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The Legal Status *of* Tibet



Table of Contents

Introduction _____	3
Part 1: The Legal Personality of Tibet _____	5
The Legal Status of Political Entities. Concepts of Statehood _____	5
Limitations On State Sovereignty _____	6
Historic Status of Tibet to 1911 _____	8
The Status of Tibet between 1911- 1949/'50 _____	14
The Status of Tibet after 1949/ 1950 _____	18
Military Intervention _____	18
The Seventeen- Point Agreement between the PRC and Tibet _____	19
The Implementation of the Seventeen Point Agreement _____	21
Establishment of Chinese Authority _____	21
Recognition _____	23
Part 2: The Status of Tibet within the Legal System of the PRC _____	25
Autonomy under international law _____	25
The Legal Framework of Autonomy in the PRC _____	26
The TAR Government _____	26
Powers of the TAR Government _____	27
Power to Regulate the Economy _____	27
Power to Formulate Policies _____	28
Power to Alter Policies _____	28
Power to Engage in Foreign Trade _____	28
Power to Regulate the Influx of Population _____	29
Power to utilise Natural Resources _____	29
Part III: The Right of Self- Determination of the Tibetan People _____	30
The legal basis, scope and content of the Right of Self- Determination _____	31
The Right of Self- Determination of the Tibetan People _____	34
A case for comparison: East Timor _____	36
Background _____	36
East Timor and Tibet _____	37
Towards a Solution _____	38
Appendices _____	43

"Tibetans shall be happy in Tibet
and Chinese shall be happy in China."

(From The China- Tibet Treaty of A.D 821)

Introduction

In this paper I will examine the legal status of the entity which is historically known as Tibet. As a geographic area it is known as the Tibetan Plateau, popularly also called the "Roof of the World". In the South it is bordered by the Himalayas, in the West by the Karakoram, and in the North by the Kun Lun, Altyn and Qilian ranges. The plateau is separated from Chinese territories in the South-east by the gorges of the Salween, Mekong and Yangtze. Tibet consists of three provinces: U-Tsang, Kham and Amdo, comprising an area of 2.5 million km², roughly equal to all Western Europe combined. Thus historic Tibet comprises a larger area than today's Tibetan Autonomous Region (TAR).¹

Since the military invasion of Tibet by the Peoples Republic of China in 1949/'50, the greatest obstacle to resolving the Sino-Tibetan conflict was the diametrically opposed stands of both parties on the historic and current legal status of Tibet. After the "liberation" of Tibet by the People's Liberation Army, the Chinese claim was based on the ground that Tibet has always been an integral part of China; therefore the influence of "aggressive imperialist forces in Tibet" had to be eliminated in order to "free" Tibetans and allow them to "return to the big family of the PRC". On the other hand, the Tibetan Government accused China of aggression and violation of Tibet's territorial integrity and independence. Both claims are based solely on historical grounds. Thus, China never claimed to have acquired legal title to Tibet by means of conquest, annexation or prescription (van Walt van Praag 1987: Preface). According to this consideration, one might feel that an inquiry into Tibet's legal status prior 1949/'50 might be sufficient enough. However, some scholars suggest that the following decades of Chinese domination may have resulted in a transfer of sovereignty (Van Walt Van Praag 1987: Preface). This inquiry will therefore include all development of the issue until present day.

In the first part of this paper I will raise the question whether Tibet enjoys statehood according to international law. This includes examining possible limitations of Tibet's legal personality, as well. I will show that after the long historic period between the 7th century and 1911 - when successive eras of independence and various forms of dependencies followed - Tibet enjoyed *de facto* independence between 1911 and 1949/'50. This will be followed by the

¹ See Annex 1,2.

question of whether the “liberation” of Tibet by the Chinese Peoples Republic in 1949/'50, or the following and ongoing exercise of power by the PRC, could lead to a transfer of state powers and extinction of Tibet as a state. I will conclude that neither of these events altered the legal statehood of Tibet. Tibet is therefore a state under illegal occupation.

The incorporation of Tibet into the Chinese administrative system has been an effective one. I will conclude in Part I that the effectiveness of the illegal act of occupation does not lead to extinction of statehood. Nevertheless, I will examine how China treats Tibet within its own constitution and legal system. This will be the topic of Part II. The purpose of this inquiry will be to show that China has not kept his promise arising from the so called Seventeen-Point Agreement, and has not granted genuine autonomy for Tibet. This fact will be especially relevant to the discussion on Tibet's future.

Finally, even if Tibet ceased to be a state for whatever reason, there still remains the question of the right of self-determination of the Tibetans as a people. This question will be examined in the third and final part.

Within the context of this discourse, I will briefly raise issues on human rights violations in Tibet and on current developments of the right of self-determination. This will include a brief comparison between the cases of Tibet and East Timor. These considerations should, however, not be looked at as separate issues, but as a collection of relevant legal facts supporting the reasoning used in this paper. Facts, such as: over a million Tibetans out of 6 million lost their lives as a *direct* result of the Chinese intervention and only less than a few dozen of more than 6.000 monasteries in Tibet escaped total destruction, cannot be ignored in a legal record. These are crucial information for a discussion on self-determination.

Part 1: The Legal Personality of Tibet

Prior a historic overview and an inquiry in the status of Tibet between 1911- 1949/50 and finally, after the Chinese invasion I will give an outline on the concepts of legal personality and its restrictions in international public law.

The Legal Status of Political Entities. Concepts of Statehood

Although there is no exact definition of “State” in international public law, some essential characteristics of a State are well settled. These characteristics may be found for example in Art. 1 of the Montevideo Convention on the Rights and Duties of States (1933):

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”²

These qualifications are often adopted by scholars, thus they provide us a solid basis for further investigation.

Some other suggested qualifications we have to abandon as not being necessary to the existence of a state. Time is naturally an element of statehood, as is space, *permanence* is not necessary to its existence – an only very brief life will fulfil the criteria and leave the question of extinction on the agenda (Chen 1951: 59-60). *The willingness to observe international law* is a duty of legal persons in international law, thus it is a consequence and not a criteria of statehood (Chen 1951: 61). Some scholars added the requirement of a *certain degree of civilisation*; however, “(i)n modern law it is impossible to regard a tribal society which refuses to conduct diplomatic relations with other states as *res nullius*” (Brownlie 1979: 78).

Recognition is “the act by which another State acknowledges that the political entity recognised possesses the attributes of statehood” (Jessup 1968: 43). It is an important political act, but has only evidentiary value with regard to an entity’s international legal status. Once a political entity actually possesses the attributes of statehood, recognition is not essential to the acquisition or maintenance of independence (Hackworth 1940: 161).³

² The Inter-American Convention on Rights and Duties of States, Montevideo 1933, U.S.T.S. N 881. Art. 1.

³ See also the Interamerican Convention on Rights and Duties of States, Art 3.: “The political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts...”

This declaratory theory of recognition is opposed to the constitutive theory, which states that the political act of recognition is precondition for rights or – in its extreme form – of the very existence of a state itself.⁴ The results of such a theory would violate basic principles of international law, namely that no state(s) can create rights and obligations for third states without their consensus. The constitutive theory creates many other difficulties, as well. By rationalising the position of an unrecognised state, the adherents of this doctrine may need to adopt quasi-declaratory views. The reference to the recognition creates a number of questions: “How many states must recognise? Can existence be relative only to those states which do recognise? Is existence dependent on recognition only when this rests on an adequate knowledge of the facts?” However, although “cogent arguments thus dictate a preference for declaratory doctrine, yet to reduce, or to seem to reduce, the issues to a choice between the two opposing theories is to greatly oversimplify the legal situation” (Brownlie 1979: 90). Therefore, later I will later examine the issue of recognition of Tibet according to the circumstances of this particular case.

The requirement “*capacity to enter into relations with other states*” raises the question on the degree of *independence* a state must possess. If we look at Judge Anzilotti’s opinion in the *Customs Regime between Austria and Germany* case, we find a distinction between formal and actual independence.⁵

Formal independence is a matter of law. It exists, where the source of the governmental authority (or sovereignty) is vested within the state. Sovereignty is a right, thus it logically includes that a state can freely decree it. Thus the delegation of governmental functions to another state, or entering treaty obligations, cannot effect formal independence, no matter how significant the arising restrictions might be. This is not the case when another state has discretionary power, as a matter of fact, to intervene in the internal affairs of a political entity; in this case the latter cannot be considered as independent.

Actual independence is a matter of political fact. It means the “exercise of effective government authority independently of an outside power”. The extend of such actual independence required in order to maintain statehood is minimal, where formal independence is undisputed. If the basis for external control lies in an agreement, even significant loss of actual independence does not effect legal independence (Office of Information and International Relations 1989: 7-9).

Limitations On State Sovereignty

⁴ Well-known adherents of the constitutive theory include Anzilotti, Oppenheim, Kelsen, Lauterpacht.

⁵ Independent Opinion, *Customs Regime between Austria and Germany*, 1931 P.C.I.J., ser, B, No. 41, at 58.

There are various restrictions on state sovereignty (“dependence”). The different types of dependencies are difficult to put in exact legal terms, because they used to describe a broad scale of rights and obligations, which themselves changed during the course of history. What makes matters even more complicated is that these terms were often inaccurately used to describe interstate relationships for political reasons. Therefore each and every case has to be examined separately, by examining the constituent documents and circumstances. Legally it will be relevant to find out about 1) the source of restraint (whether it is situated within a state or outside of it) and 2) the nature and extend of actual control.

Protectorate, suzerainty, sphere of influence, however, are relationships of dependence, which – although they exist in a number of forms – can be described through some significant common features.

a. A **protectorate** is a parole, consensual relationship. It consists of two constitutive elements: The first is the obligation of the “stronger” state to protect the “weaker” one against foreign aggression and intervention (Westlake 1910: 21-24. The second – which is a logical corollary to the obligation to protect – is “the transference of the management of the protected state’s foreign relations to the protector state (Office of Information and International Relations 1989: 11).

A mere right to come to protection or the mere agreement to come to protection without taking control over the protected state’s foreign relations, cannot be regarded as protectorate. The latter is a “simple protection” agreement.

The extensiveness of the powers transferred varies: They can reach from a mere right of approval or veto to taking an active role in the protected state’s internal affairs. Despite the possibility of far-reaching concessions, the protected state always retains its legal personality.

This follows consequently from the nature of a protectorate: it is a binding, international agreement, an act of state sovereignty. The transfer of some governmental functions within the framework of a protectorate constitutes a delegation (and not a cession!). The source of governmental authority remains within the protected state, which therefore retains its formal independence.

The extinction of a protectorate relationship is also governed by international public law. Following situations can lead to the extinction of a protectorate: the incorporation of the protected state into the protecting state; the removal of restrictions upon the protected state’s exercise of sovereignty; and the outbreak of war between the protector and the protected state (Office of Information and International Relations 1989: 11-13).

b. **Suzerainty**, in feudal law, was described as a relation between lord and vassal or liege man (Oppenheim 1955) – a relationship characterised by elements such as a solemn investiture, a promise of protection by the suzerain, annual tribute, etc., both on inner-state and inter-state level (Verzijl 1968/'69: 340).

Feudal suzerainty had a distinctive element: The source of state autonomy of the vassal state was held by the suzerain state. The exercise of the authority was then granted to the ruler of the vassal state by establishing autonomy (office of Information and International Relations 1989: 14).

However, this notion has evolved so much during the course of history that in the 19th century it was used to describe the situation of states breaking away from the Ottoman Empire (Crawford 1976/'77: 209). This "modern" suzerainty, as described by Oppenheim (1955: 191), is "a kind of international guardianship, since the vassal State is either absolutely or mainly represented by the suzerain State": The legal personality of the vassal is limited, to an extent which varies from case to case.

