Identifying a Future Refugee Problem: Hong Kong 1997

Daniel C. Turack
Capital University Law School

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj
Part of the International Law Commons

Recommended Citation

This Commentary is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
On December 19, 1984, the United Kingdom's Prime Minister, Margaret Thatcher, and Premier Zhao Ziyang of the People’s Republic of China, formally signed the Sino-British Joint Declaration on the Question of Hong Kong whereby the status of the British Dependent Territory of Hong Kong will cease to exist. As of July 1, 1997, the Chinese Government of the People’s Republic of China (PRC) will resume or be restored to sovereignty over the total territory known as Hong Kong.

1. 1984 Great Britain, Treaty Series No. 20 (Cmnd. 9352); this treaty has been reprinted under the title "A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of The People’s Republic of China on the Future of Hong Kong," 23 Int’l Leg. Mat. 1366 (1984) [hereinafter referred to and cited as “Joint Declaration” with page references to the latter citation]. The international agreement comprises The Joint Declaration, Annex I “Elaboration by The People’s Republic of China of its Basic Policies regarding Hong Kong,” Annex II “Sino-British Joint Liaison Group,” Annex III “Land Leases,” Ratifications were exchanged on May 27, 1985. The Joint Declaration entered into force on May 27, and as a treaty it was registered with the United Nations on June 13, 1985, pursuant to article 102 of the UN Charter. There is also an Exchange of Memoranda between the two governments in Peking on the day of signing the Joint Declaration, ibid. 1381.


It has been the PRC’s position that the Chinese territories in the 1842 and 1860 Treaties were never ceded de jure to United Kingdom sovereignty and that all three Treaties relating to Hong Kong were “unequal treaties” imposed illegally, see P. Wesley-Smith, Unequal Treaty 1898-1997: China, Great Britain and Hong Kong’s New Territories (1980), at (62-63; 167-68, 185-87); Hungdah Chiu, People’s Republic of China And The Law Of Treaties 60-71 (1972); W.L. Tung, China And Foreign Powers: The Impact Of And Reaction To Unequal Treaties (1970). An in depth legal analysis of the issues with respect to inequality concerning The Treaty of Nanking is found in Greenberg, “Hong Kong’s Future: Can the People’s Republic of China Invalidate The Treaty of Nanking As An Unequal Treaty?,” (1984), 7 Fordham Int’l L. J. 534. In furtherance of its position, the PRC requested and was granted the removal of Hong Kong from the list of colonial territories issued by the United Nations in the Declaration and the Granting of Independence to Colonial Territories and Peoples; see the letter of March 10, 1972, from the Chinese delegate, Huang Hu, to the UN Committee on Decolonization, reprinted in J. Cohen & H. Chiu, eds., People’s China And International Law: A Documentary Study, (1974), at 384 [here after cited as Cohen].

In the Joint Declaration, the PRC declared that in accordance with Article 31\(^3\) of the PRC Constitution on resumption of its sovereignty, a Hong Kong Special Administrative Region (SAR) would operate and retain ‘a high degree of autonomy, except in foreign and defense affairs’ which would be the responsibilities of the Central People’s Government.\(^4\) The essential characteristic of the agreement is based on the theory of “one country, two systems”\(^5\) that will preserve Hong Kong’s current social and economic systems for fifty years instead of the PRC’s socialist system and socialist policies. A Hong Kong SAR framework is set out in the Joint Declaration for autonomy to be implemented through enactment of a Basic Law for Hong Kong by the PRC’s National People’s Congress.\(^6\) The Basic Law will serve as the supreme legal instrument operative in the autonomous Hong Kong SAR for validating local legislation and the entity’s institutions.

“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,”\(^7\) while its Government shall protect the rights and freedoms of “inhabitants and other persons” in the Region according to the law.\(^8\) According to the explanatory notes attached to the agreement, the Parties do not intend the listing of the various freedoms and rights to be exhaustive.\(^9\) Interestingly, although the PRC is not a party to either the International Covenant on Civil and Political Rights or the International Covenant on Economic,

---

3. Article 31 provides: “The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in light of the specific conditions.” People’s Republic of China Constitution (1980).

4. Joint Declaration, para. 3. (1) and (2) at p. 1371.


7. Joint Declaration, para. 3 (5).

8. Annex I, XIII. It further states that the Region Government “shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.”

