

THE CASE CONCERNING TIBET

TIBET'S SOVEREIGNTY AND THE TIBETAN PEOPLE'S RIGHT TO SELF-DETERMINATION

by

International Committee of Lawyers for Tibet
(Andrew G. Dulaney and Dennis M. Cusack)

and

Unrepresented Nations and Peoples Organization
(Dr. Michael van Walt van Praag)

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**Friedrich-Naumann-Stiftung
and
The Tibetan Parliamentary and Policy Research Centre**

The Friedrich-Naumann-Stiftung (FNSt) established in 1958 is a non-profit organization for public benefit. It promotes the liberal principle of Freedom in Human Dignity in all sectors of society, both nationally as well as internationally, in developed as well as developing countries.

The Foundation is active in more than 75 countries. In the South Asian Region comprising the SAARC countries the Foundation's work encompasses projects concerned with support for economic liberalisation; fostering regional economic cooperation in South Asia; promotion of civic and human rights and the rule of law; and environmental protection. All these activities are carried out in co-operation with local, national and international NGOs, the emphasis being on self-reliance and the setting up of democratic institutions.

Friedrich-Naumann-Stiftung in partnership with the **Assembly of Tibetan People's Deputies** has set up the **Tibetan Parliamentary and Policy Research Centre (TPPRC)** with the purpose of strengthening the Tibetan diaspora in building up a healthy democratic working ethos. The objective is to prepare the Tibetans in exile for the assumption of responsibilities that would respond to their hopes and aspirations through a framework of legislative, executive and judicial institutions based on the concept of the Tibetan polity guided by *Saddharma* and with a view to generating human values and considerations based on man's free will, equality, justice and non-violence. There is also the standing need to constantly remind the Tibetan diaspora of their national identity, culture and heritage and the global community of Tibet's unique contribution to the world of thought and culture.

Established in 1994, the Centre has already reached a very representative section of Tibetans residing in India and Nepal, encouraging them to get actively involved in their new democratic institutions and helping their leadership to formulate a vision for the future. Moreover, the Centre has a sound back-up programme of publications to disseminate information to build up national and international public opinion for the fulfilment of a just cause.

PREFACE

The Tibetan Parliamentary and Policy Research Centre (TPPRC) is pleased to present a report on Tibet's sovereignty and the Tibetan People's right to self-determination. This report forms part of the action plan chalked out during discussions on the modalities and strategies of the workshops organised by TPPRC in 1994/96, on the issue of Self-Determination of Tibetans. During the workshop in New Delhi, in 1996, the participants decided that a concise legal brief be documented and presented. The brief would discuss the status of Tibet and the concept of self-determination, flowing from the discussions on the status of Tibet.

The present comprehensive report discusses at length two very important but related issues. On one hand it argues convincingly that Tibet was fully independent prior to 1951. The report draws on international legal definition of statehood to prove Tibet's pre-1951 independent status; disproves the seventeen-point agreement of 1951; and systematically states how Tibet historically never became a part of China. A very important aspect of this argument is the detailed discussion that the State of Tibet exists as an independent legal entity with a legitimate functioning Tibetan government-in-exile. On the other hand, it argues that the Tibetans are people entitled to the right to self-determination. The report provides a detailed and thorough account of how the People's Republic of China has so far not respected the human rights and fundamental freedoms of the Tibetan people.

Furthermore, by using international law, this report determines the illegality of Chinese actions and the legitimacy of the Tibetan people's right to self-determination. It specifically uses UN resolutions and declarations to prove point for point that the People's Republic of China's actions concerning Tibet—right from the invasion of Tibet to the present gross human rights violations against Tibetans, is illegal.

Excellent and well documented, this report has a wealth of information, particularly in the footnotes. Of particular relevance are the references to historical documents from multiple sources, including Chinese official policies.

Although much has been written about the issue of the Tibetan people's right to self-determination, this report is indeed relevant and pertinent. The approach of the report is also consistent with the concerns raised by the International Commission of Jurists (ICJ) in their third report on Tibet, "Tibet: Human Rights and the Rule of Law" and certainly complements the detail findings of the ICJ.

The report emphatically concludes that, "The threat to the Tibetan people if the international community takes no action is real, immediate and overwhelming; the threat to the fundamental values underpinning international human rights and international law is no less so." TPPRC fervently hopes this report will once again underscore the attention of the United Nations, governments around the globe and the international community to the right of the Tibetan people to self-determination and an end to the abusive human rights practices and policies in Tibet that threaten the very survival of the Tibetan people.

This report has been written for the TPPRC, jointly by Mr. Andrew G. Dulaney and Mr. Dennis M. Cusack of the International Committee of Lawyers for Tibet (ICLT) and Dr. Michael van Walt van Praag of the Unrepresented Nations and People's Organization (UNPO). We owe our gratitude to the authors and the organizations they represent, for taking on the onerous task of compiling this meticulous and exhaustive legal brief. The International Committee of Lawyers for Tibet, created in 1989, is an international, non-profit membership organization, based in San Francisco, USA. ICLT, devoted to legal advocacy for Tibet, is supported mainly by attorneys. The Unrepresented Nations and Peoples Organization, based in The Hague, The Netherlands, is a non-aligned organization of nations and peoples not adequately represented in the international community.

Founded in 1991, UNPO works to promote the aspirations of these nations and peoples and is dedicated to non-violent programmes and solutions.

The Centre places on record our gratitude to the Assembly of Tibetan People's Deputies (the Tibetan Parliament in-exile) and the Friedrich Naumann Stiftung for their overall guidance, support and consistent encouragement.

New Delhi

Tsering Tsomo (Ms.)
Executive Director

I. SUMMARY OF ARGUMENT

A. Tibet was Fully Independent Prior to 1951

Tibet was an independent, sovereign nation when the armies of the People's Republic of China ("PRC") entered Tibet in 1950. Tibet at that time presented all the attributes of statehood. Even the PRC does not dispute that the Tibetans are a distinct people who in 1950 occupied a distinct territory. Tibet also had a fully functioning government headed by the Dalai Lama. That government, free from outside interference, administered the welfare of the Tibetan people through civil service, judicial and taxation systems, as well as through a postal and telegraph service, and a separate currency. The government controlled the borders and issued passports to its people, which were recognized internationally. It entered into treaties as a sovereign with other states, including Great Britain, Ladakh, Nepal and Mongolia. Tibet also negotiated as an equal sovereign with China and Great Britain at the Simla Conference of 1913-14.

The Seventeen Point Agreement of 1951, which the PRC claims resolved Tibet's status, is not a legally binding agreement. The Agreement was signed when armies of the PRC occupied large parts of Tibet, the Tibetan representatives did not have authority to sign the Agreement on behalf of Tibet, and it was signed under threat of further military action in Tibet. A treaty concluded under such circumstances is legally void and of no effect.

Once a state exists, it is legally presumed to continue as an independent state unless proved otherwise. The historical evidence not only fails to prove otherwise, but affirmatively demonstrates that Tibet has always been an independent state, despite periods during which it was influenced to varying degrees by foreign powers.

Tibet indisputably was an independent state before the 13th century. Tibet was the most powerful nation in Asia in the 8th century and entered a treaty with China in 822. For the next 300 years, there was no official contact between Tibet and China. In the 13th century, Tibet came under Mongol dominance several decades before the Mongols conquered China militarily and established

the Yuan Dynasty. Tibet was not part of China before the Mongol conquest and during the Yuan Dynasty was administered separately by the Mongols through local Tibetan rulers, in contrast to China, which the Mongols ruled directly. The present government of China, therefore, cannot claim sovereignty over Tibet as a result of their separate dominance by a third power. Nor did Tibet lose its sovereignty during this period. The relationship between Tibet and the Mongols was a unique priest-patron relationship known as *cho-yon*. Tibet received protection from the Buddhist Mongol emperors in return for spiritual guidance from the ruling lamas of Tibet. The relationship involves a reciprocal legitimation of authority.

During Tibet's "Second Kingdom," from 1349 to 1642, Tibet was a secular kingdom free of both Mongol and Chinese control. Emperors of the Chinese Ming Dynasty nominally granted titles to certain Tibetan officials but exercised no effective control over Tibetan affairs or over the successive changes in the Tibetan government. Nor did the Ming Emperors exercise any effective control over the Dalai Lamas, who later took control of Tibet.

During the Qing Dynasty, the Dalai Lamas and the Manchu Emperors re-established the *cho-yon* relationship. During the 18th century, the Emperor's protection was invoked four times under this relationship. The Emperors' representatives in Lhasa, the *Ambans*, initially served only as liaisons to the Emperor. In 1793, the Emperor purported to grant the Ambans power to exercise control over Tibet's external affairs, but this was presented to the Eighth Dalai Lama as a suggestion, not an exercise of Imperial power. Moreover, within a few decades, the Ambans exerted virtually no influence in Tibet and the Qing Emperors stopped providing the protection that was their side of the *cho-yon* relationship, effectively ending it.

Tibet formally expelled the last garrisoned troops of the Qing Emperor in 1911, an unmistakable act of sovereignty, and repatriated them to China in 1912. The Kuomintang Government invited Tibet to join the Nationalist Republic, but Tibet declined. The Nationalist Government attempted unilaterally to assert control over Tibet until 1918 and then again beginning in 1931, but failed. In 1949, Tibet expelled the last remaining Chinese representatives.

Tibet was an independent country at the time of the Chinese invasion in 1950 with a government headed by the institution of the Dalai Lama. The State of Tibet continues, despite the illegal occupation, through the existence and activities of the Tibetan Government-in-Exile. The Dalai Lama remains the Head of State with executive functions organized under the cabinet, or *Kashag*. Under a draft constitution, legislative authority rests in an elected parliament, and an independent judiciary has been established. The Tibetan State therefore continues to exist, represented by its legitimate Government-in-Exile in Dharamsala.

B. The Tibetan People Are Entitled To Self-Determination

Even if Tibet had not been an independent nation in 1950, the Tibetan people would nonetheless be entitled to exercise their right of self-determination. International law recognizes the right of peoples to self-determination; that is, “the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.” The Tibetans are unquestionably a “people” to whom the right of self-determination attaches. They are entitled to choose independence from the PRC, autonomy with the PRC, or any other political status.

The Tibetans are entitled to exercise their right of self-determination as against the PRC’s claim of territorial integrity because the PRC has not acted as the legitimate government of the Tibetan people. A government’s legitimacy derives from a people’s exercise of the right of self-determination and from its conduct in accordance with its obligation to protect and promote the fundamental human rights of all of its people, without discrimination. The PRC’s government in Tibet was imposed on the Tibetans by force, not by an exercise of self-determination. Moreover, the PRC has persistently and systematically abused the human rights of Tibetans through repression of religion, population transfer, birth control policies, discrimination, destruction of the environment, involuntary disappearances, arbitrary arrest, torture and arbitrary executions. The PRC is therefore not the legitimate government of

the Tibetan people and has no claim of territorial integrity to assert against the Tibetans' right of self-determination.

A balancing of the fundamental values of the international community also weighs heavily in favor of enforcing the Tibetans' right to self-determination. A non-militarized independent Tibet would enhance peace and security in the region by serving as a buffer zone between the two most populous nations in the world—India and China—who have only gone to war since the PRC stationed troops in Tibet along the Indian border. The Tibetans' exercise of self-determination will also promote the international values of respect for human rights and fundamental freedoms. The PRC has openly and officially abused Tibetan human rights in an apparent effort to marginalize the Tibetans as a people. Only the exercise of self-determination by the Tibetans will restore respect for the Tibetans' human rights and fundamental freedoms.

II. TIBET IS RIGHTFULLY AN INDEPENDENT STATE

A. When The People's Liberation Army Entered Tibet, Tibet Was Functioning As A Fully Independent State

The four requirements of statehood in international law are population, territory, government exercising effective control over that population and territory, and the capacity to enter into relations with other states.¹ When the People's Liberation Army (PLA) entered Tibet in October of 1950, Tibet possessed all those attributes. The entry of the PLA into Tibet constituted an illegal act of aggression by the People's Republic of China (PRC) against Tibet.

1. A Distinctively Tibetan Population Inhabited Tibet

That the Tibetans constitute a distinct population is not disputed. Even the PRC recognizes Tibetans as a "minority nationality."² Indeed, Mao Dzedong stated in 1952 that "while several thousand Han [ethnic Chinese] people live in Sinkiang, there are hardly any in Tibet, where our army finds itself in a totally different minority nationality area."³ Thus, before the PLA entered Tibet in 1950, there was, by the PRC's own admission, a distinctively Tibetan population and no significant Chinese population in Tibet.

¹ Inter-American Convention on the Rights and Duties of States (Montevideo 1933, U.S.T.S. 881) art. 1: "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 relations with other states."

T. Buergenthal and H.G. Maier, Public International Law (St. Paul 1985) at 1: "To qualify as a state under international law, an entity must have a territory, a population, a government and the capacity to engage in diplomatic or foreign relations."

International Commission of Jurists, Tibet and the Chinese People's Republic: A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet (Geneva 1960) at 142-143: "On the basic requirements of statehood there is no need to cite authority: the famous four essentials are that there must be a people, a territory, a government and the capacity to enter into relations with other States of the world."

See also 1 C.C. Hyde, International Law Chiefly as Interpreted and Applied by the United States (rev. 2d ed. 1945) at 22-23; P.C. Jessup, A Modern Law of Nations (New York 1968) at 46; 1 L. Oppenheim, International Law (8th ed., London 1955) at 118-119.

² Permanent Tribunal of Peoples, Session on Tibet: Verdict (Strasbourg 1992) at 14.

³ 5 Mao Dzedong, Selected Works, at 73-74 (quoted in M.C. van Walt van Praag, Population Transfer and the Survival of the Tibetan Identity (2d ed. 1988) at 4).

2. The PLA Entered Distinctively Tibetan Territory

The PRC has never denied that there is a Tibetan territory. There are disputes over the precise boundaries of the Tibetan territory, but it is clear that the frontier of historic and ethnic Tibet extends beyond the boundaries of the Tibet Autonomous Region (TAR).⁴ Tibetan areas within the PRC but outside the TAR have been incorporated into the surrounding Chinese provinces of Qinghai, Gansu, Sichuan, and Yunnan. The Tibetan province of Ü-Tsang forms the greater part of the TAR; the Tibetan province of Amdo forms a large part of Qinghai, although a small portion lies in Gansu; and the Tibetan province of Kham is divided among Gansu, Sichuan, Yunnan, and the TAR.⁵

⁴ Tibet has made no claims, however, against its neighbors on the west and south—Pakistan, India, Nepal, Bhutan, and Burma (Myanmar)—so, at least for present purposes, the western and southern borders of Tibet may be taken to match the international boundaries.

⁵ The northwestern frontier of traditional ethnic Tibet runs approximately along the watershed of the Altun Shan range to the northwest corner of Qinghai, whereas the northwestern frontier of the TAR runs approximately along the watershed of the Kunlun Shan and Hoh Xil Shan ranges to the western border of Qinghai. (A.G. Dulaney, Map, “Tibet and the People’s Republic of China: The Border Problem,” an appendix to A.G. Dulaney, Resolving Claims of Self-Determination: A Proposal for Integrating Principles of International Law with Specific Application to the Tibetan people (International Committee of Lawyers for Tibet, rev. ed., San Francisco 1993).)

At a minimum, the northeastern frontier of traditional ethnic Tibet bisects Qinghai from northwest to southeast. (*Id.*; H.E. Richardson, Map, “Tibet and its Neighbours: Political and Ethnographic,” in P. Kelly, G. Bastian, and P. Aiello, eds., The Anguish of Tibet (Berkeley 1991) at 2 (reprinted from H.E. Richardson, Tibet and its History (Boston 1962)); Map, “Some Historical Sino-Tibetan Boundaries,” in Alastair Lamb, The McMahon Line: A Study in the Relations Between India, China and Tibet 1904 to 1914 (London 1966) at 481.) Perhaps the most problematic area is the Kokonor region in the northeast of what is presently Qinghai. The Chinese “Qinghai,” the Mongolian “Kokonor,” and the Tibetan “Tso Ngon” all mean “blue sea,” and all refer to the large lake near the Qinghai-Gansu border and to the surrounding territory. (W. W. Smith, Jr., Tibetan Nation: A History of Tibetan Nationalism and Sino-Tibetan Relation (Boulder 1996) at 119 and n. 11.) The city of Xining (= Sining), east of the lake, is by far the largest city in Qinghai. The traditional Tibetan territory may include all of Qinghai and the Qinghai-Gansu border region. (Tibetan Government-in-Exile, Department of Information and International Relations, Maps, “Tibet Before 1949” and “Tibet Under the Chinese Rule” (both 1992) in Unrepresented Nations and Peoples Organization (UNPO), The Question of Self-Determination: The Cases of East Timor, Tibet and Western Sahara (Geneva 1996) at 56-57; Map, “Historic Tibet,” in M. C. van Walt van Praag, The Status of

There are disagreements concerning the precise location of the Sino-Tibetan border. In fact, in the early part of this century a number of boundary wars took place between Tibet and China, interrupted by peace agreements or cease-fire agreements mediated by Great Britain.⁶ These disagreements over the Sino-Tibetan border, however, do not affect the question of Tibetan statehood. Across the world neighboring states have border disputes. In some cases large tracts of territory are claimed by different states. This does not affect the legal status of the disputing states themselves. Likewise, the statehood of neither Tibet nor China is brought into dispute by their border disagreement.

Tibet: History, Rights and Prospects in International Law (Boulder 1987) at xxv. The Tibetan claim in November of 1913 at the Simla Conference, however, included Lake Kokonor but not Xining. (Map, "Simla Conference Boundaries, November 1913," in Lamb, *supra*, at 485.) Asia Watch has observed that Xining "has not been Tibetan for centuries and . . . lies outside the contiguous territory of Tibetan habitation formed by the various Tibetan and semi-Tibetan autonomous areas that occupy most of the Tibetan plateau." (Asia Watch, Merciless Repression: Human Rights in Tibet (New York 1990) at 74; see also Asia Watch, Human Rights in Tibet (New York 1988) at 42.) The Kokonor region was apparently under the control of the Mongols, not the Tibetans, when it was annexed by the Manchu Qing Empire: "In 1693 the Desi [the Regent who ruled Tibet after the Fifth Dalai Lama's death] complained to the Ch'ing throne that Tibet was unable to control the Mongols of Kokonor, after which the Ch'ing annexed the Kokonor territory . . ." (Smith, Tibetan Nation, *supra*, at 119.)

The eastern and southeastern frontier of traditional ethnic Tibet includes at least Kanze Tibetan Autonomous Prefecture (TAP) and the western half of Ngapa TAP, both in Sichuan. (Maps, "Tibet and the People's Republic of China," "Tibet and its Neighbours," and "Some Historical Sino-Tibetan Boundaries," all *supra*.) The traditional Tibetan territory may include any or all of Kanlho TAP in Gansu, the eastern half of Ngapa TAP in Sichuan, and Dechen TAP and Mili Tibetan Autonomous District (TAD), both in Yunnan. (Maps, "Tibet Before 1949" and "Tibet Under the Chinese Rule," both *supra*.) The Tibetan claim of 1913, however, included all of what is now Kanze TAP and half of what is now Ngapa TAP but only small parts of what are now Kanlho TAP, Dechen TAP, and Mili TAD. (Maps, "Simla Conference Boundaries, 1913" and "Tibet and the People's Republic of China," both *supra*.)

See generally Map, "China and Mongolia" in Rand McNally, The Great Geographical Atlas (Chicago 1982) at 168; Map, "Northern India and Pakistan" in Rand McNally, Atlas of the World (Masterpiece ed. 1993) at 120; Map, "Tibet" (M. Farmer 1993); "Map of the People's Republic of China," the frontispiece of Amnesty International, People's Republic of China: Repression in Tibet 1987-1992 (London 1992); Map, "Nuclear Facilities on the Tibetan Plateau" (Tibet Justice Center, San Francisco 1991); Map, "Tibet Under the Chinese Communist Rule" in P. Kelly, *et al.* eds., *supra*, at 32; Map, "Simla Conference Boundaries, February 1914" in Lamb, *supra*, at 494; Map, "Slightly Simplified Tracing of the Map Appended to the Simla Convention (Both Texts)," in *id.* at 554.

⁶ See generally E. Teichman, Travels of a Consular Officer in Eastern Tibet (Cambridge, 1922); The Boundary Question Between China and Tibet (Peking 1940).

The other salient point about the Sino-Tibetan border is that the location of much of historic and ethnic Tibet is undisputed. With the exception of areas of India, Nepal, and other Himalayan countries, where ethnic Tibetans live, the Tibetan maps of Tibet are largely contiguous with “ethnic” Tibet.⁷ All of the TAR lies within traditional ethnic Tibet; the TAR, Kanlho Tibetan Autonomous Prefecture (TAP), Ngapa TAP, Nanze TAP, Dechen TAP, and Mili Tibetan Autonomous District (TAD) constitute virtually all of Ü-Tsang and Kham; and Qinghai and Gansu include most of Amdo. Indeed, the creation by the PRC of “Tibetan Autonomous Areas” (Region, Prefectures, and District) is tantamount to a concession by the PRC that those areas are historically Tibetan.⁸

3. The Government Of Tibet Was Exercising Effective Control Over The Tibetan Population In The Tibetan Territory

When the PLA entered Tibet in 1950, Tibet was effectively governed by the Tibetans. In fact, the PRC admits that Tibetans effectively controlled their own territory and people when it claims that in 1950 the PRC liberated Tibetans from a feudal system dominated by aristocrats, upper-class lamas and local governors.⁹ The Dalai Lama (or, during his minority, the Regent) ruled with the assistance of the *Kashag* (Cabinet) and *Tsongdu* (National Assembly) in the distinctive Ganden Phodrang form of government. The Government maintained an extensive civil service, a small army, a system of taxation, a currency, and a postal and telegraph service.¹⁰ Relations

⁷ Two small pieces of territory in the northwest of the Tibetan Autonomous Region are claimed by India and Pakistan. (Rand McNally, *The Great Geographical Atlas*, *supra* note 5, at 168 and *Atlas of the World*, *supra*, at 120.) These areas may not be part of traditional Tibet. (See Map, “Tibet,” *supra* note 5.)

⁸ According to the PRC’s 1990 census, the total population of Tibetan Autonomous Areas outside the TAR was 3,960,000, of whom 2,100,000 were Tibetans, 1,260,000 were Hans (ethnic Chinese), and 600,000 were people of other nationalities. (Zhong Quan, *Figures and Facts on the Population of Tibet*, About Tibet (6) (Beijing 1991) at 7-8.)

⁹ Qi Yan, *Tibet—Four Decades of Tremendous Change*, About Tibet (9) (Beijing 1991) at 1.

¹⁰ F. Michael, *Rule by Incarnation* (1982); R. Rahul, *The Government and Politics of Tibet* (1969); H. Harrer, *Seven Years in Tibet* (1953) at 148-150, 213; U.N. Doc. E/CN.4/Sub.2/1989/SR.18 at 13-14.

among Tibetans and between Tibetans and their government were controlled not by China but through the Tibetan judicial system, which was based on that of Tibet's secular monarchy of 1349-1642.¹¹ Studies and firsthand accounts by Tibetans, Chinese, Indians, Britons, and others show that the Tibetan Government effectively controlled the Tibetan territory.¹²

Tibetans also exercised sovereign control over passage across its borders, establishing an Office of Foreign Affairs in 1943 and issuing passports.¹³ A number of countries recognized those passports as valid travel documents.¹⁴ In particular, in 1948 France, Great Britain, India, Italy, and, with reservations, the United States accepted Tibetan passports.¹⁵

4. The Government Of Tibet Was Capable Of Entering Into International Relations And Had Entered Into Such Relations Repeatedly

Tibet was able to enter into international relations, and it did enter into such relations repeatedly before 1950. Tibet and Ladakh entered into a treaty in 1842.¹⁶ Tibet and Nepal entered into a treaty in 1856, and Nepal, in its application for United Nations (UN) membership in 1949, cited that treaty as an example of its capacity to enter into international relations.¹⁷ Tibet entered into a treaty with

¹¹ van Walt van Praag, The Status of Tibet, *supra* note 5, at 136.

¹² *E.g.*, W.D. Shakabpa, Tibet: A Political History (1973); T. Gyatso (H.H. the XIV Dalai Lama), My Land and My People (1962); T. Shen and S. Liu, Tibet and the Tibetans (1973); Li Tieh-Tseng, Tibet Today and Yesterday (1960); Sir C. A. Bell, Tibet, Past and Present (Oxford 1924; rpt. Oxford 1968); H.E. Richardson, A Short History of Tibet (1962).

¹³ Heinstorfer (West German Bundestag Research and Reference Services), The Legal Status of Tibet, in Kelly, *et al.*, eds., *supra* note 5, at 74. The assertion of border control may well impact the border dispute, in that the positing of a border suggests an acknowledgment that territory outside that border is non-Tibetan.

¹⁴ *Id.* at 75.

¹⁵ C. Mullin and P. Wangyal, The Tibetans: Two Perspectives on Tibetan-Chinese Relations (2d ed., London 1983) at 7.

¹⁶ H.E. Richardson, Tibet and Its History (2d ed., Boulder & London 1984) at 261.

¹⁷ van Walt van Praag, The Status of Tibet, *supra* note 5, at 139-140; L.G. Gyari, Opening Statement Before the Permanent Peoples' Tribunal Session on Tibet (Washington DC 1992) at 3 (hereinafter Opening Statement).

Great Britain in 1904.¹⁸ After the collapse of the Qing Dynasty and the founding of the Nationalist Republic of China in 1911, Tibet entered into a treaty of alliance with Mongolia.¹⁹ Nepal and Bhutan maintained diplomatic representatives in Lhasa.²⁰ Britain treated Tibet as a sovereign state by maintaining a permanent diplomatic mission in Lhasa from 1933 until 1947. Independent India then maintained a diplomatic mission there until the PRC invaded.²¹

In 1913-1914, representatives of China, Great Britain, and Tibet participated in the tripartite Simla Conference, called to determine Tibet's future status and its relations with China and Britain. All parties entered the negotiations as equal parties, recognized as such by the others. The Tibetan representative was a properly credited plenipotentiary whose powers were accepted formally by Britain and China²² and had the right to decide all matters which may be beneficial to Tibet.²³ No tripartite agreement emerged from the conference, although all three parties initialed a draft text, but Britain and Tibet did sign a bilateral agreement on borders and trade between India and Tibet.

¹⁸ Note to the Government of the People's Republic of China, 12 Feb. 1960, in Ministry of External Affairs, Government of India, Notes, Memoranda and Letters Exchanged Between the Governments of India and China November 1959-March 1960: White Paper No. 3 (1960) at 94-95.

¹⁹ Treaty of Friendship and Alliance (Foreign Office Document (London) at 535:16, No. 88, Incl. 1)), Urga, 11 Jan. 1913. See Law Asia and Tibet Information Network, Defying the Dragon: China and Human Rights in Tibet (London and Manila 1991) at 73 (hereinafter Defying The Dragon); K. Herold, Tibet and the United States of America: An Annotated Chronology of Relations in the 20th Century (San Francisco 1994) at 4. The status of Mongolia in 1913 was not as clear as that of Tibet, and for political reasons, the government of Mongolia does not today openly admit the validity of the treaty.

²⁰ Wilmer, Cutler & Pickering, The Legal Status of Tibet (Washington DC 1986) at 79 n.156.

²¹ Gyari, Opening Statement, supra note 17, at 3.

²² H.E. Richardson, Tibet and Its History, supra note 16, at 107; see also International Commission of Jurists, Tibet and the Chinese People's Republic, supra note 1, at 149 (quoting the Simla Convention): "After naming the respective plenipotentiaries . . . the Convention . . . recited, in the usual diplomatic formula that the plenipotentiaries, 'having communicated to each other their respective full powers and finding them to be in good and due form have agreed,' etc."

²³ Note to the Government, supra note 18, at 94-95 (quoted in International Commission of Jurists, Tibet and the Chinese People's Republic, supra note 1, at 149).

The PRC argues that this so-called “McMahon Line” delineating the border between Tibet and India was the result of an unlawful deal between the British and Tibetan delegates at the Simla Conference.²⁴ This argument misses the point. The results of the Simla Conference are not principally what demonstrates Tibet’s capacity to enter into international relations. Rather, it is the participation of Tibet as an equal party which demonstrates that capacity. Because Tibet participated as an equal with China and Great Britain,²⁵ Tibet and Great Britain could only have entered a treaty if Tibet were an autonomous state, albeit one with links to China.²⁶ A binding treaty could have resulted from the Simla Conference, had the negotiations gone well, because the parties had the capacity to form such a treaty.

As it happened, Britain and Tibet did conclude bilateral agreements regarding trade and the Indo-Tibetan border at the Simla Conference,²⁷ and India later recognized the validity of those

²⁴ “At the Simla Conference in 1913 and 1914 the British delegate made a deal with the Tibetan delegate behind the back of the Chinese delegate. They delimited a Sino-Indian boundary called the McMahon Line, attempting to take about 90,000 square kilometres of Chinese territory as a reward for their support of the ‘independence of Tibet.’ The conference was a secret deal made by Britain to incite the ‘independence of Tibet.’; The Chinese Government firmly refused the Simla Treaty and the illegal McMahon Line.” (Cheng Ran, The Origin and Truth of the ‘Independence of Tibet’, About Tibet (2) (Beijing 1991) at 4.)

