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Political Life of Treaties: Indeterminacy, Interpretation and Political Consequences

Alexander Orakhelashvili*

Abstract

The argument that the operation of the international legal system depends on political factors is to many a truism requiring little clarification or verification. But what does the operation of the system of positive international law do to international political processes? Even if it is politics and not law which primarily guides activities and decisions of States, how far could sheer politics get States in achieving their political goals? This paper focuses on three episodes—two historical and one current—about the political life of treaties involving high political stakes, and shows that the viability of foreign policies of States may be more dependent on the ways in which the system of positive international law works than is that system dependent on political agenda pursued by any State or group of States.

I. Introduction

1. Every treaty obligation brings some burden to a State-party and purports to restrain its freedom of action. Hence, States will not ordinarily assume treaty obligations unless they judge them to be in their political interest, and are assured that political stakes with the state of affairs envisaged under the relevant treaty make it worth joining. At the same time, States parties agree on the normative content of a treaty, not on its underlying political stakes. Political

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outcomes expected from the operation of a treaty are not the same as the sum of rights and obligations thereunder, and it will be up to each State party to foresee or (mis)judge the extent to which its political stakes will be fulfilled or redeemed.

2. It is also a commonplace that changing political circumstances could motivate violation by States of a treaty, but they do not affect the validity or content of the treaty. In such a case, disagreements are likely to arise on the interpretation of the treaty and outcomes are controlled by interpretation rules under 1969 Vienna Convention on the Law of Treaties, which were also relevant before this Convention was adopted because they were considered reflecting customary international law rules.¹ Underlying legal and political dilemmas have major legal and political repercussions. Here I propose to deal with three case studies, two historical and one contemporary, to demonstrate the essence of the phenomenon spoken of here.

II. Yalta Agreement and Civil War in China

3. The end of World War II in Asia coincided with the outbreak of civil war between Nationalists and Communists in China. Out of three allied powers, two (the USA and UK) favoured Chiang Kai-Shek's Nationalist government while the USSR obviously had sympathies with Mao Tse-tung's Communists. Owing to overall power dynamics in China at that time and complexities of inter-allied relations, the USSR agreed to accommodate the Western position that the Nationalist government was China's legitimate government. Consequently, the final paragraph in the 11 February 1945 Yalta Agreement stipulated that "the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the U.S.S.R. and China in order to render assistance to China with its armed forces for the purpose of liberating China from the Japanese yoke."

4. The aforementioned Soviet-Chinese Treaty was concluded on 14 August 1945, and provided for cooperation between Soviet and Nationalist Chinese governments in various areas. Most pertinently, the exchange of notes relating to the above 1945 Treaty signed by Soviet Foreign Minister Molotov and

1 PCIJ applied the same rules as those embodied in VCLT, and 1966 ILC Final Report largely relied on PCIJ practice, see ILCYB 1966, vol.II, 217.

agreed by his counterpart from Nationalist Chinese government provided that,

In accordance with the spirit of the aforementioned Treaty, and in order to put into effect its aims and purposes, the Government of the U.S.S.R. agrees to render to China moral support and aid in military supplies and other material resources, such support and aid to be entirely given to the National Government as the central government of China.²

5. Political stakes that led to these commitments should not be underestimated. The US was keen to get Soviets to recognise Chiang Kai-Shek's government as well as China's sovereignty over Manchuria, and to make no deals behind Nationalists' backs. In return, the US agreed to recognise Soviet annexation of the Kuriles and southern Sakhalin, accept the presence of a Soviet naval base at Port Arthur and preeminent Soviet interests at the port of Dalian (called Dairen by Japan) and on the Manchurian railroad. Coincidentally, the US was thus counting on clearly delineating and circumscribing Soviet influence in East Asia after the war.³

6. The Chinese Nationalist government was pleased with the agreements concluded with the USSR as a consequence of the Yalta decisions, not in the first place with their content but with the fact that no attempt was made to bring Communists to the negotiating table, let alone into government, when the treaty was negotiated and concluded. "It was taken to suggest that the Soviet leaders expected the Chinese National Government to remain in power". The Communiqué of the conference of foreign ministers held at Moscow on 16 December 1945 expressly maintained this position.⁴ At that time, this position was suitable also from the Soviet point of view because the Communists were not yet in a position to take over government.