9. Explanatory Notes [to the Joint Declaration], Section XIII at p. 1385.
Social and Cultural Rights, both of these treaties are to remain in force in the Hong Kong SAR. Maintenance of public order is within the responsibility of the Hong Kong SAR Government. However, the presence of the Central People's Government military forces stationed in the Region for defense purposes and not to interfere in the Region's internal affairs raises the question of whether the central government can intervene if it concludes that the Region's authorities can no longer control public order.

Because the Hong Kong residents played no role in the negotiations leading up to the Joint Declaration, or the legal structure to determine their future, and the adopted process gave them a limited role subject to the final decision in Beijing, the Joint Declaration's coverage of travel documents, permanent identity cards, nationality, right of abode and immigration carries great significance.

**Freedom of Movement**

Amongst the enumerated rights in the Joint Declaration, article XIV in Annex I contains provisions on lawful residence and freedom of movement to take effect when the Hong Kong SAR is established. These tenets specify who will be considered residents of the territory, and eligibility to obtain permanent identity cards to that effect. Those who will have the right of abode are: (1) all Chinese nationals born in or who have resided in Hong Kong continuously for at least seven years before or after the SAR is established; (2) Chinese nationals born outside of Hong Kong of persons in (1); (3) all other persons who have resided continuously in

---

10. Annex I, XIII. A number of important queries arise in respect of the PRC's obligations to these treaties to which it is not party, and whether the United Kingdom's reservations as applied to Hong Kong continue; see H. Hammun, *Autonomy, Sovereignty, and Self-Determination* (1990), at 144. The United Kingdom made reservations relating to immigration and to the deportation of aliens, which will be discussed subsequently. Of relevance to treaty practice of the Parties see Goldstein, "Chinese and Western Treaty Practice: An Application To The Joint Declaration Between The People's Republic Of China And Great Britain Concerning The Question of Hong Kong" (1986), 1 Am. U. J. Int'l L. & Pol'y 167. Mushkat, *supra* note 2 at 189-194.

11. Annex I, XII.


13. As to who will be considered residents and non-residents of the Hong Kong SAR, and their rights and freedoms, see Wang Shuwen, *The Basic Rights and Obligations of Residents of the Hong Kong Special Administrative Region* (1988), 2 J. Chinese L. 123.
Hong Kong as their permanent residence for at least seven years before or after the SAR is established; (4) children under 21, born of persons abovementioned; (5) other persons who had the right to reside only in Hong Kong before the establishment of the SAR.

It is further stipulated that Government of the Hong Kong SAR "may on its own issue travel documents for entry into and exit from Hong Kong." Moreover, the permanent identity cardholders who are Chinese nationals will be entitled to be issued the Region's passports and travel documents as well as to the other lawful residents. These passports and travel documents will be valid for all States and other parts of the PRC and will carry a statement of the bearer's right to return to the Region. Annex I, article XIV, further elaborates that residents of the Region may use travel documents either issued by the Region's Government, the PRC or other states, for entry into and exit from the Region, while the Region's holders of permanent identity cards may have the right of abode inscribed in their travel document. Entry into the Hong Kong SAR by persons from other parts of China continues to be subject to current practice. Finally, the Region's Government has authority to regulate immigration control over persons from foreign states who seek exit or ingress or stay in the Region. From these provisions, it is possible that non-Chinese residents and British citizens could be denied the Region's permanent identity card, and as foreigners, be subject to the vicissitudes of immigration controls.

The Chinese and United Kingdom Exchange of Memoranda concerns both travel documents and nationality, and has an impact on the status of persons after June 30, 1997, especially those who were designated as British Dependent Territories Citizens (BDTC's) at the time of the agreement. Whatever the status of these memoranda their impact on thousands, if not millions of persons, in Hong Kong, can potentially create formidable refugee problems. It is not my intention to review all the complexities of the United Kingdom and Chinese nationality principles as they pertain to the Joint Declaration and Memoranda, and their various ramifications upon the movement of persons, as the subject of

