

Self-determination and the International Legal Order: the Tibetan Experience

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I truly believe that individuals can make a difference in society. Since periods of great change such as the present one come so rarely in human history, it is up to each of us to make the best use of our time to help create a happier world.¹

His Holiness the Fourteenth Dalai Lama, 1992

ABSTRACT

Tibet has traditionally been strategically important as the world's highest plateau centred between the Russian federation, China and the Indian sub-continent. In 1950, five years after the promulgation of the UN Charter, the Peoples Republic of China (PRC) invaded Tibet and commenced an illegal occupation which continues today. Tibet now constitutes one fifth of the land area of the PRC. Since the invasion, the PRC has attempted to assimilate the Tibetan people by suppressing Tibetan culture and religion and has exploited Tibet's mineral and forestry resources while routinely violating fundamental human rights so to combine into a program of genocide. Against this background, the Tibetan people have striven for self-determination and freedom from neo-colonialist oppression. However, as yet the international community has been ineffective in guaranteeing the Tibetan people's fundamental right to self-determination.

INTRODUCTION

Self-determination of peoples has emerged as one of the most important precursors to a global climate of peace, yet its continuing emergence remains

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turbulent while challenging the existing international legal order. Self-determination as an issue confronting the international community is highly controversial² as evidenced by the recent United Nations (UN) designation of 1993 as *International Year for the World's Indigenous People* and the international media's focus upon the struggles of many peoples seeking self-determination from oppressive regimes.³

Together, these peoples who are denied the right to self-determination, represent a third of the world's population and comprise the Fourth World. It is estimated that there are approximately 5000 as yet internationally unrecognised nations whose peoples maintain a distinct political culture within the states which claim their territories.⁴ The Fourth World entities lack the sovereign identity of Third World states in the international arena, yet as a result of the process of 'classical decolonisation' many of these 'nations' remain ensconced within the political boundaries of other nation states.⁵ Fourth World nations are characterised by their continuing struggle to gain or maintain some degree of sovereignty or autonomy over their national homeland.

However, exercising the right to self-determination can directly impinge upon the sovereignty of the controlling state. Moreover, customary international law has developed in the context of regulating rights and obligations between the sovereign state entities.⁶ As a consequence, states have traditionally been considered as the subjects of international law, while individuals and peoples were occasionally considered objects, but were denied any direct access or representation in the international legal community.⁷ It is suggested that the emergence of the principles of self-determination and the universal application of human rights requires a re-examination of the scope of international law.

Tibet's Historical Independence

Tibet epitomises an ancient nation with an identifiable political structure (yet today lacks international legal recognition); it is a classic case of the denial of the right to self-determination to a people. As the Irish Ambassador observed in the General Assembly of the UN 'Tibet has fallen into the hands of the Chinese People's Republic for the last few years For thousands of years or for a couple of thousand at any rate, it was as free and as fully in control of its own affairs as any nation in this Assembly, and a thousand times more free to look after its own affairs than many of the nations here.'⁸

² M. Kirby. 'The Peoples' Right to Self-Determination - a new challenge for the ICJ.' (1993) 20 NZLJ 341.

³ For example; the Bougainville Secessionists, the Tamil Tigers, the Ogoni people in Nigeria, Zapatistas and Mayans in Mexico and many peoples within both Chinese and Indonesian territories.

⁴ R. Griggs. *The Meaning of the Nation and State and the Fourth World.* Occasional Paper No 18. (Washington: Center for World Indigenous Studies, 1992).

⁵ S. Blay. 'Self-Determination: A Reassessment in the Post-Communist Era.' (1994) 22 *Denver JILP* 275 at 276.

⁶ J.L. Brierly. *The Law of Nations: An Introduction to the International Law of Peace.* H. Waldock, (ed.). (6th ed. London: Oxford University Press, 1963.) *passim*.

⁷ Starke's *International Law* (11th ed. Sydney: Butterworths, 1994) at 51.

⁸ Statements of Mr Frank Aiken. See G.A. Doc. A/PV.898 (1960), p. 52. He repeated these

The historical status of the Tibetan nation has received an entirely biased consideration in the context of the international legal community, largely as a result of imperialist expansionism by the British and Chinese regimes during the 19th Century,⁹ and more recently by the PRC's continuing occupation of Tibet. It is not possible here to adequately review the convincing indicia of the sovereign state that Tibet enjoyed over its long and rich history.¹⁰ However, because the PRC's claim to Tibet is also historical, it is worth highlighting some of the features of government and diplomacy of these central Asian cultures.

