

The Position of Tibet in International Law

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Introduction

The activities of the Communist Government of China in Tibet have been the object of international attention for some years. This attention has centred mainly around the occupation of parts of Tibet in 1950, which precipitated a discussion in the General Committee of the United Nations' General Assembly, and the continuing suppression of the civil unrest in Tibet which came to world attention in 1959 when the Dalai Lama fled from his capital and sought political asylum in India.

In attempting to determine if either or both of these activities could be considered to involve violations of international law, the entire question of the position of Tibet with regard to China at the relevant times has to be examined. The question is complex both politically and legally and depends to some extent on historical analysis. Part I of this study deals with the relations between China and Tibet until 1911. Part II discusses the relations between China and Tibet from the overthrow of the Manchu dynasty to the Simla Conference of 1913-14. Part III deals with the period from the Simla Conference to the reappearance of Chinese forces in Tibet in 1950. Part IV attempts to answer the question of whether Chinese activities in Tibet in 1950 can properly be considered to have involved a breach of international law. Part V discusses the relations between China and Tibet from 1951 to the present and attempts to answer the question of whether Chinese activities in Tibet after 1951 can properly be considered to have involved a breach of international law.

I. RELATIONS BETWEEN CHINA AND TIBET BEFORE 1911

After some 70 years of military and political manoeuvring the Manchu rulers who governed China achieved their highest level of power in the geographical area of Tibet by 1792, at which time the polity of the Tibetans appears to have been wholly obedient to Manchu authority

whenever that authority was sought to be exercised.¹ The geographical limits of this authority were not stable, nor was the extent of Manchu actual authority entirely clear, as will be seen. Aside from mere boundary line uncertainties, the Manchu leaders of China apparently asserted rights in the name of China on which military adventures were based or tribute exacted during the years that followed in the political areas of Sikkim, Bhutan, Nepal, the Punjab hills and Kashmir (including Ladakh) as well as the Lhasa-based area of the Tibetan polity.² The fact that the Lhasa Government on occasion exercised direct control over its own foreign affairs during the nineteenth century³ would not seem to affect the view of Sino-Tibetan relations as involving ultimate authority in China, for not only were the Manchu representatives (*Ambans*) in Lhasa intimate and powerful *ex officio* members of the Lhasa Government,⁴ but given the unquestionable extent of their authority in Lhasa there seems no logical reason to apply in this context the nineteenth-century European division of "sovereignty" into "internal" and "external" compartments for purposes of determining the location of "the sovereign," with primacy going to the power controlling international relations.⁵ The factual ingredients and attitudes of mind involved here were not those familiar to nineteenth-century England seeking to expand its "rights" in India. If, as appears to have

¹ Cf. Sir Charles Bell, *Tibet Past and Present*, Oxford, 1924 (hereafter *Tibet*), pp. 40–42; H. A. Lamb, "Tibet in Anglo-Chinese Relations: 1767–1842," *Journal of the Royal Asiatic Society* (J.R.A.S.) (1957), pp. 161–172; L. Petech, *China and Tibet in the Early 18th Century* (T'oung Pao Monograph No. 1), Leiden, 1950, *passim*; W. W. Rockhill, "History of Tibet," 23 J.R.A.S. (New Series) (1891) at p. 188 *et seq.*; W. W. Rockhill, *The Dalai Lamas of Lhasa and their Relations with the Manchu Emperors of China, 1644–1908*, 11 T'oung Pao (1910) 1 (hereinafter cited as *Rockhill*) at p. 1; M. E. Willoughby, "The Relations of Tibet to China," 11 *Journal of the Royal Central Asian Society* (J.R.C.A.S.) (1924) 187 (hereafter cited as *Willoughby*) at pp. 187–192; G. Shulemann, *Geschichte der Dalai Lamas*, Leipzig, 1958, p. 340 *et seq.*; Schuyler Cammann, *Trade Through the Himalayas*, Princeton, 1951, pp. 16–18, 102 *et seq.*, 144, 151–152; *per contra*, see H. E. Richardson, *Tibet and its History*, London, 1962 (hereafter *Richardson*), pp. 43–72.

² Sir Charles Bell, "China and Tibet," 36 J.R.C.A.S. (1949) 54 at p. 55; British Parliamentary Papers, Cd. 5240 (1910) at p. 178; Lamb, *op. cit.*, Part II, J.R.A.S. (1958) 26 at pp. 401–442; *Willoughby*, p. 192; H. A. Lamb, *Britain and Chinese Central Asia*, London, 1960 (hereafter *Lamb*), *passim*; cf. also the treaty of September 1842 between the Lhasa authorities and China on the one side, and the ruler of Jammu on the other cited and analysed in M. W. Fisher, L. E. Rose and R. A. Huttenbach, *Himalayan Battleground*, New York, 1963, p. 49 *et seq.* and, to rather different effect, A. P. Rubin, "The Sino-Indian Border Disputes," 9 *International and Comparative Law Quarterly* (1960) 96 at pp. 121–122; reference to the payment of tribute to China by the Maharaja of Kashmir is in C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads . . .*, Vol. XIV, Calcutta, 1929 (5th ed.) (hereafter *Aitchison*), p. 15.

³ *Aitchison*, pp. 49–50.

⁴ *Willoughby*, pp. 191–192; P. Landon, *Lhasa*, London, 1905, Vol. I, p. 6; *Rockhill*, p. 90; Petech, *op. cit.*, p. 240; see below, note 111.

⁵ See, e.g., Sir Henry Maine, *The Kathiawar States and Sovereignty*, Minute of 22 March 1864, reprinted in Sir M. E. Grant Duff, *Sir Henry Maine . . .*, London, 1892, p. 320 *et seq.*

been the case, Manchu authority extended to the entire business of the Lhasa Government, there would seem to be no reason why a large amount of initiative and discretion should not have been permitted that government without prejudice to ultimate Chinese or Manchu right. In fact, this sort of decentralisation of administration was normal to China and its acknowledged provinces prior to 1911.⁶

It was apparently a classification of Sino-Tibetan relations as involving Chinese "sovereignty" over the territory of Tibet which prompted the British Government in India, in 1890 and 1893, to conclude conventions with China concerning the Sikkim-Tibet boundary and the opening of Tibet to British trade.⁷ Tibet as such is no party to either convention.

Despite Chinese efforts, however, Tibetan obstruction made the demarcation of the agreed border and the operation of the trade agreements impossible.⁸ Although the Chinese were present in Tibet as a privileged and politically significant class of administrators and merchants,⁹ by the end of the nineteenth century Chinese prestige in Tibet was noticeably declining, due largely to her defeat at the hands of Japan in 1895. Continued blows to her prestige and power on the part of the European Powers also accompanied the collapse of internal organisation in China associated with the late autumn of a Chinese dynastic cycle.¹⁰ To further complicate matters, the British in India had reason to suspect intrigues between Lhasa and St. Petersburg which were believed to threaten British interests in India.¹¹ Thus, for a combination of commercial and political reasons growing out of British

⁶ Cf. G. W. Keeton, *China, the Far East and the Future*, 2nd ed., London, 1949, pp. 3-5; H. M. Vinacke, *A History of the Far East in Modern Times*, 5th ed., New York, 1950, pp. 17-18; H. B. Morse, *The International Relations of the Chinese Empire*, 3 Vols., London, 1910-1918, Vol. I, p. 9.

⁷ 82 British and Foreign State Papers (B.F.S.P.) 9, 85 B.F.S.P. 1235; Imperial Maritime Customs, *Treaties, Conventions etc., between China and Foreign States*, Shanghai, 1908, Vol. I, pp. 321, 324; International Commission of Jurists, *The Question of Tibet and the Rule of Law*, Geneva, 1959 (hereafter *Question*), pp. 105, 107. Other British treaties with China concerning Tibet were made in 1876 and 1886. Imperial Maritime Customs, *op. cit.*, pp. 299, 314. The provisions of the 1876 treaty relating to Tibet appear never to have been carried out and were, in effect, cancelled in 1886. There can be no doubt that the British treated China as possessing very great rights in Tibet and even in Nepal throughout the nineteenth century. Cf. Lamb, *passim*.

⁸ Cd. 1920 (1904), p. 29 *et seq.*

⁹ *Id.* p. 56; Cd. 5240 (1910), pp. 73, 79.

¹⁰ Cf. Cd. 1920 (1904), p. 56; E. Kawaguchi, *Three Years in Tibet*, Madras, 1909 (apparently written about 1902), pp. 504, 519-525. An account of Western participation in the collapse of China following the Sino-Japanese War is P. Joseph, *Foreign Diplomacy in China, 1894-1900*, London, 1928. Morse, *op. cit.*, Vol. III, pp. 55-56.

