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Christyne J. Vachon

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Hong Kong's 1997 Transition: U.N. Enforcement Mechanisms to Guarantee Hong Kong's Human Rights Will Endure after the Transition

Keywords

Human Rights Law, Organizations, Self-Determination, Democracy, Politics

HONG KONG'S 1997 TRANSITION: U.N. ENFORCEMENT MECHANISMS TO GUARANTEE HONG KONG'S HUMAN RIGHTS WILL ENDURE AFTER THE TRANSITION

CHRISTYNE J. VACHON*

I. INTRODUCTION

On July 1, 1997 the British handed Hong Kong back to the Chinese. As I walked through Sheung Wan, Hong Kong on that day, I wondered what impact the transition would have on Hong Kong residents. Had they heard of China's promises?¹ Were they concerned that China would not uphold these promises?² I witnessed the fanfare and festivities of the transition. I spoke with many people who had different views on its effects. One taxi driver expressed his fear that over the next fifty years, based on China's governmental influence, he would have to live in fear of every word he spoke and the possibility that he could be snatched up and detained as a prisoner. Contrarily, a member of the legal community shrugged his shoulders and expressed passing interest in the effects of the transition. What are the reasons for the public's uncertainty? My curiosity was provoked. Were there any sort of legal mechanisms to guarantee that the promises made in the international agreements pertinent to the transition, the Joint Declaration and the Basic Law, would be kept?

China committed itself to the Joint Declaration: Agreement on the Future of Hong Kong (Joint Declaration)³ and the Basic Law of the

*. University of Denver, College of Law, J.D. 1993; Wellesley College, B.A. 1993. I would like to thank Garret Chan, Julian Ha, Robert Huss, Maria Mitchell, Thomas Mitchell, Celia Taylor, and Richard Wong for their support and guidance.

1. See *infra* notes 58-73 and accompanying text.

2. See The Committee on International Human Rights, *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry*, RECORD, May, 1996, at 357, 359 [hereinafter RECORD]. "The advent of Chinese rule has raised concern beyond Hong Kong's borders about future rights of people to be free of government arbitrariness in Hong Kong; and that concern, in turn, focuses sharply on preservation and modification of its system of justice, the rule of law and independence of its judges and lawyers." *Id.*

3. Joint Declaration: Agreement on the Future of Hong Kong, Dec. 19, 1984, P.R.C.-U.K., 23 I.L.M. 1366 [hereinafter Joint Declaration]. See *infra* notes 58-73 and accompa-

Hong Kong Special Administrative Region of the People's Republic of China (Basic Law)⁴ to appease the rest of the world and to provide assurance for a smooth transition for Hong Kong back to Chinese rule.⁵ Pursuant to these agreements, China promised that Hong Kong will be basically autonomous and that the rule of law in Hong Kong will remain virtually unchanged for fifty years after the transition.⁶ This would mean that those laws in place prior to the transition would remain applicable for fifty years after the transition, thereby assuring certain protections to the citizens of Hong Kong.⁷ It is difficult to predict, however, whether China will actually uphold these agreements.⁸

Some argue that, at the very least, China has dubious intentions towards upholding these legal agreements. China's scarred reputation of not upholding agreements strengthens this argument.⁹ Furthermore,

nying text.

4. The Basic Law of the Hong Kong Special Administrative Region of The People's Republic of China (April 4, 1990) [hereinafter Basic Law]. See *infra* notes 74-87 and accompanying text.

5. See generally RECORD, *supra* note 2. Basic Law, *supra* note 4, at preamble; Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 304 (1996) (stating that the intent was to provide a "seamless transition where . . . people would wake up on July 1, 1997 and the only visible change would be the flag. . ."). But see *id.* at 304 (stating that "[d]reams of a smooth transition have evaporated."). The reasons for the evaporation started with Tiananmen massacre and continued into the 1992 proposals by Chris Patten for democratic reform. *Id.*

6. See Joint Declaration, *supra* note 3, at art. 1. See also Basic Law, *supra* note 4, at ch. I, art. 8; Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Laws in China*, 5 DUKE J. COMP. & INT'L L. 289, 294 (1995).

7. See generally Robert C. Berring, *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L.J. 431 (1997) (discussing the difference between the Chinese legal system and the Hong Kong rule of law).

8. The implication is that if China does not uphold these agreements, the human rights of the Hong Kong people are at stake. Interview with Gladys Li, Former Chairman of the Hong Kong Bar Association, in Hong Kong, SAR (July 7, 1997) [hereinafter Gladys Li Interview]; Angela Young, *Hong Kong: CD Products Market*, Industry Sector Analysis, August 20, 1997, available in WESTLAW, 1997 WL 9850761 (indicating that although it is impossible to predict the future of Hong Kong, there are reasons for optimism to believe that China will uphold its agreements). See generally Berring, *supra* note 7 (discussing how superficially the agreement seems to clearly indicate China's positive intention but at a closer look, Berring contends that not only will the current system probably not survive, it won't survive).

9. See Donna Deese Skeen, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L LAW 175, 178-79 (1995). The Joint Declaration for Hong Kong is compared to China's agreement with Tibet. The Tibet agreement guaranteed regional autonomy for Tibet as a method to securing the "peaceful liberation of Tibet." Despite this agreement, Tibet has, instead, been subject to Chinese rule and has been severely oppressed. Similarly, China violated its agreement to import wheat from the United States. See Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?* 6 CONN. J.

the legal policies of China do not favor ensuring international agreements;¹⁰ and China's human rights' tradition towards its citizens is replete with violations.¹¹ Other people argue that China has already violated parts of these agreements.¹² Possible violations range from abolishment of the Legislative Council¹³ to cancellation of a series of laws that ensured civil and political rights in Hong Kong.¹⁴

In light of this, the international community will likely act to ensure China's compliance. What mechanisms are available to do this? If such mechanisms fail and China violates the terms of the agreements, are there mechanisms for punishment?

INT'L L. 667, 687, 695 (1991).

10. See Paul Vitran, *Hong Kong 1997: Can the People's Republic of China Be Compelled to Abide by the Joint Declaration*, 28 GEO. WASH. J. INT'L L. & ECON. 445, 452 (1995). "[The PRC adheres to the international legal doctrine of *rebus sic stantibus*. . . if a 'fundamental change of circumstances' occurs, a state can unilaterally terminate its obligations under an agreement. The PRC's 1956 suspension of part of the Sin-Soviet Agreement on Cultural Cooperation is an example of China's application of *rebus sic stantibus*." *Id.* See also Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309, 318-20, 323 (1992) (discussing the Chinese concept of unequal treaties and the Five Principals of Peaceful Co-existence and how China may view the treaties signed between Great Britain and the Qing Dynasty from the 1800s as unequal and therefore invalid).

11. See Davis, *supra* note 5, at 317-18 (indicating that "those searching for evidence of respect for human rights, especially civil and political rights, in mainland Chinese official practices search in vain."). In China human rights are given second rate status to the duties to which they are associated. If the duties are fulfilled by the citizens, then the state grants the human rights as it deems necessary and appropriate. *Id.* Accord Alice H. Amsden et al., *China, The United States and Human Rights*, DISSENT, Spring 1997, at 7; Robin Reichman-Coad, *Human Rights Violations in China: A United States Response*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 163 (1994) (discussing the human rights abuses in China and what the United States' response should be). See generally Kelly M. Brown, *Execution for Profit? A Constitutional Analysis of China's Practice of Harvesting Executed Prisoner's Organs*, 6 SETON HALL CONST. L.J. 1029 (1996) (providing a brief discussion of the policies of China and their impact on human rights). See also U.S. Department of State, *China Country Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/china.html>>.

12. Gladys Li Interview, *supra* note 8. See also *infra*, notes 45-48 and accompanying text. See generally U.S. Department of State, *Hong Kong Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/hongkong.html>>. Originally, Hong Kong law maintained a provision that allowed for the government to refuse to register an organization that was "incompatible with peace, welfare, or good order." However, the freedom of peaceful assembly and association in Hong Kong was "practiced without significant interference". So in 1992, the Hong Kong Government repealed the provision. This allowed for demonstrations without government interference. However, the PRC has negated that action by including language similar to the repealed provision in the Basic Law.

13. See *infra* notes 90-100, and accompanying text.

14. Christopher Patten, Governor of Hong Kong, *Our Next Five Years: The Agenda for Hong Kong*, Address at the *Opening of the 1992-93 Session of the Legislative Council* (Oct. 7, 1992).

Many international actors might have a role to play.¹⁵ However, the focus of this piece is the United Nations and its ability to encourage China to fulfill its human rights promises through the International Covenant on Civil and Political Rights (ICCPR)¹⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷ These covenants are made applicable to Hong Kong through provisions of the Joint Declaration and the Basic Law.

This article is structured as follows: Part II introduces the general history of relations between China and Great Britain including a brief synopsis of the interplay of relevant agreements. Part III provides a more detailed analysis of the agreements pertinent to the Hong Kong transition; the Joint Declaration and the Basic Law. Part IV identifies the need for this analysis. Part V analyzes the relevant U.N. covenants.

II. HISTORY OF CHINA AND GREAT BRITAIN'S RELATIONSHIP

The history of relations between the United Kingdom and the People's Republic of China regarding Hong Kong is critical to an understanding of the potential problems the world community faces in trying to make China comply with the Joint Declaration and the Basic Law.¹⁸

At the beginning of the 19th century, Hong Kong was a small parcel of rocky land.¹⁹ It was undeveloped²⁰ and had a small population.²¹

15. In 1995, the Executive Committee of the Association of the Bar of the City of New York sent a mission of inquiry to Hong Kong. The purpose of this mission was to answer questions regarding the July 1, 1997 transfer. Beyond obtaining answers for their questions, the members of the mission determined that the "rule of law in Hong Kong will require careful world-wide monitoring," RECORD, *supra* note 2, at 358-59, 387. Resulting from their conclusions, the mission developed a "proposal for an on-going relationship between the Association of the Bar of the City of New York and the Hong Kong Legal Community. *Id.* at 388. Through joint conferences and other reporting methods, the joint Hong Kong and New York committee would channel important information regarding the status of the law in Hong Kong. *See id.* at 388-89; *see also* Robert J. Guttman, *Etienne Reuter: Head of the European Commission Delegation to Hong Kong*, EUROPE, July 17, 1997, at 22 (discussing the European Commissions role in securing Hong Kong post transition). Other possible international actors are Amnesty International, Human Rights Watch: Asia Watch, and other non-governmental organizations.

16. International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967), art 6, § 1 [hereinafter ICCPR]. *See infra*, notes 124-167 and accompanying text.

17. International Covenant on Economic, Social and Cultural Rights, 6 I.L.M. 360 (1967) [hereinafter ICESCR]. *See infra*, notes 201-232 and accompanying text.

