THE RIGHT TO SELF-DETERMINATION: RECENT DEVELOPMENTS IN INTERNATIONAL LAW AND THEIR RELEVANCE FOR THE TIBETAN PEOPLE

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This article reviews developments in the understanding of a right to self-determination under international law in terms of the right's applicability and potential for resolving the Tibetan people's claims for self-government or independence. While a right to self-determination could likely justify Tibetan independence or secession from China, especially in light of continuing human rights abuses in Tibet, current political realities and global trends toward an expansion of "internal" options for realising self-determination within existing states make secession unlikely. Less radical solutions, such as greater autonomy, federal political structures and an improved minority rights regime, could provide more realistic mechanisms for settling the Tibetan question. Successful resolution, however, ultimately depends on the level of genuine international concern as well as the extent to which the Chinese Government is willing to accept greater democratic participation and consider more flexible notions of state sovereignty and territorial integrity.

Introduction

The Chinese Government has maintained political control over Tibet since the invasion of the People's Liberation Army in 1950 and throughout the past half-century of conflict over the fate of the Tibetan people. During this time, all sides have relied upon highly-charged, controversial principles of international law and politics to justify their competing claims, including the right to self-determination as well as the potentially conflicting concepts of sovereignty and territorial integrity. This article attempts to provide a current evaluation of the Tibetan people's claims to a right to self-determination in light of developments in international law, the Chinese Government's continuing violation of the Tibetan people's human rights, and an increasing pace of economic reform coupled with strengthening centralised political control over Tibetan

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regions which threaten the cultural survival of the Tibetan people. From a comparative perspective, an evaluation of China's approach to sovereignty and self-determination in the Tibetan case is also timely and useful as Hong Kong, another autonomous Chinese territory, prepares to legislate against treason, secession, subversion and sedition under Article 23 of its Basic Law.

The right to self-determination is a potentially influential device that could be – and has been – employed to protect the legitimate rights and interests of peoples around the world. The forms the right to self-determination might take vary considerably and range from full independence or secession to less extreme measures implemented within a state such as greater autonomy, respect for minority rights and political participation through representative democracy. At the same time, however, the international community has not agreed on a specific definition or application of such a right beyond particular limited contexts.

This article reviews the general evolution of and recent developments in the content of a right to self-determination under international law. A more flexible understanding of the right as an emerging "internal" norm of self-governance "within" states has grown in response to post-cold war trends, including the dissolution of the former Soviet Union and Yugoslavia and the increasing pace of globalisation. The article then evaluates these developments in terms of their potential to strengthen the right's function as a legitimate tool for resolving seemingly intractable conflicts such as the Tibetan situation, while at the same time ironically weakening certain aspects of such claims. Finally, it evaluates various perspectives on the applicability of the principle of self-determination to the Tibetan case and the feasibility of proposed solutions, concluding with some thoughts on the way forward and underlining the importance of resolving the conflict in relation to broader concerns of international peace, stability and human rights.

Roots of the Current Dispute

The current conflict over Tibet began when the Chinese People's Liberation Army invaded Tibet with little resistance in October 1950. The international community generally took no action on behalf of Tibet at that time, although the Dalai Lama presented a poignant appeal to the United Nations (UN) in November 1950, expressing a belief that the organisation would ensure that "aggression will not go unchecked and freedom unprotected in any part of the world" and a hope that "the conscience of the world will not allow the disruption of our State ...".[1] The Dalai Lama also expressed a faith in the

[1] "Appeal by His Holiness the Dalai Lama of Tibet to the United Nations", 7 Nov 1950, available at the Tibet Justice Center website: http://www.tibetjustice.org/materials/un/un2.html (visited 3 Jan 2003).

international system by suggesting that the Chinese Government could resolve its claims more appropriately "in an international court of law".[2]

Despite these pleas, China took control of Tibet and compelled the Tibetans to sign an agreement in 1951 conceding Chinese sovereignty over Tibet while establishing a degree of autonomy for the Tibetan Government. This document – known as the Seventeen Point Agreement – presented China's justification for its invasion, claiming China had "liberated" Tibet from "imperialist" forces and allowed the Tibetan people to "return to the big family of the motherland".[3] The Agreement granted the Tibetans "national regional autonomy" under the unified leadership of the Central People's Government and also provided that the "Central Authorities would not alter the existing political system in Tibet".[4] It would protect "freedom of religious belief" and "[i]n matters related to various reforms in Tibet, there will be no compulsion on the part of the Central Authorities".[5] The Chinese had control over foreign affairs and established a "military and administrative committee and a military area headquarters in Tibet".[6]

Several clashes between Chinese troops and Tibetans culminated in a Tibetan rebellion in 1959 which was brutally suppressed by Chinese troops. The Dalai Lama and his government fled to India. Since then, the Dalai Lama and others have denied the validity of the 1951 Agreement on the basis that the Chinese Government violated the treaty, that the Tibetan Government never formally ratified it, that it was only accepted under duress and threat of arms, and was opposed publicly by the Tibetan Government.[7] At the time, the International Commission of Jurists observed that:

> "Tibet can argue that she never lost her sovereignty on the ground of duress or on the ground of China's violation of the 1951 agreement. Alternatively, it might be argued that Tibet lost her sovereignty but regained it when the Dalai Lama denounced the agreement, possibly on the ground of duress and for violation by China."[8]

In addition to a right to self-determination based on previous sovereignty, Tibetan claims against the Chinese occupation have also been justified by

2 *Ibid.*

3 "The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet" (the "Seventeen Point Agreement"), 23 May 1951, Preamble and Art 1, available at the Tibet Justice Center website: http://www.tibetjustice.org/materials/china/china3.html (visited 3 Jan 2003).

4 *Ibid.*, Art 3.

5 *Ibid.*, Arts 4, 7 and 11.

6 *Ibid.*, Arts 14 and 15.

7 Michael C. van Walt van Praag, *The Status of Tibet, History, Rights, and Prospects in International Law* (Boulder: Westview Press, 1987), p 157.

8 International Commission of Jurists, *The Question of Tibet and The Rule of Law* (Geneva, 1959), p 99.

the human rights situation in Tibet. Human rights abuses increased significantly in Tibet – as in the rest of China – during the Cultural Revolution (1966–1976), when monasteries and culturally significant landmarks were destroyed and "virtually all physical evidence of Tibet's previously pervasive Buddhist culture was eradicated".[9]

After Deng Xiaoping initiated China's open door policy in 1979, the Chinese authorities partially addressed such excesses by rebuilding monasteries and undertaking a number of policies benefiting minority groups, including Tibetans. However, serious human rights abuses continue in Tibetan areas, including repression of religious freedom and political dissent, racial discrimination and denial of economic and social rights. Han Chinese migration into Tibetan areas has also exacerbated tensions and the Chinese Government has been accused of deliberately diluting Tibetan cultural influence in the region, a policy described by the Dalai Lama as "cultural genocide" and "the most serious threat to the survival of Tibet's culture and national identity".[10] This has also led to increasing discriminatory treatment toward Tibetans in many aspects of life and denial of basic economic and social rights. A study on housing rights in Tibet, for example, concluded that the "Chinese Government violates the human right to adequate housing with impunity and on a massive scale".[11] The study pointed out that "in contrast to China's official views of developmental 'triumphs' in Tibet, available facts point to a situation wherein Tibetans face systematic discrimination in the housing sphere [and] possess no rights to participate in or control the housing or planning process".[12] China has also implemented re-education drives in monasteries, schools and villages, forcing monks to pledge their loyalty to the Chinese Government.[13]

Despite – or perhaps because of – the Chinese Government's priority to increase the pace of economic development in Tibet, human rights abuses have continued and arguably deteriorated at certain points in the last decade. In June 2001, China revised its Tibet policy, aiming to consolidate Chinese control over the region and fight "separatist activities".[14] The terrorist

9 International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (Geneva, Dec 1997), p 73.

10 *Ibid.*, pp 351, 352–354.

11 Scott Leckie, *Destruction by Design, Housing Rights Violations in Tibet* (The Netherlands: Centre on Housing Rights and Evictions, Feb 1994), p 183.