7. The Agreement of 14 August 1945 was widely seen as Soviet support for the Nationalists. Mao Tse-tung's reaction was that "Stalin wanted to prevent China from making revolution, saying that we should not have a civil war and should cooperate with [the Nationalists]." Stalin is reported to have told the chief negotiator for the Nationalist government that if they would enter into

2 For text of the treaty, see 40 AJIL Supplement (1946), 54.

3 M.P. Leffler, *Adherence to Agreements: Yalta and the Experiences of the Early Cold War*, 11 *International Security* (1986), 88 at 107; Later on, however, the US went on to contest Soviet interests and sought to redefine the meaning of those concessions, *id.*, 108-109.

4 M. Beloff, *Soviet Policy in the Far East 1944-1951* (1953), 35-36.

alliance with the USSR, nobody would overthrow their government, but also that the USSR would not fight against Mao's Communists. The Nationalists had made substantial concessions to the USSR in return for their recognition as China's sole government. And, had Soviets handed Manchuria to them after the war, the Communists would have been contained in the region and liable to elimination.⁵ Even though tension between the USSR and Anglo-American allies subsequently increased, even toward the end 1946 the official Soviet attitude was that the Nationalist government was the only legitimate authority in China and agreements concluded with it still held good.⁶

8. In 1946 there was a wide-scale Communist infiltration into Manchuria. The Nationalist troops' effective presence was limited to cities and did not encompass much of the countryside. A few days after the Soviet evacuation of Changchun, the main city in the province, Communists captured it. It is reported that, "In accordance with its treaty obligations, the Red Army did not engage in overt cooperation with the Chinese communists, refused to arm them directly, and removed them from many of the major cities. This was disappointing for the CCP [Chinese Communist Party], which had expected much greater and more overt assistance."⁷ It was also "very difficult to estimate to what extent there had been definite Soviet assistance to Chinese Communists prior to this offensive." Official requests by the CCP for cooperation were refused but it was alleged that large quantities of arms were handed over to Communists. The official Soviet line was that Communists were seizing arms from Japanese dumps or through disarming the Japanese. At the same time, the USSR was the only power to receive Japanese surrender in Manchuria, and the Communists were unlikely to have obtained those arms without Soviet collusion.⁸ According to an American diplomatic source, though, there was no proof of collusion between the USSR and Chinese Communists in early 1946.⁹ At the same time, Mao's Moscow pledge as to the Soviet control of Manchuria seems to have gone on informally, though there was no official denial of it either.¹⁰ According to another report, Soviet

5 Cited in M. Hughes & M. Seligmann, *Losing the Peace: Failed Settlements and the Road to War* (2002), 126-127, 133, 135.

6 Beloff, above n.4, 43.

7 Hughes & Seligmann, above n.5, 135.

8 Beloff, above n.4, 43; Hughes & Seligmann, above n.5, 134.

9 Leffler, above n.3, 110.

10 Beloff, above n.4, 48-49; Hughes & Seligmann, above n.5, 133.

intervention was kept to a minimum, but it enabled the access of Communists to former Japanese arms supplies, and held up Nationalist forces to enable the Communists to establish themselves.¹¹ When Japanese forces surrendered in Manchuria, Nationalist forces were between 600 and 1000 miles away. They could not reach relevant localities to pre-empt the Communists from establishing themselves and acquiring arms for their further struggle against the Nationalists.¹² This eventually contributed to the Communists' success on the battlefield, defeat of the Nationalists, and establishment of the People's Republic of China.

9. Did the USSR violate its obligations under the Yalta Agreement? This Agreement and compliance therewith was taken very seriously by all allies. With regard to other provisions of the Agreement such as territorial and related issues, the UK and the USA have pointed out on relevant occasions that Soviet claims exceeded the terms of the Yalta Agreement.¹³ Assuming, for the sake of argument, that the USSR was in breach of the Yalta Agreement as regards relations between parties to the Chinese civil war, it would be difficult to say that the strengthening of the Communists after the conclusion of the Agreement amounted to a fundamental change of circumstances because the USSR did promise not to engage with anyone apart from the Nationalists. Yet, the change of political circumstances was very obvious.