18. *See* Davis, *supra* note 5, at 303.

19. *See* Keith M. Harris, *The Hong Kong Accord as a Model For Dealing With Other Disputed Territories*, 80 AM. SOC'Y INT'L L. PROC. 348, 349 (1986); Kristen Choo, *Zero Hour for Hong Kong*, 83 ABA J. 70, 70 (1997).

20. Harris, *supra* note 19, at 349. *But see* Choo, *supra* note 19, at 71 (stating that Hong Kong is the "planet's eighth-largest trading economy").

21. *See* John H. Henderson, *The Reintegration of Hong Kong into the People's Republic of China: What It Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 506 n.4 (1995) (stating that Hong Kong's population in 1851 was about 30,000);

Trading conflicts between western nations and China provoked the Opium War of 1840, the First Anglo-Chinese War.²² China's attempt to halt the British import of opium into China, further aggravated the conflicts between China and Great Britain.²³ After much wrangling, the Convention in the Treaty of Nanking of 1842 expanded the rights of the British to provide imports to China, compensated the British for the destroyed opium, and established Great Britain's possession of Hong Kong "in perpetuity."²⁴ On June 26, 1843, Hong Kong formally came into British possession following the conclusion of the Opium War.²⁵

The Second Anglo Chinese War occurred in 1860 and Great Britain acquired the southern tip of the Kowloon peninsula and Stonecutters Island.²⁶ At the end of that century, China, greatly weakened by the Sino-Japanese War, was forced to make additional concessions to Great Britain.²⁷ Great Britain leased the remainder of Kowloon from China in 1898 with a ninety-nine year lease of the "New Territories" designated to end on July 1, 1997.²⁸

Through the years, China has continued to nurse the open wound created by Britain's acquisition of the Hong Kong territories.²⁹ Nonetheless, since 1898 Hong Kong has been a British colony and the laws and policies of the United Kingdom have governed Hong Kong.³⁰ Laws

Huang & Qian, *supra* note 6, at 301 n.80 (providing statistics that "Hong Kong covers approximately 412 square miles . . . with a population in 1985 of 5.4 million"); Choo, *supra* note 19, at 71 (indicating that Hong Kong's population in 1997 was 6.3 million).

22. See Skeen, *supra* note 9, at 176-77 (discussing the politics behind Britain's opium trade and Britain's acquisition of Hong Kong).

23. *Id.*

24. Treaty of Nanking, Aug. 29, 1842, China-Gr. Brit., 30 BRIT. FOR. ST. PAP. 389, 93 CONSOL. T.S. 465; Skeen, *supra* note 9, at 176-77 (quoting Jan Morris, *Hong Kong*, at 18).

25. See Elizabeth G. Bynum, *Hong and China: The 1997 Transition*, 34 COLUM. J. TRANSNAT'L L. 299, 299 (1996); RECORD, *supra* note 2, at 357, 362; Henderson, *supra* note 21, at 349-350

26. Convention of Friendship, Oct. 24, 1860, China- Gr. Brit., 50 BRIT. FOR. ST. PAP. 10, 123 CONSOL. T.S. 71; See Skeen, *supra* note 9, at 176-77.

27. See Henderson, *supra* note 21, at 509.

28. Convention of Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 90 BRIT. FOR. ST. PAP. 17, 186 CONSOL. T.S. 310. See also Vitrano, *supra* note 10, at 446.

29. See Henderson, *supra* note 21, at 510-11 (discussing China's strong desire to reunite all of China and China's belief that Hong Kong was acquired by Britain through "unequal treaties"); Kieron Flynn, *HK Says Nothing Changed After 100 Days, But Doubters Remain*, AGENCE FR. PRESSE, Oct. 7, 1997, available in WESTLAW, 1997 WL 13409085; Berring, *supra* note 7, at 433.

30. See RECORD, *supra* note 2, at 357, 362. Consequently, Hong Kong's legal system is identical to the English legal system. Hong Kong's body of law, prior to the reversion, included statutory provisions and common law doctrines, for example, letter patent, royal instructions, & colonial regulations. See Huang & Qian, *supra* note 6, at 296-97. After July 1, 1997, the effect of the enactment of laws in Parliament on Hong Kong became obsolete. See Denis G. Brock, *Hong Kong*, in ENFORCEMENT OF JUDGMENTS WORLDWIDE 39 (Charles Platto & William G. Horton, ed., 1992) [hereinafter Platto & Horton].

enacted in Parliament in England either directly affected Hong Kong law or indirectly affected Hong Kong law via statutory implementation.³¹

In 1949, communism was established in China with the success of the Chinese Communist Revolution.³² China established a civil law system, but this system was unable to replace the traditional beliefs of Confucianism.³³ A communist Shanghai became less attractive as the primary trade port into China.³⁴ Instead, Hong Kong rapidly became the center of trade with China.³⁵ The 1950s were significant years for Hong Kong as it increased its importance in the international community.³⁶

Hong Kong's vulnerability to the influences of China became obvious when, as a result of the Great Leap Forward and the Cultural Revolution in China, Hong Kong experienced societal upheavals.³⁷ Since Hong Kong had become an integral part of international trade and the

31. Since the Hong Kong legal system was derived from the British legal system, the Letters Patent are the core constitutional documents. Within the Letters Patent are the Royal Instructions to the Governor and the power for the legislature. Hong Kong law is constituted by [1] "statutes made by the Governor by and with the consent of the Legislature, 2) the common law of England and rules of equity except insofar as they are oppressive; 3) Act of Parliament specifically incorporated by reference in local legislation; 4) Act of Parliament which either expressly or by necessary implication applies to Hong Kong; and 5) Orders-in-Council made by the Queen on the advice of her Privy Council." Neoh, *supra* note 10, at 339. See, e.g., Davis, *supra* note 5, at 306 (discussing British Colonial Rule, which was characterized by authoritarian colonialism with acknowledged strength in economic success, laissez faire policies, a free press, the rule of law, etc.); *Hong Kong: New IP Regime In Hong Kong*, BUS. MONITOR, Sept. 9, 1997, available in 1997 WL 10293455 (discussing whether intellectual property regulations will continue after the transition); Ann Jordan, *Lost in the Translation: Two Legal Cultures, The Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L. J. 335, 337 (1997) (stating that this common law system applied by Britain "sets out objective procedures that, under a rule of law system, are applied equally to everyone. . . [and] has been accepted by the majority of Hong Kong people. . .").

32. See RECORD, *supra* note 2, at 363; see also Huang & Qian, *supra* note 6, at 289 (indicating that the People's Republic of China (PRC) was established in 1949 and it has been a "unitary socialist legal system with a single legal district").

33. See Jordan, *supra* note 31, at 338. Confucianism is based on complicated rituals and codes of conduct based on etiquette. *Id.*

34. See Elizabeth Yee, *Hong Kong and China in 1997: An Examination of Possible Legal and Economic Implications for United States Business*, 36 SANTA CLARA L. REV. 595, 595-96 (1996).

35. See generally *id.* Currently, Hong Kong "is an important international financial center, second only to Tokyo in the Pacific region. . . Hong Kong is among the top twelve traders in the world. Its Gross Domestic Product Per Capita in 1989 was H.K. \$85, 325 (U.S. \$11,000). . ." Neoh, *supra* note 10, at 310.

36. See Yee, *supra* note 34, at 595 (discussing Hong Kong's role as "the Pearl of the Orient"). See also RECORD, *supra* note 2, at 363.

37. See RECORD, *supra* note 2, at 364; see also Skeen, *supra* note 9, at 192 (stating that Hong Kong is presently the "best gateway to China", however, Hong Kong's stock market is "vulnerable to internal Chinese politics.").

date for Hong Kong's transition back to China loomed closer, Hong Kong residents and international onlookers became concerned about the ground rules for the transition.³⁸

This concern provided the push to Great Britain and China to sign the Sino-British Joint Declaration,³⁹ the reversion agreement, on December 19, 1984.⁴⁰ The Joint Declaration is the precursor to the Basic Law,⁴¹ the final plan of law and government for post-transition Hong Kong. Requirements for the Basic Law stem from the Joint Declaration's demands that the Basic Law must enumerate and ensure all the guarantees provided in the Joint Declaration.⁴² Between the time that the Joint Declaration took effect on December 19, 1984 and the last day of British rule on June 30, 1997, the Government of the United Kingdom was responsible for the "administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability."⁴³ The government of China was to cooperate towards this end.⁴⁴

38. See Harris, *supra* note 19, at 350 (indicating that one of the primary concerns was the future of property transactions which were dictated by a 15 years lease plan, until the end of the United Kingdom's lease of part of the Hong Kong territory); Davis, *supra* note 5, at 310-11.

39. See generally Joint Declaration, *supra* note 3. Not every article of the Joint Declaration will be discussed since certain aspects of the agreement are more relevant to this discussion than others; therefore not every article of the Declaration will be itemized.

40. See Vitrano *supra* note 10, at 446. See also Harris, *supra* note 19, at 350-51.

41. The Basic Law, *supra* note 4. The Basic Law was designed to take effect on July 1, 1997 and to last for 50 years.

42. See Yee, *supra* note 34 at 600; Vitrano, *supra* note 10, at 447, 455-56. The Joint Declaration was the original agreement between the United Kingdom and China. The two countries agreed, in the Joint Declaration, to the content of the Basic Law. The Joint Declaration provides that the Basic Law will be established after the Joint Declaration but will contain all of the parameters agreed to in the Joint Declaration. Joint Declaration, *supra* note 3, at arts. III, XII. The Basic Law was created by the Basic Law Drafting Commission, comprised of 59 people, all of whom were appointed by the government of China and less than 50% of whom were from Hong Kong. See Harris, *supra* note 19, at 352. This deserves skepticism because a group of people hand picked by China and not adequately representative of the Hong Kong people created a document for Hong Kong to preserve Hong Kong's current system. It is difficult to imagine that this group would not be biased in favor of granting more power to China than originally assumed in the Joint Declaration, to take away Hong Kong's rights. Pursuant to this view, the group created the Basic Law, which is unclear and leaves flexibility for multiple interpretations in favor of granting more authority to China. Gladys Li Interview, *supra* note 8.

43. Joint Declaration, *supra* note 3, at art. IV. See generally, Vitrano, *supra* note 10, at 449 (discussing the reforms attempted by Governor Chris Patten in Hong Kong following 1992 and prior to July 1, 1997).