12 *Ibid.*

13 International Commission of Jurists, "Oral Intervention before the United Nations Commission on Human Rights, 54th Session, Self Determination in Tibet", 19 Mar 1998, available at Murdoch University School of Law website: http://wwwlaw.murdoch.edu.au/icjwa/icjp981903.htm (visited 5 Jan 2003).

14 Human Rights Watch, "Press Backgrounder: China Human Rights Update", 15 Feb 2002, section on Tibet, available at Human Rights Watch website: http://hrw.org/backgrounder/asia/china_update.htm (visited 5 Jan 2003).

attacks of 11 September 2001 in the United States have also strengthened Chinese resolve to crack down on political and religious dissent generally, especially in the Uighur autonomous region of Xinjiang and in Tibet. The Chinese Government has even accused the Dalai Lama of "plotting rebellion and 'terrorist activities' in Tibet".[15]

In recent months, the Chinese Government has released some high-profile dissidents and met with representatives of the Dalai Lama for the first time since 1993. However, despite these positive moves, some human rights observers have suggested that in fact little has changed for Tibetans.[16] In the past year, "[a]uthorities continued to arrest 'political' offenders and to place restrictions on religious practice".[17]

The Right to Self-determination in International Law

Before exploring the application of a right to self-determination to the Tibetan case, it is necessary to review the development of the content and status of the right in international law. The meaning of a right to self-determination is ambiguous and contested. Certain fundamental principles of international law – such as sovereignty, territorial integrity and non-intervention – can compete with the realisation of self-determination in some cases while reinforcing claims of self-determination in others. James Crawford has argued that although the right to self-determination has been clearly established in international law (*lex lata*), its application and scope have not (*lex obscura*).[18]

Despite this ambiguity, a careful examination of relevant legal texts leads to several conclusions about the content of a right to self-determination. This section discusses these texts with particular reference to two categories that are often used to describe different forms of self-determination: "external" and "internal". The "external dimension" defines "the status of a people in relation to another people", while the "internal dimension" concerns "the relationship between a people and 'its own' State or government".[19] The forms these dimensions can take may be conceptualised on a continuum ranging from independence from "alien subjugation" or the secession of a people from

15 "Chinese Parliament Attacks Dalai Lama", *Agence France Presse*, 27 Oct 2001.

16 "Human Rights Watch World Report 2003", p 222, available at the Human Rights Watch website (n 14 above) (visited 21 Jan 2003).

17 *Ibid.*

18 James Crawford, "Right of Self-Determination in International Law", in Philip Alston, *People's Rights* (Oxford: Oxford University Press, 2001), pp 10, 38.

19 Patrick Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism", in Christian Tomuschat, *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993), p 101.

an existing state on one end, to more strictly "internal" forms such as autonomy, respect for minority and individual rights, and political participation through representative democracy on the other.

Early Political Expressions

Self-determination found expression as a political principle before it developed into a legal norm. It was first articulated in the international context after World War I by both Vladimir Lenin and Woodrow Wilson, each with different purposes in mind.

Lenin espoused a more radical, anti-colonial version of "external" self-determination or "the right of the oppressed nations ... to free political separation"[20] as part of his broader theory of socialist revolution.[21] This foreshadowed later support for self-determination by the Soviet Union which had great influence on the principle's legal development, including its place in the UN Charter.[22]

Woodrow Wilson elaborated a more limited version of self-determination in his Fourteen Points address in 1918, largely meant for application in the European context for the peoples of the former Ottoman and Austro-Hungarian empires.[23] However, he also articulated the principle in more general terms in his fifth point, implying a broader application, although still more limited than Lenin's conception:

> "A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined ..."[24]

His Secretary of State, Robert Lansing, sensed the wider implications and potential dangers of the principle and was quick to temper Wilson's rhetoric. Lansing wrote that self-determination was a term "loaded with dynamite. It

20 Vladimir Lenin, "The Socialist Revolution and the Right of Nations to Self-Determination" (Theses), 1916, in G. Hanna (ed), *V.I. Lenin, Collected Works* (Moscow: Progress Publishers, 4th English edn, 1964), p 143.

21 *See* Antonio Cassese, *Self-Determination of Peoples, A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), pp 14–19.

22 *Ibid.*, p 19.

23 Richard Falk, "Self-Determination Under International Law", in Wolfgang Danspeckgruber (ed), *The Self-Determination of Peoples, Community, Nation and State in an Interdependent World* (Boulder: Lynne Rienner Publishers, 2002), p 39.

24 Woodrow Wilson, "'Fourteen Points' in the Address on the Conditions of Peace Delivered at a Joint Session of Congress, 8 January 1918", excerpted in Wolfgang Danspeckgruber and Arthur Watts, *Self-Determination and Self-Administration, A Sourcebook* (Boulder: Lynne Reinner Publishers, 1997), p 463.

will raise hopes which can never be realised. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist, who failed to realise the danger until too late."[25]

The Åland Islands case, taken up by the League of Nations after World War I, demonstrates the cautious approach pursued by the international community as the principle developed. These islands were part of Finland, but consisted largely of a Swedish-speaking population. When Finland declared its independence from Russia in 1917, the Islands wanted to secede and join Sweden. The Commission considering the case pointed out that the League of Nations Covenant did not mention self-determination and that it could not be considered "a positive rule of the Law of Nations".[26] It decided in a second report that allowing minorities to secede "would destroy order and stability within States and inaugurate anarchy in international life ...".[27] Instead, the Islands remained part of Finland under an autonomy arrangement.

The United Nations Charter

The principle of self-determination, as articulated in the UN Charter, was based on the need to secure international peace and security consistent with the potentially competing principle of "territorial integrity". The relationship between these concepts points toward a relatively uncontroversial interpretation of self-determination in the Charter in the form of "self-government", as opposed to secession or independence.

Article 1(2) provides that one of the principal purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[28] This article does not go so far as to declare a "right" to self-determination; nor does it define the principle's scope or the meaning of the term "peoples". Despite its ambiguity, this formulation represents a progression over earlier drafts which include no mention of "peoples"[29] at all. The word was only incorporated at the urging of the Soviet Union. Colombia's concerns about the provision, voiced during the debates prior to the Charter's adoption in San Francisco in 1945, illustrate

25 Robert Lansing, "Self-Determination", *Saturday Evening Post*, 9 Apr 1921, quoted in Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), p 31.

26 "Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question", quoted in Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, revised edn, 1996), p 29.

27 *The Aaland Islands Question, Report presented to the Council of the League by the Commission of Rapporteurs*, quoted in *ibid.*, p 30.

28 Charter of the United Nations (the UN Charter), 26 June 1945, Art 1(2), available at the UN High Commissioner for Human Rights (UNHCHR) website: http://www.unhchr.ch/html/menu3/b/ch-chp1.htm (visited 7 Jan 2003).

29 Cassese (n 21 above), pp 38–39.

the apprehensions of several states and shed some light on the intended meaning of the principle in the Charter:

> "If it [self-determination] means self-government, the right of a country to provide its own government, yes, we would certainly like it to be included; but if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy, and we should not desire that it should be included in the text of the Charter."[30]

In other words, self-determination, in the view of the majority of states, was a right to self-government and was not equivalent to "independence" or "secession". A distinction between self-government and independence is clear from a reading of Article 76 on the trusteeship system which distinguishes between the terms as two separate options for dependent peoples.[31]

This interpretation is also clear from self-determination's association with peace and stability in the Charter, especially when read against a backdrop of state fears of international "anarchy". Article 55 again emphasises this relationship. It provides that the UN shall promote a number of aims, such as higher standards of living, and other economic and social objectives, "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples".[32] The stress on peace actually limits the scope of the principle, since self-determination as an instrument of peace could presumably be abandoned in the event that its realisation led to war.[33] Indeed, recent trends toward a preference for and expansion of more palatable "internal" alternatives to secession – such as minority rights regimes and federalist structures – stem from concerns over increasing ethnic violence since the end of the cold war.