¹¹ Cd. 1920 (1904), pp. 113, 152-153, 187; S. Cammann, *op. cit.*, p. 151; A. Lamb, "Some Notes on Russian Intrigue in Tibet," 46 J.R.C.A.S. (1959) 46. A thorough

trading desiderata in Tibet itself and British involvement in the security and trade of India, the British Government of India decided to treat directly with the Tibetan Government in Lhasa.¹²

Unable to establish a satisfactory communication line by other means,¹³ a military mission was dispatched from India under Colonel Younghusband in 1903, which, after a deal of hesitation and correspondence, and a bit of fighting against Tibetan resistance, arrived in Lhasa on 3 August 1904.¹⁴ The Chinese Amban was fully co-operative with the British during this time¹⁵ as it apparently became Chinese policy to use the British military adventure, which the Chinese were powerless to stop, as a means of attempting to bolster flagging Chinese control in Tibet. The Chinese purported to depose the Dalai Lama, who fled to Mongolia before the British advance.¹⁶

On 7 September 1904, in the presence of the Amban, the Tibetan authorities signed a treaty with the British in Lhasa¹⁷ by which the Tibetan polity was directly bound to observe the terms of the 1890 and 1893 Conventions, and an immense indemnity was fixed on Tibet. This indemnity was intended by the Viceroy of India, Lord Curzon, as a wedge to get control of Tibetan customs and other key facets of trade,¹⁸ but was disapproved in London as tending to involve the British in an indefinite military commitment in a relatively profitless area.¹⁹ The Chinese were understood to have agreed to sign an adhesion to this 1904 Convention, by means of which the British apparently hoped to secure one agreement binding on all claimants to authority in Tibet, but on instructions from Peking the Amban refused to do so.²⁰

The 1904 Convention is studiously ambiguous regarding the Chinese role in the Lhasa Government. While certain commitments were undertaken by Lhasa, there is no indication that these commitments were meant to imply any degree of right to act independently of China. In Lhasa's agreeing to restrict her behaviour towards "any Foreign

study of the international forces involved in British actions in Central Asia at this time is Alastair Lamb, *The MacMahon Line*, 2 vols., London and Toronto, 1966, *passim*.

¹² Cd. 1920 (1904), p. 184.

¹³ *Id.* pp. 121-127.

¹⁴ *Id.* p. 303 *et seq.*; Cd. 2054 (1904) *passim*; Cd. 2370 (1905), pp. 1-49.

¹⁵ Cd. 2370 (1905), pp. 49, 225.

¹⁶ *Id.* pp. 54, 229.

¹⁷ 98 B.F.S.P. 148; *Aitchison*, p. 23; Cd. 2370 (1905), pp. 61, 270-271; *Question*, p. 110.

¹⁸ Cd. 2370 (1905), pp. 62-63.

¹⁹ *Id.* pp. 62, 65.

²⁰ *Id.* p. 65.

Power" in certain ways,²¹ although the ambiguity is continued, it seems most likely in view of the surrounding facts and later developments that Russia was the "Foreign Power" contemplated, and China was not in any way intended to be bound by her adhesion to the Convention, when it came, to limit her own actions in Tibet.²² The Tibetans do not appear to have regarded the 1904 Convention as obliging them to oust their Chinese officials. The wording of the articles of the 1904 Convention containing the most serious restrictions on Tibetan (or Chinese) action is so ambiguous that no generalisation as to the Convention's intended import beyond the probable British intention of securing legal grounds for a future free hand in Tibet can be made with confidence. At the signing in Lhasa, Colonel Younghusband expressly stated that the British "fully recognise the continued suzerainty of the Chinese Government" in Tibet.²³ Although "suzerainty" was not defined, it was apparently not felt to be incompatible with very wide authority to be exercised by China in Tibet for later developments indicate that the British still expected to be able to stiffen Chinese authority in Tibet to the point that pressure applied to China would accomplish results in Tibet without involving the British in further military adventures. Colonel Younghusband may have himself expected that his use of

²¹ Article IX of the 1904 Convention says:

"The Government of Tibet engages that, without the previous consent of the British Government:

- (a) no portion of Tibetan territory shall be ceded, sold, leased, mortgaged or otherwise given for occupation to any Foreign Power;
- (b) no such Power shall be permitted to intervene in Tibetan affairs;
- (c) no representatives or agents of any Foreign Power shall be admitted to Tibet;
- (d) no concession for railways, roads, telegraphs, mining or other rights shall be granted to any Foreign Power, or the subject of any Foreign Power. In the event of consent to such concessions being granted similar or equivalent concessions shall be granted to the British Government;
- (e) no Tibetan revenues, whether in kind or in cash, shall be pledged or assigned to any Foreign Power, or the subject of any Foreign Power."

The expression "Foreign Power" is nowhere defined in the Convention.

²² A contrary view is expressed in D. K. Sen, "La Situation Internationale du Thibet," 55 *Revue Générale de Droit International Public* (1951) 417. Sirdar Sen apparently does not consider the events of 1906 to 1911 (see below) as of any legal significance, although he gives no reasons for this belief. His interpretation of the 1904 Convention seems to be insupportable in fact or in logic.

A confusing argument is similarly made by the International Commission of Jurists in their final report, *Tibet and the Chinese People's Republic* (hereinafter *Report*), Geneva, 1960, pp. 140, 145-146, 154-157, to the effect that China was properly considered a "Foreign Power" for purposes of Article IX of the 1904 Convention. This argument seems to rest on the assumption that the intention of the British in 1904 can be drawn from their political wishes in 1912 and later (*i.e.*, that British policy in 1904 was to minimise Chinese authority in Tibet, and accepting as persuasive these later British wishes to the complete exclusion of indications of British, Chinese and, to some extent Tibetan, intentions and desires in 1904-06). In so far as the argument of the Commission is understandable, it appears to be inconsistent with all the available evidence.

²³ Cd. 2370 (1905), pp. 270-271.

the word "suzerainty" would help undercut Chinese claims to "sovereignty" in the event that the British decided to increase the scope of their direct involvement in Tibetan affairs, and these words as he used them were repeated by the British Government to support its position in a number of inconsistent ways, as shall be seen. Nonetheless, the adoption of this formula of words when a bolstering of Chinese authority was being contemplated in London seems good evidence of their original officially intended meaning in describing the relations of Tibet to China. The most extreme of the Younghusband terms to be found in the 1904 Convention were not ratified by the British, and the indemnity was cut to one-third "*ex gratia*."²⁴

After the signing of the 1904 Convention, Chinese policy apparently became set on an assertion of full Chinese sovereignty in Tibet.²⁵ While the Viceroy of India wanted to consolidate British authority in Tibet,²⁶ the British Government in London determined to permit the Chinese to have their way provided that British commercial and political interests were secured.²⁷ Accordingly, Chinese offers to pay off the 1904 indemnity were accepted as soon as China signed her adhesion to the 1904 Convention, which was done in April 1906.²⁸ Once again, the legal relations between China and Tibet were left obscure, but given a free hand politically the Chinese lost no time in attempting to consolidate their position and, along with other steps, a call was sent out to Chinese colonists to move into Tibet as permanent settlers in February 1907.²⁹ The Chinese, however, seeking to gain a satisfactory legal definition of their status in Tibet and to overcome the implications of the 1904 transaction which might be construed to indicate a degree of independence in Lhasa, obstructed British trade in Tibet by forbidding Tibetan traders to trade freely and otherwise harassing the British in Tibet.³⁰

Having determined to back Chinese pretensions to control in Tibet as a means of achieving their commercial ends without political involvement, the British were able to attain their immediate political ends in

²⁴ *Id.* pp. 70-72, 77, 93-94. The style of the Younghusband expedition was the subject of much critical comment in England and India at the time.

²⁵ Cd. 5240 (1910), pp. 69, 86; Lamb, *The McMahon Line*, p. 117 *et seq.*

²⁶ Cd. 5240 (1910), p. 87.

²⁷ *Id.* pp. 87-88.

²⁸ 99 B.F.S.P. 171; Cd. 5240 (1910), pp. 46-47, 51-52; Aitchison, p. 27; *Question*, p. 113.

²⁹ Cd. 5240 (1910), pp. 109-110, 132-133. The Chinese have attempted to "colonise" Mongolia in this way also. G. M. Friters, *Outer Mongolia and its International Position*, introd. by O. Lattimore, London, 1951, p. xvii. More recently the Chinese are reported to be encouraging a similar movement into Tibet of Chinese settlers. Cf. P. B. Henze, "The Strategic Significance of Recent Events in Tibet," 40 J.R.C.A.S. (1953) 169 at p. 173. See also O. Lattimore, *Inner Asian Frontiers of China*, New York, 1951, *passim*, for insight into the historical significance of these moves.

