

## ANALYSIS



### Human Rights in Hong Kong: The Continued Applicability of the International Covenants

In 1976, upon its ratification by the United Kingdom, the International Covenant on Civil and Political Rights was 'applied' to Hong Kong in the sense that, by that act, the former undertook to respect and to ensure to the inhabitants of Hong Kong the rights recognised in the Covenant.<sup>1</sup> That was one of the incidents of ratification by a colonial power having responsibility for the administration of a dependent territory. Under that multilateral treaty, the ratifying state is also obliged to incorporate the recognised rights in the domestic law and to provide an effective judicial remedy for their vindication. The commitment which the ratifying state makes to other states parties is that it will report periodically on the measures adopted to give effect to the rights and on the progress made in the enjoyment of those rights.<sup>2</sup> Additionally, a state party may recognise the competence of the Human Rights Committee established under the Covenant to receive and consider communications from other states parties that it is not fulfilling its obligations under the Covenant and/or from individuals subject to its jurisdiction who claim to be victims of a violation by it of the recognised rights. In regard to Hong Kong, the United Kingdom has recognised the competence of the Human Rights Committee in respect of communications of the first category but not of the second.

In the 1984 Sino-British Joint Declaration on the Question of Hong Kong<sup>3</sup> it was agreed, *inter alia*, that, upon the United Kingdom restoring Hong Kong to China on 1 July 1997, 'the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.' This statement is contained in Annex 1 which is titled: 'Elaboration by the Government of the People's Republic of China of its basic policies regarding Hong Kong.'

In the Basic Law which was enacted by China's National People's Congress in 1990 to give effect to its basic policies regarding Hong Kong, it is stated as follows:

<sup>1</sup> The International Covenant on Economic, Social and Cultural Rights was similarly 'applied' to Hong Kong in the same year. The principles discussed in this article are equally applicable to that Covenant.

<sup>2</sup> A state party is also obliged to inform the other states parties of the provisions of the Covenant from which it has derogated during a state of emergency and of the reasons by which it was activated: Art 4.

<sup>3</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984.

*Article 39*

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

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

These two provisions in the Joint Declaration and the Basic Law have been generally understood to mean that China will, by acceding to the two Covenants, ensure that they continue to 'remain in force.' Thereby, China will accept the reporting obligations in respect of Hong Kong.<sup>4</sup> But China has not done so yet, nor given any indication that it intends to do so. Instead, senior Chinese officials have stated quite categorically that China does not propose either to accede to the Covenants or to accept any reporting obligation in respect of Hong Kong under either Covenant. It has hitherto been believed that unless China accedes to the Covenant, the inhabitants of Hong Kong will cease to be subject to the protective jurisdiction of the United Nations human rights monitoring bodies when British sovereignty is terminated on 30 June 1997. But recent developments in international law consequent to the emergence of a number of new territorial units which had previously been constituent parts of states parties to the Covenants suggest that the reporting obligations under the Covenants in respect of Hong Kong and its inhabitants will continue whether or not China accedes to the Covenants.

**State succession**

State succession, particularly in respect of treaties, is an area of much uncertainty and controversy. The Vienna Convention on Succession of States,<sup>5</sup> concluded on 23 August 1978, has not yet come into force, and it is not clear whether the principles articulated in that instrument do reflect the customary law on the subject. But it is generally recognised that:

- (a) when part of the territory of a state, or when any territory for the international relations of which a state is responsible, not being part of the territory of that state, becomes part of the territory of another

<sup>4</sup> This was the interpretation offered by the representative of the United Kingdom when he was questioned on this subject by the United Nations Human Rights Committee in April 1991.

<sup>5</sup> For text, see Evans (ed), *Blackstone's International Law Documents* (London: Blackstone Press Limited, 1991), p 213.

state, treaties of the predecessor state cease to be in force in respect of that territory while, in the absence of a contrary intention, whether expressed or implied, treaties of the successor state begin to operate in respect of that territory;

- (b) the treaty obligations or rights of a predecessor state do not become the obligations or rights of the successor state by reason only of the fact that the predecessor and successor states have agreed that such obligations or rights shall devolve upon the successor state, or that the successor state has made a unilateral declaration that the treaties shall continue in force in respect of its territory.