"External" self-determination is usually associated with decolonisation and may be viewed as distinct from "secession" which implies a change of territorial boundaries. Chapters XI and XII of the UN Charter, while not explicitly mentioning self-determination *per se*, deal with non-self-governing and trust territories – generally understood as the colonial possessions of European and American powers. Colonial issues become more expressly linked with self-determination in later UN initiatives, which are discussed in the next section. The key point here is that the Charter provides only a limited understanding

30 "Debates of the First Committee of the First Commission of the San Francisco Conference, 15 May 1945, Library of the Palais des Nations, Geneva", quoted in *ibid.*, pp 39–40.
31 *Ibid.*, p 42.
32 UN Charter (n 28 above), Art 55.
33 Cassese (n 21 above), p 43.

of decolonisation. Article 73 provides that Member States responsible for peoples who "have not yet attained a full measure of self-government" must recognise "the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories".[34] Clearly, this is not intended as a bold decolonisation initiative and could easily be limited by the interests of peace and security as well as other paramount principles. Article 76 on the international trusteeship system mentions eventual independence as an option for colonial territories, but in a "progressive" manner and as only one of two options "as may be appropriate to the particular circumstances".[35] The provision is further limited by Article 77 which specifies that the trusteeship system is only applicable to certain categories of territories.[36]

The Charter, in essence, provides little guidance on self-determination, besides a vague notion of "internal" self-government which can be deduced from the debates over its inclusion[37] and not from the specific language of the Charter. It does not define the peoples who could benefit from such a principle or spell out any obligations of states, and therefore cannot be considered a "right" in the usual sense of this term. In addition, the Charter does not explicitly link self-determination with decolonisation and its decolonisation measures are quite narrow. Self-determination's limits can also be derived from its function as an instrument of peace and its juxtaposition with other competing principles within the Charter, such as sovereignty, non-intervention and territorial integrity. However, despite such limits, the Charter plants the seeds of self-determination in international law which have been elaborated by later instruments, especially after newly independent and developing states – which championed the cause – formed a majority in the General Assembly.[38]

Human Rights Instruments

The "what" and "who" of self-determination are elaborated to some extent in Article 1 common to the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) which, unlike the Charter, establish self-determination as a *right* under international law held by *all* peoples. According

[34] UN Charter (n 28 above), Art 73.
[35] *Ibid.*, Art 76.
[36] *Ibid.*, Art 77.
[37] Cassese (n 21 above), p 42.
[38] Crawford (n 18 above), p 16.

to Article 1, "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[39]

Like the Charter, neither the Covenants nor the General Comment by the Human Rights Committee on this Article define "peoples". However, the Article specifically refers to *all* peoples and not *some* peoples, and therefore the term must not be limited to peoples under colonial domination. A reading of all three paragraphs of Article 1 reinforces this interpretation. For example, Article 1(3) imposes obligations on States Parties to promote and respect the right to self-determination, "*including* those having responsibility for the administration of Non-Self-Governing and Trust Territories".[40] The word "including" implies that other states also have obligations and that the right in question cannot be limited to the colonial context.[41] However, if non-colonial peoples have a right to self-determination, does this imply that certain distinct groups within a state have a right to secession or merely a right to other "internal" methods of achieving self-determination without implications for the territorial integrity of the state in question?

Self-determination's association with the political rights listed in the ICCPR indicates the latter interpretation. Exercising a right to self-determination involves a people "freely determining" their political status and therefore depends on whether individuals can exercise other rights within the Covenant such as the right to participate in public affairs, the right to vote and the right to freedom of assembly and expression. In this sense, a breach of certain political rights could lead to a breach of self-determination *within* a sovereign state and vice versa.[42] The "freely" in Article 1 also implies that self-determination must be exercised without external interference, which is consistent with a state's right to non-intervention in its internal affairs as provided by the UN Charter.[43]

The Human Rights Committee has shed little light on the problem of self-determination. It has refused to consider communications by "peoples" – such as Indian bands in Canada claiming a breach of their right to self-determination – on the basis that the Optional Protocol only applies to *individual* communications.[44] The Committee's General Comment on

39 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 1(1), both available at the UNHCHR website: http://www.unhchr.ch (under "Treaties") (visited 7 Jan 2003).

40 Emphasis added.

41 Crawford (n 18 above), p 27.

42 Cassese (n 21 above), p 53.

43 *Ibid.*, p 55.

44 Hannum (n 26 above), p 43. *See* UN Doc No CCPR/C/38/D/167/1984, 26 Mar 1990 and UN Doc No CCPR/C/43/D/205/1986, 3 Dec 1991, both available at UNHCHR website: http://www.unhchr.ch (under "Documents") (visited 7 Jan 2003).

Article 1 of the ICCPR also does not serve to clarify the meaning of self-determination to any significant degree,[45] although by simply reiterating the wording of Article 1, the Committee reinforces a literal interpretation that *all* peoples do indeed hold a right to self-determination.[46] But the vagueness of the principle, coupled with weak human rights enforcement mechanisms at the international level and reservations expressed by several State Parties, leave doubts as to the effectiveness of the right as articulated in these instruments.

In sum, the Covenants reveal that *all* peoples and not only peoples under colonial domination have a right to self-determination and an "internal" interpretation of such right seems logical within the human rights context. A right to independence or secession is neither expressly included nor excluded and a look at other legal developments is necessary to better understand whether this form of self-determination has been established in international law.

United Nations Declarations

Two UN General Assembly Declarations – although non-binding instruments – reveal a general consensus on the applicability of "external" self-determination to the colonial context and can be regarded as elements of state practice.[47] They also suggest that decolonisation is not inconsistent with territorial integrity and that actual "secession" is justifiable in only very limited circumstances.

The first resolution, the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly on 14 December 1960 (the 1960 Declaration) placed the principle of self-determination squarely in the colonial context and, in contrast to the UN Charter, unequivocally called for immediate steps:

> "in Trust and Non-Self-Governing Territories *or all other territories which have not yet attained independence*, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their *freely expressed will and desire*, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom".[48]

[45] Human Rights Committee, "General Comment 12 on The Right to Self-Determination of Peoples (Article 1)", 13 Mar 1984, available at UNHCHR website: http://www.unhchr.ch (under "Treaties", "ICCPR") (visited 7 Jan 2003).

[46] Christian Tomuschat, "Self-Determination in a Post-Colonial World" in Tomuschat (n 19 above), p 3.

[47] Cassese (n 21 above), p 71.

[48] UN General Assembly Resolution 1514 (XV) (the 1960 Declaration), 14 Dec 1960, para 5, available at the UNHCHR website: http://www.unhchr.ch/html/menu3/b/c_coloni.htm (visited 8 Jan 2003). Emphasis added.

This differs from the Charter and Covenant provisions in several respects. First, it expands the colonial context to include all territories not yet enjoying independence and not only trust and non-self-governing territories. It also calls for *immediate* steps with no reservations to transfer all powers to such peoples, and calls directly for their freely expressed will and desire in determining the outcome, as opposed to the Charter's qualifications.

However, Article 6 still upholds the paramount position of territorial integrity: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[49] In other words, the Declaration applies to peoples within a territory as a whole and aims to ensure that minority groups within colonial territories would not, in turn, claim a right to self-determination leading to secession.[50]

The 1970 Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the 1970 Declaration) expanded on this principle in relation to the decolonisation process. The right to self-determination means that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development ...".[51] It adds that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter". As in the 1960 Declaration, this terminology implies a broader notion of colonial peoples beyond the particular colonies under the UN trusteeship system.

The 1970 Declaration – like the UN Charter – upholds the importance of territorial integrity and clarifies that decolonisation is not equivalent to secession, since "[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it". This passage also implies that an external right to self-determination in the colonial context is not a "continuing" right and can only be exercised one time, since "such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter ...".[52] Once the status expires, the principle of

49 *Ibid.*, para 6.

50 Cassese (n 21 above), p 72.

51 "Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" (the 1970 Declaration), Resolution 2625 (XXV), 24 Oct 1970, available at the University of Hong Kong website: http://www.hku.hk/law/conlawhk/conlaw/outline/Outline4/2625.htm (visited 8 Jan 2003).

52 *Ibid.* and Cassese (n 21 above), p 33.

territorial integrity would presumably apply, preventing further secession. In this sense, the right to self-determination is not a right to "secession", strictly speaking, in the colonial context.