³⁰ Cd. 5240 (1910), pp. 69, 73, 79, 96, 110.

August 1907 by the conclusion of a bilateral treaty with Russia³¹ according to which both parties agreed to respect the territorial integrity of Tibet, abstain from interference in her internal administration, and to conduct all relations with Tibet through the intermediacy of China, as "suzerain."

Thus, although the legal position of China in Tibet was left unclear, it became consistent with the policy of the British, the Russians and the Chinese that Chinese authority in Tibet be made certain and effective, and accordingly, on 20 April 1908, a new Convention, with both commercial and political terms, was concluded between the Chinese and British authorities respecting Tibet.³² This Convention was signed not only by British and Chinese Commissioners, but also by a Tibetan "delegate," subordinate to the Chinese Commissioner, and representing the Lhasa Government of Tibet.³³ In this agreement very sweeping powers, including supervision of the Tibetan judicial system and trading stations, are allotted to China, and since this document has never been expressly abrogated,³⁴ nor has it expired by its own terms,³⁵ it may be well to examine its legal effects in a little detail at this point.³⁶

The British, having been debarred from political interference in Tibet both by their own policy and by their obligations under the 1907 Convention with Russia, restricted their advantages under the 1908 Convention to commercial ones and peripheral matters, such as extra-territoriality, usual to British relations with Asian polities at this time. In the main, the British acquired only rights to trade and to facilitate their trade by establishing rest-houses, communications between Tibet and India, and a right to communicate face to face with Tibetan and Chinese authorities. They incurred no obligations, according to the terms of the 1908 Convention, except such as were limitations on the privileges conceded them and such as constituted a diminishing of their unwanted military involvement in Tibet as the Chinese took over effective administration of the trade routes. The Chinese, on the other hand, were saddled with immense responsibilities for the good order and maintenance of the amenities of trade in Tibet. China was to police the lines of communication, set up a postal service in Tibet, supervise the

³¹ 100 B.F.S.P. 558; *Question*, p. 116.

³² 101 B.F.S.P. 170; *Aitchison*, p. 28; *Question*, p. 118.

³³ Cd. 5240 (1910), p. 151 *et seq.*; *Tibet*, p. 91.

³⁴ Cf. 151 B.F.S.P. 89.

³⁵ Cf. *Aitchison*, p. 20. The Chinese, apparently unsuccessfully, sought to invoke it as recently as 9 October 1948. T. T. Li, "The Legal Position of Tibet," 50 *American Journal of International Law* (A.J.I.L.) (1956) 394 at p. 401.

³⁶ A further discussion of this Convention is below, in which I attempt to show that the 1908 Convention can be regarded as having terminated sometime between 1911 and 1914.

administration of the "Trade Marts" and reform the system of justice in Tibet. All disputes involving British trading rights in Tibet were, if found unsolvable on a local level, to be the subject-matter of negotiation between the British and Chinese governments regardless of the interests of Lhasa in the matter. The Tibetan Government in Lhasa appears in the Convention only incidentally. Certain administrative matters were to "remain" under Tibetan control, but only "under the Chinese officers' supervision and directions." The Government of India was to be able to confer directly with the Lhasa Government before appeal was taken to Peking on any matter of difference, and direct communication between British and Lhasa authorities was to be permitted, but these appear to have been British rather than Tibetan rights.³⁷

It is apparent, therefore, that the authority envisaged for China in Tibet in the 1908 Convention was very great indeed. It was to the British advantage that China consolidate her authority in Tibet to secure to the British the trading objectives which underlay so much of British action. China, buffeted on all fronts by winds from Europe, and seething internally, was anxious to recoup some of her waning prestige and to stabilise her internal administration as best she could. For a free hand in Tibet, she was apparently willing to trade away a limited amount of commercial advantage to the British. Her once unquestionable power in Tibet existed now more in tradition than in her ability to enforce obedience, and although the Tibetan constitution might take no cognisance of the loss of Chinese power and prestige in Tibet, the fact of that erosion was witnessed by the events preceding the British military adventure of 1904; this evidence of a changed conception of Chinese legal authority in the minds of the Tibetan officials at Lhasa was surely feared by the Chinese to presage a strong movement to challenge the appropriateness of legal classifications of that Chinese authority with respect to the Lhasa Government of Tibet. Seeing her position threatened, China was apparently willing to exchange the commercial concessions, which she could not in any event have prevented the British taking, for time in which to attempt to re-establish and consolidate her authority in Tibet.

³⁷ From 1910 on, the Lhasa authorities apparently interpreted the 1904 Agreement as giving them a right of direct access to the British authorities. Tsepon W. D. Shakabpa, *Tibet; A Political History*, 232, 234-236 (Yale, 1967). There is no evidence that the British concurred in this strained interpretation of the 1904 Agreement, and the Anglo-Russian Convention of 1907 would seem to have precluded the British communicating with the Lhasa authorities on any but trade matters. The co-operation of Lhasa in the elaborate British attempt to avoid the appearance of direct discussions with Lhasa authorities in 1913 (see below, note 71) is evidence of the British interpretation of the 1904 Agreement being concurred in by Lhasa.

But it must still be borne in mind that whatever the events of 1890–1906, at the time under consideration there had been more than a hundred years of more or less effective Chinese dominance in Tibet. Sino-Tibetan political, cultural and economic ties were still strong enough to force the British into negotiations in 1908, and it is easy to underestimate the degree to which China still was able to exercise authority.³⁸ Of course, there were anti-Chinese Tibetans in positions of power in Lhasa who were probably motivated as much by a genuine feeling of lack of community with the Chinese as by the more obvious economic and political advantages they expected from a weakening of Chinese authority there.³⁹ But in the main it seems that the 1908 Convention, in so far as it regulated Sino-Tibetan relations, in view of its terms and form and the background against which it must be measured, cannot properly be considered an arrangement among sovereign equals. Rather, in its Sino-Tibetan phase, it would be better considered as a constitutional document than an international one. Aside from the particular matters obtaining between China and Great Britain, the British signature may thus be conceived as a recognition of Chinese legal right to a wide degree of authority in Tibet. But it seems equally clear that so far as this British recognition exceeded reality it could not give any rights to China in Tibet, nor could the Tibetan signature deprive Tibet of any right it might have to change the Chinese constitution.⁴⁰ Furthermore, there is no international law prohibiting rebellion.

Assured of British abstention from Sino-Tibetan affairs, the Chinese began to assert authority in Tibet with increasing vigour. The Dalai

³⁸ Cf. Rockhill, p. 90; *Tibet*, p. 218.

³⁹ It may be noted that the Panchen Lama, in the nineteenth century, was normally thought to be less concerned with temporal matters than the Dalai Lama (and, to some extent, more holy since he was less involved with the affairs of the material world) (L. A. Waddell, *The Buddhism of Tibet*, 2nd ed. (1934), Cambridge, 1958, p. 235), yet even he signified his desire in 1906 to be an independent temporal ruler (Sir Charles Bell, *Portrait of the Dalai Lama*, London, 1946: hereafter *Portrait*, p. 128). One must be careful to distinguish between the sort of nationalism which appears as a cohesive force, binding opposing political and economic groups together, and the equally potent nationalism which prefers to achieve cohesiveness by excluding disturbing elements or narrowing the political or social horizon to the point at which the myopic viewer can claim to be lord of all he surveys.

⁴⁰ There would seem to be no reason in international law why a constitutional agreement should not be denounceable unilaterally when such a denunciation does not give rise to an international claim. In seeking her own advantage, it may be noted, China has claimed that the events of 1911 and after are sufficient grounds to terminate an international agreement much less closely connected with constitutional affairs than this under the doctrine of *rebus sic stantibus*. G. Scelle, "La Xe Assemblée de la Société des Nations," *Revue Politique et Parlementaire*, 10 October 1929, p. 66, cited in C. G. Ténékidès, "Le Principe Rebus Sic Stantibus; Ses Limites Rationnelles et sa Récente Evolution," 41 *Revue Générale de Droit International Public* (1934) 273 at p. 278, n. 14.