Tibet is one of the three original great central Asian cultures¹¹ with a history traceable to 127 AD, although it is widely accepted that Tibet was first unified in the 7th Century AD.¹² After two centuries of warring, Tibet concluded one of its early, and more significant treaties with China in 821 AD. That treaty clearly identified the sovereign equality of the two states, and provided for the future right to peace and territorial integrity of each, 'as the Tibetans shall be happy in Tibet and the Chinese shall be happy in China', invoking the sun, the moon, planets and stars as witnesses and thereby appealing to universal natural law.¹³ Around the beginning of the second millenium, a Buddhist renaissance flourished within the Tibetan State which served to curb Tibet's own expansionist aspirations.¹⁴ No further contact was recorded between the governments of Tibet and China until the successive conquest of both countries in the creation of the Mongol 'world empire' of Ghengis Khan in the 13th Century.

The Mongol conquest of Tibet's northern neighbour, the Tangut empire, in 1207 raised sufficient concern for the Tibetan government to establish friendly contacts with Ghengis Khan's expanding state. The Mongols were introduced to Tibetan Buddhism and culture when Prince Goden, Ghengis Kahn's grandson, summoned the Tibetan religious leader, the Lama Sakaya Pandita to the royal court. In return for the Lama's loyalty, Prince Goden invested him with authority over Tibet.

Although this formality had very little real impact, it was significant in establishing a *sui generis* relationship, known in Tibetan as Chö-Yön or 'priest - patron'. By the time Kubilai Khan (1259-1294) assumed power, Buddhism had become the state religion of the Mongol empire. The Chö-Yön relationship had developed into an expectation that the patron would provide military protection

sentiments in the General Assembly in 1965, see G.A. Doc A/PV.1394 (1965), 61

⁹ The political climate of state relations at this period is well discussed by both P. French. *Younghusband: the last Great Imperial Adventurer*. (London: Harper Collins Publishers, 1995); also M.C. van Walt van Praag, *The Status of Tibet: History, Rights and Prospects in International Law*, (Boulder, Colorado; Westview Press 1987) *passim*.

¹⁰ The international lawyer and legal representative of Tibet, M.C. van Walt van Praag comprehensively reviews the history of Tibetan sovereignty over several chapters in his authoritative book, n. 8 *supra*.

¹¹ These are the historical Tibetan, Mongol and Chinese cultures.

¹² King Songtsen Gampo and his successors achieved unification, and importantly commissioned the formulation of Tibetan script for the transfer of Indian Buddhist teachings. See Van Walt van Praag, n. 9 *supra*, at 2.

¹³ The text of this treaty was recorded on three stone pillars in the Tibetan capital, Lhasa and the Chinese capital of the time. The text is still legible on the pillars in Lhasa. See H.E. Richardson, 'The Sino-Tibetan Treaty Inscription of A.D. 821/23 at Lhasa.' (1978) 2 *JRAS* pp.153-154.

¹⁴ The Dalai Lama, *My Land and People: memoirs of the Dalai Lama of Tibet*. (Potala Corporation: New York, 1962) at 58.

for the Lama in return for the Lama's devotion to the religious needs of his patron. Subsequently, when Kublai conquered China and established the Yuan Dynasty¹⁵ he bestowed the title of Supreme Pontiff and Imperial Preceptor of the Mongol empire upon the Lama.¹⁶

Although Tibet came under the control of Kubilai Khan before his conquest of China, it also regained its independence from Mongol subjugation before China. Further, the Mongol empire recognised the special status of Tibet and did not seek to integrate the administration of the Tibetan State with the conquered state of China. The Mongol-Tibetan relationship was one of religious, cultural and racial kinship while neither shared an affinity with the Chinese. After a period of hereditary secular rule in Tibet following the contraction of the Mongol empire, the Chö-Yön relationship fell into disuse until Sönam Gyatso sought patronage from Altan Khan, who conferred the title of 3rd Dalai Lama upon him. The two previous incarnations were then recognised and had the title conferred upon them retrospectively.¹⁷ The 4th reincarnation of the Dalai Lama was discovered in the grandson of Altan Khan, further strengthening ties between the Tibetan and Mongol peoples. After a period of unrest the 5th incarnation of the Dalai Lama called upon his Mongol patron, Gushri Khan, to intervene in Tibet's continuing regional and religious power struggles. The emperor fulfilled his duties under Chö-Yön and delivered a unified Tibet to the Dalai Lama in 1642. The Chö-Yön relationship again applied to governance in Tibet, the Dalai Lama ruled as sole sovereign and spiritual head of the State religion, while Gushri Khan retained military control and continued to protect the Dalai Lama.

