation to implement the right to self-determination in Hong Kong without any conditions or reservations. It was the first time that the non-self-governing territories were given an international status as 'separate and distinct from the territory of the State administering it'. This action was rejected by the Chinese government. The Chinese objection was based on the doctrine of invalidity of 'unequal treaties',[11] arguing that, due to certain political considerations, China did not claim its sovereign right over Hong Kong against the UK because China found it advantageous to tolerate the continued existence of Hong Kong under British dominion.[12]

The main argument of the PRC was that the settlement of the 'Hong Kong question' was entirely within China's sovereign right and, accordingly, Hong Kong should not be included in the list of colonial territories covered by the Declaration on the Granting of Independence.[13] The General Assembly approved the Chinese objection by adopting a Resolution.[14] The UK, on the other hand, announced that the action of the General Assembly in no way affected the legal status of Hong Kong and its views on that status were well known and it was unable to accept any differing views which had been or might be expressed by other governments.[15]

After having considered the Chinese proposal, the Special Committee adopted a recommendation which was contained in its report to the General Assembly, stating that Hong Kong and Macao should be excluded from the list of territories to which the Declaration on the Granting of Independence was applicable. No objection was raised to this decision; consequently, Hong Kong and Macao were determined to be part of Chinese territory which were occupied by the British and the Portuguese and were removed from the list of colonial territories.

[10] Resolution 1514 (XV), 14 December 1960, Yearbook of the United Nations, 1972 at pp 538–559.

[11] In defining the 'unequal treaties', some writers give too much weight to the question of whether the treaty is equal or unequal; they ignore the problems of military coercion and the issue of lack of consent, where the legal reasons for the invalidity of a treaty may be found. According to Werner Morvay, 'unequal treaties' are treaties which may be defined as 'treaties favouring one or some of contracting parties instead of creating reciprocal and equivalent rights and duties for all the contracting parties; or treaties to which weak States have consented under the pressure of strong States'. See Werner Morvay, 'Unequal Treaties' EPIL (Vol IV) at pp 1008–1011. See also Dietrich Frenzke, 'Der Begriff des Ungleichen Vertrages im Sowjetisch-Chinesischen Grenzkonflikt' Osteropa-Recht, 11 Jahrgang, Heft 2 (Juni 1965) at pp 69–105.

[12] Cf AD Hughes, 'Hong Kong', EPIL (Vol II) at pp 871–872.

[13] See Yearbook of the United Nations, 1972 at p 543.

[14] See Resolution 2908(XXVII) on 2 November 1972.

[15] See 'Other Questions Relating to Non-Self Governing Territories', Yearbook of the United Nations, 1972 at pp 625–627.

d) Discussion

In accordance with Article 73(e) of the UN Charter, the UK initially was obligated to regularly transmit to the Secretary-General information on Hong Kong regarding the application of Chapters XII and XIII. After the decision was made by the UN, the UK announced that it was not useful to transmit the information prescribed in Article 73(e) of the Charter to the Secretary-General in regard to Hong Kong. The British announcement as to the legal status of Hong Kong was that its views on that status were well known; this position is ambiguous and seems to say nothing on the legal status of Hong Kong. No strong objection to the Resolution of the General Assembly was raised. Simultaneously, the Chinese government rejected the competence of the UN to deal with the 'Hong Kong question' by announcing that 'it should be settled in appropriate way when conditions are ripe … the United Nations has no right to discuss these questions'.[16] As a result, the legal status of Hong Kong remained unsolved until the Sino-British Joint Declaration was signed in 1984.

The attitudes of both parties to the legal status of Hong Kong suggest they were unwilling to find a solution via the UN and preferred to do so through bilateral negotiations.[17] The United Kingdom also agreed that the situation of Hong Kong was 'of course *sui generis*' in comparison to any other case where the UK divested herself of sovereignty over territory.[18]

iii) The Doctrine of 'Unequal Treaties'

At first sight, the notion of 'unequal treaties' seems to be political rather than legal because such treaties are usually concluded under duress to the disadvantage of a defeated power. The western states argued that no international rule existed, stating that obligations contained in a treaty should be balanced or equal, and thus also maintained that the 'equal' or 'unequal' character of treaty obligations could not be proved. They came to the conclusion that the notion of 'unequal treaties' as such had no legal

[16] Quoted in Anthony Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong', The China Quarterly (1983) at p 437.

[17] The treaties concluded by the earlier Chinese government were not all recognised by the communist government when they took over Mainland China in 1949. Article 55 of the Common Program of the Chinese People's Political Constitutive Conference, the provisional Constitution during the period of national establishment, declared: 'The Central People's Government of the People's Republic of China must study the treaties and agreements concluded by the Kuomintang government with foreign governments and, depending on their contents, recognize, annul, revise or re-conclude them'; cited in Hungdah Chiu, *The People's Republic of China and the Law of Treaties* (Cambridge, Massachusetts: Harvard University Press, 1972) at p 92.

[18] See Georg Ress, 'The Legal Status of Hong Kong after 1997 — The Consequences of the Transfer of Sovereignty according to the Joint Declaration of December 19 1984' ZaöRV, Bd 46 (1986) at pp 647–699.

Hong Kong to the PRC. The Hong Kong Act 1985, enacted by the UK after the signature of the Declaration, states that 'as from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong'.

2) Autonomy of the Hong Kong SAR

Paragraph 3 of the Sino-British Joint Declaration, in which the basic policies of the PRC with regard to Hong Kong are listed, states that the PRC has decided to establish the Hong Kong Special Administrative Region (the 'Hong Kong SAR') in accordance with Article 31 of the Constitution of the PRC. The Hong Kong SAR will be directly under the authority of the Central People's government of the PRC and will enjoy a high degree of autonomy, except for foreign and defence affairs which are the responsibilities of the Central People's government.

Paragraph 3 further provides that the Hong Kong SAR will be vested with executive, legislative and independent judicial power, including that of final adjudication.[46] The laws currently in force in Hong Kong will remain basically unchanged. The Hong Kong SAR may also use the name of 'Hong Kong, China', on its own, maintain and develop economic and cultural relations and conclude relevant agreements with States, regions and relevant international organisations. The government of the Hong Kong SAR may on its own issue travel documents for entry into and exit from Hong Kong.

b) Legal Nature

1) Binding Treaty

Three main elements may be considered as important criteria for determining whether the Sino-British Joint Declaration is a binding treaty:

1. the form of the agreement;
2. the specificity of the agreement; and
3. the intention of the UK and the PRC governments to be bound under international law.

1.1) *The Form of the Agreement*

The form of an agreement is not the determining factor for the validity of an international treaty, but it may reflect the intention of the parties to conclude an agreement.

The agreement between the UK and the PRC governments, named as the Joint Declaration of the Government of the United Kingdom of Great

[46] For a comprehensive exploration of the meaning of the 'autonomy' of the Hong Kong SAR in the sense of national Constitutional law, refer to Ch 3 of this study.

Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, is formed in customary style — including final clauses, signature blocks as well as the dates of entry into force — but it lacks dispute settlement provisions.

It has been emphasised that the substance, and not the name or the form, of an agreement determines whether it is a treaty. On the other hand, the failure to follow a customary form may constitute evidence of the intent not to be legally bound. The significant factor is whether the general content of the agreement and the context of its making reveal the intent to be legal bound. Thus, the lack of a customary form will not be the decisive factor. International law does not prescribe any form for binding treaties; it is admitted that the names of an international treaty can vary — for instance: convention, agreement, statute, treaty, protocol, declaration, act, covenant, concordat, exchange of notes, memorandum of agreement, memorandum of understanding, modus vivendi or charter.[47] The term 'treaty' is defined as:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[48]

A 'declaration' is generally a means by which States or subjects of international law express their will, intent or opinion when acting in the field of international relations.[49] A 'declaration' can be produced unilaterally, bilaterally or multilaterally and in oral or written form. The Sino-British Joint Declaration is a bilateral declaration in written form which is intended to solve the historical question in regard to the status of Hong Kong. The question is whether this declaration has a binding effect upon both parties. In State practice, declarations were frequently made for the sole purpose of recording intent, positions or opinions. These declarations, containing merely the description of policy, purpose, intent, are in general named 'declarations', 'declaration of policy', 'declaration of common purpose', and 'statement of principles' and have been regarded in international law as 'gentlemen's agreements' or agreements lacking binding force.[50]

The binding effect of a declaration would depend on the wording and the circumstances under which the consent of the parties to be bound by it is expressed.[51] Although the statements announced by the UK and the PRC have been termed as 'declarations', this at least does not exclude the possibility that both parties have consented to be bound by it. The

[47] Cf Gilbert H Gorning, Hongkong: Von der britischen Kronkolonie zur chinesische Sonderverwaltungszone — Eine historische und rechtliche Betrachtung unter Mitarbeit von Zhang Zhao-qun (Köln: Verlag Wissenschaft und Politik, 1998) at p 85.

[48] Article 2, para 1(a) of the Vienna Convention on the Law of Treaties.

