

## The principle of non-intervention and the battle over Hong Kong

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### 1. *Introduction*

During the XVII century, under the Qing dynasty, Hong Kong became one of the most important trading ports on the Chinese shores and a first contact point between imperial China and the West. It was then ceded to the British Empire with the Treaty of Nanking of 1842, after the end of the first Opium War. The conditions imposed at Nanking were certainly unfair and the treaty became one of the renowned examples of 'unequal treaties' in the recent history.<sup>1</sup> It came then as no surprise that, after many years of British domination, China demanded its sovereignty over the territory of Hong Kong to be restored. This happened in 1984, when the United Kingdom and China concluded the Sino-British Joint Declaration, through which Hong Kong returned to the mainland China. However, things had changed over the decades, and Hong Kong had become an important partner for the West, particularly for the United States (US). Negotiations for the Joint Declaration were extremely complex,<sup>2</sup> but a compromise was found eventually: China would have regained sovereignty over Hong Kong, but the latter would have become a region enjoying a high degree of autonomy from Beijing, both in its internal matters and in its external relations. These guarantees were incorporated and detailed in the Basic Law, the Constitution of the Hong

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<sup>1</sup> L Cafilisch, 'Unequal Treaties' (1992) 35 German YB Intl L 52, 60.

<sup>2</sup> See the account provided by R Mushkat, 'The Dynamics of International Legal Regime Formation: The Sino-British Joint Declaration on the Question of Hong Kong Revisited' (2011) 22 Eur J Intl L 1119.



Kong Special Administrative Region (HKSAR).<sup>3</sup> The Basic Law also established the principle of the ‘One Country, Two Systems’, on the basis of which the socialist system and policies would not be imposed in Hong Kong.<sup>4</sup>

Since then, the relationship between the HKSAR and China has been characterized by frequent political tensions and a growing interference from the Beijing government in the autonomy of the Region.

The situation escalated further in recent years, especially with the ‘Umbrella Revolution’ of 2014, a protest against the decision of the Standing Committee of the National People’s Congress (NPCSC) to set some limits to the elections of the Hong Kong’s Chief Executive and Legislative Council, thus granting a greater control to the Chinese government on HKSAR main institutions. Recent events led to new protests and a harsh repression both by Chinese and Hong Kong authorities and a number of Western countries have expressed their concern for the threat posed to the autonomy of the territory and for the violations of human rights and the rule of law. Such reactions have met the opposition of China, claiming a violation of its sovereignty over Hong Kong and of the principle of non-intervention.

The present article analyses the ‘battle over Hong Kong’ between China and the West from the perspective of the principle of non-intervention. The aim is to understand the legal dynamics of the principle in the case at hand, characterized by a clash of views in the international community and by the peculiarities of the status of Hong Kong in international law. In this perspective, the battle over Hong Kong is also the battle over the diverging meanings attributed by States to the principle of non-intervention, to sovereignty and to the functions of international law in general.

<sup>3</sup> The Basic Law was adopted in 1990 and came into effect on 1 July 1997. The HKSAR was established in accordance with the Chinese Constitution, whose art 31 recognizes the power of the State to create special administrative regions when necessary. The provision constituted the legal basis for the establishment of the special administrative region of Macau as well.

<sup>4</sup> Basic Law, Preamble. For an analysis of the Basic Law see Y Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press 1999) 56.



Section 2 illustrates the factual background of protests in Hong Kong and the reactions of Western countries, including the adoption of sanctions by the US. Section 3 addresses the notion of non-intervention, the constitutive elements of the principle and its scope of application, focusing on the requirement of coerciveness. Section 4 is instead devoted to the second requirement of an unlawful intervention, namely the infringement of the Chinese *domaine réservé*. Section 5 focuses on the principle of internal self-determination, in order to verify whether the autonomy of Hong Kong could derive from general international law.

## *2. The crisis in Hong Kong and the reactions of Western countries*

In the first months of 2019, protests erupted again in Hong Kong after the introduction of the Fugitive Offender Amendment Bill by the Hong Kong government. The Bill allowed the extradition towards countries with which Hong Kong does not have an extradition agreement, including mainland China and Taiwan. After several months of riots and violent repressions, Carrie Lam – Chief Executive of Hong Kong – agreed to withdraw the Bill, while invoking the need for emergency powers upon the executive. On 30 June 2020, the Chinese government passed the National Security Law (NSL) for Hong Kong, replacing the latter's authority in security matters under Article 23 of the Basic Law.<sup>5</sup> The NSL criminalizes a series of conducts (including secession, subversion, terrorism and collusion with foreign actors) and establishes a number of procedures for its enactment by the HKSAR institutions under a strict supervision of the Beijing authorities. Both the substantive and the procedural provisions of the law have raised serious concerns among the people in Hong Kong over the protection of their fundamental rights and the potential threat to the autonomy of the Region. The NSL is ultimately considered as the final attempt of China to impose strict control measures over political dissent. Tensions escalated further when, in November 2020, the NPCSC allowed the Honk Kong government to disqualify elected members of the legislative branch who support independence,

<sup>5</sup> B Hu, 'The Future of Article 23' (2011) 41 Hong Kong L J 431.



seek foreign interference or pursue other activities endangering national security.<sup>6</sup>

Such moves have attracted numerous reactions by the international community and especially by Western countries. On the background, there are the strong economic ties between Hong Kong and the West and the fear of losing the trade and financial opportunities coming from them. On the other hand, reactions have focused on violations of human rights occurring in Hong Kong against protesters, on the threat posed by the Chinese conducts to democracy and the rule of law and on the need to protect the autonomy of Hong Kong.

As for the European Union (EU), already on 24 July 2020 the Council expressed grave concern for the introduction of the NSL, affirming its incompatibility with China's international commitments under the 1984 Joint Declaration and international human rights.<sup>7</sup> It indicated certain measures that could be taken in response at the EU and Member States levels, including on asylum, visa and immigration, export controls, support for the civil society in Hong Kong and monitoring of the extraterritorial effects of the NSL.<sup>8</sup> The European Parliament also passed a number of resolutions condemning China's conducts in relation to Hong Kong, the latest of which demanded the release of those arrested under the NSL during the protests and of all protesters that have been incarcerated over the recent years.<sup>9</sup> Furthermore, it called upon Member

<sup>6</sup> Following this decision, the Hong Kong government immediately disqualified four pro-democratic legislators. Human Rights Watch, 'China: Beijing Forces Out Hong Kong Opposition Lawmakers', 12 November 2020 (available at <[www.hrw.org/news/2020/11/12/china-beijing-forces-out-hong-kong-opposition-lawmakers](http://www.hrw.org/news/2020/11/12/china-beijing-forces-out-hong-kong-opposition-lawmakers)>).