Essentially, the Dalai Lama was the Head of State of the ancient theocratic government of Tibet. The unique position of the Dalai Lama fused religious and secular government in a culture devoted to religion with monks and nuns comprising as much as 10 % of population. Effectively, Tibet possessed a dual system of government and religious hierarchy, with all positions below the Dalai Lama duplicated in the two spheres of government.¹⁸

Tibet developed no association with the subsequent Chinese Ming dynasty,¹⁹ which was eventually overthrown by Manchu invaders from the north, establishing the Qing dynasty.²⁰ The Manchu rulers were as foreign in China as the Mongols had been, and were resented by the Chinese, a situation which resulted in the dismemberment of the Qing dynasty during the Chinese Cultural Revolution of 1911. In 1653, the 5th Dalai Lama met with the Manchu Emperor in present day Beijing accepting his offer of patronage, although it is clear from documents of the royal court that the two Sovereigns met on the basis of equality. This relationship has been likened to that of the contemporary superpowers and their satellites, as at all times Tibet maintained an independent existence from the Manchu empire. However, when the British invaded Lhasa in 1904 during the height of their colonial expansion, the last vestige of Manchu influence remained in the form of a permanent ambassador of the emperor known as the Amban. At

¹⁵ (1279 - 1368).

¹⁶ Van Walt van Praag, n. 8 *supra* at 6.

¹⁷ The Dalai Lama, n. 13 *supra* at 21.

¹⁸ *Ibid* at 60.

¹⁹ (1386-1644).

²⁰ (1644-1912).

this stage, the Euro-centric term of suzerainty was used by the British to encapsulate their incomplete understanding of the Chö-Yön relationship.

The Principle of Self-determination

Self-determination is based on the fundamental precept that the government should derive its mandate from the consent of the governed. Accordingly, self-determination is a collective right vested in the people. Although self-determination rests on this democratic basis, as Lenin observed, there is no inherent incompatibility between the right to self-determination and socialism. In fact, the 1931 Constitution of Soviet China categorically and unconditionally recognised self-determination as a right to separation from China with the formation of independent states for 'national minorities'.²¹

The collective right of peoples to self-determination has only really been embraced as fundamental principle at international law during the 20th Century, whereas customary international law has a recognisable history of several centuries. Self-determination is a right independent of customary law, emanating instead from principles of natural law, and although rights to self-determination are often enshrined in the law of treaties, the existence of the right does not depend upon any treaty.

The comprehensive writings of Brierly review the development and the influence of natural law upon the absolutism of state sovereignty. Essentially sovereigns are subject to a higher or natural law, not created by any sovereign power but part of the 'order of nature'.²² Although natural law is criticised as a flexible tool often applied in different contexts, there are certain rights and freedoms which may be universally considered as basic and fundamental. In his work on fundamental human rights, Amankwah proposes that such rights can be considered as universal on the practical basis that they are requisite for a person to undertake the quest for self-knowledge and understand his/her purpose of being.²³

The Right to Self-Determination and Customary International Law

As previously noted, customary law regulates interactions between states, and as a historical consequence reflects the ideology that states should be able to enjoy complete and unencumbered exercise of their sovereign power in domestic affairs. Accordingly, the doctrine of *uti possidetis* was developed to ensure a state's right to territorial integrity and to legitimately counter any threat to the exercise of its sovereignty over its territory.²⁴

However, a people attempting to exercise their right to self-determination pose a threat to the existing *status quo* of the sovereign, and the state can attempt to deny

²¹ Van Walt van Praag, n. 9 *supra*.

²² Brierly, n. 6 *supra*.

²³ H.A. Amankwah. 'Fundamental Human Rights: Roots, Fruits, Myths and Realities.' (1989) 17 *Melanesian Law Journal* 43 at 44.

²⁴ Blay, note 4 *supra*. See also G.J. Simpson. 'New developments in the Law of Self-Determination'. *Proceedings of 1991 International Law Weekend*. (International Law Association, Department of Foreign Affairs and Trade, Attorney General's Department; Canberra, 1991) 69.

the right, while claiming subversion of its territorial integrity. Furthermore, states are all too willing to resist international involvement in issues of self-determination on the basis that it amounts to unsolicited interference with their domestic affairs. This is the PRC's current stance on Tibet.²⁵

The competing ideals of customary international law and the natural law concept of 'freedom of peoples' are evident in the Charter of the United Nations. This conflict between customary international law and self-determination presents the question: 'what should be the posture of the international community towards a postmodern tribal population inhabiting a part of a recognised state which seeks to break away to constitute a new separate state?'²⁶

Self-determination and the UN

It would seem the overriding importance of the right of self-determination is evidenced by its enshrinement in Purpose 2 of Article 1 of the *Charter of the UN* 1945: viz to 'develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.' However, this right is diluted by the statist approach of Article 2 that prohibits the use of force by members against a state's territorial integrity, and interference in the domestic jurisdiction of the state.