14. Joint Declaration, supra, note 1, par. 10.
15. Provision is also made for the PRC to assist or authorize the Region's Government to conclude visa abolition agreements.
16. The introduction to the Joint Declaration states "[a]ssociated with the agreement is a separate Exchange of Memoranda" supra, note 1, para. 25, at p. 1370. Some commentators question whether the memoranda are internationally binding on the Parties: see Mushkat, supra, note 2 at p. 202, n. 169.
nationality has already spawned considerable comment.\footnote{See in particular: Chua, "The Sino-British Agreement And Nationality: Hong Kong’s Future In The Hands Of The People’s Republic Of China" (1990), 8 U.C.L.A. Pac. Basin L. J. 163; White, “Nationality Aspects Of The Hong Kong Settlement” (1988), 20 Case W. Res. J. Int’l L. 225; Parlin, “The Nationality Crisis of Hong Kong’s Non-Chinese Residents – Scholarly Myth Or Harsh Reality” (1986), 12 Brooklyn J. Int’l L. 369; Mushkat, supra, note 2 at pp. 198-205; Mushkat, “The International Legal Status Of Hong Kong Under Post-Transitional Rule” (1987), 10 Houston J. Int’l L. 1, at 16-20; Castle, “The Reversion Of Hong Kong To China: Legal And Practical Questions” (1985), 21 Willamette L. Rev. 327 at 340-346 (1985); Karamanian, supra, note 12 at 179-181. An excellent historical review of rationality questions in respect of Hong Kong was accomplished by White, "Hong Kong Nationality and The British Empire: Historical Doubts and Confusions on the Status of the Inhabitants" (1989), 19 Hong Kong L. J. 10.} However, some nationality principles must be reviewed to demonstrate what may well occur in the future.\footnote{International law accords states a considerable latitude in determining who will be considered their nationals. State decisions in this regard directly affect whether the state’s prerogative of conferring nationality has gone too far vis-a-vis other members of the international community in international law’s regulation of nationality; see generally R. Donner, The Regulation Of Nationality In International Law (1983); H. F. Van Panhuys, The Role Of Nationality In International Law (1959); Brownlie, The Relations Of Nationality In Public International Law” (1963), 39 British Y.B. Int’l L. 284.}

The Chinese Memorandum indicates that under its Nationality Law of 1980, “all Hong Kong Chinese compatriots whether they are holders of the British Dependent Territories citizens’ Passport or not, are Chinese nationals.”\footnote{The Chinese Memorandum is found in (1984), 23 Int’l Leg. Mat. 1381. For a commentary on the Chinese Nationality Law see Ginsburgs, “The 1980 Nationality Law of The People’s Republic of China” (1982), 30 Am. J. Comp. L. 459. On the wider implications of the application of the Chinese nationality law see Tung-Pi Chen, “The Nationality Law Of The People’s Republic Of China And The Overseas Chinese In Hong Kong, Macao And Southeast Asia”(1984), 5 N.Y.L. Sch. J. Int’l & Comp. L. 281.} Reference to “compatriots” encompasses those of Chinese ethnicity who live on Chinese sovereign territory and is meant to distinguish these persons from overseas Chinese who reside in foreign territory.\footnote{The Chinese Memorandum, supra, note 19 at 1381.} The PRC Memorandum takes into account “the historical background of Hong Kong and its realities” and provides that PRC authorities “will, with effect from 1 July 1997, permit Chinese nationals in Hong Kong who were previously called ‘British Dependent Territories citizens’ to use travel documents issued by the Government of the United Kingdom for the purpose of travelling to other states and regions.” However, these persons will not be entitled to British consular protection in the Hong Kong SAR or in the PRC.\footnote{Ibid.}

Four underlying principles permeate the 1980 PRC Nationality Law: (1) unity, that is a single class of nationality, (2) a combination of the\textit{jus sanguinis} (conferment of nationality based on blood-relation-descent)
and *jus soli* (conferment based on physical place of birth), (3) equality of the sexes, and (4) non-recognition of dual nationality.\textsuperscript{22} With respect to conferment of nationality, the combination of the *jus soli* and the *jus sanguinis* deprives Chinese nationality to a child born overseas to Chinese parents settled overseas if the child, at birth, acquires foreign nationality.\textsuperscript{23} Article 3 proclaims that the PRC refuses "to recognize dual nationality for any Chinese national" and to that end elaborate measures are found in the Nationality Law.\textsuperscript{24} Tangentially, the stateless and aliens may become naturalized Chinese nationals if they are "willing to abide by China's constitution" provided that the have close relatives in the PRC, are settled there, or have "other legitimate reasons,"\textsuperscript{25} and, children born in the PRC of persons who are stateless or of uncertain nationality and settled in China are Chinese nationals.\textsuperscript{26}