[49] See Carl-August Fleischhauer, 'Declaration', EPIL (Vol I) at p 971.

[50] Cf Fritz Münch, 'Non-Binding Agreement', EPIL (Vol III) at p 607.

[51] See Carl-August Fleischhauer, 'Declaration', EPIL (Vol I) at p 971.

created by internal constitutional law.[71] The confederation and international organisations, described as unions governed by international law, do not possess the character of a State. These entities, such as alliances, administrative unions, real unions, confederations (*Staatenbund*) and associations of States, are created by States with a limited competence as subjects of international law to achieve their common goals based on an international treaty. All these entities can be called 'confederations'.[72] The British Commonwealth of Nations can similarly be considered as a confederation.

The Hong Kong SAR, however, should not be regarded as a member of a confederation. The confederation in a narrow sense is an association of States (*Staatenbund*). Although the Hong Kong SAR is the outcome of the Sino-British Joint Declaration, the provisions of the Declaration do not say that it is a treaty that attempts to establish an association of States. The reunification of the Hong Kong SAR with the PRC is expressed in the Joint Declaration as the 'common aspiration of the entire Chinese people', but the Hong Kong inhabitants did not participate in that negotiation.

d) 'Free Cities'?

There is no definition of 'free cities' in international law.[73] If there were a definition of a 'free city', then it may be understood as a 'State-like political and territorial entity', which has sovereign rights over its territory.[74] Historically, the 'free city' is the result of political action of States in being created by a treaty, which is meant to be the basic element of the city's legal status. The 'free city', being a subject of international law, although in principle independent, does not have the full capacity to act. The feature of the 'free city' is that the city is the result of internationalisation by individual settlement. The existence and activities of the 'free city' are controlled and guaranteed by the States or international organisations which create it.[75]

The Hong Kong SAR, created by the Sino-British Joint Declaration, vested only with limited capacity in foreign and defence affairs, possesses features similar to that of the 'free city'. Historically, the 'free cities' — such as the Free City of Krakow in 1815 (which was created by a settlement between Austria, Prussia and Russia to solve the Polish

71 Cf Walter Rudolf, 'Federal States', EPIL (Vol II) at p 363 and Felix Ermacora, 'Confederations and Other Unions of States', EPIL (Vol I) at pp 735–739; RC Lane, 'Federalism in the International Community', EPIL (Vol II) at p 178.

72 Felix Ermacora, 'Confederations and Other Unions of States', EPIL (Vol I) at pp 735–739.

73 P Beck, 'Die Internationalisierung von Territorien', in *Untersuchungen zur auswärtigen Politik*, Bd 2 (Stuttgart: 1962) at p 77.

74 Eckart Klein, *Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime* (Heidelberg: Springer, 1980) at p 465.

75 Eckart Klein, *Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime* (Heidelberg: Springer, 1980) at p 466.

question and restricted its powers concerning foreign affairs and constitutional autonomy), the Free City of Danzig (which was under the control of the League of Nations), and the Free Territory of Trieste (which was established after World War II in 1947 as part of the Treaty of Peace With Italy) — were placed under guarantee of the States and international organisations concerned.

There are no guarantee provisions in the Sino-British Joint Declaration. The provisions concerning the territory Hong Kong mainly benefit the PRC, and no guarantee norms like those mentioned above are found.

e) An Autonomous Territory?

There is no universally accepted definition of an autonomous territory in international law. However, there are some examples of territories which have been regarded as autonomous. The autonomous territory can be analysed in two aspects: autonomous territory in constitutional law and autonomous territory in international law. In general, the term 'autonomous territory' refers to the former, although some autonomous territories have connections to international law.[76]

The autonomous territory in international law distinguishes itself from the autonomous territory in constitutional law in that the former is usually associated with a treaty from which the autonomous status of a territory is derived or under which it is guaranteed by third States. It was difficult to distinguish in the past, as even today, whether protectorates, mandated territories, condominiums and non-self-governing territories were States or autonomous territories.[77] However, some autonomous territories, such as the Åland Islands, Greenland, the Faeroe Islands, Puerto Rico, South Tyrol and Tibet, were regarded as models for autonomy.

The autonomy of some territories is established by treaty — for instance, that of the Åland Islands is based on a treaty concluded on 20 October 1921 among Austria, Denmark, Estonia, Finland, France, Germany, Latvia, Poland and Sweden. The autonomy of South Tyrol was created by the De Gasperi-Gruber agreement between Austria and Italy on 31 August 1972. Other autonomous territories are derived from constitutional law — such as the Faeroe Islands, Puerto Rico and Greenland.

Each autonomous territory has its special features regulated, as the case may be, in the guarantee treaty or in constitutional law according to the need of the entities concerned. It is not possible to name common features for all the autonomous territories just mentioned. A general criterion to measure whether an entity is an autonomous territory in the sense of international law seems to be impossible. As Hannum and Lilich

76 Bengt Broms, 'Autonomous Territories', EPIL (Vol I) at p 308.

77 Bengt Broms, 'Autonomous Territories', EPIL (Vol I) at p 309.

The prerequisite for diplomatic protection is that the protected individual must have some special relationship to the subject of international law granting diplomatic protection. This relationship is usually nationality. Holders of the Hong Kong SAR passport, in accordance with the Hong Kong Basic Law, are both permanent residents of the Hong Kong SAR and Chinese nationals. As has been mentioned, the Central People's government is exclusively responsible for the foreign and defence affairs of the Hong Kong SAR. On that ground, the Hong Kong residents abroad are entitled to be protected by consular agents of the PRC. The Hong Kong SAR, not being a sovereign subject, is not entitled to establish consular representations abroad. Thus, diplomatic representatives and consular organs of the PRC abroad are entrusted with the responsibilities of protecting the legal rights and interests of (Hong Kong) Chinese citizens outside Chinese territory.

Apart from diplomatic protection, another function of a passport is that the issuing State is obligated to readmit its passport holders into its own territory. The government of the Hong Kong SAR, being the issuing authority, is therefore obligated to admit the holders of the Hong Kong SAR passport to re-enter the Region. One has to bear in mind that the passport does not imply that the holder has an individual right to enter or leave a foreign State. The scope and function of the passport depends on how the other subjects of international law recognise it, generally on the basis of bilateral or multilateral agreements. By 24 March 2004, 131 States had signed agreements with the government of the Hong Kong SAR to grant visa-free access or visa-on-arrival to Hong Kong SAR passport holders.[115] Article 155 of the Basic Law states:

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

The power of issuing passports thus also indicates that the region has some capacity to enter into foreign relations with other States.

[115] Immigration Department: http: //www.immd.gov.hk.

H) CONCLUSION

Obviously, the personality of States is different from that of other entities. States are the primary subjects of international law endowed with full capacity to enter into relations with other entities. The degree of power of those entities or subdivisions of States to conduct their external relations depends on whether a national legal order or national constitutional law grants that power. The Hong Kong SAR, not being a unit separate from the PRC,[116] even if the Hong Kong Basic Law and the Sino-British Joint Declaration have secured its autonomous status, cannot represent the PRC and can only be regarded as a secondary subject of international law derived from the PRC.[117]

The capacity of the Hong Kong SAR to deal with foreign affairs is limited to particular fields such as economy, trade and culture. Since it is a derivative subject of international law, its capacity has only relative effect, that is to say, an effect limited to the relations with the States which have recognised the Hong Kong SAR as a subject of international law.[118] The Hong Kong SAR is one of local administrative units of the PRC possessing an extensive degree of autonomy. However, its international personality can only be established to the extent that other international subjects accept that the Hong Kong SAR possesses such personality in relation to them. The Hong Kong SAR, acting as a local administrative unit of the PRC, has gained its international personality through participation in different international organisations. The representatives of the Hong Kong government may become members of delegations of the government of the PRC to participate in diplomatic negotiations. The Special Administrative Region is not a primary subject of international law but is instead a derivative or secondary subject, possessing a limited range of rights and duties valid vis-à-vis those other entities which have accepted its limited international personality.

[116] Article 12 of the HKBL provides national status of the Hong Kong SAR, stating: 'The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government'.

[117] It is a fact that a constituent unit of a State may possess a limited scope of personality if it is granted by national law. This theory may have been commonly admitted. For example, the judgment of the Italian Court of Cassation in 1935 reads as follows: 'a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single state. It must admit that only States can contribute to the formation of international law as an objective body of rule'. But the Court went on to say that: 'it is impossible to deny to other international collective unites a limited capacity of acting internationally within the juridical personality and capacity which is its necessary and natural corollary'. See *Nanni v Pace and the Sovereign Order of Malta* Ann Dig 1935–1937, cited in DP O'Connell, *International Law* (2nd ed, London: Stevens & Sons Ltd, 1970) at p 86.

