

THE GLOBAL REACH AND LIMITATIONS OF SELF-DETERMINATION

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I. THE TWENTY-FIRST CENTURY CONTEXT

In terms that potentially add a new dimension to the right of self-determination,¹ the March 14, 2007 Comprehensive Proposal for the Kosovo Status Settlement (Kosovo Status Settlement, or Comprehensive Proposal)—prepared by Martti Ahtisaari, Special Envoy for the future status of Kosovo—was handed over to the U.N. Secretary-General, together with the Report of the Special Envoy on Kosovo’s Future Status (Report of the Special Envoy).²

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¹ “The concept of self-determination refers to the right of a people to determine its own political destiny.” ALINA KACZOROWSKA, *PUBLIC INTERNATIONAL LAW* 574 (4th ed. 2010). See *infra* note 89 and accompanying text. See also *id.* at 574 ff.; MALCOLM N. SHAW, *INTERNATIONAL LAW* 251 ff. (6th ed. 2011).

² U.N. Secretary-General, *Comprehensive Proposal for the Kosovo Status Settlement*, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter *Comprehensive Proposal*]; *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status*, in U.N.

Although the Kosovo Status Settlement failed to find full acceptance from the international community in the forum of the United Nations—and failed to attract support, for instance, from Russia and the People's Republic of China (PRC)³—it is the fact that the Proposal was made under U.N. auspices (ostensibly in compliance with the norms of international law)⁴ that may ultimately prove significant. The Comprehensive Proposal demonstrates the evolving boundaries of self-determination and speaks of a dynamic regarding the legal right of peoples to self-determination that is continuing: an extension of the conditions in which the right may be justified, and a considerable attack on the supposed illegality of unilateral secession. Even though the situation in Kosovo has been termed *sui generis*,⁵ the Proposal has been the subject of much debate and has proved divisive since its submission. Additionally, its power to be a precursor of further argument was revealed in August 2008, during the dispute between Georgia and Russia over the territories of South Ossetia and Abkhazia.

The Kosovo Status Settlement thus has implications for other territorial entities seeking external self-determination.⁶ One such entity is Tibet, which has been seeking to establish independence

Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council, at 2, U.N. Doc. S/2007/168 (Mar. 26, 2007) [hereinafter *Report of the Special Envoy*]. See also U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council, at 1, U.N. Doc. S/2007/168 (Mar. 26, 2007) (stating that the Secretary-General fully supported both the recommendation of Martti Ahtisaari in his Report and the Comprehensive Proposal). Ahtisaari had been appointed as the Special Envoy by the Secretary-General in November 2005. See *Special Envoy*, UNOSEK, <http://www.unosek.org/unosek/en/speenvoy.html> (last visited Nov. 18, 2011).

³ See, e.g., *China Expresses Concern over Kosovo*, CHINA DAILY, Feb. 19, 2008, http://www.chinadaily.com.cn/china/2008-02/19/content_6464411.htm. See also *infra* note 86 and accompanying text.

⁴ “The settlement of the Kosovo issue should be fully compatible with international standards of human rights, democracy and international law” *Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo*, ¶ 1, in U.N. President of the S.C., Letter dated Nov. 10, 2005 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2005/709 (Nov. 10, 2005) [hereinafter *Guiding Principles*].

⁵ See *infra* Part II and note 10.

⁶ The principle of self-determination is recognised by international law, applying as a matter of right once the unit of self-determination has been determined and potentially resulting in the separation of the self-determining unit from the state. See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 127-28 (2d ed. 2007); KACZOROWSKA, *supra* note 1, at 574. See also *infra* notes 72 and 89 and accompanying text.

and greater autonomy from the PRC for the past sixty years. In consequence, this Article seeks to address issues regarding the prospective influence of the Kosovo Status Settlement on international law and its capacity to impact the Tibet issue, which has periodically exercised the international community in one form or another since 1950.

II. THE KOSOVO STATUS SETTLEMENT IN AN ERA OF GLOBALISATION

Despite the fact that the Report of the Special Envoy provides that the Kosovo settlement should not constitute a precedent for other unresolved conflicts,⁷ the Report brings an added dimension into international law, which has the potential to expand the ambit of the principle of external self-determination. Territorial integrity is a political imperative of states, and this type of development is anathema to the nation state, be it an ethnically homogeneous nation state or a multinational, or multicultural, state. In this regard, the remarks of the Conference on Yugoslavia Arbitration Commission (the Badinter Commission) are significant: “[I]nternational law as it currently stands does not spell out all the implications of the right to self-determination.”⁸

That Kosovo cannot be seen in isolation is evidenced by the Russian reaction to the 2008 conflict in Georgia.⁹ It is notable that states have deemed the Kosovo crisis and its solution *sui generis*—that is, as “creat[ing] no wider precedent”¹⁰ and not forming a manifestation of self-determination.¹¹ Yet, as a matter of fact, it is difficult to maintain that the Kosovo Status Settlement is not an instance of self-determination of the Kosovar people. To treat the Kosovo Status Settlement as not creating a precedent would seem to be a manipulation of the international system, a system premised firmly on the sovereignty of nation states and a

⁷ See *Report of the Special Envoy*, *supra* note 2, ¶ 15.

⁸ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Op. No. 2, 31 I.L.M. 1497, ¶ 1, at 1498 (1992). See generally Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT’L & COMP. L. 547 (2009) [hereinafter Dickinson, *Twenty-First Century Self-Determination*].

⁹ See *infra* pp. 372-73.

¹⁰ U.N. SCOR, 63rd Sess., 5839th mtg., at 14, U.N. Doc. S/PV.5839 (Feb. 18, 2008) (statement of Sir John Sawers, Permanent Representative of the United Kingdom to the United Nations).

¹¹ See, for example, *id.* at 12-14, for the attitude of the British Government.

prohibition against unilateral secession. Additionally, the *sui generis* nature of the Proposal does not prevent it from having the ability to serve as a platform for a new normative approach to external self-determination (i.e., a precedent).¹²

The novelty of the Kosovo Status Settlement reflects the fact that it is a new and important development in the doctrine of self-determination, prospectively providing a new interpretation of the international order. Kosovo is distinguishable from states created, for example, from the other constituent parts of Yugoslavia in that it had previously enjoyed the status of an autonomous province, not a republic. Under the 1974 Constitution, Kosovo was a constituent part of the Socialist Republic of Serbia and was recognised as such.¹³

Martti Ahtisaari concludes in the Report of the Special Envoy that “the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.”¹⁴ This concept of ‘supervised statehood’ brings an added dimension into international law, potentially expanding the ambit of the principle of external self-determination, by emphasising the global reach of the international community and adding to the growing pressure exerted by international human rights concerns.¹⁵ Thus, the mapping of international law itself evolves, commensurate with the idea that “[t]he globalisation of the principle of sovereignty and the aggressive legitimisation of state power by reference to morality and human rights leaves no-one and nothing untouched.”¹⁶ Indeed, Costas Douzinas has commented that “[h]uman rights have become the *raison d’être* of the state system as its main constituents are challenged by economic, social and cultural trends.”¹⁷

¹² See Rob Dickinson, *Universal Human Rights: A Challenge Too Far*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS (Rob Dickinson et al. eds., forthcoming April 2012) (section headed “Self-determination”) [hereinafter Dickinson, *Universal Human Rights*].

¹³ See *infra* Part IV.

¹⁴ *Report of the Special Envoy*, *supra* note 2, ¶ 5.

¹⁵ According to the U.N. High Commissioner for Human Rights, Navi Pillay, such pressures were recently exemplified in connection with U.N. and NATO involvement in Libya “to stop mass killings and bloodshed.” Stefan Bos, *EU, NATO, UN Discuss Intervention in Libya*, VOICE OF AMERICA NEWS (Feb. 25, 2011), <http://www.voanews.com/english/news/europe/EU-NATO-UN-Discuss-Intervention-in-Libya-116931063.html>.

¹⁶ COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 374 (2000).

¹⁷ *Id.* Hence, for example, the intent of the PRC to justify its human rights policies in

Ahtisaari's proposals indicate that the international order has taken on a new dimension and, as a result, that nation states may no longer be defined only by their physical territorial boundaries. Other factors, such as ethnicity, may be relevant to and/or determinative of the new boundaries.¹⁸ This expansion of the self-determination doctrine creates pressure on the international community to achieve consistency in its approach to self-determination before other ethnic majorities perceive it to be in their interest to pursue a violent course toward secession from their parent state, the likes of which has been exemplified in Kosovo.

State opposition to the Kosovo Status Settlement has been such that it proved impossible for the Members of the Security Council to secure a resolution. Accordingly, no resolution was or has since been put before the Security Council, although several drafts were circulated.¹⁹ On July 20, 2007, the co-sponsors of the draft resolution issued a statement confirming that discussions of the resolution had been put on hold.²⁰ Nevertheless, the statement articulated the co-sponsors' belief that, in the absence of agreement between the parties, the Ahtisaari Plan was the best way forward.²¹

On February 17, 2008, as a result of the failure to implement the Status Settlement, Kosovo's parliament endorsed a declaration of independence from Serbia.²² Subsequently, the United Nations

the publication of annual White Papers on the subject in defence of the state's position. These White Papers delineate progress in China's human rights cause, as seen, for example, in a 2009 White Paper highlighting "the country's efforts in safeguarding citizens' legitimate civil and political rights." *China Issues 9th White Paper on Human Rights*, CHINA DAILY, Sept. 26, 2010, http://www.chinadaily.com.cn/china/2010-09/26/content_11348633.htm.

¹⁸ In this context, one may consider, as well as the Kosovars in Kosovo, for example the Kurds in Turkey, spilling over into Iraq and Iran. A principle of nationality may supply a perspective on issues of external self-determination and secession. See David Miller, *Secession and the Principle of Nationality*, in NATIONAL SELF-DETERMINATION AND SECESSION 62 (Margaret Moore ed., 1998).