44. Joint Declaration, *supra* note 3, at introduction, art. IV (stating: [T]he government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection."). See generally, RECORD, *supra* note 2, at 367, 369 (discussing Annex I); Harris, *supra* note 19, at 351 (indicating that before June 30, 1997 "the British Government

The 1989 Tiananmen Square massacre in China created a tremendous scare in Hong Kong. The British colonial government responded by passing the Bill of Rights Ordinance (BRO) and amending their current laws to comply with the BRO.⁴⁵ The Hong Kong BRO incorporated the ICCPR into Hong Kong rule of law.⁴⁶ To avoid protest from China that the BRO violated the Joint Declaration, Great Britain copied the ICCPR almost identically.⁴⁷ China was nonetheless agitated and indicated that the BRO was unnecessary because the Basic Law already provided adequate protection of rights.⁴⁸

In 1994, Governor Patten established limited economic and political reforms, including electoral reforms.⁴⁹ The reforms were to "safeguard Hong Kong's way of life, the way of life set out in page after page of the Joint Declaration. . ." and to provide for more democracy post-1997.⁵⁰

On July 1, 1997 Hong Kong transitioned from British colonial rule to the Hong Kong Special Administrative Region of China (SAR).⁵¹ No

[was] responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability, and China will cooperate in that effort.") This provision is the counter argument to China's claim that the political and economic reforms instituted by Patten in 1992 were contrary to the Joint Declaration. The United Kingdom maintained that movement towards democracy was necessary for the administration of Hong Kong, and that China should cooperate. In fact, China is violating the Joint Declaration by denying the legitimacy of the United Kingdom's actions to administer to Hong Kong's needs.

45. See RECORD, *supra* note 2, at 378; Choo, *supra* note 19, at 72.

46. See Skeen, *supra* note 9, at 199-200; Jordan, *supra* note 31, at 368. The Bill of Rights Ordinance (BRO) was Hong Kong's first written bill of rights. See RECORD, *supra* note 2, at 378.

47. See Jordan, *supra* note 31, at 365. The Joint Declaration may be violated by a fundamental change in the Hong Kong rule of law. Since the ICCPR remained applicable to Hong Kong, according to Article 39 of the Basic Law, China should not have had any qualms. See RECORD, *supra* note 2, at 379. China, nonetheless, was troubled by the BRO. See *id.* at 379-80 (indicating China's fundamental issue was with Article 3(a) of the BRO because it nullified any previous laws that contradicted the BRO).

48. See Jordan, *supra* note 31, at 367-68.

49. See Choo, *supra* note 19, at 72. Prior to 1994, the Governor of Hong Kong was always nominated by London and 39 out of 60 members of LegCo were elected. Vitrano, *supra* note 10, at 449.

50. Vitrano, *supra* note 10, at 449 (quoting a speech given by Governor Patten and discussing the impact of the reforms).

51. See Harris, *supra* note 19, at 351-52 (stating that Hong Kong is to be restored to Chinese sovereignty effective July 1, 1997 and will become a special administrative region (SAR)). Article 31 of the Chinese Constitution provides for the establishment of a special administrative region. See also Daniel R. Fung, *Foundation for the Survival of the Rule of Law in Hong Kong - The Resumption of Chinese Sovereignty*, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 288 (1996). See also RECORD, *supra* note 2, at 367, n.14. See also *infra* note 55 and accompanying text (indicating that part of the motivation for the establishment of Special Administrative Region is the "one country, two systems" policy); Jordan, *supra* note 31, at 351-52 (stating that an "SAR is not just an economic unit distinct from the rest of the country. It is a localized political-legal entity and a socio-economic reality differentiated from the general socialist system but forming part of a unitary state. . .").

longer subject to the administration of Great Britain, Hong Kong law became administered by China based on Deng Xiaoping's "one country, two systems" policy.⁵² This policy was guaranteed in the Sino-British Joint Declaration and promulgated in the Basic Law.⁵³ In the past, when the British have ceded a territory, they have established a clear and detailed plan for the change.⁵⁴ The usual and most ideal procedure would have been for the existing legislature in Hong Kong, the Legislative Council (LegCo),⁵⁵ to provide rules for the new incoming legislature. However, China would not allow this type of conversion.⁵⁶ Instead, the new government of Hong Kong started with a new plan of law, the Basic Law.⁵⁷

III. AGREEMENTS PERTINENT TO THE HONG KONG TRANSITION

A. *The Joint Declaration: An International Agreement*

The Sino-British Joint Declaration is a treaty expressing the general agreement that the common goal of the government of the United Kingdom and the government of the People's Republic of China is for China to resume authority over Hong Kong on July 1, 1997.⁵⁸ Ratified

52. Deng Xiaoping established the "one country, two systems" policy in 1978 in response to China's controversy with Taiwan. See Huang & Qian, *supra* note 6, at 289. The Joint Declaration, *supra* note 6, art. III, para. 5. Under this policy Hong Kong will maintain its capitalist system despite the fact that China, its sovereign power, is a socialist system. See Yee, *supra* note 34, at 600.

53. The "one country, two systems" policy is guaranteed in the Sino-British Joint Declaration and promulgated in the Basic Law. See Yee, *supra* note 34, at 600. The Joint Declaration was the original agreement between the United Kingdom and China. The two countries agreed, in the Joint Declaration, to the content of the Basic Law. The Joint Declaration provides that the Basic Law will be established after the Joint Declaration but will contain all of the parameters agreed to in the Joint Declaration.

54. Gladys Li Interview, *supra* note 8. See, e.g., Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'Etat & Common Law*, 27 CORNELL INT'L L. J. 49, 60 (1994) (discussing the extensive legal provisions made by the British government for the transition of Southern Rhodesia from a British colony to an independent nation); see also *id.* at 90-91 (discussing the legal mechanisms provided by the British government for establishing the government and laws of Lesotho when it gained independence from Britain).

55. The Legislative Council was the legislative body existing in Hong Kong prior to July 1, 1997.

56. Gladys Li Interview, *supra* note 8. See also Davis, *supra* note 5, at 305 n.7 and accompanying text (discussing that although China's original intent was to keep negotiations between itself and Great Britain, Hong Kong had an un-severable interest in the process and therefore this tripartite relationship was termed the three legged stool).

57. *Id.* I believe that China's motivation was to ensure that they had the maximum opportunity to interpret and configure the Joint Declaration and the Basic Law to their advantage. Since the Basic Law is open to varied interpretation and interpretation by China alone (following the transition Great Britain no longer has any influence), much of the autonomy and guarantee of basic rights for Hong Kong citizens could vanish.

58. Joint Declaration, *supra* note 3. The issues that developed during these discus-

in 1985,⁵⁹ the Joint Declaration provides the framework for the transition of control agreed to by China and the United Kingdom,⁶⁰ for the interactions between Hong Kong and China after the transition occurs (committing the "one country, two systems" polity to writing),⁶¹ and for the establishment of the Basic Law.⁶²

The Joint Declaration institutes the general framework agreed to by China,⁶³ in which China guarantees a high degree of autonomy and basic human rights for Hong Kong and its citizens, except with regard to foreign affairs and defense affairs.⁶⁴ According to the Joint Declaration, "the laws currently in force in Hong Kong will remain basically unchanged"⁶⁵ and "[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the life-style."⁶⁶ The Joint Declaration guarantees basic human rights such as freedom of person,

sions related to the differences between the capitalist Hong Kong society, which provides a high degree of personal and economic freedoms, and the communist government of China and its socialist society. See Harris, *supra* note 19, at 349 (indicating that the assurance that the "one country-two systems" concept would be available helped to mitigate controversies that developed during the discussions that led to the Joint Declaration and helped ensure adoption of the Joint Declaration).

59. Subsequent to being signed, the Joint Declaration was registered with the United Nations. See Fung, *supra* note 51, at 289-90. Some scholars argue that registration with the U.N. was "merely a symbolic gesture" by China to the people of Hong Kong. As an enforcement mechanism, it is insubstantial. See Vitrano, *supra* note 10, at 458-59.

60. See generally Harris, *supra* note 19, at 351-52 (stating that the Joint Declaration features Britain's agreement to "restore" Hong Kong to Chinese sovereignty effective July 1, 1997. . . and during the transitional period prior to June 30, 1997, the British government is responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability, and China will cooperate in this effort. . . upon China's resumption of sovereignty in 1997, Hong Kong becomes a special administrative region (SAR), as provided in [A]rticle 31 of the Chinese Constitution." For fifty years Hong Kong will be a "quasi-autonomous entity of a semi-capitalist nature within the framework of a Socialist polity", in other words, the "one country, two systems" idea.

61. See Yee, *supra* note 34, at 600. See also Huang & Qian, *supra* note 6, at 289.

62. See Yee, *supra* note 34, at 600; see also Vitrano, *supra* note 10, at 445 (indicating that the "one country-two systems" policy has been promoted by China for the conversion of both Hong Kong and Macau back to the PRC).

63. See Harris, *supra* note 19, at 350-51.

64. See Joint Declaration, *supra* note 3, at introduction, art. III, para. 2 (stating that foreign and defense affairs are the PRC's responsibility). See generally Fung, *supra* note 51, at 290-91 (elaborating that Hong Kong "will maintain her present freedoms and lifestyles as well as her own political, economic, social, cultural, legal, and judicial systems which are fundamentally different and separate from those of the rest of China. Capitalism will continue to be the prevailing economic system. Socialism, as state policy, will not be applied.").

65. Joint Declaration, *supra* note 3, at art. III, para. 3. "[t]he Hong Kong SAR will be vested with executive, legislative and independent judicial power, including that of final adjudication." *Id.* In other words, the current legal system in Hong Kong, which is derived from the English legal system, will remain basically unchanged. See also Basic Law, *supra* note 4, at art. 8 (discussing the laws in force).

66. Joint Declaration, *supra* note 3, at introduction, art. III, para. 5.

speech, assembly, correspondence, academic research, and association.⁶⁷ In theory, the "one country, two systems" policy provides a means to this end.

The Annexes of the Joint Declaration elaborate on the basic points outlined in the main body of the Joint Declaration.⁶⁸ Annex I, part 1 provides in part, that China will enact a Basic Law that ensures that the capitalist system of Hong Kong will remain unchanged for fifty years after the transition⁶⁹ and provides guidelines for achieving.⁷⁰

Annex I, part II provides the laws to be enforced in Hong Kong. They include the Basic Law and the laws "previously in force in Hong Kong and law enacted by the Hong Kong Special Administrative Region legislature. . ." provided they do not contradict the Basic Law. Any laws enacted by the legislature of Hong Kong that are not in accordance with the Basic Law are not valid.⁷¹ Part III discusses the judicial system for the Hong Kong SAR.

Part XIII protects basic rights and freedoms that existed in Hong Kong prior to the transition and these rights include "freedom of person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike of demonstration. . ."⁷² Part XIII further stipulates that the "International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights *as applied* to Hong Kong shall

67. *Id.* at para. 3. "Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong SAR. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."