Before looking at the United Kingdom Memorandum, some preliminary attention must be given to changes of status brought about by the British Nationality Act 1981.\textsuperscript{27} As one commentator stated "[t]he immigration legislation on which the Act is founded is racially discriminatory in effect if not in intent."\textsuperscript{28} The Act was to make clear who had the right of unrestricted entry and abode in the United Kingdom. Three categories of citizenship are created under the Act. First, British citizenship and right of abode in the United Kingdom is reserved for those individuals whose "genuine and effective links"\textsuperscript{29} lie with the United Kingdom as determined primarily by existing immigration law. Second, British Dependent Territories Citizenship (B.D.T.C.) is given to those individuals whose

\begin{itemize}
\item \textsuperscript{22} Tung-Pi Chen, *supra*, note 19 at 283. For an insight into how the *jus sanguinis* and *jus soli* are applied in most countries see Scott, "Nationality: *Jus Soli or Jus Sanguinis?*" (1930), 24 Am. J. Int'l L. 158 (1930). On the different ways that dual nationality may arise and its legal implications see generally N. BarYaacov, *Dual Nationality* (1961).
\item \textsuperscript{23} Tung-Pi Chen, *supra*, note 19 at p. 286. Article 5 of the PRC 1980 Nationality Law provides: "Any person born abroad whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality. But a person whose parents are Chinese nationals and have settled abroad or one of whose parents is a Chinese national and has settled abroad and who has acquired foreign nationality on birth does not have Chinese nationality."
\item \textsuperscript{24} See the discussion by Tung-Pi Chen, *supra*, note 19 at 288-290, 310-312.
\item \textsuperscript{25} Art. 7.
\item \textsuperscript{26} Art. 6.
\item \textsuperscript{28} Blake, *supra*, note 27 at 196.
\item \textsuperscript{29} This is the terminology used in Nottebohm (*Liechtenstein v. Guatemala*), 1955 I.C.J. 5.
\end{itemize}
links lie with a dependency of the United Kingdom; these persons would have a right of abode according to the immigration law of each dependency. The third category is the British Overseas Citizenship, created for all existing citizens of the United Kingdom and Colonies who do not fit into either of the first two categories. These would be persons who, for example, were born in a now-independent former British colony, did not opt for the local citizenship, and have no right of abode anywhere.

Hong Kong residents who were formerly citizens of the United Kingdom and Colonies (a designation replaced by the Act) became British Dependent Territories Citizens on January 1, 1983, and thus all Hong Kong British passport bearers received B.D.T.C. status. Clearly, the option of emigrating to the United Kingdom by B.D.T.C.s was closed. Methods of acquisition of citizenship were also changed. Birth in the colony, Hong Kong, confers B.D.T.C. status, but only if a parent is a B.D.T.C. or settled in the colony.

The United Kingdom Memorandum specifies that B.D.T.C. status will lapse for all persons connected with Hong Kong on July 1, 1997, but those persons "will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom." They will become British Overseas Citizens, which cannot be passed on by jus sanguinis but as holders of British passports, they will be entitled to receive, upon request, British consular services and protection when in third countries (not in Hong Kong or China). Hong Kong’s immigration law is complex. The Immigration Ordinance details whom

31. See the examples of East African Asian and persons in Malaysia in White and Hampson, supra, note 27 at p. 11.
33. Ibid. 55. 1(3), 15(3).
34. Para (a), supra, note 1 at p. 1381. The paragraph stipulates further “[t]his status [British Overseas Citizens] will be acquired by such persons only if they hold or are included in such a British passport issued before 1 July 1997, except that eligible persons born on or after 1 January 1997 but before 1 July 1997 may obtain or be included in such a passport up to 31 December 1997.” Also, no person born on or after July 1, 1997, that is connected with Hong Kong will acquire British Overseas Citizenship (para. (b)). Further clarifications are found in Marston, “United Kingdom Materials on International Law 1986” (1986), 57 Brit. Y.B. Int’l L. 487 at 529-532 and Marston, “United Kingdom Materials on International Law 1989”, (1989), 60 Brit. Y.B. Int’l L. 569 at 607-608.
35. The United Kingdom Memorandum also states that its consular officers in the Hong Kong SAR and elsewhere may renew and replace passports of British Overseas Citizenship, and may issue passports to offspring born before July 1, 1997 of persons holding British Overseas Citizenship who were previously included in the passport of their parent: ibid., para. (c).
amongst its dwellers have the status of “Hong Kong belonger,” the only status which carries with it the right of abode in the territory. Actually, the Hong Kong belonger status can be acquired at birth, by naturalization, adoption, registration or marriage as set out in the provisions of the Immigration Ordinance in tandem with the British Nationality Act 1981, but the status does not inure through residence alone.\footnote{37}

Although the Joint Declaration may serve as a workable framework for the PRC and the United Kingdom to accomplish their own policies and purposes, what happens to the people of Hong Kong and their prospects for deriving the benefits of a bright future in the post-1997 years are speculative at this time. The Joint Declaration will be fleshed out and incorporated into the law of the Hong Kong SAR via the Basic Law\footnote{38} that was promulgated by the President of the PRC on April 4, 1990, following its adoption by the National People’s Congress. This legal framework is to operate for a fifty year period from July 1, 1997.\footnote{39} As completed, the Basic Law sets out the governmental structure of the Hong Kong SAR and the relationship of this autonomous region to the PRC.