¹⁹ See, e.g., *West Drops UNSC Vote on Kosovo*, CHINA INTERNET INFO. CENTER (July 21, 2007), <http://www.china.org.cn/english/international/217909.htm>.

²⁰ The co-sponsors were Belgium, France, Germany, Italy, the United Kingdom, and the United States. The fact that no resolution has been put before the Security Council reflects the advisory status of Ahtisaari's Report and that states are not obliged to follow his recommendations. Thus Ahtisaari's Report concludes by *urging* the Security Council to endorse his Settlement Proposal. See *Report of the Special Envoy*, *supra* note 2, ¶ 16.

²¹ See *The Status Process*, UNOSEK 3, www.unosek.org/docref/The%20Status%20Process-0108.doc (last updated Aug. 1, 2007).

²² *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008), <http://news.bbc>

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asked the International Court of Justice (ICJ) to give an Advisory Opinion on whether the declaration of independence was in accordance with international law.²³ The Court restricted its July 22, 2010 opinion to this narrow and specific question,²⁴ and in so doing stated that particular issues “regarding the extent of the right of self-determination and the existence of any right of ‘remedial secession’ . . . [were] beyond the scope of the question posed by the General Assembly.”²⁵ The ICJ concluded that Kosovo’s declaration of independence did not violate international law.²⁶ As of December 6, 2011, 85 out of 192 U.N. Member States have recognised Kosovo, the latest being Kuwait on October 11, 2011,²⁷ and it remains to be seen if and to what extent further additional states will recognise Kosovo following the ICJ Advisory Opinion.

On the occasion of Kosovo’s 2008 declaration of independence, “Russia’s foreign ministry . . . indicated that Western recognition of an independent Kosovo could have

.co.uk/1/hi/world/europe/7249034.stm.

²³ See G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 20 I.C.J. 141 (July 22, 2010) [hereinafter ICJ Advisory Opinion].

²⁴ ICJ Advisory Opinion, *supra* note 23, ¶ 51.

²⁵ *Id.* ¶ 83. Thus, issues concerning “the right to separate from a State” were beyond the scope of the question posed.

²⁶ *Id.* ¶ 123. See also *id.* ¶ 122 (“The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework [established in Kosovo]. Consequently the adoption of the declaration did not violate any applicable rule of international law.”). Resolution 1244 (1999) was adopted by the Security Council at its 4011th meeting on June 10, 1999. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

²⁷ See *Countries that have Recognized the Republic of Kosovo*, REPUBLIC OF KOSOVO MINISTRY OF FOREIGN AFF., <http://www.mfa-ks.net/?page=2,33> (last updated Jan. 23, 2012). States that have recognized Kosovo include Montenegro and Serbia (both of which were parts of the former Yugoslavia before its breakup). Declarations of independence from the former Yugoslavia came from Slovenia and Croatia in June 1991, and ultimately the state broke up into constituent parts in a surge of violence and what came to be known as “ethnic cleansing.” See HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 497-98 (rev. ed. 1996); Roel De Lange, *Paradoxes of European Citizenship*, in NATIONALISM, RACISM AND THE RULE OF LAW 101 (Peter Fitzpatrick ed., 1995). Montenegro and Serbia formed the Federal Republic of Yugoslavia, and in 2002, set up the new state of Serbia and Montenegro, before Montenegro declared its independence and seceded consensually after a referendum on May 21, 2006. Montenegro was admitted to the United Nations on June 28, 2006. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/members/list.shtml> (last visited Sept. 17, 2011); *Timeline: Montenegro*, BBC NEWS (June 16, 2011), http://news.bbc.co.uk/1/hi/world/europe/country_profiles/5075632.stm.

implications for the Georgian breakaway provinces of Abkhazia and South Ossetia,”²⁸ and Russia (Serbia’s close ally) further commented that “Kosovo’s independence violated the UN Charter, threatened to spark new conflict[,] and encouraged separatists elsewhere.”²⁹ Russia’s reference to the Georgian provinces of South Ossetia and Abkhazia proved significant, and, following armed conflict in August 2008, Russia recognised the independence of both South Ossetia and Abkhazia. Russian President Medvedev remarked that Moscow felt obliged to recognise South Ossetia and Abkhazia “as other countries had done with Kosovo.”³⁰ Thus, Russia drew a direct parallel between the situation in South Ossetia and Abkhazia and Kosovo, correctly or otherwise, drawing on Kosovo as a precedent. This analogy demonstrates the Kosovo Status Settlement’s potential as a trendsetter and its far-reaching effects with regard to the universality of self-determination. Consequently, self-determination evinces dynamism, even though it may be seen to conflict with concepts of sovereignty and territorial integrity.

III. THE TIBET QUESTION

The territorial entities of Kosovo, South Ossetia, and Abkhazia have already been mentioned above, but of course there are other areas where issues of secession and self-determination are in contention. Tibet is one and here the question has reverberated particularly since 1950 when Tibet fell under the control of the PRC. Independence is at the heart of the Tibet Question,³¹ and the question has been referred to as “a conflict about nationalism—an emotion-laden debate over whether

²⁸ *Kosovo MPs Proclaim Independence*, *supra* note 22.

²⁹ Rory Watson, *Serbs Vent Anger at Kosovo Independence Declaration*, SUNDAY TIMES (U.K.), Feb. 18, 2008, <http://www.timesonline.co.uk/tol/news/world/Europe/article3390760.ece>. *But see* ICJ Advisory Opinion, *supra* note 23, ¶ 123 (concluding that the adoption of the declaration of independence did not violate international law).

³⁰ *Russia Recognises Georgian Rebels*, BBC NEWS (Aug. 26, 2008), http://news.bbc.co.uk/2/hi/in_depth/7582181.stm.

³¹ For a broad interpretation of what may be termed the Tibet Question, see Barry Sautman & June T. Dreyer, *Introduction: The Tibet Question in Contemporary Perspective*, in CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION 3 (Barry Sautman & June T. Dreyer eds., 2006). Barry Sautman argues that the Tibet Question is “one of the world’s most intractable conflicts . . . [inter alia] a long-running ethnic dispute that has persisted into the post-Cold War era of rising nationalism . . . [and] a sovereignty dispute.” Barry Sautman, *The Tibet Issue in Post-Summit Sino-American Relations*, 72 PAC. AFF. 7, 11-12 (1999).

political units should directly parallel ethnic units.”³² For China, however, the question is essentially one of territorial integrity, historical continuity in contrast to invasion, and to interference by other states together with human rights proponents in the internal affairs of the People’s Republic.³³

The Tibet Question involves Chinese arguments supporting unification of Tibet within China and territorial integrity of China, on the one hand, and Tibetan arguments regarding the long-standing independence of Tibet on the other. This dissonance resonates over centuries, but a common factor emerges in a comparison of the Mongol conquest of China under Genghis Khan (1162–1227)³⁴ and the similar absorption of Tibet. Thus, both Tibet and China were subject to Mongol invasion;³⁵ indeed, the Dalai Lama’s temporal power is said to derive from “a donation” by Kublai Khan, the thirteenth century Mongol Emperor of China.³⁶ In 1644, having invaded China, the Manchu captured Peking (Beijing) and founded their new dynasty (now known as the Qing),³⁷ in which the Mongols “became a junior partner.”³⁸ About that same time, Mongol power established the Dalai Lama as the religious sovereign of Tibet.³⁹

Although the Mongols subjugated both Tibet and China, the conquests were unrelated.⁴⁰ Over the years, however, a two-way relationship subsisted between the Tibetan government and the

³² MELVYN C. GOLDSTEIN, *THE SNOW LION AND THE DRAGON: CHINA, TIBET, AND THE DALAI LAMA* ix (1997) [hereinafter GOLDSTEIN, *THE SNOW LION AND THE DRAGON*].

³³ Amy Mountcastle, *The Question of Tibet and the Politics of the “Real,”* in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 85, 86 (Barry Sautman & June T. Dreyer eds., 2006); GOLDSTEIN, *THE SNOW LION AND THE DRAGON*, *supra* note 32, at 130 (“China[] [has] extreme sensitivity to outside intervention in its internal affairs.”).

³⁴ A. TOM GRUNFELD, *THE MAKING OF MODERN TIBET* 38 (rev. ed. 1996).

³⁵ See INT’L COMM’N OF JURISTS, *THE QUESTION OF TIBET AND THE RULE OF LAW* 75 (1959).

³⁶ Alfred P. Rubin, Comment, *A Matter of Fact*, 59 AM. J. INT’L L. 586, 586 (1965). See also HUGH E. RICHARDSON, *TIBET AND ITS HISTORY* 34 (2d ed. 1984); MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW* 5-6 (1987).

³⁷ RICHARDSON, *supra* note 36, at 43.

³⁸ URADYN E. BULAG, *THE MONGOLS AT CHINA’S EDGE: HISTORY AND THE POLITICS OF NATIONAL UNITY* 6 (2002).

³⁹ See RICHARDSON, *supra* note 36, at 41; INT’L COMM’N OF JURISTS, *supra* note 35, at 75.

⁴⁰ VAN WALT VAN PRAAG, *supra* note 36, at 7.

imperial court of the Manchu, but Chinese influence in Tibet was sporadic and “underwent several changes during its existence of nearly two centuries between 1720 and 1912.”⁴¹ The Chinese Qing Empire was overthrown in 1911, and with its collapse, and the subsequent four decades of turmoil in China, Tibet “enjoyed virtually complete de facto independence.”⁴²

The fact that the Tibetans severed their existing ties with the Chinese led Michael van Walt van Praag to argue that “no [legal or political] ties existed between China and Tibet, or between the new Chinese President and the Dalai Lama, in 1911.”⁴³ A political vacuum existed in China, strengthening the British and Russian positions in the region.⁴⁴ One result was the October 1913 Simla Conference between China, Britain and Tibet. In their opening statements, the Tibetan representative emphasised that Tibet was an independent state, whereas China forcefully expressed the claim that Tibet was an integral part of the territory of the Republic of China.⁴⁵ Even so, an agreement was achieved whereby, inter alia, Chinese suzerainty over Tibet was recognised⁴⁶ and the autonomy of Outer Tibet⁴⁷ was recognised, and China agreed “to respect the territorial integrity of Tibet and abstain from interference with the administration of Outer Tibet . . . which

⁴¹ RICHARDSON, *supra* note 36, at 50.