10. From the Soviet point of view, this process was about more than intra-Chinese relations, namely about Soviet-American relations. In a situation resembling the apportionment of zones to allied powers in post-war Germany, the Yalta Agreement was seen to delimit spheres of activity as between Soviets and Americans, and the Soviets were not meant to act outside the zones conceded to them under the agreements between allies and between the USSR and the Nationalist Chinese government. However, unlike the situation in Germany, there was an indigenous fighting force in principle loyal to the USSR in China, and its advance and success could offset gains indirectly conceded to Americans under those agreements in a way that could not happen in the context of Germany. The USSR would not fight anyone apart from the Japanese, but the success of the Communists would provide the result as if they had fought and won.

11 Beloff, above n.4, 48.

12 Hughes & Seligmann, above n.5, 135.

13 Beloff, above n.4, 32.

11. Another pragmatic consideration of Soviet policy was that, from their point of view, the Nationalists could not be trusted. In fact, the Agreement of 14 August was concluded with them only owing to the American inducement and it could not be foreseen how long Americans would be ready to play the Soviet hand in this matter. And if the Communists were to prevail in the civil war, what would remain of concessions the Nationalists had legally made by agreeing to whatever was determined at Yalta? To sum up, the actual political motivations of Soviet conduct and the success of their policy would inevitably depend on three factors: actual strength of the Communists and their ability to take on the Nationalists, ideological sympathy with the Communists, and dynamics of inter-allied relations. These factors operated in tandem to determine what would be done, when and how. An overt reneging on treaty commitments was not an option. It would not only facilitate but also legitimise adverse American intervention in support of the Nationalists.

12. The key legal question is how much the USSR was legally obliged to do to facilitate aims sought by the Nationalists and their Western allies, especially whether it was under a positive treaty obligation to suppress Communist infiltration and prevent them from gaining weapons to fight the Nationalists. As pointed out, “Denying assistance to the CCP, as the Soviet forces were bound to do under the Sino-Soviet Treaty, was not the same as actively frustrating Chinese Communists in their efforts.” And even the US State Department was of the view that there was nothing in the 1945 Sino-Soviet treaty which obliged the USSR to act to exclude Communist presence from Manchuria.¹⁴

13. Requirements under the treaty did not inhibit political pragmatism in this case. Recognition of the Nationalists did not entail a duty to fight or suppress the Communists. While political circumstances kept changing, the Yalta agreements maintained a continued legal life of their own. Establishment of the PRC was far away from how Western allies saw the future of Asia at Yalta, but this frustration of political aspirations did not involve a violation of any concrete legal obligations.

III. Potsdam Agreement and Post-War Elections in Poland

14. At the end of World War II, two competing governments contended to be in charge of Poland: the London-based nationalist government and Lublin-based government loyal to the USSR. As the latter government was in

14 Hughes & Seligmann, above n.5, 133.

far greater control of the situation on the ground than the former one, the 1945 Yalta Agreement on Poland called

for the establishment of a Polish Provisional Government which can be more broadly based than was possible before the recent liberation of the western part of Poland. The Provisional Government which is now functioning in Poland should therefore be reorganized on a broader democratic basis with the inclusion of democratic leaders from Poland itself and from Poles abroad. This new Government should then be called the Polish Provisional Government of National Unity.

15. Thus, a government of unity would consist mostly of the Lublin government elements, combined with some elements from the London-based government. The Government thus envisaged in the Yalta Agreement was agreed to reflect the strategic importance of Poland to the USSR. Still, after the death of President Franklin Roosevelt, his successor Harry Truman demanded that if he was to enter into consultation with a Polish government, a new provisional government had to be established in the way that would be “genuinely representative of the democratic elements of the Polish people”. This was a clear-cut attempt at revising the Yalta Agreements and marked a shift from Roosevelt’s policy line. The Soviet position was that the US was in effect seeking to replace the existing Polish government with another, more desirable, one. They continued to insist that the Lublin-based government had to be a core of any national unity government in Poland.¹⁵

16. According to one commentator, the US view was that Yalta and related agreements constituted part of “American efforts to define permissible Soviet behaviour in as narrow way as possible in order to circumscribe Soviet influence in Europe and Asia”.¹⁶ Thus, as part of their policy to deal with the problem created by the domination of the Lublin government, both the Roosevelt and Truman administrations had placed their political stakes on the content of the Yalta agreement and recognised that the viability of the American political agenda heavily depended on the success of its accommodation by the international legal system. In short, politics was dependent on law,

15 Leffler, above n.3, 97; US Secretary of State Byrnes is reported to have privately admitted that the USSR’s legal position was correct, and “Truman acquiesced to this bitter reality” of the Lublin government forming the core of Polish national unity government, *ibid.*, 98.