<sup>7</sup> Council of the European Union, Conclusions on Hong Kong, 24 July 2020. See also the Declaration of the High Representative on behalf of the European Union on the adoption by China's National People's Congress of a National Security Legislation on Hong Kong, 1 July 2020 (available at <[www.consilium.europa.eu/en/press/press-releases/2020/07/01/declaration-of-the-high-representative-on-behalf-of-the-european-union-on-the-adoption-by-china-s-national-people-s-congress-of-a-national-security-legislation-on-hong-kong/](http://www.consilium.europa.eu/en/press/press-releases/2020/07/01/declaration-of-the-high-representative-on-behalf-of-the-european-union-on-the-adoption-by-china-s-national-people-s-congress-of-a-national-security-legislation-on-hong-kong/)>).

<sup>8</sup> Protests were raised also in relation to the disqualification of members of the Legislative Council in November 2020. See Declaration by the High Representative on behalf of the EU on the disqualification of Members of the Hong Kong Legislative Council (12 November 2020).

<sup>9</sup> European Parliament resolution of 21 January 2021 on the crackdown on the democratic opposition in Hong Kong (2021/2505(RSP)). The Parliament also criticizes the timing of the conclusion between the EU and China of the Comprehensive Agreement on Investment.



States to suspend their extradition agreements with Hong Kong and upon the Council to consider the adoption of targeted sanctions.

The United Kingdom (UK) responded by offering new migratory rights to Hong Kongers, that would allow them to live and work in the UK and ultimately to apply for citizenship.<sup>10</sup> The UK also expressed concern for the Hong Kong situation in the 44<sup>th</sup> Session of the Human Rights Council (HRC) on behalf of 27 countries, once again recalling the autonomy granted to Hong Kong by the 1984 Joint Declaration and the need to protect democracy and human rights in the Region.<sup>11</sup>

The strongest reaction, however, came from the US with the enactment of unilateral sanctions by virtue of an Executive Order (EO) signed by President Trump on 17 July 2020<sup>12</sup>. The adopted measures concern the suspension or the elimination of different forms of preferential treatment for Hong Kong, including revoking export licenses, suspending a number of international agreements and freezing of assets belonging to persons involved in the implementation of the NSL or responsible for undermining the democratic processes and the autonomy of Hong Kong.<sup>13</sup>

US sanctions are based on a number of domestic statutes,<sup>14</sup> part of which are expressly devoted to the status of Hong Kong and to its relationship with the US. In particular, the US adopted already in 1992, before the resumption of Chinese sovereignty, the Hong Kong Policy Act, which recognized the high degree of autonomy granted by the 1984 Joint

<sup>10</sup> People from Hong Kong already enjoy a special treatment for visa application in the UK. See M Casas, 'Shelter from the Storm? The International Legality of Granting Migratory Rights to Hong Kongers' *EJIL:Talk!* (9 July 2020) (<[www.ejiltalk.org/shelter-from-the-storm-the-international-legality-of-granting-migratory-rights-to-hong-kongers/](http://www.ejiltalk.org/shelter-from-the-storm-the-international-legality-of-granting-migratory-rights-to-hong-kongers/)>).

<sup>11</sup> Cross-regional statement on Hong Kong and Xinjiang, 30 June 2020 (available at <[www.gov.uk/government/speeches/un-human-rights-council-44-cross-regional-statement-on-hong-kong-and-xinjiang](http://www.gov.uk/government/speeches/un-human-rights-council-44-cross-regional-statement-on-hong-kong-and-xinjiang)>). In the same session a statement by UN independent experts was released, raising concerns over violations of the ICCPR (<[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E)>).

<sup>12</sup> Executive Order 13936 on Hong Kong Normalization, 14 July 2020. The newly elected President Biden confirmed this course of action and recently enacted other sanctions against Chinese officials for the suppression of dissent in Hong Kong (<[www.wsj.com/articles/biden-imposes-his-first-sanctions-on-chinese-officials-ahead-of-bilateral-meeting-11615976219](http://www.wsj.com/articles/biden-imposes-his-first-sanctions-on-chinese-officials-ahead-of-bilateral-meeting-11615976219)>).

<sup>13</sup> See Sec 4 of EO 13936.

<sup>14</sup> These include the National Emergencies Act (1976) and the International Emergency Economic Power Act (1977).



Declaration and confirmed US support for the application of the International Covenant on Civil and Political Rights (ICCPR) in Hong Kong and for the democratization of its legislative processes.<sup>15</sup> Moreover, the Act confirmed the interest in maintaining and developing autonomous economic and trade relationships with Hong Kong as a ‘territory which is fully autonomous from the People’s Republic of China’.<sup>16</sup> Two different statutes have been enacted immediately after the first protests broke out in Hong Kong: the Hong Kong Human Rights and Democracy Act in 2019<sup>17</sup> and the Hong Kong Autonomy Act in 2020.<sup>18</sup> The contents and the rationale of these instruments will be taken into account in the following sections.

### 3. *The principle of non-intervention and economic coercion*

Before turning to the analysis of the Hong Kong crisis from the angle of the non-intervention principle, it is worth recalling that China has vehemently protested against the actions and the measures taken by Western countries. The 44<sup>th</sup> Session of the HRC really turned into a battlefield over the Hong Kong issue, with China claiming that, ‘under the pretext of human rights’, certain countries have ‘interfered in China’s internal affairs, infringed upon the legislative sovereignty of China and breached the Charter of the United Nations’.<sup>19</sup> Such statement was backed by 53 countries in the same HRC Session<sup>20</sup> and then again by Belarus – on behalf of 70 countries – in the 46<sup>th</sup> Session, supporting China’s implementation of the ‘One Country, Two Systems’ principle in Hong Kong and

<sup>15</sup> Hong Kong Policy Act of 1992, Public Law 102-383 (5 October 1992) (102<sup>nd</sup> Congress) Sec 2.

<sup>16</sup> *ibid* Sec 103.

<sup>17</sup> Hong Kong Human Rights and Democracy Act, Public Law 116-76 (27 November 2019) (116<sup>th</sup> Congress).

<sup>18</sup> Hong Kong Autonomy Act, HR 7440 (3 January 2020).

<sup>19</sup> Statement by the Permanent Mission of the People’s Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland (30 June 2020) (<[www.china-un.ch/eng/hom/t1793749.htm](http://www.china-un.ch/eng/hom/t1793749.htm)>).