Lama, who had been travelling about in Mongolia and Western China since fleeing Lhasa in 1904, was invited to Peking, where he was invested with a title as "Loyally Submissive Vice-Gerent . . ." of Tibet.⁴¹ It was noted by a British observer at the time that Chinese attempts to secure the trappings of authority in Tibet seem to have been successful, but that the seeds of future trouble were being sown by the manner in which these things were done.⁴² A second aspect of the Chinese re-ordering of affairs in Tibet was military. A new Amban was appointed and sent with an army into Tibet. He was delayed by weather, Tibetan resistance and intrigues in his own staff.⁴³ The Dalai Lama returned to Lhasa via Mongolia on 25 December 1909 having, about a fortnight earlier, sent dispatches to Peking asking that the new Amban be recalled, and to "Great Britain and all the Ministers of Europe" asking help to stop the Chinese "invasion."⁴⁴ In February 1910, with fighting going on, a Tibetan delegation arrived in Calcutta to ask British help against China.⁴⁵ The help was refused on the grounds of the 1907 Anglo-Russian Agreement, no mention apparently being made of the Anglo-Chinese Conventions of 1890, 1893, 1906 and 1908 or the Anglo-Tibetan Convention of 1904.⁴⁶ On 12 February 1910, the Chinese vanguard arrived in Lhasa and the Dalai Lama fled to British India.⁴⁷ By 26 February a Chinese Imperial Decree had been issued which purported once again to depose the Dalai Lama from both temporal and religious authority,⁴⁸ and by 12 March the Chinese had full control of Lhasa.⁴⁹ The Chinese were understood by the British to be willing to abide by their treaty commitments in Tibet,⁵⁰ and on 4 May 1910, the Dalai Lama, who had been granted sanctuary in India,⁵¹ was informed by the British that Chinese *de facto* control over Tibet would be recognised and that he, the Dalai Lama, would be prevented from interfering in the internal affairs of Tibet while he remained in British territory.⁵² It seems clear that, as of that date, the British considered the Chinese as possessed of full legal authority in the territory of Tibet.⁵³ No evidence of the views of other Western Powers seems to be available.

⁴¹ Cd. 2370 (1905), p. 229; Cd. 5240 (1910), pp. 159-160, 170-171.

⁴² Cd. 5240 (1910), p. 165.

⁴³ *Id.* pp. 145, 161, 173, 182; Lamb, *The McMahon Line*, pp. 181 *et seq.*, 271 *et seq.*

⁴⁴ Cd. 5240 (1910), pp. 182, 185, 187.

⁴⁵ *Id.* p. 189.

⁴⁶ *Id.* p. 190.

⁴⁷ *Id.* pp. 190-193.

⁴⁸ *Id.* p. 196.

⁴⁹ *Id.* p. 205.

⁵⁰ *Id.* p. 215.

⁵¹ *Id.* p. 218.

⁵² *Id.*

⁵³ *Id.* p. 220, where it appears that the treaties of 1890, 1893 and 1908 were to be considered as binding on the territory of Tibet.

II. RELATIONS BETWEEN CHINA AND TIBET: 1911-1914

In October of 1911 the revolution began which toppled the Manchu from the Imperial throne of China. In November of that year the Chinese garrisons in Tibet mutinied.⁵⁴ In the struggle which followed, the Panchen Lama headed a pro-Manchu group but finally joined the Tibetan autonomy group headed by the Dalai Lama's supporters.⁵⁵ By June of 1912 the Chinese had been defeated and the Dalai Lama was able to return to Lhasa, the first Dalai Lama to hold real secular power in nearly a hundred years.⁵⁶

With this turn of events the British were not displeased as far as their relations with Tibet were concerned. In a parting message the Dalai Lama was told "that it was the desire of our Government to see the internal autonomy of Tibet under Chinese suzerainty, but without Chinese interference, so long as cordial relations were preserved between India and Tibet and treaty obligations were duly performed."⁵⁷ Apparently the British expected to use Chinese "suzerainty" as a vague threat over Lhasa to encourage amenability and the observance of British wishes in Tibet. As sole legal authority in Tibet China had proved unreliable and there had been too many undercurrents in Chinese internal politics to permit the smooth operation of British commercial arrangements in Tibet hitherto or for Chinese presence in Tibet to satisfy the British in any more concrete way. Now, with a weak Tibet potentially under British influence, and China given an empty classification of "suzerain" no longer linked to any particular powers although with the implication of Tibetan external affairs remaining in Chinese hands, both the political objective of an impotent neighbour to the north of India, and the commercial objective of unobstructed trade, could be expected to be fulfilled. The British apparently felt that no question of principle was involved.⁵⁸

The Amban was killed by the Tibetans in December 1911 and was not immediately replaced. It may be noted in passing that all the Ambans onward from the beginning of Manchu rule in Tibet in the early eighteenth century were Mongols or Manchu (*i.e.*, not Chinese by race),⁵⁹ and from this fact it has been since claimed that Tibetan subordination to China was only to the person of the Manchu rulers,

⁵⁴ *Tibet*, p. 120.

⁵⁵ *Id.* pp. 121-124; *cf.* *Rockhill*, pp. 46-73; *Portrait*, p. 124 *et seq.* Bell's assertions that the Dalai Lama was held to strict neutrality while he remained in India are misleading. In fact the Dalai Lama was actively directing anti-Chinese activities from his sanctuary. *Shakabpa, loc. cit.*, 239-242.

⁵⁶ *Tibet*, p. 124.

⁵⁷ *Id.* pp. 121-122, 140.

⁵⁸ *Id.* pp. 190-195.

⁵⁹ *Cammann, op. cit.*, p. 17, n. 56.

whose nation has cultural and racial affinities with Tibet much stronger than Tibetan ties with the Chinese nation.⁶⁰ It is believed that this argument is specious in view of the assimilation of the Manchu into the Chinese civilisation during the eighteenth and nineteenth centuries, and even were this not so, there is no indication that the Manchu rulers in their relations with Tibet acted as other than heads of the Chinese State during the last decades before the fall of the dynasty.⁶¹ From the point of view of Tibetan psychology, however, the point may have some value, as will be seen.

In April 1912, the new President of the Chinese Republic, Yuan Shih-K'ai, issued a mandate that Tibet should henceforth be regarded as an integral part of China. In October he declared the Dalai Lama reinstated, and appointed a new Amban. Ignoring British protests, which hoped to see a continuation of the newly reached political situation in Tibet,⁶² President Yuan sent a military mission into Tibet in 1912-13 which was checked by the Lhasa Government's forces.⁶³

It has been asserted that the Dalai Lama declared Tibet's independence of China at the beginning of 1912.⁶⁴ Even if this assertion were

⁶⁰ Sir Basil Gould, "Tibet and Her Neighbours," 25 *International Affairs* (1950) 71 (hereafter cited as *Gould*) at p. 76; *Report*, p. 139; J. E. S. Fawcett, "Intervention in International Law," 103 *Hague Recueil des Cours* (1961, II) 347 at p. 413 *et seq.*

⁶¹ Cf. O. Lattimore, *op. cit.*, p. 138; H. B. Morse, *The International Relations of the Chinese Empire*, Vol. III, New York, 1918, p. 411, citing an Imperial Decree of the Empress Dowager dated 1 February 1902; Schulemann, *op. cit.*, p. 276 *et seq.*

⁶² On 17 August 1912, the British presented a memorandum to the Peking Government denying that the 1908 Convention implied Chinese "sovereignty" in Tibet and asserting that Chinese authority there was merely that of a "suzerain." The extent of a suzerain's authority was not defined, but the British apparently felt that the Chinese military actions from 1909 onward were too much. Although nothing contrary to the Convention of 1908 is alleged to have occurred, it was said Chinese actions were opposed to the spirit of the 1908 treaty, apparently because it was impossible to trade freely in Tibet without Chinese co-operation and the Chinese were too busy with other things in Tibet to attend to British trade interests. The British memorandum also threatened to withhold recognition from the new Republican Government of China until Tibetan affairs were adjusted to British satisfaction, and forbade the passage of Chinese into Tibet via India. See *U.S. Foreign Relations, 1912*, Washington, 1919, p. 86. This dispatch giving the gist of the British memorandum is also reprinted in *Report*, p. 318. A somewhat different account of the British position is in *Tibet*, pp. 148-149.

In view of later British argument and practice it is interesting to note the attempt to use "recognition" to extract political benefits in this case. The British attempted to manipulate legal relations in Tibet by "recognising" or refusing to "recognise" Chinese rights as suited British political purposes in Tibet throughout the span of this study.

⁶³ *Willoughby*, pp. 197-198.

⁶⁴ *Report*, p. 139; U.N. Doc. A/1549, Attachment dated 11 November 1950 containing the complaint of Tibet to the U.N., reprinted in C. Sen, *Tibet Disappears*, London, 1960, p. 94 at p. 95; Letter of the Dalai Lama to the Secretary-General of the U.N. dated 29 September 1960, paragraph 6, reprinted in Dalai Lama, *My Land and My People*, London, 1962, p. 239 at p. 240.

