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DESKBY 201300Z  
FROM PEKING 201145Z SEP 83  
TO IMMEDIATE FCO  
TELEGRAM NUMBER 913 OF 20TH SEP  
AND TO IMMEDIATE HONG KONG

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FUTURE OF HONG KONG: COMMENTARY IN PEOPLE'S DAILY

1. PEOPLE'S DAILY OF 20 SEPTEMBER CARRIED A LENGTHY ARTICLE UNDER THE HEADLINE "CHINA RECOVERING SOVEREIGNTY OVER HONG KONG IS ENTIRELY CONSISTENT WITH INTERNATIONAL LAW". IT WAS TAKEN FROM A LONGER ARTICLE IN THE FOURTH VOLUME OF THE QUARTERLY "STUDY OF INTERNATIONAL AFFAIRS". WE HAVE NOT YET RECEIVED THIS.
2. THE ARTICLE ARGUES ITS CASE UNDER THREE SUBHEADINGS:
  - A. THE ILLEGALITY IN INTERNATIONAL LAW OF THE THREE TREATIES;
  - B. THE LACK OF A LEGAL BASIS FOR THE SO-CALLED "EXCHANGE OF SOVEREIGNTY FOR ADMINISTRATION";
  - C. WHO GENUINELY REPRESENTS THE PEOPLE OF HONG KONG?
3. THE ARGUMENTS UNDER A ARE: THE BRITISH INVADED CHINA AND USED COERCION IN THE SIGNING OF ALL THE TREATIES. THEY THEREFORE HAVE NO VALIDITY IN INTERNATIONAL LAW. IN SUPPORT OF THIS A NUMBER OF INTERNATIONAL LAWYERS ARE CITED AND ALSO THE STIPULATION OF THE 1969 "VIENNA CONVENTION ON TREATY LAW" THAT TREATIES WHICH VIOLATE THE PRINCIPLES OF INTERNATIONAL LAW CONTAINED IN THE UN CHARTER AND WHICH ARE SIGNED THROUGH THE THREAT OR USE OF FORCE ARE INVALID. ARTICLE 64 OF THIS CONVENTION ALSO STIPULATES THAT A TREATY ALREADY IN EXISTENCE BECOMES INVALID SHOULD IT CONTRADICT ANY NEW NORM EMERGING IN INTERNATIONAL LAW. THE ARTICLES STATES THAT FOLLOWING THE SECOND WORLD WAR THERE EMERGED A SERIES OF PRINCIPLES IN INTERNATIONAL LAW WHICH SUPPORTED THE SOVEREIGN EQUALITY AND TERRITORIAL INTEGRITY OF STATES AND OPPOSED COLONIALISM, ETC.
4. UNDER B IT IS ARGUED THAT AS SOVEREIGNTY IN LAW STILL BELONGS TO THE INVADERS AND NOT THE INVADER IT IS NOT LEGALLY POSSIBLE FOR THE INVADER TO TALK OF EXCHANGING SOVEREIGNTY FOR ADMINISTRATION. IN ANY CASE ADMINISTRATION IS THE CONCRETE EXPRESSION OF A STATE'S SOVEREIGNTY OVER ITS TERRITORY AND THE TWO CANNOT BE SEEN AS SEPARATE ENTITIES. THE THEORY THAT SOVEREIGNTY COULD BE DIVIDED UP WAS A REACTIONARY WESTERN ONE CREATED TO JUSTIFY THE OCCUPATION OF THE TERRITORY OF OTHERS. IT HAS BEEN SWEEPED INTO THE RUBBISH BIN OF HISTORY.
5. UNDER C IT IS ARGUED THAT A BRITON REPRESENTING THE PEOPLE OF HONG KONG IN THE TALKS IS A NOTION WITHOUT LEGAL OR LOGICAL FOUNDATION. THE RELATIONSHIP BETWEEN THE BRITISH AUTHORITIES AND THE PEOPLE IN HONG KONG IS STILL ONE OF COLONIAL RULE. THE OVERWHELMING MAJORITY OF THE PEOPLE IN HONG KONG ARE CHINESE

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AND SO ONLY THE CHINESE GOVERNMENT CAN TRULY REPRESENT THEM. THE SPECIAL POLICIES THE CHINESE GOVERNMENT WILL ADOPT TOWARDS HONG KONG TO PRESERVE ITS WAY OF LIFE ARE EVIDENCE OF THE CHINESE CONCERN AND SENSE OF RESPONSIBILITY FOR THE PEOPLE OF HONG KONG.