[118] Hermann Mosler, 'Subjects of International Law', EPIL (Vol IV) at p 715.

prerequisite for the enjoyment of fundamental human right and is, thus, not only applied to 'peoples under foreign domination', but to 'all peoples'.[4]

It is not clear, however, whether the people of Hong Kong have the right to self-determination despite the fact that the United Kingdom is a party to both of the aforementioned human rights Covenants of 1976, which remain in force in the Hong Kong SAR after the transfer of sovereignty. This question is related to the issue of decolonisation in which the right to self-determination was upheld. The analysis of the notion of self-determination, thus, will be divided into two main parts: 1) self-determination within decolonisation, and 2) self-determination outside decolonisation. I am going to explore the problem in two parts because the entitlement to the right to self-determination, which was originally confined to 'colonial peoples', has now been extended to 'all peoples' including the peoples of a State. Hong Kong has undergone the development of the right to self-determination from the right of 'colonial people' to the fundamental right of 'every people'. This development may be important for Hong Kong.

In 1972, in the process of decolonisation, the UN removed Hong Kong from the 'list of dependent territories', on the ground that China did not recognise it as 'non-self-governing territory' of the 'colonial type'. The first part of this section will be focused on the right to self-determination within decolonisation, with the attempt to demonstrate that the status of Hong Kong before the transfer of sovereignty was that of a non-self-governing territory entitled to the right to self-determination. The process of decolonisation was closed and it appears if it has merely historical significance. But excluding Hong Kong from colonial status may affect the exercise of the right to self-determination not only at the time when the Sino-British Declaration was concluded in 1984 (transfer of sovereignty) but also at present after Hong Kong has become a part of China on 1 July 1997. The right to self-determination is a continuing, dynamic and fundamental right which should not only be exercised 'once and for all'. The second part of this section will deal with the self-determination outside decolonisation. The people of Hong Kong may be entitled to the newly developed fundamental right to self-determination, not necessarily being a 'colonial people'.

[4] C Tomuschat, 'Self-Determination in a Post-Colonial World', in C Tomuschat (ed), *Modern law of Self-determination* (Martinus Nijhoff Publishers, 1993) at pp 1–20.

Whether the Sino-British Joint Declaration contradicts the principle of self-determination and might be considered null and void depends on whether self-determination is a rule of *jus cogens* and whether the people of Hong Kong has a claim to self-determination. There are two main factors which must be fulfilled if the people of Hong Kong are entitled to exercise the right to self-determination. First, the self-determination must be a legal 'right',[5] and second, the inhabitants of Hong Kong must be a people.[6] Nowadays, no one can deny that fact that the notion of self-determination has become as a positive international norm. Therefore, only the second factor is meaningful for the clarification of the Hong Kong question.

B) The Inhabitants of Hong Kong as a People Entitled to Self-Determination

i) Self-Determination within Decolonisation

In light of historical development of the UN practice regarding the issue of self-determination, it is manifest that a colonial people are the holder of the right to self-determination.

The people of Hong Kong may hold the right to self-determination if Hong Kong was a non-self-governing territory with a status that was 'separate and distinct from the territory of the state administering it'. Indeed, the peoples concerned by the process of decolonisation were merely confined to non-self-governing territories. Other categories of peoples were excluded from the consideration for the purposes of Article 73 of the UN Charter. The United Kingdom refused to give 'people' a definition.[7] In the practice of the United Kingdom, all the inhabitants of its 'dependent territories' were defined as 'peoples' for the purpose of the right to self-determination irrespective of the developing degree of the

[5] It has been disputed whether the right to self-determination is a political program applied to the colonial people or is a legal right applicable to all peoples.

[6] One has to distinguish between the people within and the people beyond the colonial context, since the applicability of the right to self-determination has been developed from colonial to non-colonial territory.

[7] The Legal Adviser, Sir Ian Sinclair, in replying to the United Kingdom Foreign and Commonwealth Office as to what is meant by 'peoples', commented, in UKMIL, BYIL (1983) at pp 400–401:

> This is a very difficult question, Mr Chairman. I have to say of course that there is no internationally accepted definition of the term 'peoples'. What one needs to consider are the circumstances of each particular case in which the principle may be invoked. Amongst the considerations to which we for our part attach importance in considering whether the principle of self-determination is applicable, is whether the people in a particular territory constitute a settled and self-sustaining community with its own institutions and civil administration built up over many years. That seems to us a kind of practical working definition of what we believe the concept to mean. But I must confess that that is not necessarily an internationally accepted definition. I have simply given you our own working definition or rule of thumb.

Surprisingly, no reason was given by the Special Committee as to why Hong Kong could not qualify as a Non-Self-Governing Territory of the colonial type. The entitlement to self-determination of non-self-governing territories not of the colonial type was left unclear. The removal of a territory from the 'list of colonial territories' could not mean that the people in question had no chance anymore to be entitled to the right to self-determination. For example, New Caledonia, an island territory of Melanesian Pacific under French colonial rule since 1853, was removed from the list unilaterally by France in 1947 and was recorded again on the list in 1986.[18] In the interval, although France did not submit reports under Article 73(e), the 'status' of New Caledonia as a Non-Self-Governing Territory remained unchanged. In this regard, removal from the list should not be given any effect on the application of the right to self-determination of the people in New Caledonia. Indeed, the General Assembly has never considered and accepted the unilateral action of a State.[19] The General Assembly's denial of the competence of the administering powers to determine the Non-Self-Governing Territories was confirmed by a General Assembly Resolution adopted in 1986, which stated:

> In the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering power concerned should continue to transmit information under Article 73(e) of the Charter with respect to that Territory.[20]

c) The Competence to Determine the Status of the Non-Self-Governing Territories

In the early years of the UN, the United Kingdom frequently declared that the UN was not competent to determine the territories to which Article 73(e) applied.[21] In September 1948, in a discussion in the Special Committee on Information Transmitted under Article 73(e), the United Kingdom representative denied the competence of the General Assembly to determine the non-self-governing territory for the purpose of Article

18 The French government addressed, in 1947, a letter to the Secretary-General of the United Nations requiring withdrawal of New Caledonia from the list of non-self-governing territories on the argument that Constitutional development made it no longer appropriate to treat them as non-self-governing territories; see Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right to Self-determination', BYIL Vol 66 (1995) at pp 291–292.

19 One may argue that the right to self-determination of a people cannot be determined by other people like the Administering Powers or the General Assembly of the UN. This assumption is partly correct, since at least the question of who the 'people' are and where the 'territory' is should be answered first for the purpose of abolition of colonialism. Thus, the core of the problem might be who was competent in determining non-self-governing territories.

20 GA Res 41/13 of 31 October 1986.

21 Non-Self-Governing Territories: Summaries of Transmitted to the Secretary-General during 1946 (NY, UN, 1947) at pp 132–137.

73(e).[22] Other administering powers were in favour of the UK's view.[23] Despite the opposition from administering powers, the General Assembly demanded more political information rather than the technical one which was actually transmitted and confirmed its competence relating to Article 73(e) in General Assembly Resolution 334.[24] A Special Committee was set up 'to examine the factors which should be taken into account in deciding whether any territory is or is not a territory whose people have not yet attained a full measure of self-government'. The British representative challenged the legal status of the Special Committee and rejected its 'supervision'.[25] In the British view the obligations imposed by

22 The British Representative argued, 'in view of my Government, the determination of such territories for the purpose of Article 73(e) lay exclusively with each metropolitan Power in the light of its Constitutional relationships with the territories for whose international relations it was responsible. Any suggestion that the General Assembly should define the territories within the scope Article 73(e) would involve a decision on Constitutional relationship within the domestic jurisdiction of the metropolitan Power concerned': cited in Non-Self-Governing Territories: Summaries of Transmitted to the Secretary-General during 1946 (NY, UN, 1947) at pp 132–137. However, in a report dated 13 October 1946 to the General Assembly, the Secretary-General contested:

> The transmission of such information cannot be regarded as a mere formality. Its purpose and value depends on the contribution which can be made through it to an understanding and to the implementation of the principle. It should serve to the advantage of the peoples of Non-Self-Governing Territories, of the States responsible for their development and of the world community as a whole. (Non-Self-Governing Territories: Summaries of Transmitted to Secretary-General during 1946 (NY, UN, 1947) at pp 144–145.)

23 The French delegate announced that, 'Chapter XI was a declaration involving an obligation but not providing for a medium of implementation. The only definite obligation imposed by the Charter was the transmission of specified information and it was silent as to what to be done with such information'. (GAOR, 1st Sess, Pt 2, 4th Cttee, Pt 3, at p 27.). The Philippine representative, in favour of the capacity of the General Assembly in Article 73(e), expressed his view that:

> A course of action which was not expressly prohibited was deemed to be permitted if it was consistent with the objective in view. The obligation to promote the well-being and advancement of non-self-governing peoples and the duty to transmit information to the Secretary-General had an organic connexion. It would be absurd to require the submission of information on dependent territories unless such information could be utilized for the promotion of the well-being and advancement of their inhabitants. It had been argued that there was a lacuna in Chapter XI. However, that unworthy attitude could be remedied by a reasonable interpretation, in keeping with the principle that any restrictive construction of an international agreement which would nullify or circumvent its manifest purpose should be rejected' (GAOR, 1st Sess, Pt 2, 4th Cttee, Pt 3, at pp 34–55).