The text of this alleged declaration does not appear to be printed or cited directly in any of these sources, but perhaps it is the same as that referred to in *Portrait*, p. 135, as occurring some months after the Dalai Lama's return to Lhasa.

clearly correct, and it is far from that, the legal effect of the declaration must be doubtful. Many self-proclaimed independent rulers have held brief sway, but their declarations have not prevented their parent states from doing all in their power to make the declaration ineffective, even

This "declaration" was the Dalai Lama's reply to the offer of Yuan Shih-K'ai, the President of the Chinese Republic, to restore him to his former rank. This reply mere said that the Dalai Lama was not asking the Chinese Government for rank as he intended to exercise both temporal and ecclesiastical rule in Tibet. Compare Sir Charles Bell's version of this "declaration," in which it appears that Yuan's offer was rejected as merely "unnecessary." Bell, "China and Tibet," 36 J.R.C.A.S. (1949) 54 at p. 55. Since the Dalai Lama must have regarded his rank and position as divine (even in temporal matters) during the high tide of Chinese authority in Tibet, it is difficult to see how this assertion of the Dalai Lama can have been a "declaration of Tibetan independence" as now apparently argued. It was not the Dalai Lama's personal position which was at issue except in so far as the Chinese had been attempting to oust him—a feat patently beyond their authority in Tibet at any time (which is why Dalai Lamas tended to die young during the days of greatest Chinese power in Tibet. Cf. *Portrait*, p. 38). It was the extent of his temporal authority within the Sino-Tibetan constitution, not the existence of a scintilla of that authority, which was at issue.

The Dalai Lama, *op. cit.*, p. 69, mentions "declarations" issued by his predecessor using a Tibetan seal in place of the apparently customary Chinese seal, and changing the heading on some ancient documents from the formula "By order of the Emperor of China, the Dalai Lama is the Pontiff of Buddhism" to the formula "By order of the Lord Buddha." It is not clear whether this action by the former Dalai Lama was merely a bit of forgery performed on ancient texts, or was the fixing of a new style on legislative documents. But, assuming the latter to have been the case, all that appears to have been asserted was the ecclesiastical competence of the Dalai Lama independent of Chinese delegation. This is hardly a "declaration of independence" in temporal matters. It is noteworthy that the American colonies of Great Britain in the 17th and 18th centuries normally enacted their own laws in the sole name of the local government and not in the name of the King or of the Government in London. A. H. Snow, *The Administration of Dependencies*, New York, 1902, pp. 117-118.

Most recently a proclamation dated 8 February 1913 (the date is not absolutely certain; on the difficulty of translating Tibetan dates into Christian dates see Shakabpa, *loc. cit.*, pp. 15-16) has been argued to have been a "Declaration of Independence." Shakabpa, *loc. cit.*, pp. 246-248. Read closely that document will not bear the weight ascribed to it by Shakabpa, a former official of the Lhasa Government now in exile. While it recites in the name of the Dalai Lama the acts of the Lhasa Government in 1913 in attempting to drive out Chinese troops and circumvent the Chinese intention of colonising Tibet, the Proclamation does not purport to cut the governmental ties between Peking and Lhasa in areas in which Peking had actively exercised authority in the past. There is nothing in the Proclamation inconsistent with the Dalai Lama deriving temporal authority from Chinese delegation of some years before. Furthermore, there is no evidence that the Proclamation was in fact delivered to any Chinese authorities or to the world in general.

The patent distortion by the Dalai Lama and his supporters of the meagre evidence of the political intentions of the Lhasa officials in 1911-13 argues powerfully against the proposition that Lhasa's political ties with China were truly intended to be cut at that time. As noted in the text above this note, the issue is of negligible legal significance in this context. It is of substantial legal significance, although still not decisive, with regard to the validity of the McMahon Line border between India and China today. See Rubin, "Tibet's Declarations of Independence?" 60 A.J.I.L. 812 (1966).

for long periods.⁶⁵ It is also possible to wonder whether a mere declaration by, e.g., an Angolan Government-in-Exile (or in-Hiding) of independence of Portugal, or a Southern Rhodesian declaration of independence from the United Kingdom would carry much legal weight even if the new "Government" were "recognised" by a few states. However, there certainly would be possibilities growing out of rival claims to governmental authority to disrupt trade which might depend upon stability and the enforcement of treaty rights for successful consummation.

In January 1913, a treaty was concluded between the Lhasa authorities in Tibet and the authorities asserting a right to govern an independent Mongolia.⁶⁶ This treaty included mutual recognition by the two authorities of each other's sovereignty and independence of China. Although, many years later, the Dalai Lama affirmed that the treaty was entered into on his predecessor's authority,⁶⁷ at the time in fact the Lhasa authorities denied the authority of their supposed negotiator and denied that Tibet was bound by any such treaty.⁶⁸ Even if the treaty did exist and was technically valid as an expression of the will of the Lhasa Government, it would seem to fit more closely a classification of a secret intrigue between two parties whose status was equally doubtful⁶⁹ than a clear declaration of independence. In view of the doubts surrounding the status of Mongolia's authorities it cannot be considered a recognition of Tibetan independence by an established member of the community of states.

It was at this point that the British called a conference in Simla at which delegates of Tibet, China and Great Britain were present, to define the status of British rights in Tibet.

One result of the Simla conference was an agreement⁷⁰ initialled by the three plenipotentiaries on 27 April 1914. Although in the course of negotiations the Chinese delegate had "officially" informed the

⁶⁵ See, e.g., H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, p. 10, citing long gaps between declarations of independence and recognition by the mother country (and other countries) of the new state or government. The prize might go to Spain's delay in recognising the independent Netherlands. The "Act of Abjuration" was in 1581, recognition by Great Britain and France came some 15 years later, and Spain did not unequivocally renounce its sovereignty (or cease to fight with the Netherlands over the question) until 1648.

⁶⁶ The text is in *Tibet*, pp. 304-305.

⁶⁷ Dalai Lama, *op. cit.*, p. 240.

⁶⁸ *Tibet*, pp. 228-230.

⁶⁹ On the status of Mongolia at this time see Fritters, *op. cit.*, p. 163 *et seq.*; *Tibet*, pp. 224-225. See also A. P. Rubin, "Tibet's Declarations of Independence?" 60 A.J.I.L. 812 (1966).

⁷⁰ *Aitchison*, p. 35; *Question*, p. 124. The so-called McMahon Line, defining the border between Tibet and Assam, was another result of the Simla Conference.

British "middleman" ⁷¹ that the only Chinese hesitation came from disagreement over the fixing of an internal boundary within Tibet proper beyond which China was to withdraw, leaving Lhasa in undisputed control of most of the territory of Tibet,⁷² on 29 April the Chinese negotiator was instructed by his Government not to sign the agreement.⁷³ Even if one is not sceptical about the extent to which agreement in principle had really been reached, it seems quite clear that no amount of apparent preliminary agreement can replace a valid signature. Accordingly, it seems clear that the "agreement" reached at Simla cannot be regarded as binding on China. This was certainly the view of the British and Tibetans at the time, for they then accepted the terms of the Simla "convention" as binding only on themselves.⁷⁴

This Simla Convention of 1914, in addition to a boundary agreement between the British and Tibetan representatives ⁷⁵ included terms by which the Governments of Great Britain and China would have explicitly recognised "that Tibet is under the suzerainty of China" and that Outer Tibet, which was the portion of geographical Tibet ruled by the Lhasa Government, had "autonomy." They would also have agreed "to respect the territorial integrity of" Outer Tibet and "to abstain from interference in the administration of Outer Tibet (including the selection and installation of the Dalai Lama)," which was to "remain in the hands of the Tibetan Government of Lhasa." Further, the Government of China would have been bound "not to convert Tibet into a Chinese province." On the more practical side, China was to be bound "not to send troops into outer Tibet, nor to station civil or military officers" there with the exception of a Chinese "high official" whose escort was not to exceed 300 men. The Governments of China and Tibet were to be so far separated that the Convention would have forbidden them to "enter into any negotiations or agreements regarding

⁷¹ The use of the term "middleman" in describing the British role in these negotiations was a British one. See Sir Erich Teichman, *Travels of a Consular Officer in Eastern Tibet*, Cambridge, 1922, p. 46. It seems clear that, except for certain matters connected with trade, the Anglo-Russian treaty of 1907 precluded the British dealing directly with Tibet. In so far as the British representatives at Simla did negotiate with representatives of Lhasa on questions not within the exceptions to the treaty of 1907, British obligations to Russia were violated.

⁷² Teichman, *op. cit.*, p. 46; 151 B.F.S.P. 89; 470 H.C. Deb. 5s. 255-256.