68. See Harris, *supra* note 19, at 350-51.

69. Joint Declaration, *supra* note 3, at Annex I, para. 1 ("Except for foreign and defense affairs. . . the Hong Kong Special Administrative Region shall be vested with executive, legislative, and independent judicial power, including that of final adjudication."). See generally RECORD, *supra* note 2, at 368-69 (discussing Annex I).

70. Joint Declaration, *supra* note 3, at Annex I, para. 1. The chief executive of the Hong Kong SAR is to be "selected by election or through consultations held locally and be appointed by the Central People's Government." The legislature of Hong Kong will be established through elections and the chief executive will be accountable to the legislature to certify that transactions are legal. See also Gladys Li Interview, *supra* note 8.

71. Joint Declaration, *supra* note 3, at Annex I, para. 2; RECORD, *supra* note 2, at 370. Annex I, part 3 provides for the judicial processes in the Hong Kong SAR. The judges for Hong Kong will be appointed by the chief executive of Hong Kong who will act "in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Annex I part 3 further provides that the power of final judgment is to be vested in the court of final appeal in Hong Kong. Joint Declaration, *supra* note 3, at Annex I, para. 3.

72. Joint Declaration, *supra* note 3, at Annex I, para. XIII. "The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong. . ."

remain in force."⁷³

B. *The Basic Law*

As indicated by the Joint Declaration, the Basic Law was adopted by the PRC's National People's Congress and is considered by Hong Kong citizens to be the mini-constitution for the Hong Kong SAR.⁷⁴ The Basic Law reiterates the promises made in the Joint Declaration but elaborates further on the actual law to uphold the promises made in the Joint Declaration.⁷⁵

First, the Basic Law stipulates the rights of the Hong Kong people.⁷⁶ The Basic Law provides for the fundamental rights and duties of the residents. These rights include a right to life, equality before the law, freedom from torture, personal liberty, liberty of movement, privacy of communications, freedom of expression, religion, freedom of association, and the right of peaceful assembly.⁷⁷

Second, the Basic Law establishes the plan of government for Hong Kong.⁷⁸ Continuing the theme of the Joint Declaration, the Preamble of the Basic Law indicates "that under the principle of '*one country, two systems*', the socialist system and policies will not be practiced in HK."⁷⁹ Chapter IV details the political structure. Article 45, while discussing the method for selection of the Chief Executive, stipulates that the ultimate goal is to elect the Chief Executive through *universal suffrage*.⁸⁰ Article 68 stipulates that another ultimate goal for change in Hong Kong is to have a legislature that is elected by *universal suffrage*.⁸¹

73. Joint Declaration, *supra* note 3, at Annex I, para. XIII.

74. See Vitrano, *supra* note 10, at 447; Jordan, *supra* note 31, at 335, 350. See also RECORD, *supra* note 2, at 370 (discussing that the Basic Law "will become the Hong Kong SAR's "constitution", replacing the Letters Patent, the document issued under the Queen's hand that establishes the basic framework of the colonial government.") But see Jordan, *supra* note 31, at 350-52 (indicating that China differs with Hong Kong as to the perception that the Basic Law is a mini-constitution. China perceives the Basic Law as a "non-enforceable statement of policy").

75. See Vitrano, *supra* note 10, at 447. See also RECORD, *supra* note 2, at 370.

76. See Harris, *supra* note 19, at 352; Jordan, *supra* note 31, at 335.

77. Basic Law, *supra* note 4, at ch. 3, arts. 24-42. Annex III to the Basic Law provides exceptions to the general rule that the national law of the PRC will not be applied to Hong Kong. These exceptions include: 1) recognition of Beijing as the capital of the PRC; 2) "The March of Volunteers" as the National Anthem; 3) the Five-star red Flag as the National Flag; 4) National Day falls on Oct. 1; 5) PRC's government's Declaration of the Territorial Sea; 6) the PRC nationality law; and 7) PRC regulations concerning Diplomatic Privileges and Immunities.

78. See Harris, *supra* note 19, at 352; Jordan, *supra* note 31, at 335.

79. Basic Law, *supra* note 4, at pmb1 (emphasis added). The assumption that Chinese and English are interchangeable is flawed and causes much difficulty for interpretation. See Jordan, *supra* note 31, at 339.

80. Basic Law, *supra* note 4, at art. 45.

81. *Id.* at art. 68. Provisions in the Basic Law that indicate that the ultimate goal is

However, the way the Basic Law was written allows China to manipulate Hong Kong's autonomy.⁸² Chapter I, Article 8 of the Basic Law proscribes that the laws previously operable in Hong Kong will apply only if they do not contravene with the Basic Law.⁸³ If the Hong Kong courts need to interpret a provision of the Basic Law, the Hong Kong courts need to seek the relevant interpretation from the PRC Standing Committee. Article 158⁸⁴ dictates that it is the PRC Standing Committee's power to interpret the Basic Law.⁸⁵

universal suffrage imply that the political movement in Hong Kong SAR should be towards democracy. Members of the democratic movement firmly believe that the Basic Law stipulates that the path is to be towards democracy. See Martin Lee, *The Slow Squeeze on Hong Kong*, WASH. POST, Sept. 12, 1997, at A25.

82. See Davis, *supra* note 5, at 308 (discussing that early in the drafting of the Basic Law, China seemed willing to incorporate varying political viewpoints including those of liberals like Marline Lee, but following direct confrontation with these liberals, China reformed its policies and refused to incorporate liberals whose views opposed China's). The Basic Law creates a huge gateway for China to influence the laws of Hong Kong. Gladys Li Interview, *supra* note 8.

83. Basic Law, *supra* note 4, at ch. I, art. 8. See Bryan A. Gregory, *Envisioning Futures, The Battle Over Democracy in Hong Kong*, N.C. J. INT'L L. & COMM. REG. 175, 193 (1993) (indicating that "it is possible that the Standing Committee could legally implement or rescind procedures almost at will."). The Basic Law, Chapter I, Article 11 indicates that "[t]he systems and policies practiced in the Hong Kong SAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and relevant policies, shall be based on the provisions of this Law." The Basic Law, Chapter I, Article 11 further provides that "[t]he courts of the Hong Kong SAR shall have jurisdiction over all cases in the Region, except. . . shall have no jurisdiction over acts of state such as defense and foreign affairs. . ." But see Jordan, *supra* note 31, at 336 (stating that the "ambiguity errs in favor of the common law interpretation", in other words the common law of Hong Kong).

84. See Jordan, *supra* note 31, at 354 (stating that "Articles 17, 158, and 160. . . transfer considerable judicial powers of interpretation to the Standing Committee."). Since Article 158 gives complete power to the Standing Committee of the PRC to interpret the Basic Law, by implication it gives the Standing Committee the power to dictate which parts of the Basic Law are enforceable. *Id.* at 355. See Fung, *supra* note 51, at 301.

85. Basic Law, *supra* note 4, at ch. VIII, art 158. See also RECORD, *supra* note 2, at 370-71. See Gladys Li Interview, *supra* note 8. Article 158 of the Basic Law does not allow Hong Kong to have the "final say in the interpretation of the Basic Law" and it is understood that it is "undesirable" to make amendments to the Basic Law. The Standing Committee delegates to the SAR courts the power to interpret the Basic Law if issues concerning the Basic Law should arise in the course of litigation. If an issue should arise which falls within the autonomy of the SAR, the SAR courts may interpret relevant provisions of the Basic Law in the normal course of litigation up to the Court of Final Appeal. Before the Court of Final Appeal delivers final judgment however, it must seek the review of the Standing Committee of the NPC. The Standing Committee is then obliged to consult a committee of constitutional experts know as the Committee for the Basic Law. It consists of six mainland members and six Hong Kong members, including persons from the legal profession, who will render an advisory opinion to the Standing Committee. The Standing Committee will then make its interpretation, which will be binding on the Court of Final Appeal. No interpretation of the Standing Committee affects judicial decisions

Since no clear procedure indicates when a law contravenes with the Basic Law, there is tremendous latitude for China to influence the laws that will be allowed to continue to apply to Hong Kong. Additionally, review by the National People's Congress of all of Hong Kong's laws to determine if they violate the Basic Law undermines the autonomy of Hong Kong and the ability for final adjudication.⁸⁶ In further derogation of Hong Kong's autonomy, Article 17 maintains a similar procedure for new law enacted by the Hong Kong legislature. Ultimately, when Article 158 is read with Article 19, it gives the Standing Committee the unreviewable power to determine what cases fall within the definition of "acts of state" and thus outside of the jurisdiction of the SAR's courts.⁸⁷

IV. ANALYSIS OF POST-TRANSITION HONG KONG

Within months of the transition, problems confronted the Hong Kong people and challenged the efficacy of the Joint Declaration and the Basic Law.⁸⁸ Current issues are multi faceted. One issue that developed immediately concerns the validity of the new governing legislative body.⁸⁹

Originally, the members of the former Hong Kong legislature, the LegCo, were elected by more than one million people.⁹⁰ However, after the transition, LegCo was abolished by the Preparatory Committee⁹¹ and replaced with the Provisional Council.⁹² The first startling element of this action is that China threatened to take this drastic action in 1995. China had threatened to abolish the LegCo and established a leg-

already reached. In other words, such interpretations carry no retroactive effect.

86. Gladys Li Interview, *supra* note 8.

87. See generally RECORD, *supra* note 2.

88. Since China refused to allow the Legislative Council to pass laws that would be effective after July 1, 1997 and since the Basic Law has not been in effect long, there is no clear body of law. Gladys Li Interview, *supra* note 8. Over arching all of these considerations, if China determines that the Standing Committee has the complete power to determine which provisions of the Basic Law will be enforceable, this would be a breach of China's guarantee that Hong Kong will be permitted to retain a great deal of autonomy. See Jordan, *supra* note 31, at 355.

89. There are "grey" areas in terms of the recent "scrapping" of the Legislative Council, which shed an uncertain shadow on the new legislature. Gladys Li Interview; *supra* note 8; Jordan, *supra* note 31, at 336. *But see H.K. Changes Little One Month After Handover*, BERNAMA (Malaysia), July 31, 1997, available in 1997 WL 12110903.

90. Lee, *supra* note 81, at A25.

91. The Preparatory Committee is body appointed entirely by China. It seems unlikely that a group appointed entirely by China and not Hong Kong, will be able to adequately represent the interests and needs of the Hong Kong people. In fact, the group will more likely favor China's position on issues pertaining to basic rights. Huang & Qian, *supra* note 6, at 292 n.9.