<sup>20</sup> Joint Statement delivered by Permanent Mission of Cuba at the 44th session of Human Rights Council (30 June 2020) (<[www.china-un.ch/eng/hom/t1793804.htm](http://www.china-un.ch/eng/hom/t1793804.htm)>).



calling for the immediate cessation of interferences with Chinese internal affairs.<sup>21</sup>

These claims bring forward the question whether actions taken in response to the Hong Kong crisis and to Chinese conducts might be considered illegal due to the violation of the principle of non-intervention. Besides, the issue at stake is a manifest representation of a divergent understanding of the principle in a long battle between Western countries and the so called Non-Aligned Movement (NAM) to which China belongs.<sup>22</sup>

The principle of non-intervention is traditionally considered as the ‘corollary of every state’s right to sovereignty, territorial integrity and political independence’.<sup>23</sup> It is often hard to distinguish the instances in which the principle is referred to as a political rhetorical tool from those in which it is used as a legal argument.<sup>24</sup> The distinctive feature of intervention is usually considered to be its coercive nature, as emerges from the 1970 Declaration on Principles of International Law on Friendly Relations: ‘No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind’.<sup>25</sup>

The definition of intervention ultimately rests upon the notion of *domaine réservé*, as confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case: ‘A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political,

<sup>21</sup> <[www.globaltimes.cn/page/202103/1217468.shtml](http://www.globaltimes.cn/page/202103/1217468.shtml)>.

<sup>22</sup> For a detailed account of the debate see A Hofer, ‘The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese J Intl L* 175.

<sup>23</sup> R Jennings, A Watts (eds), *Oppenheim’s International Law* (9<sup>th</sup> edn, OUP 2008) 428.

<sup>24</sup> M Jamnejad, M Wood, ‘The Principle of Non-Intervention’ (2009) 22 *Leiden J Intl L* 345, 347.

<sup>25</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) of 24 October 1970. A similar wording is to be found in the sixth principle expressed in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975. See also LF Damrosch, ‘Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs’ (1989) 83 *AJIL* 1, 6, referring to the formula of ‘subordination of the will’ as ‘highly unsatisfactory’.



economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones'.<sup>26</sup> The element of coercion also allows to distinguish prohibited intervention from other forms of lawful interference,<sup>27</sup> which are inherent to inter-state relations.

Put in more schematic terms, two conditions must be met to recognize an unlawful intervention: the measure must be of a coercive nature and it must infringe upon the *domaine réservé* of the affected State,<sup>28</sup> the latter requirement qualifying the unlawfulness of coercion.

While the coercive nature of measures amounting to prohibited intervention is 'particularly obvious' in the case of the use of force,<sup>29</sup> assessing the coerciveness of other measures might prove complex, in light of a very fragmented practice and opposite views of members of the international community. This debate focuses in particular on unilateral sanctions and on the concept of economic coercion.<sup>30</sup> Unilateral economic measures are enacted against a State or against specific individuals in order to force a change in policy.<sup>31</sup> However, the aim of forcing a State

<sup>26</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 para 205.

<sup>27</sup> A Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4 Cambridge J Intl & Comparative L 616, 620.

<sup>28</sup> N Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in N Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill/Martinus Nijhoff 2016) 1, 6-7; O Corten, P Klein, *Droit d'ingérence ou obligation de réaction?* (Bruylant 1992) 9-10.

<sup>29</sup> *Nicaragua* (n 26) para 205. The Court also recognized that supporting and assisting armed groups against another State amounts to an unlawful intervention (ibid para 241).

<sup>30</sup> Unilateral sanctions are often referred to as 'autonomous' to distinguish them from those adopted collectively through the UN Security Council. On the relationship between unilateral (autonomous) and UN sanctions see M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council' (2006) 77 British YB Intl L 333; ND White, 'Autonomous and Collective Sanctions in the International Legal Order' (2018) 27 Italian YB Intl L 3; P Achilleas, 'United Nations and Sanctions' in M Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2019) 24.

<sup>31</sup> DW Bowett, 'International Law and Economic Coercion' (1975-6) 22 Virginia J Intl L 245; L Picchio Forlati, 'The Legal Core of International Economic Sanctions' in L Picchio Forlati, L-A Sicilianos (eds), *Les sanctions économique en droit international* (Martinus Nijhoff 2004) 99; BE Carter, 'Economic Coercion' (2009) *Max Planck Encyclopedia of International Law*, quoting the definition offered in A Lowenfeld, *International Economic Law* (OUP 2008) 698.





to change its behaviour may not be enough to reach the threshold of intervention. In the *Nicaragua* case, the ICJ addressed the issue with regard to the embargo imposed on Nicaragua by the US as a measure of economic coercion, though observing that it was 'unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention'.<sup>32</sup>

As mentioned, the international community faces a strong divide between States claiming that economic coercive measures could be legitimate in certain cases and States asserting their illegality, especially when adopted against developing countries. The NAM has repeatedly submitted a number of Resolutions in the UN General Assembly, calling the international community 'to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law'.<sup>33</sup> These resolutions highlight both the impact of economic coercive measures on the right to development and the international trading system and the negative consequences for human rights. On the other hand, some actors (especially the US and the EU) deem economic coercive measures to be admissible in certain circumstances, especially when aimed at enforcing the international obligations of the targeted State, including those of a collective nature.<sup>34</sup> These arguments seem to rely (at least implicitly) on the notion of countermeasures, as measures that can be taken in response to an internationally wrongful act.<sup>35</sup> Economic countermeasures are

<sup>32</sup> *Nicaragua* (n 26) para 241.

<sup>33</sup> See eg UNGA Res 48/168 (22 February 1994) and recently UNGA 74/200 (13 January 2020).

<sup>34</sup> However, from a US perspective, sanctions may be enacted also with the aim of protecting national interests, while the EU adopts a more cautious approach. For a comparison see Hofer (n 22) 199. On the practice of the EU see P Palchetti, 'Reaction of the European Union to Breaches of *Erga Omnes* Obligations' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 219; A Spagnolo, 'Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions Under International Law' in S Montaldo, F Costamagna, A Miglio (eds), *EU Law Enforcement: The Evolution of Sanctioning Power* (Routledge/Giappichelli 2020) 215.

<sup>35</sup> It is worth noting, however, that the terms 'sanctions' and 'countermeasures' do not overlap, as the former are also adopted in the absence of an internationally wrongful act. In this case, they would not be justified as countermeasures. See ND White, A Abass, 'Countermeasures and Sanctions' in M Evans (ed), *International Law* (OUP 2014) 551.



nonetheless subject to the general limits set forth by the Draft Articles on State Responsibility (DARSIWA)<sup>36</sup>, which allow the injured State to act by violating an obligation owed to the responsible State. It has been observed that economic sanctions qualifying as countermeasures cannot be considered coercive in light of the non-intervention principle<sup>37</sup>. Indeed, since coerciveness is defined by the objective of the measure, that is to force a change of policy in the targeted State within its *domaine réservé*, it would be impossible for countermeasures to amount to coercive actions, since they do not interfere with the State's protected freedoms.<sup>38</sup>

The most problematic aspect, however, is whether States other than the injured ones are allowed to take (economic) countermeasures in response to a wrongful act. Whether third States may resort to countermeasures in the general interest of the international community, that is for violations of *erga omnes* obligations, is still unsettled, although practice is growing in this regard.<sup>39</sup>

In the context of Western measures related to Hong Kong, it is certainly hard to define comprehensively whether they violate the principle

Moreover, it has been suggested that sanctions, in contrast to countermeasures, may only be lawful when reacting to serious violations of peremptory norms. See A Pellet, 'Unilateral Sanctions and International Law' in *Annuaire de l'Institut de droit international* (Séssion de Tallinn) vol 76 (Pedone 2016) 723.