⁷³ Willoughby, p. 198.

⁷⁴ Aitchison, p. 38 (note). Lamb, *The McMahon Line*, contains the full story of these negotiations and their results.

⁷⁵ This agreement has never been accepted by the Government of China, which denies the legal authority of the Lhasa representative to have made a boundary concession without the concurrence of the Peking Government. Whether the boundary agreed upon at Simla, the McMahon Line, was in fact a yielding of rights by Tibet or merely a confirmation of the customary boundary has been at the centre of the Sino-Indian border dispute in this area. See L. C. Green, "Legal Aspects of the Sino-Indian Border Dispute," 1 (3) *The China Quarterly* (1960) 42 at pp. 42-46.

Tibet with one another, or with any other Power" except for the bilateral negotiations with the British regarding their trade in Tibet as provided for in the 1904 and 1906 arrangements between Great Britain and Tibet, and Great Britain and China respectively. The ambiguity of the 1904 Convention regarding China's possibly being a "Foreign Power" was eliminated with respect to concessions by the explicit exclusion of China from the term "Foreign Power" in Article IX (d) of that Convention. No attempt was made to shed light on the intention of the parties with regard to the other uses of the words "Foreign Power" in the 1904 Convention, although the provision for stationing a Chinese high official in Lhasa certainly would be directly contrary to Article IX (c) of the 1904 Convention if China were to be considered a "Foreign Power" in that context. The trade agreement of 1908 was cancelled, and provision made for new trade regulations to be negotiated between Great Britain and Lhasa, apparently without the active participation of the Peking Government. A boundary was to be fixed between "Outer" and "Inner" Tibet and Chinese temporal rights in Inner Tibet were to continue. Lhasa's existing spiritual rights in Inner Tibet, including the rights to appoint high priests and to control religious institutions, were also preserved. In an exchange of notes apparently appended to the Convention but, as noted above, initialled in draft but not concurred in by the Chinese in the final text, it was agreed that "Tibet forms part of Chinese territory." This sweeping assertion was then deprived of most of its legal implications by specific provisions which, in addition to the "autonomy" and abstention from "interference in the administration of Outer Tibet" in the principal agreement, would have forbidden the Chinese any voice in the "selection and appointment of all officers in Outer Tibet" and said that "Outer Tibet shall not be represented in the Chinese Parliament or in any other similar body."

It has been argued that the Chinese failure to agree to the Simla Convention bars China from claiming the benefits of that Convention including the benefit of the recognition of Chinese "suzerainty" and territorial interest in Tibet.⁷⁶ Since, in the actual case, the Chinese rights in Tibet were never thought by any of the parties, with the possible exception of the British (who had more political than legal reason for seeming to incline to this position), to depend to any degree on British recognition, it is difficult to see any substance to this argument. The facts upon which the recognition of "suzerainty"

⁷⁶ Dalai Lama, *op. cit.*, p. 241; *Question*, p. 86; *Report*, p. 140.

depended did not change because express recognition of that "suzerainty" was withheld.⁷⁷

Now, since the 1914 transaction cannot legally have affected China's rights, if any, in Tibet, where does that leave the 1908 Convention? As has been seen, the part of the Convention of 1908 which was appropriately classified as international carried with it no executory obligations on the part of Great Britain, but many on the part of China. With the complete loss of ability to perform those obligations on the part of China, it would appear that while China could urge no claim against Great Britain for breach of any international obligations founded on the Convention of 1908, Britain might have been in a position to claim a breach against China. But Great Britain was now hindered from doing this by the terms of the 1914 Simla Convention, which cancelled the earlier arrangements at least as far as the British were concerned, including in their entirety the agreements of 1893 and 1908. Since the performance by China of her obligations under those arrangements was dependent upon her relations with Tibet, and since in the 1914 Convention Great Britain expressly recognised as purporting to exist a relationship between China and Tibet which would exclude the possibility of performance of those obligations, it would appear that the supposed cancellation by Great Britain of the terms of the 1908 Convention should have estopped the British from claiming a breach of that Convention; and British recognition of a factual situation inconsistent with the continuance of the Chinese obligations under that Convention should estop Great Britain from raising any claim relating to a period after the arising of the new facts, at least in so far as the 1908 Convention assumed the existence of a set of political facts as a condition for Chinese performance of her obligations. Since, thus, China could have no claim against Great Britain under that Convention, and Great Britain could press no claim against China, it would be in the interests of clarity to regard the 1908 Convention, in its international phase, as terminated probably as of 1911, and certainly as of 1914.

As regards the Sino-Tibetan constitutional aspects of the 1908 Convention, it does not seem necessary to go further than to observe that although in most circumstances a revolution may not affect the continuity of an international document, a revolution is more than likely

⁷⁷ Had that recognition been forthcoming, then the legal position of Great Britain vis-à-vis the Chinese in Tibet might have been affected, although in fact this is doubtful since the purported "recognition" was linked to a complete negation of most of the rights a "suzerain" might have been expected to assert. In any event, the British, regardless of their unwillingness to "recognise" it, continued to assert that China had in fact an undefined "suzerainty" over Tibet. See *Question*, pp. 91-92. The point will be referred to again below.

to affect the constitution of a political society. Under Yuan Shih-K'ai it was apparently the position of China that the revolution of 1911-12 affected only the structure of government within the Chinese state, of which Tibet was a part, leaving the state as a whole intact. The view of the Tibetan autonomists was clearly that their revolution was not a part of a large revolution within the state of China, but was a sundering of the State of China, and a splitting off of Tibet from it.

Was the effect of the Simla Convention to constitute Tibet a state in international law? Clearly not. Not only was the Convention of no legal effect vis-à-vis China, the one member of the international community whose acquiescence in Tibetan independence would have been conclusive of the question at this time, but even the Convention itself, accepted as binding by Great Britain and, although with some anomalous features, by the Lhasa Government vis-à-vis each other, stops short of according to Tibet a complete independence of China. The legal ingredients of independence seem to be there, but always darkened by the shadow of an undefined "suzerainty" and an acknowledgement that the territory of Tibet was part of the territory of China.

How can an analysis of the events following the conclusion of the 1914 Simla Conference proceed? The extent to which the Lhasa Government conducted foreign relations as the government of an international entity of Tibet might serve as evidence of the extent to which the international community was willing to acknowledge an international personality, inferrably statehood, in the Tibetan political society. This factor is examined in some detail below. But while the evidence of the practice of the Lhasa Government in conducting foreign relations might serve to establish to some extent the legal capacity of the Lhasa Government to do so, it cannot rule out the conceptual possibility that this capacity was regarded by both Lhasa and Peking as arising, as it had in the past, from a delegation of authority by the Chinese state. There had always existed in Tibet a group or groups hostile to Chinese authority, and the mere temporary rise of one of these groups to dominance in Tibet should not be taken to signify a more or less permanent change in Tibet's relations with China.⁷⁸ On the other hand, the absence of explicit recognition by any number of third states will not do as a suitable test because an opportunity for recognition was notably lacking due to Tibet's policy of conscious isolation (a policy that was encouraged by the British with regard to Tibet's contacts with everybody else) and because, according to strong international law

⁷⁸ The mere contemplation of permanence or lack of permanence may in some contexts be significant. See R. Y. Jennings, "Government in Commission," 23 *British Year Book of International Law* (B.Y.I.L.) (1946) 112 at p. 123.

doctrine, lack of recognition cannot serve as an argument against the factual existence of a state and its right to independence.⁷⁹ There can be no serious doubt of the existence of more or less defined territory and a more or less stable population in the habit of obedience to the Lhasa Government even during the days of greatest Tibetan submission to Chinese authority.⁸⁰ Therefore, perhaps the best place to look for guidance as to whether the continued assertion of a right to authority in Tibet by the Chinese is entitled to weight would be in the attitudes of the leaders of the Tibetan Government during the period of evolution until some stable attitude, inferrably an attitude of the Tibetan polity, was formed. Evidence of the views of third states as to the right of Tibet to a separate international personality from that of China would also appear to be of use. Even then, our conclusions must be hesitant since the fact of a state's merely failing to recognise an entity's international status does, in the international law of today, have significant legal meaning with regard to the justifiability of that state's own activities vis-à-vis that entity.⁸¹

It may be well, since material about attitudes of mind and even historical events has been so much coloured by the views of observers even before 1911, to note that with the switch of British policy from support of Chinese power in Tibet to antipathy towards the exercise

⁷⁹ Cf. T. C. Chen, *The International Law of Recognition*, London, 1951, p. 33; H. Kelsen, "La Naissance de l'Etat . . .," 4 *Revue de Droit International* (1929) 613 at p. 615; H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, p. 38 *et seq.*; "... toute communauté politique a le droit et le devoir de pourvoir chez elle, d'une manière indépendante . . ."—G. Rolin-Jaequemyns, 2 *Revue de Droit International et de Législation Comparé* (1870) at p. 300; K. Wolff, "Les Principes Généraux du Droit Applicable dans les Rapports Internationaux," 36 *Hague Recueil* (1931) 483 at pp. 495, 503–504; *per contra* Q. Wright *et alii*, *Legal Problems in the Far Eastern Conflict*, New York, 1940, pp. 25–29.