24 General Assembly Resolutions 144(II), 551(VI), and 930 (X). Resolution 334 (IV) clearly states the responsibility of the Organisation: ' to express its opinion on the principles which have guided or which may in future guide the Members concerned in enumerating the territories for which the obligation exists to transmit information under Article 73(e) of the Charter'.

25 In the tenth session (1955) of the General Assembly, Britain questioned the legality of the Assembly's action in setting up the Special Committee: 'Nothing in the Charter allows the Organisation to exercise any 'supervision' or 'control' of the administration of non-self-governing territories (other than trust territories). Therefore, Administering Authorities are in no way accountable to the United Nations for such administration, and that to make recommendations thereon constitutes 'intervention' in matter which is essentially with their domestic jurisdiction according Article 2(7)'. (GAOR, 10th Sess, Suppl No19, Resolution 93 (X)).

groups of comparable dimensions, not one where there is a majority and (one or more) identifiable minority groups'. He added that 'a second condition is that the national or ethnic group be recognized constitutionally, having a distinct legal status within the constitutional framework, e.g., the republic of the USSR'.[90] This suggestion may not solve the problem since self-determination is generally accepted as a positive international norm while this suggestion is very dependent upon the level of constitutional law. The controversy with regard to a people of a multinational State is still open.

Nevertheless, it raises the question as to whether the Hong Kong population can be regarded as one of the 'peoples' in the multinational State of the People's Republic of China. The terms 'peoples' and 'nationalities' have the same meaning in Chinese constitutional law. Moreover, in the Chinese language, there is no strict distinction between the terms 'people', 'nation' and 'ethnic group'. All of these terms refer to 'Minzu' (民族), a population in an ethnic sense. Chinese constitutional doctrine only recognises 'the nations as a whole' which constitute the State as the holder of the right to self-determination. A nation alone does not have the right to self-determination. There is no legal difference between 'people' and 'nation' in the Chinese Constitution. The preamble of the 1984 Constitution states (emphasis added):

> *The people of all nationalities* in China have jointly created a splendid culture and have a glorious revolutionary tradition … *the Chinese people of all nationalities* led by the Communist Party of China with Chairman Mao Zedong … Both the victory of China's new-democratic revolution and the successes of its socialist cause have been achieved by *the Chinese people of all nationalities* under the leadership of the Communist Party of China … *the Chinese people of all nationalities* will continue to adhere to the people's democratic dictatorship and follow the socialist road … The People's Republic of China is a unitary *multi-national state* built up jointly by the people of *all its nationalities*. Socialist relations of equality, unity and mutual assistance have been established among them and will continue to be strengthened. In the struggle to safeguard the unity of the nationalities, it is necessary *to combat big-nation chauvinism, mainly Han chauvinism, and also necessary to combat local-national chauvinism.*

Article 4 of the PRC Constitution states (emphasis added): '*All nationalities* in the People's Republic of China are equal'. Obviously, the meaning of 'people' in the Chinese Constitution is only relevant to a 'nation'. A population of a distinct community like Hong Kong does not fit under this conception. The PRC is a multinational unified State established by and based on an ethnic rather than a territorial approach. Nations in China do not have their own territorial boundary. The majority of the population of Hong Kong are Han Chinese. Hong Kong is neither a

[90] Antonio Cassese, 'The Self-Determination of Peoples', in L Henkin (ed), *The International Bill of Rights* (New York: Columbia University Press, 1981) at p 95.

State nor a distinct nation different from the Han Chinese. Thus, the population of Hong Kong are neither a people of a homogenous national State nor that of a multinational State in an ethnic sense.

4) Minorities

Minority groups may belong to the fourth category of people, but there is no canonical definition of 'group', 'community' or 'minority'. In general, the groups as such may be seen as 'areas of common life, determined in a spontaneous way rather than by voluntary decision'.[91]

The issue of a minority's claim to self-determination could be arguable. In respect of the general principles of international law, the ethnic minority living on a delimited territory, possessing distinct religious, racial, linguistic, or other cultural attributes and desiring to preserve its special characteristics may be entitled to the right to self-determination,[92] but the right of self-determination does not include a general right of groups to secede from the States of which they form a part.[93] In respect of the ICCPR, a national group could be regarded as a people if this national group is constitutionally recognised as a component part of a multinational State. On the contrary, the minorities as such, according to the majority view, do not have a right to self-determination according to Article 1 of the ICCPR. This is because a right to secession is not recognised. It has been argued that Article 1 of the ICCPR and the ICESCR do not encompass a collective right of minorities. Minority rights are separately protected in Article 27 of the ICCPR, which provides that persons belonging to ethnic, religious, or linguistic minorities shall not be denied the right to enjoy their culture, practice their religion, or use their language. One has to note that the distinction between 'minority rights' and the right of 'peoples' to self-determination is that the rights provided in Article 27 of the ICCPR are possibly not group rights but 'individual rights' of persons belonging to the respective minority,[94] because the minority group itself does not have, but rather the 'member of the minority', the personality of law. It has been suggested that the protection of a collective minority identity could only be achieved through the exercise of the individual rights of its

[91] UN Doc No E/CN4/Sub2/85, Definition and Classification of Minorities, at para 18.

[92] Definition found in the *Greco-Bulgarian Communalities Case*, PCIJ, 1930, Series B, No 17, at p 21. Cited by Karl Doehring, 'Das Selbstbestimmungsrecht der Völker', in B Simma and H Mosler (eds), *Charta der Vereinten Nationen: Kommentar* (München: CH Beck, 1991) at p 64.

[93] The right of secession is not recognised by international law. However, it may be legitimated, if the ethnic group or minority are seriously discriminated against by the sovereign power. It then becomes evidence of a brutal violation of fundamental rights. Such violations normally appear in brutal form and measures, e.g. killing or unlimited imprisonment without legal protection, destroying family relations, expropriation without any regard for the necessities of life, special prohibitions against following religious professions or using one's own language; see Karl Doehring, 'Das Selbstbestimmungsrecht der Völker', in B Simma and H Mosler (eds), *Charta der Vereinten Nationen: Kommentar* (München: CH Beck, 1991) at p 66.

[94] Rainer Hofmann, 'Minority Rights: Individual or Group Rights?', German Yearbook of International Law, Vol 40 (1997) at pp 356–382.

principle of territorial integrity is confirmed by the UN[135] and is repeatedly stressed in UN practice. Article 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples restricts the applicability of the right to self-determination (emphasis added):

> any attempt aimed at the partial or total disruption of the national unity and the *territorial integrity of a country* is incompatible with the purpose and principles of the Charter of the United Nations.

The Declaration on Principles of International Law concerning Friendly Relations, in addition, upholds the principle of territorial integrity in paragraph 7, which states:

> Nothing in the foregoing paragraphs shall be construed as authorizing 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

According to Gros Espiell, 'where the territorial integrity of the State is involved the right to self-determination does not in principle apply'.[136] The right of secession is not only unrecognised, it is rejected by the majority of writers. However, it has been argued that the right of secession would possibly be justified if the people concerned were exposed to extremely brutal discrimination, such as death or unlimited imprisonment without legal protection, destroying family relations, prohibition of using one's own language and prevention of religion by brutal methods.[137] The exercise of external self-determination of the people of Hong Kong, when linked to independence, may consequently constitute a partial disruption of the national unity of China. It is recognised that territorial integrity is paramount where the right to self-determination is being applied.[138]

Gros Espiell, in his report submitted to the Sub-commission on Prevention of Discrimination and Protection of Minorities at its 31st session, tried to clarify the problem as follows:

135 The territorial integrity and political independence of States have been expressly protected by para 4 of Article 2 of the UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

136 Héctor Gros Espiell, The *Right to Self-determination: Implementation of United Nations Resolutions* (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), (New York: United Nations, 1980) at p 13, para 89.

137 Doehring, 'Das Selbstbestimmungsrecht der Völker', in B Simma and H Mosler (eds), *Charta der Vereinten Nationen: Kommentar* (München: CH Beck, 1991) pp 15–32, p 25.

138 See Héctor Gros Espiell, *The Right to Self-determination: Implementation of United Nations Resolutions* (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), (New York: United Nations, 1980) at p 13, para 89.

> The right of peoples to self-determination, as it emerges from the United Nations system, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of State. The right to secession from an existing State member of the United Nations does not exist as such in the instruments or in the practice followed by the organization, since to seek to invoke it in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter.

He added further:

> However, to avoid any misunderstanding … it is necessary to specify that if the national unity claimed and the territorial integrity invoked are merely legal fictions which cloak real colonial and alien domination, resulting from actual disregard of the principle of self-determination, the subject people or peoples are entitled to exercise, with all the consequences thereof, their right to self-determination.