⁴² Wang Lixiong, *Reflections on Tibet*, 14 NEW LEFT REV. 79, 81 (2002).

⁴³ VAN WALT VAN PRAAG, *supra* note 36, at 136. See also Charles H. Alexandrowicz-Alexander, *The Legal Position of Tibet*, 48 AM. J. INT’L L. 265, 270 (1954); INT’L COMM’N OF JURISTS, *supra* note 35, at 85. “Tibet unquestionably controlled its own internal and external affairs during the period from 1913 to 1951 and repeatedly attempted to secure recognition and validation of its de facto autonomy/independence.” MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913-1951: THE DEMISE OF THE LAMAIST STATE* 815 (1989) [hereinafter GOLDSTEIN, *A HISTORY OF MODERN TIBET*].

⁴⁴ See, e.g., INT’L COMM’N OF JURISTS, *supra* note 35, at 87 (“On November 3rd, 1912 Russia concluded an agreement with Mongolia as the first step in the gradual detachment of Outer Mongolia from Chinese polity.”).

⁴⁵ GOLDSTEIN, *THE SNOW LION AND THE DRAGON*, *supra*, note 32, at 32.

⁴⁶ “Suzerainty” has been defined “as a kind of international guardianship, since the vassal state [here Tibet] is either absolutely or mainly represented internationally by the suzerain state [here China].” Dibyesh Anand, *The Tibet Question and the West: Issues of Sovereignty, Identity, and Representation*, in CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION 285, 288 (Barry Sautman & June T. Dreyer eds., 2006) (citation omitted) (quoting Lassa Oppenheim) (citing VAN WALT VAN PRAAG, *supra* note 36, at 107). The difficulty so far as Tibet is concerned in overcoming the hurdle of suzerainty and the status of a vassal state lies particularly in its failure to participate in international relations and its pursuit of an insular policy.

⁴⁷ Outer Tibet, which excluded a buffer zone, designated Inner Tibet, to the north and east—which was considered a buffer region for China.

was to remain in the hands of the Tibetan Government at Lhasa.”⁴⁸ However, while all parties initialled the agreement, it never entered into force, as the Chinese Government subsequently refused to sign it.⁴⁹ Had the negotiating parties been able to come to terms at this point, the legal position of Tibet would have been fully clarified.⁵⁰ Nevertheless, and although it is not binding on China, the Simla Convention “is the best evidence of what the negotiating parties thought of Tibet’s status at the time—or, perhaps, of what they hoped Tibet could successfully claim.”⁵¹ Thus, in 1914, Tibet benefited from substantial autonomy, but was not regarded as an independent country *de jure*, either by Britain or by China.⁵²

The ensuing decades were punctuated by instances of Chinese overtures towards Tibet and periods of hostilities, while China simultaneously sought internal stability.⁵³ The Chinese Nationalist Government and Chinese Communist Party were in ever-increasing conflict, and by October 1949, the Nationalist rump had fled to Taiwan and Mao Zedong had proclaimed the People’s Republic of China.⁵⁴

In the 1949 dying days of the Republican regime of Chiang

⁴⁸ INT’L COMM’N OF JURISTS, *supra* note 35, at 86. See also GRUNFELD, *supra* note 34, at 64-67; VAN WALT VAN PRAAG, *supra* note 36, at 54-60; Alexandrowicz-Alexander, *supra* note 43, at 271; Convention Between Great Britain, China, and Tibet art. 2, July 3, 1914 [hereinafter Simla Convention], available at <http://www.tpprc.org/documents/agreements/1914-A.pdf>.

⁴⁹ See, e.g., GRUNFELD, *supra* note 34, at 67; VAN WALT VAN PRAAG, *supra* note 36, at 58. See also GOLDSTEIN, A HISTORY OF MODERN TIBET, *supra* note 43, at 74-75; Simla Convention, *supra* note 48, app. C.

⁵⁰ Tieh-Tseng Li, *The Legal Position of Tibet*, 50 AM. J. INT’L L. 394, 400 (1956).

⁵¹ CRAWFORD, *supra* note 6, at 325.

⁵² See also GOLDSTEIN, THE SNOW LION AND THE DRAGON, *supra*, note 32, at 34 (“Since China did not agree to the convention, Tibet still had no *de jure* status accepted by China.”).

⁵³ See, e.g., INT’L COMM’N OF JURISTS, *supra* note 35, at 88. In 1917, for instance, the Chinese made military advances into Kham, a Tibetan province, which were met with a major victory by the Tibetan forces. GOLDSTEIN, A HISTORY OF MODERN TIBET, *supra* note 43, at 83. Similarly, a Chinese initiative in 1930—premised on the basis “that the time was right for Tibet and China to settle their differences”—led to cordial negotiations. *Id.* at 215. However, fighting again broke out in Kham, and this escalated into the Sino-Tibetan War of 1930–1932. See *id.* at 215-21.

⁵⁴ See, e.g., Premen Addy, *British and Indian Strategic Perceptions of Tibet*, in RESISTANCE AND REFORM IN TIBET 40 (Robert Barnett & Shiran Akiner eds., 1994). The People’s Republic of China was proclaimed on October 1, 1949. JEROME A. COHEN, *Introduction to CHINA’S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* 1, 1 (Jerome A. Cohen ed., 1972).

Kai-shek, the Regency in Tibet proclaimed Tibetan independence.⁵⁵ The incoming Chinese Communist Government denounced the Tibetan declaration and insisted that “both the Chinese and Tibetan peoples were anxiously awaiting the region’s ‘liberation’ from oppressive colonialism and reactionary exploitation.”⁵⁶ In 1950, the Peking Government dispatched troops into eastern and north-eastern Tibet. Tibet’s appeals to the outside world, including the United Nations, were ignored. Tibet had insufficient military capacity to repel the Chinese troops, and was soon forced to capitulate.⁵⁷ On May 23, 1951, the Agreement on Measures for the Peaceful Liberation of Tibet (Seventeen-Point Agreement) was signed.⁵⁸ Following the Agreement,

⁵⁵ See George Ginsburgs, *Peking–Lhasa–New Delhi*, 75 POL. SCI. Q. 338 (1960). See also GRUNFELD, *supra* note 34, at 79 (referring to the “most daring gesture” made by the “Lhasa government . . . in asserting its independence: it ordered the Chinese Mission to leave Lhasa”); GOLDSTEIN, A HISTORY OF MODERN TIBET, *supra* note 43, at 613 (“One step the Tibetan government took was to close the Chinese Mission and expel all Chinese officials from Tibet.”). The Regency was in place due to the minority of the Dalai Lama. See *infra* text accompanying note 60.

⁵⁶ Ginsburgs, *supra* note 55, at 339. Indeed, if there is one subject on which the Chinese Republican regime and the Communists were in agreement, it was that both “believed that historically Tibet was a part of China and [both] sought to reunify it with the ‘mother’ country.” GOLDSTEIN, A HISTORY OF MODERN TIBET, *supra*, note 43, at 815.

⁵⁷ See Ginsburgs, *supra* note 55, at 338-42; see generally GOLDSTEIN, A HISTORY OF MODERN TIBET, *supra* note 43, at 638-772. The Indian Government protested to China against the decision to send troops into Tibet, and this attitude was supported by both the U.S. and British Governments. However, Tibet’s claim for full political independence found no formal support, and India believed it was essential that friendly relations should be maintained between India and China. See *Chinese ‘Liberation’ Invasion of Tibet*, in 7-8 KEESING’S RECORD OF WORLD EVENTS 11101 (1950); VAN WALT VAN PRAAG, *supra* note 36, at 143 (quoting a note from the Indian Foreign Ministry to the Chinese Government on October 26, 1950). No resolutions were passed by the U.N. Security Council or General Assembly with respect to Tibet either in 1950 or 1951, at a time when the General Assembly was preoccupied with the Korean question. In 1950, El Salvador had asked the U.N. General Assembly to consider the Tibetan appeal, but, particularly due to a U.S. offensive in Korea, consideration of the draft resolution was postponed *sine die*. Other factors included: India’s failure to support a discussion in the General Assembly; British and American deferral to the Indian viewpoint; and the urging of an adjournment by the Russian delegate. See *id.* at 145; Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 144 (2002); TSERING SHAKYA, THE DRAGON IN THE LAND OF THE SNOWS: A HISTORY OF MODERN TIBET SINCE 1947, at 55-57 (1999).

⁵⁸ Agreement on Measures for the Peaceful Liberation of Tibet, China-Tibet, May 23, 1951 [hereinafter Seventeen-Point Agreement], available at <http://www.freetibet.org/about/china-tibet-seventeen-point-agreement>. The Agreement on Measures for the Peaceful Liberation of Tibet signalled the end of Tibet’s de facto independence following Chinese military incursion. Due to the number of its clauses, the agreement is known as

Chinese troops entered Lhasa, and China remains in control of Tibet sixty years later.

The international community's reaction to these events has been limited, if not muted; no U.N. General Assembly resolution succeeded until 1959, and only three to date have been passed.⁵⁹ Of the U.N. General Assembly resolutions, the first—in October 1959, some seven months after insurrection in Tibet had been violently suppressed and the Dalai Lama (spiritual and political leader of the Tibetans) had fled Tibet for exile in India— “[c]all[ed] for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life[.]”⁶⁰ and expressed concern that “fundamental human rights and freedoms of the people of Tibet have been forcibly denied them.”⁶¹ In the second resolution, the General Assembly “renew[ed] its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination.”⁶² The third resolution similarly called for an end to “practices which deprive the Tibetan people of the human rights and fundamental freedoms which they have always enjoyed.”⁶³ In addition, on August 23, 1991, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Resolution 1991/10 by nine votes to seven (with four abstentions) calling on the Government of the People's Republic of China “fully to respect the fundamental human rights and freedoms of the Tibetan people.”⁶⁴ Resolution 1991/10 is

the “Seventeen-Point Agreement.” *Id.* The Indian Government's attitude to the Seventeen-Point Agreement was fatalistic, and India was “prepared to accept the new situation created by the Seventeen-Point Agreement as a *fait accompli*.” VAN WALT VAN PRAAG, *supra* note 36, at 149; *see also* FOREIGN RELATIONS OF THE UNITED STATES, 1691–1693, at 7 (1951) (the British continued to support the Indian position).