“It is well known that the British Government threatened not to recognize the government of the Republic of China unless Yuan Shikai, head of the Chinese government, agreed with the participation of Tibetan delegates in the Simla conference. Immediately after the conference began, at the instigation of the British colonialists, the Tibetan delegates submitted a request for the independence of Tibet. This met with the opposition of the Chinese government, which insisted that Tibet was an inseparable part of Chinese territory and that China enjoyed sovereignty over Tibet. When the British delegate Henry McMahon worked behind the Chinese delegates’ back to compel the Tibetan delegates to cede a large tract of the Chinese territory (according to a line which later came to be known as the so-called McMahon Line), the Chinese delegates flatly refused to sign the treaty.” (N. Cering, The Relations Between the Local Tibetan Government and the Central Government During the Period of the Republic of China, in Jing Wei, ed., China: Issues and Ideas 1: Is Tibet an “Independent Country”? — On van Praag’s “The Status of Tibet” (Beijing 1991) at 34.)

²⁵ International Commission of Jurists, Tibet and the Chinese People’s Republic, *supra* note 1, at 149.

²⁶ Permanent Tribunal of Peoples, *supra* note 2, at 21.

²⁷ van Walt van Praag, The Status of Tibet, *supra* note 5, at 138 (footnote omitted): “The outcome of the Simla Conference was significant in that the three agreements concluded between Great Britain and Tibet comprehensively regulated their mutual relations. By these agreements the previous treaties concluded between Britain and the Qing Empire were superseded, and henceforth Anglo-Tibetan relations were regulated solely by the 1904 Lhasa

treaties.²⁸ When India gained its independence in 1947, the Tibetan government did initially ask for a return of some territory conceded to British India at Simla.²⁹ The Government of India responded, in an official communication to the Tibetan Foreign Office in Lhasa, as follows:

The Government of India would be glad to have an assurance that it is the intention of the Tibetan Government to continue relations on the existing basis until new agreements are reached on matters that either party may wish to take up. This is the procedure adopted by all other countries with which India has inherited treaty relations with His Majesty's Government.³⁰

During World War II, Tibet remained neutral, and it insisted on that neutrality as against China, Great Britain, and the United States. As against China, Tibet refused to permit the construction of a road through Tibet to carry military supplies from British India to China. China proposed the road in 1941, and Britain

Convention and the 1914 agreements, which modified it in some respects." The texts of the three agreement appear as Appendices 18-20 to *id.*

See also International Commission of Jurists, The Question of Tibet and the Rule of Law (Geneva 1959) ("as the Chinese representative of the Chinese government declined to sign and ratify the [Simla] Convention it was signed on July 3rd, 1914 by representatives of Great Britain and Tibet"); International Commission of Jurists, Tibet and the Chinese People's Republic, *supra* note 1, at 150 ("Great Britain at no stage after 1914 dealt with Tibet through the intermediary of China and entered into two separate treaties with Tibet alone in 1914").

²⁸ When in 1960 the PRC questioned the validity of the 1914 Anglo-Tibetan (and, hence, Indo-Tibetan) agreements, India responded in an official note that "[a]t the Simla Conference, the Tibetan and Chinese plenipotentiaries met on an equal footing. This position was explicitly and unequivocally accepted by the Chinese Government. The three Plenipotentiaries exchanged copies of their credentials at the first session of the Conference on October 13, 1913. The credentials of the Tibetan representative issued by the Dalai Lama made it clear that Tibet was an equal party at the Conference with the right 'to decide all matters that may be beneficial to Tibet,' and the Chinese representative accepted the credentials of the Tibetan representative as being in order." Note to the government of the PRC, 12 Feb. 1960, White Paper, No. 3 (1960) at 94-95 (quoted in van Walt van Praag, The Status of Tibet, *supra* note 5, at 139).

²⁹ L/P&S/12/4197, UK High Commissioner, New Delhi, to Commonwealth Relations Office, 7 Nov. 1947.

³⁰ Ministry of External Affairs, Government of India, Notes, Memoranda and Letters Exchanged and Agreements Signed by the Governments of India and China, Vol. 2 (1959) at 39.

responded by asserting that its construction would require Tibetan permission: “His Majesty’s Government and the Government of India . . . could not be parties to any scheme for the construction of a road that would pass through territory under the jurisdiction of the Tibetan Government without the full and willing assent of the Tibetan authorities.”³¹ Tibet rejected the proposal, and when China announced its intent to proceed, Tibet made clear that whether a road would be constructed in Tibet was a matter to be decided by the Tibetan Government:

When the Chinese simply announced to the Tibetan government that “it has been decided between the British and Chinese Governments to construct a motor road for the benefit of Tibetans” and asked permission to construct it through Tibetan territory, the Kashag replied: “The British and Chinese Governments may have decided to construct the road for their own convenience, but it is of no concern to the Tibetan Government, [which] cannot allow the Chinese to construct a road in Tibetan territory.”³²

The Tibetan Assembly then resolved not to permit the road construction and communicated that decision to the government of China.³³

The Government of Great Britain, although unwilling to embark with the Chinese on a road-construction project over the express objection of the Government of Tibet, nonetheless favored the passage of war material through Tibet. Thus, the War Cabinet in London agreed with the recommendation of the British Ambassador and the General Officer Commanding in China that “action should now be taken with the Tibetan government to induce them to agree

³¹ L/P&S/12/4613, British Ambassador (Chongqing) to Ministry of Foreign Affairs, 6 June 1941.

³² van Walt van Praag, The Status of Tibet, *supra* note 5, at 71 (quoting L/P&S/12/4613, Government of India to India Office, 25 July 1941 (first quotation) and L/P&S/12/4613, Rai Bahadur to Pol. O. Sikkim, 29 December 1941 (second quotation) (brackets *in* van Walt van Praag).

³³ L/P&S/12/4613, Foreign Office to Chongqing, 30 July 1941; British Embassy, Chongqing, to Chinese Ministry of Foreign Affairs, 16 August 1941; L/P&S/12/4613, Government of India to India Office, 30 September 1941. *See* van Walt van Praag, The Status of Tibet, *supra* note 5, at 71.

to immediate exploration and development of all possible routes by land and air across Tibet and that the Chinese Government should be openly associated with [Great Britain] in these representations.”³⁴ Simultaneously, London asserted that the “Tibetans have every moral right to their independence for which they have fought successfully in the past and we are committed to support them in maintaining it.”³⁵

Ultimately, the Tibetan Government agreed to permit only the passage of non-military supplies—which would not violate Tibetan neutrality—from India to China.³⁶ The Government of China wanted to station Chinese technicians along the supply route, but the Tibetan Government refused to allow the Chinese Ministry of Communications to establish stations in Tibet or to allow its representatives to travel within Tibet.³⁷ Thus, because of Tibet’s neutrality, and despite the wishes of both Great Britain and China, the military supply route was never opened.³⁸

As against Great Britain, in addition to refusing the establishment of a military supply route from British India to China, Tibet also asserted its neutrality by refusing British requests for extradition from Tibet of two prisoners of war who had escaped from a British prison camp.³⁹ As against the United States, Tibet asserted its neutrality by insisting that U.S. Air Force planes not fly through Tibetan airspace on their way between India and China.⁴⁰

Thus, Tibet had repeatedly engaged in international relations before 1950. Not only had Tibet entered into numerous treaties with its neighbors and others, it had also asserted the sovereign right of neutrality against three major powers in World War II. These were

³⁴ L/P&S/12/4614, Chongqing to Foreign Office, 20 May 1942.

³⁵ L/P&S/12/4614, War Cabinet Distribution to China, Foreign Office to Chongqing, 7 June 1942.

³⁶ L/P&S/12/4614, Government of India to India Office, 17 July 1942; L/P&S/12/4614, War Cabinet Distribution to the United States, Foreign Office to Washington, 15 August 1942.

³⁷ L/P&S/12/4614, Tibetan Foreign Office to Ludlow, 11 December 1942.

³⁸ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 73.

³⁹ *Id.* at 236-237 n. 83; Harrer, *supra* note 10, at 159-162, 181-182.

⁴⁰ L/P&S/12/4201, *Lhasa Letter*, 2 January 1944; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 237 n. 83.

the acts of a functioning and independent state. Had Tibet been a part of China, Tibet would not have been entitled to assert its neutrality against China's interests.

5. Conclusions Regarding The Status Of Tibet In 1950

The Tibetan people occupy, and have for centuries occupied, the Tibetan territory (roughly speaking, the Tibetan Plateau). When the PLA entered Tibet in 1950, there existed in Tibet a government which exercised effective control over the Tibetan territory, including both relations among Tibetans and relations between Tibetans and their government. The Tibetan government had the capacity to enter into relations with foreign states and had done so. It concluded treaties, and it maintained neutrality when its neighbors, including China, were at war. Tibet possessed all the attributes of independent statehood. Under international law, therefore, Tibet was an independent state as of 1950.

B. The Seventeen-Point Agreement Of 1951 Is Absolutely Void Under International Law

The PRC claims to have “peacefully liberated” Tibet in 1950 despite the PRC’s simultaneous assertion that Tibet has always been part of China. This “peaceful liberation,” according to the PRC, was then embodied in the Seventeen-Point Agreement concluded between Tibet and the PRC in 1951:

After the founding of new China in October 1949, it [was] the Chinese Government’s responsibility as well as the shared demand of the Chinese nationalities, including the Tibetans, to liberate its own territory in Tibet, expel the imperialist forces, remove outside obstacles preventing the Tibetan people from enjoying rights of equality and freedom, and safeguard China’s sovereignty and territorial integrity. Under such circumstances, through the concerted efforts of the Central People’s Government and the Local Government of Tibet, the two sides sent delegations and conducted friendly negotiations. Agreement was reached on various matters related to the peaceful liberation of Tibet and the Agreement of the Central People’s Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet was signed on 23 May 1951. This Agreement is an important and legally-binding document for the Government of new China to settle its domestic ethnic question.⁴¹

Tibet and the PRC agree that the PLA entered what the PRC acknowledges to be Tibet in 1950 and that the Seventeen-Point Agreement was signed in 1951, while PLA troops occupied large parts of Tibet.⁴² The treaty was therefore concluded under force and the continued threat of force. There are only two situations in

⁴¹ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2.

⁴² John F. Avedon, *In Exile from the Land of Snows* (1986) at 26-32; T. Gyatso (H.H. the XIV Dalai Lama), *Freedom in Exile: The Autobiography of the Dalai Lama* (New York 1990) at 49-53 and 64; Ngapoi Ngawang Jigme, *A Great Turn in Tibetan History*, About Tibet (10) (Beijing 1991) at 4-5; Mullin and Wangyal, *supra* note 15, at 7; Office of Tibet, *Executive Summary of the Tibetan Government-in-Exile’s Response to the People’s Republic of China’s White Paper on Tibet* (New York 1993) at 3; Reply of the Permanent Representative of China, *supra* note 41, at 2; Richardson, *Tibet and Its History*, *supra* note 16, at 182-184 and 189;

which a treaty may lawfully be imposed upon a party whose territory is forcibly occupied: (1) where the occupying power is using force against an unlawful aggressor and (2) pursuant to a resolution of the United Nations Security Council.⁴³ The Tibetans of course were not unlawful aggressors, nor has the United Nations Security Council ever enacted any resolution authorizing force against Tibet. Thus, the so-called “Agreement” of 1951 is not a valid or binding treaty.

Debates persist over whether the Tibetan delegates to the 1950-1951 negotiations were true plenipotentiaries,⁴⁴ whether they were threatened with personal violence,⁴⁵ and whether the Dalai Lama’s conduct in continuing to act as head of the local Tibetan government after the PRC’s invasion constituted an implicit acceptance of the “Agreement.”⁴⁶ As a legal matter, however, these disputes need not be resolved. A treaty procured through the forcible occupation of one party’s territory by the military forces of the other party is (except in the circumstances already mentioned) absolutely void. A treaty that is absolutely void can be repudiated at any time, and acceptance of such a treaty cannot be implied from the conduct of the party whose territory is occupied:

“If the treaty is tainted with relative nullity by reason of a defect of capacity, error, fraud or corruption, the injured party is free to

Yuan Shan, *The Dalai Lama and the Seventeen-Article Agreement*, About Tibet (3) (Beijing 1991) at 5- 6; Zhai Wenjie, *The Liberation of Tibet in 1951 is China’s Internal Affair*, in Jing Wei, ed., *supra* note 24, at 53-56.

⁴³ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 179.

⁴⁴ N. N. Jigme, *supra* note 42, at 6, states: “The five-man negotiating team of us was given plenipotentiary powers for the negotiations with the Central People’s Government.” Likewise, Shan, *supra* note 42, at 5-6, states: “In February 1951 the Dalai Lama appointed kalon Ngapoi Ngawang Jigme chief plenipotentiary and [other named persons] plenipotentiaries. . . . The Dalai Lama issued them each a sealed certificate, giving the name and status of the delegate and granting them full power to negotiate with the Central People’s government on matters relating to the peaceful liberation of Tibet.”

Gyatso, *Freedom in Exile*, *supra* note 42, at 64, however, states: “What was most alarming was that Ngabo [= Ngapoi] had not been empowered to sign anything on my behalf, only to negotiate. I had kept the seals of state with me at Dromo to ensure that he could not.”

⁴⁵ *Contrast* Avedon, *supra* note 42, at 35 *against* Reply of the Permanent Representative, *supra* note 41, at 2.

⁴⁶ See, e.g., International Commission of Jurists, *The Question of Tibet and the Rule of Law*

invoke or not to invoke the invalidity of its consent, and it could agree to confirm the act—expressly or impliedly. On the other hand, if a treaty has been procured by force or is in breach of a rule of *jus cogens* there is no question of waiver or estoppel resulting from the conduct of the state victim. This state or any other state may at any time allege the invalidity of a treaty obtained through duress or in violation of *jus cogens*.⁴⁷

Both parties agree that the PLA had already occupied large parts of Tibet when the “Agreement” was signed in 1951.⁴⁸ Moreover, China threatened the negotiators with further use of force—a military advance to Lhasa—if they refused to sign.⁴⁹ Therefore, the “Agreement” is absolutely void and provides no support for any claim by the PRC to sovereignty over Tibet.

(Geneva 1959) at 97 and n.20; E. Lazar, *Accommodation or Independence*, in Kelly, et al., eds., *supra* note 5, at 307; Yuan Shan, *supra* note 42, at 9-11.

⁴⁷ E. Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 *Recueil des Cours* (1978) at 68 (quoted in van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 165); cf. Buergenthal & Maier, *supra* note 1, at 107-108: “The usual grounds which may be invoked under domestic law to invalidate treaties. . . . Moreover, a treaty is void *ab initio* if, at the time it was entered into, it was in conflict with a peremptory norm of general international law (*jus cogens*).”

The Buergenthal & Maier work suggests that duress is a ground only of relative, not of absolute, nullity. That may be true of personal duress imposed on a negotiating representative, but it cannot be true of duress imposed by military force upon one of the parties to a treaty. As Buergenthal and Maier observe, a treaty in conflict with a rule of *jus cogens* is absolutely void, and unlawful aggression against a sovereign state violates *jus cogens*. (E.g., Restatement 3d of Foreign Relations Law §102, Comment K and Reporters’ Note 6; §905, Comment G.) Thus, the rule stated by Arechaga might be better articulated as providing that “if a treaty has been procured by force or is in breach of any other rule of *jus cogens*,” etc.

Moreover, personal duress imposed on a negotiating representative may be a ground of absolute nullity: “An international agreement is void (a) if a state’s consent to the agreement was procured by the coercion of the state’s representative, or by the threat or use of force against the state in violation of the principles of international law embodied in the Charter of the United Nations; or (b) if at the time the agreement is concluded, it conflicts with a peremptory norm of general international law.” (*Id.* at §311(s).) “The [Vienna] convention [on the Law of Treaties] indicates the grounds that can be waived But coercion of the state’s representative or use or threat of force against the state (Subsection 2(a)) are not included among the grounds for termination that can be waived.” (Comment G to *id.*)

⁴⁸ Chinese sources include Reply of the Permanent Representative of China, *supra* note 41, at 2; Yuan Shan, *supra* note 42, at 5-6; and Zhai Wenjie, *supra* note 42, at 53-56. Tibetan sources include Gyatso, *Freedom in Exile*, *supra* note 42, at 49-53 and 64; and Office of Tibet, *Executive Summary*, *supra* note 42, at 3.

⁴⁹ Kashag Document 11(4)1. See also Wilson to US Secretary of State, 3 July 1951 and 10 July 1951, FRUS 7 (1951) at 1729 and 1735.

C. Historically, Tibet Never Became Part of China

The PRC contends that Tibet has been an inalienable part of China since the Yuan Dynasty.⁵⁰ Examining this claim requires analyzing events over more than one thousand years while keeping in mind the legal presumption of the continued existence of states:

Once the existence of a State is established, there is a strong presumption in favor of its continuation. To establish a loss of independence is, consequently, to overcome a formidable burden of proof. This presumption follows from the central position of independence and sovereignty in the system of international law, created and maintained by sovereign States for their protection. Any restrictions on a State's independence can be accepted only with strong and unequivocal evidence and must be interpreted restrictively. In the absence of such evidence, full independence must be presumed; hence the burden of proof is on the party claiming the existence of restrictions.

A State claiming to have established sovereign rights over another State must show convincing proof of the transfer of sovereignty by a consensual transaction or the undisputed and effective exercise of authority for a prolonged period of time. . . . Furthermore, the presumption in favor of continued statehood

⁵⁰ Cheng Ran, Why Tibet is an Integral Part of China, About Tibet (1) (Beijing 1991) at 6.

See also Reply of the Permanent Representative, supra note 41, at 2: Under the Yuan Dynasty, Tibet became "an administrative region of China and inalienable part of the Chinese territory."

See also Jin Zhonghui, Is Tibet an 'Independent State?' in Jing Wei, ed., supra note 24, at 1: "Tibet became an administrative region under the jurisdiction of the central government in the 13th century, during the reign of the Yuan Dynasty (1271-1368). Such a relationship of subordination as that between a local government and the central government has remained unchanged through the centuries despite dynastic changes."

See also Losang, Is the Relationship Between Tibet and the Central Government Merely a Lama-Patron Relationship? in id. at 15: "[S]ince the Yuan Dynasty, Tibet has always been a component part of China's territory, the Tibetan local government has always been subordinate to the central Chinese Government and the political and religious leaders of Tibet have always been subject to the Chinese emperor. This political relationship of subordination had remained unchanged for three dynasties, Yuan (1271-1368), Ming (1368-1644) and Qing (1644-1911), and during the period of the Republic of China (1912-49)."

prevails over the principle of effectiveness in the case of belligerent occupation. In addition, statehood is not lost when a State has established control over another in contravention of general principles of international law. Thus, acts of illegal intervention, including military aggression and occupation, cannot in themselves cause the extinction of a State.⁵¹

1. Tibet Was Indisputably Independent Before The Thirteenth Century

There is no genuine dispute about the status of Tibet as a state before the thirteenth century. Chinese court historians recognized that by the eighth century, Tibet had become the most powerful nation in Asia,⁵² and Tibet actually conquered several Chinese provinces.⁵³ For example, in 670 Tibetan forces took over four Chinese military garrisons in the Tarim (Kashgar, Khotan, Kucha and Karashar) and then defeated a Chinese army of 100,000 men sent to regain the Tarim.⁵⁴ Hostilities continued over the next century, including a failed treaty in 783.⁵⁵ In 822, Tibet and China entered into a treaty which “acknowledged the military stalemate between Tibet and China”⁵⁶ and provided, in part:

Tibet and China shall abide by the frontiers of which they are now in occupation. All to the east is the country of Great China; and all to the west is, without question, the country of

⁵¹ van Walt van Praag, The Status of Tibet, *supra* note 5, at 99-100 (footnotes and internal quotation marks omitted); *see also* J. Crawford, The Creation of States in International Law (Oxford 1979) at 68; K. Marek, Identity and Continuity of States in International Law (Geneva 1968) at 279, 302, 310-311, 553-556, 589 and 592). The presumption of continued statehood is reflected in Article 2(7) of the UN Charter, which protects the State's territorial integrity and independence. *See* G. Schwartzberger, International Law, Vol.1 (3d ed., London 1957) at 119, 123-126.

⁵² *See* Jiu Tang Shu, Tang Imperial Histories, Ch. 196B, *trans.* in P. Pelliot, Histoire Ancienne du Tibet (Paris 1961) at 43-45.

⁵³ Richardson, Tibet and Its History, *supra* note 16, at 32; Mullin and Wangyal, *supra* note 15, at 7.

⁵⁴ Smith, *supra* note 5, at 66 (footnotes omitted); *see* T'ang Dynasty Annals, chapters pertaining to Tibet *trans.* F.W. Bushell, The Early History of Tibet from Chinese Sources in *Journal of the Royal Asiatic Society* (1980) at 448.

⁵⁵ Smith, *supra* note 5, at 67-71.

⁵⁶ *Id.* at 73.

Great Tibet. Henceforth on neither side shall there be waging of war nor seizing of territory. . . .

Now that the two kingdoms have been allied by this great treaty it is necessary that messengers should once again be sent by the old route to maintain communications and carry the exchange of friendly messages regarding the harmonious relations between the Nephew and Uncle. According to the old custom, horses shall be changed at the foot of Chiang Chun pass, the frontier between Tibet and China. . . .

Between the two countries no smoke nor dust shall be seen. There shall be no sudden alarms and the very word “enemy” shall not be spoken. . . .

This solemn agreement has established a great epoch when Tibetans shall be happy in the land of Tibet and Chinese in the land of China.⁵⁷

The treaty of 822 treated China and Tibet as equals and recognized Tibet as a separate state with its own inviolable territory. “The terminology of ‘Nephew and Maternal Uncle’ was common diplomatic phraseology implying amicable relations as close as family relations, which, while according the Chinese symbolic superiority as ‘Uncle,’ did not imply any political dominance of China over Tibet.”⁵⁸

Because Tibet was an independent state as of the early ninth century, when the Chinese Tang Dynasty collapsed,⁵⁹ the presumption of its continued existence applies. The claim that “[w]hat view one takes . . . depends on where one opens the history book,”⁶⁰ is legally irrelevant, as is the question posed by the PRC: “[A]t what time has China ever lost its sovereignty over Tibet?”⁶¹ The legally relevant question that must be answered is: “When and why did Tibet become a part of China?”⁶²

⁵⁷ Richardson, *Tibet and Its History*, *supra* note 16, at 259-260; *see also* Smith, *supra* note 5, at 73-74 (setting forth translation given in Bell, *supra* note 12, at 271).

⁵⁸ Smith, *supra* note 5, at 74.

⁵⁹ *Id.* at 32; R.A. Stein, *Tibetan Civilization*, *trans.* J.E. Stapleton Driver (Stanford 1972) (originally *La Civilisation tibétaine* (Paris 1962)) at 70.

⁶⁰ Mullin and Wangyal, *supra* note 15, at 7.

⁶¹ U.N. Doc. E/CN.4/1991/73 at 2.

⁶² van Walt van Praag, *Tibet: An Occupied Country*, in Kelly, *et al.*, eds., *supra* note 5, at 61.

2. Tibet Did Not Become Part of China During The Mongol Yuan Dynasty

After the collapse of the Tang Dynasty, there was no official contact at all between China and Tibet until the appearance of the Mongols in the twelfth century.⁶³ During the intervening centuries, without interference from China, Tibet developed its lamaist society, which founded the Sakyapa, Kadampa, and Kagyudpa schools of Tibetan Buddhism.⁶⁴

In the thirteenth century, the Mongol Empire expanded to include, separately, Tibet and China. In 1249, the pre-eminent Sakyapa lama, Pandita, was given temporal authority over Tibet by the Mongol Godan Khan; in 1253, he was succeeded by Phagspa, whose secular authority was conferred upon him by Kublai Khan. In 1260, Kublai Khan took control of China, founding the Mongol Yuan Dynasty in 1279.⁶⁵ Thus, Tibet and China were separately overrun by the same foreign invader.

[T]he Mongols were and are a race distinct from the Chinese; and their empire was a Mongol empire, not a Chinese empire. . . . [N]orthern and southern China did become parts of this Mongol empire after their conquest in 1271 and 1279, respectively. But these conquests, and the submission of the Chinese to the Mongols, never turned the empire into a Chinese one, as China claims today. In fact, the Chinese finally overthrew the Mongol emperor Toghon Timur Kham and drove him and his army out of China and back to Mongolia in 1368, reclaiming the independence of China and

⁶³ Richardson, *Tibet and Its History*, *supra* note 16, at 33. The PRC's claims generally accord with this view. See Cheng Ran, *About Tibet* (1), *supra* note 50, at 2 (moving immediately from the treaty of 821 to the founding of the Mongol Khanate in the thirteenth century); Reply of the Permanent Representative, *supra* note 41, at 2 (asserting inception of sovereignty under Yuan Dynasty); Jin Zhonghui, *supra* note 50, at 1 (beginning with Yuan Dynasty); Losang, *supra* note 50, at 15 (same).

⁶⁴ 3 M. Eliade, *A History of Religious Ideas*, *trans.* A. Hildebeitel and D.A. Cappadonia (Chicago 1985) (originally *Histoire des croyances et des idées religieuses* (Paris 1983)) at 271-274; H. Hoffman, *The Religions of Tibet*, *trans.* E. Fitzgerald (New York 1961) at 114-153; Michael, *supra* note 10, at 12-42; Stein, *supra* note 59, at 70-75.

⁶⁵ Hoffman, *supra* note 64, at 138; Richardson, *Tibet and Its History*, *supra* note 16, at 34; Stein, *supra* note 59, at 78.

establishing a Chinese empire under the Ming dynasty. China can hardly claim credit for the conquests of the Mongols in Europe or Asia.⁶⁶

Tibet was not part of China before the Mongol conquest, and it became part of the Mongol empire before China was conquered. Tibet was administered by the Mongols separately from their administration of China, under a system established before they conquered China. “Tibet was administered by Tibetans under the supervision of the Mongol Court . . . and no Chinese were involved in the administration of Tibet.”⁶⁷ On the contrary, “the Yuan Empire was divided into twelve provinces and Tibet was not included in these provinces of the empire.”⁶⁸

While the Mongols dominated Tibet, the Mongol Khans and the Tibetan lamas developed a relationship known as *cho-yon*. Usually translated lama-patron or priest-patron, *cho-yon* is a unique Buddhist and Central Asian institution that cannot be categorized under current international legal terms.⁶⁹ The Tibetans and Mongolians claim that this relationship was the core of Mongol-Tibetan relations,⁷⁰ whereas the PRC contends that it was

⁶⁶ See Department of Information and International Relations, *The Mongols and Tibet: A Historical Assessment of Relations Between the Mongol Empire and Tibet* (Dharamsala 1996) (DIIR, *The Mongols and Tibet*) at 21.

⁶⁷ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 121; see also *id.*: “Tibet was never fully integrated into the Mongol Empire—in contrast with most territories, including China, which were directly ruled by the Mongols. . . .” See also DIIR, *The Mongols and Tibet*, *supra* note 66, at 22: “The relationship between the Mongols and Tibet . . . was very different from that of other nations that had come under Mongol rule or influence. The other nations were ruled directly by the Mongols through the permanent presence of Mongol princes, ministers or generals. The rule of Tibet, on the other hand, was given to the Sakyas by Khubilai Khan. The Sakyas ruled Tibet independently and there were no permanent Mongol officials stationed there.”

⁶⁸ DIIR, *The Mongols and Tibet*, *supra* note 66, at 25.

⁶⁹ *Id.* at 123.

⁷⁰ S. Rinpoche (Chairperson, Assembly of Tibetan People’s Deputies, Government-in-Exile), remarks summarized in *Tibet: The Position in International Law: Report of the Conference of International Lawyers on Issues Relating to Self-Determination and Independence for Tibet* (London 1993) at 119: “In Tibetan, the word ‘cho’ derives from ‘chonan’ (or ‘chuba’), which in turn is a translation of the Sanskrit ‘puja’, which includes all kinds of offerings, ‘nan’ indicating the place where the offering is to be made. ‘Yon’ refers to the honour of the offering, and derives from the Tibetan ‘yunda’. This relationship of ‘chonan’ and ‘yunda’ was established

secondary to the incorporation of Tibet into Mongol China.⁷¹ The constitutive elements of the lama-patron relationship are the patron's commitment to protect the lama and the lama's commitment to fulfill the patron's spiritual needs,⁷² and its most important aspect is reciprocal legitimation of authority: The Mongol Khans conferred temporal authority over Tibet on the Tibetan lamas, and the Tibetan lamas' religious mandate conferred legitimacy on the Mongol Khans' Imperial rule.⁷³ The separate administration of Tibet within the Mongol Empire, and the unique and uniquely personal *cho-yon* relationship between the Mongol rulers and the Tibetan lamas, thus provide no support for the claim that the Chinese asserted sovereignty over Tibet during the Yuan Dynasty.⁷⁴

when the Mongols invaded and occupied Tibet in the 13th Century and thereafter became followers of 'Sakya Pandita' (the founder of the Sakya [Sakyapa] school of Tibetan Buddhism) and subsequently of the Sakyapa patriarchs. Even before establishing their rule in China, the Mongols decided to dedicate the sovereignty, administration and entire territory of Tibet as an offering to the Sakyapa as thanks for the religious teachings received from Sakya Pandita and the Sakyapa (see Snielling, *The Buddhist Handbook*, (Century 1989)). This was the source of Chinese misunderstanding. The appointment of a governor (or a Vice-Regent) and making a territory the subject of an offering are entirely different. China's interpretation is that Sakya Pandita was appointed as a governor, but the reality, as understood by the Tibetans and the Mongols, was quite different."