The inclusion of a so-called "saving clause" in the 1970 Declaration is a departure from the text of the 1960 Declaration. This begins by upholding the principle of territorial integrity: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". But it also adds that these states must be "conducting themselves in compliance 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 colour*".[53] This clause equates self-determination with an internal right to representative government and implies that if the government does not represent the whole people, without distinction as to race, creed or colour, then the principle of territorial integrity may not apply and secession may be possible.

An Established Right

The above discussion indicates that a right to self-determination has been established in international law. Its key components so far may be summarised as follows:

1 "all peoples" have a right to self-determination under international law;
2 "all peoples" includes – but is not restricted to – peoples under colonial domination;
3 "all peoples" have a right to freely determine their political, economic, social and cultural status;
4 a right to external self-determination applies to territories under "alien subjugation, domination and exploitation" and must be consistent with the principles of national unity and territorial integrity; and
5 a right to secession is not recognised, but may be possible in cases where peoples are denied political representation based on race or religion.

The International Court of Justice has also upheld self-determination's status as an international legal principle, clearly applicable to the colonial context while at the same time reaffirming the importance of territorial

53 *Ibid.* (1970 Declaration). Emphasis added.

integrity and state sovereignty.[54] The most recent such decision, the 1995 case concerning East Timor, held that:

> "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognised by the United Nations Charter and in the jurisprudence of this Court ...; it is one of the essential principles of contemporary international law".[55]

Recent Developments

More recent documents indicate increasing acceptance of the application of the principle of self-determination within the territory of a single state. The international community appears to have revisited and expanded on an "internal" democracy component of self-determination originally espoused by President Wilson. This section reviews several relevant developments, including the Helsinki Declaration of 1975 (the Helsinki Declaration), the Vienna Declaration of 1993, and the Canadian Supreme Court's decision in *Reference re Secession of Quebec*, followed by discussion of political factors that have been influencing legal trends since 1989.

Although the Helsinki Declaration is a non-binding document and only reflects the views of 35 European Member States of the Conference on Security and Co-operation in Europe, it indicates new directions in which the right to self-determination may be moving in the international legal context, especially a growing acceptance of a right to internal self-determination which implies representative democracy.[56] The document gives a much broader and more explicit definition of self-determination than the UN Declarations. First, because the text is addressed to peoples living in European sovereign states, not colonies or territories under foreign occupation, the term "peoples" must refer to peoples outside a colonial context.[57] It declares that:

> "[b]y virtue of the principle of equal rights and self-determination of peoples all peoples *always* have the right, *in full freedom*, to determine,

[54] See, for instance, International Court of Justice (ICJ) *Namibia Advisory Opinion* (1971) and *Western Sahara Advisory Opinion* (1975), both available at the ICJ website: http://www.icj-cij.org (under "Decisions") (visited 8 Jan 2003). For a discussion of ICJ cases related to self-determination, see Crawford (n 18 above), pp 32–37.

[55] *Case concerning East Timor*, Decision of 30 June 1995, available at ICJ website: http://www.icj-cij.org (under "Decisions") (visited 8 Jan 2003).

[56] Cassese (n 21 above), p 302.

[57] *Ibid.*, p 278.

> *when and as they wish*, their *internal and external* political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."[58]

The addition of "always" and "when and as they wish" implies a "continuing" right as opposed to a right that expires after it is exercised once. As an external right, it applies to the "whole peoples" of every signatory state according to the primary principle of territorial integrity and is, therefore, not a right to secession.[59]

The Vienna Declaration and Programme of Action of 25 June 1993, a document that 160 states adopted by consensus and which may be considered, therefore, to express general world opinion, maintains that the importance of the effective realisation of the right to self-determination:

> "shall not 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 and *thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*."[60]

This passage expands on the 1970 Declaration's saving clause and is not restricted to groups discriminated against on the basis of race or religion.

The Canadian Supreme Court decision *Reference re Secession of Quebec* in 1998 considered whether the Canadian province could, under international law, unilaterally secede from Canada. The court gave a negative answer to the question, deciding that international law does not recognise a right to unilateral secession on the basis of a right to self-determination. Quebec could only secede after negotiations with and the agreement of all of the other provinces. The court found that:

> "a right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms

58 Helsinki Declaration, Principle VIII, quoted in *ibid.*, p 285. Emphasis added.
59 *Ibid.*, p 287.
60 UN Doc A/Conf.157/23, para 2, available at the UNHCHR website: http://193.194.138.190/html/menu5/wchr.htm (visited 3 Mar 2003). Emphasis added.

> a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state."[61]

The court reached its decision after hearing the views of a number of international legal experts and also articulates the criteria that would justify a right to unilateral secession in much more explicit terms than any of the earlier expressions discussed above. The implication is that self-determination is generally an "internal" right not including secession – except in extreme circumstances. Although this decision was rendered by a domestic court, Article 38(1)(d) of the Statute of the International Court of Justice provides that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" may be used "as subsidiary means for the determination of rules of law" at the international level.[62]

These documents and some regional instruments, such as the 1992 European Charter for Regional or Minority Languages, along with the bulk of recent state practice point to the emergence of an expanding norm of internal self-determination, in part as a reaction against the growing violence and instability arising from secessionist claims of nationalist groups since 1989. Many scholars argue that such political developments are leading toward legal acceptance of an emerging norm of democratic governance.[63] In 1992, UN Secretary-General Boutros Boutros-Ghali observed that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve".[64]

While the international community's support for East Timor's recent independence appears to counter this trend, it actually supports the entrenched norm of external self-determination already established in international law as discussed above. Indonesia's invasion of East Timor and subsequent human rights violations in the territory – very similar to China's treatment of Tibet – was arguably a case of "third world colonialism".[65] However, East Timor was able to exercise its "external" right to self-determination on the basis of its status as a non-self-governing territory under Portugal's administration, and was therefore considered an unresolved colonial case. Tibet, on the other

61 "Reference re Secession of Quebec" (1998) 161 *DLR* 446. *See also* generally Anne F. Bayefski (ed), *Self-Determination in International Law, Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2001).

62 *Statute of the International Court of Justice* (New York: UN, 1993).

63 Philip Alston, "Peoples' Rights: Their Rise and Fall" in Alston (n 18 above), p 270. *See also* Thomas M. Franck, "Postmodern Tribalism and the Right to Secession", in Catherine Brölmann et al., *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1993), p 20. Franck writes: "The probable redefinition of self-determination does recognize an international legal right, but it is not to secession but to democracy."

64 UN Doc A/47/277, 1992, para 17, quoted in Alston, *ibid.*, p 269.

65 Crawford (n 18 above), p 33.

hand, while arguably a Chinese colony, does not fit the traditional "salt-water" understanding of the term and has received no official international support for its claims of sovereignty.

The Kurdish situation in Iraq illustrates the continuing limits of self-determination and is perhaps more comparable to the Tibetan case. The international community has not favoured an independent Kurdish State despite severe human rights abuses faced by this minority group. In contrast, the Iraqi invasion of Kuwait – a state with internationally recognised territorial boundaries – brought swift action against Iraq by the United States and its allies.

Distaste for secession and a preference for democracy were expressed in stark terms by one commentator in relation to the former Soviet Republics which he sarcastically labels "Trashcanistan".[66] He blames poverty in these regions in part on "the idolatry of 'national' self-determination" and goes on to argue that:

> "[a]lthough each case for a nation-state may appear just, and although those who have already achieved statehood may seem in no position to deny the same to others, 'national' self-determination is too often a recipe for Trashcanistan – for systematic malfeasance and economic involution, with convenient cover for the worst political scoundrels and their legions of apologists."[67]

He adds, "[b]y contrast, self-government within an existing entity – or better yet, an enlarged entity – where citizenship trumps ethnicity constitutes an altogether different proposition ...".[68]

Former United States assistant Secretary of State Strobe Talbott also espouses a democratic principle of "self-government" as an antidote to secession:

> "[t]he best way for an ethnically diverse, geographically sprawling state to protect itself against separatism is to protect the rights of minorities and far-flung communities. Democracy is the political system most explicitly designed to ensure self-determination. Democracy can be a vehicle for peaceful secession, but it is also the best antidote to secessionism and civil war, since, in a truly democratic state, citizens seeking to run their own lives have peaceful alternatives to taking up arms against their government."[69]

66 Stephen Kotkin, "Trashcanistan: A Tour Through the Wreckage of the Soviet Empire", *The New Republic*, 15 Apr 2002.
67 *Ibid.*
68 *Ibid.*
69 Strobe Talbott, "Self-Determination in an Interdependent World" (Spring 2000) *Foreign Policy* 159.