<sup>36</sup> Spagnolo (n 34) 237.

<sup>37</sup> Tzanakopoulos (n 27) 625-626.

<sup>38</sup> The aim of countermeasures is defined by art 49 DARSIWA: 'An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations'.

<sup>39</sup> See, among others, L Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *Eur J Intl L* 1127; C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); A Pellet, A Miron, 'Sanctions', in *Max Planck Encyclopedia of Public International Law* (OUP 2013); M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017). The question arises especially out of the ambiguities characterizing the work of the International Law Commission and the codification expressed in arts 48 and 54 of the DARSIWA, whereby a State not directly injured by the wrongdoer is entitled to invoke the latter's responsibility for breaches of collective obligations and to take 'lawful measures'. Cf ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' in *YB Intl L Commission*, 2001 vol II Part Two 139, where the Commission expressly recognized that 'the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest'.



of non-intervention due to their coercive nature. Indeed, these measures might infringe upon other international obligations, such as those deriving from international trade and investment law.<sup>40</sup> Still, the requirement of coercion needs to be carefully assessed.

While certain responses fall within the definition of mere interference – such as political statements and diplomatic protests – other type of reactions could reach the threshold of coercion. Economic pressure may indeed, in certain circumstances, constitute a violation of the customary principle of non-intervention.<sup>41</sup> This is especially so for unilateral sanctions having an extraterritorial effect.<sup>42</sup> Even countries that deem economic coercion to be lawful have condemned the recourse to extraterritorial sanctions.<sup>43</sup> The case of US sanctions against Iran offers a clear example, with countries contesting the lawfulness of such measures.<sup>44</sup> The EU, in particular, has enacted an internal piece of legislation to counter effect the impact of US sanctions on European operators.<sup>45</sup> So-called

<sup>40</sup> L Boisson de Chazournes, *Les contre-mesures dans les relations internationales économique* (Pedone 1992); P Dupont, ‘The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions’ in A Marossi, M Bassett (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (Springer 2015) 197; P Bechky, ‘Sanctions and the Blurred Boundaries of International Economic Law’ (2018) 83 *Missouri L Rev* 1; A Viterbo, ‘Extraterritorial Sanctions and International Economic Law’ in *Building bridges: central banking law in an interconnected world – ECB Legal Conference 2019* (European Central Bank 2019) 157.

<sup>41</sup> A Lowe, A Tzanakopoulos, ‘Economic Warfare’ (2013) *Max Planck Encyclopedia of Public International Law* 11-13.

<sup>42</sup> M Sossai, ‘Legality of Extraterritorial Sanction’ in Asada (n 30) 62.

<sup>43</sup> Jamnejad, Wood (n 24) 371.

<sup>44</sup> The extraterritorial character of sanctions imposed by the US on Iran are also under the scrutiny of the ICJ. See ICJ, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Preliminary Objections) (3 February 2021).

<sup>45</sup> See Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, then update in 2018 to react to US sanctions against Iran (Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom). The Preamble of the so-called Blocking Statute expressly refers to the adoption of extraterritorial sanctions as a violation of international law. Moreover, in a recent debate within the General Assembly, Austria (on behalf of the EU) condemned the extraterritorial reach of US sanctions against Cuba. See General Assembly official records, 73rd session (30th plenary meeting) UN Doc A/73/PV.30 (1 November 2018) 10.



'blocking regimes' against the extraterritorial effects of US sanctions were also adopted by other countries.<sup>46</sup>

This alleged illegality is based on a number of reasons, primarily on the need to protect the rights and the interests of third parties, that may be affected by extraterritorial measures. Nonetheless, the latter are also usually regarded as in violation of the non-intervention principle due to the unlawful exercise of prescriptive jurisdiction extraterritorially.<sup>47</sup> The HRC has condemned – with the negative vote of most Western countries – the recourse to extraterritorial sanctions and expressly qualified their coercive nature, by calling upon States 'to stop adopting, maintaining or implementing unilateral coercive measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature with extraterritorial effects'.<sup>48</sup>

It is thus noteworthy that some of the measures imposed by the US in relation to Hong Kong have an extraterritorial character and may qualify as violation of the principle of non-intervention, in so far as they amount to an unlawful exercise of prescriptive jurisdiction.<sup>49</sup> This occurs

<sup>46</sup> See, for instance, the Foreign Extraterritorial Measures Act, adopted by Canada in 1985 in response to the trade embargo on Cuba. Blocking mechanisms were also introduced in response to the Helms-Burton Act in 1996 by the UK under the Protection of Trading Interests Act (1980) and by Mexico under the Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law (1996).

<sup>47</sup> C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 29, 35-36; R Mohamad, 'Unilateral Sanctions in International Law: A Quest for Legality' in Marossi, Bassett (n 40) 71, 77.

<sup>48</sup> HRC Res 27/21, UN Doc A/HRC/27/L.2 (26 September 2014) para 1. See also Resolution 34/13 of 24 March 2017.

<sup>49</sup> See, for instance, Sec 5 and 6 of the Hong Kong Autonomy Act, whereby the properties of foreign persons or foreign financial institutions may be blocked when they are in the US or under the control or the possession of US persons (<https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/5571>). See also Sec 7(c)(1) of the Hong Kong Human Rights and Democracy Act, authorizing the President 'to block and prohibit all transactions in property and interests in property of a foreign person identified in the report required under subsection (a)(1) if such property and interests in property are in the United States, come within the United States, or come within the possession or control of a United States person'. Extraterritorial effects derive especially from the application of the control criterion and from the notion of 'US Person' under US law. See C Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation' in Ronzitti (n 28) 103, 113. Even more problematic is the case of extraterritorial enforcement jurisdiction, which might occur when international transactions are denominated in US dollars. See S



predominantly in secondary sanctions, that are specifically addressed to foreign operators.<sup>50</sup> China has responded by adopting a set of rules for counteracting what it deems to be an ‘unjustified extraterritorial application of foreign legislation’.<sup>51</sup>

No doubt that the international opposition towards extraterritorial sanctions is growing and partly because of their incompatibility with the principle of non-intervention. In the latest Report on the negative impact of unilateral coercive measures, the Special Rapporteur Idriss Jazairy highlighted the possibility of identifying an emerging customary norm prohibiting unilateral extraterritorial sanctions as a mean of economic pressure.<sup>52</sup> In such context, the continuing recourse to such measures by the US is losing most of its legitimacy from an international law point of view.<sup>53</sup>

#### 4. *Chinese sovereignty and the notion of domaine réservé*

The notion of *domaine réservé* is central to determine whether certain coercive measures may be in violation of the non-intervention principle. The main argument put forward by China as regards the unlawfulness of

Emmenegger, ‘Extraterritorial Economic Sanctions and Their Foundation in International Law’ (2016) 33 *Arizona J Intl L & Comparative L* 631.