⁵⁹ G.A. Res. 1353 (XIV), U.N. Doc. A/RES/1353(XIV) (Oct. 21, 1959) (adopted by a 45 to 9 vote, with 26 abstentions) ; G.A. Res. 1723 (XVI), U.N. Doc. A/RES/1723(XVI) (Dec. 20, 1961) (adopted by a 56 to 11 vote, with 29 abstentions); G.A. Res. 2079 (XX), U.N. Doc. A/RES/2079(XX) (Dec. 18, 1965) (adopted by a 43 to 26 vote, with 22 abstentions).

⁶⁰ G.A. Res. 1353, *supra* note 59, ¶ 2.

⁶¹ *Id.* pmb.

⁶² G.A. Res. 1723, *supra* note 59, ¶ 2.

⁶³ G.A. Res. 2079, *supra* note 59, ¶ 4.

⁶⁴ Comm'n on Human Rights Sub-Comm'n on Prevention of Discrimination Protection of Minorities Res. 1991/10, Situation in Tibet, ¶ 1, U.N. Doc. E/CN.4/Sub.2/1991/L.19 (Aug. 23, 1991). In the resolution “the Sub-Commission noted its concern at continued reports of violations of Tibetans' fundamental rights.” INT'L COMM. OF LAWYERS FOR TIBET, THE PERSISTENT PATTERN OF HUMAN RIGHTS ABUSES IN

significant because it was the first U.N. resolution on Tibet since the People's Republic replaced Taiwan as the representative of China at the United Nations in 1971.⁶⁵

Although it is clear that Member States of the United Nations have not been prepared to oppose China over the issue of Tibet, the Tibet question does not go away,⁶⁶ and it is appropriate at this time to fully consider all aspects of the Sino-Tibetan relationship. In so doing, issues concerning self-determination come to the fore.⁶⁷

IV. THE REMEDIAL RIGHT THEORY AND SELF-DETERMINATION

The Tibet Question has retained prominence due to the Tibetan desire for self-determination and independence and allegations of Han Chinese abuse of Tibetans' human rights.⁶⁸ In the context of self-determination, the remedial right theory is pertinent. Remedial right theorists emphasise that the right to

TIBET 1 (2007), available at <http://www.tibetjustice.org/reports/un/unint2.pdf>.

⁶⁵ G.A. Res. 2758 (XXVI), ¶5, U.N. Doc. A/Res/2758 (XXVI) (Oct. 25, 1971). Although the 1991 Resolution is significant, the title of the Sub-Commission itself is nevertheless also important here. Thus, Tibet is merely seen as a minority within another state, rather than a state in its own right. As a minority within a state, Tibetans would, however, have certain rights "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion . . . to use their own language." International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR contrasts rights of minorities with rights of peoples who, by virtue of Article 1, have the right to self-determination. See Sloane, *supra* note 57, at 129-30. The U.N. General Assembly resolutions in respect of Tibet of 1959, 1961, and 1965 all refer to "the Tibetan people." See *supra* note 59.

⁶⁶ As evidenced by various protests at the time of the Beijing Olympic Games in 2008. See, e.g., *Tibet Protest at Olympic Ceremony*, N.Y. TIMES, Mar. 31, 2008, <http://www.nytimes.com/2008/03/31/world/30cnd-greece.html>.

⁶⁷ See, e.g., Dickinson, *Twenty-First Century Self-Determination*, *supra* note 8, at 550.

⁶⁸ Instances of such abuse are numerous, and detail is beyond the scope of this Article. See ANDREW G. DULANEY & DENNIS M. CUSACK (INT'L COMM. OF LAWYERS FOR TIBET) & MICHAEL VAN WALT VAN PRAAG (UNREPRESENTED NATIONS & PEOPLES ORG.), *THE CASE CONCERNING TIBET: TIBET'S SOVEREIGNTY AND THE TIBETAN PEOPLE'S RIGHT TO SELF-DETERMINATION* 59-95 (2d ed. 2000) [hereinafter *THE CASE CONCERNING TIBET*] (outlining early findings of Chinese abuse of Tibetan human rights); HUMAN RIGHTS WATCH, *TRIALS OF A TIBETAN MONK: THE CASE OF TENZIN DELEK* (Feb. 8, 2004), <http://www.hrw.org/sites/default/files/reports/china0204.pdf> (discussing more recent instances of persecution—in the religious and political context—by the state in Tibet, specifically the arrest, treatment, and death sentence of Tenzin Delek Rinpoche, and the arrest, trial, and January 26, 2003 execution of Lobsang Dondrup); *UCS 22/07/05: Phuntsok Wangdu; Urgent Campaign—22 July 2005*, FREE TIBET (July 22, 2005), <http://www.freetibet.org/campaigns/ucs-220705-phuntsok-wangdu> (reporting the detention and torture of Phuntsok Wangdu).

self-determination is legitimated only if the right is necessary to remedy a prior injustice.⁶⁹ In consequence, remedial right theorists impose a burden of proof on those who seek self-determination—a burden to prove that they have a just cause: “[A] group has the right to secede (in the absence of any negotiations or constitutional provisions that establish a right) only as a remedy of last resort to escape serious injustices.”⁷⁰ Such injustices, according to Allen Buchanan, “consist of persistent violations of human rights.”⁷¹ Further, Li-ann Thio comments that “[t]he international community is more likely to recognise the realities of secessionist attempts as a remedy where the government of the predecessor State [has] committed gross human rights violations against the seceding unit.”⁷²

It must be borne in mind, however, that international law, in general terms, includes no right to unilateral secession, and so secession is not a right of self-determination.⁷³ Secession as a concept stands in opposition to ideas of territorial integrity and state sovereignty, notions that dominate the international political arena, and, by extension, international law. While states in the post-World War II era have shown “extreme reluctance . . . to recognize or accept unilateral secession outside the colonial context,”⁷⁴ there is an apparent exception: “A government may become partially illegitimate if effective participation by minority

⁶⁹ See, e.g., Allen Buchanan, *Democracy and Secession*, in NATIONAL SELF-DETERMINATION AND SECESSION 14, 25 (Margaret Moore ed., 1998) [hereinafter Buchanan, *Democracy and Secession*]. The remedial right theory has been developed by Allen Buchanan. See Allen Buchanan, *Self-Determination, Secession and the Rule of Law*, in THE MORALITY OF NATIONALISM 301-23 (Robert McKim & Jeff McMahan eds., 1997); Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1997).

⁷⁰ Buchanan, *Democracy and Secession*, *supra* note 69, at 25. Buchanan refers to a group having the right to secede, and the nature of a “group” having the right to benefit from the principle of self-determination can be distilled into two particular questions: first, as to who the people are; and second, as to the relevant territorial unit over which they should exercise self-determination. The issues of “people” and “territorial unit” have particular relevance in the Tibetan context. See *infra* Part VI.

⁷¹ Buchanan, *Democracy and Secession*, *supra* note 69, at 25.

⁷² Li-ann Thio, *International Law and Secession in the Asia and Pacific Regions*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 300 (Marcelo G. Kohen ed., 2006).

⁷³ See Georg Nolte, *Secession and External Intervention*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 84 (Marcelo G. Kohen ed., 2006). It will be borne in mind that the ICJ in its Advisory Opinion with regard to the legality of the declaration of independence of Kosovo specifically did not address the extent of the right of self-determination and the existence of any right to remedial secession. See *supra* note 24 and accompanying text.

⁷⁴ CRAWFORD, *supra* note 6, at 415.

or indigenous groups or their members has been rendered impossible by either deliberate discrimination or a political situation which permanently excludes such groups.”⁷⁵ Similarly, a government may lose legitimacy if it practises human rights abuses, and the “common denominator is the violation of fundamental rights by the state.”⁷⁶ The U.N. Charter, in its Purposes and Principles, refers to “promoting and encouraging respect for human rights.”⁷⁷ As a result of this U.N. commitment and the increasing profile and importance of human rights, if a state fails to respect the human rights of its peoples or minorities, it may “forfeit the protection it enjoys by virtue of international law.”⁷⁸

The relevance of human rights is clear, but it is important to recall that “China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country.”⁷⁹ This view does not belong to China alone, but is widely held in Asia, as evidenced by the 1993 Bangkok Governmental Declaration (Bangkok Declaration),⁸⁰ which emanated from a regional meeting of Asian countries prior to the Second World Conference on Human Rights held in Vienna later that year. Paragraph 5 of the Bangkok Declaration emphasises “the principles of respect for national sovereignty and territorial integrity[,] as well as non-interference in the internal affairs of States.”⁸¹ Further, while reiterating in paragraph 12 that “self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien or colonial domination and foreign occupation . . . and that its denial constitutes a grave violation of human rights,”⁸² paragraph 13 stresses “that the right to self-determination is applicable to peoples under alien or colonial domination and foreign

⁷⁵ HANNUM, *supra* note 27, at 470-71.

⁷⁶ *Id.* at 471.

⁷⁷ U.N. Charter art. 1, para. 3.

⁷⁸ Christian Tomuschat, *Secession and Self-Determination*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 41 (Marcelo G. Kohen ed., 2006).

⁷⁹ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 548 (2d ed. 2000).

⁸⁰ World Conference on Human Rights, Mar. 29–Apr. 2, 1993, Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, U.N. Doc. A/CONF.157/ASRM/8, A/CONF.157/PC/59 (Apr. 7, 1993) [hereinafter Bangkok Declaration].

⁸¹ *Id.* ¶ 5.