Article 55 of the Charter urges member states to promote activities 'based on respect for the principle of equal rights and self-determination of peoples'. Article 56 then imposes a duty on member states to jointly or separately undertake measures to achieve these purposes. Importantly, Article 59 obligates the UN to initiate the creation of agencies to accomplish the purposes of Article 55. While it does not expressly use the term self-determination, Article 73 of the UN Charter places a specific duty upon members to facilitate self-government and other rights incidental to self-determination of the peoples within their territory.

However, the peoples who actually possessed the right to self-determination, were not provided with any means of recognition or representation within the existing international legal framework. For example, the Charter identifies rights and vests judicial determination of claims in the International Court of Justice, yet Article 34 of the *Statute of the International Court of Justice* 1945 restricts legal standing to States only in any proceedings before it.

It was not until 1960 that the General Assembly of the UN reaffirmed the principle of self-determination in Resolution 1514,²⁷ the *Declaration on the Granting of Independence to Colonial Territories and Peoples*, indicating that the right to self-determination did not only exist by virtue of the UN Charter. Self-determination gained further credence as an internationally enforceable right with the adoption of the *International Covenant on Economic, Social and Cultural*

²⁵ Dunkley, G. 'Human rights and Chinese gold.' *The Republican (Independent Weekly)*, Friday, May 16th 1997 (10) 1 & 7.

²⁶ T.M. Franck. 'Postmodern tribalism and the right to secession.' 3 at 4. in C. Bröhlmann *et al.*, (eds.) *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1993).

²⁷ passed on 14 Dec 1960 (89:0, 9 abstentions). UN Doc A/4684 (1960) 15 UN GAOR Supp 16, 66-67.

*Rights*²⁸ and the *International Covenant on Civil and Political Rights*²⁹ in 1966. These covenants shared a common Article 1 framed in the same terms of the 1960 Declaration; 'All peoples have the right to self-determination' and continues by acknowledging that fundamental human rights are a consequence of the existence of this right.

Individual, Collective and Sovereign Rights

From this perspective, the UN, essentially a forum where only states have representation, afforded legal recognition of human rights which are vested in the individual and the collective right of a people to self-determination, although these rights can conflict with the deeply entrenched, absolute sovereign right vested in a state. It is the contention of many authors that there is no provision for reconciliation of these competing rights within the State oriented UN system.³⁰

In contrast to the UN instruments, the *Algiers Declaration on the Rights of Peoples 1976* formulated by non-State entities comprised of eminent jurists, trade unionists and national liberation organisations, though lacking the force at international law of a treaty instrument, serves to elucidate the principle that the right of self-determination exists as a consequence of natural law. Although Article 1 of the UN Charter sets out the right to self-determination as a precursor to the enjoyment of fundamental human rights, the Algiers Declaration more clearly expresses this relationship; that is, any systematic denial of the fundamental rights of a people are fully indicative of infringement of the right to self-determination.

The Declaration is also important in that it establishes that the process of self-determination is frequently the cause of tension and international crises. However, the peace attained after the successful recognition of people's rights culminating in the achievement of social justice is much to be preferred to a mere cessation of any armed conflict while breaches of self-determination occur.³¹ Accordingly, the Declaration also serves to impose obligations upon the international community under Article 30, which states:

The re-establishment of the fundamental rights of peoples when they are seriously disregarded, is a duty incumbent upon all members of the international community.

The Algiers Declaration, by virtue of its externality to the legal system of sovereign states, is perhaps a means by which the competing rights of individuals and peoples can be reconciled with state rights. It is appropriate that fundamental

²⁸ (1966) 993 UNTS 3.

²⁹ (1996) 999 UNTS 171.

³⁰ For example H.A. Amankwah, 'Self-Determination in the Spanish Sahara: a Credibility Gap in the United Nations' Practice and Procedure in the Decolonisation Process.' (1989) 14 *The Comparative and International Law of Southern Africa* 34; Franck, n. 26 *supra*, see also Klabbers, J. and Lefebvre, R. 'Africa: lost between self-determination and *uti posseditis*.' 37 at p. 43, in C. Bröhlmann *et al.*, (eds.) *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1993).