In the history of struggles for self-determination, an absolute priority has been claimed for that right, but this occurred only in the colonial situation. We may say that self-determination has the character of an absolute right only in respect of the colonial territories.[139] The ethnic group or minority in an existing independent state, where the right of secession is not recognised, has only the internal right of self-determination and enjoys protection against discrimination.[140]

b) Territorial Division

The question of the paramount nature of the right to self-determination has played a varying role in the practice of the United Kingdom relating to its non-self-governing or colonial territories. For example, in Gibraltar in 1967,[141] the General Assembly rejected the right to self-determination of the people of Gibraltar and was in favour of supporting the territorial integrity of Spain by the adoption of a resolution which declared the invalidity of the referendum held in Gibraltar: 'Any colonial situation which partially or completely destroys the national unity or territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations, and specifically with paragraph 6 of General Assembly Resolution 1514 (XV)'.[142] The resolution implied that the exercise of the right to self-determination by the people of Gibraltar

139 See James Crawford, 'The Rights of Peoples: Some Conclusions' in James Crawford (ed), *The Rights of Peoples*, (Oxford: Clarendon Press, 1988) at pp 159–175.

140 Cf Christiane Simmler, 'Selbstbestimmungsrecht der Völker contra *uti possidetis*?', Verfassung und Recht in Übersee (VRÜ) 32 (1999) at p 226.

141 See Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right to Self-determination', BYIL Vol 66 (1995) at pp 283–331.

142 Resolution 2353 (XXII), GAOR, 22nd Sess, Supp No 16, at p 53. UN Doc A/6716 (1967).

Whether the Hong Kong SAR has gained the status of autonomy in Chinese constitutional law is a domestic law question.

Consequently, the fundamental rights and freedoms of the inhabitants of the Hong Kong SAR agreed in the Sino-British Joint Declaration could only exist truly and fully when self-determination also exists. The right of people to self-determination is a continuing right, the legal effect of the exercise of this right will not be once and for all. Instead of 'shall have', the human rights Covenants use 'all peoples have'. Hence, once the people of Hong Kong are entitled to the right, the right exists continually. The people of Hong Kong did not exercise their right to self-determination to determine the establishment of the Special Administrative Region. In fact, during the drafting of the Hong Kong Basic Law, the legal status of the Special Administrative Region was ambiguous for most of Hong Kong's population. The establishment of the government of the Hong Kong SAR without the right to self-determination of the people of Hong Kong does not seem to have a legitimate basis from a democratic point of view.

It is beyond doubt that the existence of self-determination is the essence for the protection of the autonomy of the Hong Kong SAR. This is particularly related to the protection of the human rights of the region. However, returning to the question of the invalidity of the Sino-British Joint Declaration, one will note that all of the considerations mentioned above are dealing with the issue of the entitlement of, the existence of self-determination rather than the violation of the peremptory nature of self-determination. The right to self-determination of the people of Hong Kong still exists even if the population of Hong Kong did not directly participate in the negotiation. Here it deals with the measure or the method of implementing the right to self-determination. International law does not require an absolute method, but only a democratic measure, to realise self-determination. Whether the method of implementation is democratic or not seems not to be a rule of *jus cogens*. On that ground, the essence is how and to what degree the contents of the Sino-British Joint Declaration violate the peremptory nature of the right to self-determination with a radical contradiction to the rules of *jus cogens*.

In the Declaration, Hong Kong has been granted a higher degree of autonomy, including political, economic and cultural autonomy. The autonomy arrangements in the Declaration protect Hong Kong against intervention by China in local administrative affairs. It could be regarded as a means of protecting the existence of the local economy, the preservation of local identity and the freedom of development. All of these seem to be part of the notion of self-determination.[204] The Sino-British Joint Declaration potentially has restricted the

[204] Otto Kimminich, 'Rechtscharakter und Inhalt des Selbstbestimmungsrechts', in Dieter Blumenwitz and Boris Meissner (eds), *Das Selbstbestimmungsrecht der Völker und die Deutsche Frage* (Köln, Verlag Wissenschaft und Politik, 1984) pp 37–46, at pp 42–43.

implementation of self-determination in a democratic aspect, but individual human rights are basically protected in the Declaration. The contents of internal self-determination are principally realised through the autonomy arrangement in this international agreement. But the autonomy arrangement in the Declaration is not a right to autonomy or a right to self-determination, since the guarantee to this autonomy arrangement is limited to 50 years. It is unclear whether such autonomy will be retained afterwards. In this regard, the time limitation has violated the right to self-determination. The people of Hong Kong have the right to choose the political status of Hong Kong under the principle of territorial integrity within or after 50 years.

6) The Negotiations and Consultations Regarding the Future of Hong Kong

6.1) *The Aim of the Negotiation*

The expiry of the lease of the New Territories in 1997 was the main reason for the British government to seek a solution for the continuation of British Administration after 1997. After several visits of the British Prime Minister to Peking, the British government realised that any form of continuation of the British administration after 1997 would not be accepted by the Chinese government. The British government then tried to find effective measures to ensure the lasting stability and prosperity of Hong Kong.[205] Apparently, the real aim of the negotiation was not the implementation of self-determination of the people of Hong Kong but the interest of both governments to seek an alterative solution, with which they were satisfied. A joint statement was issued following a meeting between the British Prime Minister and the Chinese State Chairman Deng Xiaoping on 24 September 1982:

> Today the leaders of both countries held far-reaching talks in a friendly atmosphere on the future of Hong Kong. Both leaders made clear their respective positions on the subject. They agreed to enter talks through diplomatic channels following the visit *with the common aim of maintaining the stability and prosperity of Hong Kong*.[206]

6.2) *Channels of Expression of Public Opinion*

During the negotiation period, the people of Hong Kong were anxious to know what was being negotiated regarding their future. The Unofficial Members of the Executive Councils and Legislative Councils provided advice to the Governor and to British Prime Ministers on the course of the negotiations and on the attitude of the people of Hong Kong. British

[205] The UK White Paper, A Draft Agreement on the Future of Hong Kong, Cmnd 9352 (HMSO, London, 1984), Introduction, at para 10.

[206] The UK White Paper, A Draft Agreement on the Future of Hong Kong, Cmnd 9352 (HMSO, London, 1984), Introduction, at para 8 (emphasis added).

3) Tibet

3.1) *The Nature of Autonomy*

The autonomous status of Tibet was established by an agreement between the government of Tibet and the Central People's government on 23 May 1951: the Agreement of the Central People's government and the local government of Tibet on Measures for the Peaceful Liberation of Tibet (17–Article Agreement). The agreement was signed between Tibet (Tibet Autonomous Region) and China, not between China and a third State as in the case of the Sino-British Joint Declaration. The problem is that it is difficult to define the legal status of Tibet at the time the treaty was concluded.[276]

In accordance with Article III of the 17-Article Agreement, the Tibetan people have the right to exercise national regional autonomy. It states: 'According to the ethnic policy in the common program of the CPPCC,[277] under the unified leadership of the Central People's Government, the Tibetan people shall have the right to exercise regional ethnic autonomy'. It states further that the status quo in the Tibetan regional government structure as well as in the inherent position and authority of the Dalai

[276] Before Tibet became a 'national regional autonomy' of the PRC, the international legal status of Tibet was unclear. In 1720, the Manchu Emperor of China defeated a Dzungarian invasion of Tibet and rescued the Dalai Lama from personal captivity, and concluded an agreement with the Dalai Lama recognising that Tibet was a vassal (or feudatory) of the Manchu Emperor. From the legal point of view, the Sino-Tibetan relationship, namely the suzerain-vassal relationship in form of a superior and inferior state, is indefinable in international law. Meanwhile, Great Britain was seeking trading relationships with Tibet and India, and had three times recognised Chinese sovereignty over Tibet by negotiation with the Chinese government on the questions relating to Tibet (in the Chefoo Convention of 13 September 1876; in the Peking convention of 24 July 1886 and in the Calcutta Convention of 17 March 1890). However, the Tibetans refused to implement these agreements. Britain realised China's ineffective control over Tibet and forced Tibet, by concluding an agreement in 1904, to agree to the 1890 convention and the 1893 Trade Regulations. Afterwards, in the Convention between Great Britain and Russia on 31 August 31 1907, the British government announced that it would not enter into negotiations with Tibet 'except through the intermediary of the Chinese Government'. The Ch'ing dynasty, however, never waived any sovereign right in Tibet. In 1911, when the Ch'ing dynasty collapsed, Tibet emerged as a *de facto* independent State. That independence was not recognised by China, nor was it formally and unambiguously acknowledged by Britain, India or any other State. The revolution in China banished the Manchu Emperors from Peking and established a new republic. The new republic government issued a proclamation declaring that Tibet, Mongolia and Sinkiang were henceforth to be regarded as being on an equal footing with the provinces of China and as integral parts of the Republic. After the People's Republic of China was established, in 1950, the government of the PRC ordered the invasion of Tibet and took control over the country. On 23 May 1951, an agreement was signed between Tibet and the government of the PRC in which the autonomous status of Tibet was granted. See Tieh-Tseng Li, 'The Legal Position of Tibet', AJIL, Vol 50, No 2 (April 1956) at pp 394–404. See also Charles Henry Alexandrowicz-Alexander, 'The Legal Position of Tibet', AJIL, Vol 48, No 2 (April 1954) at pp 265–274; AD Hughes, 'Tibet', EPIL (Vol IV) at pp 858–860; Official Documents: 'Convention between the Governments of the Great Britain and Tibet, signed 7 September 1904',AJIL, (1907) at pp 80–83; Allen Carlson, *Beijing's Tibet Policy: Securing Sovereignty and Legitimacy* (Washington, East-West Center Washington, 2004); Karl Josef Partsch, 'New Findings on the Right of Self-Determination for Tibet?', GYIL, Vol 36 (1993) at pp 525–529.