⁸⁰ The actual extent of the authority of Lhasa is not and has never been in fact entirely clear to Western writers.

⁸¹ One may ask, for example, what the legal situation would be if the Chinese Government in Taiwan were to renew its struggle against the Communist Government in the mainland today, 19 years after the establishment of the latter government. What would the legal situation be if the United States were to become involved in hostilities directly with the Communist Chinese? There is, fortunately, no need to answer these speculative questions now; however, it is submitted that the legal position of at least the Nationalist Chinese in these circumstances would be affected if not determined by the non-recognition by that government of the Chinese Communist Government in China. See Wright *et alii*, *op. cit.*, Part II on p. 129 *et seq.* (essays by H. Lauterpacht, and E. M. Borchard and P. Morrison on the problem of non-recognition in the Far East). Lack of recognition has been held irrelevant in some cases, e.g., the Tinoco Arbitration (1923), 1 United Nations Reports of International Arbitral Awards 369 (1948). But those cases seem to deal only with the position of third countries to the entity in question, and not the position of the parent state vis-à-vis that entity. Cases dealing with the legal effects of third states withholding recognition deal typically with recognition or non-recognition of governments, which involve different issues than arise in considering the legal effects of not recognising statehood. See *Cheng Fu-sheng v. Rogers*, 280 F. 2d 663 (1960).

of effective Chinese control in Tibet (which, as has been seen, represented no real change of policy at all but a continuation of a policy based on commercial and political objectives arising out of British interests in India), two consciously opposed schools of analysis arose among interested British officials as to the position of Tibet. The Indian school, whose great spokesman was Sir Charles Bell, and is now H. E. Richardson, and which has been represented by British Political Officers whose activities centred in India and (later) Lhasa, strongly asserted the existence of a Tibetan right to independence from China. The Chinese school, originally represented by British officials active in China but later tending to silence as British influence in China began to diminish during the Kuomintang period, supported the view that Tibet was an integral part of China.⁸² Tibetan and Chinese interests were more directly reflected in the opinions of Tibetan and Chinese spokesmen. This is not to say that accurate analysis is hard to come by; only that impartial analysis is.⁸³

III. THE SIMLA CONFERENCE TO 1950

Fighting between Chinese and Tibetan forces continued after the Simla Conference despite temporary cease-fires, sporadic negotiation and near-agreement.⁸⁴ By 1919 the Lhasa Government was in control of territory beyond the historical Sino-Tibetan (*i.e.*, inner-outer Tibet) border as conceived by the Chinese and trade between the two areas had begun to resume.⁸⁵

A Chinese Mission was received at Lhasa in 1919–20 which stayed for four months.⁸⁶ It is difficult to evaluate the effect of this Mission, as at different times, and attempting to draw different lessons, the same observer spoke of it first as representing a clear increase in Chinese influence in Tibet⁸⁷ and later as having been subjected to indignities in Lhasa.⁸⁸ Whatever its effect, Lhasa apparently continued to vacillate between reliance on the unknown quality of British friendship, which would not permit Tibet to import arms or otherwise make itself more self-reliant,⁸⁹ and the known quality of Chinese subordination, which would reduce the Dalai Lama and the large

⁸² For a clear statement of the division of views see 11 J.R.C.A.S. (1924) at p. 47, discussion following the reading of a paper by Sir Charles Bell, particularly the remarks of Sir John Jordan.

⁸³ See Richardson for a work that is both painstakingly accurate as far as it goes and unabashedly partial.

⁸⁴ Willoughby, pp. 201–202 (remarks by Sir John Jordan); Teichman, *op. cit.*, pp. 46, 51–54.

⁸⁵ Teichman, *op. cit.*, p. 58. See also the map between pp. 46 and 47.

⁸⁶ *Portrait*, p. 231. Shakabpa, *loc. cit.*, p. 266, denies that any Chinese visited Lhasa during the 1920s. It is difficult to believe that Bell's report of the visit is untrue.

⁸⁷ *Tibet*, p. 176.

⁸⁸ *Portrait*, p. 231.

⁸⁹ *Tibet*, pp. 191–192.

monasteries to positions of lesser importance in Tibet as the Chinese central government consolidated its control over the hitherto decentralised, locally administered areas which had been under the ultimate authority of the Manchu.⁹⁰

In 1921 the British informed the Chinese officially that they recognised the status of Tibet "as an autonomous state under the suzerainty of China."⁹¹

In 1926 representatives of the Lhasa Government met with representatives of the British Government of India and of the Indian territory of Tehri to discuss the boundary between Tehri and Tibet.⁹² But, as has been pointed out, Lhasa enjoyed a high degree of authority in international affairs even during the days of undoubted Chinese dominance, so the significance of this incident seems small.

During these years also intrigues between power groups in Tibet itself, groping for control of Lhasa and other areas, resulted in the expulsion of the Panchen Lama from Tibet in 1923. He spent his exile in Western China and Mongolia until his death in 1937 in Chinese-controlled territory.⁹³ Still another complication at this time was an attempted extension of Soviet Russian influence into Tibet, first via Mongolia, and later directly, although there is no evidence of any actual Russian influence being established in Tibet at this time.⁹⁴ Both the earlier Czarist intrigues in Tibet and these Soviet moves appear to have dealt with the Lhasa Government directly, but none of the intrigues seems to have achieved the dignity of official, or government to government relations.

A Chinese mission to Tibet in 1928 failed to convince the Lhasa Government of the advantages of officially joining the Chinese Republic.⁹⁵ Nonetheless, in 1931 the Chinese Government declared

⁹⁰ *Portrait*, p. 366.

⁹¹ 151 B.F.S.P. 90. In later years this formal recognition of Chinese "suzerainty" over Tibet was considered to be the earliest British attempt to resolve the legal question of Tibet's status left open by the Simla Conference. Cf. U.S. Department of State, *Foreign Relations of the United States, 1943, China*, Washington, 1957 (hereinafter cited as *1943, China*), pp. 637-638. As pointed out in note 62 above, however, the British position recognising an undefined Chinese "suzerainty" over Tibet after the Manchu had been overthrown had been reached before the Simla Conference. The International Commission of Jurists nonetheless takes the view that "Britain was still withholding from China a formal recognition of suzerainty over Tibet." *Report*, p. 153. The logic of the Commission is obscure.

⁹² *Report*, p. 150; Dalai Lama, *op. cit.*, p. 241.

⁹³ *Portrait*, pp. 362-364; Shakabpa, *loc. cit.*, p. 263; Richardson, pp. 125-128; Schulemann, *loc. cit.*, p. 409.

⁹⁴ *Portrait*, p. 366, speaks of a Mongolian-Communist mission to Lhasa in 1927; p. 367 tells of a Soviet agent visiting Lhasa in 1928. Shakabpa, *loc. cit.*, p. 266, also speaks of these missions. Russia played a major role in detaching Outer Mongolia from Chinese authority after 1911. See G. M. Friters, *op. cit.*, p. 44 *et seq.*

⁹⁵ P. Calvocoressi and others, *Survey of International Affairs 1949-1950*, Oxford, 1953, p. 368. Most of the background information appears to have been taken from Sir Basil Gould's article on Tibet in *Chambers' Encyclopaedia*.