Also, there should be a distinction between nominal and substantive suzerainty. While substantive suzerainty includes the elements listed above, nominal suzerainty is nothing more than a purely symbolic relationship (acknowledgement of the higher status of the suzerain and respect; but no exercise by the suzerain of the vassal's governmental functions).

After these considerations we must see that the term "suzerainty" neither implies the existence nor the lack of legal personality.

c. The term "**Sphere Of Influence**" is similarly not easy one to define. Mostly it is used to characterise an imperialist power's control over existing states in Asia and Africa. In such cases, without exercising sovereign powers, the imperialist state could establish a buffer zone, exercise varying degrees of interference and prevent other powers from exercising influence. This kind of relationship, however, never entailed the loss of formal independence of the influenced state (Rutherford 1926: 318).

Historic Status of Tibet to 1911

The earliest period of Tibetan history could be called the Age of the **Tibetan Empire** (ca. 630-842 AD). The characteristics which define Tibet as a people -- shared ethnicity, territory, culture and religion -- were already consolidated in these early centuries (International Commission of Jurists 1997: 31). This was the time when the great emperor Tsanpo Songtsen Gampo (ca. 620-649 AD) unified the nomadic tribes of the Tibetan Plateau, conquered most of the peoples on Tibet's borders and entered into matrimonial alliances with neighbouring rulers (Van Walt Van Praag 1987: 2). Through one of these marriages Buddhism reached Tibet, which soon became mixed with the ancient Bön religion and developed a unique, typically Tibetan form (monastic or Mahajana Buddhism). Religious consciousness has remained until the present day the strongest factor of national identity among the Tibetans.

821 AD a **Tibet-China Peace Treaty** was concluded that ended almost two centuries of fighting. It was the “Ministers of Great Tibet” and “the Ministers of Great China” who concluded this treaty in order to bring about “a great area, when Tibetans shall be happy in Tibet and Chinese shall be happy in China”. This was not the first treaty within which China and Tibet acted as contractual parties: By that time Tibet had already had at least seven bilateral treaties with China (Van Walt Van Praag 1987: 2). Both countries acted as equal parties and the legal personality of Tibet during this area remains today unquestioned even by Chinese scholars (Office of Information and International Relations 1989: 18).

The Age of the Tibetan Empire ended soon after the assassination of the Emperor Tsanpo Ralpachen in 836 AD. For the next ca. 400 years an **Age of Disintegration** (Van Walt Van Praag 1987: 4) followed, during which there was no central authority, only a system of monastic Buddhism, while no Buddhist school was powerful enough to dominate the others (International Commission of Jurists, 1997: 31). By the beginning of the 10th century China had recovered most of the territory it had lost during the time of the Tibetan Empire. A “no-man's land” was created between China and Tibet, and practically no exchanges took place between the two governments. Contacts were re-established only later, through the conquest of both countries by a third power, the Mongols (Van Walt Van Praag 1987: 4).

In the 13th century the Mongols conquered Asia and large parts of Europe, eventually creating the “greatest Empire the world has ever known”: The **Mongol Empire** (Sinor 1971: 163). The Mongols succeeded with extending their influence over Tibet even before they conquered China or established the Yuan dynasty. The first manifestation of this influence was a *sui generis* relationship – known in Tibetan as the **Chö-yön (Priest-Patron) relationship** – between Prince Goden, the grandson of the great Mongol conqueror Chingis Khan and Sakya Pandita (1182-1251), one of Tibet’s leading religious hierarchies. The Tibetan Lama introduced the Mongols to Buddhism and promised loyalty, in return the Prince invested him with temporal authority over the still divided territory of Tibet. This investiture could have had little real impact on statehood, because neither Prince Goden nor Sakya Pandita could claim authority over all the Mongols or all Tibetans respectively. However, this relationship was important, because it formed the basis for future relations between the Yuan Emperors and the Sakya Lamas and also later between the Manchu Emperors and the Dalai Lamas.

A real degree of autonomy over Tibet was established in the middle of the 13th century by Kubilai Khagan (1259-1294), who developed a dual temporal and religious order in the Empire: The Khagan truly embraced Buddhism and gave Sakya Pandita’s successor, Pagpa (1235- 1280) the title of “National Master”. Thus, the Lama became the spiritual ruler in the Empire, while the Emperor was the supreme **temporal sovereign** (Van Walt Van Praag 1987: 6).

As we see, this relationship existed between the Mongols and the Tibetans and not between the Chinese and the Tibetans. Moreover, it might be exactly because of this relationship that, during the Mongol Empire, Tibet was never directly administered by the Mongols, and the administration of China and Tibet was also kept separate. Tibet also **broke away effectively from the Mongol Empire** (1350) before China did (1368), (Office of Information and International Relations 1989: 18).

After regaining independence both countries lived an age of **nationalistic renaissance**: In China the Ming took over, a dynasty (1368- 1644) built on Confucian tradition, showing little interest in (Buddhist) Tibet and never claiming authority over Tibet (International Commission of Jurists 1997: 32). In Tibet a new and distinctly Tibetan administration system was introduced and a code of law was enacted which remained effective well into the 20th century (Van Walt Van Praag 1987: 7). This code promoted national culture and this way it constituted “a national claim and a statement of independence” (Tucci 1980).

Thus from the early 14th century Tibet existed as a separate and independent state, all to the early 18th century. During the Ming dynasty Tibet maintained its relations with the Mongols (International Commission of Jurists 1997: 32), more than with the Chinese. These ties were again ones with religious leaders – however, in Central Asia, by this time, it is almost impossible to draw the line between religion and politics (Van Walt Van Praag 1987: 8). A new Tibetan Buddhist school, the Gelugpa school (the “yellow church”) was founded by the great religious reformer Tsong Khapa (1357-1419), who revitalised the practice of monasticism (Thurman 1997). The Gelugpa quickly became a political force, as well (VanWalt Van Praag 1987: 8). The third incarnation in the line following Tsong Khapa, Sonam Gyatso (1534-1588) was awarded by the Mongol Althan Khan (1543-1583) the name Dalai (the Mongol translation of “Gyatso,” meaning “ocean”). The **Dalai Lama** became the Khan's spiritual teacher and the Chö-yön relationship ones again was established. In the word of Althan Khan himself: “the Buddhist religion first came to our country in the earlier times, when we gave our patronage to Skaya Pandita. [...] Your visit to us has helped the Buddhist religion to revive. Our relation of Patron and Lama can be likened to that of the Sun and the Moon” (Shakabpa 1967: 95). After the 14th century, the Dalai Lama was being found to be incarnated in the Khan’s own family. The ties between the two peoples were firmly sealed and a generation later, it were the Mongols who helped the great 5th Dalai Lama (1617-1682) to attain supreme religious and political power in Tibet.

In 1644 the Ming dynasty was overthrown in China. The country got invaded by the Manchus, who established the Qing Empire (1644-1912). As Michael Van Walt Van Praag (1987: 11) points out, “(m)uch confusion has resulted from the careless, and, at times, intentional practice of calling the Qing Empire Chinese”. What existed was a “**Manchu Empire**, of which China formed only one part” (Lattimore 1962: 77). The Manchus were, in fact, foreign to the

Chinese, at the discussed time even intermarriage was forbidden between the two (van Walt van Praag 1987: 11).

The Manchus established the same kind of Chö-yön relationship with the Tibetans, as they earlier had with the Mongols. We can clearly see the two constructive elements of this typically Central Asian and Buddhist relationship by now: On one hand, the Lama is the spiritual teacher of the temporal ruler, he is the object of worship and offerings, while the Emperor is the worshipper. On the other hand, we can see the element of protection: while the Emperor promises to protect his "Spiritual Master" and his teaching from all its enemies, in turn, the Lama sees and prays for the spiritual well-being of his Patron (Office of Information and International Relations 1989: 19).

The best comparison to a better known institution would probably be that of a protectorate which I described earlier in this paper. Both of the relationships are based on a consensual transaction, both involve the protector's responsibility for the protected state's foreign relations and both provide the legal basis for the protector's intervention. Nevertheless, categorisation beyond this similarity, becomes difficult, especially if we consider that the Chö-yön shows similarities with feudal suzerainty, as well. However, in the Chö-yön relationship the elements of inferiority and submission, investiture and traditional tributary framework were absent: There is no more than a slight similarity between these relationships. Therefore, it is correct to describe the Chö-yön as a typically Buddhist, *sui generis* relationship, during which the formal source of government remained in Tibet. The state of Tibet therefore did not cease to exist.

On ground of the obligation arising out of the Chö-yön relationship the Manchu emperor entered Lhasa with his troops on four occasions: In 1720 to expel the Dzungar Mongols trying to occupy Tibet; in 1728 to restore the administration after a civil war; in 1751 following factional fighting and in 1792 to help with the invasion of the Nepalese Kingdom of Gorkha (Office of Information and International Relations 1989: 20).

The formal ground for these interventions was the Chö-yön relationship. In practice, Manchu involvement was effective only during its peaks, at times immediately following each of these military interventions. The height of Manchu influence in Tibet was marked the Imperial reforms following the defeat of the Ghorikas. The Manchus tried to take part in the administration of Tibet. In choosing the great incarnate lamas they effectively took control of Tibet's foreign relations and thus they were the ones who imposed a "forbidden land" policy on Tibet, closing its borders to foreigners, especially to the British and the Russians" (Van Walt Van Praag 1987: 26-27).

During this period Tibet nevertheless possessed and maintained its statehood: Even after the Manchus took over the control of its foreign relations all acts were done on behalf and in the name of the Tibetan State. The **source of state sovereignty remained in Tibet** and as we saw it previously, this is the criterion for subjectivity in international law. Tibet possessed inherited

sovereignty, nothing that derived from an outside power. By the early 19th century Manchu authority became considerably weaker and shortly after no influence remained – the relationship became a purely nominal one. Tibet concluded **peace treaties** in 1842 and 1856, on the occasion of the Dogra and Gorkha wars, and did this with no imperial assistance or intervention. Moreover, on both of these occasions the Emperor failed to protect Tibet from foreign invaders. This constituted a **breach of one of the essential elements of the Chö-yön relationship** – protection – and therefore signified an abandonment by the Emperor of his protectors role (Office of Information and International Relations 1989: 21-22). Tibetan relations with the Manchus were reduced to ceremonial gestures (Van Walt Van Praag 1987: 22-24). The “sweeping erosion” of the Manchu influence “had turned (the emperor's) traditional sovereignty over Tibet into a constitutional myth”, as the Nepalese historian Uprety (1980: 119) concludes. During the two mentioned wars it was Nepal which tried to be the new protector of Tibet, but the extend of Nepal's protective role was wholly insignificant (Van Walt Van Praag 1987: 25). The 1856 treaty with Nepal constituted a simple protection agreement; however it is interesting to mention that concluding the treaty itself presupposed the full exercise of sovereignty by the Tibetan government (Office of Information and International Relations 1989: 23).

In 1904 the Younghusband Expedition reached Lhasa and the British invaded Tibet for a short period of time. This adventure was intended – in face of London's disapproval – by the powerful Viceroy Lord Curzon to prevent Russian interference in Tibet. The British made the Tibetan government to sign a treaty, the **Lhasa Convention**⁶, by which Tibet was bound not to alienate any of its territory to any foreign power without previous consent of the British. Through this establishment of a typical **power's sphere of influence** the British presence in Tibet was secured while allowing the already dying Manchu Empire to assert for a few years its vague claims to “suzerainty” (Watson 1974: 148).