16 Leffler, above n.3, 94.

and possibilities of interpretation, re-interpretation, and manipulation of the content of relevant treaties would not be unlikely to arise.

17. The provisional government was eventually to be replaced by the elected government of Poland. On that point, the Potsdam Agreement of 1 August 1945 emphasised that,

The Three Powers note that the Polish Provisional Government in accordance with the decisions of the Crimea Conference has agreed to the holding of free and unfettered elections as soon as possible on the basis of universal suffrage and secret ballot in which all democratic and anti-Nazi parties shall have the right to take part and to put forward candidates; and that representatives of the Allied Press shall enjoy full freedom to report to the world upon developments in Poland before and during the elections.

18. The above provision has touched upon the essential conflict of interests between the allies. Initially the US administration under Roosevelt “believed that the incorrigibly anti-Soviet London Poles were incapable of playing a constructive role in their grand design of a new world order based on postwar Russo-American cooperation. [...] Polish elections would clear the path for a new and more ‘democratic’ government with friendly intentions toward Moscow.” As a corollary, the USA expected the USSR to respect Poland’s “considerable sovereignty in their internal affairs”. The USSR considered it had “a legitimate right to ‘good neighbors’ on their western borders”.¹⁷ Later in 1945 the US was further demanding that the USSR in Eastern Europe “had to refrain from intervention in the strictly internal affairs of these countries and to accept the principles of open and non-discriminatory trade, free elections, and the unimpeded movement of Western journalists”.¹⁸ That already was an expectation as to a substantive outcome from the Soviet government that was not visibly covered by obligations arising under the Potsdam Agreement provision cited above. The US claim was premised on an implicit recognition of both the USSR’s political predominance in and its legal authority over Poland, so that the USSR could then lawfully induce the Polish government to adopt policies suitable to American interests. But that not only

17 W. Larsh, *Yalta and the American Approach to Free Elections in Poland*, 40 *Polish Review* (1995), 267 at 267-268; see also Leffler, above n.3, 98, on adverse concerns of the USSR regarding the pro-American orientation of London-based Polish Committee.

18 Leffler, above n.3, 101.

required the USSR to do more than it had to do under any treaty, but also stumbled over the political challenge of whether the USSR would tolerate a Polish government hostile to it. How would a freely elected government of a country that was a market economy before 1940 and had fought a war against Soviet Russia be expected to be receptive to Soviet concerns of security? As explained, “throughout Eastern Europe, except perhaps Bulgaria, free elections portended the emergence of anti-Soviet governments; open trade meant the eventual influx of Western capital, goods, and influence.”¹⁹

19. Not surprisingly, the 1947 parliamentary election in Poland was rigged and manipulated to return a communist government. Forms of manipulation included intimidation of and violence against members of non-communist parties, inducement of workers to show their ballots in public even if elections were held under secret ballot, and appointing communists to most if not all electoral commissions.²⁰ At Potsdam, “FDR dropped the proviso on joint United States, British and Soviet supervision of the elections. In consequence, the Communists were able to effectively rig the elections in 1947. [...] The Soviets knew exactly what this was all about; and so did the Americans.”²¹ It has been suggested that “Moscow’s refusal to ensure free elections and to establish representative governments constituted clear-cut violations of wartime agreements and engendered legitimate consternation in Washington.”²² There was, however no treaty obligation stipulated to that effect and no allied power was under a legal duty to ensure fairness of elections in Poland.