At the same time, a modern understanding of state sovereignty is also emerging that implies more than simple non-interference in internal affairs of states and supports the political trends toward a normative expectation of democratic governance. A recent report on the issue of intervention calls state sovereignty a "dual responsibility: externally – to respect the sovereignty of other States, and internally, to respect the dignity and basic rights of all the people within the State".[70]

Emergence of a Democratic Principle

General trends indicate that there is little tolerance for secessionist claims except in extreme cases, as expressed in the 1970 Declaration and by the Canadian Supreme Court. While the Tibetan case is arguably one such extreme example where secession may be justifiable under international law, in fact the development of milder forms of "internal" self-determination present more realistic opportunities for resolving Tibetan claims.

The methods for realising such a right have been expressed in both political and legal terms and include policies and structures such as representative democracy, the rule of law, internal autonomy structures, self-administration, special electoral arrangements, and greater protection of group rights within states, such as guaranteeing the right to practice a religion, speak a minority language and establish minority schools. The Liechtenstein Convention on Self-Determination Through Self-Administration is typical of these trends and presents a moderate alternative to secession, recognising that attainment of independence is not the only possible outcome of self-determination.[71] Several of these internal structures have been suggested for the Tibetan case and will be reviewed more carefully with specific reference to the Tibetan situation in the next section. While these trends provide a greater degree of flexibility for resolving conflicts than a principle of self-determination conceived much more narrowly and limited by the roadblocks of territorial integrity and state sovereignty (not to mention political considerations), they also pose dangers that the Tibetan's justifiable claims against the Chinese Government – in the absence of workable internal solutions – may be sidelined by the international community. Some even suggest that an emerging democracy principle could supersede the right to self-determination and lead to its general decline.[72]

70 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), para 1.35, available at the International Development Research Centre website: http://www.idrc.ca/index_e.html (visited 20 May 2002).

71 See, generally, Draft Convention on Self-Determination Through Self-Administration, reproduced in Danspeckgruber and Watts (n 24 above), pp 36–45.

72 Alston (n 18 above), pp 272–273.

Self-determination and the Tibetan People

What do these developments suggest for the Tibetan people's efforts to realise their right to self-determination? First, it should be clear that if *all* peoples have a right to self-determination and if Tibetans are indeed a "people", then there would be little question that Tibetans, as a people, have a right to self-determination. Although the term "peoples" has not been satisfactorily defined in international law, several generally accepted criteria may include a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, and common economic life.[73] According to these factors, Tibetans are undoubtedly a distinct people. Even the Chinese Government refers to Tibetans as a "national minority".[74] The question, therefore, is not *whether* Tibetans have a right to self-determination, but instead in which forms could Tibetans exercise that legitimate right.

This section evaluates the various forms of self-determination that could apply to the Tibetan case. It examines Tibetan calls for independence, China's current autonomy and minority rights regime, and several proposed solutions to the Tibetan problem which fall somewhere in between full independence and the current status quo and demonstrate the recent expansion of "internal" options available for resolving self-determination claims.

Independence

Many Tibetans have called for independence from China based on historical evidence that Tibet constituted a sovereign state before 1950 and that China's invasion, therefore, violated the principle of territorial integrity. However, this approach has not led to productive results so far despite both sides' detailed descriptions of their differing interpretations of history. Indeed, although Tibet was arguably a state-like entity and a *de facto* sovereign country from 1912–1950 – when China was unable to maintain centralised control – no state has officially recognised the Tibetans' claims to sovereignty since 1950 (or even before 1950), casting doubts on Tibet's international legal personality.[75]

[73] These are drawn from the 1990 UNESCO Meeting of Experts on Further Study of the Rights of Peoples, quoted in Robert McCorquodale and Nicholas Orosz, *Tibet: The Position in International Law, Report of the Conference of International Lawyers on Issues relating to Self-Determination and Independence for Tibet, London 6–10 January 1993* (Stuttgart: Edition Hansjorg Mayer, 1994), p 145.

[74] See, generally, Information Office of the State Council of the People's Republic of China , "New Progress in Human Rights in the Tibet Autonomous Region", Feb 1998, available at the Chinese Government website: http://www.china.org.cn/e-white/last/index.htm (visited 8 Jan 2003).

[75] Surya P. Subedi, "The Right of Self-Determination and the Tibetan People", in Dino Kritsiotis (ed), *Studies in Law, Self-Determination: Cases of Crisis* (Hull University Law School, Studies in Law Series, 1994), pp 4–6.

Some Tibetans also argue that China's domination over Tibet resembles a "colonial" situation and, therefore, a right to external self-determination would apply. Although the definition of colonialism in international law is unclear, the 1960 Declaration suggests in paragraph 1 that it amounts to "[t]he subjection of peoples to alien subjugation, domination and exploitation".[76] The preamble "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations",[77] suggesting that more than one form exists. However, the traditional understanding of colonialism – widely accepted during the decolonisation process initiated by this Declaration as well as the UN Charter Chapters XI and XII – is a "salt-water" version in which a foreign power controls a far-flung territory. "Third-world colonialism" – when a more powerful developing state takes over a neighbouring territory – has not been clearly established as "colonialism" *per se* and, therefore, any claims to a right to independence in such a situation are generally more controversial than claims in the "salt-water" context.[78] A conference on Tibet's position in international law held in 1993 recognised these ambiguities and attempted to address them by recommending that the UN General Assembly "expand the mandate of the Special Committee on Decolonization to include Tibet in its mandate" and, therefore, validate Tibet's colonial status.[79]

Several elements of China's treatment of Tibet certainly resemble a "colonial" situation. For instance, the Chinese Government's rhetoric about increasing economic development in China and benefits for minority groups has paternalistic overtones reminiscent of the European colonisers' claims of cultural superiority.[80] Such rhetoric resonates throughout China's minority policies. For example, Article 6 of China's Law on Regional National Autonomy provides that the organs of self-government in autonomous regions shall "steadily raise the socialist consciousness and scientific and cultural levels of the people of the various nationalities".[81]

One scholar has referred to China as the last standing "multinational empire", comparable to the former Ottoman, Austro-Hungarian and Soviet empires.[82] This metaphor is instructive since the component parts of these

76 1960 Declaration (n 48 above), para 1.
77 *Ibid.*, Preamble.
78 Crawford (n 18 above), pp 23, 20 and 33.
79 McCorquodale and Orosz (n 73 above), p 150.
80 Michael C. Davis, "The Future of Tibet: A Chinese Dilemma" (Jan–Mar 2001) *Human Rights Review* 7, 8.
81 Law of the People's Republic of China on Regional National Autonomy 1984 (the Autonomy Law), Art 6, available at the Tibet Justice Center website: http://tibetjustice.org/materials/china/china6.html (visited 8 Jan 2003).
82 Pei, Minxin, "From Nominal Autonomy to Genuine Self-Administration: A Strategy for Improving Minority Rights in China", in Danspeckgruber and Watts (n 24 above), p 289.

other large political entities have already achieved self-determination in the form of independence. He also notes that "[t]he demographic dominance of Han Chinese is the key to the maintenance of the empire".[83] Again, this image of imperial domination supports many Tibetans' criticism that policies encouraging Han migration into Tibetan areas are "colonial" in nature.[84]

Other scholars, however, have questioned this characterisation. Sautman argues that if "Tibet is not a colony, self-determination is not required and a compromise must then be forged".[85] He then goes on to claim that Tibetan émigrés have weakened the Tibetan "colonial" cause by quoting inconsistent statistics related to numbers of Han migrants in Tibet, Tibetan deaths, incarcerations, etc. He also claims that the Tibetan population is actually growing, not shrinking, and since "demographic catastrophe" was one of the defining characteristics of Western-dominated colonies, Tibet does not resemble a traditional colony after all.[86] While Sautman's argument ignores other colonial criteria and his formulation of self-determination is overly simplistic, his argument is still illustrative of the difficulties inherent in demonstrating colonial status for Tibet.