However, in 1905 there were changes in the administration of England and India. The new head of the India Office, John Morley, made it clear that the British, from now on, should maintain a **policy of non-interference** towards Tibet. He considered that the only legitimate British interest in Tibet was to ensure that no other European power established itself there. This took three stages. First, in 1906 The Anglo-Chinese Convention⁷ was signed. This Convention said that Tibet was a region belonging to the Chinese, with restrictions of the rights of the Chinese. No other power than the Chinese could interfere in internal Tibetan affairs. There were a couple of economic advantages retained to the British. Secondly, in 1907 the Anglo-Russian Convention⁸ was signed. The Russians agreed not to enter into political relations with the Dalai

⁶ Convention Between Great Britain and Thibet (1904).

⁷ Convention Between Great Britain and China Respecting Tibet (1906)

⁸ Anglo-Russian Convention - An Agreement Relating to Persia, Afghanistan, and Tibet (1907).

Lama and his people. The British kept their economic privileges from 1906, but made some declarations of self-denial as well. Finally, in 1908, by the new Trade Regulations⁹, the mechanism of British commercial contact with Tibet was codified (Lamb 1966: 113).

As regards Tibet three facts should be emphasised. First, the Lhasa Convention was a bilateral treaty between Britain and Tibet, and therefore necessarily implied a recognition of Tibet's statehood and unrestricted sovereignty in internal and external matters. This does not mean though that the British rejected the existence of a relationship between the Emperor and Lhasa. On the contrary: the British concluded a separate agreement with the Imperium, the Adhesion Agreement (1906), by which China recognised the Lhasa Convention. Regardless the relationship, Great Britain recognised this was a purely nominal one which did not restrict Tibet's international personality (Van Walt Van Praag 1987: 131).

Secondly, those treaties, of which Tibet was not a party (the 1906 Anglo-Chinese Convention and 1907 Anglo-Russian Treaty) cannot create rights and duties for Tibet. This is because "a treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deducted from it in favour of third States".¹⁰ This *Pacta tertiis nec nocent nec procunt* is a well established, generally accepted rule of international law which can be found in Art 34 of the Vienna Convention on the Law of Treaties¹¹.

Thirdly, the Manchu Emperor did not come to assistance when Tibet was invaded. Since this was the second time of imperial inactivity, the Manchu Emperor thereby confirmed his abandonment of his protecting role. This fact re-confirms that Tibet was linked to the Emperor only by means of a "nominal suzerainty" and had regained its actual independence.

In 1910 there was a short-lived occupation of Tibet, after Manchu troops entered Lhasa. The Tibetans found the "deposition" of the Dalai Lama to be an *ultra vires* action. This was a situation when the patron had attacked the very object of his protection. In 1911, during the revolution in China, the Tibetans attacked the imperial troops, which by the following year surrendered and were repatriated to China. The Dalai Lama returned to Lhasa where he issued a **Proclamation of Independence of Tibet**¹² (1913). He notified the British, Indian, Russian and the new republican Chinese government that he had resumed the exercise of full sovereignty over independent Tibet. He signed a Treaty of Friendship and Alliance with Mongolia¹³ in 1913. Both countries declared themselves freed from Manchu domination.

⁹ Agreement Between Great Britain, China and Tibet Amending Trade Regulations of 1893 (1908).

¹⁰ See: German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No 7, 27- 29, 1926.

¹¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155. p. 331.

¹² Proclamation Issued by H. H. the Dalai Lama XIII. on the Eighth Day of the First Month of the Water-Ox Year (1913).

¹³ Treaty of Friendship and Alliance Between the Government of Mongolia and Tibet (1913).

The Status of Tibet between 1911- 1949/'50

The previously described severance of the Manchu-Tibetan relations should be examined a little closer, particularly because later Chinese claims are based on the notion that the Peoples Republic of China succeeded to the position of the Manchu Emperor.

The Manchu invasion constituted a serious material breach of the Chö-yön relationship. Material breach is defined in Art 60 of the Vienna Convention on the Law of Treaties as “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”. The same Article entitles the injured party “to invoke the breach as a ground for terminating the treaty” (Brownlie 1983: 233)¹⁴. The Dalai Lama denounced the Manchu intervention as early as September 1910, declaring all ties with Tibet’s former patron to be broken. He reaffirmed this position as Tibet’s spiritual and temporal leader in his Proclamation of Independence (see above).

The Chö-yön relationship was further a personal-religious one: The Emperors were *not* the patrons of the Dalai Lama because of their positions as Emperors of China. Therefore, the change of regime in China automatically resulted in the extinction of this relationship: When one party to a relationship cease to exist, the relationship itself no longer exists (Glahn 1976: 450). Moreover, since the outbreak of war between protector and protected state in a protectorate or similar arrangement extinguishes the relationship, it can be argued that the same happened in the case of Tibet, for the Manchus sent their troops to Tibet in 1910.

In October 1913 the plenipotentiaries of Great Britain, China and Tibet came together for a Conference in Simla, in order to end boundary disputes between the two latter countries.¹⁵ Although China did not sign the convention, and therefore the fight continued, the conference itself is of great significance considering the fact that all parties of the conference formally recognised one another as plenipotentiaries of their governments (Van Walt van Praag 1987: 54). The British delegate, McMahon intended to mediate between the two countries holding contrary statements. The Tibetans clarified the Chö-yön as a historic relationship with no element of subordination involved and held that Tibet is an independent state.¹⁶ On the other hand, the Chinese claimed that after protecting

¹⁴ Although the *Vienna Convention on the Law of Treaties* is was not yet applicable at his time, its substance shows the developing consent of the international community on the issue.

¹⁵ These happened after the Government of China acknowledged the Dalai Lama’s Declaration of Independence. However, the Chinese would not abandon efforts to induce him to form a union. They sent missions to Tibet, but none of these was successful. The patience of the Chinese started to run slow, and therefore soon after Tibet had to face threats of invasion (see Van Walt van Praag 1987: 51- 52).

¹⁶ For the text of the statement of the Tibetan claims, made 10. Oct. 1913, see *The Boundary Question between China and Tibet: A Valuable Record of the Tripartite Conference between China, Britain and Tibet, Held in India, 1913- 1914* (Peking, 1940), 1- 6.

Tibet from foreign invaders, they established sovereignty over Tibet in 1973.¹⁷ The documentary evidence of territorial claims was overwhelming on the Tibetan side; nevertheless, China had succeeded to some extent in consolidating their position over a considerable tract of land in Eastern Tibet, between Batang and Dartsedo. Therefore, as a compromise, McMahon suggested the division of Tibet in an "Outer Tibet" (enjoying full autonomy) and an "Inner Tibet" (where the Chinese could safeguard their historic position, without infringing Tibet's integrity). Both countries rejected the proposal. This way the major task laying ahead of the Tibetans remained to strengthen their independence, after Tibet's international personality was formally recognised at the beginning of the conference (Van Walt Van Praag 1987: 58-60). For this purpose, as Van Walt Van Praag (1987: 65) points out, "Tibet has embarked on a policy of independent and equal diplomatic relations with its two giant neighbours - a policy of power by which the Dalai Lama wished to demonstrate his independence as well as that of his country".

As for the British, after the Simla Conference they formally assured support for the Tibetans in obtaining munitions for their war at the Chinese border. They have failed in delivering the promised military supplies. This partly resulted in loss of faith in Britain as a protecting power. However, in 1918, with a better and stronger army than the one back in 1910, the Tibetans achieved Chinese surrender. A new British mission was sent to Lhasa, which was warmly welcomed, partly because of the special friendship between the Thirteenth Dalai Lama and Charles Bell, the leader of the mission. In 1921 they reached a new Anglo-Tibetan agreement, reviving mutual friendship and trust.

With China, there were two major obstacles to a good relationship. The first was the boundary dispute. The second was China's continued intention to subjugate Tibet. Although China had no authority and at this point no factual power, it nevertheless used the strategy of misrepresentation (Van Walt Van Praag 1987: 66) of facts in public (not only in the Chinese public, but i.e. also in its dealing with the British).

How large-scaled this strategy was, can be demonstrated with the words later said by T.V. Song, the Chinese Foreign Minister: "(A)ll Chinese who have had any schooling have learned in their study of geography that Tibet is a part of China; that it has never occurred to them that there is any question about this as a matter of simple fact; and that these are, politically speaking, the Chinese People"(cited by Hombeck 1943: 134). It should be also underlined that documents produced in this early times seem to serve as "evidence" for China's future claim (Van Walt Van Praag 1987: 66).

¹⁷For the text of the statement of the Chinese counterclaims, made 30 Oct. 1913, see *The Boundary Question between China and Tibet: A Valuable Record of the Tripartite Conference between China, Britain and Tibet, Held in India, 1913- 1914* (Peking, 1940) 1- 11.

A test of strength of Tibet's independence arose from the fact that between the death of the Thirteenth (1933) and the enthronement of the Fourteenth Dalai Lama (1940) there was a regency period, which constituted an era of political insecurity. However, the Regent, along with the Kashang (Council of Ministers) and the Tsongdu (National Assembly) remained resistant to the Chinese proposal of sovereignty in exchange for autonomy and maintained that Tibet was an independent country (International Commission of Jurists 1997: 42). Tibet also remained neutral during World War II and resisted the Allies' plan to build a military road through Tibet to transport supplies from India to China.¹⁸

During this time, Tibet also expanded his international relations. In 1942 a Foreign Office was created and new relations were created with a number of states. So did Tibet renew his deeply rooted historical relations with Mongolia by the means of the Tibet-Mongolia Treaty of 1913. The relationship with Nepal remained friendly and there was a permanent Nepalese ambassador in Lhasa (the Vakil). The United States showed little interest in Tibet prior World War II; their first reference to Tibet was in 1942, in a memorandum of the State Department, describing Tibet as a part of the "total area of Chinese territory". This statement led to a discussion with the British Foreign Office, but despite these considerations, "the United States did deal with Tibet directly and without reference to China". Great Britain maintained his position it had by the time of the Simla Conference at least until 1951. Tibet also continued friendly diplomatic relations with Sikkim, Bhutan and even Japan, forming a "Buddhist Alliance" (Van Walt Van Praag 1987: 82).

Tibetan diplomacy became even more active in 1945 by sending good-will missions to India and China to congratulate the allies victory. The Tibetans were extremely well received by the British in India, who also warned them that the Chinese might put pressure a Tibetan mission, once in Nanjing, to attend the National Assembly.¹⁹ It happened just the way they feared. In April 1945, a Tibetan mission arrived in Nanjing. The Tibetan Delegation was practically kept hostage while the Assembly's agenda indicated that the participants were called upon to declare that "all the people of the countries whose delegates are present in this assembly are subjects of the Chinese Kuomintang government."²⁰ As soon as the Kashag learned about this, it immediately ordered his delegates never to accept such a resolution. The Tibetans made a public demonstration of their refusal, including the refusal to sign the newly drafted Chinese constitution. This displeased the Chinese, but at the end the resolution was not passed (Van Walt Van Praag 1987: 84).

¹⁸ Note also that the British, participating in this plan, tried to put pressure on Lhasa only under the condition that Tibet's autonomy and internal affairs remain respected.

¹⁹ The Chinese went through great effort to have a Tibetan Mission as a delegation to the Chinese national Assembly. They thought that if they had some form of Tibetan representation in their Parliament, this would imply acceptance by Tibet that it formed a part of the Republic of China. (See Van Walt van Praag 1987: 82).

²⁰ British Embassy in China. File Number: L/P&S/12/4226, Dec. 9, 1946.