[277] The Common Program of the Chinese People's Political Consultative Conference (CPPCC).

Lama shall be maintained (Articles II and IV). The Tibetan troops, in accordance with Article VIII of the Agreement, shall be gradually reorganised into the People's Liberation Army and shall become a part of the defence force of the PRC. The most significant difference to the autonomy of the Hong Kong SAR is that foreign affairs in Tibet shall be handled only by Peking (Article XIV).[278]

For legal and historical reasons, the Chinese government regards Tibet as an autonomous region that constitutes an inseparable part of China. In other words, Tibet becomes now a province of China.[279] Recently, the Chinese government issued a White Paper published in May 2004, which reiterated that Tibet is a 'regional ethnic autonomy'.[280] In the view of the Chinese government, the regional ethnic autonomy and the organs of self-government are established 'under the unified leadership of the State' and 'in areas where various ethnic minorities live in compact communities, so that the people of ethnic minorities are their own masters exercising the right of self-government to administer local affairs and the internal affairs of their own ethnic groups'.[281] One has to note that the term 'right of self-government' here is not recognised by the Chinese government as equal to the universal right of self-determination.[282] It has to be understood as the local regional government within China under the leadership of the central authority, but one that possesses some degree of administrative power. This situation is similar to the status of the Hong Kong SAR in the context of Chinese national law. The difference is that the autonomy of the Hong Kong SAR is established by an international treaty together with the autonomy statute — the Hong Kong Basic Law. Tibet's autonomy is also arguably based on an international treaty, but primarily this autonomous power is bestowed by the Constitution, with a view to protecting the national minority in Tibet.

The purpose of autonomy in Tibet differs from that of Hong Kong in that the former relates to an ethnic conflict in order to prevent any group discrimination, while the latter only has a territorial basis for the purpose of respecting the success of the practiced capitalism in Hong Kong and shielding it from the influence of socialism. It is intended to create an environment under which the socialist market-oriented economy in Mainland China and the capitalist market economy in Hong Kong may coexist.

[278] SeeTieh-Tseng Li, 'The Legal Position of Tibet', AJIL, Vol 50, No 2 (April 1956) at p 403.

[279] Charles Henry Alexandrowicz-Alexander, 'The Legal Position of Tibet', AJIL, Vol 48, No 2 (April 1954) at p 273; Karl Josef Partsch, 'New Findings on the Right of Self-Determination for Tibet?', GYIL, Vol 36 (1993) at p 526.

[280] The White Paper does not directly address the Tibetan government-in exile led by their spiritual leader, Dalai Lama, but it has called for further dialogue on the basis of autonomy within the framework of territorial integrity. See Lionel Kesenne, 'Chinese White Paper Rejects Dialogue with Tibet', EurAsia Bulletin, Vol 8, Nos 3&4 March–April (2004).

[281] White Paper, Regional Ethnic Autonomy in Tibet, (Information Office of the State Council of the People's Republic of China, May 2004, Beijing).

[282] Cf Gerald Schmitz, *Tibet und das Selbstbestimmungsrecht der Völker* (Berlin: Walter de Gruyter, 1998) at pp 67–68.

the Chinese government believes that 'it is necessary to combat big-nation chauvinism, mainly "Han" chauvinism, and to combat local national chauvinism' by promoting the common prosperity of all the nationalities. Notwithstanding the fact that the interest of the minority nationalities is protected under the Constitution, an express stipulation of a constitutional 'right to autonomy' or of the right to self-government cannot be found. The autonomy arrangement concerning minority nationalities appears to be a means to achieve certain administrative purposes. It is unlikely that granting them executive and regulatory and some limited or specified legislative competences is a collective right that establishes a higher degree of constitutional protection of self-government. The 'autonomous areas' are designated principally to solve the possible ethnic conflict between Han and minority nationalities. Autonomy is applied exceptionally to the Hong Kong SAR based on 'State necessity'.[352] In light of general autonomy arrangements enshrined in the Constitution, the 'Special Administrative Region' seems merely to be a regional, administrative and political autonomy and not to be a constituent entity having a collective, constitutional right.

ii) 'One Country, Two Systems'

a) The Meaning of 'One Country, Two Systems'

1) Deng Xiaoping's Idea

The PRC Constitution does not define the legal meaning of the term '*yiguo liangzhi* 一国两制 ' ('One Country, Two Systems'). A legal analysis appears to be very difficult since none of the provisions of the PRC Constitution mentions the term. In governmental documents, the term is often employed together with the word '*fangzhen* 方针 ('policy'). The term '*yiguo liangzhi fangzhen* 一国两制方针 ' ('the policy of 'One Country, Two Systems') appears frequently in Chinese literature. Chinese scholars are of the view that the term 'One Country, Two Systems' is a basic policy of the Chinese government and the Chinese Communist Party towards the reunification of China with an aim to solve the problems arising from Hong Kong, Macau and Taiwan.[353] It is frequently announced by the government of the PRC as a pattern to solve the so-called 'Taiwan Question' (*taiwan wenti* 台湾问题)[354] or the 'One China Problem' (*yige zhongguo wenti* 一个中国问题).[355] According to Deng Xiao-Ping, 'One Country, Two Systems' means that 'within the People's Republic of China, the Mainland with its one billion people will maintain the socialist system, while Hong Kong, Macau and Taiwan continue under the capitalist system'.[356] He explained:

> After reunification of the motherland, the Communist Party and the Kuomintang will supervise each other, cooperate and coexist for a long time to come. As a special administrative region, Taiwan may maintain a system different from that on the mainland, so that the two will complement and support each other. Only if reunification is truly based on reality can our country become strong, prosperous and dynamic. To support the reunification of the motherland means to love the country. On condition that the country is reunified, all problems can sooner or later be solved through consultation. It is our sincere hope that the people of all nationalities in Taiwan, our other compatriots in Hong Kong and Macao and the Chinese nationals residing abroad, together with the people of various nationalities on the mainland, will continue to offer suggestions, so as to contribute to peaceful reunification.

In the National People's Congress held in January 1979, the Chinese government issued a 'Message to Compatriots in Taiwan',[357] stating that the current situation and the opinions of the people of Taiwan would be respected and that a suitable and reasonable solution should be adopted so as to protect the people of Taiwan from being disadvantaged because of reunification.[358] One has to pay attention here that the term 'One Country, Two Systems', as frequently emphasised by Chinese scholars and officials, does not mean that there are two different systems which exist correspondingly in one country. It is meant that under the central

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352 Article 31 of the PRC Constitution (1982).

353 Xiao Weiyun 肖蔚云 , *Yiguo Liangzhi Yu Xianggang Tebie Xingzhengqu Jibenfa* 一国两制与香港特别行政区基本法 (Hong Kong: Xianggang Wenhua Jiaoyu Chubanshe 香港文化教育出版社 , 1990) at pp 1–2.

354 The preamble of the PRC Constitution (1982) states: 'Taiwan is part of the sacred territory of the People's Republic of China; it is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland'.

355 The Chinese government insists that the term 'One China' refers only to 'The People's Republic of China', while the Taiwanese government argues that 'One China' is 'the Republic of China' funded in 1912. For the implication of the term 'One China', see the official interpretation announced by the Taiwanese government (the Republic of China) on 1 August 1992: 'Guanyu Yige Zhongguo de Han Yi 关于一个中国的涵意 ', in *Dalu Diqu Sifa Shenzha Zhidu Zhi Yanjiu* 大陆地区司法审查制度之研究 (Taiwan Taipei: Xingzhengyuan Dalu Weiyuanhui 行政院大陆委员会 , 1998) at p 453.

356 Deng Xiaoping said, '… if the thought of "One Country, Two Systems" is a meaningful thought to the world, it must be attributable to the Dialectic Materialism and Historical Materialism of Marxism. Using the words of Mao Zedong, it is seeking truth from facts'. He added that 'the thought of "One Country, Two Systems" was not formed recently, but rather over the past several years, and mainly conceived subsequent to Third Secession of Eleventh Communist Congress of our Party … the Third Session of Eleventh Communist Congress restored Mao Zedong's line of seeking truth from facts, all starting from reality. To respect facts and reality is to respect the reality of Hong Kong and Taiwan. We suggest keeping Hong Kong capitalism intact, that is to execute "one country, two systems"'. Cited in Xao Wei-Yun, *One Country, Two Systems: an Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001) at p 6. See also Deng Xiao-Ping, *Selected Works of Deng Xiaoping*, Vol III (1982–1992); Deng Xiao-Ping, 'Yige Guojia Liangzhong Zhidu 一个国家两种制度 in *Jibanfa de Dansheng* 基本法的诞生 (Wenhui Chubanshe 文汇出版社) at p 180.