In fact, it would appear that hitherto, except for treaties concerning boundaries and other territorial regimes, a new state was not obliged to assume its predecessor's rights and obligations under multilateral treaties. It would appear that there is now a third exception to this rule: the provisions of human rights treaties will apply, on a continuing basis, to the inhabitants of new territorial units which had previously been constituent parts of states parties to such treaties.

### The Yugoslav precedent

The Socialist Federal Republic of Yugoslavia was a state party to the International Covenant on Civil and Political Rights, having ratified it in 1971. Its third periodic report was considered by the Human Rights Committee on 8 and 9 April 1992. But by then, the Yugoslav federation had begun to disintegrate and in its place had emerged several distinct and separate units, each claiming to exercise exclusive jurisdiction over the people living on its own separate portion of the territory. Of them, the Government of Slovenia informed the Secretary-General of the United Nations on 1 July 1992 that the Republic of Slovenia considered itself bound, since declaring independence on 25 June 1992, by several human rights treaties including the two Covenants by virtue of succession to the Socialist Federal Republic of Yugoslavia. On 6 July 1992, the Secretary-General received the relevant instruments of succession.

On 18 September 1992, the Chairman of the Human Rights Committee (which was then not in session) proposed to its members that the Committee request the Governments of the Republic of Croatia, the Republic of Yugoslavia (Serbia and Montenegro), and the Republic of Bosnia-Herzegovina each to submit a short report as soon as possible and not later than 30 October 1992 on the following issues in respect of persons and events coming under their jurisdiction:

- (a) Measures taken to prevent and combat the policy of 'ethnic cleansing' pursued, according to several reports, on the territory of certain parts

of the former Yugoslavia, in relation to Articles 6 and 12 of the Covenant;

- (b) Measures taken to prevent arbitrary arrests and killings of persons, as well as disappearances, in relation to Articles 6 and 9 of the Covenant;
- (c) Measures taken to prevent arbitrary executions, torture, and other inhuman treatment in detention camps, in relation to Articles 6, 7, and 10 of the Covenant;
- (d) Measures taken to combat advocacy of national, racial, or religious hatred constituting incitement to discrimination, hostility, or violence, in relation to Article 20 of the Covenant.

He also proposed that the Committee invite the three governments to appear, through their representatives, before it during the third week of its next session (2–4 November 1992). The members of the Committee individually endorsed the proposal and authorised the Chairman to act on the Committee's behalf. Accordingly, on 7 October 1992, a formal decision of the Committee incorporating the Chairman's proposal was forwarded to the states concerned.

Under Article 40 of the Covenant, only a state party to the Covenant is required to report to the Human Rights Committee. On 7 October 1992, none of the three new states to whom the Committee's formal request to report was forwarded had acceded to the Covenant. But the request was based on the premise that 'all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant.' At a meeting of the Committee held on 19 October 1992, at which this decision taken when the Committee was not in session was confirmed, the rationale for the request to report was discussed by the members for the first time. The following were some of the views expressed by the members:

- (a) there was no reason to presume that successor states would not continue to apply human rights treaties;
- (b) the international instruments relating to human rights, besides being inter-state instruments, conferred rights on individuals, who could not be deprived of those rights in the event of state succession;
- (c) the obligation to respect human rights was a universal one that transcended treaties;
- (d) state succession should be viewed as a matter of the acquired rights of the population of the state that had ratified the Covenant, which were not diluted when a state was divided.