⁷¹ Losang, *supra* note 50, at 15: "[T]he Central Government and the Tibetan local government did also establish a special religious relationship, that is the lama-patron relationship. The central imperial government assumed the role of a major alms-giver of Tibetan Buddhism, while Tibetan Buddhist monks were alms-receivers. This kind of relationship, which is different from that practiced among ordinary people, had a strong political character and was established on the basis of Tibetan local government being subordinate to the Central Government."

⁷² van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 123.

⁷³ *Id.* at 121; see also DIIR, *The Mongols and Tibet*, *supra* note 66, at 22: "The nature of the relationship between Tibet and the Mongols was that of *Chō-Yōn*, or priest-patron. This unique Central Asian symbiosis entailed the protection and making of offerings by the secular patron to his spiritual teacher and master, in return for religious teachings and the bestowal of spiritual protection and blessings by the lama to his patron. This was in no way a relationship between a ruler and his subject."

⁷⁴ Smith, *supra* note 5, at 98; see also DIIR, *The Mongols and Tibet*, *supra* note 66, at 29 (emphases in original): "China cannot claim that it inherited sovereignty or any other authority from the Mongol Khans, since the empire was a *Mongolian* empire and not a Chinese one, and China only constituted one of the many conquered territories of that empire, and that for less than half of the empire's duration."

3. Tibet Was Not Part Of China During Tibet's "Second Kingdom"

In 1349, Changchub Gyaltsen overthrow the Sakyapa hierarchs, broke away from the Mongol Empire, and established Tibet's "Second Kingdom," a secular regime in which Tibet's lamas did not rule.⁷⁵ The new Tibetan ruler established himself not merely without Mongol assistance, but at the expense of the very Sakyapa hierarchs whose authority the Mongols were bound to protect. Moreover, he firmly established himself as ruler of Tibet almost two decades before the Chinese won their independence from the Mongols and established their own Ming Dynasty in 1368.⁷⁶ Thus, Tibet's subordination to the Mongol Empire, which had begun decades before the Mongol subjugation of China, ended before the Mongols lost control of China. Recognizing that the collapse of the Mongol Empire restored to China and to Tibet the independence that each had enjoyed before the Mongol conquest, "the first Ming emperor referred to Tibet as a foreign state, in language that was unequivocal."⁷⁷

The PRC claims that the Ming Dynasty exercised effective sovereignty over Tibet primarily by granting titles to various Tibetan lamas and officials.⁷⁸ The granting of titles, though, was merely part of a system of diplomatic and economic relations that China maintained or attempted to establish with neighboring countries, and, indeed, the Ming emperors gave complimentary titles to anyone who wanted them.⁷⁹ The titles conferred by the Ming Emperor were not effective grants of power. On the contrary, the Ming Emperors handed out the title "King" to many religious leaders simultaneously, with no apparent expectation that any of them would actually rule

⁷⁵ Richardson, *Tibet and Its History*, *supra* note 16, at 34 and 306; Shen and Liu, *supra* note 12, at 106; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 121-122.

⁷⁶ Richardson, *Tibet and Its History*, *supra* note 16, at 35; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 121-122.

⁷⁷ Asia Watch, *Human Rights in Tibet*, *supra* note 5, at 5.

⁷⁸ See, e.g., Losang, *supra* note 50, at 24-27.

⁷⁹ *Id.* at 28; see also *id.* at 32 (giving examples of Korea, Kalikoti, and Lampar).

Tibet.⁸⁰ As a result, the Ming Dynasty's policy of bestowing honorary titles on various heads of religious orders did not affect the succession of secular rulers who actually wielded power in Tibet.⁸¹ Despite Chinese claims, Ming patronage of Tibetan lamas and their award of titles and non-existent official positions is hardly the equivalent of actual Ming authority over Tibet or evidence that Tibet was a part of China during the Ming Dynasty.⁸²

Moreover, extinction of Tibetan statehood would require the undisputed and effective exercise of authority by an outside state, in this case Ming China, for a prolonged period of time. The secular Phagmodru regime founded by Changchub Gyaltsen in 1349 was succeeded by the Rinpung Dynasty in 1481, which was in turn succeeded by the Kings of Tsang in 1565.⁸³ Each of these changes of power was attended by a struggle, and there were numerous other conflicts among religious and secular groups throughout the period.⁸⁴ Although this was a period of great political upheaval in Tibet, Tibetans remained firmly in control of their own country and the Ming emperors of China played no part in the successive changes in government.⁸⁵

Nor did the Ming Dynasty influence the selection and powers of the Dalai Lamas, who would later take temporal control

⁸⁰ This can be seen in the PRC's own contention: "The Ming Dynasty changed the practice of the Yuan Dynasty which attached importance only to the Sagya Sect, and adopted an enfeoffment policy towards other powerful sects as well. Besides conferring the title of State Tutor and King Chanhua upon the leaders of Pagmo Shuba, the Ming emperor granted Namke Leisiba, a monk of the Sagya Sect, the title of King Fujiao; Zhongbaje Gyamcan, monk leader of the Gagyui Sect, the title of King Chanjiao; Zongbawo, a monk of Guanjo, that is, Namge Bazangbo, the title of King Hujiao; Shangshi of the Gagyui Sect, the title of King Dabao; Kuncse Siba, a monk of the Sagya Sect, King Dacheng; . . ." (Losang, *supra* note 50, at 26-27.)

⁸¹ Stein, *supra* note 59, at 79.

⁸² Smith, *supra* note 5, at 105.

⁸³ L.L. Mehrotra, *Tibet's Right to Self-Determination* in Tibetan Parliamentary and Policy Research Centre, *Tibetan People's Right of Self-Determination* (New Delhi 1996) at 89; Richardson, *Tibet and Its History*, *supra* note 16, at 306-307; cf. Smith, *supra* note 5, at 101: "In 1434 . . . the Phagmognrupa [Phagmodru] were succeeded by the Rinpung family."

⁸⁴ See generally Stein, *supra* note 59, at 79-84.

⁸⁵ DIIR, *The Mongols and Tibet*, *supra* note 66, at 26.

of Tibet from the secular Second Kingdom. In 1578, the Mongol ruler Altan Khan conferred upon Sonam Gyatso (H.H. the III Dalai Lama), and posthumously upon his predecessors, the title “Dalai Lama” (meaning “ocean lama” or “ocean of wisdom” in Mongolian).⁸⁶ Sonam Gyatso was later invited by the Ming Emperor to the Ming Court, but he declined to go.⁸⁷ Yonten Gyatso (H.H. the IV Dalai Lama) likewise declined an invitation from the Ming Emperor to bless a Buddhist temple in Nanking.⁸⁸

The institution of the Dalai Lamas was therefore a creation of the Tibetans and Mongols, not the Chinese. The Dalai Lamas, moreover, did not view themselves as subjects of the Ming Emperors.

4. Relations Between The Dalai Lamas Of Tibet And The Manchu Qing Dynasty Do Not Show That Tibet Was Part Of China

The secular monarchs of Tibet’s Second Kingdom ruled Tibet until 1642, when the Mongol Gusri Khan overthrew King Karma Ten-Kyong with the backing of the Gelukpa hierarchs and united Tibet under the Fifth Dalai Lama.⁸⁹ The Fifth Dalai Lama had in 1638 bestowed the title of “Dharma King” (*Tenzin Choskyi Gyalpo*) on Gusri Khan as a reward for his service.⁹⁰ The Khan, in return, recognized the supreme rule of the Dalai Lama to whom he was bound by a *cho-yan* relationship. Thus, after Gusri Khan installed the Fifth Dalai Lama as ruler with “temporal authority over all of Tibet,” the Khan “received the title of King of Tibet, but retired to the Kokonor with his armies.”⁹¹

The PRC argues that in 1653 the Qing emperor made Gusri

⁸⁶ Mehrotra, *supra* note 83, at 90; Richardson, *Tibet and Its History*, *supra* note 16, at 307.

⁸⁷ Mehrotra, *supra* note 83, at 90; Smith, *Tibetan Nation*, *supra* note 5, at 104. Indeed, the founder of the Gelugpa school of Buddhism, Tsongkhapa, twice (in 1408 and 1414) declined invitations to come to the Ming court. DIIR, *The Mongols and Tibet*, *supra* note 66, at 27.

⁸⁸ Mehrotra, *supra* note 83, at 90; Smith, *supra* note 5, at 104.

⁸⁹ R. Hicks and N. Chogyam, *Great Ocean: An Authorized Biography of the Buddhist Monk Tenzin Gyatso, His Holiness the Fourteenth Dalai Lama* (London 1984) at 31; Richardson, *Tibet and Its History*, *supra* note 16, at 41 and 307; Stein, *supra* note 59, at 82-83.

⁹⁰ Smith, *supra* note 5, at 107.

⁹¹ *Id.* at 107 (both quotations).

Khan the supreme political chieftain of Tibet,⁹² but Gusri Khan had already been “Dharma King” of Tibet since 1642. The PRC also argues that the Emperor Shunzhi of the Qing Dynasty conferred the Fifth Dalai Lama’s title upon him.⁹³ The Fifth Dalai Lama’s authority, however, derived from the overthrow of the Second Kingdom by the Mongol Khan, which was a *fait accompli* when the Qing Dynasty was founded.

Gusri Khan continued as “Dharma King” (a primarily military function) until his death in 1655. After his death, the Fifth Dalai Lama assumed complete control of temporal affairs in Tibet and ruled without any outside interference.⁹⁴ Also, despite the presence of the so-called “kings” of Tibet, putative successors to Gusri Khan, the Dalai Lamas wielded all the actual power, and the “Dharma Kings” served under the Dalai Lamas. Thus, a Jesuit living in Tibet early in the eighteenth century said of the Seventh Dalai Lama and his government: “The hierarchy existing in Thibet is not secular but superior to all temporal and regular government. Head of all is the Grand Lama of Thibet. . . . He rules not only over religious, but over temporal matters, as he is really the absolute master of all Thibet.”⁹⁵ A more succinct description of the effective exercise of sovereignty can scarcely be imagined.

The *cho-yon* relationship was established between the Dalai Lamas of Tibet and the Manchu Emperors in 1639, well before the latter conquered China and while the secular monarchs of the Second Kingdom still ruled Tibet. It was a personal spiritual relationship between them with “no formal role for a Tibetan Lama at the Manchu Court.”⁹⁶ This did not change when the Manchus conquered China and established the Qing Dynasty to rule their new “Chinese empire.” As already noted, the primary obligation of the Manchu Emperors in the *cho-yon* relationship was the protection of the Dalai Lama, his “Church” and country. Qing troops entered

⁹² Jin Zhonghui, *supra* note 50, at 3.

⁹³ Cheng Ran, About Tibet (1), *supra* note 50, at 5.

⁹⁴ Richardson, *Tibet and Its History*, *supra* note 16, at 42.

⁹⁵ I. Desideri, S.J., *An Account of Tibet* (London 1932) at 206.

⁹⁶ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 124.

Tibet four times for that declared purpose—"in 1720 to drive out the invading Dzungar Mongols and to escort the newly discovered seventh Dalai Lama to the Tibetan capital; in 1728 and 1751 to restore order after civil wars; and in 1792 to meet the Gorkha invasion. Each time this was in response to appeals from Tibet under the Cho-Yon relationship, the initiative resting with the Tibetan [government]."⁹⁷

After the first of these offerings of protective services, the Qing Emperor explicitly invoked his duty of protection.⁹⁸ The successive interventions, though, did result in an increase in Qing administrative control over Tibetan affairs until in 1792 the Qing temporarily restricted Tibetan autonomy in both domestic and foreign affairs.⁹⁹ In the Imperial Edict of 1793, the *Ambans*, Imperial representatives at Lhasa, were given increased authority,¹⁰⁰ and the Qing asserted a right to control the search for reincarnations of high lamas.¹⁰¹

The measures undertaken in the wake of the 1792 intervention represent the height of Qing influence in Tibet but fall far short of establishing Chinese sovereignty over Tibet.¹⁰² The most important reason for this is that the nature of the Qing relationship with Tibet remained one between an empire and a semi-autonomous

⁹⁷ Mehrotra, *supra* note 83, at 90.

⁹⁸ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 124.

⁹⁹ Smith, *Tibetan Nation*, *supra* note 5, at 146.

¹⁰⁰ See van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 21: "Tibetan officials were to submit all matters of importance to the Ambans, whose position was further enhanced by the requirement that the Dalai Lama and the Panchen Lama communicate with the Emperor indirectly through the Ambans. The latter were also required to control Tibet's foreign relations, trade, and defence."

See also Smith, *Tibetan Nation*, *supra* note 5, at 134-135: "The *Ambans* were elevated above the *Kashag* [the Tibetan Cabinet] and the Dalai Lama in responsibility for Tibetan affairs. The Dalai and Panchen Lamas were no longer allowed to petition the Ch'ing emperor but could only do so through the *Ambans*. The *Ambans* took control of Tibetan frontier defence and foreign affairs. Tibetan authorities' foreign correspondence, even with the Mongols of Kokonor, had to be approved by the *Ambans*. The *Ambans* were put in command of the Ch'ing garrison and the Tibetan army (whose strength was set at 3,000 men). Trade was also restricted and travel could be undertaken only with documents issued by the *Ambans*. The *Ambans* were to review all judicial decisions. The Tibetan currency, which had been the source of trouble with Nepal, was also taken under Ch'ing supervision."

¹⁰¹ Smith, *Tibetan Nation*, *supra* note 5, at 135; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 21.

¹⁰² Smith, *Tibetan Nation*, *supra* note 5, at 137.

peripheral state, not a relationship between a central government and an outlying province.¹⁰³ Thus, the Tibetan State, though dominated to some extent by the Manchu Imperium, continued to exist. Tibet was not conquered or annexed by the Emperor and the formal source of government remained in Tibet in an at best protectorate relationship with the Manchu. Because the extent of actual interference was limited and by no means continuous, and Tibet continued to possess the essential attributes of statehood, the State of Tibet never ceased to exist.¹⁰⁴ Although Tibet became for a relatively short period of time a dependent state of the Qing empire, Tibet did not thereby become a part of China; Tibet remained a distinct nation.¹⁰⁵

Another reason that the changes instituted in 1792-1793 did not establish Chinese, or even Manchu, sovereignty over Tibet is that the Tibetans ignored those provisions of the Emperor's unilateral Edict with which they did not agree. Among other things, the Edict required that the incarnations of the Dalai Lama, the Panchen Lama, and other high lamas be chosen under the supervision of the *Ambans* through a system of choosing of lots from a golden urn. This was intended to symbolize that final authority over the selection of reincarnations, and thus over political succession in the Tibetan system, belonged to the Qing Emperors as the sovereign power in Tibet.¹⁰⁶ The symbolism was soon overwhelmed by the reality,

¹⁰³ *Id.* at 145.

¹⁰⁴ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 127.

¹⁰⁵ Smith, *Tibetan Nation*, *supra* note 5, at 148.

¹⁰⁶ *Id.* at 135; *see also id.* at 137: "The most significant reform in terms of implications for Tibet's sovereignty [was] the right to approve reincarnations . . ."

See also van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 21 (footnotes omitted; punctuation modified): "Another significant reform concerned the method of choosing the great incarnate lamas—namely, the leaders of the ecclesiastical hierarchy in Tibet and Mongolia, including the Dalai and Panchen Lamas. That selection had always been the responsibility of the high lamas and the government of Tibet, and it was carried out in accordance with prescribed religious regulations. The Imperial Edict invoked the Emperor's obligation 'as Protector of the Yellow Church' (i.e., the Gelugpa [the school of Tibetan Buddhism, founded by Tsongkhapa, in which all Dalai Lamas have thus far been found]) to protect that church from alleged corruption and nepotism, and prescribed the drawing of lots from a golden urn as the new selection procedure. The reform did not give the Emperor any influence in the selection of incarnate lamas, on the face of it; nevertheless, the implications of such intervention in an important traditional religious process were potentially serious."

however, as only twelve years later, on the first occasion the Tibetans had for selecting a new Dalai Lama (the Ninth), the Tibetans ignored the Edict and chose the Ninth Dalai Lama in the traditional manner.¹⁰⁷

The Edict's lottery system was used for subsequent selections of Dalai Lamas only sporadically.¹⁰⁸ The Tenth Dalai Lama was determined by traditional Tibetan methods; however, the *Ambans* insisted that it be announced that the lottery system had been used, so that the Qing could claim authority over the selection of the Dalai Lama while the Tibetans were satisfied that he had actually been chosen by traditional methods.¹⁰⁹ The Eleventh Dalai Lama was "confirmed, apparently by the use of the Ch'ing lottery."¹¹⁰ The Twelfth Dalai Lama likewise "was selected by the Tibetan method but was confirmed by means of the lottery."¹¹¹ In his case, however, the use of the lottery was a complete sham, because "the name of the same boy was on all three slips of paper put into the golden urn."¹¹² The Thirteenth Dalai Lama was confirmed in 1879 without the use of the lottery system.¹¹³

A third reason that the changes instituted in 1792-1793 did not establish Chinese, or even Manchu, sovereignty over Tibet is that the provisions of the Imperial Edict of 1793 were actually voluntary. The PRC asserts that the Imperial Edict of 1793 conferred powers upon the *Ambans* through which China exercised sovereignty over

¹⁰⁷ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 22; *see also id.* at 126: "[A]s the Tibetans totally ignored the Emperor's wishes the very next time a Dalai Lama was selected, the edict had virtually no effect."

See also Smith, *Tibetan Nation*, *supra* note 5, at 137 (footnote omitted): "[T]he right to approve reincarnations became essentially symbolic or was ignored altogether. The Ninth Dalai Lama was discovered in 1806 and confirmed by the traditional process, without recourse to the Ch'ing golden urn lottery system, possibly due to the outbreak of demonstrations in Lhasa against Ch'ing interference in the selection."

¹⁰⁸ Smith, *Tibetan Nation*, *supra* note 5, at 145.

¹⁰⁹ *Id.* at 138 (footnote omitted).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 140 (footnote omitted).

¹¹² *Id.* at 140 n.59.

¹¹³ *Id.* at 151 (both quotations) (footnotes omitted).

Tibet. The General who presented the decree to the Eighth Dalai Lama, however, did so as a set of suggested regulations for Tibet's protection, openly declaring that Tibet was free to accept or reject the Emperor's suggestions as it pleased:

[I]f the Tibetans insist on clinging to their age-old habits, the Emperor will withdraw the Ambans and the garrison after the troops are pulled out. Moreover, if similar instances [i.e. to the Gorkha invasion of 1792] occur in the future, the Emperor will have nothing to do with them. The Tibetans may, therefore, decide for themselves as to what is in their favour and what is not or what is heavy and what light and make a choice on their own.¹¹⁴

Similar instances did occur and, indeed, the Qing Emperors had nothing to do with them. The Qing Emperors provided no military assistance at all in Tibet's wars with the Dogras of Jammu (1841-1842), the Gorkhas of Nepal (1855-1856), and British India (1903-1904).¹¹⁵ In 1841 the Dogra rulers of Mannu and Kashmir invaded western Tibet in an attempt to capture the lucrative *pashim* trade but the Tibetans repelled the Dogras without any assistance from the Qing.¹¹⁶ The war ended with a peace treaty signed by the Dogra and Tibetan plenipotentiaries in September 1842.¹¹⁷ Later, the PRC admitted that China had not participated in treaty of 1842.¹¹⁸ When the Gorkhas of Nepal invaded Tibet in 1854, the Qing Emperor did not assist Tibet and that war was also concluded

¹¹⁴ Quoted in Mehrotra, *supra* note 83, at 91.

¹¹⁵ International Commission of Jurists, *Tibet and the Chinese People's Republic*, *supra* note 1, at 154; Mehrotra, *supra* note 83, at 90; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 128.

¹¹⁶ Smith, *Tibetan Nation*, *supra* note 5, at 138 (footnote omitted).

¹¹⁷ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 23 (footnote omitted).

¹¹⁸ Smith, *Tibetan Nation*, *supra* note 5, at 139 n.55: "In 1959, when India brought up this treaty as evidence that China had recognized the border between Tibet and Ladakh, Chou En-lai denied that Chinese representatives had participated in the 1842 Treaty. Letter from Chou En-lai to Prime Minister Nehru, 8 September 1959, in C. Sen, *Tibet Disappears: A Documentary History of Tibet's International Status, the Great Rebellion and Its Aftermath* (New Delhi 1960) at 448."

by a treaty signed in 1856 by Nepalese and Tibetan plenipotentiaries in Kathmandu.¹¹⁹ Under that treaty, Nepal exacted a form of tribute from Tibet and assumed protection over it, replacing the Manchus to some extent.¹²⁰ Notably, when Kalon Shatra established a new government in Tibet in 1862, he looked to the Nepalese Court for official recognition, not to Beijing.¹²¹ By the middle of the nineteenth century, therefore, the Qing Empire did not exercise effective control over Tibet, even to the limited extent of securing its borders. The Qing Emperor's abdication of his role as protector of the Dalai Lama, moreover, effectively ended the *cho-yon* relationship.

A further reason that the changes made in 1792-1793 did not establish Manchu, let alone Chinese, sovereignty over Tibet is that soon thereafter, the *Amban* became little more than a foreign ambassador in Lhasa.¹²² The Regent¹²³ who ruled Tibet from 1819 to 1844 was able to rule without interference from the *Ambans*,¹²⁴ and by the middle of the nineteenth century the Tibetans neither sought nor followed the *Ambans*' advice.¹²⁵ The Manchus retained little influence in Tibet, and many in Lhasa and Kathmandu favored their expulsion from the region.¹²⁶ Even the *Ambans* themselves acknowledged their lack of authority. For example, *Amban* Yu Tai stated in 1903 that "he was only a guest in Lhasa—not a master—and he could not put aside the real masters, and as such he had no force to speak of."¹²⁷

¹¹⁹ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 23.

¹²⁰ *Id.* at 24; *see also* Smith, *Tibetan Nation*, *supra* note 5, at 139: "Tibet was forced to pay tribute to Nepal and grant judicial extraterritoriality to Nepalese subjects in Tibet."

¹²¹ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 24 (footnote omitted).

¹²² *Id.* at 128.

¹²³ During the minority of a Dalai Lama, the country was governed by a regent who assumed the political but not religious powers of the Dalai Lama.

¹²⁴ Richardson, *Tibet and Its History*, *supra* note 16, at 71.

¹²⁵ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 255 n.33.

¹²⁶ *Id.* at 255 n.35 (quoting L. Rose, *Nepal: Strategy for Survival* (Berkeley 1971) at 112).

¹²⁷ Quoted in Mehrotra, *supra* note 83, at 91.

The Qing Dynasty's abandonment of its patronage of the Dalai Lamas was formalized in 1910. The Manchu Emperor Hsuan T'ung officially denounced the supposed object of his devotion, the Thirteenth Dalai Lama, "taking away" the title conferred by him on the Tibetan sovereign in an effort to "depose" him.¹²⁸ The Tibetan government responded that the Emperor "never conquered Tibet or gave it to the Dalai Lama. Titles given by the Emperor to the Dalai Lama are complimentary; the Dalai Lama's power and position does not depend on them. . . . The deposing of the Dalai Lama is as if the Dalai Lama would try to depose the Emperor by withholding the usual title of 'Celestial Emperor Manjushri Incarnate of China [which is conferred on him by the Dalai Lama].'"¹²⁹

The Manchu Qing Empire was overthrown by the Chinese nationalist revolution of 1911. The Tibetan government soon thereafter accepted the surrender of the imperial troops that remained in Tibet, as well as Chinese troops that had entered Tibet two years earlier from Sichuan, and repatriated them to China with the mediation of the Nepalese Ambassador in Lhasa.¹³⁰ A "Three Point Agreement" to that effect was signed on 12 August 1912, and a second agreement on 14 December.¹³¹ The Dalai Lama declared any links that might still have existed with the Empire to have ended, and he reaffirmed Tibet's independence.¹³²

¹²⁸ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 133 and 135.

¹²⁹ Letter from Tibetan Ministers and National Assembly, in L/P&S/10/147, Charles Bell to Government of India, 10 May 1910.

¹³⁰ FO 535/15, No 92, Incl, Manners-Smith, British Resident, Nepal, to Government of India, 22 April 1912.

¹³¹ For the texts of the Agreements, see Appendices 14 and 15, respectively, in van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 314-317.

¹³² Proclamation of H.H. the XIII Dalai Lama, Potala Palace, Lhasa, 13 February 1913. Text in Appendix 16, van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 318. See letters of the Dalai Lama and the Chief Ministers of Tibet and the National Assembly to the Viceroy of India and other British Officials in FO 535/15, No. 228, Incl. 2, Government of India to India Office, 26 Oct. 1912; Letter of the Dalai Lama to the Czar of Russia, February 1912, in FO 535/15, No. 39, Incl. 2. See also T. Shakabpa, *Tibet: A Political History*, (New Haven 1967) at 234-237.

5. Tibet Was Not Part of China During China's Nationalist Period

From 1911 until the arrival of Chinese troops in Lhasa in 1951, Tibet exercised effective control over its territory and engaged in international relations, the specific aspects of which have already been discussed. The last Qing Emperor had garrisoned troops in Tibet, but the Tibetans formally expelled them in 1911,¹³³ an unmistakable assertion of national sovereignty, and actually repatriated them in 1912. Moreover, the new Chinese Republic conceded the independence of Tibet. Once established, the Republic of China invited Tibet to “join” the new republic¹³⁴ and thereby acknowledged that Tibet was not as such a part of the Republic.¹³⁵ The Republic then sent a mission to announce and explain the Republic and ask Tibet to accept it.¹³⁶ The Tibetans Government did not allow that mission even to enter Tibet¹³⁷ and the Dalai Lama telegraphed the President that “the Tibetans do not approve of the Central Government,” and that “the Tibetans are quite capable of preserving their existence intact and there is no occasion for the President to worry himself at this distance or to be discomposed.”¹³⁸ Nonetheless, the President of China unilaterally declared Tibet a province of China.¹³⁹ The British Government strongly protested China's action as inconsistent “with the international obligations it had inherited from the Manchus and with the autonomy which

¹³³ Heinstorfer, *supra* note 13, at 75; Herold, *supra* note 19, at 7.

¹³⁴ Concluding Statement by the Conference of International Lawyers on Issues Relating to Self-Determination and Independence for Tibet in Tibet: The Position in International Law (London 1993) at 147 (The London Statement on Tibet).

¹³⁵ *Id.*

¹³⁶ Foreign Office 535/15, No. 198, Incl., Government of India to India Office, 4 September 1912.

¹³⁷ Bell, *supra* note 12, at 148; FO 535/16, No. 172, Incl. 4, British Trade Agent at Gyantse to Government of India, 28 February 1913; FO 535/16, No. 240, Incl., Government of India to India Office, 29 May 1913; L/P&S/10/147, Minute Paper, 28 November 1912.

¹³⁸ Foreign Office 535/16, No. 58, Incl. 1, extract from Guomin Gongbao, 6 January 1913 (both quotations).

¹³⁹ Presidential Order, 21 April 1912, in L/P&S/10/265, Jordan to Foreign Office, 12 April 1912, Incl. containing English translation of the text.

[Tibet] had always enjoyed.”¹⁴⁰ The British Ambassador told the Chinese President that Great Britain wanted to see “an autonomous Tibet lying between the territories of Great Britain and China” and made clear that his government did not consider Tibet to be a part of China, a view supported by the fact that the Chinese treaties with foreign powers were not valid in Tibet.¹⁴¹

China’s subsequent attempts to impose its authority by force in border areas of Eastern Tibet were unsuccessful.¹⁴² The Tibetans repulsed the Chinese advance and in April 1918 forced the Chinese troops to surrender.¹⁴³ Tibet and China, with the help of a British consular officer, then negotiated a truce establishing a Sino-Tibetan boundary between the Yangtze and the Mekong but Beijing never ratified the agreement.¹⁴⁴ The British Government, in the face of China’s refusal to negotiate matters pertaining to Tibet, announced its intent to deal with Tibet independently of China:

We regard ourselves as at liberty to deal with Tibet, if necessary, without again referring to China; to enter into closer relations with the Tibetans; to send an officer to Lhasa from time to time to consult the Tibetan Government; to open up increased trading intercourse between India and Tibet; and to give the Tibetans any reasonable assistance they might require in the development and protection of their country.¹⁴⁵

With that communication, the British government determined to recognize and treat Tibet as a fully autonomous State and to deal with it separately from China.¹⁴⁶ China, in contrast,

¹⁴⁰ L/P&S/10/265, Jordan to Foreign Office, 6 June 1912, Incl.

¹⁴¹ L/P&S/10/265, Jordan to Foreign Office, 23 and 26 June 1912; *see also* L/P&S/10/265, Government of India to India Office, 23 March 1912.

¹⁴² Herold, *supra* note 19, at 9; International Commission of Jurists, *The Question of Tibet*, *supra* note 46, at 88

¹⁴³ Smith, *Tibetan Nation*, *supra* note 5, at 207 (footnote omitted).