Several commentators take the view that the Hong Kong legislature will be ineffective in enactment of its own laws, as the PRC Constitution expressly authorizes the State Council, the executive body of the National People’s Congress of the PRC, the highest organ of state power, “to annul, or alter, any of Hong Kong’s legislature enactments that conflict with the National Constitution.”\footnote{40} Moreover, the Joint Declaration states that the

\footnote{37. Clarke discusses the Hong Kong belonger status in detail, \textit{supra}, note 36 at 342-350, as well as the statuses of Chinese resident, resident British citizen, and resident United Kingdom belonger, who carry qualified rights to land in Hong Kong, \textit{ibid.}, at 350-356. See also, Chen, \textit{supra}, note 36 at 644-648. On the meaning of “residents and non-residents in the Hong Kong SAR” see Shuwen, “The Basic Rights and Obligations of Residents of the Hong Kong Special Administrative Region” (1988), 2 J. Chinese L. 123, 126-130 (1988).


The complete text of both the first and second drafts of the Basic Law are reprinted in (Fall 1989), 22 Chinese L. & Gov’t, 12, 196. A multitude of issues and problems concerning the drafting of the Basic Law are examined in a number of scholarly works presented in a Symposium on the Hong Kong Basic Law, (1988), 2 J. Chinese L. 1-151. For an introductory note, see C. Ku, Basic Law Drafting Background as promulgated on April 4, 1990, and the adopted Basic Law itself are found in (1990), 29 Int’l Leg. Mat. 1511.

39. Joint Declaration, para. 3(12).

40. Shiu, “Recent Development, Hong Kong: Prospects of Autonomy under Chinese Rule after 1997” (1990), 3 Transnat’l L. 141 at 163. Reference is to art. 85 of the PRC Constitution which states “[the State Council, that is, the Central People’s Government of the People’s Republic of China, is the executive body of the [National Congress,] the highest organ of state power; it is the highest organ of state administration.”: \textit{ibid.}, at 163, n. 191. Mushkat, \textit{supra}, note 2 at 180-181.}
Hong Kong SAR will be constituted in accordance with the provisions of Article 31 of the PRC Constitution. The second draft of the Basic Law, published in February 1989, continued to leave potential problems between its provisions and the Joint Declaration unresolved.

The Pro-Democracy Movement and Tiananmen Massacre of 1989

In the Spring of 1989, the interplay of many social, economic, and political factors collectively spawned the so-called pro-democracy movement. Supported initially by several thousand Beijing University students, the movement rapidly attracted over a million followers and developed into a nationwide mass movement. Despite this serious threat to the Chinese Communist Party, the PRC Government exercised relative restraint in confronting the massive demonstrations until some two weeks after President Gorbachev’s visit to the PRC. The PRC Government had branded the pro-democracy movement as a “counter-revolutionary rebellion”. A build up of positive expectations in Beijing and other major cities of the PRC was quickly reversed in the Chinese Army’s great massacre of Tiananmen Square that ominously began at 2 a.m. on June 4th. The brutal crackdown and the ensuing political oppression aroused worldwide repercussions including immediate economic sanctions against the


Article 31 of the PRC Constitution provides that “[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the NPC in the light of the special conditions”: ibid., at 66.


Beijing regime. Although certain of the measures were symbolic and transitory, the force used against unarmed people left an indelible image.

Beijing’s military repression of the pro-democracy movement abruptly weakened the confidence of the people in Hong Kong as to whether the PRC would abide by its commitments in the Joint Declaration. Not surprisingly, a new wave of capital flight and emigration began. In the aftermath, it was reported that the best educated individuals, including managers, professionals, secretaries and technicians were lining up in record crowds in Hong Kong at the American, Australian and Canadian consulates seeking visas. One day saw 1700 Chinese at the Australian Consulate as compared with an average of 120 a day. Despite Hong


46. Emigration from Hong Kong in 1983 was 19,800. During 1984 and 1985 the level was about 22,400. After a slight decline in 1986 to 19,800, it rose to 30,000 in 1987 and to 45,800 in 1988, approximately 90% going to Australia (nearly 8,000), Canada (24,588) and the United States (nearly 12,000); The Political Situation In Hong Kong And Issues Relating To Emigration, Hearing And Markup Before The Subcommittee on Asian & Pacific Affairs, Comm. on Foreign Affairs, U.S., H.R. 101st Cong., 1st Sess. Oct. 25, 1989, pp. 6-7, 14 (1990). For a brief assessment of United States, Australian, Canadian, New Zealand, Singapore and United Kingdom attitudes and projections concerning future emigration from Hong Kong see ibid., at 27-35.