⁸² *Id.* ¶ 12.

occupation, and *should not be used to undermine the territorial integrity, national sovereignty and political independence of States.*"⁸³ Thus, the Bangkok Declaration qualified the universality of human rights and the principle of self-determination in a manner reflecting the Asian interpretation.⁸⁴

Emphasising that self-determination should not be used to undermine territorial integrity of states, and the consequent prospective denial of self-determination to minorities within states, results in the potential for states to legitimise their own values. As a result, it is argued that "[h]uman rights norms are not persuasive in and of themselves; instead they are imposed as the values of the dominant state."⁸⁵ The PRC was a leading participant in the regional meeting and this restrictive interpretation of self-determination—that is adverse to secessionist movements—provides background information that explains the PRC's failure to support unilateral independence for Kosovo and buttresses their opposition to any Tibetan independence.⁸⁶ It is noteworthy

⁸³ *Id.* ¶ 13 (emphasis added). See also STEINER & ALSTON, *supra* note 79, at 549. So far as paragraph 5 of the Bangkok Declaration is concerned, Tsering Shakya comments that, in Bangkok, China succeeded in gaining "the support of all the Asian countries (except Japan) in endorsing the principle that human rights concerns should be guided by the principles of non-interference in the internal affairs of a state." SHAKYA, *supra* note 57, at 435.

⁸⁴ The Bangkok Declaration therefore presented a challenge to "what was perceived as a western concept of human rights However, the universality of human rights and its place beyond the limits of domestic jurisdiction were reaffirmed by the Vienna Declaration and Programme of Action on Human Rights 1993 that was adopted by the Vienna World Conference." D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 657 (6th ed. 2004). Accordingly, it seems that customary international law is wider than that reflected in the Bangkok Declaration. The broad issue of universality of human rights is a topic beyond the scope of this Article.

⁸⁵ MING WAN, *HUMAN RIGHTS IN CHINESE FOREIGN RELATIONS: DEFINING AND DEFENDING NATIONAL INTERESTS* 12 (2001). Further, as Andrew Hurrell remarks, "[w]riters such as Berlin and Elster have underlined the extent to which formal political democracy can entrench murderous majorities of all kinds—but most dangerously, perhaps, murderous ethnic majorities." Andrew Hurrell, *Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World*, in *HUMAN RIGHTS IN GLOBAL POLITICS* 280 (Tim Dunne & Nicholas J. Wheeler eds., 1999). See also Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 165-69 (1969); Jon Elster, *Majority Rule and Individual Rights*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 175 (Stephen Shute & Susan Hurley eds., 1993). Ming Wan's words have particular resonance in the context of the Han majority and Tibetan ethnic minority.

⁸⁶ Opposition to the independence of Kosovo by the PRC was itself hardened by virtue of the accidental bombing of the Embassy of China in Belgrade on May 7, 1999, by NATO forces during the Kosovo campaign. See Press Release, Security Council, China, at Security Council Meeting, Registers Strongest Possible Protest Over Attack Against its Embassy in Belgrade, U.N. Press Release SC/6674 (May 8, 1999), available at <http://www>

too that the PRC relies on the principle of non-intervention in the affairs of states—both so far as the PRC is concerned and so far as other states are concerned.⁸⁷ Hence, its refusal to recognise Kosovo, and its insistence “that a final resolution of the status of Kosovo should be a settlement acceptable to both sides reached through negotiations,”⁸⁸ may be properly understood.

The Kosovo Status Settlement itself was proposed against this background of the primacy of sovereignty and territorial integrity, and the apparent prohibition of unilateral secession, and thus it has proved contentious. Unilateral secession reflects external self-determination and contrasts with internal self-determination, which may be seen as a protection of “the right of national or ethnic groups within the state to assert some degree of ‘autonomy’ over their affairs, without giving them the right to secede.”⁸⁹ Secession is, of course, the ultimate potential recourse attributable to self-determination, whereas schemes of autonomy—as part of the evolving concept of self-determination—are seen as less divisive and “have been offered to placate secessionist sentiments and maintain State cohesion, although it is feared that such schemes could be the prelude to independence claims, by weakening the central government.”⁹⁰

U.N. concern for humanitarian matters regarding Kosovo yielded U.N. Security Council Resolution 1244, which referred to the situation as a “humanitarian tragedy” and expressed the determination “to resolve the grave humanitarian situation in Kosovo.”⁹¹ This Resolution can be seen as reflecting the remedial

.un.org/News/Press/docs/1999/19990508.SC6674.R1.html. In Tibet, suspected separatists—*a.k.a.* splittists—continue to be imprisoned. See HUMAN RIGHTS WATCH, *WORLD REPORT 2006: TIBET* 251 (2006).

⁸⁷ See, e.g., Bangkok Declaration, *supra* note 80, ¶ 5.

⁸⁸ U.N. SCOR, 63rd Sess., 5917th mtg., at 18, U.N. Doc. S/PV.5917 (June 20, 2008) (statement of Mr. La Yifan, Chinese Ambassador).

⁸⁹ PAUL GROARKE, *DIVIDING THE STATE: LEGITIMACY, SECESSION AND THE DOCTRINE OF OPPRESSION* 84 (2004). See also ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 350-51 (1995). Internal self-determination can thus be understood as “forms of self-government and separateness within a state rather than separation (so-called ‘external’ self-determination) from the state.” STEINER & ALSTON, *supra* note 79, at 1249.

⁹⁰ Thio, *supra* note 72, at 331-32 (citing examples of autonomy offered to Tamil insurrectionists in Sri Lanka, to West Papua and Aceh by Indonesia, and to Mindanao by the Philippines). See also Photini Pazartzis, *Secession and International Law: The European Dimension*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 355, 373 (Marcelo G. Kohen ed., 2006). In the context of Tibet, see *infra* Part V.B.

⁹¹ S.C. Res. 1244, pmb., U.N. Doc. S/RES/1244 (June 10, 1999).

right theory of self-determination, as well as the fact that a government may lose legitimacy if it practises human rights abuses.⁹²

In the context of Tibet and issues of a Kosovan precedent, it is relevant that Kosovo (having the status of an autonomous province, not a republic) is distinguishable from the states created from the other constituent parts of Yugoslavia.⁹³ The 1982 Constitution of the PRC provides for regional autonomy for the minority nationalities, one of which is the Tibet Autonomous Region (TAR).⁹⁴ This fact provides a parallel link between Kosovo and Tibet, and makes it worthwhile to reflect on why Tibetans do not regard the autonomy that the TAR enjoys as sufficient to preclude a desire for a greater self-determination.

V. ENHANCED AUTONOMY AND AUTONOMY LIGHT

Generally, issues of autonomy are seen as involving: “language; education; access to governmental civil service, including police and security forces, and social services; land and natural resources; and representative local government structures.”⁹⁵ It is worthwhile to examine these elements in the Tibetan context and with reference to the 1982 Constitution of the PRC. Essentially, autonomy may be considered as the realisation of internal self-determination as self-governance, and a significant point regarding Tibet is whether internal self-determination has in fact been realised.

A. *Elements of Autonomy*

Article 115 of the 1982 PRC Constitution circumscribes the right to autonomy and limits the authority of the organs of self-

⁹² For example, governments—such as those in Egypt and Libya (and perhaps also in Syria and Bahrain)—were perceived to lose legitimacy for such reason at the time of the so-called “Arab Spring” in 2011.

⁹³ See *supra* text accompanying note 13.

⁹⁴ See XIANFA [CONSTITUTION] art. 4 (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html>. Ethnographic Tibet today spreads over a number of provinces of China. The TAR includes the Tibetan province of Ü-Tsang and its western extensions, while the Tibetan provinces of Amdo and Kham are largely incorporated within Qinghai, Gansu, Sichuan and Yunnan. Thus, the ethnic boundaries of Tibet are not congruous at this time with its political boundaries. See also VAN WALT VAN PRAAG, *supra* note 36, at 156.

⁹⁵ HANNUM, *supra* note 27, at 458.

government to exercise that right of autonomy.⁹⁶ Against that background, however, Article 4 states that “[t]he people of all nationalities have the freedom to use and develop their own spoken and written language, and to preserve or reform their own ways or customs.”⁹⁷

Article 4 notwithstanding, the Tibetan language has not been studied in schools. The principal teaching language has been Chinese, which has also dominated areas of business and governance.⁹⁸ This state of affairs has persisted even in the face of Article 121 of the Constitution, which provides that “[i]n performing their functions, the organs of self-government of the national autonomous areas [shall], in accordance with the autonomy regulations of the respective areas, employ the spoken and written language or languages in common use in the locality.”⁹⁹

Arguably some evidence of a changing situation exists. For example:

In 1987, a provisional law to make Tibetan an official language of the TAR was enacted, including a provision requiring officials there to learn Tibetan. Similar regulations have been promulgated in other PRC Tibetan areas, yet in the main, they have not been implemented. It is not yet clear whether the permanent TAR language law, passed in 2002, will meet with the same disregard.¹⁰⁰

Language, particularly as a medium of education, is important and pilot projects conducted during the last decade of the twentieth century showed that Tibetan students educated in the Tibetan language produced better examination results than those educated

⁹⁶ XIANFA [CONSTITUTION] art. 115 (1982) (China) (“The organs of self-government of autonomous regions, prefectures and counties exercise the functions and powers of local organs of state as specified in Section V of Chapter Three of the Constitution. At the same time, they exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of regional national autonomy and other laws, and implement the laws and policies of the state in the light of the existing local situation.”).

⁹⁷ *Id.* art. 4.

⁹⁸ See, e.g., JOHN F. AVEDON, *IN EXILE FROM THE LAND OF SNOWS: THE DALAI LAMA AND TIBET SINCE THE CHINESE CONQUEST* 269, 270-71, 316 (1994).

⁹⁹ XIANFA [CONSTITUTION] art. 121 (1982) (China).