<sup>50</sup> On the distinction between primary and secondary sanctions see A Viterbo (n 40) 159-163; Sossai (n 42); T Ruys, C Ryngaert, ‘Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions’ (2020) *BYIL* 1, observing that also primary sanctions may, in certain instances, have an extraterritorial impact (at 6).

<sup>51</sup> See Order No 1 of 2021 of the Ministry of Commerce of the People’s Republic of China on Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (<<http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>>). Article 3 of the Order, which contains a policy statement, reads: ‘[t]he Chinese Government pursues an independent foreign policy, adheres to the basic principles of international relations, including mutual respect for sovereignty, non-interference in each other’s internal affairs, and equality and mutual benefit, abides by the international treaties and agreements to which China is a party, and fulfills its international obligations’.

<sup>52</sup> HRC, ‘Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights’ UN Doc A/HRC/42/46 (5 July 2019) 13-14.

<sup>53</sup> See Ruys, Ryngaert (n 50); C Ryngaert, ‘Extraterritorial Export Controls (Secondary Boycotts)’ (2008) 7 *Chinese J of Intl L* 625; JA Meyer, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 *U Pennsylvania J Intl L* 905.



Western reactions is based on the violation of its sovereignty over the territory of Hong Kong. In particular, the adoption and the implementation of the NSL by the Chinese authorities should be considered as an internal matter, subject to the domestic jurisdiction of the State. Accordingly, it is first necessary to define the notion of *domaine réservé* with the aim of verifying whether measures taken against China infringe upon its exclusive competence over the territory of Hong Kong.

International instruments prohibiting intervention do not provide a definition of *domaine réservé*. They usually refer to ‘internal affairs’ or to ‘matters which are essentially within the domestic jurisdiction of any state’, as in Article 2(7) of the UN Charter. A commonly accepted criterion to determine the extent of the State’s exclusive jurisdiction is represented by the international obligations binding upon the State, as affirmed in the *Nationality Decrees* advisory opinion by the Permanent Court of International Justice: ‘it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law – using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law [...] The words ‘solely within the domestic jurisdiction’ seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge’.<sup>54</sup> According to this construction, the perimeter of a State’s *domaine réservé* is defined by the areas where the State is free from international obligations.<sup>55</sup> In the *Nicaragua* case, the ICJ attempted to identify matters falling within the State’s

<sup>54</sup> PCIJ, *Nationality Decrees issued in Tunis and Morocco*, PCIJ Rep Series B No 4, 23-24. See also H Kelsen, ‘Théorie du droit international public’ (1953) 84 *Recueil des Cours Académie de Droit International* 116: ‘[i]t is incorrect to say that a matter can be settled by international law because it is an external matter and another may be settled by national law because it is an internal matter. One should say on the contrary that a matter is external when it is settled by international law and another is internal so long as it actually is settled by national law alone’; JHW Verzijl, ‘Le domaine réservé de la compétence nationale exclusive’ in *Scritti di diritto internazionale in onore di Tomaso Perassi* (Giuffrè 1957) 391.

<sup>55</sup> K Ziegler, ‘Domaine Réservé’ (2013) *Max Planck Encyclopedia of Public International Law* para 1. For a critique of this approach, although mainly in relation to the activities of international organizations vis-à-vis their Member States, see G Arangio-Ruiz, ‘Le domaine réservé: L’organisation internationale et le rapport entre droit international et droit interne’ (1990) 225 *Recueil des Cours Académie de Droit International* 9.



exclusive jurisdiction and made reference to ‘the choice of a political, economic, social, and cultural system, and the formulation of foreign policy’.<sup>56</sup> The Court, however, also clarified that ‘a State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law’.<sup>57</sup>

In this perspective, the scope of a State’s reserved domain is variable,<sup>58</sup> since it can change over time, depending on the development of international law and of international relations. Most importantly, though, it is also relative on the subjective side: it depends on the subjects to which a certain obligation is owed. A State may claim that a matter falls within its exclusive competence *vis-à-vis* States towards which it has assumed no international obligation.<sup>59</sup> The relativity of the reserved domain flows from the relative effect of treaties as established under Article 34 of the 1969 Vienna Convention on the Law of Treaties: according to the *pacta tertiis* principle, a treaty cannot be opposed to a third party. This also leads to another consequence, namely that the determination of a violation of the *domaine réservé* is not left entirely to the affected State.<sup>60</sup> Other actors may deem that the conduct of a State does not constitute a purely internal matter, but is instead a violation of international obligations owed to them.

In light of this, it is now possible to verify whether the measures taken against China violate the principle of non-intervention by coercing the targeted State in choices that are part of its exclusive competence. As already mentioned, Western responses are mainly justified on two claims: the violation of human rights and democracy in Hong Kong and the violation of the autonomy of the HKSAR as established under the 1984 Joint Declaration.

#### 4.1. *Human rights and democratic aspirations*

In the last decades, the growing practice of measures taken in response to human rights violations by non-injured States or international

<sup>56</sup> *Nicaragua* (n 26) para 205.

<sup>57</sup> *ibid* para 258.

<sup>58</sup> Corten, Klein (n 28) 87-88.

<sup>59</sup> B Cheng, ‘La jurimétrie: sens et mesure de la souveraineté juridique et de la compétence nationale’ (1991) 3 *Journal de Droit International* 579, 596.

<sup>60</sup> Corten, Klein (n 28) 89.





organizations has prompted the debate over the lawfulness of such reactions.<sup>61</sup> The adoption in 2012 of the Magnitsky Act by the US Congress represents a first model for addressing human rights violations worldwide<sup>62</sup> and has been followed by the EU in the recent adoption of the Council Regulation concerning restrictive measures against serious human rights violations and abuses.<sup>63</sup>

It is common view that the protection of certain human rights falls today outside the *domaine réservé* of States. In the case of China, however, this claim must be carefully assessed. Indeed, China only signed the ICCPR in 1998 but never ratified it. Still, the ICCPR has been recalled as one the main grounds for reacting against China and for the enactment of sanctions by the US.<sup>64</sup>

The application of the ICCPR to the HKSAR mainly derives from Article XII of the Annex I to the 1984 Joint Declaration, according to which ‘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’.<sup>65</sup> It follows that the protection of human rights under the ICCPR in Hong Kong is part of the international commitments China accepted towards the United Kingdom. Nonetheless, in subsequent years, China confirmed its will to submit reports on the implementation of the ICCPR in HKSAR in the context of the periodic reviews before the Human Rights Committee<sup>66</sup>

<sup>61</sup> See, among other, Dawidowicz (n 39); C Focarelli, ‘International Law and Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 QIL-Questions Intl L 17; MNS Sellers, ‘Economic Sanctions against Human Rights Violations’ in Picchio Forlati, Sicilianos (n 31) 477; Tams (n 39).