47. See Butterfield, “Hong Kong Fears China’s Hard Line” N.Y. Times, June 8, 1989, p. 8. It was also reported that applications were up 50% at the Jamaica Consulate in Hong Kong as an immigrant can become a permanent resident of Jamaica for an investment of $100,000.
Kong’s leaders’ request to the United Kingdom Government for a right of abode in that country as a practical reassurance against PRC mistreatment after 1997, it was not in the offing.48

After months of speculation the United Kingdom announced in late December 1989, that it would grant full British passports and British citizenship to 50,000 families in Hong Kong, giving as many as 225,000 people, out of 3.25 million holders of the current special British passports, the right to settle in the United Kingdom.49 The PRC reaction was to brand the United Kingdom’s decision as a violation of the Joint Declaration. At the year’s end, it was calculated that about 42,000 Hong Kong residents had emigrated during the year.50 Meanwhile, the final drafting of the Basic Law for the Hong Kong SAR stirred deep dissatisfaction from the United Kingdom and Hong Kong spokespersons.51 Beijing announced that it would not recognize foreign passports held by Hong Kong Chinese after 1997, and thereby directly undermined the United Kingdom’s plan to give its full citizenship to the 50,000 Hong Kong families, enabling them to remain in Hong Kong with an escape voucher in their pockets.52 Given the doubts as to their future if they remained, emigration from the colony was averaging about 1,000 persons a week,53 and investment continued to flow outward.54

49. See Basler, "Fight in Hong Kong for Rights as Britons," N.Y. Times, Dec. 21, 1989, p. 3; Prokesch, "225,000 In Colony To Become British," N.Y. Times, Dec. 21, 1989, p. 3. On April 19, 1990, the House of Commons passed the bill to offer refuge to the 50,000 families; see Rule, "Britain Will Offer Refuge To 50,000 Successful Hong Kong Families," N.Y. Times, April 20, 1990, p. A3.

For more details on the debate concerning the right of abode in the United Kingdom see Note, "Great Britain's New Hong Kong Immigration Policy: The Solution To Hong Kong's Emigration Crisis?" (1990), 4 Geo. Immigr. L.J. 145, 148-150. Also, on the selection process to be used see Onslow-Cole, "Hong Kong Blues," (April 27, 1990), 140 New L. J. 584; British Information Service, 20 Survey of Current Affairs, No. 5, 170 (May 1990).


Before the end of 1990, the United States passed legislation which, amongst other things, considered Hong Kong as a foreign state for the purposes of immigration quotas. In each of the next three years the annual quota was doubled from 5,000 to 10,000 persons. Hong Kong was to be treated as a foreign state after 1997, for immigration purposes. In addition, 12,000 visas above the annual quota in each of the next three years were available to employees of U.S. businesses operating in Hong Kong, and certain of their dependents. Also, special immigrant status was made available for foreign service nationals at the United States Consulate in Hong Kong who were in service for at least three years, and their immediate family members. Finally, and most importantly, the successful visa applicants could use their visa at any time until January 1, 2002.55

Other developments in Hong Kong towards the end of 1990 also showed the Hong Kong people that Beijing was prematurely interfering with their future prosperity.56

Most recently was the passing of the deadline set by the United Kingdom for applications requesting British passports with a right to reside in the United Kingdom. This first phase, offering 50,000 heads of households to apply for 43,500 places brought only 65,674 applications, a considerable shortfall from the 300,000 applications expected. Perhaps it was the 32-page application form with its 250-page instruction manual which many felt was daunting,57 or perhaps Australia, Canada and United States offered greater prospects.