¹⁰⁰ Baogang He & Barry Sautman, *The Politics of the Dalai Lama's New Initiative for Autonomy*, 601 PAC. AFF. 627-28 (2005) (footnotes omitted). The 1987 provisional law has, though, to all intents and purposes been withdrawn. See Robert Barnett, *Beyond the Collaborator-Martyr Model: Strategies of Compliance, Opportunism, and Opposition Within Tibet*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 25, 45 (Barry Sautman & June T. Dreyer eds., 2006).

in the Chinese language.¹⁰¹

Thus, language should not be seen simply as a cultural issue, a part of what it means to be a Tibetan. Moreover, it has real value and relevance in the economic world, in the context of prosperity of individual Tibetans. Nevertheless, culture is also significant here, and China regards it as so:

Since the late 20th century, the focus of much writing on China's minorities and national identification program has been on the 'civilizing mission' of China's policy toward its 'backward minorities' Minorities, generally less educated in the Chinese school system than the Han majority, are thought to be somewhere behind the Han culturally. Education plays a privileged role in executing China's national integration project.¹⁰²

If education, business and administration in the TAR are not carried out in Tibetan, then individuals who employ Tibetan as their mother tongue will be disadvantaged. For example, where Han Chinese possess better linguistic and technical skills, they will take business away from the local Tibetans;¹⁰³ and where local Tibetans are educated (and business is conducted) in Chinese, there is a high probability that Tibetans will be linguistically disadvantaged (with attendant advantage to the Han Chinese population).

The issue of disadvantage is particularly relevant with regard to the population of the TAR in its historical context. While the precise population of Tibet some sixty years ago is a matter of estimate and debate, the make-up of the population in the TAR is not so disputed. In the summer of 1952, Chairman Mao estimated the Tibetan population to have been between 2 and 3 million,¹⁰⁴ an approximation that tallies with another Chinese estimate of "just under three million in the early 1950s."¹⁰⁵ Other estimates, such as an official 1951 Chinese estimate of 3.75 million and a subsequent

¹⁰¹ Dawa Norbu, *Economic Policy and Practice in Contemporary Tibet*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 152, 163 (Barry Sautman & June T. Dreyer eds., 2006).

¹⁰² DRU C. GLADNEY, *DISLOCATING CHINA: REFLECTIONS ON MUSLIMS, MINORITIES, AND OTHER SUBALTERN SUBJECTS* 261 (2004) (citations omitted).

¹⁰³ Baogang He, *The Dalai Lama's Autonomy Proposal: A One-Sided Wish?*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 67, 79 (Barry Sautman & June T. Dreyer eds., 2006).

¹⁰⁴ See SHAKYA, *supra* note 57, at 114.

¹⁰⁵ GRUNFELD, *supra* note 34, at 250.

Chinese Communist figure of 1,274,969 Tibetans, differ considerably.¹⁰⁶ There is, however, acceptance of the fact that when Chinese troops entered Tibet in 1950, there were virtually no Chinese residing there, and in 1952, Mao was quoted as stating that, “while several thousand Han [ethnic Chinese] people live in Sinkiang, there are hardly any in Tibet, where our army finds itself in a totally different minority nationality area.”¹⁰⁷ Even in 1960, Han civilians in the TAR are said to have numbered only 50,000.¹⁰⁸

Although these figures are in the nature of estimates, a 1990 census “found a Tibetan population of 4.59 million, about one-half (2.2 million) of whom live within the boundaries of the [TAR].”¹⁰⁹ The Unrepresented Nations and Peoples Organization (UNPO) currently estimates a Tibetan population of about 6 million within the area of ethnographic Tibet, of whom approximately 2.44 million live within the TAR.¹¹⁰ At the same time, though, the UNPO estimates that there are 7.5 million Chinese settlers now within ethnographic Tibet, of which approximately 160,000 are within the TAR.¹¹¹ Today, Tibetans are said to represent one of fifty-six ethnic groups within the People’s Republic and the *People’s Daily China* continues to estimate the population of Tibetans at 4.59 million.¹¹²

Turning specifically to education, Article 119 of the Constitution states that education is to be independently administered by the organs of self-government of the TAR.¹¹³ As is evident, however, education is very much linked with language. The failure rate of Tibetan students has been high, due in large part to the language-medium of education and patchy school attendance.¹¹⁴ For Tibetans, autonomy requires incorporation of

¹⁰⁶ RICHARDSON, *supra* note 36, at 6.

¹⁰⁷ THE CASE CONCERNING TIBET, *supra* note 68, at 5 (internal quotation marks omitted).

¹⁰⁸ See GRUNFELD, *supra* note 34, at 252.

¹⁰⁹ *Id.* at 253.

¹¹⁰ *Tibet*, UNREPRESENTED NATIONS & PEOPLES ORG. (Mar. 25, 2008), <http://www.unpo.org/article/7879>.

¹¹¹ *Id.* Though, there are indications of a larger number of Han Chinese settlers within the TAR. See, e.g., HANNUM, *supra* note 27, at 426; AVEDON, *supra* note 98, at 376.

¹¹² See *The Tibetan Ethnic Minority*, PEOPLE’S DAILY ONLINE (China), Aug. 8, 2011, <http://english.peopledaily.com.cn/data/minorities/Tibetan.html>. See also *Ethnic Groups*, PEOPLE’S DAILY ONLINE (China), <http://english.peopledaily.com.cn/china/19990914A104.html> (last visited Nov. 29, 2011).

¹¹³ XIANFA [CONSTITUTION] art. 119 (1982) (China).

¹¹⁴ See, e.g., *Conclusion to THE NEXT GENERATION: STATE OF EDUCATION IN TIBET*

compulsory education in the Tibetan language.¹¹⁵

The TAR has access to governmental civil service—including police and security forces, and social services—but such services and forces are under the control of the PRC's central government. The March 7, 1989 establishment of martial law in Tibet exemplifies this, and the 1982 Constitution emphasises the security of the motherland and the unity of the country.¹¹⁶ Social services also—e.g., the right of the old, ill or disabled to material assistance—are in the hands of the state.¹¹⁷

Land and natural resources are areas of direct conflict in the Sino-Tibetan context. The autonomy that the TAR has enjoyed under the PRC has not incorporated autonomy over its land and natural resources. Indeed, by virtue of the 1982 Constitution, mineral resources are owned by the state, as is land.¹¹⁸ China's claimed territorial integrity incorporates its sovereignty over the land comprising Tibet¹¹⁹ and its attendant right to extract natural resources from the land. Tibet has abundant natural resources that have been exploited by the PRC over the decades: "The gold-bearing sands of cultural Tibet have been renowned for centuries. Less well known are the area's other rare metals, including lithium, lead, antimony, and, it is rumored, uranium. There are also coal deposits and an abundance of salt."¹²⁰

Representative local government structures are and have

TODAY, TIBETAN CTR. FOR HUMAN RIGHTS & DEMOCRACY (1997), http://www.tchrd.org/publications/topical_reports/next_generation_education-1997/#Conclusion; *see also* AVEDON, *supra* note 98, at 316.

¹¹⁵ Compulsory education (at least at the primary level) should be feasible to attain generally (and not only among Tibetans), in accordance with the U.N. Millennium Goals. *See* United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). *See also* *Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals> (last visited Nov. 29, 2011).

¹¹⁶ *See, e.g.*, XIANFA [CONSTITUTION] arts. 52,54 (1982) (China).

¹¹⁷ *Id.* art. 45.

¹¹⁸ *See* XIANFA [CONSTITUTION] arts. 9, 10 (1982) (China). Further, nuclear sites and installations within ethnographic Tibet, and the strategic initiative given to China by its control over the Tibetan plateau (reinforced by the 1982 Constitution and China's emphasis on sovereignty and territorial integrity), will ensure that China is not prepared to willingly divest itself of land or mineral resources contained within Tibet. *See, e.g.*, DAWA NORBU, CHINA'S TIBET POLICY 242-46 (2001).

¹¹⁹ Both areas of ethnographic Tibet outside the TAR and the TAR itself. *See supra* note 94 with regard to the distinction between ethnographic Tibet and the TAR.

¹²⁰ June T. Dreyer, *Economic Development in Tibet Under the People's Republic of China*, in CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION 129, 130 (Barry Sautman & June T. Dreyer eds., 2006). *See also* AVEDON, *supra* note 98, at 41.

been in place within the TAR, in one form or another, since the advent of the Seventeen-Point Agreement in 1951.¹²¹ The right of the Tibetan people to exercise regional autonomy was referred to in Article 3 thereof,¹²² and—to a greater or lesser extent—the People’s Republic contends that a system based on autonomy has been in place thereafter.¹²³ Chinese officials, however, have held leadership positions in Tibet and “in September 2000[,] a class of some seventy ethnic Chinese was opened at Tibet University specifically to train future Chinese officials so they could take up leadership positions in Tibetan counties and townships.”¹²⁴ Consequently, opportunities for ethnic Tibetans to take up official positions within Tibet are limited. Thus, it is arguable that what appear to be “representative” local government structures in fact lack an element of true representation, as committees and local government structures are heavily influenced by and may be dominated by Han Chinese.

Despite this state of affairs, Robert Barnett argues that Tibetan politicians in Tibet are not wholly without power or influence, even though “a politics of ethnic superiority” has been created in Tibet.¹²⁵ There is, nevertheless, “contempt of Chinese officialdom for their Tibetan colleagues.”¹²⁶ This contempt chimes in with the general superiority evinced by the Han Chinese toward the country’s “backward minorities,”¹²⁷ and also emphasises the present limitations on the representative capacity of local government structures within the TAR. It is noteworthy that in *Reference re Secession of Quebec*,¹²⁸ it was stated that there is no right in international law to unilateral secession where the central government represented “the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination.”¹²⁹ This reflects U.N. General Assembly

¹²¹ See *supra* note 58.

¹²² Seventeen-Point Agreement, *supra* note 58, art. 3 (“In accordance with the policy towards nationalities laid down in the Common Programme of the Chinese People’s Political Consultative Committee, the Tibetan people have the right of exercising national regional autonomy under the unified leadership of the [Central People’s Government].”).