¹⁴⁴ *Id.* at 208.

¹⁴⁵ British Foreign Minister, Marquess Cuzon of Kendlestone, to Government of China (quoted in van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 64).

¹⁴⁶ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 64; *see also* Smith, *Tibetan Nation*, *supra* note 5, at 214: “Britain thereafter dealt with Tibet as a de facto autonomous state”

continued to assert authority over Tibet¹⁴⁷ but the facts on the ground belied that assertion. For example, between 1918 and 1931, China made military threats along the Sino-Tibetan border, and Tibet and China exchanged charges of border violations. Open fighting finally broke out in 1931 and resulted in Tibetan territorial gains.¹⁴⁸ The fighting ended in a truce in November 1931, under which Tibet retained control of all areas it occupied and China paid Tibet an indemnity. The parties subsequently amended the agreement in 1932 and 1933, however, to reinstitute the boundaries agreed to in 1918.¹⁴⁹

On 17 December 1933, the Thirteenth Dalai Lama died. From 1933 until 1947, Britain maintained a permanent diplomatic mission in Lhasa, treating Tibet as a sovereign state. Independent India then maintained its diplomatic mission in Lhasa until the Chinese invasion.¹⁵⁰ The PRC, in contrast, was not permitted the same freedom of presence in Tibet. The head of the British Mission noted: “Unlike those of us in the British Mission, the Chinese in Lhasa were not permitted to travel freely outside the city. When members of their mission wanted to enter Tibet by way of India, they had to get permission from the Tibetan government to do so.”¹⁵¹ During these years, Tibet continued to defend its borders. For example, the Communist “Long March” retreat entered eastern Tibet in 1934,¹⁵² and the Tibetans drove the Maoist forces out of Kham in 1936.¹⁵³

Tibetan representatives did attend Chinese Parliamentary sessions in 1946 and 1948, but they were there to observe, not to take part. There is no evidence that they either did or were

¹⁴⁷ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 66.

¹⁴⁸ *Id.*

¹⁴⁹ Tieh-tseng Li, *Tibet: Today and Yesterday* (New York 1960) (a document originating in the archives of the Nationalist Chinese Government’s Mongolian and Tibetan Affairs Commission) at 164-165.

¹⁵⁰ *Opening Statement*, *supra* note 17, at 3.

¹⁵¹ H.E. Richardson, *The Independence of Tibet* in Kelly, et al., eds., *supra* note 5, at 34.

¹⁵² Herold, *supra* note 19, at 9.

¹⁵³ International Commission of Jurists, *The Question of Tibet*, *supra* note 46, at 88.

empowered to accede to any actions taken by those bodies.¹⁵⁴ Indeed, the leader of the Tibetan delegation expressly affirmed that they had not recognized or signed the new Chinese constitution adopted by the Chinese assemblies.¹⁵⁵ On the contrary, the Tibetan delegates attended these “Constitutional Assemblies” for the purpose of presenting to the Chinese Government Tibet’s proposals for their future relations.

The *Tsongdu* [Tibetan National Assembly] demanded that the Chinese in Tibet should be subject to the laws of Tibet, and that they should apply for entry visas for Tibet; the Chinese Government should conduct its diplomatic correspondence with Tibet through the Tibetan mission at Nanking; Tibetan representatives to China would carry Tibetan Government credentials, and no others should be accepted by China as official representatives of Tibet. The *Tsongdu* promised to maintain friendly relations with other countries and to negotiate and protect Tibet’s frontier. If any country should attack Tibet, however, Tibet should be able to call upon China to come to Tibet’s assistance.¹⁵⁶

While the Tibetan delegation was in India, British officials warned the representatives, in what turned out to be a prophetic admonition, that their attendance at the Chinese assembly could be construed as implying that Tibet accepted Chinese sovereignty. Although the delegation had instructions to attend only as observers, the Chinese convinced the Tibetans that the Constitutional Assembly would discuss Tibet’s situation and the Tibetans agreed to participate in order to put forward Tibet’s case.¹⁵⁷ The Tibetan representatives had been deceived:

[T]he Chinese Constitutional Assembly did not address the Tibetan issue except to assert that “all of the peoples whose delegates are present in this Assembly are subjects of the Chinese

¹⁵⁴ See Cering, *supra* note 24, at 39-44; Cheng Ran, About Tibet (1), *supra* note 50, at 5-6; International Commission of Jurists, *Tibet and the Chinese People’s Republic*, *supra* note 1, at 147-148; Mullin and Wangyal, *supra* note 15, at 7.

¹⁵⁵ International Commission of Jurists, *Tibet and the Chinese People’s Republic*, *supra* note 1, at 148.

¹⁵⁶ Smith, *Tibetan Nation*, *supra* note 5, at 253.

¹⁵⁷ *Id.*

Kuomintang Government.” The Tibetan delegation found that it had been tricked into participating in an entirely Chinese governmental affair as representatives of Tibet. The Chinese never mentioned the Tibetans’ letter nor their request to negotiate Tibet’s status, nor did they ever reply to the letter nor agree to any negotiations. However, the Chinese press fully publicized the presence of the Tibetan delegation, conveying the impression of official Tibetan participation in the Chinese Constitutional Assembly.¹⁵⁸

At the next Constitutional Assembly, in 1948, delegates from the Tibetan mission in Nanking attended but they similarly did not recognize or sign the resolution of the assembly.¹⁵⁹ When Mao Dzedong’s Communist revolutionaries came to power in 1949, Tibet expelled all the members of the Chinese Mission in Lhasa.¹⁶⁰

Thus, when the PLA entered Tibet in 1950, Tibet was a fully functioning state. Indeed, the International Commission of Jurists concluded that:

Tibet demonstrated from 1913 to 1950 the conditions of statehood as generally accepted under international law. In 1950 there was a people and a territory, and a government which functioned in that territory, conducting its own domestic affairs free from any outside authority. From 1913-1950 foreign relations of Tibet were conducted exclusively by the Government of Tibet and countries with whom Tibet had foreign relations are shown by official documents to have treated Tibet in practice as an independent state.¹⁶¹

¹⁵⁸ *Id.* at 253-254 (quoting Goldstein, History of Modern Tibet, at 563).

¹⁵⁹ International Commission of Jurists, Tibet and the Chinese People’s Republic, *supra* note 1, at 148.

¹⁶⁰ Richardson, The Independence of Tibet, *supra* note 151, at 35.

¹⁶¹ International Commission of Jurists, Tibet and the Chinese People’s Republic, *supra* note 1, at 5-6. This passage does not address the situation prior to 1913 and, hence, cannot be taken as implying any Chinese sovereignty over Tibet before 1913.

D. The Tibetan Government-in-Exile Is The Only Legitimate Government of Tibet

“Nothing illustrates [the] dynamic aspect of the continuity of the occupied State better than the existence and activity of exiled governments or, as is sometimes more radically said, States in exile.”¹⁶² The first notable examples took place during the First World War, when the governments and armies of occupied States, such as those of Belgium, Serbia, and Montenegro, continued to exist on foreign soil. During the Second World War, an even larger number of governments of States occupied by German and Italian forces, including those of the Netherlands, Norway, Yugoslavia, and Greece, carried on their activities in London.¹⁶³ Sir Arnold McNair formulated the accepted view thus:

The mere fact that a foreign Government has been deprived of the control of a part or the whole of its territory by an enemy in no way invalidates legislation passed or other acts of sovereignty done by it outside its normal territory . . . 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.¹⁶⁴

In March 1959, the various Tibetan resistance movements’ activities and the growing popular resentment to Chinese rule culminated in an open revolt in Lhasa and the surrounding areas. Starting on March 10, daily mass meetings were held in Lhasa, calling on the Chinese to quit Tibet and to restore Tibet’s full independence. While Tibetan guerrilla troops consolidated their positions in South and East Tibet, Lhasans, their ranks swelled by east-Tibetan refugees and soldiers, staged mass demonstrations. Government officials held meetings and issued proclamations, including one in the name of the Cabinet, repudiating the Seventeen-Point Agreement and proclaiming Tibet’s full independence. Open fighting broke out in

¹⁶² K. Marek, Identity and Community of States in Public International Law (Geneva 1968) at 86 (quoted in van Walt van Praag, The Status of Tibet, *supra* note 5, at 186-187).

¹⁶³ van Walt van Praag, The Status of Tibet, *supra* note 5, at 187.

¹⁶⁴ Sir A. McNair, Legal Effects of War (1948) at 357-58.

Lhasa soon afterwards. Detailed descriptions of the revolt are readily available from Tibetan, Chinese, Indian and Western sources.¹⁶⁵ The PLA put down the revolt in a relatively short time, but casualties were high. Around 90,000 Tibetans were killed¹⁶⁶ and as many fled the country, while tens of thousands were imprisoned. The Dalai Lama and most of his ministers managed to escape in the night of March 17, arriving in India two weeks later.

On 28 March 1959, as soon as the Chinese forces had regained control over Lhasa, Premier Zhou Enlai issued an Order of State Council dissolving the Government of Tibet. The Order stated, in part:

In order to safeguard the unification of the country and national unity, in addition to enjoining the Tibet Military Area Command of the Chinese People's Liberation Army to put down the rebellion thoroughly, the decision is that from this day the Tibet Local Government is dissolved. . .¹⁶⁷

The Dalai Lama and his ministers, *en route* to the Indian border, reacted promptly by formally inaugurating a Provisional Government in Lhutse Dzong, to be the sole legitimate government of an independent Tibet.¹⁶⁸ As for the new administration in Lhasa, the Dalai Lama claimed that it was totally controlled by the Chinese and that the people of Tibet would never recognize it. Upon his arrival in India, the Dalai Lama declared: "Wherever I am, accompanied by my government, the Tibetan people recognize us as the Government of Tibet."¹⁶⁹

In India the Dalai Lama lost no time in establishing an effective government-in-exile. At first, this consisted of his cabinet, the *Kashag*, with six portfolios: Home Affairs, Foreign Affairs, Religion and Culture, Education, Finance, and Security.

¹⁶⁵ For accounts see e.g., International Commission of Jurists, *Tibet and the Chinese People's Republic*, Interview with H.H. The Dalai Lama (1960) at 290; N.Y. Times, 26 March 1959; *Statesman*, 26 March 1959; Foreign Language Press, Peking, *Concerning the Question of Tibet* (1960) at 166-74.

¹⁶⁶ PLA document, in possession of Tibetan Government-in-Exile, Dharamsala.

¹⁶⁷ Order of State Council of the People's Republic of China, NCNA, Beijing, 28 March 1959.

¹⁶⁸ T. Gyatso, *My Land and My People*, *supra* note 12, at 211-12.

¹⁶⁹ Press conference, Mussoorie, 20 June 1959.

A bureau was opened in New Delhi to serve as the link with the Indian Government, foreign diplomatic missions, and the various international relief agencies. Offices were subsequently opened in New York, Geneva, Kathmandu, Gangtok, and later in Tokyo, London, Paris, Moscow, Canberra, and Budapest to act as unofficial embassies for the government-in-exile.

In 1960, the Dalai Lama called the first democratic elections for a newly created representative body, the Commission of People's Deputies. A year later he announced the outline for a new democratic constitution, and on 10 March 1963, the Dalai Lama promulgated the "Constitution of Tibet," an instrument combining principles of Buddhism with popular democracy.

The Constitution, in its Preliminary Articles, specifically recognizes the supremacy of international law, the United Nations Charter, and the Universal Declaration of Human Rights, and renounces the use of force as an instrument of national policy. The main body of the document provides for a system of government not unlike a constitutional monarchy, with the executive power vested in the Head of State, the Dalai Lama, and the *Kashag*; the legislative authority vested in the elected National Assembly; and the judicial authority in an independent Supreme Court.

Under the Charter of the Tibetans in Exile, adopted in 1991, a smaller elected body, the Commission of People's Deputies, essentially fulfills the function of a parliament in exile. Below the *Kashag*, the government functions are now organized under the following departments: the Councils for Home Affairs, for Religious and Cultural Affairs and for Education, the Finance office, the Security Office and the Information Office, and the Departments of Health, of Service Management, and of Audit. In 1993, an independent judiciary was established with jurisdiction (within the bounds permitted by Indian law) to resolve disputes between Tibetans. The government is financed primarily by a voluntary tax from the refugees around the world and from Tibetan business organizations, as well as by small enterprises run by the Finance Office. The government established or encouraged the establishment of a number of institutions to preserve and promote the Tibetan

heritage and to enhance the exile community's cultural life.

The Tibetan Government-In-Exile effectively administers all affairs pertaining to refugees in India and, to a lesser extent, elsewhere. Furthermore, the Dalai Lama's Government enjoys a special status in India. New Delhi, for example, refers all matters relating to Tibetan refugees to Dharamsala or, at least, handles them in consultation with the exile government. International governmental or non-governmental agencies also work with the Dharamsala administration. More importantly, the Dalai Lama's government is looked upon by the Tibetan people, in Tibet as well as in exile, as their only legitimate government, and the one representing their interests.

The Dalai Lama's objective, to reconstruct a viable and even successful community in exile, has succeeded remarkably well. Indeed, the Tibetans have been called "the world's most well settled refugees,"¹⁷⁰ and Professor Michael concludes:

In India, the Tibetan policy, its settlements, its enterprises, and its religious political structure have not only flourished but have transformed and developed from the prototype in Tibet into an active part of the modern world.¹⁷¹

The Tibetan Government-in-Exile is not a new body established outside the territory of Tibet, but the continuation of the legitimate and recognized Government of Tibet in Lhasa. In exile, the Dalai Lama's Government has functioned, and still functions, effectively to the extent that this is possible on foreign soil and without official political recognition.

E. Conclusions Regarding The Legal Status Of Tibet

Tibet was a fully independent state until the thirteenth century. It was made a separate part of the Mongol Empire in 1249 but never became a part of the Chinese portion of the Empire that was established in 1279. Tibet regained its full independence from the Mongol Empire in 1349. China did likewise in 1368. Tibet functioned as a fully

¹⁷⁰ J. Sweeney, Keeping the Gentle Faith, Sheffield Morning Telegraph, 23 June 1983.

¹⁷¹ Michael, Rule by Incarnation, *supra* note 10.

independent state at least until 1720, when the Manchu Empire began to exert some influence and, for short periods in the late 18th century, a measure of control over Tibetan affairs. By 1840, Tibet was again functioning as an independent state, the Manchu influence having effectively faded. Except for a brief period of occupation by provincial Sichuan troops in the last years of the Manchu Imperium (1909-1911) when the Dalai Lama sought exile in India, the Tibetan government exercised effective control over Tibet as an independent state until Communist China invaded it in 1950.

Because Tibet was an independent state in 1950, the PRC must show convincing proof that it achieved sovereignty over Tibet through a consensual transaction. As discussed above, the so-called “Agreement” of 1951 was not the product of a consensual transaction. On the contrary, as shown above, “Tibet signed at pistol-point.”¹⁷²

Although under earlier international law, effective exercise of authority for a prolonged period of time¹⁷³ was recognized as a mode of acquiring sovereignty,¹⁷⁴ the United Nations Charter dramatically alters the legal situation:

Under classic international law, the freedom of annexation was derived from the right to wage war. In the meantime that right to wage war has been superseded by the ban on the use of force (Article 2(4), UN Charter). Thus the freedom of annexation, too, was transformed into a ban on annexation.¹⁷⁵

¹⁷² International Commission of Jurists, *The Question of Tibet and the Rule of Law*, *supra* note 46, at 96.

¹⁷³ It is not clear that sufficient time has elapsed since the PRC's invasion of Tibet to support a claim of acquisition by exercise of authority under pre-UN international law. It was observed in 1987, for example, that “even the almost 50-year period since the incorporation of the Baltic States are generally not considered sufficiently long to give a legal effect to the acts of . . . the Soviet Union with respect to those territories Even the classic writers, such as Grotius, argued that more than one hundred years was required for the establishment of a prescriptive title, while other, more recent authorities such as F. de Martens and A. Rivier required ‘immemorial possession.’” van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 183-184 (footnote omitted). As the PRC's exercise of authority over Tibet has only been even arguably effective since the invasion of 1950, the PRC would appear to have no claim of title to Tibet even under former international law.

¹⁷⁴ Heinstorfer, *supra* note 13, at 76; van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 178.

¹⁷⁵ Hinstorfer, *supra* note 13, at 76.

As a result, the overwhelming majority of States reject claims to territory based on the illegal use or threat of force as contrary to modern international law.¹⁷⁶ Because Tibet was legally and functionally independent before the PRC's invasion, the invasion cannot create a foundation for a legal claim of sovereignty:

To brand as illegal the use of force against the "territorial integrity" of a State, and yet at the same time to recognize the rape of another's territory by illegal force as being itself a root of legal title to the sovereignty over it, is surely to risk bringing the law into contempt. For it is not simply a question whether it is possible to allow a title which cannot be pleaded without incidentally exhibiting the illegality. Nor is it merely a question of the limits of the maxim *ex injuria jus non oritur*. The question is whether an international crime of the first order can itself be pleaded as titled because its perpetration has been attended with success.¹⁷⁷

Nor has the exercise of authority by the PRC been undisputed: The PRC admitted the existence of substantial popular opposition in 1959,¹⁷⁸ it has continued to the present,¹⁷⁹ and the Tibetan Government-in-Exile is the embodiment of such opposition. Tibet is rightfully an independent state, and the PRC has violated Tibet's territorial integrity.

No sufficient legal grounds exist to support the contention that after 1951 the Tibetan State ceased to exist and was legally incorporated into the PRC. The State of Tibet still exists as an independent legal entity, with a legitimate Government-in-Exile in Dharamsala, to represent it. That government and the people of Tibet, consequently, have the right to resume the exercise of sovereignty over their own territory, free from the interference of other States.

¹⁷⁶ van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 183.

¹⁷⁷ R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester 1963) at 4.

¹⁷⁸ Statement issued by the Chinese Embassy in New Delhi, 1 April 1959 (*quoted in* van Walt van Praag, *The Status of Tibet*, *supra* note 5, at 164).

¹⁷⁹ *See generally*, International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (Geneva 1997) (hereinafter "ICJ 1997") at 260-269, 289-295, 300-305, 335.

III. THE TIBETANS ARE ENTITLED TO SELF-DETERMINATION

Tibet was an independent state when the PRC invaded in 1950; therefore, the PRC has no claim of territorial integrity to assert against Tibet. Even if Tibet was not independent, however, the Tibetan people's right of self-determination recognized under international law must prevail over any claim of territorial integrity by the PRC. First, the PRC is not the legitimate government of the Tibetan people with an enforceable claim of territorial integrity. This is so because the PRC's authority did not originate in a free exercise of self-determination by the Tibetans, and the PRC has persistently violated, rather than protected, the human rights and fundamental freedoms of the Tibetan people. Second, the Tibetans' right to self-determination should be enforced as against the PRC's claim of territorial integrity because doing so will enhance international peace and security in the region and promote respect for human rights and fundamental freedoms. The Tibetan people should therefore be given a full opportunity to exercise their right of self-determination.

A. The Tibetans Are A People With The Right of Self-Determination

1. International Law Recognizes The Right Of Self-Determination

The Charter of the United Nations states that one of its Purposes is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."¹⁸⁰ That "principle" has been recognized as a right of peoples:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

¹⁸⁰ Charter of the United Nations, article 1, ¶ 2. See also article 55, which enjoins each member state to create stability and well-being "based on respect for the principle of equal rights and self-determination of peoples."

development, and every State has the duty to respect this right in accordance with the provisions of the Charter.¹⁸¹

International instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (now ratified by 136 and 135 States Parties, respectively), and the unanimously adopted Vienna Declaration on Human Rights (June 1993),¹⁸² unequivocally define self-determination as a legal right:

All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁸³

2. Independence Is Only One Manifestation Of Self-Determination

Self-determination is not synonymous with independence. On the contrary, independence is merely one of an infinite variety of potential outcomes of the exercise of self-determination:

The establishment of a sovereign and independent State, the free association with an independent State or the emergence into any

¹⁸¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 GAOR, Supp. 28, U.N. Doc A/8028, at 121 (1970) (hereinafter Declaration on Principles) (emphasis added).

¹⁸² World Conference on Human Rights: The Vienna Declaration and Programme of Action (June 1993) (hereinafter Vienna Declaration).

¹⁸³ International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”), Part 1, G.A. Res. 2200(A)(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N.

Doc. A/6316 (1966), 993 U.N.T.S. 3 (Dec. 16, 1966), entered into force Jan. 3, 1976; and International Covenant on Civil and Political Rights (hereinafter “ICCPR”), Part 2, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717, entered into force Mar. 23, 1976, common Art. 1(1); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2625 (XV) 1960 (hereinafter Declaration on Independence) ¶1; Vienna Declaration, art. 2. The PRC signed the ICESCR in 1997, but has not yet ratified it.

See also Charter of Economic Rights and Duties of States, G.A. Res. 3281 (1974); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (1965); Declaration on Social Progress and Development, G.A. Res. 2542 (1969); Declaration on the Strengthening of International Security, G.A. Res. 2734 (1970); Definition of Aggression, G.A. Res. 3314 (1974).

other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.¹⁸⁴

In balancing the Tibetans' right to self-determination against the PRC's claims to territorial integrity, it is important to know how the Tibetans would exercise their right: would they choose independence or something less?

It appears that the Tibetan people do not rule out independence. The wishes of the Tibetan people inside Tibet with respect to whether Tibet should become an independent state or remain confederated with the PRC, though with greater autonomy, cannot be formally ascertained. No mechanism exists for those people to express their wishes freely. Nonetheless, Tibetans in Tibet have used different avenues in an attempt to express a desire for independence from the PRC: "There is no pro-democracy movement in Tibet; it is a pro-independence movement, and every single political prisoner there—without exception, to our knowledge—is detained for some form of pro-independence activity."¹⁸⁵

¹⁸⁴ Declaration on Principles, *supra* note 181.

See also Brownlie, The Rights of Peoples in Modern International Law, in Crawford, ed., The Rights of Peoples (Oxford 1988) at 4: "[T]he exercise of [self-determination] involves a range of political models, including the choice of independent statehood or some form of autonomy or associated statehood."

See also Nettheim, 'Peoples' and 'Populations'—Indigenous Peoples and the Rights of Peoples, in Crawford *supra*, at 118: "Self-determination is normally thought to permit a people a range of options from absorption within another nation, at one end of the range, to full sovereign independence at the other."

See also Hannum, Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights (Philadelphia 1990) at 95: "The content of . . . self-determination varies tremendously, reflecting the diversity of situations in which indigenous peoples find themselves and the diverse character of indigenous groups themselves. Some do aspire to complete independence and statehood, while many others demand autonomy or self-government only in specific areas of competence (such as full control over land and natural resources)."

See also Martin Ennals Memorial Symposium on Self-Determination, The Saskatoon Statement on Self-Determination (Saskatoon 1993) ("Saskatoon Statement") ¶¶ 4-6: "Peoples may exercise their right to self-determination in a wide variety of forms, responding to their particular circumstances. . . . The formation and reformation of states may be one outcome of the exercise of the right to self-determination but it is not a necessary or even usual consequence of fulfillment of a people's right to self-determination."

¹⁸⁵ Sidney Jones, Executive Director of Asia Watch, Testimony Before the U.S. Senate Foreign Relations Committee (28 July 1991) at 1 (quoted in Thonden, *infra* note 186, at 1).

Some evidence of the desires of the Tibetans can also be gleaned from expressions made by the Tibetan Government-in-Exile. The Tibetan Assembly of People's Deputies is apparently unwilling to settle for anything less than complete independence, and that position appears to have substantial popular support in Tibet.¹⁸⁶ The Dalai Lama has stated, however, that although "[t]he Tibetan people must once again be free to develop culturally, intellectually, economically, and spiritually," the "future status of Tibet" is negotiable.¹⁸⁷

In 1988, the Dalai Lama made an offer to negotiate on the basis of a proposal for self-government under which the PRC would control the defense and foreign policy of Tibet (the so-called "Strasbourg Proposal").¹⁸⁸ Although negotiations between the Tibetan Government-in-Exile and the PRC have not taken place, the Dalai Lama has continued to state that he will accept "genuine self-rule" short of full independence:

With regard to a mutually-acceptable solution to the issue of Tibet, my position is very straightforward. I am not seeking independence. As I have said many times before, what I am seeking is for the Tibetan people to be given the opportunity to have genuine self-rule in order to preserve their civilisation and for the unique Tibetan culture, religion, language and way of life to grow and thrive. My main concern is to ensure the survival of the Tibetan people with their own unique Buddhist cultural heritage. For this, it is essential, as the past decades have shown clearly, that the Tibetans be able to handle all their domestic affairs and to freely determine their social, economic and cultural development.¹⁸⁹

¹⁸⁶ Tibet Information Network, Reports from Tibet: March-September 1992 (London 1992) at 16; D.T. Tenley, Tibetan Youth: 'The Future Denied to Us' in Kelly, *et al.*, eds., *supra* note 5, at 43; C. Thonden, Population Transfer Into Tibet (San Francisco 1992) at 1.

¹⁸⁷ T. Gyatso (H.H. the XIV Dalai Lama), The Strasbourg Statement: An Address to Members of the European Parliament in Kelly, *et al.*, eds., *supra* note 5, at 302 (both quotations).

¹⁸⁸ *Id.*

¹⁸⁹ Statement of His Holiness the Dalai Lama on the 39th Anniversary of Tibetan National Uprising Day, 10 March 1998.

3. The Tibetans Are A People With The Right Of Self-Determination

There is no universally accepted definition of a “people” in international law. Indeed, the wisdom of even attempting such a definition has been called into question.¹⁹⁰ A group of experts meeting under the auspices of the United Nations has identified seven objective indicia of peoplehood for purposes of self-determination, no single one of which is either necessary or sufficient to establish that a group is a people: “(a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; [and] (g) common economic life[.]”¹⁹¹ Peoplehood also necessarily includes subjective aspects which are not readily, if at all, subject to proof.¹⁹²

¹⁹⁰ See A. Cristescu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (New York 1981) ¶¶ 274-275: On the one hand, “any attempt at definition might prove dangerous to subject peoples by providing those who govern them with pretexts for denying them self-determination[.]” On the other hand, “various possibilities of interpretation and the consequent uncertainties could in many cases turn the right of peoples to self-determination into a weapon for use against the territorial integrity and political unity of States.”

See also Makinson, Rights of Peoples: Point of View of a Logician in Crawford, ed., *supra* note 184 at 74-75: “The question arises, however, whether it is possible to give some general characterization of what is to count as a ‘people’ that will serve to distinguish ‘peoples’ from ‘lesser’ kinds of collectivity for whom it is felt that the right to self-determination cannot reasonably be applied. Of course, it is always possible to do so in a vague manner, but that is hardly adequate. It appears, moreover, that there are so many variations and gradations of social bonding as to render extremely arbitrary any attempt to draw a neat dividing line marking off a privileged category, of ‘peoples’ who bear special rights, and others who do not.”

¹⁹¹ UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations (1990). It is generally accepted that no single objective factor is essential to peoplehood. See A. Cobban, The Nation State and National Self-Determination (rev. ed. 1969) at 107; International Commission of Jurists, 8 *The Review* (1972) at 42, 47 (hereinafter ICJ) Dinstein, “Self-Determination and the Middle East Conflict” in Alexander and Friedlander, eds., Self-Determination: National, Regional, and Global Dimensions (Boulder 1980). One sometimes-argued-for exception is territorial connection, on the ground that such a connection is necessary to stop “the disintegrating process of self-determination” (Cobban, *supra*; see also Brillmayer, Secession and Self-Determination: A Territorial Interpretation, 16 *Yale J. Int’l L.* (1991) at 198, which would otherwise be “almost unlimited.” R.A. Friedlander, Self-Determination: A Legal-Political Inquiry in Alexander and Friedlander, eds., *supra*, at 315.

¹⁹² It has been suggested that peoplehood “has one essential and indeed indispensable

Thus, a people combines objective characteristics describing a group's common historical, ethnic, cultural, religious or other background, with the subjective consciousness that the group has a common identity.¹⁹³

While it may be difficult to define a "people" in the abstract,¹⁹⁴ the Tibetans are without question a people by any meaningful standard:

The Tibetan people meet all the relevant tests of peoplehood. Tibetans are a distinct racial or ethnic group. Their language, Tibetan, is a Tibeto-Burmese language distinct from the Indian and Chinese languages and dialects. Tibetans are bound by their religion (Tibetan Buddhism) which is inextricably linked to the people's cultural, social and historic development. The Tibetans have a unique culture, passed

characteristic . . . : a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist." International Commission of Jurists, 8 *The Review*, *supra* note 191, at 47. According to this view, "it is the consciousness of a separate-group status which provide[s] the basis for a claim of self-determination." H.S. Johnson, Self-Determination: Western European Perspectives in Alexander and Friedlander, eds., *supra* note 191; *see also* Przetacznik, The Basic Collective Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace, 8 N.Y.L. Sch. J. of Hum. Rts. (1991) at 49, 51 ("a people or group of people that . . . considers itself separate and distinct must also have the right to determine the state in which they will live and the form of government that will be implemented").

¹⁹³ van Walt van Praag, The Status of Tibet, *supra* note 5, at 20.