³¹ For example Article 28 proclaims, it is the right of peoples '... whose fundamental rights are seriously disregarded to enforce them, especially by political or trade union struggle and even, in the last resort, by the use of force.'

human rights and the collective right to self-determination are concomitant with the principles of natural law, and accordingly these rights should prevail over sovereign rights derived from customary international law. This ideology is reflected in the postulation of Cassese and others, that a consequence of the right to self-determination is that each state is entitled to help oppressed peoples in their effort to achieve self-determination, and that the oppressing state then forfeits any right to be free from external interference.³² Again, this is compatible with the opinions expressed in the International Court of Justice that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people.'³³ Alternatively, using the paradigm of natural law, a state's right to unfettered domestic jurisdiction and territorial integrity is entirely dependent upon the successful observance of rights conferred under natural law.

TIBET'S STRUGGLE FOR SELF-DETERMINATION AND THE INTERNATIONAL COMMUNITY

Invasion by the People's Republic of China

Effectively, the Tibetan state has been denied its sovereign right to existence, and the people of Tibet have been denied both this collective right of self-determination and their individual basic human rights since 1950, when the Peoples Liberation Army (PLA) of the PRC invaded Tibet.³⁴ After the 1949 revolution in China, the PRC was not afforded recognition by the UN until 1971.³⁵ It would seem that this gave the 'new' Chinese regime a licence to operate outside the purview of international law. Be that as it may, 'China's continued presence in Tibet constitutes a serious violation of international law'.³⁶

The PLA, numbering some 40,000, forced the surrender of the Tibetan army of 8000 two weeks after their incursion into Tibetan territory. At this time the PRC authorities publicly announced that the PLA had advanced into Tibet to free three million Tibetans from imperialist oppression and to consolidate national defences on China's western borders.³⁷ Realising that only the divine incarnation of the historical protector of Tibet could be trusted to lead his people in the face of such adversity, the Tibetan National Assembly (the Tsongdu) requested the then 15 year old, Fourteenth Incarnation of the Dalai Lama to accept full governing power of Tibet. In an appeal for UN intervention, the Dalai Lama wrote in a letter to the Secretary General:

We can assure you, Mr Secretary General, that Tibet will not go down without a fight. Though there is little hope that a nation dedicated to peace will be able to resist the brutal effort of men trained to war, we

³² A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*. (Cambridge: Cambridge University Press, 1995) at p 176. See also van Walt van Praag 8 *supra*.

³³ Judge Drillard in the *Western Sahara* case. I C J Rep., 1975, at 122.

³⁴ In what Beijing farcically termed the 'peaceful liberation of Tibet.' Van Walt van Praag, 8 *supra* at 143.

³⁵ GA Res 2758 (XXVI) of Oct 25, 1971.

³⁶ Van Walt van Praag. 8 *supra* at p. 203.

³⁷ *Id.* at 142.

understand that the United Nations has decided to stop aggression wherever it takes place.³⁸

This appeal contains the essence of the situation, namely that a large expansionist state had unilaterally violated the territorial integrity and subjugated a small, independent, peaceful state in an act of unprovoked aggression thus in breach of the principles of the UN Charter and both international customary law and treaties.

Later in 1951 delegates of the Tsongdu in Beijing were detained and forced to sign an agreement 'authorising' Chinese control of Tibet, although they expressly informed the Chinese that they had no sovereign authority to bind Tibet to the PRC's ultimatum. Subsequently, after displays of violent repression³⁹ of any opposition in Eastern Tibet, the Dalai Lama and his government tried to maintain a semblance of autonomous government in the face of increasing Chinese political control and a program of assimilation of Tibet into the PRC.

In 1959, masses of Tibetans openly protested in Lhasa against the denial of their right to self-determination. The repressive response of the occupying forces left 87 000 Tibetans dead, with tens of thousands imprisoned, and the issuing of a Chinese edict dissolving the Tibetan Government.⁴⁰ The Dalai Lama, his government and some 100 000 Tibetans fled Tibetan territory and continued to execute the duties of government while operating in exile in Dharmasala, India.

UN Response

In response to the Dalai Lama's pleas for the observance of fundamental rights and freedoms of the Tibetan people, the General Assembly of the UN passed a resolution⁴¹ calling for the cessation of human rights abuses, although it contained no direct reference to the unrecognised state of the PRC. This was followed by other resolutions of the General Assembly in 1961 and 1965 expressing grave concern that events occurring in Tibet 'violate fundamental human rights and freedoms, including the principle of self-determination ... of the Tibetan people.'⁴² These resolutions of the General Assembly are evidence that the representative organ of states within the international community recognised the Tibetans as a 'people' entitled to the right of self-determination, and that this right together with fundamental human rights of Tibetan people were being denied. However, the structure of the UN meant that the Tibetan government was afforded virtually no assistance and minimal representation, while similarly, the PRC was not recognised as a member, and, therefore, could not be chastised, or reprimanded within the UN.