A few month before India's independence, Tibet attended the Asian Relations Conference, where all countries of Asia, including China, have come together on an equal basis, and where the Tibetan flag flew alongside those of the other states. "After the transfer of power in India, the Indian Government inherited Britain's treaty relations with Tibet and both governments agreed to continue bilateral relations on the basis of those treaty relations" (Office of Information and International Relations 1989: 33)

In 1948, the government in Lhasa sent trade missions to India, China, the United States, and the United Kingdom. The missions were successful. They involved negotiations on export control and customs duties in India, and the question of purchase of gold from the United States in order to back up the Tibetan currency. The United Kingdom received the mission warmly, as it would any other delegation from an independent country. However, following Chinese protests, the US carefully expressed that its receiving of the mission was not to be interpreted as diplomatic recognition (International Commission of Jurists 1997: 43). On the other hand, Paul Patrick, head of the Commonwealth Relations Office, explained Britain's policy as follows: "As with regard Tibet as capable of entering into Treaties, it is difficult to see why we should at the present juncture be chary of receiving a Tibetan Trade Mission in this country or of recognising Tibetan passports. Nor would we be in favour of admitting the claim of the Chinese Embassy that our official contact with the Mission should be through them."²¹

In February 1949 the Communist forces took over Beijing. Mao Zedong and Zhu De issued orders to the Peoples Liberation Army (PLA) "to wipe out" all Nationalist Kuomintang resistance, in order "to liberate the entire people, and defend the sovereignty and territorial integrity of the country". Thus, by the end of 1949, "all territories on the mainland except Tibet were liberated."²² To "achieve a genuine republic by the liberation of Mongolia, Tibet and Sinkiang" (Brandt *et al.*, 1952: 64), was one of the Chinese Communist Parties (CCP) principle aims proclaimed as early as 1922²³ and remained a central point in Mao's politics for the next thirty years.

Since the Tibetan people feared nothing more than religious persecution, they asked the Chinese official in Lhasa, a couple month after the Communist overtaking in Beijing, to leave the country along with his staff and sympathies. However, the Chinese threat just strengthened later in 1949, when communist forces marched into Amdo. The Chinese delivered a warning: "Tibet is Chinese territory and no foreign aggressor is allowed; the Tibetan people are an indivisible part of the Chinese people. Any aggressor who fails to recognise this

²¹ United Kingdom, Political (External) Files and Collections. File Number: L/P&S/12/4195B, CRO to FO, Nov. 16, 1948.

²² See: An Outline History of China (Beijing: Foreign Language Press, 1958: 434- 435).

²³ This aim was listed in the Manifesto of the party's second National Congress, in 1922.

point will crack his skull against the mailed fist of the PLA.”²⁴ The Tibetan government reacted immediately and decisively, emphasising the fact that Tibet was a religious and independent country and demanded assurance that no Chinese troops would cross the Tibetan frontier from the Sino-Tibetan border.²⁵ The Tibetans sent a copy of this protest-letter to a number of countries²⁶, making the statement that in case of Chinese aggression the Tibetan State will be obliged to defend himself and therefore requested every possible help from the addressed governments, also seeking to send missions to these countries. However, the three governments advised Tibet not to provoke the Chinese, by either declaring independence or by appealing to the United Nations. They stated that it was politically and logistically impossible for the UN to come to Tibet's assistance, but the Chinese, if unprovoked, might recognise Tibet's traditional autonomy. Therefore the planned missions did not occur (Warren 1996: 267).

In the meanwhile, the PLA had moved his troops into position in Qinghai, “Xikang” (Kham), Yunnan and Xinjian, and on 7 October 1950 attacked Eastern Tibet. In Van Walt Van Praag's (1987: 92) words: “The full- scale invasion of Tibet had begun.”

The Status of Tibet after 1949/ 1950

The subsequent review analyses the relevant facts and legal rules regarding Tibet's statehood after 1949/'50.

Military Intervention

Facts. In 1949/'50, the People's Liberation Army, involving troops of 80.000 soldiers, defeated the small, some 8.000 man strong Tibetan army and invaded Tibet.

Law. Several international instruments condemn the use of force for the purpose of territorial aggrandisement. Thus the so-called Kellog-Briand Peace Pact (1928) renounced war “as an instrument of national policy” and “for the solution of international controversies”.²⁷ The UN Charter outlaws *all* threat or use of force.²⁸

²⁴ United Kingdom, Political (External) Files and Collections. File Number: L/P&S/12/4232, FO to Singapore, Sept. 6, 1949, quoting the Beijing Radio Broadcast.

²⁵ United Kingdom, Political (External) Files and Collections. File Number: L/P&S/12/4232, Tibetan FO to Chairman Mao Zedong, Nov. 2, 1949.

²⁶ The copies of the letters were sent to Great Britain, the United States and India.

²⁷ The General Treaty for the Renunciation of War, 94 L.N.T.S. 57, 25 Aug 1928, Art 1.

(China became party to both instruments.) The prohibition has been strengthened, among others, in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States²⁹ and by the ICJ in the Corfu Channel case (1949).³⁰

Conclusions. Through the military invasion China violated these international legal instruments, and, in addition, many basic principles of customary international law, such as state sovereignty, independence and territorial integrity. In fact, the invasion of Tibet constituted an act of aggression within the meaning of Article 2(2) of the Conventions for the Definition of Aggression of 1933 and a crime against the peace within the meaning of Article 6(a) and 5 of the Charters of the International Military Tribunals at Nürnberg and Tokyo (Office of Information and International Relations, 1989: 36).

The Seventeen- Point Agreement between the PRC and Tibet

Facts. In February 1951, following the occupation, a fifteen man Tibetan delegation was sent to Beijing. This delegation was sent with great reluctance by the Dalai Lama, but at the time pursuing negotiations seemed to be the only viable course of action. The Dalai Lama, however, did not give the delegates plenipotentiary powers (Goldstein 1989: 759; Gyatso 1977:87). The draft agreement, which opened the negotiations, was entirely rejected by the Tibetans. Even a later, modified draft was just as unacceptable as the first one. Following that, however, the Chinese negotiators put a tremendous pressure on the Tibetans. They made it clear that the terms of the agreement as they now stood – incorporation of Tibet into China while only granting regional autonomy in return – “were final and in effect represented an ultimatum” (Van Walt Van Praag 1987: 147). The negotiators claim they were threatened personally and they were not allowed to contact the Tibetan government for instructions. On May 30th, the Seventeen Point Agreement for the Peaceful Liberation of Tibet³¹ was signed, sealed with Chinese fabricated seals and with no knowledge or approval of the Tibetan government.³²

²⁸ U.N. Charter, Art 2 para 4. The use of force is only justified in collective self- defence, individual self- defence when the U.N. Security Council has failed to take the necessary steps to maintain international peace and security, or upon the Council’s recommendation against an aggressor.

²⁹ Gen. Assembly Resolution 2625, 25 U.N. GAOR, 1970.

³⁰ 1949 I.C.J. 4, 35.

³¹ The Agreement of the Central People's Government and the Local Government of Tibet for the Peaceful Liberation of Tibet (1951).

³² For the text of the agreement see: Union Research Institute, Tibet: 1950- 1967 (1968), 19- 23. See also Annex 3.

The Tibetan Government declared the Agreement unacceptable, as soon as it learned of its existence. However, with over 40.000 Chinese troops still in control over more than half of the country, Tibet lost its freedom to reject. The same pressure was there, when in September 1951 – after the Dalai Lama decided to return to Lhasa from his first time leaving the capitol – the Tibetan Kashag (Cabinet) and Tsongdu (Assembly) accepted the Seventeen Point Agreement. On the first occasion he could express himself freely, the Dalai Lama declared that the Agreement was “never accepted by them of their own free will”.³³

Law. The principle of “free consent” in the international law of treaties is universally recognised. This principle is essentially what became Article 52 of the Vienna Convention of the Law of Treaties. It 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.”³⁴ This principle has also been strengthened by the case law of the I.C.J.³⁵ In fact, the PRC is not signatory to the Vienna Convention. However, it has “consistently held that all treaties imposed by the threat or use of force are invalid, even those concluded in the last century” (Office of Information and International Relations 1989: 38)³⁶. In cases where “a state’s representative was coerced into signing the agreement or the state itself was coerced by the threat or use of force into concluding it”, absolute nullity can be invoked (Office of Information and International Relations 1989: 39-40).

Conclusions. The situation in which the Tibetans were made to sign the Seventeen Point Agreement amounted to that kind of coercion, where absolute nullity can be invoked. Following facts are especially relevant in this regard:

- At least 40.000 Chinese troops have entered Tibet before negotiations have been opened in 1951. By the time the Tibetan negotiators left for Beijing, the greater parts of Amdo and Kham were under effective Chinese occupation (Van Walt Van Praag 1987: 154).
- Several times the Chinese authorities declared that they are ready to use force, if necessary, to take control of all Tibet.³⁷
- The terms of the Agreement have been unilaterally set by the Chinese five month prior the negotiations.³⁸ Terms providing that the Tibetan government has

³³ Statement issued by the Dalai Lama at his first press conference, held in Mussoorie on June 20, 1959.

³⁴ Regarding the principle that an “agreement” imposed on a weaker party by coercion lacks validity see I.L.C. Report on the Law of Treaties, Lauterpanct, Special Rapporteur, U.N. Doc. A/cn. 4/63, at 148. See also Nozari 1971: 64. In the Preamble to the Vienna Convention on the Law of Treaties the principles of free consent and of good faith are declared to be “universally recognised”. See further I.L.C. Report on the Law of Treaties, Fitzmaurice, Special Rapporteur, U.N. Doc. A/CN. 4/101, at 16.

³⁵ See e.g. the Fisheries Jurisdiction case, I.C.J. 3, 14, 1973.

³⁶ For a discussion on the PRC’s attitude see Chiu 1972: 62- 63.

³⁷ For example, Gen. Zhang Guohua: “Tibet Returns to the Bosom of the Motherland”, Renmin Ribao, Oct. 25, 1962.

³⁸ See New China News Agency, 1950: Doc 3.

to “actively assist” the Chinese army to enter and occupy Tibet, leave little doubt that there was coercion. In fact, the terms of the Agreement showed that what the settlement really presented, was an ultimatum (Van Walt Van Praag 1987: 145).

As we have seen from the foregoing neither the Tibetan negotiators nor later the Tibetan government itself was free to form its own will.

The Implementation of the Seventeen Point Agreement

Facts. Following the imposition of the Seventeen Point Agreement the PCR set up its governmental and administrative organs in Tibet and – for further integration of the Tibetan administration into the Chinese – the “Preparatory Committee for the Autonomous Region of Tibet”. The Dalai Lama became officially chairman of the Committee, but did not possess real power.

Law. Subsequent express acceptance of a coerced treaty by the government of the coerced state can heal the nullity. However, under no circumstances, can the mere, de facto enforcement of such a treaty change its *de iure* invalidity (Office of Information and International Relations 1989: 42).

Conclusion. The Tibetan government and people were at no time in a position of expressing their free will. Therefore, there was no express acceptance of the Seventeen Point Agreement. Instead, the Dalai Lama tried to find a compromise and avoid confrontation. The Tibetan people soon rebelled against the Chinese invasion³⁹, thus the rejection of the terms of the agreement by the Tibetan people was well known to the Chinese authorities.⁴⁰

Establishment of Chinese Authority

Facts. Following the uprising in 1959, after the Chinese forces regained control, Premier Zhou Enlai issued an Order of State Council stating that “the Tibet Local Government is dissolved”. The declared reason behind this act was “to safeguard the unification of the country and national unity, in addition to enjoying the Tibet Military Area Command of the Chinese People’s Liberation Army to put down the rebellion thoroughly”⁴¹. The Dalai Lama and his ministers, by that time on their way to the Indian border, therefore quickly inaugurated a provisional

³⁹ During the 1956 and 1959 revolts approximately 90.000 Tibetans were killed, as many fled the country and tens of thousands of Tibetans were imprisoned, see generally Abendon (1984).