¹⁹⁴ It has been argued that establishing whether a claimant group is a people is not at all necessary to resolving the group's claim of self-determination, because all the relevant objective factors involved in peoplehood must also be considered in determining whether a particular exercise of the right of self-determination accords with the fundamental values of the international community: "The question of a group's peoplehood need not be resolved because it can (indeed, it must) be assumed without affecting the outcome of the balancing analysis. The balancing analysis is concerned with the potential outcomes of alternative resolutions.

Those outcomes can be predicted on the basis of objectively demonstrable facts and patterns. Peoplehood, by contrast, is subjective perception of self-identity. The existence and strength of such a perception can only be inferred, not demonstrated. Therefore, a claimant group's peoplehood must be assumed, or the group is faced with proving the undemonstrable. . . . The assumption of a claimant group's peoplehood gives that group no advantage as against an opposing State, because the claimant group must still demonstrate that the likely outcome of recognizing its claim of self-determination is in accordance with international values. . . . In the present connection, this means that a claimant group will have to demonstrate at least some objective indicia of peoplehood in order to show that recognizing its claim of self-determination will conduce results more in accord with international values than will denying that claim." (Dulaney, *supra* note 5, at 15-17 (footnotes omitted).)

down and developed through many thousands of years of separate and distinct history as expressed in the development of Tibetan fine art, literature, architecture, dress, dance, drama, medicine and way of life. They have an identifiable territory, Tibet (referred to by most Tibetans as *Cholkhagsum*, the three regions of Tibet) geographically and geologically distinct from China.¹⁹⁵

The Permanent Tribunal of Peoples examined the Tibetans in the light of UNESCO criteria and concluded that the Tibetan people meet the criteria of a “people” and are entitled to exercise their right of self-determination.¹⁹⁶ Likewise, the Conference of International Lawyers on Issues Relating to Self-Determination and Independence for Tibet concluded that the Tibetan people satisfied the UNESCO criteria and are a “people” under international law.¹⁹⁷ In short, it is not disputed that Tibetans are a distinct people with a language, culture, religion and history separate from china.¹⁹⁸

B. The Tibetans Are Entitled To Exercise Their Right of Self-Determination Because The PRC Has Not Acted As The Legitimate Government Of The Tibetan People

1. Territorial Integrity Is A Principle Which Can Be Invoked Only By Legitimate Governments “Conducting Themselves In Compliance With The Principle Of Equal Rights And Self-Determination Of Peoples”

The principle of self-determination does not necessarily conflict with the principle of territorial integrity. The tension between territorial integrity and self-determination that appears in the Declaration on Principles and in the 1993 Vienna Declaration is also resolved by those Declarations:

¹⁹⁵ International Committee of Lawyers for Tibet, The Right of the Tibetan People to Self-Determination: A Preliminary Report (San Francisco 1991) at 26; see also Mehrotra, supra note, 83 at 80-84.

¹⁹⁶ Permanent Tribunal of Peoples, supra note 2, at 15.

¹⁹⁷ The London Statement on Tibet, supra note 134, at 146.

¹⁹⁸ Thonden, supra note 186, at 6.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples . . . bearing in mind that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle [of equal rights and self-determination of peoples] of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

* * *

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.¹⁹⁹

¹⁹⁹ Declaration on Principles, *supra* note 181 (emphasis added). The 1993 Vienna Declaration

By its very terms, the Declaration affords the right to be secure in territorial integrity only to States which conduct themselves in accordance with “the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”²⁰⁰ “Legitimacy”²⁰¹ is therefore a necessary precondition of a State’s claim of territorial integrity. This principle of governmental legitimacy reconciles the apparent conflict between territorial integrity and self-determination and expresses the recognition in international law that human rights place a limit on State authority.²⁰²

A State’s legitimacy derives from the satisfaction of its duties, and the accomplishment of its purposes. According to the Declaration on Principles, each State has the duty to: “promote . . . realization of the principle of equal rights and self-determination

also limits the claim of territorial integrity to states “conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . .” Vienna Declaration, *supra* note 182, art 2.

²⁰⁰ See also Declaration on Principles, *supra* note 181: “Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality, [and c]onvinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or of its political independence is incompatible with the purposes and principles of the Charter,” the General Assembly promulgated the Declaration on Principles.

²⁰¹ See, e.g., Bibo, The Paralysis of International Institutions and the Remedies (New York 1976) at 75; Thomas Heberer, Tibet and the Chinese Concept of Nationhood, in Kelly, *et al.*, *supra* note 5, at 50-51.

²⁰² See ICJ 1997, *supra* note 179, at 337-338; R.P. Dhokalia, Legitimacy of State Authority and of the Collective Right of Self-Determination, in Report of the Conference on The Tibetan People’s Right of Self-Determination (New Delhi 1996) (hereinafter New Delhi Conference Report) at 23-24. Cf. Emerson, Self-Determination, 65 Am.J. Int’l L. 459 (1970) at 466-467: “[T]otal non-intervention has been accepted by the United Nations as one of the highest of principles. A still higher principle, however, has been established by the United Nations which overrides the right of internal self-determination and invalidates the obligation to abstain from interference in what would otherwise be the domestic affairs of other states. This loftiest of principles is covered in the Declaration on Non-Intervention by the injunction that ‘all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.’ The Declaration on Principles imposes on States a similar duty to ‘co-operate . . . in the elimination of all forms of racial discrimination and all forms of religious intolerance [.]’”

of peoples”; “promote . . . respect for and observance of human rights and fundamental freedoms”; and “refrain from any forcible action which deprives peoples referred to above . . . of their right to self-determination and freedom and independence.”²⁰³ A State that fails to fulfill its duty to promote its people’s “human rights and fundamental freedoms” and its people’s right to self-determination, loses its legitimacy and cannot claim a right of territorial integrity as against a claim of self-determination.

A State’s legal duties follow from the purposes for which States exist. States exist for the purpose of fulfilling four fundamental tasks: 1) to protect the population of the state; 2) to promote the economic, social and cultural welfare of that population; 3) to represent the interests of that population externally, that is, internationally;²⁰⁴ and 4) to promote the spiritual welfare of the people.²⁰⁵ Where a state, or its government, does not fulfill these functions over a period of time, but instead represses or even kills the people it is supposed to protect, destroys their culture, economically exploits them, or represents other interests than those of the people, then that state or government lacks legitimacy in respect of the whole population of the state or of that section of the population which it oppresses:

If one . . . or all . . . are missing, a very serious question arises as to the legitimacy of that Government, and if it continues over a long period of time, then it can be shown that it is not just a particular regime, but it is actually the State that has over a period of time shown this lack of legitimacy, regardless of the change of leader[ship], then the whole question of the legitimacy of that State arises in relation to that particular population group. It does not mean the whole state has to cease existing, but its sovereignty claim

²⁰³ Declaration on Principles, *supra* note 181.

²⁰⁴ M.C. van Walt van Praag, in *New Delhi Conference Report*, *supra* note 202, at 227.

²⁰⁵ This last purpose is notably more central to the Tibetan people and the Tibetan State. As Professor Samdung Rinpoche has noted, the ultimate goal of the Tibetan people is a spiritual one, not a political one, though the political goal of self-determination is the means to achieve the Tibetans’ spiritual goal. See *New Delhi Conference Report*, *supra* note 202, at 230-31

over that particular group does have to be questioned. This is where democracy is concerned, as perhaps the most effective and the best expression we have of the consent of the governed, that indeed [it] is the legitimate government that represents, protects and promotes their interests.²⁰⁶

A legitimate government is one which originates in and expresses a people's exercise of self-determination. Such a government facilitates the people's free determination of their political status and pursuit of their political, civil, economic, social, cultural and spiritual development.²⁰⁷ In short, a government's claim to territorial integrity is not a claim in opposition to a people's right of self-determination, but a claim to be the authentic manifestation of the people's continuing exercise of that right:

[W]hat is the requirement of legitimacy of state authority?

Is this legitimacy a one-time requirement in the lifetime of a state authority, or whether this requirement of legitimacy continues throughout the existence of the state authority? I think that it continues throughout the lifetime of the existence of the state authority.²⁰⁸

A government that is the authentic manifestation of people's exercise of the right of self-determination distinguishes that

²⁰⁶ van Walt van Praag, New Delhi Conference Report, supra note 202, at 228.

²⁰⁷ See Final Act of the International Conference on Human Rights, Teheran (United Nations publication, Sales No. E.68.XIV.2) at 4: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." See also Declaration on the Right to Development, G.A.Res. 41/128 (1986) (quoted in Crawford, supra note 184, at 211): "All human rights and fundamental freedoms are indivisible and interdependent; equal protection of civil, political, economic, social and cultural rights."

²⁰⁸ P. Thinley, New Delhi Conference Report, supra note 202 at 240. Thus, should the government have resulted from an earlier exercise of self-determination, its legitimacy still depends upon its being an authentic manifestation of the governed people's current exercise of the right of self-determination. Self-determination is the right of peoples "freely to determine... their political status "and freely" to pursue their economic, social and cultural development." See also Declaration on Principles, supra note 181; ICESCR and ICCPR, supra note 183, common art. 1(1); Declaration on Independence, supra note 183, ¶1. To conclude that a people can exercise the right of self-determination only once does not honor that right; instead, it holds a people to have abandoned that right by its very exercise. Should the government have the support of a larger group within the governed territory, but should a smaller group seek to exercise self-determination in opposition to that government, the question becomes the government's legitimacy as the government of the smaller group. van Walt van Praag, New Delhi Conference Report, supra note 202, at 227-28.

government's territorial integrity from mere control over a piece of ground. The government's territorial integrity in turn makes concrete the self-determination which the governed people exercise.²⁰⁹

Self-determination includes the right of peoples "freely to determine their political status,"²¹⁰ which is: "[T]he freedom of the people of an entity, with respect to their own government, to participate in the choice of authority structures and institutions and to share in the values of society."²¹¹

Legitimacy in turn requires that a government represent "the whole people belonging to the territory."²¹² Under modern human rights law, therefore, a state derives its continuing legitimacy not just from its respect for the human rights of the governed but also from its representation of the governed through their expression of popular will.²¹³ This is expressed in the UDHR, which guarantees "the right to take part in the government of [one's] country, directly or through freely chosen representatives,"²¹⁴ thus requiring every government to accord "universal and equal suffrage"²¹⁵ to the population which it governs. The UDHR further states:

209 But see Bibo, supra note 201, at 75: "The principle of territorial stability cannot invalidate that of self-determination, as self-determination is the ultimate governing principle, whereas territorial stability is not so much a principle as the institutional reality of international law." Cf. id.: "We could say that compliance with the principle of self-determination is the essence, the real legitimacy of a status quo, while territorial stability stands for formal, institutionalized legitimacy."

210 Declaration on Principles, supra note 181.

211 Friedlander, supra note 191, at 314 (quoting Moore, The Control of Foreign Intervention in Internal Conflict, 9 Va. J. Int'l L. (1969) at 209, 247). See also Dhokalia, supra note 202, at 28: "The will of the people freely and fairly expressed through periodic and genuine elections provides the basis of the authority and legitimacy of all governments." See also Saskatoon Statement, supra note 7, at ¶12: "Self-determination serves at least two primary purposes: ensuring a representative, democratic and participatory framework in which people have the possibility of effective participation in political, social and economic life, and in creating the conditions necessary for a people to protect and develop its identity."

212 Declaration on Principles, supra note 181.

213 B.C. Nirmal, New Delhi Conference Report, supra note 202, at 222.

214 Universal Declaration of Human Rights (hereinafter "UDHR") art. 21(1); accord ICCPR, supra note 183, art. 25(a).

215 UDHR, supra note 214, art. 21(3); accord ICCPR, supra note 183, art. 25(b).

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections . . . and shall be held by secret vote or by equivalent free voting procedures.²¹⁶

A claim of self-determination, therefore, can prevail over a claim of territorial integrity asserted by a State that is not the legitimate representative of a people but is the subjugator or exploiter of a people. The resulting remedy may be secession. The right of self-determination includes the right of secession at least in the “special, but very important case . . . of peoples, territories and entities subjugated in violation of international law.”²¹⁷ Where a state has severely abused a people’s human rights and secession appears to be the only remedy to save a people from genocide or other grave human rights violations, or where sovereignty over the territory is in dispute, secession is the appropriate remedy.²¹⁸

We show below that the PRC is not the legitimate government of the Tibetan people. The current government in Tibet did not originate in a free exercise of self-determination by the Tibetan people, but was imposed by the PRC by means of an illegal use of force.²¹⁹ Moreover, the PRC has not respected the essential human rights and fundamental freedoms of the Tibetan people. To the contrary, the PRC has engaged in a systematic effort to destroy the Tibetans as a people.

²¹⁶ UDHR, *supra* note 214, art. 21(3); *accord* ICCPR, *supra* note 183, art. 25.

²¹⁷ Cristescu, *supra* note 190, at ¶173; *but see* Heberer, *supra* note 201, at 51: “The denial of equal participation in the exercise of national rule (but not the denial of national and cultural autonomy) can constitute a justifiable demand for self-determination.” *Cf.* International Committee of Lawyers for Tibet, *supra* note 195, at 17: “Thus, the right to self-determination does not appear to apply to peoples who have joined together voluntarily, pursuant to an act of self-determination, to form a State, where that State respects the equal rights of its constituent peoples and the human and democratic rights of the individuals that make up these principles. Similarly, the right presumably does not apply to minorities which form an integral part of States and enjoy full democratic rights and freedoms by which means they in fact exercise their right to self-determination. In this context, the exercise of equal rights and self-determination by the people in question and the observance of human rights and democratic freedoms by the State must be real, as must the voluntary nature of any form of integration or association between peoples and States.”

²¹⁸ B.C. Nirmal, *The Right of Self-Determination of the Tibetan People, Approaches and Modalities*, in *New Delhi Conference Report*, *supra* note 202, at 51.

²¹⁹ See discussion *supra* pp. 5-19.

2. The PRC Does Not Respect The Human Rights And Fundamental Freedoms Of The Tibetan People

The PRC's abuse of human rights in Tibet started with the 1950 invasion and continues to the present. The abuse spans a broad spectrum of human rights which the Tibetans are entitled to enjoy, including: suppression of religion; population transfer; denial of reproductive rights; discrimination in employment, education and housing; destruction of the environment; enforced disappearances; denial of freedom of expression; torture; and summary execution. Increasingly, the PRC has acknowledged official policies that have had the purpose and/or effect of denying Tibetans human rights in many of these areas, for example: suppression of religion, population transfer, birth control restrictions, discrimination in education, and denial of freedom of expression. The persistent denial of human rights in Tibet, then, is more than a case of mere governmental indifference to one of its minority populations. The human rights abuses in Tibet evidence a governmental policy to deprive the Tibetans of any ability to express a political identity and to eviscerate as much as possible the social, cultural and economic ties that have bound Tibetans together historically as a people.

a. The PRC unlawfully suppresses religion in Tibet

The PRC's suppression of Tibetan Buddhism is an overt attack on both the political and cultural identity of the Tibetan people. The Tibetans are among the most religious people in the world: "Buddhism has not been a mere system of belief to the Tibetans; it encompasses the entirety of our culture and civilization and constitutes the very essence of our lives."²²⁰ In short, "[o]f all the bonds which defined Tibetans as a people and as a nation, religion was undoubtedly the strongest."²²¹ Thus, the suppression of Tibetan

²²⁰ Office of Tibet New York, Executive Summary of the Tibetan Government-in-Exile's Response to the People's Republic of China's White Paper on Tibet (New York 1993)

(hereinafter Executive Summary) at 6.

²²¹ Id. International Campaign for Tibet, Forbidden Freedoms: Beijing's Control of Religion in Tibet (Washington, D.C. 1990) (hereinafter Forbidden Freedoms) at 1 (same).

Buddhism threatens the core identity of the Tibetan people.

Freedom of religion is protected in international law by article 18 of the UDHR, article 18 of the ICCPR, and under the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.²²² The right to freedom of opinion and expression, guaranteed under article 19 of the UDHR and under article 19 of the ICCPR, also protects aspects of the right to worship and teach religion freely. Finally, freedom of religion is also protected against the most extreme attacks under the Genocide Convention.²²³ The PRC's attack on Tibetan Buddhism violates all of these human rights.

In 1960, the International Commission of Jurists ("ICJ") determined "that acts of genocide had been committed in an attempt to destroy the Tibetans as a religious group"²²⁴ The ICJ found that: (a) the Chinese will not permit the practice of Buddhism in Tibet; (b) they have systematically set out to eradicate this religious belief in Tibet; (c) in pursuit of this design they have killed religious figures; and (d) they have forcibly transferred large numbers of Tibetan children to China in order to prevent them from having a religious upbringing.²²⁵

Since the ICJ's 1960 finding of acts of genocide, the suppression of religion, through some of the same means, has continued to take place. From 1960 to 1976, almost all of Tibet's 6,000 monasteries were destroyed.²²⁶ Although the PRC blames the wholesale destruction of Tibet's monasteries on a mistake of the Cultural Revolution,²²⁷ "more than half of [them] were dismantled

²²² G.A. Res. 36/55, 25 November 1981, arts. 1-3.

²²³ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III) (9 December 1948) (hereinafter Genocide Convention) entered into force 12 January 1951, art. II.

²²⁴ International Commission of Jurists, Tibet and the Chinese Peoples Republic, *supra*, at 3.

²²⁵ *Id.* at 13-14.

²²⁶ By 1976, only a handful remained. Executive Summary, *supra* note 220, at 6; Thonden, *supra* note 186, at 3.

²²⁷ U.N. Doc. E/CN.4/1988/SR.27 at 9. See also Su Jia, Freedom of Religious Belief in Tibet, About Tibet (8) (Beijing 1991) at 7: "There is no denying the fact that the religious policy in... Tibet, like in other areas of the country, was destroyed in the 'Cultural Revolution' (1966-1976). After this turbulence, the Chinese Communist Party and the Chinese government

and destroyed before China's Cultural Revolution began in 1966.”²²⁸

Since 1976, the PRC has controlled the practice of Tibetan Buddhism through political and institutional means. The PRC states that it “‘must teach Tibetan Buddhism . . . to reform all those religious tenets and practices which do not comply with the socialist society.’”²²⁹ As a result, the PRC has placed all religious institutions under the control of the Bureau of Religious Affairs.²³⁰ The Chinese Buddhist Association (CBA) and the Tibetan Buddhist Association (TBA) are advisory bodies to the RAB, whose primary objective is to reform Buddhism to match the principles of the (officially atheist) Communist Party.²³¹

The PRC prevents Tibetans from engaging in the large

have gradually corrected the error and implemented various policies, including the policy of freedom of religious belief.” See also Tibetan Buddhism in Tibet (Beijing 1992) (unpaginated): “China’s religious policy was sabotaged in Tibet, as well as in other parts of the country, during the ‘Cultural Revolution’ (1966-1976). After the ten years of turmoil, the Chinese Government corrected the mistake and began the renovation of monasteries in Tibet”

²²⁸ Thonden, supra note 186, at 2-3 (emphasis in original). See also Executive Summary, supra note 220, at 6: “Soon after their invasion of Tibet, the Chinese authorities began to undermine the traditional social system and religion of Tibet. . . . By the middle of the fifties, monasteries, temples, and cultural centers were systematically looted and destroyed in eastern Tibet. . . . Contrary to official Chinese assertions, much of Tibet’s culture and religion was destroyed between 1955 and 1961, and not during the Cultural Revolution (1966-1976) alone.” See also J. Ackerly and B. Kerr, Torture and Imprisonment in Tibet in Kelly, et al., eds., supra, at 126 n.1: “According to ‘Tibet: The Facts,’ a report by the Scientific Buddhist Association for the UN Commission on Human Rights, 80% of monasteries and temples were destroyed from 1960 to 1966, before the Cultural Revolution.”

²²⁹ Tibet Information Network, TIN News Update, 3 January 1995 (quoting The Golden Bridge to Reach the New Era). In May 1996, an article in Tibet Daily elucidated the PRC’s policy of vigilance: “‘The influence of religion on the people’s minds should be weakened.’” Tibet Information Network, TIN News Update, 1 June 1996 (quoting Tibet Daily, 13 May 1996). Thus, when Buddhist doctrines do not meet the objectives of the state, the PRC “‘must add new content to the doctrines, [and] make new explanations for the development of the cause of socialist construction.’” Ganze Prefectural Propaganda Committee, Ganze Prefecture Policy on Religious Freedom (1990) Trans. Tibet Information Network (quoted in Forbidden Freedoms, supra note 221, at 93).

²³⁰ Central Committee of the Communist Party of China, The Basic Viewpoint and Policy on the Religious Question During Our Country’s Socialist Period (1982) (quoted in Forbidden Freedoms, supra note 221, at 19).

²³¹ Id. at 22.

religious ceremonies that characterized their public life before 1950.²³² Under the PRC's view, "to undertake religious activities outside the religious site is abnormal, and must be forbidden."²³³ Moreover, "[w]hether religious teachings or ceremonies are permitted within monasteries . . . depends largely on local County and District officials."²³⁴

The PRC has also attempted to control all internal monastic functions.²³⁵ and in recent years monasteries and nunneries have

²³² Defying the Dragon, *supra* note 19, at 8 (quoting the Shining Life Daily (Beijing) of 9 May 1988); F. Ermacora and W. Benedek, Austrian Delegation of Legal Experts to China/Tibet, July 1992: Conclusions and Recommendations (Vienna/Graz 1992) ¶ 14. In accord with that policy, "[m]ost monks are prohibited from giving public teachings to large Tibetan gatherings [, and c]onducting religious services outside of designated religious sites is prohibited by Chinese law." International Committee of Lawyers for Tibet, *supra*, at 8 (footnotes omitted). See also Human Rights Advocates, *supra*, at 5: China prohibits the practice of Buddhism outside of monasteries and other places officially designated for religious services, and in Lhasa it has allowed only certain teachers to give public teachings within monasteries and nunneries, subject to the current political climate. See also Defying the Dragon, *supra* note 19, at 8 (quoting Central Committee of the Communist Party of China, The Basic Viewpoint and Policy on the Religious Question During Our Country's Socialist Period (1982)): "The Chinese government prohibits the propagation of religion outside of monasteries and other 'places designated for religious services.'"

²³³ Ganze Prefectural Propaganda Committee, *supra*, at 94. This policy prevents not only large public gatherings, but also traditional rituals in private homes. *Id.* at 71 (citing R. Bush, Religion in Communist China, at 301). This policy is carried out with varying degrees of efficacy. Some monks report that they are "free to go to peoples' homes to perform religious rites," although they are "only allowed to read texts and perform rituals," not "to explain the meaning of the text or of the rituals because such acts are considered to be 'preaching.'" Other reports indicate that "a monk could be invited to one's home to perform a puja (religious ceremony) only on religious holidays. In rural areas, where the Chinese do not maintain a strong presence, however, there do not appear to be any restrictions on the monks' abilities to perform religious ceremonies in people's homes." (*Id.* at 72 (all quotations).)

²³⁴ "Gatherings that are too large, or too enthusiastic, or which could be a focus for nationalist sentiment, run the risk of being summarily banned." Defying the Dragon, *supra* note 19, at 8. Also, even when the teachings are permitted to be given, the public may be prohibited from attending. Thus, for example, "[w]hen Kirti Rinpoche returned to Tibet from India in 1984, he requested authority to perform a certain ceremony at the Jokhang Temple in Lhasa. The authorities initially denied his request. After several months, the Chinese changed their minds and the request was granted. This was to be the first performance of this particular ceremony since 1959. However, on the day scheduled for the ceremony, the participants found that the doors to the Jokhang had been locked and the public was not permitted to attend." International Campaign for Tibet, *supra*, at 71.

²³⁵ The PRC controls all expenditures of funds by the monasteries. Ackerly, *supra*, at 135; Forbidden Freedoms, *supra* note 221, at 41-43. It should be noted that this is a direct violation of the so-called "Agreement" of 1951, Article 7, which explicitly provides: "The

been closely monitored by the military and police, including inside informers.²³⁶ The PRC has installed “Democratic Management Committees” in the monasteries, whose role is to implement the government’s religious and political policies, and serve as the eyes and ears of the security police.²³⁷

Most importantly, the PRC has interfered in the recognition of reincarnations. This conduct cuts to the very heart of Tibetan Buddhism. All of the major religious figures—the Dalai and Panchen Lamas, the head lamas of other schools, and virtually every high-ranking lama in any sect (a total of about 4000 before the invasion²³⁸)—are believed to be ongoing reincarnations of various enlightened beings.²³⁹ Although inconsistent in practice, the PRC

Central Government shall not alter the income of the monasteries.” (Quoted in Su Jia, *supra*, at 1-2.) The PRC also seeks to control the monasteries by imposing admission criteria for would-be monks and nuns. These include “love of the Communist Party,” the permission of local and regional authorities, and arbitrary quotas. *Forbidden Freedoms*, *supra* note 221, at 59. See also Human Rights Advocates, *supra*, at 6: “The Chinese government has established obstacles to admission into the clergy, at least in the larger, urban monasteries, where novices must be screened for political background and must obtain permission from the state before officially joining a monastery. Larger monasteries are generally given quotas for novices, and since 1988, it appears that all monasteries and nunneries in the TAR have been barred from officially accepting any new monks or nuns.” See also *Executive Summary*, *supra* note 220, at 6: “Admission[s] to the monasteries are controlled, [the] number of monks [is] limited and political indoctrination is undertaken in the monasteries.” See also *Defying the Dragon*, *supra* note 19, at 14 (footnote omitted): “Tibetans wishing to join larger, urban monasteries . . . have often had to bribe and cajole local officials at the Township, District and County levels to obtain approval. At the very least, admission to a major monastery involves a monastic teacher agreeing to take the applicant on as a student, and the Democratic Management Committee and local police vetting the political background of the applicant and his/her family. . . . The larger monasteries usually have quotas for the number of official monks that can be admitted each year.” See also Office of the Representative, *supra*, at 3: “The authorities have also set ceilings for the admission of new monks and nuns, and these political bodies are often involved in deciding upon individual applications.”

²³⁶ Office of the Representative of His Holiness the Dalai Lama, *Human Rights in Tibet Today* (Geneva 1992) at 3. See also International Fellowship of Reconciliation, *Tibet: A contribution to the Secretary General’s Report Following the Resolution of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (Aklmaar 1992) at 4: “Many of the monasteries near Lhasa are under constant police and military watch. It is widely thought that police spys [sic] have been brought into the monasteries.”

²³⁷ *Defying the Dragon*, *supra* note 19, at 12.

²³⁸ Avedon, *supra* note 42, at 15.

²³⁹ *Id.*; Gyatso (H.H. the XIV Dalai Lama), *Freedom in Exile*, *supra* note 42, at 2, 8, 9.

has attempted either to prohibit the recognition of reincarnations at all, or to control the process and recognitions.²⁴⁰

Most notably, in 1989 the PRC intervened in the search for the reincarnation of the Panchen Lama (the second highest religious figure in Tibetan Buddhism), who died in January 1989. The PRC stated that the search would take place only within the boundaries of the PRC and under government supervision.²⁴¹ The PRC also decided what criteria would be used in recognizing the reincarnation and reserved to itself veto power over any recognition.²⁴²

On 14 May 1995, the Dalai Lama, acting in accordance with Tibetan Buddhist procedures and tradition, officially recognized a six-year-old boy in Tibet, Gedhun Choekyi Nyima, as the Eleventh Panchen Lama.²⁴³ Two days later, the Chinese authorities launched a major campaign denouncing the Dalai Lama's right to make such a statement, insisting that only Beijing can publicly declare the final candidate.²⁴⁴ Gedhun Choekyi Nyima, the new Panchen Lama,

²⁴⁰ Thus, "[i]n 1985 it was reported that reincarnated monks recognized before 1959 will be treated as such, but no new reincarnations will be recognized. In 1988, a western delegation to Tibet was informed of an upcoming meeting at which the best method of prohibiting Tibetans from recognizing reincarnations would be discussed." *Forbidden Freedoms*, *supra* note 221, at 66 (footnotes omitted). By 1990, it appeared that the PRC "condone[d] discovering reincarnations but . . . vehemently condemn[ed] Tibetans in exile recognizing reincarnations, "under strict government control, [was] sometimes tolerated. *Defying the Dragon*, *supra* note 19, at 9. In June 1992, however, Xinhua announced that the selection of all 'living Buddhas' must be 'approved by the central government.' Tibet Information Network, *Reports from Tibet: March-September 1992* (London 1992) at 29.

²⁴¹ *Defying the Dragon*, *supra* note 19, at 9. See also *Forbidden Freedoms*, *supra* note 221, at 67: "Following the death of the Panchen Lama, Li Peng ordered that the search for his reincarnation be restricted to areas within China's borders and that it be conducted by a government-organized committee."

²⁴² International Campaign for Tibet, *The Long March: Results of a Fact Finding Mission in Tibet* (Washington DC 1991) at 24.

²⁴³ Statement of H.H. the XIV Dalai Lama, 14 May 1995, in World Tibet Network News, 14 May 1995.