6. THE ARTICLE CONCLUDES THAT A PRELIMINARY ANALYSIS OF THESE THREE MATTERS SHOWS THAT CONTINUED BRITISH OCCUPATION AND COLONIAL RULE WOULD VIOLATE INTERNATIONAL LAW. BUT CHINA'S DECISION TO RECOVER HONG KONG IN 1997 IS ENTIRELY CONSISTENT WITH THE LAW. THIS IS RECOGNISED THROUGHOUT THE WORLD AND EVEN AMONG SOME PEOPLE IN BRITAIN.

7. THE ARTICLE IS SIGNED BY JIN PU, PROBABLY A PSEUDONYM. THOUGH A NEW ONE TO US.

COMMENT

8. THIS IS THE FIRST TIME THAT A DEFENCE OF THE CHINESE POSITION IN TERMS OF INTERNATIONAL LAW HAS APPEARED IN THE PRESS HERE.

IT IS CLEARLY DESIGNED TO PUT FURTHER PRESSURE ON US, AND TIMED FOR THIS ROUND OF TALKS. THE CHINESE USED SIMILAR TACTICS LAST YEAR WHEN NEGOTIATING WITH THE AMERICANS, PARTICULARLY IN RELATION TO THE LEGALITY OF THE TAIWAN RELATIONS ACT. THE ARTICLE MAKES NO SPECIFIC REFERENCE TO THE POSITION ADOPTED BY THE BRITISH SIDE IN THE TALKS, THOUGH IT CARRIES THROUGHOUT A STRONG IMPLICATION THAT THE POINTS BEING ATTACKED REPRESENT OUR POSITION. IT DOES HOWEVER AT ONE POINT STATE "THE BRITISH SIDE SAYS THAT THE TASK OF THE BRITISH AND CHINESE NEGOTIATORS WILL BE TO STUDY HOW TO AMEND THE TREATIES ON HONG KONG", WHICH IS PRESUMABLY A REFERENCE TO THE PRIME MINISTER'S REMARKS AT HER PRESS CONFERENCE IN HONG KONG LAST SEPTEMBER.

9. SEE MIFT.

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TO IMMEDIATE PEKING

TELEGRAM NUMBER 628 OF 21 SEPTEMBER

INFO IMMEDIATE HONG KONG (FOR ACTING GOVERNOR)

YOUR TELNOS 913 AND 914 AND HONG KONG TELNO 539: FUTURE OF  
HONG KONG: COMMENTARY IN PEOPLE'S DAILY

1. WE HAVE THE FOLLOWING TO ADD TO SIR IAN SINCLAIR'S HELPFUL  
COMMENTS:

(A) THE VIENNA CONVENTION ON THE LAW OF TREATIES, BY ITS OWN  
TERMS (ARTICLE 4) RELATES ONLY TO TREATIES CONCLUDED AFTER ITS  
ENTRY INTO FORCE.

(B) THE MAJORITY OF HONG KONG'S INHABITANTS ARE BRITISH  
NATIONALS. THE UK ACCORDINGLY HAS THE RIGHT TO SPEAK FOR THEM  
IN INTERNATIONAL AFFAIRS.

(C) THE UK IS ALSO ENTITLED TO NEGOTIATE ON THEIR BEHALF IN  
ORDER TO PROMOTE THEIR WELL BEING, IN ACCORDANCE WITH ARTICLE 73  
OF THE UN CHARTER. INDEED THE UK IS UNDER A DUTY IN ALL CONTEXTS  
TO PROMOTE THAT WELL BEING. THE GENERAL ASSEMBLY'S DECISION IN  
1972 THAT HONG KONG BE REMOVED FROM THE LIST OF NON-SELF-GOVERNING  
TERRITORIES TO WHICH ARTICLE 73(E) APPLIES DID NOT ALTER THE  
LEGAL STATUS OF HONG KONG. THE FACT REMAINS THAT IT IS A  
TERRITORY FOR WHOSE ADMINISTRATION THE UK HAS RESPONSIBILITY AND  
TO ALLEGE OTHERWISE IS NOT IN ACCORDANCE WITH REALITY.