⁴⁰ Several Chinese statements indicated Tibetan opposition. See e.g. Tse- Tung: 1965.

⁴¹ Order of the State Council of the People’s Republic of China, China News Agency (NCNA), Beijing, 28 March, 1959.

government. Thus today the Central Tibetan Administration, known as the Tibetan Government-in-Exile is not a new body established abroad, but a continuation of the legitimate and recognised Government of Tibet in Lhasa. This Government-in-Exile is a successful one, which administers effectively all affairs of the exile community. A small elected body, the Commission of People's Deputies, fulfils the function of a Parliament, while below the *Kashag* (Cabinet) the government is organised under several departments. In exile there is no separate Tibetan judicial system. The Government-in-Exile is financed by voluntary tax from Tibetan refugees, Tibetan business organisations, and small enterprises managed by the Finance Office. One can say, that in exile, the Tibetan Government effectively functions to the extent that is possible on foreign soil and without official political recognition (Office of Information and International Relations 1989: 44).

Law. Once the statehood of an entity is established, there is a strong presumption in favour of its continuing existence. Without the fact that the government powers have been beyond reasonable doubt transferred to another state, the state's formal independence cannot get lost. Similarly, "actual independence is not lost unless the effective government of the independent state has been totally extinguished and replaced by that of the controlling state."⁴²

War, in modern, post 1945, international law, is not any longer considered as a valid form of acquisition of territory.⁴³ It is regarded as supreme violation of international law. However, it has to be taken into consideration that even an illegal act can over time have legal effect. It is a difficult question of international public law how to resolve the conflict of the principles *ex injuria jus non oritur* and *ex factis jus oritur*. If there are clear objective standards, according to which the situation can be judged, the starting point should be that an illegal act has no legal consequences.⁴⁴ However, the situation can change when the illegal position persists. As we can read it in the legal opinion by Wilmer, Cutler and Pickering: "One can certainly accept the proposition that the lapse of time brings about the actual acceptance of the new situation by the government or population of a conquered state, the fact, illegal in its origin, may thus gradually be legalised." This is especially the case when the conquered government or people consider that the benefits of the new state outweighs the advantage of a restoration; or when over time virtually any challenge of the conqueror's claim has been eliminated.

The history of conquests and annexations shows that at least since World War II, the international community has rejected claims to territory on the basis

⁴² Office of Information and International Relations(1989: 45). See also Schwarzenberger 1957: 119-123; the UN Charter, Art 2, Para 7; The Lotus Case (1928) P.C.I.J., Series A, No. 10 at 18). See also Bishop 1962: 209.

⁴³ C.f. Brierly 1963: 147- 148.

⁴⁴ C.f. Bouchez, 1962: 151- 159.

of conquest. The annexation the Baltic states by the Soviet Union, for example, was widely unrecognised⁴⁵, and therefore they were the states which factually regained independence from the Soviet Union in the fastest way. Currently international law is extremely reluctant to consider conquest as a valid title of acquisition, especially where it can effectuate the extinction of a whole state. Therefore the *ex factis jus oritur* principle here is applicable in a very limited way.

As for Governments- in- Exile, as Sir Arnold McNair states, “there is no principle of international law which says that a Government cannot act validly upon foreign territory with the consent of the local sovereign” (McNair 1948: 357-358). Thus a government in exile can represent the continuity of a state, provided that the government had a prior constitution in its own country (Office of Information and International Relation 1989: 50).

Conclusions. Tibetans, neither their people nor their politicians have ever accepted Chinese rule. It is difficult to ascertain the exact amount of support the Dalai Lama enjoys today in Tibetan territories, but his delegations to Tibet enjoyed dramatic support in 1979, 1980 and 1985. Thus, although there is effective Chinese control in Tibet, this regime has to be supported by military presence and political oppression, due to widespread Tibetan opposition. The Chinese position in Tibet is far from “undisputed or peaceable”. In conclusion, the “Tibetan state has not been extinguished by the imposition of Chinese authority in Tibet, the continuation of the Tibetan state is affirmed by the continued existence and activity of the Tibetan Government- in- Exile” (Office of Information and International Relation 1989: 51).

Recognition

Facts. Throughout the whole Chinese invasion the Tibetan government sent messages to India, Nepal, the United States and the United Kingdom asking for support. However, India, the US and UK advised them to avoid provoking the Chinese. Later, after the first appeal of Tibet to the United Nations, with the supportive proposals of nations like El Salvador, New Zealand, Malaya, Thailand, Ireland and India, the United Nations passed resolutions on Tibet (see Annex), mainly showing concern about the human rights violations in Tibet⁴⁶. Generally we can say that international awareness of the situation in Tibet has grown in recent years, particularly since the Dalai Lama has awarded the Nobel

⁴⁵ See, for example, the Proclamation by the President of the United States of America, 15 June 1984: "The United States has never recognised the forceable incorporation of the Baltic states into the Soviet Union , and it will not do so in the future." (Proclamation by the President of the United States of America, No. 5302, 16 February 1985.)

⁴⁶ See Annex 4- 6. G.A. Res. 1353, 14 UN GAOR (1959); G.A Res. 1723, 16 UN GAOR (1961); G.A Res. 2079, 20 UN GAOR (1965).

Peace Prize in 1989. Numerous parliamentary bodies have passed resolutions condemning human rights violations in Tibet and calling for a peaceful resolution of the conflict. In 1991, the U.S Congress passed a bill that recognises Tibet as an “occupied country” whose “true representatives are the Dalai Lama and the Tibetan Government- in- Exile” and in 1998 a Resolution “Expressing the sense of the Congress concerning the December 1997 report of the International Commission of Jurists and on United States policy on Tibet”. On the other hand, there has been no political recognition of the Tibetan Government- in- Exile.

Law. As we have seen it at the beginning of this paper, regarding recognition as a condition for statehood there are the declaratory and the constitutive theories. A lot more speaks in favour of the declaratory theory, but nevertheless the circumstances of each case must be taken into account.

Conclusions. It seems that one of the arguments against the constitutive theory, namely no state should be able to create rights and obligations for another subject of international public law, should be especially strong in the case of Tibet. Taking the huge power of the PCR into account (economically, military-, and size- wise) it becomes obvious that that the decisions of other states regarding recognition is a very political one. This should not contravene current developments of international law, condemning aggression, war and similar actions. Therefore, in the case of Tibet, undoubtedly the declaratory theory of recognition should be preferred.

Conclusions to Part I.

Tibet has been an independent state throughout its history. There have been several dependency situations during the course of centuries, however, the source of governmental power always remained in Lhasa, and therefore these relationships did not affect the question of statehood. The occupation of Tibet by China has been an illegal one. China has based its claims on Tibet on historic facts, which cannot be obtained. There have been no other valid titles of acquisition of the Tibetan territory, either.

Some might argue that Tibet ceased to be a state for different reason, like effective incorporation of Tibet into China, lack of recognition of the Tibetan Government-in-Exile, etc. In this case, however, there still remains the question on the right of self-determination of the Tibetans as a people. This shall be examined later, in the third part.

Part 2: The Status of Tibet within the Legal System of the PRC

More than a decade after the invasion of Tibet, in 1965, China inaugurated the “Tibet Autonomous Region”. This comprised the area of central Tibet and parts of eastern Tibet. Other parts of Tibet were designated either as Tibetan autonomous prefectures or autonomous countries (International Campaign for Tibet 1994: 4).

In this second part of the paper I will examine whether these regions and thus the Tibetan people enjoy autonomy. I will examine what rights are granted to the Tibetan people by Chinese law and further, how and to what extent these rights are realised in practise. I will conclude that the autonomy granted by the PRC is so widely limited that speaking of an autonomous status is quite absurd. Further, even these limited rights are entirely undermined and jeopardised by the way the PRC *de facto* treats the Tibetans – as individuals, as a people and as a government.

Autonomy under international law

There is no legal or standard definition of autonomy in international public law. In legal history one can speak of autonomy where there is a state practising at least some of the external relations of another state entity which, however, remains in charge of its own internal affairs. To speak of a “fully autonomous” entity, at least most of the following conditions must be given:

- a locally elected legislative body with some independent authority over local concerns, including control or influence over primary and secondary education, language and land use and planning; the exercise of power by the locally elected legislative body is usually not subject to veto by the central government;
- a locally elected chief executive;
- an independent local judiciary with full responsibilities for interpreting local laws;
- joint authority over matters of common concern, such as police and exploitation of natural resources (Hannum 1996: 467-468).

Furthermore, “so long as members of indigenous communities desire to maintain their form of government, those structures should normally be immune from the intervention of an outside authority” (Hannum 1996: 467-468).

The Legal Framework of Autonomy in the PRC

The so-called Seventeen Point Agreement, as we already discussed in Part I, contained guidelines for the relationship between the Central Government and Tibet. It granted specific guarantees, *inter alia*, the right of the Tibetan people to exercise “national regional autonomy under the unified leadership of the Central People’s Government”. It was also agreed that the Central Authorities will not alter the established status, functions, and powers of the Dalai Lama” and will provide that the “freedom of religious belief” will be protected. Other than the question on the legality of the agreement itself, it is fact that implementation of these promises never followed.⁴⁷

The major pieces of legislation governing autonomy in the PRC include: the 1949 Common Program of the Chinese People’s Political Consultative Conference (temporary Constitution, the “Common Program”), its three amended versions between 1954 and 1978, and the 1958 General Program for the Implementation of Regional Autonomy of Nationalities (the “General Program”). The 1982 People’s Republic of China Constitution (the “1982 Constitution”) and the 1984 Law of the People’s Republic of China on Regional Autonomy (the “1984 Law on Regional Autonomy”), implementing the provisions of the 1984 Constitution regarding autonomy, have by now superseded the previous laws. These sources of law apply to all “autonomous areas” in the PRC.

It should be noted that various other sources of law also include provisions relevant to residences of the autonomous areas. Examples are the Election Law, the Marriage Law, the Mineral Resources Law, the Grass Land Law, and rules and regulations issued by the Central People’s Government (known as the “State Council”) and by various local government entities in the autonomous areas (International Campaign for Tibet 1994: 11).

The TAR Government

Regional autonomy is *exercised under the uniform direction of the central government*.⁴⁸ Self-governing bodies in the autonomous areas (the *People’s Congress* and the *People’s Government*) function as both as a provincial government within China’s governmental hierarchy, as well as the self-government of the autonomous region. This governmental structure is not a result of the active determination of the people of the TAR.

⁴⁷ For the text, see: Union Research Institute, 1968: 19- 23. See also Annex 3.

⁴⁸ 1984 Law on Regional Autonomy. See: International Campaign for Tibet (1994).

The old Tibetan government structures and the status of previous Tibetan officials have been all abolished following the 1959 uprising (International Campaign for Tibet).

Powers of the TAR Government

The following analysis of provisions in the 1984 Law on Regional Autonomy and some other sources should show how that the powers granted to self-governments of autonomous regions, thus also to the TAR Government, are both *de iure* and *de facto* undermined. At the end, all real authority remains in Beijing.

Power to Regulate the Economy

Article 6. The self-governing body shall have the power to adopt special policies and flexible measures in accordance with the local economic conditions, so long as they do not contravene the Constitution and other laws and regulations. In accordance with state planning, the self-governing body shall have the power to promulgate its own economic policies, and plans in light of the local economic conditions.

The key phrase, showing us that this power is extremely limited by the very wording of the article, is “state planning”. It shows that all the power granted to self-governing bodies to regulate the economy is meant to be just an internal part of the establishment of a Communist-type controlled economy. So were all the “socialist reforms” (especially harsh in the 1950s and 1960s) forcefully dictated and carried through by the Chinese.