²⁴⁴ Tibet Information Network, *TIN News Update*, 31 May 1995. The PRC accused Chadrel Rinpoche, the abbot of Tashilhunpo monastery (the traditional seat of the Panchen Lama), and Chairman of the PRC-installed Search Committee, of communicating with the Dalai Lama concerning the recognition of the Panchen Lama. Chadrel Rinpoche was detained on 17 May 1995 and has been held incommunicado since then. See discussion *infra* pp.87.

along with his parents, disappeared almost immediately after his recognition was announced.²⁴⁵ On 12 November 1995, the PRC announced for the first time that it would not recognize Gedhun Choekyi Nyima as the Panchen Lama.²⁴⁶ Within a few weeks, the PRC staged a ceremony in the Jokhang Temple in Lhasa and selected its own incarnation of the Panchen Lama.²⁴⁷

At the same time, the PRC openly declared that religious activity in Tibet was far too great and new efforts would be instituted to make religion subservient to “patriotism.”²⁴⁸ Monks and nuns were forced to sign statements acknowledging the PRC’s choice for the Panchen Lama and criticizing the Dalai Lama.²⁴⁹

Pictures of the Dalai Lama have now been banned in all public places, and campaigns have even been conducted to remove it from private homes.²⁵⁰ Indeed, the effort appears underway now to remove the Dalai Lama’s influence from religion, not just politics.²⁵¹

On 5 August 1996, the PRC announced another “re-education” campaign to purge the monasteries of monks and nuns with nationalist sentiments.²⁵² Monks have been asked to sign pledges of political allegiance or face ex-pulsion from their monasteries.²⁵³

²⁴⁵ *Id.* A year later, the PRC finally admitted that it was holding Gedhun Choekyi Nyima and his parents, purportedly to prevent his being kidnapped by Tibetan nationalists. Tibet Information Network, TIN News Update, 14 September 1995 (quoting the PRC’s Ambassador to the U.N., Wu Jianmin).

²⁴⁶ *Id.*

²⁴⁷ Tibet Information Network, TIN News Update, 30 November 1995.

²⁴⁸ Tibet Information Network, TIN News Update, 5 December 1995 (quoting Xinhua); Tibet Information Network, TIN News Update, 1 June 1996 (quoting Tibet Daily, 13 May 1996).

²⁴⁹ See Tibet Information Network and Human Rights Watch/Asia, Cutting off the Serpent’s Head: Tightening Control in Tibet, 1994-1995 (1996) at 62-66.

²⁵⁰ *Id.*

²⁵¹ Cutting off the Serpent’s Head, *supra* note 249, at 66-69.

²⁵² Tibet Information Network, TIN News Update, 15 August 1996.

²⁵³ *Id.* The pledge “consist[s] of five political principles: opposition to separatism, the unity of Tibet and China, recognition of the Chinese-appointed Panchen Lama as the true Panchen Lama, denial that Tibet was or should be independent, and agreement that the Dalai Lama is destroying the unity of the people.” *Id.* As translated by Tibet Information Network, the document reads, in part: “The time has arrived for patriotic education to take place in Sera Monastery by means of Comprehensive Propaganda Education. The purpose of carrying out this education session is to implement the Party’s policy on religion totally and correctly, to stress the management of religious affairs according to the law, and to initiate efforts for

Monks who have objected have either been expelled from their monasteries, or arrested.²⁵⁴

The Party Secretary of Tibet reaffirmed in 1997 that the re-education campaign is a “basic policy,” effectively criminalizing any criticism of the campaign.²⁵⁵ Authorities in Tibet have put an extraordinary amount of effort into the campaign, as evidenced by a recent report that in March 1998, Chinese troops and more than 40 government officials from Lhasa were sent to the remote Rongpo Rabten monastery to quell resistance to the re-education campaign.²⁵⁶

The efforts to repress Buddhism, moreover, have been extended outside the monasteries. In a speech in 1997, the Party Secretary of Tibet linked the view that Buddhism is an important part of Tibetan culture with “separatist” activities, virtually criminalizing the serious study and teaching of Buddhism as part of Tibetan literature and culture.²⁵⁷

The recently intensified campaign against Tibetan Buddhism, centered on the re-education campaign in the monasteries and convents but now beginning to extend outward, is a gross violation of the Tibetans’ human rights. It is also a direct and open challenge to the identity of Tibetans as a people.

the harmonious co-existence between the religious and socialist societies. It is also aimed at creating the thought of patriotism and implanting in the masses of the monks the views of the government, the political view and the legal view. The campaign is also for the purpose of educating [monks] to oppose completely any activities aimed at splitting the motherland. . . . The Comprehensive Propaganda education [Drive] is an important method in the next stage in fixing the numbers of the masses of monks in the monastery. Therefore, during the study period, time must be allocated and groups organized to do the work of fixing the numbers of the masses of the monk[s]. The good students should not only be praised but also be given consideration in advance for their names to remain among the number of monks [who will be allowed to stay]. Those with a bad attitude to the studying and those with poor results or deliberately causing obstacles to the study will be severely criticized and their right to remain among the number of monks will be struck out.” (First, second, and fourth brackets in original.) Tibet Information Network, [TIN News Update](#), 7 September 1996.

²⁵⁴ In addition, in an effort at reeducation at Ganden Monastery, a group of monks protested and several were shot and killed by police called in to back up the campaign. U.S. Department of State, [China Country Report on Human Rights Practices for 1996](#).

²⁵⁵ Tibet Information Network, [TIN News Update](#), 28 July 1997.

²⁵⁶ Tibet Information Network, [TIN News Update](#), 15 May 1998.

²⁵⁷ Tibet Information Network, [TIN News Update](#), 15 August 1997.

b. State-sanctioned population transfer violates the Tibetans' fundamental rights

Population transfer has been defined as “the movement of people as a consequence of political and/or economic processes in which the State Government or State-authorized agencies participate.”²⁵⁸ The large scale transfer of Chinese into Tibet since the Chinese military invasion in 1950 has itself resulted in widespread human rights violations against the Tibetan people. Viewed in the context of other human rights abuses, it is a complimentary part of government policies designed to supplant the Tibetan identity with that of another people.

The large-scale transfer of Chinese into Tibet violates humanitarian and human rights laws, including treaties which PRC has ratified. Article 49 of the Fourth Geneva Convention prohibits an occupying power to “deport or transfer parts of its own civilian population into the territory it occupies.”²⁵⁹ Article 49 applies to belligerent occupations and to prolonged occupations after military operations have ceased.²⁶⁰ Article 47 extends the Convention’s protections regardless of the change of status of Tibet today.²⁶¹ The Convention’s protections also make irrelevant the PRC’s claims to sovereignty over Tibet.²⁶²

²⁵⁸ A.S. Khasawneh and R. Hatano, The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers: Preliminary Report (U.N. Doc. No. E/CN.4/Sub.2/1993/17) (6 July 1993) at 6 (hereinafter Preliminary Report).

²⁵⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), ratified by China on 28 December 1956. 444 U.N.T.S. No. 973 (1957).

²⁶⁰ Preliminary Report, *supra* note 258, at 37.

²⁶¹ Article 47 provides: “Protected persons who are in occupied territory shall not be deprived, in any case or any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, or by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or the part of the occupied territory.”

²⁶² See van Walt van Praag, Population Transfer and the Survival of the Tibetan Identity (2d ed. 1988) at 25-29.

The Chinese population within Tibet (both the Chinese-designated Tibet Autonomous Region (TAR) and the Tibetan autonomous prefectures incorporated into Qinghai, Gansu, Sichuan and Yunnan provinces) has increased manifold since the Chinese invasion.²⁶³ At the time of the invasion, according to both Tibetan and PRC statistics, there were virtually no Chinese in the TAR and only a few hundred thousand in the bordering provinces.²⁶⁴ By 1982, the official census showed 1,541,000 Chinese in Tibet, including 92,000 in the TAR.²⁶⁵

Independent observations indicate that the numbers of Chinese in Tibet is continuing to grow.²⁶⁶ A recent fact-finding mission to Tibet estimated the total Chinese population in the TAR at 250,000 to 300,000. Those same observers estimated the total Chinese population in the remaining areas of Tibet at 5 to 5.5 million.²⁶⁷ Other estimates put the figures higher, at up to 7.5 million Chinese.

In the TAR, Tibetans may still be a majority overall; however, in Lhasa and other major cities, Chinese are a definite majority. Within Tibet as a whole, Tibetans are a minority overall and a clear minority in all major cities and towns.²⁶⁸

²⁶³ Population statistics for Tibet are difficult to come by both because of differences in defining what constitutes Tibet due to Chinese manipulation of administrative and provincial boundaries following the invasion and because official Chinese statistics tend to significantly undercount Chinese settlers. Observers in the late 1980's indicated as many as 7 million Chinese in all areas of Tibet, while recent estimates based on observation and official statistics are somewhat lower. Even the lower figure, however, reveal that the Chinese are now a majority within Tibet.

²⁶⁴ Tibet support Group UK, New Majority: Chinese Population Transfer into Tibet (London 1995) at 84-88.

²⁶⁵ *Id.* at 92, citing Ma Rong and Pan Naigu, Tibetan-inhabited areas: demographic changes, Beijing Review (April 4, 1988) at 21-24

²⁶⁶ For example, the official PRC census for the TAR in 1990 showed 67,000 Chinese, but a 1993 official report indicated that the number was 118,000. International Campaign for Tibet, Population Transfer and the Future of Tibet, (April 1993) (ICT 1993) at 5.

²⁶⁷ New Majority, *supra* note 264, at 158-59. The authors note that the remaining areas of the provinces are included that are outside the autonomous prefectures but that have traditionally been inhabited by Tibetans, the Chinese population would be 5 to 5.5 million, while the total Tibetan population would be approximately 4.6 million.

²⁶⁸ van Walt van Praag, *supra* note 262, at 12-13; New Majority, *supra* note 264, at 101-155.

In 1994, the Chinese government publicly acknowledged that it encourages and supports migration into Tibet.²⁶⁹ Recent statements by government leaders and in official PRC publications have acknowledged government policies and programs to encourage Chinese migration to Tibet.²⁷⁰ Most recently, the 1997 Plan for

269 International Campaign for Tibet, China Admits to Policy of Promoting Chinese Migration to Tibet, Tibetan Environment & Development News (October 1994). The Central Committee of the Communist Party's Third Work Forum on Tibet announced preferential treatment for workers migrating to Tibet to accompany 62 new economic development projects for Tibet. The government had previously denied any policy to relocate Chinese into Tibet, but other sources have acknowledged that such a policy has existed for decades. For example, Deng Xiaoping told President Jimmy Carter in 1987 the Chinese were being encouraged to move to Tibet in order "to develop its resources." Reuters, Beijing, June 30, 1987.

270 ICJ 1997, supra note 179, at 106-114. See also New Majority, supra note 264, at 52-55, 60-61, 99-100, noting the 1992 designation of Lhasa as a "special economic zone" and programs and policies adopted to accelerate economic development within Tibet. The development of Tibet (and other western regions) appears to be part of a more general effort to reduce the population strain on the eastern provinces, where 90% of China's population lives. Id. at 45-50. The PRC offers wages, pensions and other benefits to relocated workers that are far more generous than are available in eastern China (on average 87% higher). ICT 1993, supra note 266, at 8. In addition, regulations adopted in 1992 provide financial incentives—including lower taxes and land use rates—to attract Chinese entrepreneurs to Tibet. These same regulations guarantee employment to family members of relocating Chinese. 1992 Provisional Regulations of the Peoples Government of the Tibet Autonomous Region on the Encouragement of Foreign Investment in Tibet, promulgated July 14, 1992. The regulations apply mainly to Chinese businesspersons and generally are not available to Tibetans unless in a partnership with a Chinese or foreign investor.

PRC policies and programs, moreover, encourage a large "floating population" to migrate to Tibet. New Majority, supra note 264, at 45-50, 56-57 (discussing the emergence of a large "floating population" as a result of economic reforms and efforts by the Chinese leadership to direct this population to the north and west and away from the already overburdened eastern and southern provinces). The government has built housing, schools, hospitals and even shopkeepers' stall to support the Chinese migration. Id. at 107-110 (government *danweis* (communal work units), including the PLA compound in Lhasa, allowed to replace walls with shops made available to private entrepreneurs). The vast majority of new private businesses in Lhasa are Chinese. China has relaxed regulations to make it simpler to open a private enterprise in Tibet and substantial numbers of Chinese are taking advantage. Id. at 57.

The government has been building and improving major roads connecting Chinese provinces with Lhasa and other Tibetan cities, and is now working on railroad connections. New Majority, supra note 264, at 55-56. The government recently removed all checkpoints on roads leading from neighboring provinces to Tibet. Id. at 56-57; ICT 1993, supra note 266, at 6.

The government also resettles Chinese cadres and technical experts involuntarily (New Majority, supra, at 68, 119-20) and actively recruits others. Id. at 113-14, 119-20.

the Tibet Autonomous Region focuses on attracting “private entrepreneurs from outside Tibet” as a principal means to expand the economy.²⁷¹

There are also 200,000 or more soldiers in Tibet.²⁷² The government encourages families of soldiers to relocate to Tibet and offers incentives to retired soldiers to settle in Tibet permanently. Soldiers have also helped build roads, airfields, farms and factories that have drawn more civilian migration into Tibet.²⁷³ Finally, the large prison population in the autonomous prefectures in what is now Qinghai also attracts families of prisoners and prisoners who are released are often forced to remain and settle in Qinghai.²⁷⁴

The impact on Tibetans of the massive transfer of Chinese settlers and soldiers has been devastating. Tibetan farm and grasslands have been confiscated and incorporated into collectivized and communal farms.²⁷⁵ The rapid increase in settlers and soldiers led to the first famines in Tibet’s history, with the deaths of over 340,000 Tibetans.²⁷⁶ Ill-conceived efforts to boost productivity of lands suitable only for nomadic grazing or limited farming has resulted in widespread desertification.²⁷⁷

²⁷¹ Tibet Information Network, TIN News Update, 18 July 1997.

²⁷² New Majority, *supra* note 264, at 151-52 (estimating 80,000 to 100,000 in the TAR alone, with substantial numbers in other provinces); van Walt van Praag, at 9 (citing estimates in 1988 of 250,000 in the TAR and 400,000 in Tibet overall).

²⁷³ New Majority, *supra* note 264, at 88-89 (Peoples Liberation Army soldiers began building infrastructure, industry and agriculture immediately after the 1949 invasion).

²⁷⁴ *Id.* at 146-48; van Walt van Praag, *supra* note 262, at 10-11 (“Qinghai Gulag” estimated to have several million inmates, many of whom are forced to live in internal exile following release); ICT 1993, *supra* note 266, at 3, n. 3.

²⁷⁵ ICJ 1997, *supra* note 179, at 167; van Walt van Praag, *supra* note 262, at 36, 89-90 (noting that the collectivization of agriculture in eastern regions of Tibet in the 1950’s was in part responsible for the Tibetan uprising of 1956-59).

²⁷⁶ van Walt van Praag, *supra* note 262, at 6, n.14; International Committee of Lawyers for Tibet, The Relationship Between Environmental Management and Human Rights in Tibet, (July 14, 1992) at 13 (hereinafter ICLT 1992).

²⁷⁷ ICJ 1997, *supra* note 179, at 174-75; ICLT 1992, *supra* note 195, at 12-15, which contains a more detailed discussion of Chinese policy to boost short-term agricultural and animal husbandry yields in order to support the rapidly growing population, despite the obvious evidence of environmental degradation.

Economic development projects have been carried on with primarily Chinese workers, even in unskilled positions.²⁷⁸ Tibetans are not being allowed to participate in the economic development that is supposed to be benefiting them.²⁷⁹ Tibetans are also being displaced from farmlands confiscated for construction sites.²⁸⁰

Housing, schools and hospitals are being built for the inflowing Chinese population, not for Tibetans. Elsewhere, the concentration of new housing and services in the major towns and cities where they support the majority Chinese population has left these services unavailable to most Tibetans who live in rural areas.²⁸¹

Discriminatory policies and practices that accompany the population transfer extend to language and education. Primary schools now teach in both Chinese and Tibetan, abandoning any emphasis on Tibetan language.²⁸² Entrance exams and all schooling beyond primary school are conducted in Chinese.²⁸³ Most business and government is carried on in Chinese.²⁸⁴ The Chinese influx has also resulted in Chinese cadres dominating government posts. This allows Chinese to favor Chinese in housing, job and services decisions.²⁸⁵

²⁷⁸ *New Majority*, *supra* note 264, at 93-94, 113-14. The large-scale industrialization and urbanization of the Tibetan plateau has been accomplished primarily with Chinese workers, who now dominate the growing urban centres. Discrimination in education is also leading to preferential treatment in employment opportunities.

²⁷⁹ *Id.* at 120-121. Statements in the government-controlled press promote the bias against Tibetans as “backward” and inferior and hiring Chinese workers from outside Tibet reinforces the view.

²⁸⁰ *Id.* at 120.

²⁸¹ Habitat International Coalition, “Analysis of the situation regarding the rights to adequate housing in Tibet,” annexed to Note by the Secretary General submitted pursuant to Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1991/10 (hereinafter *Secretary General’s Note*), U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1992/37 (1992) at 106-08. In a recent example in Lhasa, thousands of Tibetans were removed from their homes and relocated to the outskirts of the city so that their homes could be razed to build housing for Chinese workers.

²⁸² ICJ 1997, *supra* note 179, at 135.

²⁸³ ICJ 1997, *supra* note 179, at 211.

²⁸⁴ The International Campaign for Tibet, The Long March: Results of a Fact Finding Mission in Tibet (Wash. D.C. 1991) at 17-18.

²⁸⁵ *Id.* at 11; See also *New Majority*, *supra* note 264, at 149-50 (noting that Chinese were a majority of government officials in one prefecture even though Tibetans were a majority of the population).

Perhaps the most insidious practice to accompany the Chinese migration into Tibet is the restriction on child-bearing.²⁸⁶ Chinese family planning policies have gradually been extended to all Tibetans, even though the only population pressure within Tibet has been created by the migrating Chinese.²⁸⁷

The massive population transfer into Tibet with accompanying dislocation, discrimination, overburden on the fragile environment and restrictive child-bearing practices are resulting in human rights abuses against the Tibetan people. Through intentional policies and perhaps indifferent acts, the now dominant Han population is placing enormous stress on the social, cultural and economic life of Tibetans.

c. The PRC denies Tibetan women their right to reproductive freedom

Tibet has never had a population problem and it does not have one today.²⁸⁸ Tibet stretches over 2.5 million square kilometers, roughly equivalent in size to the European Union. Fewer than 6 million Tibetans live in Tibet. Even with the transfer of 7.5 million Chinese into Tibet,²⁸⁹ Tibet is by any definition a sparsely populated country.²⁹⁰

According to Chinese law, the “one family, one child” policy covers only “nationalities” in the PRC with over ten million members.²⁹¹ Tibetans, with a population of less than six million, should be exempt from this policy. Nonetheless, stringent locally imposed restrictions are apparently permissible, as are centrally

²⁸⁶ See discussion *infra* pp. 72-75.

²⁸⁷ The Chinese government has acknowledged increasingly restrictive family planning policies for Tibetans. *Secretary General's Note*, *supra* note 281. Attachment No. 3 to *Reply of the Permanent Representative of China to the United Nations Office at Geneva*, at 90.

²⁸⁸ *Defying the Dragon*, *supra* note 19, at 39.

²⁸⁹ See discussion *supra* pp. 70-76.

²⁹⁰ International Campaign for Tibet, *Tibet Today: Overview* (1988) at 1.

²⁹¹ Tibet Information Network, *Background Briefing Paper: Survey of Birth Control Policies in Tibet* (1994) at 21 (hereinafter *TIN Briefing Paper*).

imposed restrictions that differ from the “one family, one child” policy. Local authorities are “authorized to decide their own specific population policies, according to local conditions.”²⁹²

Beginning in the mid 1980’s, local Chinese authorities began implementing family planning policies on Tibetans.²⁹³ These regulations provided for “rewards and punishment,” including fines and other economic sanctions.²⁹⁴ In 1992, for the first time, the PRC admitted to the international community that a two-child policy has been in force in towns in the TAR since 1984.²⁹⁵

Outside of the TAR in Eastern Tibet, in the areas traditionally called Amdo and Kham, compulsory birth control has been implemented in some areas since 1982.²⁹⁶ According to a recent report, since 1991 all Tibetans in Gonghe County, Qinghai Province, have been restricted to one child.²⁹⁷ The worst occurrences of forced and coerced abortions and sterilizations have been reported from this region, including “blitz” campaigns in villages to carry out abortions and sterilizations on virtually every woman of child bearing age.²⁹⁸ In fact, regulations in Gonghe County require forced

²⁹² Zhu Baoxia, Birth Rate Control Aids Minority Economies, China Daily, March 14, 1990, at A1. (quoting Minister of State Family Planning Commission Deng Delyun).

²⁹³ TAR Planned Birth Leading Group, Established Guidelines Relevant to Granting Birth Permits (1985), reprinted in Tibet Information Network, Documents on Birth Control 1 (1994) at 1-3. In 1990, according to the PRC, 3% of Tibetan women in the TAR had been sterilized. Heather Wardle, Forced Abortion and Sterilization in Tibet, Tibetan Bulletin, July-Aug. 1991, at 25; TIN Briefing Paper, supra note 291, at 5. By 1992, TAR birth control regulations encouraged late marriage, delayed births, and preferably one child. TIN Documents on Birth Control, supra, at 29.

²⁹⁴ TIN Documents on Birth Control, supra note 293, at 27.

²⁹⁵ Information Office of the State Council, Tibet: Its Ownership and Human Rights Situation (1992), reprinted in China on Its Ownership of and Human Rights in Tibet, BBC Summary of World Broadcasts, Sept. 24, 1992. The PRC also openly attempts to control the “quality” of the population through eugenics laws, which prohibit anyone with a “hereditary mental illness, mental disability or physical deformity” from having children. TIN Briefing Paper, supra note 291, at 11. As a result, under the guise of controlling population quality, Tibetans may be forcibly sterilized under eugenics laws, regardless of the number of children they already have or intend to have.

²⁹⁶ TIN Briefing Paper, supra note 291, at 10.

²⁹⁷ Id. at 11.

²⁹⁸ Blake Kerr, Tibetans under the Knife, in Kelly, et al., eds. supra note 5, at 106.

sterilizations for every woman who has had an out-of-plan child.²⁹⁹

Force and coercion are widely used by local authorities to enforce population quotas set down by higher authorities.³⁰⁰ Numerous reports document Tibetan women being subjected to abortions without their knowledge.³⁰¹ Abortions are often followed by sterilization operations, performed without the informed consent of the Tibetan woman.³⁰²

Even where “consent” is given to abortions or sterilizations, it is often under duress.³⁰³ Women face the threat of their husbands being beaten and arrested and having all of their possessions confiscated.³⁰⁴ Reports of coercion being used to compel women to undergo abortions and sterilizations are pervasive.³⁰⁵ In punishment for having a child “out of plan,” families must pay large fines, reportedly at times exceeding a family’s total yearly income.³⁰⁶ “Out of plan” children are punished for being born; the child’s name will not be registered. Consequently, the family will not receive a ration card for the additional family member. Also, the unregistered child will not be eligible for day care, for school, for medical treatment, and, later in life, possibly for any government job.³⁰⁷

299 TIN Briefing Paper, supra note 291, at 11.

300 Catriona Bass, Tibet: The Courage of Their Convictions, Amnesty, Feb-Mar 1991, at 18; Tibetan Woman Association, Tears of Silence: Tibetan Woman and Population, (1994) at 15-17, 38-49 (hereinafter Tears of Silence); Kerr, supra note 298, at 102-105; TIN Briefing Paper, supra note 291, at 13. See also Asia Watch, Evading Scrutiny: Violations of Human Rights after the Closing of Tibet (1988) at 27.

301 Asia Watch, Human Rights in Tibet (1988) at 55.

302 John F. Avedon, Tibet Today: Current Conditions and Projects (1987) at 10.

303 Steven W. Mosher, Broken Earth: The Rural Chinese (1983). See also Kerr, supra note 298, at 102-105; TIN Briefing Paper, supra note 291, at 21-25.

304 Tears of Silence, supra note 300, at 39; TIN Briefing Paper, supra note 291, at 23.

305 See Kerr, supra note 298, at 102-105; Birth of a Nation: China Proposes Eugenics Policy, Far E. Econ. Rev., Jan. 13, 1994, at 5.

306 TIN Briefing Paper, supra note 291, at 19.

307 Id. at 19-21. See also Carol Devine, Determination: Tibetan Women and the Struggle for an Independent Tibet (1993) at 71; Kerr, supra note 298, at 100.

The PRC's family planning policies as applied to Tibetans violate internationally recognized human rights. First, the practice of coercive and forced family planning violates Tibetan women's reproductive rights. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")³⁰⁸ provides for the right of couples to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Forced and coercive family planning practices also implicate the rights to liberty and security, to freedom from torture, to marry and found a family, to private and family life, to health care, to non-discrimination on the basis of sex, religion and national or ethnic origin, and to freedom of thought, conscience and religion, all guaranteed in the UDHR.³⁰⁹

The PRC's practices may also violate the Genocide Convention, which provides in part that the imposition of measures intended to prevent births of a national, ethnic, racial or religious group is genocide if these measures are imposed with the intent to destroy such a group in whole or in part.³¹⁰ The PRC's conduct in Tibet points to a systematic pattern of reducing the Tibetan population, suppressing the Tibetan culture, and relegating Tibetans to a minority in their own country through the combination of controlled population growth and the transfer of millions of Chinese settlers into Tibet.³¹¹ The factual pattern provides, at minimum, a prima facie case of an act of genocide against the Tibetan people.³¹²

³⁰⁸ Adopted and opened for signature, ratification and accession by U.N. General Assembly resolution 34/180 on 18 December 1979, entered into force on 3 September 1981. The PRC ratified CEDAW on 4 November 1980.

³⁰⁹ For a discussion of women's reproductive rights under international law, see Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. Int'l L. & Pol. (1992) at 645.

³¹⁰ *Genocide Convention*, *supra* note 223, art. II (d).

³¹¹ See discussion *supra* pp. 67-72, regarding the PRC's population transfer policies.

³¹² The PRC's practices also violate the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture as any act by a person acting in an official capacity, by which severe physical or mental pain or suffering is intentionally inflicted on a person in order to intimidate, coerce or discriminate against the person. Torture Convention, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/RES/39/46 (1984), at art.1. Forced and coerced abortions and sterilizations

d. Tibetans are subject to discrimination on the basis of their race

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) prohibits discrimination based on race or national or ethnic origin.³¹³ Article 27 also specifically prohibits a State from denying ethnic, religious or linguistic minorities the right to enjoy their own culture, religion and language. In August 1996, the United Nations Committee on the Elimination of Racial Discrimination strongly criticized the PRC for denying Tibetans the rights to practice and enjoy their culture and to receive equal treatment in education and employment. Nonetheless, the PRC continues to discriminate against Tibetans in employment, education, housing, language and reproductive rights. Moreover, as government policies cause more ethnic Chinese to migrate into Tibet,³¹⁴ discrimination against Tibetans is worsening.

Article 5(e)(i) of CERD prohibits discrimination in employment. Economic development policies in Tibet, however, are causing a huge influx of Chinese entrepreneurs and workers into Tibet. This has increased inflation and caused unemployment for Tibetans, who find that they cannot compete with ethnic Chinese for jobs controlled by ethnic Chinese.

violate the Torture Convention when they are performed by doctors who are public employees and when they cause, as indicated by many first hand reports, severe mental and physical pain and suffering. Pema Dechen, The Oppression and Resistance of Tibetan Women, in Anguish of Tibet, *supra* note 5, at 92-95; Tears of Silence, *supra* note 300, at 38-49. Also implicating the Torture Convention is the practice of relying on abortions, often late-term abortions, rather than contraception, for family planning purposes. The PRC considers contraceptives too expensive and unsafe and reliance is placed on abortions for birth control. TIN Briefing Paper, *supra* note 291, at 2, 17. TIN reports also that women who are more than 45 days pregnant are sent home from hospitals and required to return when they are no less than five months pregnant. *Id.* at 18. These late term abortions are medically unnecessary, physically dangerous and debilitating for Tibetan women. They also unnecessarily increase the psychological trauma suffered by women who are forced to carry the fetus until it is potentially viable, and then submit to an abortion.

³¹³ Adopted by U.N. General Assembly resolution 2106A (xx), December 21, 1965, entered into force on 4 January 1969, ratified by the PRC on 29 December 1981.

³¹⁴ For a discussion of population transfer, see discussion *supra* pp. 67-72.

Tibetans are also being pressed into service to help build the infrastructure (irrigation, mining, bridges and roads) to support the rapid economic development of Tibet. The Tibetans, however, are often not being paid for their work but are being pressed into service as a “contribution to the community.” Chinese workers, on the other hand, are being paid regular wages.³¹⁵ In addition, virtually all of the skilled jobs are held by Chinese, while Tibetans perform most of the manual labor.³¹⁶

The PRC discriminates against Tibetans in education in a variety of ways. Chinese students often receive better facilities and teachers.³¹⁷ The government has built new schools mainly in the cities and county headquarters towns.³¹⁸ These schools, with comparatively better facilities, serve the predominately Chinese urban population. Fees imposed on children to attend school substantially restrict the number of Tibetans who can attend, particularly in rural areas.³¹⁹ Tibetan children find it difficult to advance to secondary and higher level schools because of Chinese language requirements and comparatively poorer education.³²⁰ The numbers of Tibetan children in middle school and higher grows disproportionately smaller compared to ethnic Chinese children as a result of the discriminatory treatment.³²¹

Chinese directors of the University of Tibet determined that the History of Tibet course would be taught in Chinese, even though many of the students and teachers are Tibetan and the course is part of the Tibetan Language Department.³²² The University, founded ostensibly to maintain and develop Tibetan language and culture,

³¹⁵ Cutting off the Serpent's Head, *supra* note 249, at 107-114.