<sup>62</sup> Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (112<sup>th</sup> Congress). See also the recent adoption of the Global Magnitsky Human Rights Accountability Act of 2016 (114<sup>th</sup> Congress).

<sup>63</sup> Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I (7 December 2020) 1.

<sup>64</sup> See for instance Sec 3(2)(a) of the Hong Kong Human Rights and Democracy Act.

<sup>65</sup> The UK joined the ICCPR in 1976 and extended its application to the territory of Hong Kong.

<sup>66</sup> HRC, ‘Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations on Hong Kong Special Administrative Region’ UN Doc CCPR/C/HKG/CO (21 April 2006).



and the HRC.<sup>67</sup> Continuity in the application of the ICCPR to Hong Kong might constitute a derogation from the general moving-frontiers rules on State succession, although such result derives from the express will of the parties enshrined in the 1984 Joint Declaration.<sup>68</sup> In this perspective, there may be room for third States to invoke the responsibility of China for violating the ICCPR, alongside customary human rights law,<sup>69</sup> as far as the Hong Kong territory is concerned. Whether this would also entail the possibility of enacting coercive measures is a different issue, still facing the strong opposition of a remarkable number of countries that have harshly criticized the pretext of human rights to illegally intervene in the internal affairs of States.<sup>70</sup>

Besides human rights violations, most measures adopted against China are justified on the need to protect the democratic aspirations of the Hong Kong people and their right to a democratic governance. The traditional ‘undemocratic’ stance of international law has been questioned over the last decades,<sup>71</sup> with authors foreseeing the emergence of

<sup>67</sup> In accordance with the principle One Country, Two Systems, the reports on Hong Kong and Macao are prepared and drafted by the respective regional authorities. See HRC, ‘National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – China’ UN Doc A/HRC/WG.6/31/CHN/1 (20 August 2018).

<sup>68</sup> The case of Hong Kong has been considered as evidence of a special rule on State succession with regard to human rights treaties. See J Chan, ‘State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights’ (1996) 45 ICLQ 928. For a different position see D Russo, *L’efficacia dei trattati sui diritti umani* (Giuffrè 2012) 228.

<sup>69</sup> On the customary status of human rights see, among others, T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991); H Thirlway, ‘Human Rights in Customary Law: An Attempt to Define Some of the Issues’ (2015) 28 Leiden J Intl L 495.

<sup>70</sup> See HRC, ‘Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights’ UN Doc A/HRC/45/7 (21 July 2020) para 100: ‘States are free to apply means of pressure that do not constitute violations of international law, or the illegality of which is excluded under international law, in particular, in the course of countermeasures taken in response to violations of international law committed against it or in response to violations of *erga omnes* obligations as formulated by the International Court of Justice. Taking such countermeasures should not, however, result in the arbitrary application of unilateral sanctions’.

<sup>71</sup> J Crawford, ‘Democracy and International Law’ (1993) 64 British YB Intl L 113.



a principle of democracy within the internal legal order.<sup>72</sup> However, a very fragmented practice and the opposition of a number of States makes it impossible to determine the existence of such principle in current international law,<sup>73</sup> not to mention a right to democratic governance.<sup>74</sup> Particularly when it comes to Asian countries, there are major differences as to how the concept of democracy should be interpreted and implemented.<sup>75</sup> Accordingly, an argument on the lawfulness of coercive measures justified on a general principle of democracy would appear all the more fragile.

#### 4.2. *The autonomy of Hong Kong*

As mentioned, the second ground upon which Western reactions are based refers to the autonomy of the territory of Hong Kong from the mainland China. Autonomy seems to constitute the main focus of US concerns since the Hong Kong Policy Act of 1992. In the latter, autonomy was seen as the core element of the preferential treatment accorded to Hong Kong in economic-related matters: ‘The United States should play an active role, before, on, and after July 1, 1997, in maintaining Hong Kong’s confidence and prosperity, Hong Kong’s role as an international

<sup>72</sup> See especially T Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *AJIL* 46.

<sup>73</sup> For instance, the practice that subordinates recognition to the respect of democratic formation of governments might at least constitute evidence of a regional customary norm. See J Wouters, B De Meester, C Ryngaert, ‘Democracy and International Law’ Leuven Interdisciplinary Research Group on Intl Agreements and Development, Working Paper No 5 2004 19.

<sup>74</sup> On the distinction see S Besson, ‘The Human Right to Democracy in International Law: Coming to Moral Terms with an Equivocal Legal Practice’ in A von Arnould, K von der Decken, M Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric* (CUP 2020) 481. See however Damrosch (n 25) 37, claiming that the protection of a State’s political independence should be read in conjunction to the political rights of its inhabitants, thus justifying certain forms of interference when aimed at guaranteeing the political participation of people. The author herself, however, recognizes that this construction is influenced by the Western model of pluralist democracy (at 40-41).

<sup>75</sup> S Varayudej, ‘A Right to Democracy in International Law: Its Implications for Asia’ (2006) 12 *Annual Survey of Intl & Comparative L* 1, 12.



financial center, and the mutually beneficial ties between the people of the United States and the people of Hong Kong'.<sup>76</sup>

The autonomy of Hong Kong forms part of the international obligations binding upon China by virtue of the 1984 Joint Declaration.<sup>77</sup> The latter set forth that 'The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government'.<sup>78</sup> In the US view, 'the ways in which the Government of China, at times with the support of a subservient Government of Hong Kong, has acted in contravention of its obligations under the Joint Declaration and the Basic Law, are deeply concerning to the people of Hong Kong, the United States, and members of the international community who support the autonomy of Hong Kong'.<sup>79</sup> The EU Council has adopted a similar statement, affirming that 'China's actions and the new legislation are not in conformity with China's international commitments under the Sino-British Joint Declaration of 1984 or with the Hong Kong Basic Law'.<sup>80</sup> These arguments seem to heavily rely on the idea that the obligations enshrined in the Joint Declaration are of general interest to the international community. However, it has to be recalled that the Joint Declaration is a treaty concluded between only two countries, namely the UK and China, with the aim of restoring Chinese sovereignty over Hong Kong.