In fact, Chinese “reforms” made a severe, destructive impact on Tibetan economy. They involved seizure of agricultural land, livestock and products; in some regions the general confiscation of private property; requisition of land and buildings for Chinese occupation and crushing taxes (International Commission of Jurists 1997: 44). The Chinese economic reforms, beginning in 1978, did reach the TAR quite late (1980), further, they came directly from Beijing and did not specify the Tibet's distinct problem sufficiently (International Campaign for Tibet 1994: 20).

In practise, the power of the TAR government regarding economical issues was also limited by the fact that it was funded mostly by the Central Government. This gave Beijing the control over how money was spent, so most of the subsidies served urban areas, benefiting Chinese settlers rather than Tibetans (International Campaign for Tibet 1994: 21).

Power to Formulate Policies

Article 19. Subject to approval by the National People's Congress, the People's Congress of an autonomous area has the power to formulate regulations with respect to regional autonomy and other regulations in accordance with its own political, economic and cultural characteristics.

As we see, the regulations, rendered by the People's Congress of an autonomous area, have to be submitted for approval by the National People's Congress. The same stands for amendments or non-implementations of decisions or instructions of state organs at a higher level on the ground that these laws and regulations "do not suit the conditions of an autonomous area".⁴⁹ In other words, these provisions confer Beijing the right of veto.

Power to Alter Policies

Article 20. Upon approval by the Central Government the self-governing body of an autonomous area may either alter or cease to implement any laws or regulations issued by the Central Government if these laws and regulations do not suit the conditions of an autonomous area.

In this field Beijing possesses the same kind of veto. The power that seems to be granted in Article 20, would be however, an important step towards meaningful autonomy in the TAR. Like the International Campaign for Tibet (1994: 18) concludes: "Even Beijing concedes that many of the problems in the TAR have been caused by Beijing not taking proper account of the different conditions in the TAR."⁵⁰

Power to Engage in Foreign Trade

Article 32. In accordance with the Central Government guidelines, the self-governing body of the autonomous areas may pursue foreign trade and may, with the approval of the State Council, open foreign trade ports.

In practice, foreign trade has been managed by the Central Government. As of 1988, Beijing still imposed many controls on the TAR's foreign trade.

⁴⁹ Art 20, 1984 Autonomy Law. See: The International Campaign for Tibet (1994).

⁵⁰ The statement was based on: Hu Yaobang (former Communist Party Secretary), Speech on the Party's Policy Toward Tibet (May 22, 1980).

Lately, there are signs of little change (International Campaign for Tibet 1994: 21-22).

Power to Regulate the Influx of Population

Article 43. In accordance with legal stipulations, the organs of self-government of national autonomous areas shall work out measures for control of the transient population.

Since Article 43 only talks about “transient population” regarding the TAR, it does not solve the very controversial problem of the influx of ethnic Chinese, regarding neither the official transfer nor the voluntary moves. “Transient population” only consists of people who do not possess residency cards, like Tibetans who appear in Lhasa during the month they are not farming, or Chinese doing business during summer hours. There is no evidence that the TAR government ever even exercised this limited right.

On the contrary, “Chinese official often make requests on behalf of the TAR government calling for the transfer of more Chinese personal from the rest of China”. Despite strong opposition by the Tibetan officials, the influx of Chinese into the TAR continues (International Campaign for Tibet 1994: 23-24).

At this point I would like to emphasise that the population policy of the PRC is root of one of the most serious damages and human rights violations done to Tibet. Official transfer does not only include the transfer of Chinese people into Tibetan areas, but also large number of children were transferred from Tibet to China (International Commission of Jurists 1960: 51). The Chinese population policy goes so far that it involves measures designed to prevent birth (International Commission of Jurists 1960: 49).

Power to utilise Natural Resources

Article 33, Mineral Resources Law. In exploiting mineral resources in national autonomous areas, the Central Government shall give due consideration to the interests of those areas and make arrangements favourable to the areas' economic construction and to the production and livelihood of the people of local minority nationalities. ... The organs of self- government of national autonomous areas shall, in accordance with legal provisions and the unified state plan, have priority for nationally developing and utilising the mineral resources that may be developed by local authorities.

While the law grants some control over natural resources for autonomous regions, this power is extremely limited. More than that, it is Beijing's policy to instruct to TAR government that natural resources should be extracted from the TAR for use in China. As Jiang Zemin, Communist Party Secretary articulated at the Fourteenth National Party Congress: "(i)nstead of attempting to built complete, self- sufficient economies of their own, the (Western) regions⁵¹should do everything in the interest of the nation as a whole" and that the Western regions "should built more infrastructural projects to facilitate the utilisation of their natural resources."⁵²

Article 7, Grassland Law. If grasslands in national autonomous areas are to be requisitioned or used for state construction, due consideration shall be given to the interests of the national autonomous areas and arrangements made in favour of the economic development of those areas.

This provision either gives the autonomous governments the power to stop the use of land nor the right for compensation; and does not provide a concrete measure for "due consideration" International Campaign for Tibet 1994: 27). In practise, the Chinese took great advantages by exploiting Tibet's natural resources. This is especially tragic, because given the country's "mountainous terrain and harsh climate" replanting and restoring "requires sustained care and attention" (International Campaign for Tibet 1994: 27). Tibet has become a deposit place for China's nuclear waste (International Campaign for Tibet 1993).

An outstanding example for the problem is provided by the building of the Yamdrok Tso hydro-power station. Using the Tibetan sacred lake to generate electricity, is not only environmentally, but also culturally destructive.⁵³

Part III: The Right of Self- Determination of the Tibetan People

"Why should an alien rule be forced upon (the Tibetan people)? Why shouldn't they have the choice of holding their own beliefs, traditions, culture, and identity?"

⁵¹ These "Western regions" include the TAR.

⁵² "Jiang Zamin's Report at Party Congress", China Daily (Document Supplement), Oct. 21, 1992.

⁵³ "Chinese Draw Their Power from Tibet's Sacred Lake", The Independent (London), July 20, 1993.

This is the question Tenzin Gyatso, the current Dalai Lama asked back in 1984, on the twenty-fifth anniversary of the Tibetan National Uprising Day, in Dharamsala.⁵⁴ What the religious and political leader of the Tibetan people proposes is a “Middle Way Approach” between declaring Tibet unconditionally as an independent state and the status quo. His Holiness, as he laid down in his Five Point Peace Plan for Tibet (Strasbourg, 1988), envisaged a “self-governing, democratic political entity” in the whole of Tibet “in association with the People’s Republic of China”.⁵⁵ He is, in fact, asking for self-determination:

“Whether Tibet was previously part of China or not, whether it was previously independent or not, if under present circumstances the Tibetan people want to be separate because they are ethnically, culturally and linguistically different, and are in danger of losing their identity and their culture, they have the right to exercise the right of self-determination. On that basis, the entire Tibet should be equal and share in the exercise of the right to self-determination. So the right of self-determination on that basis is the right of a people, the Tibetan people, regardless of the past and present status of Tibet. Now my position is seeking self-rule mainly in order to overcome the danger of extinction of Tibetan culture. So, therefore, when I talk about self-rule I am talking of the whole of Tibet, the six million Tibetan people.”

My conclusion in Part I, namely that Tibet has the claim to be recognised as a State, *argumentum a maiori ad minus* includes the right to determine their political destiny. Taking into account, however, that Tibet’s statehood is a very controversial international issue and taking specifically into account the proposal of the Dalai Lama, I will examine the question on the right of self-determination separately. It is, indeed, a question that can be resolved apart from the past and present legal status, even though the status will affect the discussion. I will lay out the legal basis, scope and content of the right of self-determination, in the theoretical as well as the practical context (drawing parallels with East Timor). Finally, I will be inquiring whether the Tibetan people should enjoy it. I will conclude that it should.

The legal basis, scope and content of the Right of Self-Determination

Self-determination is “the right of cohesive national groups (“peoples”) to choose for themselves a form of political organisation and their relation to other

⁵⁴ Dalai Lama, “The Dalai Lama Speaks Out His Mind,” Asian Wall Street Journal, 25 August 1977.

⁵⁵ “Address to Members of the European Parliament by His Holiness the Dalai Lama, 15 June 1988” Government Resolutions and International Documents on Tibet (Office of Information and International Relations 1989: 11).

groups” (Brownlie 1983: 595). Although this notion is by no means a new one, scholars have yet to agree upon the actual source of its origin and its exact scope.

It was President Wilson who elevated this principle to an international level, when he included it in his fourteen points, in 1916.⁵⁶ By the 1960s, the citation of the principle of self-determination had become common place. The right has been incorporated not just into the United Nations Charter, but also into a number of other international treaties and conventions.⁵⁷

Through practice of the organs of the UN this principle became law of the United Nations (Brownlie 1983: 596). In Resolution 637A(VII) of 16 December 1952 the General Assembly recommended, *inter alia*, that “the States Members of the United Nations shall uphold the principle of self- determination of all peoples and nations”.⁵⁸ If any doubts remained with regards to the right of self-determination as an enforceable and inalienable right, the Security Council and General Assembly resolutions on the explicit recognition of Palestinian rights, removed it.⁵⁹

Currently the right of self-determination is a legal principle which “has become, in the last generation, an integral part of ... international law” (Dinstein 1976: 106) and “the United Nations organs do not permit Article 2, paragraph 7, to impede discussion and decision when the principle is in issue” (Brownlie 1983: 593). As the ICJ stated in his East Timor (Portugal v. Australia) judgement, self-determination “is one of the essential principles of contemporary international law” (cited by: International Commission of Jurists 1997: 102).

⁵⁶ “President Woodrow Wilson, address before the League of Nations to Enforce Peace” (May 27, 1916)”, reprinted in 53 CONG. REC. 8854 (May 29, 1916).

⁵⁷ The key development of this rights was the appearance of references to “the principle of equal rights and self- determination of people” in Article 1, paragraph 2, and Article 55 of the United Nations Charter, although it is often referred to the declarations in the Atlantic Charter of 14 August 1941, as well. (Text: 35 AJ (1941), Suppl., p. 191. Adherence by the USSR and other states in a Decl. of 1 January 1942: 36 AJ (1942), Suppl., p. 191.) Other international treaties and conventions which incorporated the right of self-determination, are, for example: International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, para. 1, 999 U.N.T.S 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, para. 1, 993 U.N.T.S. 3, 5; Declaration on the Granting of Independence to Colonial countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No 16, at 66- 67, U.N. Doc. A/4684 (1960); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625, U.N GAOR, 25th Sess., Supp. No. 28, at 123, Doc. A/802 (1970) U.N.; Conference on Security and Cooperation in Europe (CSCE): Final Act, Aug. 1, 1975, Principle VIII, reprinted in 14 I.L.M. 1292, 1295 (1975).

⁵⁸ See also the Advisory Opinion of the International Court of Justice relating to the Western Sahara case: “the validity of the principle of self- determination” has been confirmed and thus the ICJ called for “the right of the population of Western Sahara to determine their future political status by their own freely expressed will”. (ICJ Reports (1975), 12 at 31- 3.) For non- self governing territories the ICJ has affirmed the right of self- determination in his earlier “Advisory Opinion on Legal Consequences for States and the Continued Presence of South Africa in Namibia (South West Africa) Not- withstanding Security Council Resolution 276 (1970)”. (ICJ Reports (1971), p. 31)

See G.A. Res. 3236 (XXIX), adopted 22 Nov 1974. See also “Resolutions and Decisions of the General Assembly and the Security Council Relating to the Question of Palestine,” G.A. Doc. A/ AC. 183/L.2 (1976) and G.A. Doc. A/AC. 183/L.2/Add. 1 (1980). See also, van Walt van Praag, 1987: 192.