If the three states submitted their reports as requested, it was the Committee's view that not only would the question of state succession be resolved, but a precedent under international law would be established. The Committee, however, recognised the possibility that its requests would be ignored. But there was disagreement among the members on what ought to be done if the three states failed to respond. One member was of the view that that would be an

indication that the states did not regard themselves as bound by the Covenant, in which case the Committee could not insist. But others thought that if the states did not respond, the Committee should continue its action by sending reminders and trying to induce those states, through its words and authority, to respond to its request. The Committee had already begun to make law, and in a revolutionary manner, and it could not now turn back. It was noted that what the Committee was seeking to do was not something that was prohibited by its rules or incompatible with its objectives as far as procedure was concerned.<sup>6</sup>

In response to the request made by the Human Rights Committee, Croatia submitted a short report entitled 'Report on measures taken to prevent criminal acts perpetrated in violation of the human rights and freedoms in the Republic of Croatia' which was considered by the Committee on 4 November 1992. The government was represented on that occasion by a delegation led by the Assistant Minister of Foreign Affairs. Meanwhile, on 12 October 1992, the Republic of Croatia notified the Secretary-General of the United Nations that it had succeeded, as from 8 October 1991 which was the date of its proclamation of independence, to various human rights treaties, including the Covenant.<sup>7</sup>

The Government of Bosnia-Herzegovina submitted a background paper dated August 1992 on the violations of human rights that had occurred in its territory which was considered by the Committee on 3 November 1992. The government was represented by a delegation led by the Vice-President of the Academy of Science and Art who was also a member of the State Assembly. The Committee noted that by complying with its request to submit a report and by sending a delegation before it, Bosnia-Herzegovina had confirmed its succession to the obligations undertaken under the Covenant by the former Yugoslavia in respect of its territory. The Committee recommended that the new state formalise its succession to the Covenant by submitting the appropriate notification to the UN Secretary-General.<sup>8</sup> On 1 September 1993, the Secretary-General received the instruments of succession of Bosnia-Herzegovina, with effect from 6 March 1992, to the two Covenants.

The Federal Republic of Yugoslavia (Serbia and Montenegro) submitted a special report dated 30 October 1992, which was considered by the Committee on 4 November 1992. The government was represented by a delegation led by the Deputy Foreign Minister for Human Rights and Ethnic Minorities. The

<sup>6</sup> See Human Rights Committee, 46th Session, Summary Record of the 1178th Meeting held at the Palais des Nations, Geneva, on Monday 19 October 1992, UN document CCPR/C/SR.1178/Add.1 of 5 November 1992. The summary records of this meeting are also published in full in 15 European Human Rights Reports 233.

<sup>7</sup> Human Rights Committee, 46th Session, Summary Records of the 1201st and 1202nd Meetings held at the Palais des Nations, Geneva, on Wednesday 4 November 1992, UN documents CCPR/C/SR.1201 of 11 November 1992 and CCPR/C/SR.1202 of 8 April 1993. See also Comments of the Human Rights Committee, UN document CCPR/C/79/Add.15 of 28 December 1992.

<sup>8</sup> Human Rights Committee, 46th Session, Summary Record of the 1200th Meeting held at the Palais des Nations, Geneva, on Tuesday 3 November 1992, UN document CCPR/C/SR.1200 of 13 April 1993. See also Comments of the Human Rights Committee, UN document CCPR/C/79/Add.14 of 28 December 1992.

Committee explained that it regarded the submission of the report by the government and the presence of the delegation as confirmation that the Federal Republic of Yugoslavia (Serbia and Montenegro) had succeeded, in respect of its territory, to the obligations under the Covenant by the former Yugoslavia.<sup>9</sup>

### A new rule of international law

The practice in the Human Rights Committee suggests that where the inhabitants of a territorial unit have been brought within the protective jurisdiction of the Committee, they continue to enjoy such protection notwithstanding any change of sovereignty over that territorial unit. In other words, state succession will be implied in respect of the principal human rights treaties and, at least in respect of the Covenants, the obligations of the predecessor state will be deemed to have devolved upon the successor state. Such a rule of international law is consistent with the view that human rights are inherent and inalienable. Once it is formally acknowledged by multilateral treaty that the inhabitants of a particular territorial unit are entitled to enjoy certain defined rights and freedoms, that enjoyment cannot be interrupted, suspended, or terminated by reason of new arrangements that may be made in relation to the governance of that territory. As Fausto Pocar has observed, the human rights treaties devolve with the territory.<sup>10</sup>

This view was confirmed by the chairpersons of human rights treaty bodies who, at a meeting held in September 1994, emphasised that successor states were automatically bound by obligations under international human rights instruments from the respective date of independence, and that observance of the obligations should not depend on a declaration of confirmation made by the government of the successor state.<sup>11</sup>

<sup>9</sup> Human Rights Committee, 46th Session, Summary Record of the 1202nd Meeting held at the Palais des Nations, Geneva, on Wednesday 4 November 1992, UN documents CCPR/C/SR.1202 of 8 April 1993 and CCPR/C/SR.1202/Add.1 of 15 April 1993. See also Comments of the Human Rights Committee, UN document CCPR/C/79/Add.16 of 28 December 1992.