20. Poland had its government recognised under the Potsdam Agreement but it was not a party to that Agreement. Parties to that Agreement, including the USSR, had merely acknowledged what the Polish government was promising, as opposed to undertaking that the allies would themselves secure that elections are held in a particular manner. The extent to which Polish government complied with its pledge given to allies at Potsdam is not very clear either. Elections were to be held “as soon as possible” but “no firm deadline”

19 And, “At the Moscow Conference in December 1945, the Soviet dictator reminded [US Secretary of State] Byrnes that Rumanian troops had marched to the Volga, Hungarian armies had reached the Don, and Nazi naval vessels had moved unhindered through Bulgarian waters.” Leffler, above n.3, 102.

20 R.F. Starr, *Elections in Communist Poland*, 2 *Midwest Journal of Political Science* (1958), 200 at 208-210.

21 Larsh, above n.17, 274-275.

22 Leffler, above n.3, 103.

was set.²³ Claims about postponement of elections were thus more difficult to raise. Hence, “the Communists were able to exploit the situation and consolidate their grip on Poland.”²⁴ Nor is it easy to conclude that, in 1945 when modern human rights law was unheard of, the term “free elections” possessed a clear international legal meaning. And the only possible comparator in determining what a “democratic” party was could be US democrats. The text of Polish commitment merely stipulated participation conditions, and did not go as far as determining the criteria of fairness of the electoral process.

21. Admittedly, all the above sounds rather cynical, and there is no way of saying that any of the above conclusions are absolutely incontestable. Abram Chayes and Antonia Chayes have examined various situations where seemingly indeterminate content of a treaty induces parties to seek to (re)identify its meaning the way that would be legitimate and obvious to all parties. As Chayes and Chayes explain,

In all such cases, it remains open to a party, in the absence of bad faith, to maintain its position and try to convince the others. In fact this kind of discourse among the parties, often in the hearing of a wider audience, is an important way of clarifying the meaning of the rules. [...] Although one party may charge another with violation and deploy legions of international lawyers in its support, a detached observer cannot readily conclude that there is noncompliance, at least in the absence of “bad faith.” [...] It is, of course, by no means unheard of that states, like other legal actors, take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action. Indeed a state may consciously seek to discover the limits of its obligation by testing its treaty partners’ responses.²⁵

22. Political pressure could be used against a State-party that advances interpretation of a treaty that is not desirable to other parties, but such political pressure could only get so far unless the legal meaning of underlying treaty provisions indisputably supports and sustains the outcome politically sought. This was hardly the case with the plain meaning of the Potsdam Agreement and outcomes sought by Western Allies. Another line of legal argument would

23 As suggested in Larsh, above n.17, 274.

24 Larsch, above n.17, 274.

25 A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), 12.

be to view Poland in 1947 as a mere instrumentality of Soviet government, similar to how the UK House of Lords held regarding East Germany twenty years later,²⁶ but the Polish government created pursuant to the Potsdam Agreement was generally acknowledged to be a government of an independent country. As for the USSR's responsibility for rigging, this would have to be established through demonstrating effective Soviet control of the actual electoral process, on terms that were four decades later defined by the International Court of Justice in *Nicaragua v. US*.²⁷

IV. 1984 Sino-British Joint Declaration and China's Response to Protests in Hong Kong

23. Recent events in Hong Kong have been viewed by Western governments as a crackdown on democracy. Most prominently, this has involved the adoption of 2020 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law") which provides for criminal punishment for separatist and secessionist activities in Hong Kong. These steps have been viewed as China's violation of 1984 Sino-British Declaration which constitutes a treaty whereby Hong-Kong was restored to China in 1997.

24. Pertinent provisions of 1984 Sino-British Joint Declaration, in paragraph 3, suggest that Special Administrative Region (SAR) of Hong Kong will be vested with a "high degree of autonomy", and more specifically that

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

(4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. [. . .]

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of

26 *Carl Zeiss Stiftung v. Rayner and Keeler Ltd (No 2)*, [1967] 1 AC 853.

27 *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. US*, Merits, Judgment, ICJ Reports 1986, 14.