¹²³ See, e.g., XIANFA [CONSTITUTION] art. 4 (1982) (China).

¹²⁴ Barnett, *supra* note 100, at 45.

¹²⁵ *Id.* at 49.

¹²⁶ *Id.* at 50.

¹²⁷ GLADNEY, *supra* note 102, at 261.

¹²⁸ [1998] 2 S.C.R. 217 (Can.).

¹²⁹ *Id.* para. 154.

Resolution 2625 (XXV) of October 24, 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹³⁰ By implication, if there is no such representation, then the situation is called into question. This general principle then raises the issue of the meaning of autonomy itself in Tibet.

B. The Meaning of Autonomy in Tibet

Autonomy in Tibet means different things for the PRC, on the one hand, and for Tibetans, on the other: “The debates over what kind of autonomy should be implemented in Tibet stem from different theoretical sources and positions. While the Dalai Lama’s *genuine* autonomy proposal draws on liberal principles of autonomy, the official Chinese conception of *regional* autonomy derives from Marxist principles.”¹³¹ Autonomy as practised in the TAR is, of course, that understood by the PRC.

It has been noted *supra* how, in practice, issues surrounding language and education have turned out. The freedom to practise religion is an additional area of significance regarding autonomy in Tibet. Destruction of the monasteries and oppression of the monkhood took place in Tibet after the Dalai Lama’s departure into exile in 1959 and particularly during the Cultural Revolution, although subsequently there has been an easing of policy by the central government.¹³² Even so, there remain limits on the numbers who may become monks and pilgrimage is controlled.¹³³ Both these restrictions are contrary to Tibetan cultural autonomy.

Even where laws and directives are in place, they are not

¹³⁰ G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970). The Declaration provides that nothing therein:

[S]hall 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 . . . possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Id.

¹³¹ He, *supra* note 103, at 73.

¹³² After the Cultural Revolution ended, the more liberal policy of Deng Xiaoping was in the ascendancy, and China sought a more conciliatory policy in Tibet. SHAKYA, *supra* note 57, at 371.

¹³³ He, *supra* note 103, at 77.

necessarily put into effect. For example, despite the 1987 adoption of the provisional language law, plans for middle school texts to be written in Tibetan, and for most school subjects to be taught in Tibetan, were abandoned.¹³⁴ Almost all subjects, certainly after primary school, are still taught in Chinese and although directives have been issued by the central government to Chinese residents in the TAR to learn Tibetan, these are largely ignored.¹³⁵ All of this leads to the disadvantage of Tibetans in the TAR, which is compounded by the fact that, not unnaturally, officials and factory managers who speak only Chinese tend to prefer to employ people able to speak Chinese, thus excluding many ethnic Tibetans.¹³⁶

Turning to the question of political autonomy, the limited opportunity for Tibetans to take up official positions in the TAR has been noted. Although the majority of high-ranking Tibetan cadres¹³⁷ hold only titular and nominal power, an ever-increasing number of Tibetan cadres hold posts at lower levels in government and ever-increasing numbers are admitted to the Chinese Communist Party (CCP).¹³⁸ Thus, the PRC can claim that there is an element of power sharing and some form of limited autonomy.¹³⁹ However, local laws cannot override national law. In consequence, central authority—i.e., the central government—is dominant, and specific regulations of the TAR have to be submitted to the Standing Committee of the National People's Congress for approval before going into effect.¹⁴⁰ Thus, such regulations are subject to veto by the Standing Committee at the national level.

Consequently, the autonomy enjoyed by the TAR is limited in scope and does not accord with, for example, the Dalai Lama's proposals presented and addressed to the European Parliament at Strasbourg, France, on June 15, 1988 (Strasbourg Proposal).¹⁴¹

¹³⁴ *Id.* at 78.

¹³⁵ *Id.*

¹³⁶ *Id.* See *supra* notes 98 and 100 and accompanying text.

¹³⁷ A "cadre" is "a group of activists in a communist or other revolutionary organization." *Cadre Definition*, OXFORD DICTIONARIES ONLINE, <http://oxforddictionaries.com/definition/cadre?region=us> (last visited Nov. 27, 2011).

¹³⁸ He, *supra* note 103, at 76.

¹³⁹ See *id.* In 1990, Tibetans comprised as many as 85% of the members of the Tibetan Political Consultation Committee, but 54% of the Tibetan People's Congress and only 22% of the Tibetan Party Committee; also, in 1991, the CCP had more than 57,000 Tibetan and other minority members. *Id.* at 77.

¹⁴⁰ XIANFA [CONSTITUTION] art. 116 (1982) (China); see also *id.* art. 115.

¹⁴¹ His Holiness the 14th Dalai Lama, Address to the Members of the European

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The five-point plan called, inter alia, for negotiations between the Tibetans and the Chinese. Additionally, while the Government of the People's Republic would retain responsibility for Tibet's foreign policy, the Dalai Lama stated that a Tibetan government, founded on a constitution or basic law should:

[D]evelop and maintain relations, through its own foreign affairs bureau, in the field of commerce, education, culture, religion, tourism, science, sports and other non-political activities

. . . The basic law should provide for a democratic system of government entrusted with the task of ensuring economic equality, social justice, and the protection of the environment. This means that the Government of Tibet will have the rights to decide on all affairs relating to Tibet and the Tibetans.¹⁴²

In a 2001 speech, the Dalai Lama explained that the Strasbourg Proposal envisaged a real autonomy for Tibet:

[W]ithin the framework of the People's Republic of China
[A] true self-governing, genuinely autonomous Tibet, with Tibetans fully responsible for their own domestic affairs, including the education of their children, religious affairs, cultural matters, the care of their delicate and precious environment, and the local economy. Beijing would continue to be responsible for the conduct of foreign and defense affairs.¹⁴³

There are a number of reasons why the People's Republic has rejected the Dalai Lama's proposals. Baogang He, for instance, cites:

- [F]ear that acceptance could ultimately lead to full independence for Tibet;
- a reluctance to agree to the idea of the chief executive in Tibet being elected;
- the unacceptability of demands that autonomy for Tibet should extend beyond the TAR into the remainder of ethnographic Tibet (as within ethnographic Tibet only the TAR presently enjoys autonomy);

Parliament: Strasbourg Proposal 1988 (June 15, 1988), *available at* <http://www.dalailama.com/messages/tibet/strasbourg-proposal-1988>.

¹⁴² *Id.*

¹⁴³ His Holiness the 14th Dalai Lama, Speech of His Holiness the Dalai Lama to the European Parliament (Oct. 14, 2001) [hereinafter *Strasbourg Speech (2001)*], *available at* <http://www.dalailama.com/messages/tibet/strasbourg-speech-2001>. There is thus at least an implicit acknowledgement of China's present-day sovereignty over Tibet.

- the unacceptability of the withdrawal of Chinese troops as a precondition for negotiation;
- the failure of the Dalai Lama to publicly state that Tibet is an inalienable part of China;
- the rejection of liberal principles of autonomy and rejection of the applicability of the right of self-determination to minorities in China;¹⁴⁴
- the fact that the Dalai Lama has brought the Tibet Question into international focus; and
- the fact that regional autonomy for minority nationalities already exists in China.¹⁴⁵

At the root of the matter, Hu Jintao, the General Secretary and President of the People's Republic, has stated that "it is essential to fight unequivocally against the separatist activities by the Dalai clique and anti-China forces in the world, vigorously develop a good situation of stability and unity in Tibet[,] and firmly safeguard national unity and state security."¹⁴⁶

Despite this failure to negotiate, the benefits to the PRC of resolving the Tibet Question are apparent, for example, in the potential to enhance the State's international image and in respect of increased stability and unity.¹⁴⁷ Tibet continues to benefit from autonomous status within the PRC, at least in so far as the area of the TAR is concerned.¹⁴⁸ It is clear, however, that Tibetans (and those taking their part in the Sino-Tibetan discourse) view the autonomy—i.e., the internal self-determination—that Tibet has with cynicism.¹⁴⁹ The Dalai Lama's moves towards enhanced

¹⁴⁴ The Bangkok Declaration contemplated self-determination in a restrictive fashion, which "pre-empts groups within sovereign, independent States from asserting self-determination as grounds for a legal claim to secession, allaying fears of State fragmentation." Thio, *supra* note 72, at 310. See also *supra* note 83 and accompanying text.

¹⁴⁵ He, *supra* note 103, at 80.

¹⁴⁶ *Id.* The PRC thus also implicitly brings into the equation the current agenda of the "War against Terror," although these 2001 remarks by President Hu pre-date the terror attacks of 9/11.

¹⁴⁷ Strasbourg Speech (2001), *supra* note 143.

¹⁴⁸ Thus benefiting, for example, from the provisions of Article 115 of China's Constitution. See XIANFA [CONSTITUTION] art. 115 (1982) (China).

¹⁴⁹ Hence the continued discontent among Tibetans, evidenced by the existence of the Tibetan independence movement and the Tibetan Parliament-in-Exile. See, e.g., *International Tibet Independence Movement*, TIBET ONLINE, <http://www.tibet.org/Resources/TSG/Groups/itim.html> (last visited Dec. 15, 2011); *Tibetan Parliament-in-Exile*, TIBETAN PARLIAMENTARY & POL'Y RES. CENTER, <http://tpprc.org/tpie.html> (last visited Dec. 15, 2011).

autonomy have not come to fruition, and essentially an impasse has been reached. Of significance, and worthy of emphasis, is the fact that autonomy for Tibetans is limited to the TAR—it does not extend beyond what may be termed ‘political Tibet’ under the terms of the Chinese Constitution into the entirety of ethnographic Tibet¹⁵⁰—whereas, for Tibetans, as a distinct people, Tibet comprises ethnographic Tibet and not the more limited area.¹⁵¹

Autonomy such as the PRC has granted to Tibet may be considered deficient in two respects: firstly, in that only a part of historical Tibet, the TAR, has benefited from autonomy; and secondly, as to the ambit of autonomy enjoyed by the TAR. Consequently, there remains discontent among Tibetans. While deadlocked negotiation continues to prevent resolution of the Tibetan autonomy issue, the question of external self-determination may become more pressing, especially in light of the Comprehensive Proposal for the Kosovo Status Settlement and other subsequent developments, such as the situation in Georgia.