92. See Lee, *supra* note 81, at A25.

islative body of its own appointment⁹³ in retaliation for the passage of Hong Kong's Bill of Rights and the 1995 elections which resulted in major victories for the pro-democracy party.⁹⁴ China adamantly refused to acknowledge the validity of the democratic reforms because, according to China, they were directly contrary to the Joint Declaration.⁹⁵

The second alarming issue related to this action is that the Provisional Council members were *appointed* by China.⁹⁶ As discussed earlier, the Basic Law indicates that one goal for the Hong Kong SAR is that Hong Kong should have a chief executive and legislature *elected by universal suffrage*.⁹⁷ The Basic Law provides for the establishment of the new legislative body.⁹⁸ However, Annex II stipulates that the first legislative body will be an exception to the rule, "formed in accordance with the 'Decision of the National People's Congress on the Method for the Formation of the First Government' and the First Legislative Council. . . ." This process takes a step backward from the goal expressed in Article 68 of the Basic Law to have a legislature elected by universal suffrage.⁹⁹ It also contravenes the Article 5 provision that the capitalist

93. Choo, *supra* note 19, at 72. See The Department of State, *Hong Kong Report on Human Rights Practice for 1996* (visited June 15, 1997) <<http://www.usis.usemb.se/human/hongkong.html>>. This report indicates that the status of human rights abuses in Hong Kong is included in the report for the United Kingdom. The report acknowledges that the 60 LegCo. seats were filled in 1995 either through direct or indirect balloting. They were contested by the PRC. The report indicates that the PRC's intent for post-transition was to declare as null and void the 1995 LegCo, district boards, and municipal counsels because it was not consistent with the electoral rules adopted by the Hong Kong Government in 1994 for election to these bodies. The report also indicates that China's design was to install a PRC appointed preparatory committee to decide how to establish the first legislative council post July 1, 1997. The report issued no statement as to these indications. See also Vitrano, *supra*, note 10, at 453-55 (indicating that if the PRC's discontinued the democratic reforms implemented by Governor Patten, it would be a violation of the Joint Declaration).

94. See Choo, *supra* note 19, at 72.

95. See *supra* note 44 and accompanying text. China believed that the status quo in Hong Kong at the time of the signing of the Joint Declaration should not be radically changed by the United Kingdom.

96. Editorial Writer's Desk, *Beijing-Style Democracy Hong Kong Will Have to Endure a Convoluted Voting Scheme*, L.A. TIMES, Sept. 30, 1997, at B6 [hereinafter *Beijing Style*]; The cut in the number of office holding Democratic Party members such that they will not hold the majority as they did before the reversion. This will result in more distance between the public and the government officials of Hong Kong, decreasing democracy. *When the Outline of Hong Kong's Electoral Arrangements was First*, S. CHINA MORNING POST, Oct. 14, 1997, at 18 [hereinafter *Outline*]. A decrease in democracy will mean that the Hong Kong people will not be able to influence the administration of the laws pertaining to their basic rights and increase the chances that China will abuse the loopholes in the Basic Law.

97. Peter Montagnon, *Legal Eagles Remain Wary*, FIN. TIMES, June 16, 1997, at VII. See also Gladys Li Interview, *supra* note 8.

98. Basic Law, *supra* note 4, at art. 68, Annex II.

99. *But see* Keith B. Richburg, *100 Days of Chinese Rule; Hong Kong's People Seem Content as New Leader Promises Prosperity, Not Democracy*, WASH. POST, Oct. 9, 1997, at

system will remain in place and practiced for the next fifty years. Since this seems to violate the Basic Law's provisions, it is unclear whether the new legislative body, the Provisional Legislature, is legally in place.¹⁰⁰

Furthermore, it is also doubtful whether the legislative body will be able to comply with the procedures laid out in the Basic Law.¹⁰¹ Part of the plan for the Provisional Legislative Council was to confirm the judges appointed to the Court of Final Appeals.¹⁰² Since the judges were approved by the Provisional Legislature, whose legal existence is in doubt, this creates doubt as to the legal validity of the judges on the Court of Final Appeals.¹⁰³

Second, Tung Chee-Hwa, the new chief executive, canceled the laws created by Governor Patten prior to July 1, 1997 that ensured basic civil and political rights of Hong Kong residents.¹⁰⁴ "As incrementally and inevitably as pages being ripped from a daily calendar, Hong Kong's new administration stripped away the fledgling rights and democratic reforms enacted during the last days of British rule."¹⁰⁵ As contemplated by the Joint Declaration, these rights pertained to freedom of the press, public expression in government, right to peaceful demonstration, and the movement towards democracy in Hong Kong.

A third possible violation is the new laws introduced by Tung following the reversion. These new laws limit the right to demonstration and institute controls on political and other organizations.¹⁰⁶ The laws have also weakened trade union rights by freezing labor laws,¹⁰⁷ limited the right to protest, and limited the right to form political parties.¹⁰⁸

In August 1997, new election laws withdrew voting power from

A25 (construing Chief Executive Tung as having promised that a new legislature will be established on May 24, 1998 but that more democracy will not occur for another 10 years).

100. Gladys Li Interview, *supra* note 8.

101. *Id.*

102. Article 88 of the Basic Law indicates that the Chief Executive appoints the judges. Basic Law, *supra* note 4, at art. 88. Article 73, paragraph 7 indicates that the legislative council endorses appointments and removals. *Id.* at art. 73(7).

103. Gladys Li Interview, *supra* note 8.

104. Tung was appointed by China and therefore, would presumably have China's best interests in mind. Maggie Farley, *A Hundred Days in Hong Kong: A Matter of Haves, Have-Nots*, L.A. TIMES, Oct. 8, 1997, at A4.

105. *Id.* These election laws were drawn up by the China-appointed Preparatory Committee with the same motivations that lead the Committee to abolish LegCo and make it more difficult for the pro-democracy candidates to obtain seats in the legislature. See Lee, *supra* note 81, at A25; Eric Bjornlund, *Hong Kong Election Law Fair?*, CHRISTIAN SCI. MONITOR, Oct. 8, 1997, at 20.

106. See Flynn, *supra* note 29. Although no one has felt repercussions from these laws, there is no guarantee that they won't tomorrow. Lee, *supra* note 82, at A25.

107. See Farley, *supra* note 104, at A4.

108. *Id.*

close to 2 million Hong Kong citizens¹⁰⁹ and greatly crippled the democratic movement in China.¹¹⁰ There are sixty seats in the legislature. Now the electorate for thirty of those seats has been cut from 2.7 million to 186,000¹¹¹ and "corporate voting".¹¹² Furthermore, Tung is trying to introduce further legislation that will additionally weaken the democratic representation.¹¹³ These new laws are directly in confrontation to the Basic Law's guarantee to move towards democratic elections.¹¹⁴

Fourth, Tung also called for a "watering down"¹¹⁵ of the U.N. Universal Declaration of Human Rights.¹¹⁶ His reasoning was that the U.N. Declaration was not representative of the beliefs of developing countries. Instead, it represented the views of the West.¹¹⁷ Fifth, the Human Rights Report of the State Department discussed the continuing problem of self-censorship by the media.¹¹⁸

However, before July 1, 1997, Great Britain and Hong Kong endeavored to insulate Hong Kong from China's lower standard of human rights.¹¹⁹ According to the Joint Declaration¹²⁰ and the Basic Law,¹²¹ the ICCPR and ICESCR will remain applicable to Hong Kong following

109. *See id.*

110. *See Lee, supra* note 81, at A25.

111. *See Outline, supra* note 96, at 18.

112. *See Beijing-Style, supra* note 96, at B6 (indicating that "[a]ccording to the new rules, Hong Kong will use a complex proportional representation system to prevent any one party from dominating the 60-seat legislature. Under Beijing's scheme, 20 seats will be filled at large by all voters and 30 seats will go to business representatives elected by a smaller number, 180,000 people. The remaining 10 seats will be filled by an 800-member electoral committee of pro-Beijing and business interests."); *Lee, supra* note 81.

113. *See Lee, supra* note 81, at A25.

114. Bjornlund, *supra* note 105, at 20.

115. *See Lee, supra* note 81, at A25.

116. *See* G.A. Res. 217A (III), U.N. GAOR, Resns., U.N. Doc. A/810, at 71 (1948).

117. *Lee, supra* note 81, at A25. *But see* Michael Chugani, *Washington Urges More Democracy*, H.K. STANDARD, Sept. 10, 1997, available in WESTLAW, 1997 WL 14153419 (quoting Wang Yusheng, consul general of San Francisco, "Hong Kong's democracy, human rights, and freedom of the press have been increased and will be more extensive in the future. . .")

118. *See* The Department of State, *Hong Kong Report on Human Rights Practice for 1998* (visited Feb. 10, 2000) <<http://www.usis.usemb.se/human/human1998/hongkong.html>>. *But see* Richburg, *supra* note 99, at A25 (construing Chief Executive Tung's speech as reassuring the Hong Kong people the freedom of the press and media). A notorious issue was the release of cartoonist Larry Feign from the South China Morning Post in quick succession to his publication of cartoons that criticized PRC leaders. The report indicates that although the South China Morning Post management vowed the cartoonist's release was due to staff cuts, reports in Hong Kong remain convinced that his release was politically motivated. *Id.*

119. *Id.*

120. Joint Declaration, *supra* note 3, at Annex I.

121. Basic Law, *supra* note 4, at art. 39

the transition.¹²² Article 39 of the Basic Law contains a policing mechanism for checking the actions of China as pertaining to Hong Kong. Article 39 of the Basic Law guarantees that the United Nations International Covenant on Civil and Political Rights, the United Nations International Covenant on Economic, Social and Cultural Rights, and the UN's international labor conventions shall remain applicable to Hong Kong through the laws of the Hong Kong SAR. Any rights of the Hong Kong citizens will not be restricted unless sanctioned by law and those restrictions will not contravene the previously mentioned U.N. conventions.¹²³

V. U.N. COVENANTS

A. *The International Covenant on Civil and Political Rights and the Optional Protocol, December 16, 1966*

1. Description of the International Covenant on Civil and Political Rights

Although similar in content to the U.N. Declaration of Human Rights,¹²⁴ the International Covenant on Civil and Political Rights (ICCPR)¹²⁵ goes further and requires State Parties to provide remedies in the case of a Covenant violation.¹²⁶ "The International Covenant on Civil and Political Rights is one of the fundamental instruments created by the international community for the global promotion and protection of human rights."¹²⁷ The Covenant is binding on each State Party to the Covenant, subject to reservations.¹²⁸

Part III of the Covenant enumerates the rights protected by the ICCPR. Among these rights are the right to life,¹²⁹ freedom from forced

122. See Skeen, *supra* note 9, at 199-200.

123. Basic Law, *supra* note 4, at art. 39.

124. See generally B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, FORTY YEARS AFTER THE UNIVERSAL DECLARATION (1989) (discussing the Universal Declaration, its impact, and subsequent actions).

125. The United Nations' International Covenant on Civil and Political Rights (ICCPR) was ratified on December 16, 1966 and went in to force on March 23, 1976. ICCPR, *supra* note 16.

126. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 125 (1996).

127. UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, (1992), 31 ILM 645 [hereinafter SENATE REPORT].

128. See STEINER & ALSTON, *supra* note 126, at 123. There are disputes between States as to the interpretation of terms of the Covenant. *Id.*

129. ICCPR, *supra* note 16, at art. 6, sec. 1.

servitude and slavery,¹³⁰ liberty and security of persons,¹³¹ liberty of movement and freedom to choose his residence,¹³² freedom of thought, conscience, and religion,¹³³ to hold opinions without interference,¹³⁴ to freedom of expression,¹³⁵ peaceful assembly,¹³⁶ to take part in the conduct of public affairs, directly or through freely chosen representatives,¹³⁷ to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,¹³⁸ and to have access, on general terms of equality, to public service in his country.¹³⁹ It is the responsibility of each State to ensure that all of the Covenant measures are implemented appropriately.¹⁴⁰

The ICCPR provides three means to guarantee that the Covenant's provisions are properly respected and ensured by State Parties. As Article 40 provides, State Parties must periodically provide reports to the Human Rights Commission (HRC)¹⁴¹ illustrating the progress made to enhance those rights and the measures taken by the State to ensure the provisions of the Covenant.¹⁴² The reports must be submitted within one year of becoming a party to the Covenant.¹⁴³

HRC members dispute over the uncertain role of specialized agencies and non-government organizations (NGOs) in this reporting procedure. The Covenant does not contain any provision for consideration of this type of outside information.¹⁴⁴ The specialized agencies may only

130. *Id.* at art 8, sec. 1

131. *Id.* at art 9, sec. 1

132. *Id.* at art 12, sec. 1

133. *Id.* at art 18, sec. 1

134. *Id.* at art 19, sec. 1

135. *Id.*

136. *Id.*

137. *Id.* at art 25, sec. a

138. *Id.* at art 25, sec. b.

139. *Id.* at art 25, sec. c.

140. UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 149 (Hurst Hannum & Dana D. Fischer, eds., 1993) [hereinafter Hannum & Fischer].

141. The Human Rights Committee of the United Nations was created entirely for the purpose of being the administrator of the ICCPR. See DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: IT'S ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 126 (1991); Hannum & Fischer, *supra* note 140, at 149. STEINER & ALSTON, *supra* note 126.

142. ICCPR, *supra* note 16, at art. 40. According to Article 40, the State Party reports must be periodically filed with the HRC and must indicate "(1) measures [the State] ha[s] adopted, including legislative or judicial action, which give effect to the rights recognized within the Covenant; (2) the progress made in the enjoyment of those rights; and (3) the factors and difficulties encountered in giving them effect." See Hannum & Fischer, *supra* note 140, at 151.

143. ICCPR, *supra* note 16, at art. 40

144. See Hannum & Fischer, *supra* note 140, at 153. A purely textual analysis would indicate that specialized agencies have no opportunity to comment on reports provided by

provide comment when it is requested by the HRC. However, past practice has indicated that although formal reports are not permitted, work produced by specialized agencies of the U.N. *has* influenced HRC decisions.¹⁴⁵ Likewise, since there is no specific Covenant provision that prohibits or permits formal reporting by NGOs, NGOs are not prevented from providing information and statistics to individual members of the Committee. Recently, the HRC has frequently relied on the information provided by NGOs such as Amnesty International.¹⁴⁶

After all of this information is assimilated, the HRC is able to provide only "general comments" to the parties on the reports filed by each State Party.¹⁴⁷ More importantly, however, the HRC files an annual report¹⁴⁸ on its activities for publication with the General Assembly.¹⁴⁹ In this manner, it is available to inform the rest of the international community.

A second method of ensuring that the Covenant is respected is through Article 41 of the Covenant, which provides an optional inter-State complaint procedure.¹⁵⁰ This procedure permits one State Party to execute a communication to the HRC that another State Party is not ensuring the provisions of the Covenant.¹⁵¹ This process under is not automatically available.¹⁵² A State Party to the ICCPR must file a separate declaration that it "recognizes the competence of the HRC to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."¹⁵³ Furthermore, only a State Party that has accepted Article 41 can report a violation by another State Party of the Covenant.¹⁵⁴ The accusing State Party must have exhausted all domestic remedies; and both parties must first try to settle the dispute amongst themselves.¹⁵⁵ If these conditions are met, then a State Party may file a communication alleging that the accused State is not fulfill-

the State Parties. The content of the report is a description and evaluation, consistent with the ICCPR terms, of the protections measures for civil and political rights enumerated in the Covenant in the State Party under scrutiny. MCGOLDRICK, *supra* note 141, at 9.

145. See Hannum & Fischer, *supra* note 140, at 153.

146. See *id.* at 153-54.

147. See STEINER & ALSTON, *supra* note 126, at 131 (stating that according to Articles 40 & 45 of the ICCPR, general comments should be submitted to the U.N. Secretary General).

148. MCGOLDRICK, *supra* note 141, at 131 (indicating that the annual reports not contain information about Optional Protocol reports).

149. See Hannum & Fischer, *supra* note 140, at 154.

150. See ICCPR, *supra* note 16, at art. 41.

151. *Id.*

152. *Id.*

153. *Id.* See Hannum & Fischer, *supra* note 140, at 155.

154. See *id.*

155. *Id.* at 156.

ing its obligations under the Covenant.¹⁵⁶ Inter-State communications are rare.¹⁵⁷

If the alleged violation reaches the HRC, the HRC can not opine as to whether there has been a violation of the Covenant. The HRC's purpose is to be a fact-finder and to assist in friendly settlement between the accused and the accused state.¹⁵⁸ If a settlement is not reached, the State Parties may agree to the appointment of an ad hoc conciliation commission, which will also assist towards a friendly settlement.¹⁵⁹ If a settlement still is not reached, the HRC submits a report with its position on the likelihood and means toward a friendly settlement.

Third, the Optional Protocol (OP)¹⁶⁰ provides an opportunity for an individual citizen or an individual subject to the control of a State to file a communication with the HRC against his or her State Party.¹⁶¹ Eventually, the General Assembly adopted the Optional Protocol to provide for individual petition,¹⁶² but NGOs were still denied the right of petition.¹⁶³ The OP is a separate agreement from the ICCPR, requiring the State Party to assent to the OP and the ICCPR separately. Therefore, the Human Rights Commission is only allowed to consider petitions from individuals alleging an ICCPR violation by a State Party if the State Party is a signatory to the ICCPR *and* the OP.¹⁶⁴

156. *Id.* at 155.

157. *Id.* at 156-57.

158. *Id.* at 156.

159. *Id.* (indicating this is done according to procedure laid out in Article 42).

160. HUMAN RIGHTS COMMITTEE, SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (Vol. 1: U.N. Sales No. E.84.XIV.2, 1985; Vol. 2: U.N. Sales No. E.89-XIV.1, 1990). Originally, the final draft of the ICCPR by the Human Rights Commission contained no provisions for petitions by individuals or organizations. However, many argued that States were not the only actors affected by international law. International persons and organizations were affected as well. "[U]nder the very terms of the Covenant the individual was plainly a subject of international law and the purpose of the Covenant was to protect him against abuses of power by the State." MCGOLDRICK, *supra* note 141, at 122.

161. HUMAN RIGHTS COMMITTEE, *supra* note 160, at 9-10. STEINER & ALSTON, *supra* note 126, at 776. "[A] failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed." Hannum & Fischer, *supra* note 140, at 149. The UN Secretary General determines whether communications pursuant to the OP are submitted to the HRC. MCGOLDRICK, *supra* note 141, at 128.

162. See MCGOLDRICK, *supra* note 141, at 124.

163. See *id.* at 125. The Human Rights Commission is the administrator for the ICCPR and Optional Protocol; although, it is important to clarify that they are separate agreements. *Id.* at 126. There are no explicit rules as to which submissions the Secretary General may or may not determine are submissable to the HRC. However, there is an explicit rule that stipulates that any communications against a State that is not a party to the OP will not be determined reviewable by the HRC because the HRC would not have jurisdiction. *Id.* at 128.

164. *Id.* at 124. "The OP is open for signature by any State that has signed the ICCPR (Article 8(1) OP). It can only be ratified or acceded to by a State which has ratified by or acceded to the ICCPR (article 8(2)(3) OP). . . For States subsequently ratifying or acceding

As dictated by Article 4(1), following submission, the individual communication is brought to the attention of the State Party against which it was brought. The State Party must reply within six months by providing a submission to the HRC.¹⁶⁵ It is also the State Party's burden to prove, in detail, that the individual did not exhaust the remedies available to settle the issue.¹⁶⁶ Once the HRC has considered the communication, the HRC states its "views on the matter", which includes the HRC legal analysis of the issue and a determination whether a violation of the Covenant occurred.¹⁶⁷

2. Application

"An important part of Hong Kong's [pre-transition] legal system derives from international treaties."¹⁶⁸ In the past, international treaties were applicable to Hong Kong either through the terms of the treaties or through the British legislative process.¹⁶⁹ However, Hong Kong's reversion to China rendered this process obsolete¹⁷⁰ and a fledgling system has been established in its place. In order for a State Party, like China, to adhere to the terms of the ICCPR, the State's laws might have to be revised to meet these standards.¹⁷¹ China might have to establish enforcement mechanisms if none exist.¹⁷² The principal means to achieve implementation of the ICCPR is through legislation or judicial remedies.¹⁷³

Based on China's approval of the ICCPR in Article 39 of the Basic

to the OP, the OP enters into force three months after the date of the deposit of the instrument of ratification or accession (article 9(2) OP)." *Id.* at 126-27. In order for an individual to provide a communication to the Human Rights Commission regarding a violation of the ICCPR, it must be submitted in written form according to Article 2 of the Optional Protocol. Article 2 and 5 (2)(b) of the Optional Protocol indicate that all domestic remedies must have been attempted and not achieved the proper result before an individual petition would be considered. According to Article 3, any communications to the HRC that are anonymous, or that the HRC considers to be an abuse of the communication or inconsistent with the purpose of the Covenant, will not be considered by the HRC. *Id.* at 125.

165. *Id.*

166. See Hannum & Fischer, *supra* note 140, at 159. Article 4 (2) further explains that the State Party's submission can be "[w]ritten explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State".

167. See Hannum & Fischer, *supra* note 140, at 160.

168. See Skeen, *supra* note 9, at 188.

169. See *id.*

170. *Id.*

171. STEINER & ALSTON, *supra* note 126, at 775.

172. *Id.* Reservations by the State Party to terms of the Covenant would reduce the requirement for domestic legal changes. Compliance would be rendered obsolete as to reserved terms. *Id.* at 775.