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 Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

It has been suggested by a commentator that, after the handover, Hong Kong's autonomy "has nonetheless been eroded. The erosion of autonomy has particularly been caused by and manifested of the mechanism laid down in Article 158 of the Basic law vests the power of interpretation of the Basic Law Standing Committee of the National People's Congress, a legislative body of China."²⁸

25. Articles 20, 21 and 22 of China's 2020 National Security Law for Hong Kong criminalise secessionist and subversive activities in Hong Kong aimed at detaching Hong Kong from China or altering unlawfully its status or surrendering it to another State; and subversive activities aimed at overthrowing the existing political system in SAR. UK Foreign Secretary's statement in Parliament of 1 July 2020 has suggested that this "legislation violates the high degree of autonomy of executive and legislative powers and independent judicial authority, provided for in paragraph 3 of the Joint Declaration." Hence, the legislation is seen to be "a clear and serious breach of the Joint Declaration."²⁹ It is a commonplace that domestic law of a State cannot be used to breach international obligations of that State. All turns, therefore, on what the scope of China's obligations under 1984 Sino-British Joint Declaration is.

26. In the first place, what "high degree of autonomy" means has never been defined beyond specific provisions of the Joint Declaration that give effect to that notion. The conclusion that any possible degree of autonomy requires toleration of secessionism within PRC would be unwarranted. The Foreign Secretary's statement of 1 July 2020 has also placed reliance on Article 23 of the 1997 Basic Law for Hong Kong (adopted by PRC's People's National Congress in 1990 and entered into force in 1997), which states that,

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against

28 P.C.W. Chan, *Hong King's Political Autonomy and Its Continuing Struggle for Universal Suffrage*, *Singapore Journal of Legal Studies* (2006), 285 at 286.

29 National security legislation in Hong Kong: Foreign Secretary's statement in Parliament, 1 July 2020.

the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

27. However, the most this could show is that PRC Government has contradicted Hong Kong's own constitution, which is a point for experts of Chinese constitutional law to clarify. On a domestic legal plane, the Chinese legislation does seem to be similar to the "implied repeal" doctrine which operates in UK's constitutional law, but this hardly amounts to a breach of international law. As the International Court of Justice observed in *ELSI* (US v. Italy),

it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise.³⁰

28. Another controversy relates to whether Hong Kong's "high degree of autonomy" commits China to any particular manner of conducting elections in Hong Kong, especially whether members of legislature advocating secessionism have to be kept in the positions they occupy. A Joint Statement by the Foreign Ministers of Australia, Canada, New Zealand, and the United Kingdom, and the United States Secretary of State of 9 August 2020, suggests that,

Hong Kong government's unjust disqualification of candidates and disproportionate postponement of Legislative Council elections. [...] We support the legitimate expectations of the people of Hong Kong to elect Legislative Council representatives via genuinely free, fair, and credible elections. We call on the Hong Kong government to reinstate the eligibility of disqualified candidates so that the elections can take place in an environment conducive to the exercise of democratic rights and freedoms as enshrined in the Basic Law. Beijing promised autonomy and freedoms under the "One Country, Two Systems" principle to the Hong Kong people in the Sino-British Joint Declaration, a U.N.-

30 ICJ Reports 1989, 74.

registered treaty, and must honour its commitments. We urge the Hong Kong government to hold the elections as soon as possible.³¹

29. On 12 November 2020, UK's Foreign Secretary has stated that,

Beijing's imposition of new rules to disqualify elected legislators in Hong Kong constitutes a clear breach of the legally binding Sino-British Joint Declaration. China has once again broken its promises and undermined Hong Kong's high degree of autonomy. The UK will stand up for the people of Hong Kong, and call out violations of their rights and freedoms. With our international partners, we will hold China to the obligations it freely assumed under international law.

The statement continues that, "We judge that this Decision breaches the legally-binding Sino-British Joint Declaration. It breaches both China's commitment that Hong Kong will enjoy a 'high degree of autonomy' and the right to freedom of speech guaranteed under Paragraph 3 and Annex I of the Declaration."³² But, the Declaration only says there should be a legislative power in Hong Kong; it does not define the detail of its arrangement.

30. A further issue is whether the freedom of speech extends to secessionist propaganda. Article 19 ICCPR, to which China is a party, stipulates freedom of speech and provides in Article 19(3) that,

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.³³

31 (www.gov.uk/government/news/hong-kong-statement-on-the-erosion-of-rights).