VI. TIBET AND THE EVOLVING CONCEPT OF SELF-DETERMINATION

There is, therefore, potentially renewed impetus for secession by Tibet. If this course is to be pursued, it will be up to the Tibetans to establish equivalence to the situation in Kosovo concerning human rights abuses, together with parity of status between Tibet and Kosovo as autonomous units, and to demonstrate a momentum of the right to self-determination as indicated by the situation in Georgia.

Yet, the peaceful and negotiated resolution of the Tibet Question is in both Tibetan and Chinese interests. Both sides have much to risk if the impasse continues. For instance, a violent outcome—particularly one involving revolution and repression—could not only destroy Tibet and its culture, but could also leave the PRC as a pariah in the international community.¹⁵² The

¹⁵⁰ See *supra* note 94. See also VAN WALT VAN PRAAG, *supra* note 36, at 156.

¹⁵¹ See, e.g., Emmanuel Bello, *Tibetans as a Distinct People*, in *TIBET: THE POSITION IN INTERNATIONAL LAW; REPORT OF THE CONFERENCE OF INTERNATIONAL LAWYERS ON ISSUES RELATING TO SELF-DETERMINATION AND INDEPENDENCE FOR TIBET* 35, 35-36, 39 (Robert McCorquodale & Nicholas Orosz eds., 1994) (the conference took place in London, from January 6–10, 1993); *Discussion: Tibetans as a Distinct People*, in *TIBET: THE POSITION IN INTERNATIONAL LAW*, *supra*, at 41 (comments of Emmanuel Bello and Wolfgang Benedek).

¹⁵² As, arising from a rather different context, Libyan leader Muammar Gaddafi

concept of self-determination evolves, and in the absence of a negotiated conclusion based on satisfactory autonomy, the doctrine of external self-determination merits further examination in seeking a prospective solution to the Tibetan problem.

It is in the Comprehensive Proposal for the Kosovo Status Settlement, and in the developments in state practice arising thereout, that the solution to the Tibet Question may find expression. As Kosovo can be distinguished from states created from the other constituent parts of Yugoslavia, and also from states created following the breakup of the Soviet Union (in that it has enjoyed the status of an autonomous province), it bears similarities to the Tibet Autonomous Region under the Chinese Constitution. Although the Proposal failed to reach fruition, its mandate for supervised statehood and other terms open the door to the possibility of independence, thus demonstrating a focus on the “central issue” of the Tibet Question.¹⁵³ Ahtisaari’s Kosovo Status Settlement may give impetus to the Tibetan independence movement currently restrained by the Dalai Lama,¹⁵⁴ prospectively representing a new interpretation or reconfiguration of the international order.

If Martti Ahtisaari’s proposals comply with international law—and it was a prerequisite of the Settlement proposals that they should¹⁵⁵—then it would appear that secession by an autonomous region is potentially legitimated. This could then provide a basis for prospectively legitimising Tibet’s secession from the PRC, and thus may have profound significance in the context of the Tibet Question. The particular significance, though, is for the TAR and the people of the TAR, rather than for the entirety of ethnographic Tibet.¹⁵⁶ The Comprehensive Proposal potentially legitimises secession for a territorially-defined

became.

¹⁵³ Edward Lazar, *Afterword* to TIBET: THE ISSUE IS INDEPENDENCE 83, 84 (Edward Lazar ed., 1994). Continued state opposition to Ahtisaari’s proposals is inevitable, for example from Serbia, Russia, and the PRC: Serbia in the sense that it views Kosovo as part of its territory, while Russia and the PRC have traditionally supported the Serbian position. See *supra* text accompanying note 3. Recognition of Kosovan independence would potentially have implications for the PRC in the context of Tibet.

¹⁵⁴ See JANE ARDLEY, THE TIBETAN INDEPENDENCE MOVEMENT: POLITICAL, RELIGIOUS AND GANDHIAN PERSPECTIVES 180 (2002) (“The Dalai Lama’s stated goal of autonomy does not seem to correspond with the wishes of the majority of Tibetan people . . .”).

¹⁵⁵ See *Guiding Principles*, *supra* note 4.

¹⁵⁶ See *supra* note 94.

autonomous region, rather than secession by a people or an ethnic group as a whole. The Kosovo Status Settlement has extended the meaning of “people” to those based in an autonomous region, and would so apply in the case of Tibet and the TAR. Consequently, the Kosovo Settlement has implications for “people” in the Tibetan context: it is the people within the specific unit of the TAR to which the Settlement has relevance. For Tibetans (including the Dalai Lama), however, it is ethnographic Tibet that constitutes Tibet. The Dalai Lama has been quoted as saying that “Tibet was and is in fact different from China—racially, culturally, linguistically, geographically and historically. No knowledgeable person would for a moment think that Tibetans are Chinese.”¹⁵⁷

In the context of Kosovo, human rights were emphasised by the Contact Group. Thus, credence appears to be given to the remedial right theory of self-determination, rendering it critical for Tibetans to establish that they have been victims of human rights abuses such that the merits of their situation may be seen to be on equal footing with those of the Kosovars.¹⁵⁸ Tibet would then have a case to seek to build on the trend emanating from the Comprehensive Proposal for the Kosovo Status Settlement, limited by norms of international law, particularly in the event of continued failure of Tibetans to achieve substantial and substantive autonomy.¹⁵⁹ It is this potential that can be engaged to focus the minds of both China and Tibet in negotiation.

Yet, Tibetans are entitled to ask whether a course of action based on the Kosovo Status Settlement will prove sufficient. It is necessary to bear in mind the fact that Tibet has failed to harness the support of the international community since coming under control of the PRC in 1950. If Tibet can establish equivalence with the situation in Kosovo then, as self-determination is said to be indivisible, it would seem that Tibet would be well-placed to follow that trend, despite the contention that Kosovo is *sui generis*¹⁶⁰ and

¹⁵⁷ NORBU, *supra* note 118, at 313. *See also supra* note 151 and accompanying text.

¹⁵⁸ To prospectively take advantage of the remedial right theory of self-determination, and therefore attempting to follow the precedent set in the context of Kosovo, Tibetans would need to establish they had been victims of human rights abuses in similar fashion to the suffering experienced by the Kosovars. *See supra* note 68 and accompanying text (on the question of the remedial right theory).

¹⁵⁹ *See* Thio, *supra* note 72 and accompanying text.

¹⁶⁰ Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo?*, in *KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT* 213 (Christian Tomuschat ed., 2002) (“The right of self-determination is indivisible.”).

the fact that the Kosovo Status Settlement failed to garner support within the U.N. Security Council. Only certain states recognise the independence of Kosovo, which is effectively an exercise of self-determination from Serbia. Fewer recognise the independence of South Ossetia and Abkhazia, an exercise of self-determination from Georgia. Thus, it appears that the indivisibility of the right of self-determination may now be put to the test.

All states may not be equal. At this time, we may be witnessing the use of self-determination as a political tool, rather than as a legal principle, in the cases of the West intervening against the FR Yugoslavia (later Serbia) and Russia intervening against Georgia. In neither of these cases is a major power intervening against another major power, and moreover in neither is there any intervention against a major power, which would potentially be the case if Tibet were to find state support in the West. This factor may partially explain Tibet's failure to achieve progress in its quest for independence to date.

If Tibet can establish a parity of circumstances with Kosovo, and yet is still unable to achieve state support for self-determination, a lack of indivisibility of self-determination would be indicated. The state of affairs would also predicate a limited will on the part of the international community to intervene against the territorial integrity of other states. This would chime with the foreign policy views of those such as Tony Blair,¹⁶¹ which comprises "a doctrine of ethical imperialism wrapped up in the language of globalisation."¹⁶² This view, called the Chicago Doctrine, has profound implications for international law, and indeed for the United Nations. It would premise that some states—i.e., powerful states—are indeed more equal than others, and consequently that equality of states is a myth. Not only does this raise questions at the very heart of international law, but it is

¹⁶¹ Christopher Hill, *Putting the World to Rights: Tony Blair's Foreign Policy Mission*, in THE BLAIR EFFECT 2001-5, at 394 (Anthony Seldon & Dennis Kavanagh eds., 2005) ("[H]is belief in the principle of intervention to overthrow tyrannies which threatened international peace as well as their own peoples . . ."). This then presupposes no intervention if international peace is not at stake, or indeed if intervention would conflict with such peace.

¹⁶² Robert Skidelsky, *The Reinvention of Blair*, in THE BLAIR EFFECT 2001-5, at 444 (Anthony Seldon & Dennis Kavanagh eds., 2005) (discussing a speech made by Tony Blair in Chicago in April 1999—hence termed his Chicago Doctrine). The Chicago Doctrine has arguably been applied recently in the context of the Arab Spring, where there has been international intervention, for example, in Libya, but not, for example, in Bahrain and Saudi Arabia.

also indicative of limits on the validity of human rights—which are seen as “the *raison d’être* of the state system”¹⁶³—as states seek to dress up instances of self-determination as *sui generis* and, with certain irony, Russia seeks to establish Kosovo as a precedent to achieve self-determination for South Ossetia and Abkhazia from Georgia.

The presently contrasting positions of Kosovo and Tibet raise two further points: can unilateral external self-determination be achieved only following violent revolution? And only against a parent state that is without influence, for instance, against such as Serbia, but not the PRC? This may indeed be presaged by Blair’s Chicago Doctrine. If so, it would lead to the conclusion that self-determination is a political, rather than a legal, construct. It would also be instructive for Tibetans when considering the implications of the Kosovo Status Settlement.

¹⁶³ DOUZINAS, *supra* note 16, at 374. *Cf.* DOUZINAS, *supra* note 16 and accompanying text. *See also* Dickinson, *Universal Human Rights*, *supra* note 12.