The Potential Refugees of Hong Kong SAR

Today, Hong Kong has a population of approximately 5.7 million persons of whom there are some 3.25 million Chinese. Although Hong Kong has had a Chinese refugee problem in the past58 and a present refugee problem59 of considerable magnitude it is the potential refugee60 problem

55. Immigration Act of 1990, P.L. No. 101-649, 104 Stat. 1978, ss. 103, 124, 152, 154 (Nov. 29, 1990). The legislative history of the Act discloses that American investment in Hong Kong was over $6 billion. More than 900 American firms were doing business in Hong Kong, employing approximately 200,000 Hong Kong nationals. It was estimated that those firms lost 24% of their key employees in the previous year as a result of emigration and transfers to non-U.S. businesses who offered these highly skilled employees immigration benefits as a prerequisite condition of employment: U.S.C.C. & A.N. Legislative History Section, p. 47 (Jan. 1991).


that could occur once the PRC resumes its sovereignty over the Hong Kong SAR that is being considered. Thusfar, I have only accounted for those Hong Kong belngers who have sought to emigrate legally or who have secured the necessary documentation to emigrate but have not yet actually left or who are eligible to emigrate but have not yet applied to the potential host countries. The numbers of these people are still in the tens of thousands. Of course there is the potential of a massive flow of refugees from the Hong Kong SAR in the hundreds of thousands if not millions.

There is the recognized fundamental human right of freedom of movement. The International Covenant On Civil And Political Rights, 1966, provides that “everyone shall be free to leave any country, including his own.” Neither the International Covenant nor other human rights instruments which contain a similar provision restricts freedom of movement to travel internationally so as to exclude the right to emigrate. There is an important caveat to freedom of emigration and that is to have a willing, receiving host state. Thus, a voluntary massive movement of people would require states to take not only the brain drain segment of Hong Kong society, but those less endowed by ability, education, financial resources or position.

Along with the traditional matters undertaken by the Office of the United Nations High Commissioner for Refugees (UNHCR), (the principal United Nations agency concerned with refugees), those of

59. A recent book dealing with the refugee problems following the American withdrawal from Vietnam and the subsequent political upheavals in Laos and Cambodia is V.O. Sutter, The Indochinese Refugee Dilemma (1990). Specifically with respect to Hong Kong, arrivals began to outstrip resettlement since 1986 and on June 16, 1988, Hong Kong initiated a screening process so that the authorities could cope with the number of arrivals. See Hanson, “Hong Kong’s Screen Door Policy: An Analysis Of Hong Kong’s Screening Procedures In The Context of International Law” (1990), 16 Brooklyn J. Int’l L. 583; Helton, “The Comprehensive Plan Of Action For Indo-Chinese Refugees: An Experiment In Refugee Protection And Control” (1990), 8 N.Y.L. Sch. J. Hum. Rts. 111, 114-115, 132-138, 143-144. As to the overall Hong Kong refugee policy see Mushkat, “Refugee in Hong Kong” (1989), 1 Int’l J. Refugee L. 449.
60. There is a considerable literature on the various aspects involving refugees. A good starting point is G.S. Goodwin-Gill, The Refugee In International Law (1983) and the select bibliography included in the book, and G. Loescher & L. Monahan, eds., Refugees and International Relations (1990), along with the Refugee Reference Guide and Selected Reading at 410 ff., together with some major bibliographical references pertaining to refugees at 4, n. 1.
61. Article 12(2). Article 12(3) provides: “[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” 999 U.N. Treaty Series 171. Article XIII of Annex I of the Joint Declaration stipulates that “[t]he 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.” The PRC is not party to either International Covenant. Some interesting queries arise if the PRC were to become a party to these treaties: see Hannum, supra, note 10 at p. 144.
humanitarian protection and relief, repatriation, integration into the state of first asylum and resettlement in third states, a new dimension has been added. Since the early 1980’s there has been a focus and concern directed towards the prevention of refugee situations from arising. Initiatives taken at the United Nations to avert new flows of refugees have produced two reports but not much more sufficient progress so as to alleviate the current refugee situations that have arisen in consequence of Iraq’s invasion of Kuwait in 1990, and the Iraqi Kurds and Iraqi Shiite Muslims of 1991.

The factors contributing to a potential mass exodus from Hong Kong are at present ideological, political and socio-economic. Any observers of an early warning system can merely examine the Joint Declaration to see what is to be preserved and protected in the Hong Kong SAR and compare those concepts and institutions with their counterparts in the PRC. A reading of U.S. or Canadian ‘national’ newspapers over the last several years leads one to say that there is regional discontent, socio-economic disparity, cultural separatism, political repression, economic deprivation, incompetent government, and widespread human rights violations in the PRC.