These difficulties of historical interpretation and definition limit to some degree the usefulness of classifying Tibet as a "sovereign" country or a Chinese "colony" when determining a Tibetan right to independence. As discussed in the previous section, outside of the colonial context there are few situations in which a right to independence or secession is recognised. The saving clause of the 1970 Declaration, however, may provide better support for Tibetan independence claims since it implies that the principle of territorial integrity – in this case China's – only holds when a government represents "the whole people belonging to the territory without distinction as to race, creed or colour". This clause, read alongside self-determination's association with other political rights in the ICCPR, such as the right to vote, and in the context of the growing notion of "democratic legitimacy" discussed earlier,[87] could certainly apply to the Tibetan case since China arguably does not provide true representation for Tibetans in the sense of Article 25 of the ICCPR.[88]

83 *Ibid.*

84 Barry Sautman, "Is Tibet China's Colony?: The Claim of Demographic Catastrophe" (Fall 2001) 15 *Columbia Journal of Asian Law* 82, 90.

85 *Ibid.*, p 83.

86 See, generally, *ibid.*, pp 82–131.

87 For a discussion of "democratic legitimacy" and its relationship with self-determination, see Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 *AJIL* 46, 46–91, reprinted in Robert McCorquodale (ed), *Self-Determination in International Law* (Dartmouth: Ashgate, 2000), pp 509–554.

88 Art 25 reads: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ..."

The Canadian Supreme Court also suggested that in cases where "'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part",[89] secession may be possible.

Thomas Franck argues that "[d]emocracy is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes".[90] The Dalai Lama seems to recognise this trend and has been democratising and secularising the structure of his government-in-exile.[91] In light of Franck's observations, such moves could help the Dalai Lama gain greater legitimacy in the eyes of the international community and provide a contrast to China's generally undemocratic, and therefore less legitimate, government.

For these reasons, the Tibetan case for independence – or other forms of self-determination – rests more securely on the requirement of government *legitimacy*, meaning representative democracy and respect for fundamental human rights. In other words, the Chinese Government's lack of democratic "legitimacy" and human rights abuses against the Tibetan people provide a stronger – though not the only – basis for realising the Tibetan people's aspirations. According to Hannum:

> "[t]here are two instances in which secession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated ... secession may be the only option. Such circumstances will probably be uncommon, although the atrocities against, for example, Tibetans in China ... might qualify ... A second possible exception might find a right of secession if reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government ..."[92]

However, in practice, the international community at the official level has done little to assist Tibetans in their efforts to achieve self-determination aside from passing relatively mild General Assembly resolutions in 1951, 1961 and 1965 and a Sub-Commission resolution in 1991. Although these documents all express "grave concern" over human rights abuses in Tibet, only the 1961 resolution actually mentions the right to self-determination, calling

89 "Reference re Secession of Quebec" (n 61 above).

90 Franck (n 87 above), p 46.

91 "Statement of His Holiness The Dalai Lama on 10 March 2002 on the 43rd Anniversary of The Tibetan National Uprising Day" (the Dalai Lama Statement), available at the International Campaign for Tibet website: http://www.savetibet.org (under "News and Information" and "Press Releases") (visited 8 Jan 2003).

92 Hurst Hannum, "The Specter of Secession, Responding to Claims for Ethnic Self-Determination" (Mar / Apr 1998) 77 *Foreign Affairs* 13, 16.

for the "cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination".[93] But it uses relatively weak language, does not mention the Chinese Government's role in such practices, and ends with a feeble expression of "hope that all Member States will make all possible efforts, as appropriate, towards achieving the purposes of the present resolution". Although the Dalai Lama received the Nobel Peace Prize in 1989, Chinese Government pressure has led to his exclusion from a number of international forums, such as the 1993 World Conference on Human Rights in Vienna. More recently, in February 2002, a UN Committee voted to bar a Tibetan group from attending a conference on development,[94] and when local Tibetan government officials recently met with representatives of the Dalai Lama, the local officials "accused the Dalai Lama of attempting to split the motherland and insisted that talks about his 'individual future' were predicated on his willingness to publicly state that Tibet and Taiwan were inalienable parts of China".[95]

For practical, political reasons, and in response to this lack of international support, the Dalai Lama has retreated from calls for independence and turned toward internal compromise in line with international trends. However, the limits of China's autonomy and minority rights regime make workable internal solutions unlikely, as the next section demonstrates. Also, many Tibetans have been disappointed in the Dalai Lama's more moderate approach and believe that anything short of independence will fail to achieve their true aspirations.[96]

Chinese Autonomy and Minority Rights Regime

An examination of China's current legal framework for the protection of minority rights, including the establishment of autonomous regions, demonstrates violations of the Tibetan's right to "internal" self-determination. China's political philosophy of democratic centralism and its obsession with sovereignty and territorial unity effectively limit the meaningful exercise of autonomy within the Chinese system[97] as well as possibilities for resolving Tibetan claims.

93 UN General Assembly Resolution 1723 (XVI) on Tibet, 21 Oct 1961, available at the Tibet Justice Center website: http://www.tibetjustice.org/materials/un/un5.html (visited 8 Jan 2003).

94 "World Briefing United Nations: Committee Bars Pro-Tibet Group", *New York Times*, 9 Feb 2002.

95 "Human Rights Watch World Report 2003" (n 16 above), p 223.

96 "Address to Members of the European Parliament by his Holiness the Dalai Lama, Strasbourg", 15 June 1988 (the Strasbourg Proposal), available at the Tibet Justice Centre website: http://www.tibetjustice.org/materials/tibet/tibet4.html (visited 8 Jan 2003).

97 Yash Ghai, "Autonomy Regimes in China: Coping with Ethnic and Economic Diversity", in Yash Ghai (ed), *Autonomy and Ethnicity* (Cambridge: Cambridge University Press, 2000), p 78.

As early as 1935, the Chinese Communist Party – in contrast to Soviet policy at the time – explicitly decided not to grant a right to secession for border, minority regions of China.[98] In 1949, the Chinese Government promulgated the Common Program of the Chinese People's Political Consultative Conference (the Common Program) which has provided the basis for China's nationality policy since the founding of the People's Republic. Its provisions have been elaborated in the current Chinese Constitution and Chinese laws related to minority rights. Article 50 of the Common Program illustrates the general tone of these documents:

> "All nationalities within the boundaries of the People's Republic of China are equal. They shall establish unity and mutual aid among themselves, and shall oppose imperialism and their own public enemies, so that the People's Republic of China will become a big fraternal and cooperative family composed of all nationalities. Great national chauvinism will be opposed. Acts involving discrimination, oppression and the splitting of the unity of the various nationalities shall be prohibited."[99]

Although this formulation provides for equality and non-discrimination, it also emphasises national unity and implies an assimilationist approach to minority issues and a lack of tolerance for secession.

China's 1984 Autonomy Law is similar. Its preamble reiterates that China is a "unitary multinational state" and explains that "[r]egional national autonomy means that the minority nationalities, under unified state leadership, practice regional autonomy in areas where they live in concentrated communities".[100] Again, the emphasis is on unity and "state leadership". The final section of the preamble further links autonomy policy to the development of socialism: "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the people of various nationalities in the autonomous areas shall ... concentrate their efforts on socialist modernization ... and strive for ... the transformation of China into a socialist country ..."[101] Other sections of the law reiterate that autonomous areas are "integral parts" of China[102] and that the local

98 Gerard Postiglione, "National Minorities and Nationalities Policy in China", in B. Berberoglu (ed), *The National Question, Nationalism, Ethnic Conflict, and Self-Determination in the 20th Century* (Philadelphia: Temple University Press, 1995), p 264.

99 The Common Program of the Chinese People's Political Consultative Conference, Adopted by the First Plenary Session of the Chinese People's PCC on 29 September 1949 (the Common Program), available at the Fordham University website: http://www.fordham.edu/halsall/mod/1949-ccp-program.html (visited 8 Jan 2003).