173. *Id.* at 269. As we have seen before, the validity of the legislature and judiciary in Hong Kong is already in question.

Law, the following four examples are current violations which could be determined to violate the ICCPR. First, Article I of the ICCPR establishes that all "peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹⁷⁴ Hong Kong's right to self-determination was quashed by China, when the UN Special Committee accepted China's request to remove Hong Kong from the list of colonies covered by Article I of the ICCPR.¹⁷⁵

Second, the ICCPR's guarantee that people have a right to take part in the conduct of public affairs, directly or through freely chosen representatives,¹⁷⁶ would challenge China's actions regarding the recent alteration in election laws that took Hong Kong one step further away from democracy.¹⁷⁷ By reducing the electorate, the ability of the Hong Kong people to participate in public affairs has been diminished.

Third, the ICCPR ensures the right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.¹⁷⁸ Members of the democratic party in Hong Kong would be among the first people to claim China's violation of the terms of election and the guarantee to move toward universal suffrage.

Fourth, the ICCPR upholds the civil and political rights guaranteed in the Universal Declaration of Human Rights.¹⁷⁹ The rights protected in the ICCPR are the key composites of a democratic society.¹⁸⁰ Tung's weakening of the force of the Declaration is counter to the ICCPR.

In response to these derogations of the ICCPR, there are four possible scenarios to ensure or attempt to ensure compliance with the ICCPR. First, if everything was *ideal*, the ICCPR would be applied to the Hong Kong SAR as it was applicable under United Kingdom's administration. Article 39 of the Basic Law and Annex I, part XIII of the Joint Declaration stipulate China's approval of the ICCPR *as it applied* to Hong Kong at the time those agreements were ratified. Originally, Great Britain adopted the ICCPR and extended its application to Hong Kong.¹⁸¹ The tradition would continue and China would provide reports to the HRC once a year following the first year after July 1, 1997. If

174. ICCPR, *supra* note 16, at art. I.

175. See Neoh, *supra* note 10, at 323-23.

176. ICCPR, *supra* note 16, at art. 25, sec. a.

177. See *supra* notes 109-12 and accompanying text.

178. ICCPR, *supra* note 16, at art. 25, sec. b.

179. SENATE REPORT, *supra* note 127, at 649.

180. *Id.*

181. LIESBETH LUNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY OR RUIN? 275 (1995). There are reservations made by the United Kingdom for Hong Kong as to Articles 13 and 25.

this were the most likely situation, this research would be unnecessary.

A second scenario is imaginable if China does not comply with the reporting requirement, and the ICCPR is applied to the Hong Kong SAR as it was applied under the United Kingdom's rule. Great Britain made a declaration as to its acceptance of the "competence of the Human Rights Committee under Article 41" of the ICCPR.¹⁸² If the United Kingdom's declarations carried forward past the reversion, another State Party to the Covenant, with similar acceptance of Article 41, could bring a communication to the Human Rights committee claiming that China was not fulfilling the terms of the ICCPR. For example, as part of the United States consideration for ratification of the ICCPR, it considered the resulting influence the U.S. would have upon shaping human rights development in other countries.¹⁸³ Therefore, under Article 41 the United States would be able to provide reports if it had accepted Article 41 as well.

The Optional Protocol would not be applicable to the Hong Kong SAR because the United Kingdom was not a party nor a signatory to the Optional Protocol and therefore, an *individual* could not file complaints against the United Kingdom.¹⁸⁴

A third scenario would be if China insisted that its acceptance of the ICCPR did not include Article 41, and China refused to comply with the reporting requirements. The chief executive of Hong Kong might be able to provide reports on behalf of the Hong Kong SAR to the HRC. Additionally, NGOs could effectively protect rights such as freedom of speech, association and participation.¹⁸⁵ To draw a parallel, in 1995 Amnesty International submitted a report to the Human Rights Commission concerning the abuses of human rights in Kashmir.¹⁸⁶ Prior to this report, the Indian government had denied the truth of allegations of human rights abuses.¹⁸⁷ However, this report angered the Indian government and spurred the government to provide its own reports and take action to enforce these rights.¹⁸⁸

However, China included Article 23 in the Basic Law, which limits the "foreign political organizations or bodies from conducting political activities in the Region" or those same organizations from establishing ties with similar organizations in the Region.¹⁸⁹ It remains unclear

182. ICCPR, *supra* note 16, at Declarations

183. SENATE REPORT, *supra* note 127, at 659.

184. *See supra* notes 160-64 and accompanying text.

185. STEINER & ALSTON, *supra* note 126, at 463.

186. *Abuse of Human Rights Commission*, ECONOMIST, Feb. 4, 1995, at 30.

187. *Id.*

188. *Id.* However, the article further indicates that although Amnesty International got this reaction from India, the UN Commission on Human Rights did not assume the influential role it could have.

189. Basic Law, *supra* note 4, at art. 23.

whether China intended for this article to apply to NGOs.¹⁹⁰

Fourth, the worst and most likely scenario, China will refuse to comply with the reporting procedure for the ICCPR or acknowledge its application to Hong Kong. China would insist that Article 39 of the Basic Law was merely a recognition of the ICCPR as an international convention but that Article 39 in no way bound China. Already, China adamantly refuses to acknowledge an intergovernmental organization's, like the U.N., authority over human right issues that are specifically State concerns.¹⁹¹ The Government of China maintains a doctrine of absolute sovereign immunity¹⁹² and emphatically denies that the ICCPR is enforceable through Article 39 of the Basic Law.¹⁹³ "It seems pretty clear, that a suit against the PRC, or against its top officials, would be regarded as violating the basic principles of the laws of the PRC."¹⁹⁴ According to Chinese law, the PRC court could reject a matter issued by a foreign court because it was incompatible with the sovereignty or security of the People's Republic of China.¹⁹⁵ Furthermore, the Basic Law indicates that China will determine whether international agreements to which it is a party will apply to Hong Kong.¹⁹⁶

Overarching all of these concerns is the questionable competency of the HRC to address human rights violations. If China does not comply, the HRC does not have recourse. Even if China does file a report with the Committee, there is no guarantee that it will be accurate.¹⁹⁷ The petition mechanism,¹⁹⁸ whereby another State Party or individual may submit reports, may increase the accuracy of the reports.

Finally, and most importantly, the HRC can only provide reports and appropriate general comments to the Parties. The Committee has no police power.¹⁹⁹ The matter may be further referred, with prior con-

190. See Davis, *supra* note 5, at 315.

191. Vitrano, *supra* note 10, at 458. Great Britain is a party to the Joint Declaration which was registered with the U.N. Britain could submit a complaint to the U.N. concerning a violation by China. As an additional measure, the United States, even as a third State Party, could submit a complaint to the U.N. on the behalf of Hong Kong or defending its own, the United States', interests.

192. Platto & Horton, *supra* note 30, at 20.

193. Jordan *supra* note 31, at 367-68. China is inconsistent in its approach to human rights in Hong Kong. It insists that the BRO is unnecessary because the Basic Law provides all of the necessary safeguards for human rights so this "implies that Article 39 of the Basic Law and other rights provisions in the Basic Law are directly enforceable." *Id.*

194. Platto & Horton, *supra* note 30, at 20.

195. *Id.*

196. *Id.*

197. MATHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 31 (1995) (stating that "[r]eporting systems are dependent, to a large extent, upon the good faith of the States concerned.")

198. See *id.* at 32 (stating that a petition mechanism is "generally considered the most effective means for the protection of human rights.")

199. Timothy Jones, *Fundamental Rights in Australia and Britain*, in

sent by the Parties, to an appointed ad hoc Conciliation Commission. The Commission, also, does not have policing powers, instead, they endeavor to reach an "amicable solution".²⁰⁰

The ICCPR, like its counterpart the ICESCR, does not have any police mechanism but it does serve as a gatherer and conveyor of information. This will be an important function to notify the rest of the community that China is not upholding its promises.

B. International Covenant on Economic, Social and Cultural Rights

1. Description of the ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on January 3, 1976.²⁰¹ The ICESCR's obligations are primarily listed in Article 2 as well as other provisions of Part I and Part III.²⁰² Among the rights included in the ICESCR are the right to work,²⁰³ to "just and favourable" work conditions,²⁰⁴ to form trade unions and strike,²⁰⁵ to the greatest protection for the family unit,²⁰⁶ to education,²⁰⁷ and to participate in cultural life.²⁰⁸

While the ICCPR requires State Parties to "respect and ensure"²⁰⁹ rights, the ICESCR necessitates that States should "take steps, individually and through international assistance and cooperation. . . . to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights."²¹⁰ This principle in Article 2 is generally called the principle of progressive implementation.²¹¹ Most of the rights set forth in the ICESCR, as opposed to the ICCPR, are positive rights that require affirmative government action to ensure

UNDERSTANDING HUMAN RIGHTS 91, 104 (Conor Gearty & Adam Tomkins, eds., 1996) (stating that "[t]he Committee is not a judicial body; it is not a Supreme Court of Human Rights. Nor are the views expressed by the Committee legally binding. Nor are there any means of enforcement, apart from the Committee's moral authority and the potential pressure of public opinion.").

200. ICCPR, *supra* note 16, at art 7(a)

201. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 410 (1995).

202. *See Id.* at pt. I, pt. III, & art 2.

203. *Id.* at art 6

204. *Id.* at art 7

205. *Id.* at art 8.

206. *Id.* at art 10.

207. *Id.* at art 13.

208. *Id.* at art 15.

209. ICCPR, *supra* note 16, at art. 2(1).

210. ICESCR, *supra* note 17, at art. 2. *See* Geraldine Van Bueren, *International Human Rights Law*, in UNDERSTANDING HUMAN RIGHTS 596, 598 (Conor Gearty & Adam Tomkins, eds., 1996).