32 UK Government press release, Foreign Secretary declares breach of Sino-British Joint Declaration, 12 November 2020, (www.gov.uk/government/news/foreign-secretary-declares-breach-of-sino-british-joint-declaration).

33 Article 10(2) ECHR clearly refers to "the interests of national security, territorial integrity or public safety".

31. Thus, Article 19 ICCPR endorses a strong interpretative presumption that a two-way relationship of mutual respect between an individual and State or society is envisaged. Maintenance of a State-party's territorial integrity is at the core of the national security exception under Article 19(3)(b) ICCPR, whether that provision is to be read narrowly or expansively. Article 4 of the 2020 National Security Law indeed alludes to ICCPR. The Chinese Government's position also is that "One Country' is the precondition and basis for 'Two Systems'", and that, "No right or freedom is absolute. They must be exercised within the limits of laws. The legislation is aimed at the very few activities that gravely undermine China's national security."³⁴

32. The above interpretation of ICCPR appears to be a reasonable one. The Human Rights Committee's General Comment 34 which deals with obligations of States-parties under Article 19 ICCPR, identifies some impermissible restrictions on freedom of speech, such as penalisation of journalists when they spread information undesirable to the government. There is, however, no suggestion that national security concerns cannot be used in situations of separatism or secessionism. The General Comment speaks of terrorism, which is about harming a State, its government and population, as a legitimate reason to restrict freedom of speech in the interests of national security;³⁵ while from the State-party's interest, secessionism is worse than terrorism because it aims at dismembering the State. When dealing with communication in *AK and AR v. Uzbekistan* (1233/03), the UN Human Rights Committee dealt with a conviction for preaching ideology harmful to the State, and suggested that "it is apparent that the courts, while not explicitly addressing article 19 of the Covenant, were concerned with a perceived threat to national security (violent overthrow of the constitutional order) and to the rights of others."³⁶ In that spirit, it is very unclear how suppression of secessionism in Hong Kong could breach ICCPR, or how what China does in this context is purely and simply a suppression of dissent. It is, therefore, very difficult to conclude that 2020 National Security Law breaches China's international obligations under the 1984 Declaration or any other international agreement. China's decisions with regard to Hong Kong may not be politically acceptable to all, but they are not acts of sheer revisionism by a growing

34 Statement by Chinese Embassy in London, 4 June 2020.

35 HRC General Comment No. 34, 12 September 2001, CCPR/C/GC/34.

36 *AK and AR v. Uzbekistan* (1233/03), U.N. Doc. CCPR/C/95/D/1233/2003, Communication No. 1233/2003, 31 March 2009.

power either. If the 1984 Joint Declaration's provisions are not more advantageous to some inhabitants of Hong Kong, that is because they were not initially negotiated and agreed to yield such result.

V. Conclusion

33. The three cases dealt with above demonstrate that States need to be careful when negotiating international agreements relating to highly contingent political situations, because a treaty will never legitimise any political interest or restrain any State-party to a greater extent than a treaty's own terms themselves envisage. It is possible that one of the States-parties to a relevant treaty could subsequently undertake a set of political actions that frustrates another parties' political expectations with regard to the subject-matter of a treaty, but does little to breach that treaty's actual terms. There is a clear distinction between revisionism through attempts to auto-interpret treaty obligations, and adverse political action (inaction) in compliance with same treaty obligations. It is the latter, not the former, which States benefitting in three cases examined above have engaged in.

34. Another lesson to be learned is that there is recognisable at least, if not invariable, connection between the content of legal obligations under treaties and the success of political agenda pursued through those treaties and with regard to their subject-matters. Mere allusions to treaties as part of a political debate will not change their normative content that could be identified only through the legal process of treaty interpretation, or adapt that content to any particular political agenda. It is politicians who identify the direction of political agenda, but also it is legal advisers who give legal expression to those agenda or identify whether a treaty clause supports the relevant political argument. Indeterminacy and lack of precision of treaty obligations may open room for attempts at political manipulation, but they do not bring either legal or political success. For a treaty cannot contribute to any political agenda any more than provisions of that treaty allow it to do. Of course, the final text of a treaty is the best deal that the parties can achieve. But anyone agreeing to disagree in writing does so at their own political risk.