³⁸ UN Doc A/1549, 11 Nov, 1950.

³⁹ Including the destruction of religious buildings and the imprisonment of community leaders.

⁴⁰ Van Walt van Praag, 8 *supra* at 163.

⁴¹ G.A. Res. 1353 (XIV) 1959, UN Ybk, pp.67 - 69.

⁴² G.A. Res. 1723 (XVI); G.A. Res. 2079 (XX).

The role of the Tibetan Government in Exile

After the 1959 uprising, the Tibetan leader realised that the exiled-Tibetan Government lacked any real access to international fora and relied upon the conscience of other states to intercede on its behalf with the PRC. It became obvious that although there was much debate in congresses and parliaments of many states, the executive arms of those same states were entering into trading arrangements with the PRC regarding the 'Tibet Autonomous Region'. In these circumstances formal recognition of the government in exile created a very real risk of political or military retribution by Beijing.

In 1963 the Dalai Lama promulgated and enacted⁴³ a constitution for a democratically elected Tibetan parliament. During this time, the Tibetan Government, with very limited resources, sought to establish Dharmshala as an exiled community that could actively pursue the right of the Tibetan people to self-determination, while adequately catering for the continuous stream of Tibetan refugees crossing over the Himalayas, through Nepal into India.

The Panchen Lama, the nation's second highest spiritual leader who remained in Tibet, was incarcerated as a 'revolutionary traitor' for fifteen years after he defied Beijing by proclaiming his loyalty to the Dalai Lama and Tibetan independence at a mass public meeting in 1964. By 1976, when China's 'Big Three' leaders had passed away,⁴⁴ the social fabric of the Tibetan state was replaced with a socialist structure.⁴⁵ Military action, social repression and hitherto unknown famines caused by devastating agricultural reforms combined as a tool for the PRC's genocide of the people of Tibet, and over one million people, more than a sixth of the Tibetan population had died as a result of the PRC's invasion and occupation.⁴⁶

After increased religious persecution of Tibetans in the early 1980s and the difficulty of dialogue between the PRC and the Tibetan Government-in-exile, the Dalai Lama began an arduous program of public addresses as part of a campaign to focus international attention upon Tibet's struggle for self-determination. Significantly, the Dalai Lama was awarded the Nobel Prize for Peace in 1987, serving to raise the profile of the Tibetan cause internationally. In 1989, Beijing responded to the growing movement of democratisation throughout the PRC with the students at Tiananmen Square,⁴⁷ and the cessation of negotiations on Tibet's status. At this time, the 10th Panchen Lama died after a tortured life of incarceration and re-education by Chinese authorities.

⁴³ As far as it is possible for a government deprived of its territory.

⁴⁴ Zhou Enlai, Jhu De and Mao Zedong.

⁴⁵ R. Terrill. *China in Our Time*. (Sydney: Hale & Iremonger Publishers, 1995) *passim*.

⁴⁶ Prior to the PRC's 1950 incursion, Tibet had experienced neither peasant rebellions nor famines, and had no police or army of any significance, the military only existing for the defence of Tibet from expansionist states. An analogous situation exists in East Timor, where famine was previously unknown before the Indonesian invasion; G.J. Aditjondro 'International Law and the Question of East Timor' (1995) *Conference of International Lawyers at the London Law Society Buildings CIIR/IPJEJ* at 58.

⁴⁷ The complete lack of respect for human rights during this attack on the tens of thousands of unarmed protestors by the PRC's Military is covered in Chapter 15 of Terrill, *supra* 45.

The Permanent Tribunal of Peoples

In June 1992, the Tibetan Government-in-exile lodged a complaint with the Permanent Tribunal of Peoples against the PRC leading to the Tribunal's *Session on Tibet, Strasbourg, France, November 1992*.⁴⁸ The Permanent Tribunal of Peoples was formed in 1979 following the *Declaration of Algiers 1976*, and was originally constituted by eminent jurists, but since has also included prominent philosophers, theologians and others with a reputation for commitment to a universal application of human rights principles. The Tribunal has investigated several incidents of deprivation of peoples' rights,⁴⁹ with varying results. The PRC declined an invitation to join in the proceedings, although documents were submitted in an effort to substantiate its claim to sovereignty over Tibet. The determination of the Tribunal was that the activities of the PRC had the effect of denial to the Tibetan people of the right to self-determination.