357 The 'Message to Compatriots in Taiwan' is translated from the Chinese official document '*Gao Taiwan Tongbaoshu* 告台湾同胞书 '.

358 '*Gao Taiwan Tongbaoshu* 告台湾同胞书 , *Xinhua Yuebau* 新华月报 , Vol 411 (Beijing 北京 , January 1997) at p 11.

Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.

Article 31 of the PRC Constitution does not directly stipulate the autonomy of the Special Administrative Regions. The systems, possibly the autonomy, which will be established in these Regions, depend on State policies when necessary. A constitutional entrenchment of the autonomy of a Special Administrative Region does not exist. It raises, thus, the question as to how the autonomy of the Special Administrative Regions will be protected under the Constitution. One can infer that the establishment of a Special Administrative Region in Article 31 of the Constitution does not automatically mean a creation of autonomy; the systems practiced in the Regions are not stipulated and it can vary. It provides a useful basis on which flexible and unique political structures may be developed to respond to the complexity of the unification of China. Such flexible stipulation is due to the fact that the Taiwan's future is still unclear. The purpose of Article 31 is to allow the existence of another system. The Chinese government repeatedly declares that the socialist system is the main system while others can exist to solve special historical problems. Therefore, to the question of what system shall be practiced in the Region is entirely determined by the subordinate law 'in the light of specific conditions'. This view is also supported by Article 62(13) of the PRC Constitution, which states that the NPC has the power 'to decide on the establishment of special administrative regions and the systems to be instituted there'.

The establishment of the Special Administration Region and the authorising of autonomy by the Constitution, in view of Article 31 of the PRC Constitution, are two different issues. The PRC Constitution recognises a right of a national minority to have their self-government; it does not say that the peoples of the Special Administrative Regions are also entitled to self-government. The autonomy of the national minority has already been recognised in the Constitution.[422]

One may conclude that the autonomy of the Special Administrative Regions is not directly derived from the Constitution; it is an autonomy arrangement made by the subordinated law under the Constitution.[423]

[422] See Articles 4, 113, 114, 115, 116, 117, and 121. Some Articles expressly make reference to a 'right of autonomy': Article 4 states that 'Regional autonomy is practised in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of *the right of autonomy*' (emphasis added). Article 89(11) grants the State Council the power 'to direct and administer affairs concerning the nationalities and to safeguard the equal rights of minority nationalities and *the right of autonomy* of the national autonomous areas' (emphasis added). In addition, Article 115 provides (emphasis added): 'The organs of self-government of autonomous regions, prefectures and counties exercise the functions and powers of local organs of state as specified in Section V of Chapter Three of the Constitution. At the same time, they exercise *the right of autonomy* within the limits of their authority as prescribed by the Constitution'.

[423] The Macau Basic Law, like the HKBL, is also a subordinate and ordinary law under the PRC Constitution: Texto Para Recolha De Opinioes Do Projecto Da Lei Básica De Regiao Administrativa Especial De Macau Da Republica Popular Da China.

These features lead to the consequence that there are two kinds of autonomies within the legal system of the PRC: the autonomy of the Special Administrative Region created by an autonomy statute and the autonomy of ethnic minorities granted by the Constitution. The former seems to be more political rather than constitutional.

v) The Self-Government

The degree of regional autonomy generally depends on how much regulatory powers are transferred from the Central government to local regions.[424] The executive, legislative and judicial powers are the significant yardsticks to measure the degree of autonomy. According to Hurst Hannum,[425] a full autonomous territory may possess most of the following features:[426]

1) A locally elected legislative body with some independent legislative authority;
2) A locally selected chief executive with responsibility for the administration and enforcement of state (national) as well as local laws;
3) An independent local judiciary with full responsibility for interpreting local laws; and
4) Areas of joint concern subject to power-sharing arrangements between the autonomous and central governments.

Article 2 of the HKBL states that the Hong Kong SAR is authorised by the National People's Congress to exercise a high degree of autonomy that means that it enjoys executive, legislative and independent judicial power, including final adjudication. The purpose of granting autonomy to a certain area is commonly to distinguish this area from the rest of a State. In order to protect the autonomous status or exactly the right of

[424] Frederik Harhoff, 'Institutions of Autonomy', NTIR, Vol 55 (1986) pp 31–40, at p 31.

[425] Hurst Hannum, 'Rethinking Self-determination', Virginia Journal of International Law, Vol 34 (1993) at pp 138–139.

[426] Regarding the question of what is meant by 'full autonomy', Hannum did not give it a definition. However, the features suggested by Hannum may represent the degree of the independence of an autonomous entity to the State concerned. There are no generally accepted criteria and patterns of autonomy in international law. The majority writers are of the view that 'autonomy' is difficult to be defined. As Thornberry points out, 'autonomy' is 'coming apart at the seams, lacking a define shape': see Thornberry, 'Image of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities', in Markku Suksi (ed), *Autonomy: Applications and Implications* (The Hague: Kluwer Law International, 1998) at p 98. According to Suksi, 'autonomy' 'seems to be very elastic and capable of stretching into a multitude of social and legal relationships': see Markku Suksi (ed), *Autonomy: Applications and Implications* (The Hague: Kluwer Law International, 1998) at p xi. Sohn, likewise, holds that the concept of 'autonomy' is in the position between the concept of a non-self-governing territory and an independent State. Autonomy is short of independence, granting the power to the inhabitants of the territory to control its economic, social and cultural affairs and thus it refers to a certain degree of independence. See LB Sohn, 'The Concept of Autonomy in International Law and the Practice of the United Nations', ILR, Vol 15(2) (1980) at p 190.

July 1997, *will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.*

The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997.

III. The Government of the People's Republic of China has already carried out separately the formalities required for the application of the treaties listed in the aforesaid Annexes, including all the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997.

IV. With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State.

The Government of the People's Republic of China have the honour to request Your Excellency kindly to place this Note and the Annexes to it formally on record and bring it to the attention of the other Members of the United Nations and the Specialised Agencies of the United Nations.[14]

There are many subjects listed in Annex II of the Notification, including 'human rights',[15] but both human rights Covenants are excluded from the list in Annex II of the Notification. Annex II of the Notification merely indicates the status of such treaties, that is, they may remain in existence in Hong Kong after the transfer of sovereignty. It seems difficult to ascertain whether the PRC has consented to be a party of them. The attitude of the Chinese government in relation to this category of treaties has been expressly announced in the HKBL. Regarding the treaties to which the PRC is not a party and which are not limited to States, the Hong Kong SAR may, in accordance with Article 152(2), using the name 'Hong Kong, China', become a member of them. The treaties which are limited to States and to which the PRC is not a party but which have been applied to Hong Kong because of it being British territory is the core of the problem. The ICCPR falls within this category. In this category, the PRC government is reluctant to accede to the treaties but offers assistance

[14] Letter of notification of treaties applicable to Hong Kong after 1 July 1997, deposited by the government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997 (emphasis added). See Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003, Vol I, Pt I, Chs I to XI (ST/LEG/SER.E/22) (New York: United Nations Publication, 2004): historical information, n 2, at p v; reprinted also in *International Legal Materials*, Vol 36 (Nov 1997) at pp 1675–1691.

[15] They are: international crime, private international law, customs, marine pollution, science and technology, civil aviation, merchant shipping, trade, health, intellectual property, conservation, transport, telecommunications, human rights, international labour conventions, and conventions establishing international organisations.

for the continued application of those treaties. Article 152(4) of the HKBL states (emphasis added):

> The Central People's Government shall, where necessary, *facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations* in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is *not* a member.

Article 153 (2) of the HKBL, in the same manner, states (emphasis added):

> International agreements to which the People's Republic of China is *not* a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, *authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.*

The same formulation is found in Annex I, Chapter XI of the Joint Declaration.[16]

As far as the nature of 'the notification of succession' is concerned, it is understood that a successor State notifies the parties of a multilateral treaty that it considers itself a party thereto. Article 2(1)(g) of the Vienna Convention on Succession of States in respect of Treaties of 1978[17] defines it as a notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty. This principle, based on respect for the sovereign will of the newly independent States, is applied to the newly independent States in order to give them the option to choose the treaties to which they wish to become a party.[18] It has become a rule of customary law that the newly independent state is not bound to maintain in force, or to become a party

[16] It states (emphasis added):

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

[17] The 1978 Vienna Convention on Succession of States in respect of Treaties entered into force in December 1996 when the 15th State had become a party. Among the members only Croatia, Estonia, Slovenia, Slovakia, and Ukraine are European States. Due to the relative low number of ratifications of the Convention, the international judicial bodies, such as the International Court of Justice, are referred to the Convention as a guiding instrument.