At times the international community may not become aware of the internal causes which bring about a refugee flow until the eruption is ignited. Premature preventative measures taken by the international community could be characterized as an interference into the domestic affairs of the country of origin. In the case of the PRC, countries such as the United States watched for the PRC Government to show some positive signs in resolving the problems that set aflame the pro-democracy movement. Although Beijing’s human rights performance was found to be unacceptable a year after the Tiananmen Square massacre,
the United States renewed China’s most-favored-nation trading status for another year as being in the best interests for the United States and for the Chinese people. For the year, the United States found “China’s human rights climate in 1990 remained repressive, if less overtly so than in 1989 . . . At least several hundred persons remained detained without formal charge since the 1989 crackdown on political dissent.” One needs only to compare the human rights records of Hong Kong with that of the PRC to recognize why the people of Hong Kong question PRC integrity towards them after 1997.

At this time, it can be said that the PRC is not intentionally creating the root causes of a potential mass exodus from Hong Kong. Its own problems run deep. There is no forced emigration as a government policy. It wants to receive Hong Kong back as a continuing thriving financial and economic centre. But its own political social, economic and legal systems are different. There are enough current differences and incompatibilities between Hong Kong and the PRC to give anyone cause for concern aside from the disruption of confidence brought about by Tiananmen Square action of June 1989.

Government officials for the United Kingdom and the PRC continue to consult bilaterally on matters relating to the future of Hong Kong, but other mechanisms should be developed before 1997.

Mechanisms required to monitor root causes of potential refugee flows due to man-created situations, as distinguished from natural disasters may evoke a negative response from any state targeted. There are of course the political sensitivities of the State being watched. Although human rights transgressions may well be some of the root causes, they

65. 26 Weekly Comp. Pres. Doc. 827 (May 24, 1990). It was reported that approximately 17,000 Chinese nationals emigrated from the PRC to the U.S. in 1989. It was further stated that “[n]ot to continue MFN for China would deliver a terrible blow to Hong Kong, costing as many as 20,000 jobs and reducing the colony’s GNP by as much as 2.5 percent. Hong Kong should not be the innocent victim of our disappointment with the Chinese administration”: p. 828. The U.S. Senate was made specifically aware of the confidence crisis in Hong Kong at this time and what were considered to be violations of the Joint Declaration by the recent enactment of the Basic Law; see Lee, “Hong Kong: Denial of Democracy and Human Rights Before and After 1997,” supra Hearing, note 64, at 221-225.


67. See the reports on Hong Kong and PRC, ibid. at 1333-1341 and 845-866, respectively. Generally, this type of national monitoring by the U.S. and intergovernmental and non-governmental organizations have really brought the changes beneficial to the best interests of the people of the monitored country.


may also be only a part of greater complexities. Linkage of human rights groups and humanitarian aid entities operating closely with government decision-makers have been proposed, but as that focus has been to try and deal with all future possible mass exoduses, perhaps the Hong Kong-United Kingdom-PRC known situation can be dealt with independently.

**A Stop-Gap Suggestion**

What is suggested is not a prototype, as the establishment of an effective machinery requires in depth studies of alternatives representing the great diversity of conditions existing in the world’s community of nations. A durable pragmatic design of approaches should be the objective to take into consideration the various regional differences that exist and circumstances that may be peculiar to particular groups of states. The ultimate breakthrough would be the development of a code of conduct and procedures that States would voluntarily want to adopt so as to recognize root causes and resolve them before any social unrest threatens the government’s continued existence or international posture, and the outpouring of humanity across national boundaries. At this juncture, given the time for transition and 1997 still being some years away, it is recommended that the good offices of the Secretary-General of the United Nations be considered. The Secretary-General could create an *ad hoc* group of advisors, who would be ideologically neutral, to investigate avenues of dealing with and analyzing the information which they find, and work with the particular government representatives appointed by each of the Parties. They could report to the Secretary-General directly or be authorized to offer recommendations to both Governments. To avert a potential massive outflow in the future and the continued emigration that currently exists, the people of Hong Kong need some positive signs from the PRC and the United Kingdom. It is not a panacea, but a new road of international cooperation may give Hong Kong’s people nascent hope that they deserve.

---

72. Statements like those made on April 9 at a news conference by Prime Minister Li Peng of the PRC, to mark the end of the 1991 session of the National People’s Congress, that Beijing was ready to use force again to suppress dissent, are not likely to quell anxiety in Hong Kong. See Kristof, “Chinese Premier Defends ’89 Crackdown on Protestors,” *N.Y. Times*, April 10, 1991, p. A3.