This was followed by the 1993 *Conference of International Lawyers on Issues Relating to Tibet*⁵⁰ in London which concluded that the Tibetan people's right to the exercise of self-determination had been denied by reason of the act of military aggression and occupation by the PRC. In all respects, since the invasion, the PRC has dominated Tibet with the characteristics of oppressive colonial administration. Additionally, the Conference found that the PRC also breached international law with respect to the large population transfers of non-Tibetans into Tibet, and the continued violation of fundamental human rights.

Despite the conclusive findings of these conferences, neither the international community nor the PRC has come any closer to helping the Tibetans achieve self-determination. Since the Tiananmen Square massacre, every year an attempt has been made at the UN Commission on Human Rights (UNCHR) to condemn China's human rights record, yet the PRC (itself, one of the 53 nation members of the UNCHR) has thus far managed to buy enough votes to block any resolution. For example, Australia has co-sponsored or supported all UNCHR motions condemning China's human rights violations, yet in 1997 the Australian government desisted on the annual motion in return for 'trade initiatives'.⁵¹

Conversely, the situation within Tibet worsens, despite the increased international dialogue with the PRC. During 1996, political and religious repression in Tibet had intensified with Chinese authorities banning the display of the Dalai Lama's

⁴⁸ The Tibetan accusation consisted of the following categories;

The PRC's invasion in 1949-50 was an invasion of an independent state, and the presence thereafter of the Peoples Liberation Army (PLA) in Tibet was in breach of international law. The PRC was continuing to deprive the Tibetan people of the right to self-determination and was transferring populations of non-Tibetan people into the territory of Tibet, so as to alter the conditions for the exercise of self-determination rights by the Tibetan people;

Serious repeated and fundamental breaches of human rights directed at Tibetan people and individual Tibetan protesters in particular; and in addition,

Serious derogations from the environmental rights of Tibetan people resulting from large-scale agriculture, population transfers, deforestation and dumping of radioactive waste.

⁴⁹ For example: Western Sahara (1979); Philippines (1980); Eritrea (1980); East Timor (1981); Armenia (1984); Brazilian Amazonia (1990).

⁵⁰ Chaired by the Hon Justice Michael Kirby, Chairman of the Executive Committee of the International Commission of Jurists.

⁵¹ Dunkley, *supra* n. 25.

photographs as well as purging the monasteries.⁵² Following the recognition of the 11th Panchen Lama, the 6 year old Gedhun Choeyki Nyima, by the Dalai Lama and clergy in January, Beijing responded by kidnapping the young Lama⁵³ and installing their own 6 year old in his place. 'The reincarnation of the Panchen Lama is purely a religious matter, one which an atheist, Communist government should have nothing to do with.'⁵⁴

UNPO AND OTHER NON-GOVERNMENT ORGANISATIONS

From the Tibetan experience, it is apparent in the current climate of the international legal order that nations and peoples are denied access to the foremost organisations simply because they do not constitute an internationally recognised state. This exclusion, combined with the demise of classical 'decolonisation', has resulted in many of the peoples seeking self-determination to resort to violence based on the well-founded belief that states are more likely to respond to violence over reason and diplomacy of the disenfranchised.

The Unrepresented Nations and Peoples Organisation (UNPO) is a recently formed forum of nations and peoples who are not adequately represented in the international community. The signatories to the UNPO Covenant pledge adherence to the right of all peoples to self-determination and democracy, human rights, religious freedom and the right to protect their environmental resources through non-violent activities. Since its formation in 1991, UNPO has expanded its role as a legitimate international organisation where governments can meet the representatives of movements that oppose regimes with whom governments maintain relations.⁵⁵ In this way, UNPO can bring the claims and needs of its members to the attention of the international community. Other non-government organisations (NGOs) have been formed in an effort to provide the Forth World with the resources necessary to formulate a campaign to achieve self-determination.⁵⁶

REFORM OF THE UN

With the completion of the program of classical decolonisation, and the passage of half a century since its conception, perhaps it is time to amend the Charter so that power is more equitably distributed throughout the UN, the organisation which represents the peoples of the world. The new framework would need to emphasise the priority of fundamental rights vested in individuals and peoples, over the sovereign rights of states in their 'domestic affairs'. Currently, there exists the inherent problem that China is a permanent member of the Security Council,

⁵² D. Schulz. 'Revolutionaries in Saffron.' *The Australian Magazine*. Sept. 7-8, 1996. 18-23.