[18] Articles 17 and 18 of the VCSST, 1978.

employment,[133] b) non-payment of tax,[134] c) investigation of a travel agent suspected of conducting business contrary to the public interest,[135] and d) persons under investigation for offences under the Prevention of Bribery Ordinance.[136] The reservation of Article 12 of the ICCPR was invoked by the Courts of the Hong Kong SAR as a valid legal basis to prevent those people who might have the right of abode in the Hong Kong SAR from entering into the Region (*Abode Cases*).[137]

6) Article 13 of the ICCPR

Article 13 requires that an alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with the law, and after being allowed to submit reasons against his expulsion and have his case reviewed by, and to be represented for that purpose before, the competent authority or persons designated by the competent authority. The UK reserved Article 13 not to apply to Hong Kong in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority.

This reservation is given domestic effect in Article 9 of the Bill of Rights Ordinance in which a right of review in respect of a decision to deport a person not having a right of abode in Hong Kong or a right to be represented for this purpose before the competent authority is not conferred.[138]

7) Article 20 of the ICCPR

Under Article 20, any propaganda for war and any advocacy of national, racial or religious hatred constitute incitement to discrimination, hostility or violence shall be prohibited by law. The UK reserved the right not to introduce any further legislation and extended this reservation to its

133 Section 67 of the Employment Ordinance (Cap 57).
134 Section 77 of the Inland Revenue Ordinance (Cap 112).
135 Section 21 of the Travel Agents Ordinance (Cap 218).
136 Section 17 A of the Prevention of Bribery Ordinance (Cap 201).
137 *Ng Ka Ling & Ors v Director of Immigration* (Final Appeal No 14, 15, 16 of 1998 (Civil)) [1999] 1 HKLRD 315; *Chan Kam-Nga & Ors v Director of Immigration* (Civil Appeal No 40 of 1998) [1998] 2 HKC 405; *Chan Mei Yee v Director of Immigration* (HCAL No 77/1999 and No 99/1999); *Rai & Anor v Director of Immigration* (HCAL145/1999) [2000] 1 HKLRD C19; *Santhos Thewe & Anor v Director of Immigration* (HCAL 134/1999 and 7/2000) [2000] 1 HKLRD 71; *Tam Nga Yin & Anor v Director of Immigration* (FACV Nos 20 & 21 of 2000); *Yu Pik Ying & Anor v Director of Immigration* (HCAL No 1804 of 2000) [2000] 3 HKLRD I1; *Mok Chi Hung & Lau Wan Sze v Director of Immigration* (HCAL 371/2000).
138 In accordance with the Immigration Ordinance, persons who enjoy the right of abode in Hong Kong cannot be deported or removed from Hong Kong. Deportees who have been convicted of an offence punishable with imprisonment for not less than two years, or who are deemed by the Chief Executive that their deportation to be conducive to the public good, have a statutory right to have their cases reviewed by the Chief Executive in Council. Any person may make representations to the Chief Executive before a deportation order is made and can appeal to the Chief Executive after the order has been issued. Any person may petition the Chief Executive for the suspension or rescission of a deportation order in force.

dependent territories, declaring that in these matters, existing law already restricted the exercise of the freedoms of expression and peaceful assembly in the interests of public order.

The criminal law in the Hong Kong SAR does not prohibit propaganda for war, but if such propaganda or its manner of presentation, were such as to bring the sovereign government into hatred or contempt or generally to create disorder, discontent or disaffection, they might amount to sedition under the current law, at least if there was an intention to provoke a breach of the peace. If such propaganda were intended or tended to cause a breach of the peace and the language used were threatening, abusive or insulting, a prosecution might proceed under the Crimes Ordinance (Cap 200) or the Public Order Ordinance (Cap 245). Furthermore, the broadcast of particularly offensive material that is likely to incite hatred against any group of persons by reference to their race, sex, religion, or ethnic origin, to result in a general breakdown of law and order or gravely damages public health or morals is prohibited.

8) Article 24 of the ICCPR

Article 24 provides that every child, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, has the right, inter alia, to be registered immediately after birth and shall have a name and nationality. In this respect, the UK has declared the following reservation:

> The Government of the United Kingdom reserves the right to enact such nationality legislation as they may deem necessary from time to time to reserve the acquisition and possession of citizenship under such legislation to those having sufficient connection with the United Kingdom or any of its dependent territories and accordingly their acceptance of Article 24(3) and of the other provisions of the Covenant is subject to the provisions of any such legislation.

Article 20 of the Bill of Rights Ordinance gives domestic effect to the provisions of Article 24(1) and 24(2) of the Covenant.[139] After the transfer of sovereignty, the Nationality Law of the People's Republic of China is applicable to Hong Kong, Article 4 of which provides that any person born in China whose parents are Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. In addition, Article 6 of the Nationality Law of the People's Republic of China provides that any person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.

139 It states that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State; and every child shall be registered immediately after birth and shall have a name.

Commissioner of Customs and Excise.[153] In addition, only permanent residents have the right to vote and the right to stand for election in accordance with the law.[154]

In any case, the fundamental rights and duties provided in Chapter III of the HKBL are generally applicable to all Hong Kong residents, including permanent and non-permanent residents, except for certain political rights mentioned above, which are exclusively enjoyed by permanent residents.

c) Rights of 'Other Persons'

'Other Persons' are the persons who are not Hong Kong residents but reside in Hong Kong temporarily (e.g. visitors). Chapter III of HKBL is termed as 'Fundamental rights and duties of Hong Kong residents'. That means that 'other persons' who are not Hong Kong residents will not be protected directly under the HKBL. Annex I of the Sino-British Joint Declaration states that 'the Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law'. On that ground, the government of the Hong Kong SAR is also obligated to protect the rights and freedoms of 'other persons'. Nevertheless, such persons do not directly enjoy the fundamental rights prescribed in Chapter III of the HKBL. Article 41 of HKBL provides that (emphasis added): 'Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, *in accordance with law*, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter'. Under this provision, the non-Hong Kong residents are protected merely under common law and statutes rather than the HKBL.

The consequence would be that such 'other persons' are not entitled to invoke directly the fundamental rights before the court of the Hong Kong SAR and must resort to ordinary legislation. Thus, an appropriate interpretation would be that 'other persons' are not the holders of fundamental rights prescribed in Chapter III of the HKBL. Chapter III are mainly designed to protect the individual rights of all Hong Kong residents but not 'all people' in the Region.

d) Rights of Indigenous Inhabitants

There is a special category of persons whose traditional rights and interests are practically protected by the HKBL. These persons are the indigenous inhabitants of the New Territories.[155] It is, however, not clear what the traditional rights and interests mean. In practice, such rights are

[153] Article 101 of the HKBL.
[154] Article 26 of the HKBL.
[155] Article 40 of the HKBL.

generally related to rights to land and the right of male descendants to build 'small houses' and certain burial and funeral rights. Certain special rights are conferred only to male descendants of persons who were residents in 1898 of an established village in Hong Kong. It has been argued in public that the special protection of the male descendants contradicts the principle of equal right before the law.

iii) The Nature and the Status of Fundamental Rights

In general, fundamental rights are divided into citizen's rights (those to which only nationals of the State are entitled) and human rights (those to which every one is entitled).[156] This distinction does not apply to the rights enshrined in the HKBL. They are neither citizen's rights in the usual term, nor are they human rights. The holders of the rights are confined to 'residents' living in the Hong Kong SAR, including permanent and non-permanent residents. Notwithstanding the fact that the HKBL is an ordinary law, according to the view of the Court of the Final Appeal, the 'Fundamentals Rights' listed in Chapter III of the HKBL, are 'constitutional guarantees'.[157]

iv) Rights against the Government of the Hong Kong SAR

In general, the function of protecting fundamental rights is to prevent the State from infringing upon the right of citizens. The government of the Hong Kong SAR is the authority in the region exercising the power of administration. In case of violation of fundamental rights, Hong Kong residents are entitled to protection against the Government of the Region rather than against the PRC government. The courts of the Hong Kong SAR have no competence to challenge the authority of the PRC government if the issue is not within the autonomy of the Hong Kong SAR. The fundamental rights embodied in Chapter III of the HKBL are not national constitutional rights. The Hong Kong residents are not able to claim such rights against the Chinese government before the courts of

[156] Cf Hesse Konard, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20, neubearb Aufl, Heidelberg: Müller Verl, 1995) at p 129.
[157] The Court of Final Appeal held:

> Chapter III of the Basic Law begins by defining the class constituting Hong Kong residents including permanent and non-permanent residents and then provides for the rights and duties of the residents, including the right of abode in the case of permanent residents. What is set out in Chapter III, after the definition of the class, are the Constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these Constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so Constitutionally guaranteed.

Ng Ka-Ling & Ors v Director of Immigration (Final Appeal No 4, 15, 16 of 1998 (Civil)) [1999] 1 HKLRD 315.