³¹⁶ *Id.* at 113-114.

³¹⁷ ICJ 1997, *supra* note 179, at 211-12.

³¹⁸ *Id.* at 208-09.

³¹⁹ *Id.* at 208.

³²⁰ *Id.* at 211-12.

³²¹ *Id.* at 212-13.

³²² *Id.* at 135.

requires students to pass an entrance examination in Chinese and English, not Tibetan.³²³

Government meetings and judicial proceedings are now conducted primarily in Chinese.³²⁴ This is so despite official government regulations that were intended to promote the use of Tibetan in such fora.³²⁵

These discriminatory policies and practices are preventing Tibetans from fully participating in the economic life of Tibet. The direct assault on the Tibetan language, moreover, threatens one of the key elements of the Tibetan identity.

e. The PRC's exploitation of Tibet's natural resources and abuse of the environment violate the Tibetans' human rights

The ICESCR and the ICCPR confer upon all peoples the right to “freely pursue their economic, social and cultural development” and to “for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”³²⁶ In its 1991 submission to the Commission on Human Rights, the PRC listed “various autonomous rights involving politics, economy, culture and all other aspects of social development” guaranteed to the Tibet Autonomous Region, including “the right to independently protect, exploit, and use local natural resources according to law.”³²⁷

Despite these acknowledgments of the Tibetans' rights, the PRC continues to abuse the Tibetan environment in two broad categories: its removal of Tibet's natural resources for use elsewhere in China, and the enormous resource demands created by the

³²³ *Id.* at 211.

³²⁴ *Id.* at 131.

³²⁵ *Id.* at 129-30.

³²⁶ ICESCR, *supra* note 183, at Part. 1, ¶¶ 1 and 2; ICCPR, *supra* note 183, at Part I, art. 1, ¶¶ 1 and 2.

³²⁷ Secretary General's Note, *supra* note 281, at 15, 16.

Chinese settlers who have participated in the government's policy of population transfer to Tibet. This abuse violates a number of internationally recognized human rights.

The Chinese word for Tibet, Xizang, means "Western Treasure House"³²⁸ or "Western Storehouse."³²⁹ The PRC has been exploiting Tibet's natural resources while at the same time directing a heavy flow of consumer goods and other subsidies into Tibet, which benefit primarily the Chinese settlers.³³⁰

The 1997 Plan for Tibet in fact describes two of the five "pillars" of Tibet's economy as forestry and mining.³³¹ China has logged Tibet's forests at an ever-increasing pace. The Chinese government asserts ownership over the forested land and does not pay the Tibetans for the value of the timber extracted.³³² Many lumber jobs go to Chinese settlers and some felling is done without compensation by prison labor.³³³ The great majority of the timber is sent out of Tibet.³³⁴

The lumbering is proceeding at a rate far faster than the ecosystem can support and reforestation efforts have been

328 Galen Rowell, The Agony of Tibet, Greenpeace, March/April 1990, at 6 reprinted in Essential Environmental Materials on Tibet (International Campaign for Tibet ed., 2d ed. 1991) (hereinafter EEMT).

329 Clair Longrigg and Bradley Rowe, International Campaign for Tibet, Deforestation in Western China and Tibet, in EEMT, supra note 328, at 18.

330 The former Tibetan areas in western Sichuan province and the Tibet Autonomous Region comprise China's second and third largest stores of forest biomass, respectively. International Campaign for Tibet, supra note 328, at 25 (citing Vaclav Smil, The Bad Earth (1984) at 13).

331 Tibet Information Network, TIN News Update, 18 July 1997.

332 Defying the Dragon, supra note 19, at 89. The Chinese constitution "states that resources in autonomous minority areas 'belong' to the local government, and thus that central government use is supposed to be accompanied by ongoing financial contributions," although local administrators are not always aware of this policy. Ann Forbes and Carole McGranahan, Developing Tibet? A Survey of International Development Projects (1992) at 8-9.

333 Deforestation in Tibet Worth \$54 Billion to Peking, Tibetan Review, July 1987, reprinted in EEMT, supra note 328.

334 At least 90% of the Tibet Autonomous Region's timber is sent to other regions of China. Golmu City Becomes a Hub Linking Tibet, Xinhua General Overseas News Service, Nov. 4, 1991.

inconsequential.³³⁵ No effort is made to log selectively.³³⁶ As a result, the PRC is also destroying the capacity of the land to support forests in violation of the right of the Tibetan people to self-determined, sustainable development.³³⁷

Tibet also contains very rich mineral resources.³³⁸ Tibet has the world's largest deposits of uranium and borax, half the world's supply of lithium, the second largest copper deposits in Asia, and the largest supplies of iron and chromite in China.³³⁹ It also has more than 40% of China's present supply of bauxite, gold, and silver, and extensive reserves of oil, coal, tin and zinc.³⁴⁰

In traditional Tibetan culture, religious and social injunctions limited mining to a very few locations;³⁴¹ yet, the PRC is exploiting Tibet's mineral resources with no demonstrable concern for the Tibetans' wishes in violation of their right to self-determined development.³⁴² As with timber, the minerals extracted generally do

³³⁵ *Id.*

³³⁶ Dong, Zhiyong, Present Situation of Forest Administration in Duin-West Region of China and its Role in River Basin management, Proceedings of the International Workshop on Watershed Management, October 1995, reprinted in *EEMT*, *supra* note 328, at 12; Robbie Barnett Notes on Environmental Crisis in Tibet, in *EEMT*, *supra* note 328, at 3.

³³⁷ ICJ 1997, *supra* note 179, at 182-86; As reported in the August-September 1990 issue of the Tibetan Bulletin: "In Ngapa in eastern Tibet (called Aba by Chinese), the deforestation is a staggering 68%. Palgon, a local environmentalist, started a campaign to stop this menace. He was imprisoned for two and [a] half years."

³³⁸ Chinese government surveys have so far determined that Qinghai province (in Tibet's Amdo region) contains 119 kinds of minerals, constituting 63% of the total varieties of minerals claimed by the Chinese government, which has now formed 409 mining zones in the Qinghai province. Qinghai Develops Mineral Resources, *Xinhua*, Jan. 10, 1992.

³³⁹ Tenzin Phuntsok Atisha, A Profile of Tibet's Devastated Ecology, *Tibetan Bulletin*, *supra* note 338, at 10, citing Tibet: A General Survey (Peking 1988).

³⁴⁰ Department of Information and International Relation, Central Tibetan Administration of His Holiness the XIV Dalai Lama, Tibet's Environmental and Development Issues 1972 (1992) at 26 (hereinafter *TEDI*) (Ching Wang Xiao Quiang and Bai Nanfeng, The Poverty of Plenty (1991) (hereinafter *Wang and Bai*)).

³⁴¹ *Id.* at 25.

³⁴² ICJ 1997, *supra* note 179, at 186-188.

not remain in or enrich Tibet; rather, the minerals are shipped out to China.³⁴³

The impacts on the Tibetan landscape from absorbing Chinese settlers have been severe, culturally and environmentally. The terrain is fragile due to its very high altitude and its human carrying capacity is low, but traditional Tibetan culture had adapted to the fragile ecosystem. Chinese settlers, on the other hand, overtax the ecosystem and bring with them much greater demands for consumer goods, electrical energy, and different foodstuffs than are consumed by Tibetans.³⁴⁴

Grass and rangeland is Tibet's most extensive land resource, comprising roughly 70% of its area.³⁴⁵ By contrast, only 2% of the

³⁴³ Golmu City Becomes a Hub Linking Tibet, *supra* note 334; China to Step Up Mineral Prospecting, Xinhua, Feb. 10, 1992. Xinhua reports that the output of gold from Qinghai province in 1991 increased by 73% over the previous year's output, "turning over to the state total profits and taxes of 500,000 yuan" Qinghai Province Sets Record in Gold Production, Xinhua, Feb. 4, 1992. The government's unwillingness to heed Tibetan religious views with regard to mining has had one of its most culturally offensive impacts in the village of Riwoche, in Kham. The hill behind the Trachen-Ma Temple in Riwoche is considered particularly sacred by Tibetan Buddhists. When the Chinese determined that the hill was rich in uranium, miners were brought in. Tibet's leaders protested unsuccessfully to Beijing. The mining was considered a sufficiently serious matter that, in early 1988, Tibetans rioted, were taken away for interrogation by the Chinese, and did not return. John Ackerly, Mining Tibet's Sacred Sites, Greenpeace Magazine, March/April, 1990, at 9, *reprinted in* EEMT, *supra* note 328. Furthermore, while information on mining practices in Tibet is limited, 80% of mines in China have been deemed to be environmentally unsound and it seems fair to assume that management of tailings and contaminated runoff is likely to be at least as poor in Tibet. Poorly managed mines can pollute watersheds for decades after they are closed and uranium mine tailings can poison residents with radioactivity. *Id.* at 26.

³⁴⁴ When Chinese authors have commented on Tibetan simplicity, it is in the context of the difficulties such self-sufficiency poses for the establishment of a modern, consumerist economy. One source noted:

Where the Tibetans eat neither poultry nor fish (and so, naturally do not raise them) and even have no use for oil, salt, vinegar and soy sauce, it is difficult to imagine how they might engage in exchange and exactly what they might exchange [They] have no great desires or demands, nor do they possess the urge to make money or exchange goods.

Wang and Bai, *supra* note 340, *quoted in* John Ackerly, Development for Whom?, Human Rights Tribune, January 1992, at 5. The same authors conclude that the "existing state of self-sufficiency" must be transformed to generate "non-traditional techniques of exploitation." Wang & Bai, *supra* note 340.

³⁴⁵ TEDI, *supra* note 340, at 53.

land is suited to farming.³⁴⁶ Now, the fertility of their land and its long-term carrying capacity are diminishing due to the pressures and governmental policies connected with the population transfer of Chinese settlers into Tibet.³⁴⁷ Farmers are required to grow new varieties of wheat instead of barley and other grain strains adapted by long usage to the high, dry climate, and are required to use large amounts of fertilizer and pesticides, even though farmers complain that the chemicals are poisoning the land and crops.³⁴⁸ The heavy and inappropriate use of chemicals in China has been directly associated with a severe loss of soil fertility by Chinese scholars.³⁴⁹

Herders are forced out of their former lower, winter pasturage by expanded agriculture and by expropriation of lands for mining and military uses.³⁵⁰ The government has issued directives to nomads regarding the numbers and types of animals to be raised³⁵¹ and fencing and access to pastureland.³⁵²

Despite claims by Tibetans and some Chinese scientists that the government's population transfer policies cannot justify the environmental degradation in Tibet, the Agricultural Minister, Liu Zhongyi, acknowledged that environmental damage has been severe but insisted that population transfer must continue.³⁵³ He "asserted

³⁴⁶ *Id.* at 55.

³⁴⁷ See generally ICJ 1997, *supra* note 179, at 174-182.

³⁴⁸ TEDI, *supra* note 340, at 56; *Poisoning the Plateau: The Fertilizer Scandal in Tibet*, Tibetan Bulletin, November-December, 1991.

³⁴⁹ See, e.g., He, Bochuan, *China on the Edge: The Crisis of Ecology and Development* (1991) at 101.

³⁵⁰ See, e.g., *Declaration of Suzanne S. La Pierre*, June 23, 1992 (Ms. La Pierre is an attorney and the Research and Policy Director of the Institute for Asian Democracy in Washington D.C.; her declaration reports the contents of an interview she conducted in Dharamsala, India, with a Tibetan refugee who had been a nomad responsible for disseminating the Chinese government's policy directives to his district until he left Tibet in 1990); TEDI, *supra* note 340, at 54.

³⁵¹ TEDI, *supra* note 340, at 54 (describing the forcing of nomads to raise more animals than the range can support, in order to supply Chinese slaughterhouses with meat for export); *Declaration of Suzanne S. La Pierre*, *supra* note 350.

³⁵² TEDI, *supra* note 340, at 54.

³⁵³ *Chinese Agricultural Chief Defends Land Exploitation in Tibet*, Environmental Update (International Campaign for Tibet, Washington D.C.) April 1992, *citing* a UPI article dated Mar. 26, 1992.

that bettering the lives of China's peasants outweighs concerns over environmental degradation in remote Qinghai province."³⁵⁴

A prime example of the disregard the PRC has shown for Tibetan culture is the choice of Yamdrok Tso to be the site of a major hydropower facility. The third largest lake in Tibet, Yamdrok Tso is regarded by Tibetans as one of their most sacred lakes.³⁵⁵ The hydroelectric plan for Yamdrok Tso was approved by China in 1985 over the Tibetans' strenuous opposition, including that of the Tenth Panchen Lama.³⁵⁶

Tibetans oppose the project because it desecrates the lake. It would benefit primarily residents of Lhasa, the majority of whom are Chinese, and the settlers in the neighboring agricultural valleys.³⁵⁷ It would also scar the lake, expose residents and wildlife to hazardous levels of dust, create drier weather patterns, and reduce the fish stock in the lake.³⁵⁸ Work on the project continues.

Tibet's fragile environment and resources are being exploited on a colonial model. Tibetans as a result face the long-term possibility of destruction of the land that has supported them as a people for thousands of years.

f. The PRC has violated the Tibetans' right to housing

Housing provides safety, dignity and privacy. It is the center from which people develop social relationships and a sense of community. The form and layout of housing are designed to serve the unique

³⁵⁴ *Id.*

³⁵⁵ International Campaign for Tibet, Chinese Officially Begin Construction of Controversial Power Plant, July 1, 1991 (hereinafter ICT, July 1, 1991); Construction of Power Station Restarted Amid Protests, Tibetan Bulletin, *supra* note 337.

³⁵⁶ Yamzhog Yumco Lake Hydropower Station to Benefit Local People, Xinhua, Apr. 22, 1990. In 1985, members of the Tibetan Autonomous Region delegation to the National People's Congress in Beijing formally petitioned the government to cancel the project. Widespread Opposition to Yamdrok Tso Hydroelectric Station Reported Among Tibetan Cadres, Dec. 10, 1991.

³⁵⁷ *Id.*; TEDI, *supra* note 340, at 45.

³⁵⁸ China, Tibet Tangle Over Dam Project, IPS, October 17, 1996.

cultural needs of each society. In Tibet, the home also serves as the place of daily religious practice. Destruction of individual Tibetan housing therefore threatens an important part of the fabric of Tibetan society.³⁵⁹

The PRC's housing policies and practices are in violation of its international obligations under CEDAW, under CERD and under the Convention on the Rights of the Child (Child Convention).³⁶⁰ Article 14(2)(h) of CEDAW and Article 27 of the Child Convention specifically require states to ensure the right for women and children to have adequate housing. In addition, Article 55 of the Fourth Geneva Convention prohibits destruction of real and personal property of the occupied people, except where absolutely necessary for military operations.³⁶¹ China's destruction and looting of Tibet's monasteries and its continuing demolition of houses is contrary to its obligations under this Convention.

In the four decades of Tibet's occupation, the PRC has expropriated Tibetan homes, looted their property, and carried out large-scale demolitions of traditional urban and rural settlements.³⁶² For instance, the PRC's implementation of the 1980 Lhasa Development Plan has resulted in the rapid and widespread destruction of Tibetan structures in Lhasa. Entire sections of Lhasa have been obliterated by bulldozers.³⁶³ The PRC has replaced most Tibetan structures in Lhasa and elsewhere with buildings which conform to modern Chinese architectural styles.³⁶⁴ The rapid pace of construction has helped double Lhasa's size since 1989 to meet

³⁵⁹ Scott Leckie, Destruction by Design: Housing Rights Violations in Tibet (Netherlands 1994) at 77, 115, 124.

³⁶⁰ CEDAW, supra note 308; CERD, supra note 313; Convention on the Rights of the Child, adopted by UN General Assembly resolution 44/25, 20 November 1989, entered into force September 2, 1990, ratified by China March 2, 1992.

³⁶¹ Fourth Geneva Convention, supra note 259, art. 55.

³⁶² Hugh E. Richardson, Tibet & Its History (1984) at 201; Avedon, In Exile, supra note 42, at 226; See also Leckie, supra note 359, at 65, 93-114.

³⁶³ See Leckie, supra note 359, at 101-108.

³⁶⁴ China News Analysis No. 1432, Housing Reform: What's New? (April 1, 1991). See also Leckie, supra note 359, at 106.

the housing needs of immigrating Chinese settlers. As a result, the historic Tibetan capital has been reduced to the “Tibetan quarter,” which comprises only 2% of Lhasa today.³⁶⁵

Forced evictions and demolitions also take place in Tibet’s rural areas where approximately 90 percent of the Tibetan population lives. In 1993, for example, a dam construction project resulted in the displacement of 6000 Tibetans in northeastern Tibet.³⁶⁶

The PRC, before and during the Cultural Revolution, destroyed an estimated 6000 monasteries throughout Tibet, depriving Tibetans of their most valued cultural and spiritual heritage.³⁶⁷ Rebuilding of these monasteries has begun but reconstruction of monasteries requires Chinese permission. Some Tibetans have been incarcerated for rebuilding their monasteries, even after permission was granted.³⁶⁸

Tibetans also suffer from housing discrimination. Throughout Tibet, Chinese settlers tend to be allocated more expansive housing, usually with running water, electricity and sanitary facilities, while Tibetan housing is more crowded, is often in a deteriorated state and is much less likely to be equipped with such amenities.³⁶⁹ Virtually all of the PRC’s housing subsidies are spent in urban areas, even though 9 out of 10 Tibetans live in rural communities.³⁷⁰ With 83% of the China’s state housing investments devoted to state-owned work units, few funds are available to construct “Tibetan-style” housing or to renovate traditional Tibetan houses. Since most Tibetans do not work in Government work units, they are precluded from benefiting from these investments in newly-

³⁶⁵ Tibet Daily, 27 February, 1991; Tibet Information Network, TIN Housing Supplement 9th November: Reconstruction of the Old City of Lhasa (London, 1990) at 2. See also Leckie, supra note 359, at 87 and 101.

³⁶⁶ Leckie supra note 359, at 145.

³⁶⁷ Kelly, et al., eds., supra note 5, at xii.

³⁶⁸ International Campaign for Tibet, Beijing’s Control of Religion in Tibet (Washington D.C. 1990) at 34-37.

³⁶⁹ Asia Watch, Human Rights in Tibet (Washington, D.C. 1988) at 46.

³⁷⁰ Department of Statistics of TAR, Economic and Social Statistics Yearbook of Tibet 1989 (Beijing 1989); Robbie Barnett, Chinese Development Policy in Tibet: Notes and Comments (London 1989). See also Leckie supra note 359, at 78.

built housing.³⁷¹

Tibetans today live in overcrowded, inadequately insulated housing, lacking facilities. A marginalized minority in their own land, they are deprived of participation in housing decisions and face discrimination.

g. Tibetans are subject to enforced and involuntary disappearances

In addition, to the above-described efforts to undermine the fabric of Tibetan, economic, social and cultural identity, the PRC openly, officially and violently suppresses all political dissent in Tibet. The PRC's abusive treatment of dissidents and political detainees has been well documented.

The “disappeared” are people who have been taken into custody by agents of the state, yet whose whereabouts and fate are concealed, and whose custody is denied.³⁷² In Tibet, the disappearance of persons is a routine occurrence. In numerous cases, Tibetans have been arrested at (or taken from) home for political reasons without warrant and taken into police custody without the family of the detained person being informed of his or her whereabouts.

Disappearance encompasses a number of human rights standards regarding arbitrary arrest and detention, denial of due process and, often, ill-treatment and torture. Rule No. 37 of the United Nation's Standard Minimum Rules for the Treatment of Prisoners states:

Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.³⁷³

³⁷¹ U.S. State Department, China in Human Rights Country Report (1990) at 8. See also Leckie, *supra* note 359, at 75.

³⁷² Amnesty International, 14 Point Program for the Prevention of Disappearances (1993).

³⁷³ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the ECOSOC resolution of 31 July 1957 and 13 May 1977.

Disappearance is not, however, just a combination of other human rights abuses. It is set apart by the characteristic of completely cutting a person off from the outside world and its protective mechanisms. Not only are the loved ones of the person subjected to the uncertainty of not knowing the whereabouts of the individual, or even whether the person is alive, but the individual also suffers isolation and helplessness. The State, by simply denying any knowledge of the person, can act with impunity.

The PRC's legal system has contributed to the conditions in which disappearances are able to occur in Tibet by allowing for prolonged detention and administrative detention without trial. Despite the conclusion by the United Nations Working Group on Disappearances that "States are under an obligation to take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance,"³⁷⁴ the PRC has remained largely unwilling to respond even in the few cases where disappearances have been exposed.

Eight year-old Gendun Choekyi Nyima, the Eleventh Panchen Lama, has been missing since May 4, 1995.³⁷⁵ The UN Committee on the Rights of the Child has requested that China allow a UN representative to visit the family and provide reassurances.³⁷⁶ So far there has been no public response to the request and the PRC has still not revealed his or his parent's whereabouts.³⁷⁷

Chadrel Rinpoche, head of the PRC-appointed Search Committee for the reincarnation of the Panchen Lama, disappeared on 17 May 1995. The PRC refused for two years to acknowledge his whereabouts.³⁷⁸ The PRC finally acknowledged in May 1997 that Chadrel Rinpoche had been arrested and was sentenced to six years in prison.³⁷⁹

³⁷⁴ UN Doc. No. E/CN.4/1993/25, ¶ 74.

³⁷⁵ UN Doc. No. E/CN.4/1996/38, ¶ 134.

³⁷⁶ Tibet Information Network, TIN News Update, 1 June 1996.

³⁷⁷ UN Doc. No. E/CN.4/1998/43, ¶ 134.

³⁷⁸ China Sentences Head of Panchen Lama Search Team to Six Years, Agence France Presse, 7 May 1997

³⁷⁹ Id.

Dhamchoe Gyatso (27), Jigme Tendar (29), Dhamchoe Kalden (31) and Phuntsog (25) of “Nga-rig Kye-tsel-Ling” school (English translation: Flourishing Garden of Five Knowledges) at Kumbum Monastery in Amdo have been accused of publishing a literary magazine which has now been labeled as “counter-revolutionary” and banned. The monks disappeared after their arrest in March 1996 (along with 21 other monks who were later released) and their whereabouts remain unknown.³⁸⁰ Jangchub Gyaltzen (31), a tailor at Sera Monastery was arrested in April-May 1995; Lungtok (21), a monk of Rongbo Monastery in Amdo was arrested in July 1995; Lobsang Namgyal, a former monk of Nechung Monastery, was arrested in February 1995 and Ngawang Thonglam, a former monk of Ganden Monastery, was arrested in February 1995. All arrests were for political reasons and the whereabouts of these political prisoners remain unknown.³⁸¹

In October 1996, over 15 months after Ngawang Choephel was taken into detention, the PRC finally admitted that he was being held. Today he is serving an 18-year prison sentence.³⁸²

Disappearance, therefore, remains a frightening and still unchecked threat to Tibetans. It violates international law and is intended to chill any effort by Tibetans to assert their political will.

h. Tibetans are subject to arbitrary arrest and detention

Today, hundreds of Tibetans are in prison for peacefully exercising their rights to speak freely and to hold opinions, including speaking or demonstrating in support of the Tibetans’ right to self-determination or in support of the Dalai Lama, printing or distributing leaflets or posters, or speaking to foreigners. Despite international condemnation, the PRC openly continues to deny Tibetans’ the freedom to express and hold opinions.

³⁸⁰ Tibetan Government-in-Exile, Disappearances in 1996 Human Rights Report (Dharamsala 1997).

³⁸¹ Id.

³⁸² Ngawang Choephel was sentenced on 26 December 1996 to 18 years for engaging in “espionage activities.” Tibet Information Network, TIN News Update, 27 December 1996.

Article 19 of the UDHR establishes freedom of opinion and expression as a fundamental human right. Article 20 establishes the right to freedom of peaceful assembly. Article 35 of China's Constitution also guarantees freedom of expression, publication, demonstration and assembly.³⁸³

The PRC's denial of freedom of speech and opinion in Tibet has existed since 1949. Most recently, it has intensified since 1987 when Tibetans began publicly demonstrating against the Chinese occupation. In 1991, more than 100 Tibetans were known to be in prison for exercising their rights to freedom of expression and opinion.³⁸⁴ In the year following the Sub-Commission's resolution, arrests and torture of peaceful demonstrators increased rather than decreased.³⁸⁵ In 1993, for example there were almost 300 documented arrests of Tibetans for expressing or holding dissident opinions.³⁸⁶

The PRC reported that they arrested twice as many Tibetans in 1994 as in 1993 for "counterrevolutionary" activities. Monks and nuns accounted for 87% of those arrested. By the end of 1994, there were at least 628 Tibetans in prison because of their political beliefs,

³⁸³ Art. 35 1982 Constitution.

³⁸⁴ Amnesty International, People's Republic of China: Amnesty International's Concerns in Tibet (AI Index: ASA 17/71/91, December 1991) at 2. In August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the United Nations Commission on Human Rights, passed Resolution 1991/10 (E/CN.4/Sub.2/1991/L.19), noting its concern at continued reports of violations of Tibetans' fundamental rights and requesting the Secretary General to report to the Commission on Human Rights on the situation in Tibet.

³⁸⁵ Cutting off the Serpent's Head, *supra* note 249, at 122 (statistics showing a doubling of political arrests from 1991 to 1992). For example, five nuns from Michungri nunnery and a monk from Sera Monastery were arrested for participating in a demonstration in Lhasa on February 3, 1992. Two of the nuns, Phuntsog Yangkyi, age 20, and Sherab Ngawang, age 15, died as a result of beatings and lack of medical care while in prison. *Id.* at 148

³⁸⁶ Asia Watch, Detained in China and Tibet (New York 1994) at xi. The authors observed that of 250 documented political arrests in China in 1993, "[a]lmost eighty percent of these cases occurred in Tibet, where a continuing Chinese government campaign of repression against peaceful pro-independence activities by Buddhist monks and nuns sharply intensified during the year." Updated information revealed almost 300 political arrests in Tibet in 1993. Cutting off the Serpent's Head, *supra* note 249, at 122. For example, in June 1993, fourteen Buddhist nuns from the Gari nunnery were arrested: two (Gyaltsen Tsultrim and Ngawang

including 182 women and 45 children.³⁸⁷ This is a six-fold increase over the number of political prisoners reported in 1991. Among documented cases since 1989 are 71 Tibetan children under the age of 18 who were detained for peacefully expressing their opinions.³⁸⁸

In October 1994, the UN Working Group on Arbitrary Detentions ruled that the PRC had violated the rights to freedom of expression and opinion of 39 Tibetans, mostly monks and nuns, “in contravention of Articles 19 and 20 of the Universal Declaration of Human Rights. . . . The right of the person concerned to freedom of opinion and expression has not been respected.”³⁸⁹ The Working Group made the same ruling as to 18 additional Tibetan prisoners in 1995.³⁹⁰

Yangkyi) while attempting to lead a demonstration on the Barkhor in Lhasa, and twelve more, apparently for planning a demonstration (Gyaltzen Kelsang, Ngawang Keldron, Ngawang Dedrol, Ngawang Chendrol, Gyaltzen Sangmo, Rinchen Drolma, Phuntsog Choekyi, Gyaltzen Kunga, Ngawang Chime, Ngawang Choekyi, Ngawang Pemo, and Gyaltzen Pelsang). These nuns were between 13 and 25 years old. Gyaltzen Pelsang, the youngest, was under the age of criminal responsibility in China at the time of her arrest but nevertheless was held for a year and a half without trial or sentence before being released in February 1995. One nun, Gyaltzen Kelsang, died on February 20, 1995, as a result of beatings and maltreatment while in prison. She had been released only shortly before her death. *Id.* at 147.

Article 19 of the UDHR also protects the right to “receive and impart information . . . regardless of frontiers.” See *supra* note 214. Nonetheless, in May 1993, Gendun Rinchen was arrested for passing information to a foreign fact-finding delegation. He was later released, but another Tibetan who was arrested in May 1993 for passing information to foreigners, Lobsang Yonten, age 65, died in October 1994 after his release from prison as a result of torture and mistreatment while in prison. Yulo Dawa Tsering, age 67, was arrested in 1987 for speaking to two Italian tourists and was released after serving 7 years. *Cutting off the Serpent’s Head*, *supra* note 249, at 147.

A Tibetan nun, Phuntsok Nyidron, is currently the longest serving known female political prisoner in Tibet. She has been in prison since October 14, 1989, when she peacefully demonstrated against the Chinese occupation of Tibet. Her nine-year sentence was increased by 8 years in 1993 when she and other nuns sang pro-independence songs in Draphchi prison.

³⁸⁷ *Amnesty International’s Concerns*, *supra* note 384.

³⁸⁸ Among these are Ngawang Sangdrol, age 15, who was sentenced to three years in prison for taking part in a demonstration in 1992. Her sentence was increased to 9 years for singing songs in prison. In December 1993, six schoolchildren, ages 13 to 17, were arrested in Lhasa for singing nationalist songs. Tibet Information Network, *Civil Rights of Children in Tibet* (London 1995).