<sup>10</sup> See Fausto Pocar, 'Enhancing the universal application of human rights standards and instruments,' UN document A/CONF.157/PC/60/Add.4 of 8 April 1993. Pocar points out that the purpose of human rights treaties is not to provide for individual advantages of the contracting states, but rather to reflect their common interest, ie the interest of all mankind. The universal application which such treaties aim at represents an additional reason, according to him, for concluding that, once the people living in a territory find themselves under the protection of an international instrument, such protection cannot be denied to them by virtue of the mere dismembering of that territory and its coming within the jurisdiction of more than one state.

<sup>11</sup> UN document E/CN.4/1995/80 of 28 November 1994. The Commission on Human Rights had adopted, without a vote, at its fiftieth session in 1994, a resolution in which it referred to the special nature of the treaties aimed at the protection of human rights and fundamental freedoms and reiterated its call to successor states which had not yet done so to confirm to appropriate depositories that they continued to be bound by obligations under international human rights treaties. The Commission also requested the human rights treaty bodies to consider further the continuing applicability of the respective international human rights treaties to successor states, with the aim of assisting them in meeting their obligations. See Commission Resolution 1994/16 of 25 February 1994.

Apart from the successors to the former Yugoslavia (Bosnia-Herzegovina, Croatia, Slovenia, Yugoslavia, and the former Republic of Macedonia), the successors to the former Czechoslovakia (Czech Republic and Slovakia), and most of the successors to the former Soviet Union (Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Estonia, Latvia, Lithuania, Republic of Moldova, Russian Federation, and Ukraine) had deposited instruments of succession to the two Covenants, as on 28 November 1994. On that date, only Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan had not formally done so.

### **The Hong Kong SAR government's competence to succeed to, and to report under, the Covenants**

Hong Kong will not, of course, be an independent state. But if human rights treaties devolve with the territory and continue to provide a protective umbrella to the inhabitants of that territory, the legal status of Hong Kong within the international community does not appear to be relevant. However, since Hong Kong will be an integral part of another sovereign state, which is not a party to either Covenant, the question arises whether the territory of Hong Kong and its inhabitants can, substantively, be distinguished from the rest of China and its inhabitants. The answer to this question lies in the provisions of the Basic Law.

The Hong Kong Special Administrative Region has been conceived of as an autonomous entity with its own legislature, executive, and judiciary.<sup>12</sup> Its exclusive legislative competence extends over every subject, whether civil, political, economic, social, or cultural in nature, encompassed by the two Covenants.<sup>13</sup> Beyond the autonomy usually enjoyed by the constituent unit of a federal state, the Hong Kong SAR will have its own convertible currency, and an independent taxation system with its financial revenues being used exclusively for its own purposes. It will be a separate customs territory, and will issue its own certificates of origin for its products. It will maintain its own shipping and aircraft registers. It will issue its own passports and other travel documents, and apply immigration controls on entry into, stay in, and departure from the SAR by persons of foreign states as well as from other regions of China. It may also conclude visa abolition agreements with foreign states.<sup>14</sup>

While matters relating to defence and foreign affairs will be handled by the Chinese government, the SAR is authorised, using the name 'Hong Kong, China' to participate on its own in maintaining and developing relations, and

<sup>12</sup> Art 2.

<sup>13</sup> Except upon the declaration of a state of war or emergency, the only Chinese laws that may be applied to the Hong Kong SAR are those relating to defence and foreign affairs; in particular, laws that designate the capital, calendar, national anthem, national flag, national days, and national emblem of China; the territorial sea, nationality, and diplomatic privileges and immunities. See Art 18.