⁵³ Nyima is described by the Dalai Lama as 'the world's youngest political prisoner': The Statement of His Holiness, the Dalai Lama on the Thirty Seventh Anniversary of Tibetan National Uprising Day, March 10th, 1996,

⁵⁴ Press Release from the *Tibetan Youth Congress*, 10th March 1996.

⁵⁵ M.C. van Walt van Pragg. 'The Position of UNPO in the International Legal Order.' in Bröhlmann *et al.*, *supra* n. 26, 313 at 324.

⁵⁶ Center for World Indigenous Studies (CWIS) provides online resources with its Fourth World Documentation Project at <http://www.halcyon.com/FWDP/cwisinfo.html>.

and so is both unlikely and unwilling to support enforcement measures of the UN against itself. UN commissioned studies into UN reform have acknowledged the inequitable distribution of powers among states, and the near total denial of access of non-state entities to the international arena, as a result of interim measures adopted to preserve peace among the geopolitical power blocs existing after the Second World War.⁵⁷ If the UN is to be an effective representative of the peoples of the world, and importantly, the framework for achieving world peace, then power must be more equitably distributed to ensure the observance of the fundamental rights of individuals and peoples.

CONCLUSION

Despite the feeble assertions made by the PRC, and some commentators including Cassese,⁵⁸ Tibet undoubtedly was a distinct sovereign entity for over a millennium, and the PRC's invasion is illegal at international law. Accordingly, the Tibetan nation currently epitomises a people requiring self-determination, and freedom from subjugation by another State. Disturbingly, in his recent treatise on self-determination,⁵⁹ Cassese suggests that the struggle of Tibet and its people is not a case of self-determination, but one of human rights violations only.⁶⁰ In any case, the state of the PRC, or any other nation or state, does not have the legal capacity to deny the Tibetan people's right to self-determination. This is a collective right, arising from natural law, which is vested in the Tibetan people, and not dependant upon any nation or state.

However, in the circumstances of the current international legal order, it is evident that a people who are denied their collective right to self-determination have the onus not only to establish but to actively pursue the realisation of that right. Now the NGOs bear most of the burden of upholding the right of many peoples to self-determination, and often, just to preserve basic human rights. This is clearly a major weakness in the current structure of the UN, as the peoples liberation organisations lack the 'statehood' indicia that is necessary to bring members of the United Nations to account. Additionally, because NGOs are funded by the public, they consequently rarely have the infrastructure or funds available to effectively pursue a legitimate claim. Furthermore, these organisations come under direct attack from the substantial resources of the transgressing states.⁶¹

Organisations such as the Unrepresented Nations and Peoples Organisation, combined with the resources of the Centre for World Indigenous Studies provide

⁵⁷ 'Our Global Neighbourhood.' *Report of the Commission on Global Governance*. 1994, available on the world wide web at <http://www.unsystem.org/>. See also the Statement of the UN Secretary-General to the Special Meeting of the General Assembly on Reform at New York, 16 July 1997 at <http://www.un.org/reform/track2/sgstatmn.htm>.

⁵⁸ In a footnote Cassese relies on outdated literature which alleged a Chinese claim over Tibet from a 'suzerainty' relationship. See footnote 86 at p.96 of A. Cassese, n. 32 *supra*. The Euro-centric term of suzerainty was first used to describe the Manchu-Tibetan relationship following the British invasion of Tibet by Captain Younghusband in 1904; see text of n. 19 *supra*.

⁵⁹ *Id.*

⁶⁰ *Id.* at footnote 86, .96.

⁶¹ For example, the *Rainbow Warrior* incident in New Zealand, where agents of the French Secret Service sank the Greenpeace flagship in port, killing two crew.

interim facilities for peoples attempting to achieve self-determination. Perhaps, these bodies will be able to provide the mechanism for Tibet to realise self-determination, and to achieve the stated aim of the Dalai Lama and his people of creating a 'peace park' of neutral territory⁶² on the world's highest plateau, where Tibetan Buddhism could effectively play a role in the advancement of world peace.⁶³ When a change in the international legal order allows the Tibetan people successfully to exercise their right to self-determination, humanity perhaps will be witnessing the dismemberment of the last remnant of colonial expansionism, and the inauguration of a system for the recognition and realisation of self-determination for the third of humankind who constitute the many peoples of the Fourth World.

⁶² Envisaged as playing a role similar to the neutralised States of Switzerland and Austria in the Asian region.

⁶³ Van Walt van Praag, *supra* n. 8 at 203, and the Dalai Lama cited in Schulz, *supra* n. 52.