(D) ARTICLE 64 OF THE VIENNA CONVENTION, LIKE THE REST OF  
THE TREATY, APPLIES ONLY TO TREATIES CONCLUDED AFTER THE ENTRY  
INTO FORCE OF THE CONVENTION. IN ANY EVENT A PEREMPTORY NORM OF  
INTERNATIONAL LAW CAN EXIST ONLY WHEN IT IS 'ACCEPTED AND  
RECOGNISED BY THE INTERNATIONAL COMMUNITY AS A WHOLE AS A NORM  
FROM WHICH NO DEROGATION IS PERMITTED.' (ARTICLE 53). THE  
ALLEGED RULE AGAINST COLONIALISM IS CLEARLY NOT SO ACCEPTED AND  
RECOGNISED.

(E) THERE IS NO RULE OF INTERNATIONAL LAW WHICH WOULD PREVENT TWO

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STATES FROM AGREEING THAT TERRITORY UNDER THE SOVEREIGNTY OF ONE SHOULD BE ADMINISTERED BY THE OTHER. SUCH AN AGREEMENT MADE IN THE FREE EXERCISE OF SOVEREIGN RIGHTS IS IN NO WAY INCONSISTENT WITH THE RETENTION OF TERRITORIAL SOVEREIGNTY.

2. EXAMPLES OF SOME PRECEDENTS WERE SENT UNDER COVER OF DAVIES' LETTER OF 4 JULY TO CLIFT, COPIED TO PEKING. A MORE EXHAUSTIVE STUDY IS ON ITS WAY BY BAG. WE DO NOT HOWEVER BELIEVE THAT ANY CASE OR PRECEDENT IS WORTH CITING TO THE CHINESE, ALTHOUGH SOME FEATURES OF CERTAIN PRECEDENTS MAY PROVE USEFUL TO US.

3. THESE POINTS, WITH SIR IAN SINCLAIR'S, COULD BE USED AT YOUR DISCRETION IF THE CHINESE DIRECTLY REPEAT THE ARGUMENTS IN THE PEOPLE'S DAILY ARTICLE. YOU MAY HOWEVER WISH ALSO TO REMIND THE CHINESE THAT OUR COMMON AIM CLEARLY REQUIRES THAT THE FOCUS OF THE TALKS SHOULD BE KEPT ON THE FUTURE AND NOT ON THE PAST. WE ARE NEGOTIATING IN THAT SPIRIT. TO TALK OF 'CONTINUED BRITISH OCCUPATION AND COLONIAL RULE' DISTORTS THE PRESENT POSITION AND DOES NOT HELP IN AGREEING ARRANGMENTS FOR THE FUTURE.

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TO IMMEDIATE PEKING

TELEGRAM NUMBER 539 OF 21 SEPTEMBER

INFO IMMEDIATE HONG KONG GOVERNMENT OFFICE LONDON, FCO

PEKING TELNO 914: FUTURE OF HONG KONG: COMMENTARY IN PEOPLE'S DAILY.

1. SIR HAN SINCLAIR HAS NOW READ THE ARTICLE BY JIN PU. FOLLOWING ARE HIS COMMENTS, PREPARED WITHOUT THE BENEFIT OF ACCESS TO SOURCE MATERIALS.