211. Van Bueren, *supra* note 210, at 598.

these rights.²¹² These government actions will require the use of scarce resources, and the availability of these resources directly determines the ability of the State Party to comply with the terms of the ICESCR.²¹³

The ICESCR has a mandatory reporting procedure for State Parties that ratified the Covenant.²¹⁴ Similar to the ICCPR State reports, these State reports are designed to indicate the measures instituted by the State Party to uphold the Covenant rights and the progress made towards achieving the standards. If a State has difficulty meeting the standards, it should indicate this in the report with the reasons for its noncompliance.²¹⁵ Within two years of ratification of the ICESCR, a State Party must submit an initial report. These reports are submitted to the U.N. Economic and Social Council (ECOSOC).²¹⁶ An additional report is required every five years thereafter.²¹⁷ When a State does not submit a report or is tardy in its submission, the ECOSOC includes this in its report to the Secretary-General.²¹⁸ If there is no State report and no one has been identified that should have compiled the report, an individual from the Committee is delegated to develop a report of the important and relevant issues.²¹⁹

No specific committee or review group was established to evaluate the ICESCR reports.²²⁰ According to Articles 16 through 22, enforcement of the Covenant is to be administered by ECOSOC.²²¹ In 1985, the ECOSOC established the Committee on Economic, Social and Cultural Rights (ESCC) to review the Covenant Reports.²²² The ESCC carries forth three primary objectives for the ICESCR: (1) development of standards for evaluation of the rights recognized in the Covenant; (2) catalyzing State Parties' ability to uphold the rights and to confront

212. Hannum & Fischer, *supra* note 140, at 163-64. Civil and political rights are negative rights because the state must only refrain from committing a violation of those rights. Van Bueren, *supra* note 210, at 599. "The Human Rights Committee has, however, pointed to the positive duties involved in protecting the right to life . . ." *Id.*

213. Hannum & Fischer, *supra* note 140, at 164-65.

214. STEINER & ALSTON, *supra* note 126, at 316 (reports must be consistent with the "reporting guidelines").

215. CRAVEN, *supra* note 197, at 38.

216. *See infra* note 214; CRAVEN, *supra* note 197, at 38 (indicating that the Commission on Human Rights may also review these reports).

217. STEINER & ALSTON, *supra* note 126, at 264.

218. CRAVEN, *supra* note 197, at 59.

219. *Id.* at 59-60 (indicating that in some situations this technique has proven successful)

220. The ICCPR established the Human Rights Commission to review the ICCPR reports. Hannum & Fischer, *supra* note 140, at 262.

221. *Id.*

222. STEINER & ALSTON, *supra* note 126, at 264 (indicating that "[i]ts principal activities are the adoption of 'general comments' and the examination of states parties' reports leading to the adoption by the Committee of 'concluding observations' thereon.").

those State Parties that do not comply; and (3) ensuring that State Parties comply with the standards.²²³

Since the 1990s, however, there has been a pile up of State reports to be reviewed, so specialized agencies of the U.N. have also become involved in the review process.²²⁴ These review bodies have the ability to make recommendations according to the State reports. Article 22 permits the ECOSOC to apprise other U.N. bodies of the status of a State's report in order to more effectively guarantee that the Covenant provisions are upheld.²²⁵

As a part of the reporting procedure, the Covenant has a mechanism for input from NGOs and specialized agencies.²²⁶ "State Parties and specialized agencies may comment to ECOSOC on any such recommendations."²²⁷ Article 18 provides that specialized agencies may provide updates on progress made by the States towards achieving the standards.²²⁸ The Covenant does not include any other provisions for outside contributions such as specialized agencies participating in the evaluation of the reports or other groups providing reports.²²⁹ However, the Committee has invited all parties concerned with the issues to submit information.²³⁰

Unlike the ICCPR, the ICESCR does not have an Optional Protocol allowing for individuals to communicate a violation by a State Party of the ICESCR.²³¹ Over the years since its adoption, there have been motions to provide for a similar method of individual petition. Thus far there has been no success.²³²

2. Application

Unlike the ICCPR, any violation by China of the ICESCR will not be immediately perceptible. The ICESCR mandates progressive programs that do not necessitate immediate results. Thus, the ICESCR will require compliance from China *over time*. China's obligation is to reach an end result. This will require that China implement programs that assure economic, societal and cultural rights will be preserved.

223. CRAVEN, *supra* note 197. See also STEINER & ALSTON, *supra* note 126, at 316.

224. See Hannum & Fischer, *supra* note 140, at 263.

225. See *id.* at 264.

226. CRAVEN, *supra* note 197, at 355.

227. See Hannum & Fischer, *supra* note 140, at 264.

228. CRAVEN, *supra* note 197, at 76.

229. *Id.*

230. *Id.* at 76-77 (indicating that the Committee's Rules of Procedure clearly include the specialized agencies as part of the evaluative process of State reports). The Committee also passed a resolution that allows for NGOs to submit written reports and make oral statements. *Id.* at 80.

231. *Id.*

232. *Id.*

Over time, if this does not occur, then there are grounds for complaint and action. Here are two examples of areas where China might be remiss in the future.

First, according to Article 2(2) of the ICESCR, there is a provision against discrimination based on national origin.²³³ China might aggravate this provision, if, while hiring people for Hong Kong government jobs, China discriminates against Hong Kong-born Chinese versus Chinese mainland born Chinese. China would not have as much leeway for non-compliance compared to other ICESCR provisions. The elimination of discrimination does not require as many resources as other ICESCR provisions do for compliance.²³⁴ In fact, compliance can be attained with barely any resources at all. A history of certain types of discrimination may actually justify or necessitate the implementation of affirmative action programs.²³⁵

A second compliance issue could be equality of opportunity for all, according to Article 7(c) and 1(2)(c) of the ICESCR.²³⁶ If the trend continues that democrats are stymied from obtaining public office positions due to the new election laws, this may be actionable inequality of opportunity. When the UN Committee evaluates China's compliance with the ICESCR, it will consider measures taken by the legislature to determine whether China is adequately using its resources to reach its ultimate goal. On the contrary, Hong Kong legislative action has, in fact, cut back the electorate with the effect of legislating against election of democrats. China is currently not directing its resources to reach an ultimate goal of equal opportunity.

In the years to come, the prediction of China's violations of the ICESCR may become reality. However, the applicability of the ICESCR to the Hong Kong situation may be bogged down by peripheral issues. The ICESCR will probably be second-in-line to the ICCPR as a UN enforcement mechanism alternative because the trend in international favors the importance of civil and political rights over economic, social and cultural rights.²³⁷ For this reason, often the rights in the ICESCR have been termed "non-justiciable" or "programmatic"²³⁸ and the greatest challenge facing the ICESCR is ensuring enforcement of its provisions.²³⁹

233. ICESCR, *supra* note 17, at art 2(2).

234. *See generally id* (discussing various rights protected by the ICESCR and the resource issues pursuant to compliance).

235. *Id.*

236. *See* ICESCR, *supra* note 17, at arts. 7 & 1(2).

237. Van Bueren, *supra* note 210, at 599; CRAVEN, *supra* note 197, at 9 (indicating that in reality these rights are "ignored").

238. CRAVEN, *supra* note 197, at 353.

239. STEINER & ALSTON, *supra* note 126, at 268-69 (indicating that one of the greatest difficulties to ensure compliance with the Universal Declaration of Human Rights). Ini-

Another difficulty relates to the ICESCR's insufficient reporting mechanisms. Although the reporting procedure is the best method for monitoring a particular human rights record,²⁴⁰ in general, the history of reporting by State Parties to the Covenant has been poor.²⁴¹ This begs the question, then why should China submit reports? State Parties that do not contest the applicability of the Covenant are negligent to comply with the reporting requirement. China, who is loath to accept the applicability of the Covenant, therefore, will have no compunction ignoring the reporting requirement.

Under the ICCPR, if the State Party did not provide reports, there were alternatives. However, the ICESCR does not offer solutions like the Optional Protocol or Article 41. The ICESCR does provide for participation by NGOs. However, NGOs may not be as effective advocating economic, social and cultural rights as they are for advocating civil and political rights.²⁴² First, the NGOs, in practice, are reluctant to advocate economic, social, and cultural rights alone.²⁴³ Second, even if a NGO may pursue upholding these rights, the actual enforcement of the terms of the ICESCR requires a state to have available resources.²⁴⁴ The availability of resources is not controllable by the NGO.

A third deficiency of the effectiveness of the ICESCR is the imprecise language of the Covenant. Although the Covenant indicates that "appropriate means" must be used to protect the rights in the ICESCR, the Covenant does not identify those means.²⁴⁵ The legislative and judicial methods recommended for enforcement of the ICCPR may not suffice for the ICESCR.²⁴⁶ Once again, the lack of development of enforcement mechanisms for economic, social and cultural rights, as compared to civil and political rights, can be attributed to the relative lack of concern in the international arena.²⁴⁷

tially one of the greatest challenges to the ICESCR was whether economic rights were really rights. This issue has been settled. *Id.*

240. CRAVEN, *supra* note 197, at 33.

241. *Id.* at 57 (indicating that 14 States have not produced one report in 10 years).

242. *But see id.* at 32. The means of petition are considered among the most effective ways to protect human rights.

243. STEINER & ALSTON, *supra* note 126, at 269-70. A tug of war exists over whether or not economic, social, and cultural rights are really rights. Thus, NGOs are often not apt to pursue something that might not be a right.

244. *Id.* at 271-72 (quoting Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW 33 (Theodore Meron, et. al, 1984).

245. STEINER & ALSTON, *supra* note 126, at 268-69.

246. *Id.* at 269.

247. *Id.* (indicating the reasons are "1) the ambivalence of most governments, but particularly those from the Third World; 2) the demonstrated reluctance of non-governmental organizations (NGOs) to focus specifically on economic and social rights; and 3) the lack of innovative legal and other approaches to implementation by those governments that clearly do support the concept.")

VI. CONCLUSION

The ICCPR and IECSCR are both applicable to the Hong Kong SAR. The Joint Declaration, an international agreement that has been registered with the U.N., is proof of this intent by both the United Kingdom and China.²⁴⁸ Furthermore, the Basic Law, written by China, characterizes this provision as a promise to the Hong Kong people.

The Joint Declaration establishes China's international legal duty to administer Hong Kong pursuant to the provisions of the Declaration.²⁴⁹ The primary purpose of an international treaty is that it serves as reliable proof that each party to the treaty is bound to its provisions and must fulfill them in good faith.²⁵⁰ If China does not uphold its promises in the Joint Declaration and the Basic Law to maintain the capitalist system in Hong Kong for the next fifty years and to pursue a plan for greater democracy, the international community could resort to the UN Covenants.

The primary obstacle, as we have seen is that these Covenants can do little more than serve as conduits for protest and dialogue. The Committees to the Covenants have very little judgment power and no police power. However, this is not as ineffective as it may seem. It is important that the international community is aware that China is not upholding its promises, that there are human rights violations. Reports that the Committees provide to the Secretary-General of the UN will provide notice that collective action needs to be taken. Collective action, countries working in concert, will be the ideal means through which Hong Kong's human rights will be secured.²⁵¹

248. See Neoh, *supra* note 10, at 327 n.78 (quoting The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, at art. 2(1)(a). Article 2(1)(a) defines a treaty 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.").

249. Skeen, *supra* note 9, at 178.

250. Vienna Convention, *supra* note 248, at art. 26. An international treaty takes precedence over internal law. "Primary responsibility for carrying out treaty obligations rests with States Parties." *Id.*

251. Maleiha Malik, *Communal Goods as Human Rights*, in UNDERSTANDING HUMAN RIGHTS, 138, 141 (Conor Gearty & Adam Tomkins, eds. 1996).