100 Autonomy Law (n 81 above), Preamble.

101 *Ibid.*

102 *Ibid.*, Art 2.

autonomous institutions must apply "the principle of democratic centralism" and "uphold the unity of the country".[103]

The Autonomy Law provides some freedoms, including the right for minorities to use and develop their own languages and preserve or reform their own customs. There are also certain benefits for minority groups, such as exemptions from the "one-child" family planning policy, but in practice such benefits are often unfairly implemented by local officials.[104] "Han chauvinism" and derogatory stereotypes of Tibetans persist despite official pronouncements to the contrary.[105] For example, the exiled Chinese dissident Wei Jingsheng recalled his parents' negative reaction when he wanted to marry a Tibetan woman and their view that Tibetans were "half-human, half-beast".[106]

Recent revisions to the Autonomy Law appear to be aimed at increasing the rate of minority assimilation and centralised control over autonomous areas, especially by escalating the pace of economic development in those regions. These revisions further entrench an assimilationist and centralised approach to minority policy within the state political structure and could make proposals for greater autonomy more difficult to negotiate or implement. According to Xinhua, China's official news agency, "other amendments to this law focus on the economic system and the support and help that state organs at higher levels offer to localities under ethnic autonomy ... so as to accelerate the economic and social development in ethnic regions and promote national solidarity".[107] Li Peng, chairman of the Standing Committee of the National People's Congress, linked the revisions to China's development strategy in western regions, including new railway lines connecting Tibet with the interior.[108] These projects have been criticised by Tibetan activists and their supporters since they would increase contacts between the coastal regions and Tibet and certainly increase the flow of Han migrants into Tibet.[109] China's western development projects have also been criticised for contributing to environmental degradation in Tibet and other regions. Human Rights Watch has observed that the specific policy change toward Tibet in June 2001 underwent a "semantic shift from 'general stability' to

[103] *Ibid.*, Arts 3 and 5.
[104] Thomas Heberer, *China and Its National Minorities, Autonomy or Assimilation?* (Armonk, New York: M. E. Sharpe, Inc, 1989), pp 128–129.
[105] *Ibid.*, p 129.
[106] Wei Jingsheng, "A Letter to Deng Xiaoping", in Cao Changching and James D. Seymour (eds), *Tibet Through Dissident Eyes, Essays on Self-Determination* (Armonk, New York: M. E. Sharpe, 1998), p 85.
[107] "Jiang Zemin Signs Order Announcing Revision of Minority Self-Rule Law", *Xinhua News Agency Domestic Service*, 1 Mar 2001.
[108] "Consolidate National Unity in Line with Law: Li", *Xinhua General News Service*, 6 Dec 2001.
[109] "China Seeking to Colonise not Modernise Tibet: Exiled Premier", *Agence France Presse*, 10 Dec 2001.

'permanent rule and lasting peace'" which "may have also signaled Beijing's determination to strengthen direct control over Tibetan affairs".[110]

Former Chinese Premier Zhou Enlai highlighted the incompatibility between China's socialist political structure – based on democratic centralism and unity – and true enjoyment of autonomy in a statement after the Dalai Lama fled Tibet in 1959:

> "[W]e have always adhered to the principle of the unity of all the nationalities of our country and the unity of the Tibetan people themselves, and have stood for the institution of local autonomy in Tibet ... [T]he local government of Tibet should unite the people and drive the aggressive forces out of Tibet; and the backward social system of Tibet must be reformed."[111]

The Chinese Government's classification of China's national minorities into 55 specific groups also poses problems for the resolution of minority claims. Although ostensibly based on scientific criteria, this classification tends to impose identity on these groups in an arbitrary and bureaucratic fashion.[112] It also decreases the relative significance of larger and more restless groups, such as the Tibetans and Muslim Uighurs,[113] and excludes other groups altogether that consider themselves minorities, such as the Taiwanese.[114] Finally, it enforces territorial boundaries on minority regions, including Tibet, which do not necessarily correspond to national groups' claims to their traditional lands.

The various repressive strategies used by Beijing to suppress Tibetan unrest actually run counter to China's national interests. As a result of Tibet's location on the borders of Chinese territory as well as growing global interest in human rights, the Tibetan issue – especially human rights abuses in Tibet – has become an element of China's international relations and can interfere with other issues that the Chinese Government would like to address.[115] Also, maintaining control and unity through the use of force and human rights abuses ultimately creates further dissent. Leaving calls for self-determination unfulfilled can actually backfire and strengthen secessionist tendencies and cause greater instability.[116] For these reasons, an effective resolution to the

110 Human Rights Watch (n 14 above).
111 Excerpted from Premier Zhou Enlai's Report on the Work of the Government to the First Session of the National People's Congress (1959), quoted in Hannum (n 26 above), p 424.
112 Ghai (n 97 above), p 82. This system is comparable to classifications imposed by colonising powers in "salt-water" colonies which also imposed ethnic identity on particular groups. Such systems sometimes had disastrous effects, and have arguably contributed to ethnic violence in certain territories.
113 Dawa Norbu, *China's Tibet Policy* (Richmond: Curzon Press, 2001), p 342.
114 Daniel A. Bell, "Commentary", in Danspeckgruber and Watts (n 24 above), pp 298–299.
115 Davis (n 80 above), p 7.
116 Heberer (n 104 above), p 128 and *ibid.*, p 8.

Tibetan problem is also crucial for the Chinese Government to retain political legitimacy and succeed in holding its empire together.[117] The Chinese Government could more effectively resolve the Tibetan problem through negotiations with the Dalai Lama and implementation of a longer-term strategy, including real autonomy for Tibetans. However, the success of such proposals depends to a large degree on whether the Chinese Government can quicken the pace of political liberalisation generally throughout China.

Other Forms of Self-determination

Although Tibetans have presented a convincing case for independence from China, as discussed above, the urgency of the situation and the need for preservation of Tibetan culture as well as international trends away from "secession" make compromise a more practical option. But what sort of compromise would be acceptable and would truly fulfil the Tibetans' right to self-determination?

Short of the status quo, Minxin Pei proposes one of the most moderate plans for resolving minority issues in China. He suggests that greater protection of minority rights and "self-administration" is possible within the existing autonomy framework[118] and does not see realistic potential for more radical change given centralised control in Beijing and an undemocratic political system.[119] He suggests a compromise between the current system and secession or independence based on two methods: (i) "the development of local political institutions of genuine self-administration", including "semi-open democratic elections" leading to greater political participation for minorities; and (ii) "the construction of economic federalism", including "full utilization of local comparative economic advantage and a system of local finance" along with free trade with the rest of China.[120] However, his views have been criticised by other scholars as overly conservative. One commentator points out that Pei's concern that abrupt change could unleash greater ethnic hostilities does not take the Tibetan case into account where the status quo has meant severe repression and requires more radical action.[121]

There could be some value in promoting the Tibetan cause under the rubric of indigenous peoples' rights, since this category of group rights may have greater momentum and chance of success than other "peoples" rights movements.[122] Although no generally accepted definition for indigenous

117 Davis (n 80 above), p 9.
118 Pei (n 82 above), p 297.
119 *Ibid.*, p 293.
120 *Ibid.*, pp 297–298.
121 Bell (n 114 above), pp 300–301.
122 Alston (n 63 above), p 292 and Benedict Kingsbury, "Competing Structures of Indigenous Peoples' Claims", in Alston (n 18 above), p 110.

peoples exists in international law,[123] a convincing case could be advanced that Tibetans are indeed indigenous according to most commonly accepted criteria.[124] The 1994 Draft Declaration on the Rights of Indigenous Peoples (the Draft Declaration) is an attempt to set standards on issues that are of paramount importance to the Tibetan people, such as self-determination (Article 3) and the prevention of and redress for ethnocide or cultural genocide (Article 7).[125] However, the Tibetans themselves do not wish to be classified as an indigenous group, since this might imply that they hold minority status within the Chinese state and could weaken their claims for independence as a form of "external" self-determination.[126] Indeed, the right to self-determination, specifically articulated for indigenous groups in the Draft Declaration, may exclude the possibility of secession since the Declaration appears to limit the forms self-determination could take in Article 31: "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education [etc.]".[127] Finally, the Chinese Government does not acknowledge the existence of indigenous groups in China and would, therefore, be unlikely to agree to any indigenous rights regime for Tibetans.