Scope. Despite the recognition of the right of self-determination, there is still a great deal of disagreement regarding its scope and conditions among scholars. Some argue that the right of self-determination is strictly limited to people under colonial rule or foreign occupation. This is known as external self-determination. Yet according to others, the right is given not only to those under colonial rule or foreign occupation, but rather to all peoples, including minorities and indigenous people who live within the boundaries of a nation state. Whether this so-called internal self-determination encompasses the right to secede, or only a right to have a representative (democratic) government, is subject to discussion.⁶⁰

As a result of this international development, currently, one can say that self-determination applies to peoples under colonial domination and exploitation or under alien subjugation. One can apply the reasonableness test to the case of Tibet (see below) by subsuming the Tibetan case under *alien subjugation*.

From the foregoing it is evident that the right of self-determination is not an absolute one. Even if currently both the United Nations and States are more readily applying it to non-colonial situations, as after World War II, a “process of balancing these rights and their underlying values must take place” (van Walt van Praag 1987: 193). The principle should not be applied dogmatically, rather in the context of human rights, of conflicts with the principle of territorial integrity, of the degree of disidentification with the larger unit, of compatibility with basic community interest, etc. In other words what must be taken as the determining factor, is the reasonableness test.

This reasonable test, as suggested van Walt van Praag (1987: 193) consists of the following elements:

- 1) the nature and extent of the common characteristics and values of a people and of their disidentification with the dominant group;
- 2) the stability of expectations and extent of public support;

⁶⁰ As for the practical side, in the colonial context the United Nations supported the right of self-determination in the cases of Indonesia (in the conflict between the Netherlands forces in Indonesia, then Dutch East India); the Moroccan, Tunisian, and Algerian peoples (See G.A. Res. 612 (VII), adopted 19 Dec. 1952; G.A. Res. 611 (VII), adopted 17 Dec. 1952; G.A. Res. 1573 (XV), adopted 19 Dec. 1960; G.A. Res. 1724 (XVI), adopted 20 Dec. 1961.) ; further in Angola, Mozambique, Rhodesia, and Namibia. Outside the colonial context, Bangladesh is a good example of successful exercise the right of self-determination, recognised by States and the UN. The independence of the Mongolian People’s Republic was a result of a referendum expressing the countries desire for independence and therefore could be regarded as an implementation of self- determination which was recognised by the PRC⁶⁰, as well. (Official note from Zhou Enlai to A. Vyshinsky, Minister of Foreign Affairs of the U.S.S.R., 14. Feb. 1950, in “Exchange of Notes Concerning... the Recognition of the Independence of the Mongolian People’s Republic,” U.N.T.S. 226 (1956), pp. 16- 18.) In Eritrea, Tibet, and Portugese Timor, the United Nations explicitly recognised the right of self- determination, but failed in engendering its implementation. (See G.A. Res. 390 (V), adopted 2 Dec. 1950, regarding Eritrea; G.A. Res. 1723 (XVI), adopted 20 Dec. 1961, regarding Tibet; Security Council Resolutions 384 (XXX), adopted 2222 Dec. 1975, and 389 (XXXI), adopted 22 Apr. 1976, regarding Timor.)

- 3) the viability of the anticipated end and its compatibility with the dominant groups vital interests and those of the region and world community as a whole; and, above all,
- 4) its contribution to the furtherance of human rights and dignity.

The Right of Self- Determination of the Tibetan People

The reasonableness test can be applied to the Tibetan people as follows:

- 1) The nature and extent of the common characteristics and values of a people and of their disidentification with the dominant group:

Taking into account the independent history of the Tibetans, and their ethnic, religious, linguistic and cultural identity, territory, institutions, the position of the Dalai Lama, and the Tibetans' strong will to be identified as a people, there is no doubt that this first requirement is fulfilled (International Commission of Jurists 1997: 325-326). On the other hand, it is visible that the Chinese rule constitutes a serious threat to Tibetan identity. Through population transfer, "socialist transformation", religious persecution, destruction of Tibetan texts, etc. the traditional Tibetan culture became a seriously endangered one.

- 2) The stability of expectations and extent of public support:

This stability can also be safely assumed from the history of Tibet. Tibetans have governed themselves through the course of their own history and have always shown strong aversion to foreign intervention. They would use their right of self-determination rather for regaining what they have lost than for creating a new, unforeseen situation (van Walt van Praag 1987: 195).

- 3) The viability of the anticipated end and its compatibility with the dominant groups vital interests and those of the region and world community as a whole:

There are few problems regarding the countries geographic and economic viability. The way Tibet existed prior the 1950 invasion, goes towards proving viability. Tibet's striking natural borders, huge mineral resources, traditional agriculture, in the future probably even tourism would contribute to a viable Tibetan economy in the 21st century (Karan 1976: 50). From a political point of view the functioning of the Tibetan Government-in-Exile, supports the assumption of viability.

China's interests in Tibet are more of military than overall economical nature, which is clear from "the geography of the region and the heavy Chinese military concentration" (Sawhny 1960: 486-494). Tibet does contribute to China's military security, therefore economic activity in Tibet is often directed towards the maintenance of the PLA forces in the region. However, neither of the two interests is so strong that they could influence China's continued existence. Arrangements between independent Tibet and the PRC could satisfy these interests. The existence of an independent Tibet could well contribute to the regions stability – especially with the creation of a Tibet as a "Zone of Peace", as the Dalai Lama suggested it – and could serve the interests of neighbouring counties, such as India and Nepal (see Rahul 1940: 523-541).

4) Contribution to the furtherance of human rights and dignity:

Since the Chinese occupation more than a million Tibetans, roughly one-fifth of the total population died under Chinese rule from execution, torture, and starvation, and similar causes. The Chinese virtually banned the study and practice of Buddhism. Prior to the Chinese invasion, there were over 6.000 monasteries and nunneries throughout the country; by 1979 all but 13 of them had been looted and destroyed. Prisons and forced labour camps did become a dominant aspect of life for Tibetans under Chinese occupation. Any criticism or resistance to Chinese authority has been grounds for arrest. The exact number of political prisoners jailed in Tibet is unknown, but it has been estimated that at least 70% did in captivity. Torture is a routine aspect of interrogation and confinement of political prisoners in Tibetan prisons. Natural resources of Tibet have been exploited. One of the most serious threats now facing Tibetans in their struggle to preserve their country and cultural identity is the systematic, organised effort to generate a massive population influx of Chinese into Tibet. This calculated policy is the Chinese Communist Party's "final solution" to their problematic occupation.

These facts only constitute examples of human rights violations committed by the CPR against the Tibetan people. There is no room within the framework of this paper to show all of it. It is clear though, that what the Chinese committed in Tibet constitutes acts of genocide (International Commission of Jurists 1960: 3) and that there is no article of the Universal Declaration of Human Rights that has not been violated by Chinese authorities (International Commission of Jurists 1960: 59). To end this regime would not only "contribute to the furtherance of human rights and dignity", but would eliminate one of the most shameful and inhuman oppressions of the 20th century.⁶¹

⁶¹ The Chinese regime in Tibet was described by A. Solzhenitsyn as "more brutal and inhuman than any other communist regime in the world" (Address delivered in Tokyo, 9 Oct. 1982, see: Minority Rights Group 1983: 22).

Conclusion. Therefore one can conclude that the Tibetan people unquestionably have the right to self-determination. To underline this conclusion and to show briefly some aspects of a practical possibility of an exercise of this right, I would like to draw some parallels with the resent case of East Timor.

A case for comparison: East Timor

Numerous similarities between the case of East Timor and Tibet might suggest a comparison and lead to the question whether the “popular consultation” in East Timor might be a pattern which could be followed in Tibet, as well.

Background

In 1975, Indonesia invaded East Timor, a former Portuguese colony, and proclaimed it as the 27th province of the Republic. A full-scale incorporation of East Timor into the Indonesian administration followed.

For example, the office of the Provincial Governor has been set up, along with institutions, such as Golongan Karya (Golkar), the quasi- governmental party in Indonesia which all military personnel and civil servants are obliged to join, as well as the pro-Muslim Partai Persatuan Pembangunan and the more secularly oriented Partai Demokrasi Indonesia (PDI). While these organisations nominally serve as political parties, obviously in East Timor they serve as further agents of recruitment for the integration of the former Portuguese colony.

Subsequently, Indonesia exercised a policy of information control, economic integration, population control and demographic engineering. Military oppression, massacres and most severe human rights violations became a part of every-day life in East Timor.

Central to the Indonesian policy of *integrasi* has been education. Education was based on a Jakarta-centric world view. Portuguese was eliminated as language of media, school, and publication. As for the economy, it was a central theme of the Indonesian propaganda that East Timor received since 1976 by far the largest central governmental allocations – a fact which is true if one includes the budget for the army of occupation! Traditional sectors of East Timorese economy, like handicrafts, have been destroyed, and as a corollary of the Indonesian policy, the country suffered severe famines and unemployment. Despite crucial food shortages the presence of international aid organisations has

been restricted. Under state sponsored scheme “transmigrants” are brought into Timor from Java and Bali and resettled in designated zones.

The Indonesian occupation claimed the lives of over 200.000 Timorese people, which is one third of the original population. Alone on November 12, 1991, in Dili, at the Santa Cruz Cemetery, Indonesian troops gunned down more than 270 Timorese civilians.

East Timor and Tibet

From the foregoing we have seen that there are outstanding similarities between these two cases raising issues of self- determination and human rights. The major difference lies in their status at the UN. While the Tibetan cause has a disadvantage is this regard the status at the UN was the strength for those campaigning in support of East Timor.

The United Nations General Assembly placed East Timor on its agenda in 1960, when it added the territory to its list of Non-Self-Governing Territories. It never recognised the Indonesian integration, and called for Indonesia’s withdrawal. Beginning with 1982, at the request of the General Assembly, regular talks had been held with Indonesia and Portugal to solve the status of the territory by subsequent Secretaries-General.

Further, as a result of these talks Indonesia did propose a limited autonomy for Indonesia, in June 1998. In light of this, the talks made rapid progress and resulted in agreements between Indonesia and Portugal, signed in New York on 5 May 1999.

Within the framework of the New York Agreements the two governments entrusted the Secretary-General of the UN with conducting a “popular consultation” to ascertain whether the people of East Timor accepted or rejected a special autonomy for their country. In order to carry out this consultation the Security Council created the United Nations Mission in East Timor (UNAMET), a body also responsible for overseeing the transition period following the vote. On August 30, 1999, an overwhelming majority of the east Timorese population went to the polls to vote. Ca. 78.5% rejected autonomy and voted for independence. Pro-integration militias reacted immediately with violence, to which the Indonesian government did not responded effectively. Following diplomatic efforts of the Secretary-General and the Security Council, the government of Indonesia finally accepted assistance. In September the security Council authorised the multinational force (INTERFET) to restore peace in East Timor. With agreement of Portugal, Indonesia and the mandate in Resolution 1272 (1999) on February 28, 2000 the command of military operations was handed over from INTERFET to the United Nations Transitional Administration in East Timor (UNTAET). Thus an integrated, multinational peacekeeping

operation is fully responsible for the administration of East Timor during its transition to independence (see Gunn 1997).

On the contrary, until present day there was no success in arranging negotiations between the Dalai Lama and Beijing.