As a consequence, it would be hard to reconcile the relative effect of such treaty with the interest of third parties to its correct execution. If considered from the angle of China's *domaine réservé*, the autonomy of

<sup>76</sup> Sec 101 of the 1992 Hong Kong Policy Act. See also Sec 103(1): 'The United States should seek to maintain and expand economic and trade relations with Hong Kong and should continue to treat Hong Kong as a separate territory in economic and trade matters'.

<sup>77</sup> This is also the understanding expressed by the EU in European Commission, The European Union and Hong Kong: Beyond 1997, COM(97) 171 final (23 Apr 1997) paras 1, 12.

<sup>78</sup> Art 3(b) of the 1984 Joint Declaration.

<sup>79</sup> Hong Kong Autonomy Act, Sec 3(16).

<sup>80</sup> Council Conclusions (n 7) 2.



Hong Kong deriving from the Joint Declaration remains an internal matter, with the exception of the Chinese relationships with the UK.<sup>81</sup> It is certainly true that Hong Kong's autonomy is of a very peculiar nature, in that it encompasses both internal powers (legislative, executive and judicial) and the capacity to enter into international agreements with other countries.<sup>82</sup> These features even prompted a debate on the international legal personality of the HKSAR.<sup>83</sup> However, this is not enough to claim that other countries may have a legally protected interest in securing the autonomy granted by a bilateral treaty.

Nor can the Joint Declaration be considered in its entirety as a treaty establishing an objective regime.<sup>84</sup> Notwithstanding the interest that part of the international community has shown for the question of Hong Kong's autonomy, such construction would not find any support in the text of the Joint Declaration nor in the intention of its parties.<sup>85</sup> Accordingly, apart from the provision regarding the cession of the Hong Kong

<sup>81</sup> The UK recognized its unique position as a signatory to the Joint Declaration together with its 'continuing legal responsibilities towards Hong Kong'. See R Mushkat, 'The Future of Hong Kong's International Legal Personality: Does International Law Matter? A Post-Handover Snapshot' (1998) 22 *Southern Illinois University L J* 275, 287.

<sup>82</sup> X Xu, G Wilson, 'The Hong Kong Special Administrative Region as a Model of Regional External Autonomy' (2000) 32 *Case Western Reserve J Intl L* 1.

<sup>83</sup> See R Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong University Press 1997); L Langer, 'Out of Joint? – Hong Kong's International Status from the Sino-British Joint Declaration to the Present' (2008) 46 *Archiv des Völkerrechts* 309; S Zhichao, 'International Legal Personality of the Hong Kong Special Administrative Region' (2008) 7 *Chinese J Intl L* 339.

<sup>84</sup> A definition of objective regime was offered by the Special Rapporteur H Waldock, 'Third Report on the Law of Treaties' (1964) vol II YB Intl L Commission 26: '[a] treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space'. The proposal was rejected by the ILC and never incorporated in the Vienna Convention, where priority was given to the relative effect of treaties under art 34. Some modern treaties are nonetheless considered as establishing objective regimes, such as the Montego Bay Convention provisions on the Area. See F Salerno, 'Treaties Establishing Objective Regimes' in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011) 225, 226.

<sup>85</sup> Langer (n 83) 341.



territory to China,<sup>86</sup> no third States could claim to have a right or a direct interest under the Joint Declaration.

Since however there seems to be a common concern among Western countries regarding the autonomy of the HKSAR, one should ask whether other sources of international law could provide for such obligations on a more general level.

##### 5. *The relevance of internal self-determination for the territory of Hong Kong*

In 1946, the United Kingdom listed the territory of Hong Kong as a non-self-governing territory within the framework of the UN and regularly submitted information to the Secretary General as required by Article 73 of the UN Charter. It was removed from the list in 1972, upon a request from China addressed to the Special Committee claiming sovereignty over the territories of Hong Kong and Macau.<sup>87</sup> The process that led to the resumption of Chinese sovereignty over Hong Kong and the conclusion of the 1984 Joint Declaration never mentioned the principle of self-determination nor the right of the territory to become independent. Instead, the Joint Declaration set out that after fifty years from its conclusion the conditions accepted by China will no longer be applicable.<sup>88</sup> Such process is often criticized for having denied the possibility to

<sup>86</sup> Although a general interest of the international community should be involved in order to determine whether a treaty establishes an objective regime, such effect would be always present in treaties through which the parties dispose of their real rights. See A McNair, *The Law of Treaties* (OUP 1986) 256: 'the treaties belonging to this category [dispositive treaties] create, or transfer, or recognize the existence of, certain permanent rights, which thereupon acquire or retain an existence and validity independent of the treaties which created or transferred them'.

<sup>87</sup> Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of two Colonial Countries and Peoples, 66th Report of the Working Group, UN Doc A/AC.109/L.795 (6 June 1972) 3.

<sup>88</sup> See art 3(12) of the 1984 Joint Declaration: 'The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years'. Recently, Hong Kong government officials have reassured that the status of Hong Kong, in particular the One Country Two Systems principle, will not change after the 50 years period (G Torode,

the people of Hong Kong to freely express their will on the international status of their territory.<sup>89</sup> The result, however, was also achieved due to the lack of opposition of many countries to China's demands, including their passive acceptance on the part of the UK.<sup>90</sup>

It is today still disputed whether the territory of Hong Kong would fall within the scope of the self-determination principle in its external dimension.<sup>91</sup> However, it seems arguable that the autonomy granted to Hong Kong should derive not only by the Joint Declaration, but primarily by internal self-determination.

The notion of internal self-determination is identified in the right to authentic self-government, that is 'the right of a people really and freely to choose its own political and economic regime'.<sup>92</sup> It was mainly a Western concept that faced the opposition of a Third World trying to get rid of colonial domination.<sup>93</sup> However, its relevance has been partly acknowledged even in other parts of the world, especially in some Asian countries.<sup>94</sup>

Despite these developments, the idea that internal self-determination could encompass a right to democratic governance is still debated and

J Pomfret, 'Explainer: Hong Kong's 'Borrowed Time'-Worry about 2047 Hangs over Protests' available at <[www.reuters.com/article/us-hongkong-protests-explainer/explainer-hongkongs-borrowed-timeworry-about-2047-hangs-over-protests-idUSKCN1VD0S6](http://www.reuters.com/article/us-hongkong-protests-explainer/explainer-hongkongs-borrowed-timeworry-about-2047-hangs-over-protests-idUSKCN1VD0S6)>).

<sup>89</sup> P Dagati, 'Hong Kong's Lost Right to Self-Determination: A Denial of Due Process in the United Nations' (1992) 13 *NYLS J Intl & Comparative L* 153.

<sup>90</sup> Probably because of the fear of a Chinese invasion of the Hong Kong territory. See P Wesley-Smith, *Unequal Treaty, 1898-1997: China, Great Britain, and Hong Kong's New Territories* (OUP 1998) 252.