VALIDITY OF SO-CALLED "UNEQUAL" TREATIES

(i) IT CAN BE CONCEDED THAT UNDER CONTEMPORARY INTERNATIONAL LAW, A WAR OF AGGRESSION IS UNLAWFUL AND INDEED, IN TERMS OF THE NUREMBERG PRINCIPLE, A CRIME AGAINST THE PEACE. AT MOST, HOWEVER, THIS PRINCIPLE RELATES BACK ONLY TO THE KELLOGG-BRAND PACT OF 1928 WHICH OUTLAWED WAR AS AN INSTRUMENT OF NATIONAL POLICY. THE BASIC FLAW IN THE CHINESE ARGUMENT IS TO APPLY NEWLY EMERGENT PRINCIPLES TO TEST THE VALIDITY OF TREATIES CONCLUDED LONG BEFORE THE MODERN LAW OF TREATIES ACHIEVED GENERAL ACCEPTANCE.

(ii) THE QUOTATION FROM THE VIENNA CONVENTION ON THE LAW OF TREATIES IS A MISTRANSLATION OF ARTICLE 52 OF THAT CONVENTION WHICH, ACCORDING TO MY RECOLLECTION, PROVIDES THAT "A TREATY IS VOID IF ITS CONCLUSION HAS BEEN PROCURED BY THE THREAT OR USE OF FORCE IN VIOLATION OF THE PRINCIPLES OF INTERNATIONAL LAW EMBODIED IN THE CHARTER OF THE UNITED NATIONS". THE USE OF THE EXPRESSION "IN VIOLATION OF THE PRINCIPLES OF INTERNATIONAL LAW EMBODIED IN THE CHARTER OF THE UNITED NATIONS" WAS PRECISELY DESIGNED TO CONFIRM THAT THE PRINCIPLE WAS NOT (NOT) TO BE REGARDED AS OPERATING RETROSPECTIVELY SO AS TO INVALIDATE TREATIES CONCLUDED BEFORE THE MODERN LAW HAD CRYSTALISED. OTHERWISE, ALL PEACE TREATIES CONCLUDED IN THE PAST (FOR EXAMPLE, THE TREATY OF VERSAILLES OF 1919 AND THE TREATY OF UTRECHT OF 1713) WOULD HAVE BEEN PUT AT RISK.

(iii) THE DOCTRINE THAT A TREATY MAY BECOME NULL AND VOID AS A RESULT OF THE EMERGENCE OF A NEW PAREMPTORY NORM OF INTERNATIONAL LAW (I.E. A NORM OF (NEXT TWO WORDS UNDERLINED) JUS COGENS) IS HIGHLY CONTROVERSIAL, SINCE THERE IS NO AGREEMENT AMONG JURISTS AS TO WHAT IS THE CONTENT OF EXISTING, FAR LESS EMERGING, NORMS OF (NEXT TWO WORDS UNDERLINED) JUS COGENS. SOME EVEN ASSERT THAT SELF-DETERMINATION IS A NORM OF EXISTING (NEXT TWO WORDS UNDERLINED) JUS COGENS. WE HAVE NEVER ACCEPTED, AND NEVER WOULD ACCEPT, THAT CONTINUANCE OF COLONIAL STATUS CONTRAVENES ANY EXISTING OR EMERGING NORM OF (NEXT TWO WORDS UNDERLINED) JUS COGENS.

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SOVEREIGNTY AND ADMINISTRATION

2. CHINA CEDED HONG KONG ISLAND IN PERPETUITY BY THE TREATY OF NANKING OF 1842; AND SHE CEDED PART OF KOWLOON PENINSULA BY THE TREATY OF PEKING OF 1860. THESE TREATIES REMAIN IN FULL FORCE AND EFFECT UNLESS TERMINATED OR MODIFIED BY MUTUAL AGREEMENT. IT IS WRONG TO SAY THAT SOVEREIGNTY IS INDIVISIBLE. THERE HAVE BEEN MANY EXAMPLES IN THE PAST AND THERE ARE SOME TODAY WHERE SOVEREIGNTY AND ADMINISTRATION HAVE BEEN DIVIDED (FCO CAN NO DOUBT PROVIDE SUITABLE EXAMPLES). HOW COULD IT BE SAID THAT CHINA WOULD BE ACCEPTING A NEW "UNEQUAL" TREATY IF IT FREELY NEGOTIATED A NEW INTERNATIONAL AGREEMENT TO REPLACE WHAT THE CHINESE ASSERT (AND WE DENY) TO BE THE EXISTING "UNEQUAL" TREATIES?

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