Some have suggested that a federal system in China could better address minority concerns by devolving political power from the centre to the regions in much the same way that China's "economic federalism"[128] has contributed to economic decentralisation.

Yan Jiaqi, a Chinese political scientist, has proposed a Chinese federal system with the characteristics of a "confederation". This is bolder than Pei's proposal and would provide Tibet with greater autonomy than other provinces and a status as a "member state with special characteristics".[129] Yan's system differs from the current autonomy structure since "[t]he immediate

123 Benedict Kingsbury, "'Indigenous Peoples' as an International Legal Concept", in R. H. Barnes, Andrew Gray and Benedict Kingsbury (eds), *Indigenous Peoples of Asia* (Ann Arbor: The Association for Asian Studies, 1995), pp 15–17.

124 James Seymour, "Introduction", in Cao and Seymour (n 106 above), p xxi. For a discussion on attempts to define "indigenous peoples", *see* generally *ibid.*, pp 13–34.

125 UN Doc No E/CN.4/Sub.2/1994/2/Add.1 (Draft Declaration), Arts 3 and 7, available at the University of Minnesota website: http://www1.umn.edu/humanrts/instree/declra.htm (visited 3 Mar 2003). Ethnocide and cultural genocide, according to Art 7, would include: "(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; (e) Any form of propaganda directed against them."

126 Barnes et al. (n 123 above), p 2.

127 Draft Declaration (n 125 above), Art 31.

128 Michael C. Davis, "The Case for Chinese Federalism" (1999) 10 *Journal of Democracy* 124, 130.

129 Yan Jiaqi, "Federalism and the Future of Tibet", in Cao and Seymour (n 106 above), pp 113–119.

source of power of the Tibetan member state's government would come from the people of all of Tibet ..." and "the federal government would have no power ... to dismiss or replace different levels of officials in the Tibetan member state's government".[130] It would also stop forced population transfers and allow migrants into Tibet originally from interior provinces to return to those provinces if they wish.

Others, including the Dalai Lama, have suggested a system similar to the "one country, two systems" formula applied to Hong Kong and Macau – and ultimately designed for Taiwan in the eyes of the mainland Chinese authorities – as a blueprint for a Tibetan solution.[131] The system in Hong Kong, for example, allows a high degree of local autonomy and the maintenance of local legal and economic structures for 50 years, while Beijing controls most aspects of foreign affairs and defence.

In a 1988 speech before the European Parliament in Strasbourg, the Dalai Lama presented a compromise proposal based on a similar set of autonomy features. Tibet, including traditional Tibetan regions outside the Tibet Autonomous Region, would become a "self-governing democratic political entity ... in association with the People's Republic of China".[132] The Chinese Government would be responsible for Tibet's foreign policy and the Government of Tibet would "have the right to decide on all affairs relating to Tibet and the Tibetans".[133]

However, China has rejected a "one country, two systems" solution for the Tibetan situation. In Beijing's view, there is little need for a similar compromise with Tibet since Tibet has already been "liberated" and integrated into the rest of China.[134] "One country, two systems" may also have limits that make its potential application to Tibet problematic. For example, some have observed that Hong Kong's mainly undemocratic political system is actually structured to ensure control by the Central Government.[135] Indeed, the Dalai Lama has pointed out the similarities between "one country, two systems" and the terms of the 1951 Seventeen Point Agreement[136] which the Chinese Government, under an authoritarian regime, quickly dismantled. His Strasbourg proposal emphasised a democratic system of self-government for Tibet and individual freedom based on "full adherence to the Universal

130 *Ibid.*, p 117.
131 Art 31 of the Chinese Constitution provides for the establishment of "Special Administrative Regions" such as Hong Kong.
132 Strasbourg Proposal (n 96 above).
133 *Ibid.*
134 Ghai (n 97 above), p 94. However, Hong Kong's status as an international financial centre and its economic significance to China provide some measure of protection against Beijing's overt interference in local affairs. This would not be the case with Tibet.
135 *Ibid.*, pp 93–94.
136 *Ibid.*, p 92.

Declaration of Human Rights".[137] Others have observed that federalism is not possible without democracy, since it depends on real local self-rule and is, therefore, inconsistent with an authoritarian system.[138]

Although the Dalai Lama backed away from this proposal after negative responses from both the Chinese Government and many within the Tibetan émigré community, he has continued to promote compromise and advocate autonomy as a form of "internal" self-determination. In a recent speech, he reiterated this point using the meaning of self-determination articulated in the ICCPR and ICESCR:

> "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 for genuine self-rule in order for them to preserve their civilization and for the unique Tibetan culture, religion, language and way of life to grow and thrive. For this it is essential that the Tibetans be able to *freely determine their social, economic and cultural development*".[139]

Some commentators suggest that the Tibetans' prospects depend largely on political reform in China. For example, Xue Wei, a mainland Chinese dissident, has expressed a sentiment typical among Chinese democracy activists: "Without a democratic China there can be no separation. Once China is democratic, there is no need for separation".[140] Martin Shaw also argues that "the democratisation of China is probably the context in which the Dalai Lama's case ... is most likely to reach fruition".[141]

Conclusions

Developments in the international legal understanding of the right to self-determination as well as political trends toward a principle of democratic self-government could offer creative and more flexible options for realising the Tibetan people's right to self-determination. However, any potential "internal" manifestations of self-determination, such as autonomy, federalism and other political and legal structures, designed to resolve the Tibetan conflict should not preclude the possibility of secession. Indeed, the notion of

137 Strasbourg Proposal (n 96 above).
138 Davis (n 128 above), p 130.
139 Dalai Lama Statement (n 91 above). Emphasis added.
140 Xue Wei, "Ripple on the River of History", in Cao and Seymour (n 106 above), p 104. *See also* Martin Shaw, "A Response to Surya Subedi", in Kritsiotis (n 75 above), p 18. Shaw remarks: "The Tibetan case probably depends now on the future of China ... The democratisation of China is probably the context in which the Dalai Lama's case ... is most likely to come to fruition".
141 Shaw, *ibid.*

democratic self-government discussed above includes an acceptance of pluralism and a diversity of views. Any suppression of secessionist opinion could violate this principle. Kymlicka argues convincingly that successful resolution of minority claims does not depend on eliminating secession from the political agenda.[142] On the contrary, allowing secessionist political parties and platforms to operate within a federal system may actually diminish the possibility that secession might occur.[143] In the author's view, any successful negotiation of Tibetan claims through "internal" methods must go hand in hand with the acceptance by Chinese authorities that secession could be a legitimate option for the Tibetans if internal methods fail.

But effective resolution of Tibetan claims remains *politically* unfeasible in the current Chinese political environment, especially without greater international support for the Tibetan cause. In the current context, it is unlikely that the Chinese Government would accept any form of secessionist dialogue, and international support for Tibet will probably remain weak in light of China's growing economic importance. However, violations of human rights resulting from the denial of the Tibetan people's right to self-determination pose serious threats to the continuation of a distinct Tibetan civilisation and, despite the difficulties of application, the principle of self-determination should not be abandoned in the Tibetan case.

Tibet is one of the rare examples of a largely peaceful "peoples" movement against oppression and denial of their right to self-determination. As such, the Tibetan case presents an ideal opportunity for the international community to demonstrate its commitment to such a right as an instrument of peace as expressed in the UN Charter. The Dalai Lama, responding to these concerns and with particular reference to terrorism and the events of 11 September 2001, reminded the world of the significance of the Tibetan cause:

> "The international community must assume a responsibility to give strong and effective support to non-violent movements committed to peaceful changes. Otherwise, it will be seen as hypocrisy to condemn and combat those who have risen in anger and despair but to continue to ignore those who have consistently espoused restraint and dialogue as a constructive alternative to violence."[144]

[142] Will Kymlicka, "Federalism and Secession: At Home and Abroad" (July 2000) 13 *Canadian Journal of Law & Jurisprudence* 207.
[143] *Ibid.*, p 215.
[144] Dalai Lama Statement (n 91 above).