<sup>91</sup> See, for instance, C Petersen, 'Not an Internal Affair: Hong Kong's Right to Autonomy and Self-Determination under International Law' (2019) 49 *Hong Kong L J* 883.

<sup>92</sup> A Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP 1995) 101. According to Principle VIII of the 1975 Helsinki Final Act 'by virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their *internal* and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development' (emphasis added). See also A Rosas, 'Internal Self-Determination' in C Tomuschat (ed), *Modern Law of Self-Determination* (Nijhoff Publishers 1993) 225.

<sup>93</sup> P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *ICLQ* 867, 883.

<sup>94</sup> K Seranratne, 'Internal Self-Determination in International Law: A Critical Third-World Perspective' (2013) 3 *Asian J Intl L* 305, 317.





international practice does not seem to offer much support.<sup>95</sup> On the other hand, the core element of internal self-determination consists in the right to a certain degree of autonomy within the borders of the State to which the territory belongs.

As much as autonomy may appear as ‘a palliative’ in certain circumstances,<sup>96</sup> it may be regarded as a ground for international demands over the situation of Hong Kong. This is also how the Joint Declaration should be construed, that is as a recognition of the internal self-determination of the people of Hong Kong. The argument draws strength by reference to other obligations binding upon China that envisage the right to internal self-determination.<sup>97</sup> In this perspective, the events occurring in the HKSAR could no longer be regarded as a purely internal matter.

## 6. *Conclusive remarks*

In the international landscape, the situation of the territory of Hong Kong is a rather unusual one.<sup>98</sup> It is thus particularly difficult to draw general conclusions even with regard to the recent events described in this article. The stance of the Chinese government rests on a very traditional notion of State sovereignty, while reactions from Western countries, but especially from the US, seems to be based on weak grounds as far as the enforcement of the 1984 Joint Declaration is concerned.

The complexities of defining the precise scope of the Chinese *domaine réservé* do not help in determining the respective responsibilities. The dynamics of the non-intervention principle are however blurred by

<sup>95</sup> A Tancredi, ‘Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia’ (2008) 18 *Italian YB Intl L* 37, 78-79.

<sup>96</sup> J Trinidad, *Self-Determination in Disputed Colonial Territories* (CUP 2018) 243-244.

<sup>97</sup> According to the General Recommendation 21 of the Committee on the Elimination of Racial Discrimination, the right to self-determination ‘has an internal aspect, ie the rights of all peoples to pursue freely their economic, social and cultural development without outside interference’ (Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (Forty-eighth session, 1996) UN Doc A/51/18 (30 September 1996)). China ratified the Convention on the Elimination of All Forms of Racial Discrimination in 1981. Moreover, in 2001 it also ratified the International Covenant on Economic, Social and Cultural Rights, whose art 1 enshrines the right to self-determination.

<sup>98</sup> M Shaw, *International Law* (CUP 2014) 731.



political and economic interests, which in turn are in need of finding a legal justification, no matter how fragile or instrumental.

Moreover, the analysis conducted on the Hong Kong case demonstrates that major differences between countries as to how the principle should be interpreted and applied are still affecting its legal dimension and effectiveness. China's argument is indeed straightforward, albeit legally incorrect: any kind of interference with its internal affairs would amount to an internationally wrongful act, eventually prompting further counteractions.<sup>99</sup> On the other hand, the response coming from Western countries is justified on the need to protect certain values of the international community, but it is also the expression of a common concern that depends on the international relevance of Hong Kong as one of the most important Western outposts in Asia.

No doubt that the principle of non-intervention is an essentially relative concept,<sup>100</sup> whose scope might change depending on time and on actors involved. It certainly encompasses a number of obligations that must be coordinated with the evolving framework on human rights, democratic governance and the rule of law. Nonetheless, some general considerations can be drawn from the specific case of Hong Kong.

First of all, notwithstanding the uncertainty surrounding the scope of the principle, the latter should induce countries to exercise with a certain degree of restraint their capacity to impose economic coercive measures. The use of extraterritorial sanctions appears in this context particularly problematic from different angles, especially for the absence of a proportionality assessment when exercising jurisdiction outside one's own territory.<sup>101</sup>

<sup>99</sup> As demonstrated by the recent adoption by the EU of sanctions imposed on Chinese officials for human rights violations in Xinjiang through Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses to which China responded by imposing its own sanctions, L 99 I/1 (22 March 2021). China has responded by imposing its own sanctions targeting EU officials (including members of the European Parliament) and European entities (<[www.politico.eu/article/china-slaps-retaliatory-sanctions-on-eu-officials/](http://www.politico.eu/article/china-slaps-retaliatory-sanctions-on-eu-officials/)>).

<sup>100</sup> Jamnejad, Wood (n 24) 381.

<sup>101</sup> Indeed, the proportionality principle should be applied even to measures that do not qualify as countermeasures. See R Kolb, 'La proportionnalité dans le cadre des contre-mesures et des sanctions – Essai de clarification conceptuelle' in L Picchio Forlati, L-A Sicilianos (eds), *Les sanctions économique en droit international* (Martinus Nijhoff 2004) 379, 439, observing that the applicability of proportionality requirements



Second, the principle of non-intervention should at the very least require States to identify clear and solid legal bases for the adoption of measures against other countries. This seems also the meaning attached to the principle by a considerable part of the international community and by many resolutions adopted in the context of the UN, condemning the enactment of sanction on the basis of domestic law. Besides, the selectivity surrounding the recourse to coercive measures, that is the choice to react only to certain violations of international law in accordance with national interests, constitute a major obstacle for the legitimacy of such actions.

These aspects, together with the fact that unilateral coercive measures are mainly resorted to by a minority of the international community, also impact on the identification of applicable rules of general international law and on their development. All in all, the battle over Hong Kong is just another brick in a very thin wall.

derives from the very notion of intervention. Cf also A Hofer, 'The Proportionality of Unilateral "Targeted" Sanctions: Whose Interests Should Count?' (2020) 89 *Nordic J Intl L* 399. Although US measures against China are tailored as individual sanctions, this might not exclude their evaluation in terms of proportionality. See HRC, 'Report on coercive measures' (21 July 2020) (n 70) para 108: 'The United Nations should exercise full control over the legality of unilateral measures and pay special attention to the expanding use of unilateral measures, which do not formally constitute sanctions against States but *the cumulative effect of which is equivalent to or at least compatible with that of comprehensive sanctions*' (emphasis added). It is also worth recalling that a requirement for 'jurisdictional reasonableness' is enshrined also in US law. See NL Dobson, 'Reflections on 'Reasonableness' in the Restatement (Fourth) of US Foreign Relations Law' (2019) 62 *QIL-Questions Intl L* 19.