The Dalai Lama himself expressed the opinion that although “there are similarities between East Timor and Tibet [...] there are bigger differences”. As Buddhist leader, His Holiness wants non-violence. He bemoaned the “human suffering and violence” in East Timor since the referendum. He said that the fact that East Timor has had the opportunity to express its feelings, “is good”. What he wants for Tibet, as he repeatedly said it on this occasion, “is autonomy, not independence, and non-violence”.⁶²

Whether this approach of His Holiness reflects the will of the whole Tibetan people, or not, could be only said after a referendum – such as in East Timor – was held in Tibet. One can only guess (taking into account the current atmosphere in Tibetan exile organisations, like the for example Tibetan Youth Congress) that it might not be likely that Tibetans would vote for autonomy. The Tibetan struggle remained non-violent for half a century, without any success. The Chinese side has already promised to grant Tibet autonomy. It is unlikely that in the future, the Government of the PRC could be persuaded to comply this promise or any renewed promises.

However, any offer from the Chinese side would open possibilities, as did the proposal of the Habibi-administration in East-Timor.

Towards a Solution

Holding a referendum, as it happened in East Timor, is the classical means to grant a people the exercise of the right of self- determination⁶³. In this case the United Nations should ensure conditions guaranteeing a free decision. This should include a fair voter registration system⁶⁴; probably an international peace-keeping mission during and after the vote⁶⁵; or similar safeguard actions. A lesson which can be learned from the East Timorese case is, that peace-keeping after the referendum will be crucial and preventing further massacres might not be an easy task.

⁶² "Dalai Lama Says Tibet Shouldn't go East Timor's Way", online, reformasitotal, Internet, 10 Oct 1999.

⁶³ Such referendum happened for example in the case of Eritrea, See: The United Nations and the Independence of Eritrea, Department of Public Information, UN, New York, 1996: 4.

⁶⁴ See as an example for relevant problems the Western-Sahara case. (ICJ Reports 1975, para 55.)

⁶⁵ See as historic examples the UN Mission for the Referendum in Western Sahara (MINURSO)

There are different possible results of a referendum for Tibet one can think of. It can be integration with an independent State, free association with an independent State or actual re-emergence of Tibet as an independent State (van Walt van Praag 1987: 198). Crucial is, however, only to end the *status quo*, taking especially into account that the present unstable and unbearable situation is likely to lead to a serious international conflict.

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Appendices

Annex 1: Historic Tibet and the Tibetan Autonomous Region Today



Annex 2: Tibet Today Within the People's Republic of China



Annex 3: Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet

("Seventeen- Point Agreement")

23 May 1951

The Tibetan nationality is one of the nationalities with a long history within the boundaries of China and, like many other nationalities, it as performed its glorious duty in the course of the creation and development of our great Motherland. But over the last one hundred years or more, imperialist forces penetrated into China, and in consequence also penetrated into the Tibetan region and carried out all kinds of deceptions and provocations. Like previous reactionary governments, the Kuomintang reactionary government continued to carry out a policy of oppression and sowing dissension among the nationalities, causing division and disunity among the Tibetan people. And the local government of Tibet did not oppose the imperialist deceptions and provocations, and adopted an unpatriotic attitude toward our great Motherland. Under such conditions, the Tibetan nationality and people were plunged into the depth of enslavement and suffering.

In 1949, basic victory was achieved on a nation- wide scale. In the Chinese People's War of Liberation, the common domestic enemy of all nationalities- the Kuomintang reactionary government- was overthrown, and the common foreign enemy of all the nationalities- the aggressive imperialist forces- was driven out. On this basis, the founding of the People's Republic of China and of the Central People's Government was announced. In accordance with the Common Program passed by the Chinese People's Political Consultative Conference, the Central Peoples Government declared that all nationalities within the boundaries of the Peoples Republic of China equal, and that they shall establish unity and mutual aid and oppose imperialism and their own public enemies, so that the People's Republic of China will become a big fraternal and co- operative family. Composed of all its nationalities, that within the big families of nationalities of the Peoples republic of China, national regional autonomy shall be exercised in areas where national minorities are concentrated and all national minorities shall have freedom to develop their own spoken and written languages and to preserve or reform their customs, habits, and religious believes, while the Central Peoples Government shall assists all national minorities to develop their political, economic, cultural, and educational construction work. Since then, all nationalities within the country, with the exception of those within the areas of Tibet and Taiwan, have gained liberation. Under the unified leadership of Central Peoples Government and the direct leadership of higher levels of People's Government, all national minorities are fully enjoying the right of

national equality and have established, or are establishing, national regional autonomy.

In order that the influences of aggressive imperialist forces in Tibet might be successfully eliminated, the unification of the territory and sovereignty of the Peoples Republic of China accomplished, and national defence safeguarded; in order that the Tibetan nationality and people might be freed and returned to the big family of the Peoples Republic of China to enjoy the same rights of national equality as all other nationalities in the country and develop their political, economic, cultural, and educational work, the Central Peoples Government, when it order the Peoples Liberation Army to march into Tibet, notified the local government of Tibet to send delegates to the Central Authorities to conduct talks for the conclusion of an agreement on measures for the peaceful liberation of Tibet.

In the latter part of April 1951, the delegates with full powers of the local government of Tibet arrived in Peking. The Central People's Government appointed representatives with full powers to conduct talks on a friendly basis with the delegates with full powers of the local government of Tibet. As a result of these talks, both parties agreed to conclude this agreement and guarantee that it will be carried into effect.

1. The Tibetan people shall unite and drive out imperialist aggressive forces from Tibet: the Tibet people shall return to the big family of the Motherland- the People's Republic of China.
2. The local government of Tibet shall actively assist the People's Liberation Army to enter Tibet and consolidate the national defence.
3. In accordance with the policy toward nationalities laid down in the Common Program of the Chinese People's Political Consultative Conference, the Tibetan people have the right of exercising national regional autonomy under the leadership of the Central People's Government.
4. The Central Authorities will not alter the existing political system in Tibet. The Central Authorities also will not alter the established status, functions and powers of the Dalai Lama. Officials of various ranks will hold office as usual.
5. The established status, functions, and powers of the Dalai Lama and of the Panchen Ngoerhtehni shall be maintained.

6. By the established status, functions, and powers of the Dalai Lama and of the Panchen Ngoerhthehni are meant the status, functions and powers of the Thirteenth Dalai Lama and of the Ninth Panchen Ngoerhthehni when they were in friendly and amicable relations with each other.
7. The policy of freedom of religious belief laid down in the Common Program of the Chinese People's Political Consultative Conference shall be carried out. The religious beliefs, customs, and habits of the Tibetan peoples shall be respected and Lama monasteries shall be protected. The central authorities will not affect the change in the income of the monasteries.
8. Tibetan troops shall be reorganised by stages into the People's Liberation Army, and become a part of the national defence forces of the People's Republic of China.
9. The spoken and written language and school education of the Tibetan nationality shall be developed step by step in accordance with the actual conditions in Tibet.
10. Tibetan agriculture, livestock raising, industry, and commerce shall be developed step by step, and the peoples livelihood shall be improved step by step in accordance with the actual conditions in Tibet.
11. In matters related to various reforms in Tibet, there will be no compulsion on the part of the central authorities. The local government of Tibet should carry out reforms of its own accord, and when the people raise demands for reform, they shall be settled by means of consultation with the leading personnel of Tibet.
12. In so far as former pro- imperialist and pro- KMT officials resolutely severed relations with imperialism and KMT and do not engage in sabotage or resistance, they may continue to hold office irrespective of their past.
13. The People's Liberation Army entering Tibet shall abide by all the above mentioned policies and shall also be fair in buying and selling and shall not arbitrarily take a single needle or tread from the people.
14. The Central People's Government shall conduct the centralised handling of all external affairs of the area of Tibet; and there will be peaceful co-existence with neighbouring countries and establishment and development of fair commercial and trading relations with them on the

basis of equality, mutual benefit, and mutual respect for territory and sovereignty.

15. In order to ensure the implementation of this agreement, the Central People's Government shall set up a military and administrative committee and the military area headquarters in Tibet, and apart from the personal sent thereby the Central People's Government, shall absorb as many local Tibetan personal as possible to take part in the work. Local Tibetan personal taking part in the military and administrative committee may include patriotic elements from the local government of Tibet, various districts, and leading monasteries; the name list shall be drawn up after consultation between the representatives designated by the Central People's Government and the various quarters concerned, and shall be submitted to the Central People's Government for appointment.
16. Funds needed by the military and administrative committee, the military area headquarters, and the People's Liberation Army entering Tibet shall be provided by the Central People's Government. The local government of Tibet will assist the People's Liberation Army in the purchase and transport of food, fodder, and other daily necessities.
17. This agreement shall come into force immediately after signature and seals are affixed to it.

Annex 4: United Nations General Assembly Resolution 1353 (XIV)

21 October 1959

The General Assembly,

Recalling the principles regarding fundamental human rights and freedoms set out in the Charter of the United Nations and in the Universal Declaration of Human Rights adopted by the General Assembly on 10 December 1948,

Considering that the fundamental human rights and freedoms to which the Tibetan people, like all others, are entitled include the right to civil and religious liberty for all without distinction,

Mindful also of the distinctive cultural and religious heritage of the people of Tibet and of the autonomy which they have traditionally enjoyed,

Gravely concerned at reports, including the official statements of His Holiness the Dalai Lama, to the effect that the fundamental human rights and freedoms of the people of Tibet have been forcibly denied them,

Deploring the effect of these events in increasing international tension and embittering the relations between peoples at a time when earnest and positive efforts are being made by responsible leaders to reduce tension and improve international relations,

- 1) *Affirms its belief* that respect for the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order based on the rule of law;
- 2) *Calls* for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life.

Annex 5: United Nations General Assembly Resolution 1723 (XVI)

20 October 1961

The General Assembly,

Recalling its resolution 1353 (XIV) of 21 October 1959 on the question of Tibet,

Gravely concerned at the continuation of events in Tibet, including the violation of the fundamental human rights of the Tibetan people and the suppression of the distinctive cultural and religious life which they have traditionally enjoyed,

Noting with deep anxiety the severe hardships which these events have inflicted on the Tibetan people, as evidenced by the large- scale exodus of Tibetan refugees to the neighbouring countries,

Considering that these events violate fundamental human rights and freedoms set out in the Charter of the United Nations and the Universal Declaration of Human Rights, including the principle of self- determination of peoples and nations, and have the deplorable effect of increasing international tension and embittering relations between peoples,

- 1) *Reaffirms its conviction* that respect for the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order based on the rule of law;
- 2) *Solemnly renews* its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self- determination;
- 3) *Expresses the hope* that Member States will make all possible efforts, as appropriate, towards achieving the purposes of the present resolution.

Annex 6: United Nations General Assembly Resolution 2079 (XX)

18 December 1965

The General Assembly

Bearing in mind the principles relating to human rights and fundamental freedoms set forth in the Charter of the United Nations and proclaimed in the Universal Declaration of Human Rights,

Reaffirming its resolutions 1353 (XIV) of 21 October 1959 and 1723 (XVI) of 20 December 1961 on the question of Tibet,

Gravely concerned at the continued violation of the fundamental rights and freedoms of the people of Tibet and the continued suppression of their distinctive cultural and religious life, as evidenced by the exodus of refugees to the neighbouring countries,

- 1) Deplores the continued violation of the fundamental rights and freedoms of the peoples of Tibet;
- 2) Reaffirms that respect for the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order based on the rule of law;
- 3) Declares its conviction that the violation of human rights and fundamental freedoms in Tibet and suppression of the distinctive cultural and religious life of its people increase international tension and embitter relations between peoples;
- 4) Solemnly renews its call for the cessation of all practices which deprive the Tibetan people of the human rights and fundamental freedoms which they have always enjoyed;
- 5) Appeals to all States to use their best endeavors to achieve the purposes of the present resolution.