³⁸⁹ U.N. Doc. No. E/CN.4/1995/Add.1

³⁹⁰ U.N. Doc. No. E/CN.4/1997/4/Add.1.

In 1994, China formally outlawed even the display of photographs of the Dalai Lama.³⁹¹ In November 1995, religious leaders in Tibet were ordered to prepare statements criticizing the Dalai Lama and Chadrel Rinpoche and that “reeducation” campaign has intensified and continues.³⁹²

Arbitrary arrest and detention of Tibetans culminated in 1996 with the sentencing of Ngawang Choephel, a 34 year-old Tibetan musicologist, to 18 years in prison. Ngawang Choephel was arrested while recording and videotaping traditional Tibetan music and dance.³⁹³

The PRC also limits freedom of opinion and expression through non-judicial means, including “neighborhood committees” and “work units.”³⁹⁴ These local administrative structures are used to monitor opinions, to warn Tibetans not to demonstrate or to display pro-independence posters, or to impose sanctions outside the judicial system for pro-independence opinions and speech.³⁹⁵ Work units established in monasteries and nunneries in recent years have been used to monitor pro-independence activities, with the result that hundreds of monks and nuns have been expelled and others imprisoned because of their opinions.³⁹⁶

Despite frequent and blunt international condemnation, the PRC has only stepped up its policy of quashing all political dissent by Tibetans.

³⁹¹ *But see* U.N. Doc. No. E/CN.4/1995/91 (Special rapporteur not able to verify claims that the sale of photographs of the Dalai Lama was banned in Tibet).

³⁹² *See* discussion, *supra* pp. 65-66.

³⁹³ U.S. Dept. of State, *supra* note 371.

³⁹⁴ Tibet Information Network and LawAsia, *Extra-Judicial Forms of Political Control in Tibet* (A Communication to the 48th Session of the UN Commission on Human Rights) (1991), ¶¶ 4-10.

³⁹⁵ *Id.* at ¶¶ 11-19.

³⁹⁶ *Id.* at ¶¶ 31-34. *See also* discussion *supra* pp. 65-66.

i. PRC officials torture Tibetan prisoners of conscience

Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”),³⁹⁷ to which the PRC is a State Party, outlaws any kind of torture. Nonetheless, in 1990, the UN Committee Against Torture noted that it had received credible allegations of a persistent practice of torture in Tibet.³⁹⁸ The Committee also made special note of the PRC’s failure to address allegations of torture in Tibet.³⁹⁹ In 1993 and again in 1996, the UN Committee Against Torture asked the PRC to set up a genuinely independent judiciary and to change its laws to ban all forms of torture.⁴⁰⁰ Despite this, the PRC’s Criminal Law only specifically prohibits certain kinds of torture.⁴⁰¹

The use of torture is in fact common in all prisons and detention centers in Tibet. Methods of torture include: inflicting shocks with electric batons; beating with iron bars, rifle butts and nail-studded sticks; branding with red-hot shovels; pouring boiling water over prisoners; hanging prisoners upside down or by the thumbs from the ceiling; shackling; kicking with boots; setting ferocious dogs onto prisoners; exposure to extreme temperatures; deprivation of sleep, food and water; prolonged strenuous “exercise”;

³⁹⁷ Adopted by General Assembly Resolution 39/46 of 10 December 1984; entered into force on 27 June 1987. Ratified by China on 11 March 1988.

³⁹⁸ Committee Against Torture, Summary Record of the 50th Meeting, 23 May 1990, p. 11 (cited in Amnesty International’s Concerns, *supra* note 384, at 6).

³⁹⁹ Committee Against Torture Considers Report of China, UN Information Service press release HR 2582, 27 April 1990 (cited in Amnesty International’s Concerns, *supra* note 384, at 6).

⁴⁰⁰ U.N. Doc. No. CAT/C/SR.254 (1996).

⁴⁰¹ China’s Criminal Law only specifically prohibits “torture to coerce a statement” by “state personnel” against “offenders” (art. 136) (1980). Other offences for ill-treatment of prisoners included within the Chinese Criminal Law are: “corporal punishment and abuse” by “judicial personnel” when the “circumstances are serious” (article 189) and unlawful detention where “beating or humiliation is involved” (art. 143). Article 7 of CAT requires States Parties to prosecute those responsible for torture. Under the Chinese Criminal Procedure Law, however, the standards for determining whether a case of torture under article 136 should be the subject of criminal investigation consider factors such as the perpetrator’s intention and the gravity of the acts. The torturer must have acted for personal revenge or used “very cruel means thus creating a grave impact.” The latter would include the torturing of many people or repeated torture, or where the act results in death, disability, insanity, suicide “or other serious consequences.”

long periods of solitary confinement; sexual violence; taunts and threats of torture and death.⁴⁰²

Specific reports of torture in Tibet, mostly from former prisoners who have been released and have fled Tibet, continue unabated. In cases studied through 1995, there were 208 cases of serious physical maltreatment out of 1276 cases studied, or more than 16% of all prisoners.⁴⁰³ In 1996 alone, there were more than 20 cases of torture documented through eyewitness accounts, not including cases of torture resulting in death.⁴⁰⁴ In fact, the torture appears to be becoming more severe, with an increasing number of prisoners who are unable to stand up fully on their own after release.⁴⁰⁵

In 1996, the U.N. Special Rapporteur for Torture and other Cruel, Inhuman or Degrading Treatment or Punishment made note of continuing reports of torture of Tibetan prisoners.⁴⁰⁶ Notably, the cases included 6 specific cases of torture of children and numerous reports of maltreatment of juveniles.⁴⁰⁷ The Special Rapporteur also noted that it had still not received replies to earlier cases brought to the PRC's attention in 1994,⁴⁰⁸ and had still not received a reply to his request to visit the PRC.⁴⁰⁹ In 1998, the Special Rapporteur reported eight additional cases of torture and again expressed his concern at the number of reports coming from Tibet.⁴¹⁰

⁴⁰² Physicians for Human Rights, Striking Hard: Torture in Tibet (October 1997) at 3-4; Cutting off the Serpent's Head, *supra* note 249, at 89-90, 99-106; Amnesty International's Concerns, *supra* note 384, at 5; Amnesty International, People's Republic of China: Persistent Human Rights Violations in Tibet (AI Index: ASA 17/18/95, May 1995) at 14.

⁴⁰³ Cutting off the Serpent's Head, *supra* note 249, at 89-90.

⁴⁰⁴ Tibetan Government-in-Exile, The Right to be Free from Torture in 1996 Human Rights Report (Dharamsala 1997). For a discussion of torture resulting in death, *see* discussion *infra* pp. 94-95.

⁴⁰⁵ Cutting off the Serpent's Head, *supra* note 249, at 100.

⁴⁰⁶ U.N. Doc. No. E/CN.4/1996/35/Add. 1, ¶¶ 102-127.

⁴⁰⁷ *Id.* at ¶¶ 110-117.

⁴⁰⁸ *Id.* at ¶ 104.

⁴⁰⁹ U.N. Doc. No. E/CN.4/1996/35, ¶ 47.

⁴¹⁰ UN Doc. No. E/CN.4/1998/38 and Add.1.

An October 1997 report by Physicians for Human Rights reported that one in every seven Tibetan refugees had personally been tortured.⁴¹¹ Ninety-four percent of political detainees reported being tortured.⁴¹² Fifteen percent of torture survivors were under age 16 at the time they were tortured.⁴¹³

Torture is never lawful. Nonetheless, credible evidence of torture of Tibetans on a systematic scale continues to come out of Tibetan prisons. Torture on such a scale evidences an international policy and practice to destroy any political will of the Tibetan people.

j. The PRC subjects Tibetans to extrajudicial, summary and arbitrary executions

Since 1987, more than 60 Tibetans are known to have been shot by security forces during peaceful demonstrations.⁴¹⁴ The majority of these extrajudicial and arbitrary executions took place in March 1989 when police fired into crowds of Tibetans with guns and automatic weapons.⁴¹⁵ Most cases of summary or arbitrary execution, however, involve torture and maltreatment of Tibetan prisoners of conscience who died as result. Some of these cases involve deaths while in custody, though most involve the deaths of prisoners shortly after their release from prison.

There are at least 16 documented cases of Tibetan prisoners of conscience who have died in prison, or shortly after release from prison, as a result of torture and mistreatment.⁴¹⁶ These include six women and one nun, Sherab Ngawang, who was only 12 years old

⁴¹¹ Physicians, supra note 402, at 2

⁴¹² Id. at 3.

⁴¹³ Id.

⁴¹⁴ Amnesty International's Concerns, supra note 384, at 8.

⁴¹⁵ Asia Watch, Merciless Repression: Human Rights in Tibet, (1990) at 13-28.

⁴¹⁶ Amnesty International's Concerns, supra note 384, at 7-8; AI, Persistent human rights violations, supra note 384, at 15-18; Cutting off the Serpent's Head, supra note 249, at 147-149; TGIE, 1996 Human Rights Report, supra note 404. The cases include: Yeshe (died August 1989 after release); Tsamla (died August 1991 after release); Lhakpa Tsering (died

when arrested and only 15 when she died shortly after her release from detention.

The U.N. Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions reported on several of these cases in 1996, but had received no response from the PRC regarding the cases of the Tibetans.⁴¹⁷ He also noted that, despite repeated requests since 1992 to visit China, he had received no response to his request.⁴¹⁸

Torture until death is the ultimate sanction for political dissent. At the same time, when it happens on a regular basis despite public condemnation, it represents one of the most fundamental flaws in a State's legitimacy. This is not indifference to the human rights a State is duty bound to protect, but contempt for those rights and for the people who hold them.

C. Enforcing The Tibetans' Right To Self-Determination Will Enhance International Values Of Peace And Security And Promote Human Rights And Fundamental Freedoms

1. The Right Of Self-Determination Should Be Enforced As Against A Claim Of Territorial Integrity When Doing So Will Advance The Fundamental Values Of The International Community

"The right of self-determination is not absolute. Where it conflicts with other rights or principles recognized by international law, a process of balancing these rights and their underlying values must take place. This is particularly true in situations where the right of self-determination conflicts with the principle of national unity

December 1990 in prison); Phuntsog Yangkyi (died June 1994 in prison); Gyaltsen Kelsang (died February 1995 after release); Kunsang Choekyi (died October 1992 after release); Sherab Ngawang (died May 1995 after release); Tashi Tsering (died January 1995 after release); Sangye Tenphel, (died May 1996 in prison); Kelsang Thutop (died July 1996 in prison); Tenchok Tenphel (died 9/96 in prison); Dawa Tsering (died August 1995 after release). In addition, Kelsang Nyendrak died May 1996 when he was shot during a protest at Ganden Monastery. Dorjee died on July 1996 after being beaten prior to an arrest. Two other Tibetans, Phurbu and Phurtse, died in 1996 from gunshot wounds and beatings received during demonstrations in 1989.

⁴¹⁷ U.N. Doc. No. E/CN.4/1996/4, ¶¶ 117-122.

⁴¹⁸ *Id.* at ¶ 125. As of December 1997, he had still not received a response. U.N. Doc. No. E/CN.4/1998/68/Add.1, ¶ 86.

and territorial integrity.”⁴¹⁹ Thus, despite some contrary scholarly opinion, the right of self-determination is not a rule of *jus cogens*, a peremptory norm of international law from which no derogation is permitted under any circumstances.⁴²⁰ Rather, its exercise must be effected in accord with the other fundamental values of the international community.⁴²¹

2. Affording The Tibetans The Broadest Latitude In Exercising Their Right Of Self-Determination Would Effectuate The Fundamental Values Of The International Community

In the case of Tibet, fundamental international values require that the Tibetans be permitted to exercise their right of self-determination, even if they might choose independence. Given the current situation in Tibet under occupation by the PRC and the likely outcome of permitting Tibetans to choose independence from the PRC, this is the only conclusion that is consistent with basic international values.

⁴¹⁹ International Committee of Lawyers for Tibet, *supra* note 195, at 16.

⁴²⁰ Vienna Convention on the Law of Treaties, Art. 53 (defining peremptory norms of international law); Cristescu, *supra* note 190, at ¶ 154 (stating “[n]o. United Nations instrument confers such a peremptory character on the right of peoples to self-determination”); Crawford, *supra* note 184, at 167 (observing that “the principle of self-determination . . . is stated in the International Covenant on Civil and Political Rights alongside the other human rights. It is not stated in terms which give it any logical or other priority over those rights. The rights are simply concurrent.”).

Some analysts have concluded that self-determination is a rule of *jus cogens*. See ICJ 1997, *supra* note 179, at 323-24 and authorities cited there, arguing that the right of self-determination is a rule of *jus cogens* where a people are subject to “alien subjugation.” Legal Consequences for States of the Continued Presence of South Africa in Manibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 89-90, Ammoun, J., sep. opn.; Brownlie, Principles of Public International Law (3d ed. 1979) at 83; H.G. Espiell, Report on the Right of Self-Determination, U.N. Doc. No. E/CN.4/Sub.2/405/rev.1 (1980) at 12; A. Cassese, Self-Determination of Peoples, in The International Bill of Human Rights: The International Covenant on Civil and Political Rights (1981). The UN General Assembly, however, has reached a contrary conclusion, declaring that self-determination, like other basic principles, should be construed in the context of the other principles. Declaration on Principles, *supra* note 181.

⁴²¹ See generally Dulancy, *supra* note 5, at 9-11.

The basic values of the international community are set forth in Article 1 of the Charter of the United Nations as the Purposes of that body:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.⁴²²

a. Affording the Tibetans the broadest latitude in exercising their right of self-determination would enhance international peace and security

The ongoing denial of the Tibetans' right of self-determination by the PRC threatens international peace and security. "The [People's Liberation Army], which suppressed Tibetan revolts in 1956-59 and 1968-69 and enforced martial law in Lhasa in 1989, remains a high-profile force which is an essential guarantor of China's continuing control over Tibet. Estimates of the number of PLA troops stationed on the Tibetan Plateau vary from about 150,000 to 500,000.

⁴²² Charter of the United Nations, art. 1, ¶¶ 1-4.

Whatever the exact figure, the numbers are substantial, and even casual observers notice the number of troops stationed in and around Lhasa and other Tibetan towns compared to cities elsewhere in the PRC. Some have described Lhasa as a ‘garrison town.’”⁴²³

India also maintains a large military presence on the borders of the Tibetan Plateau; indeed, according to the PRC’s own documents, India has had as many as 240,000 troops there in recent years.⁴²⁴ Before the PLA moved into Tibet in 1950, China and India did not have a common border; since then, however, the border tension between the two countries has been constant, breaking out into actual war—for the first time in Sino-Indian history—in 1962 and into many limited confrontations after that.⁴²⁵ Moreover, India’s recent successful tests of nuclear weapons, along with Pakistan’s apparent ability to create nuclear weapons,⁴²⁶ makes Tibet the juncture of, and potential buffer between, three nuclear powers.

⁴²³ Law Asia and TIN, supra note 394, at 77; see also Tibet Information Network, supra note 229, at 21-22 (describing a PRC military report which stated that there were “just over 40,000” PLA troops stationed in Tibet in 1992). “The South China Morning Post” reported on March 8, 1989 that 170,000 soldiers were deployed ‘within striking distance’ of Lhasa when demonstrations took place in that city.” International Committee of Lawyers for Tibet, supra note 195, at 5 n.14.

⁴²⁴ A “[Chinese military] report claims that the Indians have six times as many combat-ready troops on the border as the Chinese. . . . The Indians, on the other hand, have 240,000 troops facing the Chinese, giving them a numerical advantage of 6.4:1, according to the Chinese generals [who prepared the report]. They say that the Indians have three armies, nine divisions, 24 brigades, 11 airborne units, 400 aircraft, [and] 90 tanks.” Tibet Information Network, supra note 229, at 22.

⁴²⁵ See Gyatso (H.H. the XIV Dalai Lama), Five-Point Peace Plan for Tibet, in Kelly, et al. eds., supra note 5, at 289: “The establishing of a peace zone in Tibet would require withdrawal of Chinese troops and military installations from the country, which would enable India also to withdraw troops and military installations from the Himalayan regions bordering Tibet. . . . It was only when Chinese armies marched into Tibet, creating for the first time a common border [between India and China], that tensions arose between these two powers, ultimately leading to the 1962 war...”

See also Executive Summary, supra note 220, at 8: “The militarization of Tibet not only represents an oppressive burden on Tibetans and a source of fear and, in many cases, terror, but it is also a source of instability and potential conflict in the region. In 1962, it led to the first Sino-Indian war in history, and tension on the border has remained high since then.”

⁴²⁶ India Sets 3 Nuclear Blasts, N.Y. Times, 12 May 1998, at 1.

Demilitarizing an international hot spot would obviously tend to “maintain international peace and security” and conduce “friendly relations among nations.”⁴²⁷ Thus, it cannot reasonably be disputed that “[a] restoration of good relations between the world’s two most populous countries would be greatly facilitated if they were separated—they were throughout history—by a large and friendly buffer region.”⁴²⁸ Moreover, it has been pointed out that demilitarizing the Himalayas would not only reduce tensions between China and India, lessening the threat of international armed conflict, but also enable both of those nations to direct their resources toward improving the lives of their citizens and increase the ability of their Southeast Asian neighbors to do likewise. “If Tibet should become a zone of peace and be free from Chinese troops and nuclear weapons, there would be no reason for India to maintain a large army on the Himalayan heights. This would immediately enable both India and China to reduce their military expenditure and use the money thus saved for economic development. A totally demilitarized Tibet and an India living in peace and friendship [with China] could trigger changes in South Asia that will end tensions in the region and pave the way for a better life for its people.”⁴²⁹

Moreover, an independent or self-governing Tibet would be extremely unlikely to act aggressively toward its neighbors or any other nation. Allowing the Tibetans to exercise their right of self-determination would therefore pose no significant threat to the peace. Because “in his struggle for the liberation of Tibet [, he] consistently has opposed the use of violence [and] has instead advocated peaceful solutions based upon tolerance and mutual respect,”⁴³⁰ the Dalai Lama was awarded the Nobel Peace Prize in 1989. This has remained

⁴²⁷ Charter of the United Nations, art. 1(1) (first quotation) and 1(2) (second quotation).

⁴²⁸ Gyatso, *supra* note 5, at 289.

⁴²⁹ G. Fernandes, *Tibet-India Solidarity*, in Kelly, et al., eds., *supra* note 5, at 72.

⁴³⁰ Norwegian Nobel Committee, *Nobel Peace Prize Citation* (1989) in *Nobel Peace Prize Award Ceremony Speeches*, [Tibetan] Office of Information and International Relations (Dharamsala 1989) at 2.

the position of the Government-In-Exile and of the Tibetan people with few exceptions. Also, although the Tibetans accepted foreign support for violent campaigns during a guerrilla war of almost 20 years,⁴³¹ that war is almost twenty years past.⁴³² There is no evidence that an independent or self-governing Tibet would have any violent tendencies; therefore, no threat to the peace would result.

Averting threats to peace and maintaining international security and friendly international relations is arguably the single most fundamental value of the international community. It is the first of the constitutive purposes of the United Nations, and it underlies the U.N. Charter's assertion of the principle of self-determination.⁴³³ It is the first matter discussed in the Preamble to the Declaration on Principles, and it is expressly incorporated in that Declaration's treatment of four of the seven enumerated "basic principles of international law."⁴³⁴ Denying the Tibetans' right of self-determination undermines that fundamental principle, whereas permitting Tibet to establish its own independent or self-governing demilitarized state would advance it. The principle of international peace and security, therefore, favors Tibetan self-determination.

⁴³¹ Tibet Information Network, *supra* note 240, at 14.

⁴³² Avedon, *In Exile*, *supra* note 42, at 125-131.

⁴³³ Charter of the United Nations, art. 1(1) and 1(2).

⁴³⁴ As set forth in the *Declaration on Principles*, territorial integrity requires states to "comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and [to] endeavour to make the United Nations security system based on the Charter more effective." Peaceful settlement of international disputes requires each state to "settle its disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered. Cooperation requires states to co-operate with one another . . . in order to maintain international peace and security . . . Sovereign equality imposes on every state the duty . . . to live in peace with other States." *Declaration on Principles*, *supra* note 181. The *Declaration on Principles* is the only international instrument which asserts basic principles of international law and describes their interrelationships. Thus, it represents the United Nations' determination of how the principles enshrined in the Charter are to be applied. *Id.*

b. Affording the Tibetans the broadest latitude in exercising their right of self-determination would promote respect for human rights and fundamental freedoms

The case of Tibet is, in at least some ways, at the extremes of international law. Unlike some other peoples whose right of self-determination has been denied, the Tibetans' very survival as a people is at stake. The PRC is attempting the destruction or assimilation of the Tibetans as a people through acts of genocide, population transfer, political repression, discriminatory practices, and destruction of the Tibetans' fragile environment.

The PRC has shown contempt for the human rights and fundamental freedoms of the Tibetan people. It has openly intensified its campaign against the practice of Buddhism, eliminated opportunities for Tibetan language, history and culture to survive, increased the pace of population transfer, accelerated political arrests, increased the rate of torture and arbitrary executions of political prisoners, extended brutal birth control policies, and pillaged more aggressively Tibet's natural resources. It has done so despite international attention and condemnation.

The Tibetans, on the other hand, have demonstrated their willingness to respect human rights by adopting an interim constitution in which international legal norms concerning human rights figure prominently. Tibet "renounces war as an instrument of offensive policy and force shall not be used against the liberty of other peoples [or] as a means of resolving international controversies and [Tibet] will hereby adhere to the principles of the Charter of the United Nations."⁴³⁵

Moreover, it is "the duty of the Government of Tibet to adhere strictly to the Universal Declaration of Human Rights,"⁴³⁶ and the Tibetan Constitution includes numerous provisions which mirror those of basic instruments of international law. That Constitution guarantees the right to life⁴³⁷ and prohibits slavery

⁴³⁵ Constitution of Tibet, art. 6; see also Charter of the Tibetans in Exile, art. 7.

⁴³⁶ Constitution of Tibet, art.3; Charter of the Tibetans in Exile, art. 4.

⁴³⁷ Constitution of Tibet, art. 10; see also Charter of the Tibetans in Exile, art. 11(a).

and forced labor,⁴³⁸ prohibits inhumane treatment⁴³⁹ and arbitrary detention,⁴⁴⁰ and guarantees equality before the law.⁴⁴¹

The Constitution of Tibet guarantees freedoms of conscience and religion;⁴⁴² speech, expression, and peaceable assembly;⁴⁴³ choice of employment and association in unions;⁴⁴⁴ and movement and change of residence.⁴⁴⁵ It also guarantees numerous rights of criminal defendants,⁴⁴⁶ the right to participate in government through suffrage and by holding office,⁴⁴⁷ and the right to hold property.⁴⁴⁸ Perhaps most importantly, it guarantees the availability of an effective remedy for violations of the rights secured by it.⁴⁴⁹

The constitutional reforms currently underway with respect to the interim constitution for a free Tibet and already partially implemented in Dharamsala by the Government-In-Exile in the Charter of the Tibetans in Exile, represent the further democratic evolution of Tibet.⁴⁵⁰ The Cabinet (*Kashag*) is now popularly elected,⁴⁵¹ whereas it was formerly appointed by the Dalai Lama; the legislature now oversees the actions of the executive;⁴⁵² and an independent judiciary is emerging.

⁴³⁸ Constitution of Tibet, art. 15.

⁴³⁹ Constitution of Tibet, art. 14.

⁴⁴⁰ Constitution of Tibet, art. 11.

⁴⁴¹ Constitution of Tibet, art. 8; Charter of the Tibetans in Exile, art. 9.

⁴⁴² Constitution of Tibet, art. 17(2); see also Charter of the Tibetans in Exile, art. 10.

⁴⁴³ Constitution of Tibet, art. 18; Charter of the Tibetans in Exile, art. 11.

⁴⁴⁴ Constitution of Tibet, art. 18; Charter of the Tibetans in Exile, art. 11.

⁴⁴⁵ Constitution of Tibet, art. 18.

⁴⁴⁶ Constitution of Tibet, arts. 12-13; see also Charter of the Tibetans in Exile, art. 11.

⁴⁴⁷ Constitution of Tibet, arts. 20, 22; see also Charter of the Tibetans in Exile, art. 12.

⁴⁴⁸ Constitution of Tibet, art. 19; but see id. art. 25(1) ("All land shall belong to the State).

⁴⁴⁹ Constitution of Tibet, art. 24; see also Charter of the Tibetans in Exile, art. 14.

⁴⁵⁰ "Congressional Staff Trip Report on Tibetans in Exile," 138 Congressional Record 119 at S12732-S12737 (12 August 1992); see also *Executive Summary*, *supra* note 220, at 4-5.

⁴⁵¹ Charter of the Tibetans in Exile, art. 21.

⁴⁵² Charter of the Tibetans in Exile, arts. 52, 101.

The actual conduct of the Tibetan Government-In-Exile amply demonstrates that government's willingness to observe these constitutional guarantees in practice. From its beginnings in elections held among the refugees in 1960 (before the Tibetan Constitution had even been promulgated),⁴⁵³ that government has outgrown its early practice of having legislators serve as executive officers and has begun holding primary elections.⁴⁵⁴ The Tibetan Youth Congress developed and holds a substantial share of governmental positions.⁴⁵⁵ In short, "the Tibetans in exile have furnished proof that they are able to take their fates into their own hands. They are the best-organized exile nation in the world. They have combined their traditional values with modern education in such a way that they benefit from both. Politically, the exile government is a functioning democratic government."⁴⁵⁶

All of the available evidence therefore supports only one conclusion: that only the fullest exercise of the Tibetans' right to self-determination can halt the present systematic campaign of human rights abuses against the Tibetan people.

D. The Tibetans' Demand For "Genuine Self-Rule" Does Not Conflict With The PRC's Claim Of Territorial Integrity

The right of self-determination may not conflict with the right of territorial integrity at all if the demand for self-determination falls short of secession. For example, decentralizing power from a central government to regional or local governments ("federalism") can be a form of self-determination.⁴⁵⁷ Federalism has long been a model for power-sharing among groups outside the context of a "people" as such seeking self-determination (e.g., Canada, the United States).⁴⁵⁸

⁴⁵³ Avedon, *In Exile*, *supra* note 42, at 107.

⁴⁵⁴ *Id.* at 107-08.

⁴⁵⁵ *Id.* at 110; Gyatso, *supra* note 5, at 240.

⁴⁵⁶ van Walt van Praag, *supra* note 5, at 63; Gyari, *supra* note 150, at 11-12.

⁴⁵⁷ Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 *Stan. J. Int'l L.* 255 (1996) at 280-81.

⁴⁵⁸ *Id.*

It is also an available option short of secession to claims of self-determination, as in the case of Quebec's dispute with Canada, and the relationship between the United Kingdom and Northern Ireland, Scotland and Wales.⁴⁵⁹ Other examples include the recent restructuring of the Belgian government into a federal system consisting of Flanders, Wallonia and Brussels.⁴⁶⁰ Federalism has also been proposed as a model for resolving the situation on Cyprus.⁴⁶¹

The Dalai Lama's willingness to negotiate for "genuine self-rule" short of complete independence⁴⁶² would resolve the Tibetans' claim for self-determination without impairing the PRC's territorial integrity. "Genuine self-rule" for the Tibetans would mean actual political control over their domestic affairs, presumably under a democratic system as described by the proposed Constitution of Tibet. The Tibetans would control their political, economic, social and cultural life, and would control their land and natural resources.⁴⁶³ The PRC would remain in control of Tibet's defense and foreign affairs, thus preserving its territorial integrity.

Genuine self-rule would, moreover, put an end to the abuse of the Tibetans' human rights and fundamental freedoms. It would also enhance international peace and security because, while the PRC would still control Tibet's defense, a self-governing Tibet would provide an economically and socially more stable region at the juncture of China, India and Pakistan than currently exists. Self-rule would also likely preempt a more violent secessionist movement that could result if the PRC continues to actively quash any self-determination at all for the Tibetan people.⁴⁶⁴

⁴⁵⁹ *Id.* at 281.

⁴⁶⁰ Belgium Drifts Further Apart As Charter Reformed, Reuters, 6 February 1993.

⁴⁶¹ Simpson, *supra* note 457, at 281.

⁴⁶² See discussion *supra* pp. 52.

⁴⁶³ See Simpson, *supra* note 457, at 281 (noting that self-government is meaningless without control over land and economic rights).

⁴⁶⁴ See Statement of His Holiness the Dalai Lama, *supra* note 189 (noting increasing frustration and desire to consider violence as an alternative among Tibetans). See also Simpson, *supra* note 457, at 282 (arguing that failure to consider at the outset federalist models as a solution to the conflict in the former Yugoslavia may have contributed to the violence there).

IV. CONCLUSION

Tibet was historically sovereign, and in particular was sovereign and independent in 1950 when the PRC invaded and occupied the country. The government of Tibet, still functioning in exile in India, is the legitimate government of the Tibetan people. Furthermore, only the restoration of a government and institutions freely chosen by the Tibetan people will end the abusive human rights practices and policies in Tibet that threaten the survival of the Tibetans as a people, and secure stability in an otherwise potentially violent region. The threat to the Tibetan people if the international community takes no action is real, immediate and overwhelming; the threat to the fundamental values underpinning international human rights law is no less so.