<sup>14</sup> See Basic Law, Chapt V.

in concluding and implementing agreements, with foreign states and 'relevant international organisations in the appropriate fields.' The Hong Kong SAR is authorised to establish official economic and trade missions in foreign countries, while foreign states may establish consular and other official missions in the SAR. Its representatives may participate in international organisations and conferences not limited to states. The SAR may retain its status and be separately represented in those international organisations in which Hong Kong had previously participated, notwithstanding China's membership of such organisations. In particular, the Basic Law provides specifically that:

- 1 The Chinese Government shall, where necessary, facilitate the continued participation of the Hong Kong SAR in an appropriate capacity in those international organisations in which Hong Kong is a participant in one capacity or another, but of which China is not a member.<sup>15</sup>
- 2 International agreements to which China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong SAR.<sup>16</sup>

The statements of the Chinese government in the Joint Declaration, and of the Chinese legislature in the Basic Law, that the two Covenants 'shall remain in force' in the Hong Kong SAR, read with the provision in the Basic Law that contemplates international agreements which had been previously implemented in Hong Kong but to which China is not a party continuing to be implemented in the SAR, suggest unequivocally an intention to enable the Hong Kong SAR to succeed to the two human rights Covenants.

When the Hong Kong SAR succeeds to the Covenants, who will assume the reporting obligation? The separate, autonomous identity that is envisaged for the Hong Kong SAR and its exclusive legislative authority in respect of domestic affairs suggest that it is the SAR government that should undertake the obligation of reporting to the monitoring bodies. Indeed, to require the Chinese government to do so, even in the event of China acceding to the Covenants, is likely to breach the terms of the Joint Declaration and the Basic Law which have guaranteed a unique degree of autonomy for the Region. Since China will not be responsible for any of the matters dealt with in the two Covenants, the obligation to implement the provisions of the Covenants and to report periodically on progress made in securing the relevant rights ought to rest solely with the Government of the Hong Kong Special Administrative Region.

<sup>15</sup> Art 152.

<sup>16</sup> Art 153.



What would be the position if the SAR government neglects, or were to decline, to submit the periodic reports required under the two Covenants? This is a problem which chairpersons of human rights treaty bodies will need to focus on independently of the Hong Kong issue. There is no mechanism provided in any of the instruments for ensuring that reports are submitted whether on the due date or at all. On 15 August 1994, a total of 1040 reports were overdue in respect of the seven principal human rights instruments.<sup>17</sup> This number included 98 reports overdue under the International Covenant on Civil and Political Rights and 105 reports overdue under the International Covenant on Economic, Social and Cultural Rights. In this regard, a proposal made by Amnesty International to the 1993 World Conference on Human Rights appears to be worthy of consideration:

It should not be possible for a state to escape scrutiny by the treaty bodies simply by its own failure to provide the necessary reports. When a state persistently neglects to provide the necessary reports, the treaty bodies should seek relevant information from other sources, including other UN human rights mechanisms and non-governmental organizations, if this has not already been received, and should proceed to the examination of that state's implementation of the treaty concerned on the basis of this supplementary information. The state could be notified in advance, as is the usual practice, and again be invited to submit its report and attend the examination, but if no response is received the examination should proceed in any event in the usual way with the adoption of conclusions.<sup>18</sup>

This new development in international law will not only enable the Human Rights Committee and the Committee on Economic, Social and Cultural Rights to prevent any erosion of the authority of the two Covenants, but will also help to end the unnecessarily acrimonious debate on whether or not China should accede to the Covenants. In the spirit of the Joint Declaration and the concept of 'one country, two systems,' that decision can now be left entirely to the judgment of the Chinese government since it will not be relevant to, and will no longer determine, the continued applicability of the Covenants in Hong Kong.

*Nihal Jayawickrama\**

<sup>17</sup> The two Covenants and the Conventions on Racial Discrimination, the Crime of Apartheid, Discrimination against Women, Torture, and the Rights of the Child.

<sup>18</sup> Amnesty International, *Facing up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations*, UN document A/CONF.157/PC/62/Add.1 of 5 April 1993, p 35.

\* Senior Lecturer, Department of Law, University of Hong Kong.