Tibet to be a part of China.⁹⁶ There is no evidence that this unilateral declaration had any effect in Tibet. When the Chinese Government once again attempted to exercise control in part of Tibet in 1931-32 it was strongly resisted, and Chinese forces were eventually withdrawn.⁹⁷ When, in 1935-36, the Chinese Communist army, on its long march from East-Central China to the north-west, passed through part of what may have been considered by its inhabitants to be Eastern Tibet, it was resisted, apparently on the basis of its being Chinese, by "a populace united in its hostility to them."⁹⁸

In December 1933 the Dalai Lama died in Lhasa.⁹⁹ The Lhasa Government is reported to have given notice of this fact to the Nationalist Government of China, and a Chinese Mission was thereupon sent into Tibet. This Mission established a permanent headquarters in Lhasa in 1934.¹⁰⁰ A British Mission to Lhasa in 1936 failed to report any evidence that this Chinese Mission had any official status or effective part in the government of Tibet.¹⁰¹

Several British Missions visited Lhasa in the early 1930s, and the 1936 Mission left permanent representatives there.¹⁰²

During his exile the Panchen Lama made efforts to return to Tibet through the intermediacy of the Chinese Government, which furnished the Panchen Lama with an escort of 500 men for his return. Under this Chinese pressure the Lhasa Government agreed to permit the return of the Panchen Lama if the Chinese escort would be withdrawn via India within a month of the Panchen's arrival. It may be noteworthy that a British intercession on behalf of Lhasa in this affair was apparently ignored by the Chinese, and that the Lhasa authorities apparently felt compelled to permit the Chinese escort entry into Tibet. The Chinese do not seem to have accepted the Tibetan conditions for withdrawal of the escort, but determined not to send it, as the Panchen Lama died on 1 December 1937, before final arrangements for his return to Tibet had been completed.^{102a}

Despite Chinese representations to the contrary, it appears likely

⁹⁶ C. H. Alexandrowicz-Alexander, "The Legal Position of Tibet," 48 A.J.I.L. (1954) 265 at p. 273.

⁹⁷ Calvocoressi, *op. cit.*, p. 368.

⁹⁸ E. Snow, *Red Star Over China*, London, 1937, p. 204; see also Calvocoressi, *op. cit.*, p. 368, note 3. The dates differ, but it is possible that the same incidents are referred to in both books. Cf. Shakabpa, *loc. cit.*, p. 274.

⁹⁹ *Portrait*, p. 370.

¹⁰⁰ Calvocoressi, *op. cit.*, p. 368; A. J. Hopkinson, "The Position of Tibet," 37 J.R.C.A.S. (1950) 228 (hereafter cited as *Hopkinson*) at p. 230; *Concerning the Question of Tibet*, Peking, 1959 (hereafter *Peking*), p. 194; Dalai Lama, *op. cit.*, p. 71.

¹⁰¹ P. Neame, "Tibet and the 1936 Lhasa Mission," 26 J.R.C.A.S. (1939) 234. An account of the Tibetan Government of this time is on pp. 240-241.

¹⁰² *Portrait*, pp. 369-370; *Hopkinson*, p. 230.

^{102a} Shakabpa, *loc. cit.*, pp. 280-283.

that the role of Chinese representatives in the discovery and installation of the new Dalai Lama in 1937-40 was passive, similar to that of the British observer in Lhasa, in matters of political significance.¹⁰³ On the other hand, the Chinese appear to have had a very great hand in the selection of the new Panchen Lama in 1944, and his installation by the Chinese Nationalists in 1949 was clearly a political move which seems to have been acquiesced in by the Tibetans.¹⁰⁴ In 1950 the Chinese Communists attempted to set the Panchen Lama up as the rightful temporal ruler of Tibet, although at that time he had never set foot outside Chinese controlled territory, but this scheme does not seem to have had any practical effect other than to stiffen the resistance to Chinese threats of the Dalai Lama's supporters who controlled the Lhasa Government.¹⁰⁵

Assuming the Chinese Mission of 1934 to be "foreign," foreign representation in Lhasa after the establishment of the British Mission in 1936-37 (succeeded by an Indian Mission after the independence of India¹⁰⁶) included Missions from Great Britain-cum-India, China, Nepal, and an Agent of the Maharaja of Bhutan.¹⁰⁷ Since the foreign relations of Sikkim and Bhutan were under British management (succeeded by Indian management after the independence of India and the conclusion of new definitive arrangements between India and these two small polities),¹⁰⁸ it seems that Tibet was in direct communication with all her immediate neighbours. The Bhutanese Agency in Lhasa appears to have had primarily cultural and religious significance. The other Missions appear to have been accredited to Lhasa alone, if indeed accreditation is the correct word in circumstances in which the actual functions of the Missions are subject to much doubt.¹⁰⁹ It is clear that, with only one colourable exception, Chinese permission was not sought by Great Britain, or by other European states whose nationals visited the territory of Tibet between 1920 and

¹⁰³ *Portrait*, pp. 397-400; *Hopkinson*, p. 233; Heinrich Harrer, *Seven Years in Tibet*, London (Reprint Society), 1953 (hereafter *Harrer*), pp. 298-302; *Peking*, pp. 194-195. A detailed account of the ceremonial is in B. J. Gould, *The Jewel in the Lotus*, London, 1957, p. 214 *et seq.* See also Dalai Lama, *op. cit.*, p. 33 *et seq.* But see *Report*, p. 146, which indicates that the true role of the Chinese may have been greater than the British were led to believe.

¹⁰⁴ Calvocoressi, *op. cit.*, p. 369; *Hopkinson*, p. 235.

¹⁰⁵ Calvocoressi, *op. cit.*, pp. 369-370; *Harrer*, pp. 246, 264, 285-287, 302; H. E. Richardson, "The State of Tibet," 38 J.R.C.A.S. (1951) 112 (hereinafter cited as *State*) at p. 115.

¹⁰⁶ *Hopkinson*, p. 234; *Harrer*, p. 224.

¹⁰⁷ Gould, p. 76. The same author, in *The Jewel in the Lotus*, p. 228, also mentions a delegation from Sikkim in Lhasa in 1940.

¹⁰⁸ C. H. Alexandrowicz, "India's Himalayan Dependencies," *Yearbook of World Affairs* (1956), London, 1956, p. 136 *et seq.*

¹⁰⁹ See *Harrer*, pp. 262-263 for a description of Tibetan reception of diplomatic missions. Gould, p. 76, speaks of the British-Indian Mission as "informal."

1950 in any known instance, while there are several documented instances when the permission of the Tibetan Government in Lhasa was felt to be essential.¹¹⁰ In short, leaving the conceptual question of delegation aside,¹¹¹ in practice the external affairs of the territory of Tibet seem to have been handled by the Lhasa Government without reference to China after 1912, and between 1912 and 1950 the Lhasa Government appears to have been in solid *de facto* control of the bulk of the territory of Outer Tibet.¹¹²

It may thus be seen that with the dubious exceptions of the cases of the installation of the Dalai Lama in 1940 and the Panchen Lama's discovery and installation, in which neither the facts nor their political implications are clear enough to allow any legal inferences to be drawn, at least by 1940 there was in control of Tibet an effectively independent government in Lhasa, successfully functioning, and actively and successfully resisting all claims to authority on the part of the Government of China. However, as noted above, it does not appear that any statement to that effect was made by the Lhasa Government, during the decades 1912-42, and no other government made its position unambiguously clear.

The cumulative evidence of the facts, in so far as it may indicate an attitude of mind in the Tibetan polity, cannot be passed over lightly. The attitude of the Lhasa Government became less ambiguous as a new generation of leadership grew up in Tibet which had never known Chinese domination and which seemed to be secure in its control of Outer Tibet. That this new generation considered itself

¹¹⁰ Cf. Harrer, pp. 46-47; Hopkinson, p. 230; M. Pallis, *Peaks and Lamas*, London, 1939 (Readers Union edition, 1948), pp. 84, 90 and 101; L. Thomas, Jr., *Out of this World*, New York, 1950, p. 16; Shakabpa, *loc. cit.*, p. 267. The possible exception was in 1943 when an American mission to Lhasa was sent with Chinese approval and the separate permission of the Lhasa Government. U.S. Department of State, *Foreign Relations of the United States, 1942, China*, Washington, 1957 (hereafter cited as *1942, China*), pp. 625, 626. Cf. *Report*, pp. 151-152.

¹¹¹ Hopkinson, p. 230, points out that although Tibet was not free of the Chinese Ambans until 1912 (*sic*), foreign affairs had been conducted from Lhasa as early as 1856 without reference to China. The 1856 affair to which he refers is undoubtedly the altercation which resulted in a treaty between the Tibetan Government of the Dalai Lama and Nepal. Aitchison, pp. 15, 49-50. There is no evidence that this treaty in any way was intended as a derogation from China's rights in Tibet, and the events of later years would make drawing highly questionable any conclusion of Tibetan independence from the fact of her conducting apparently independent foreign relations. Cf. T. T. Meadows, *The Chinese and Their Rebellions*, London, 1856, p. 3 n. There can be no serious doubt of continuous Chinese supreme authority in Tibet prior to 1895. Cf. Rockhill, p. 90; Kawaguchi, *op. cit.*, pp. 504, 506-507. The British negotiated with China as sovereign over the territory of Tibet directly in 1890 and 1893 (see above), and the British Foreign Office advised a British traveller in 1897 to obtain "passports" for the territory of Tibet from China. A. H. S. Landor, *In the Forbidden Land*, London, 1898 Vol. II, p. 225.

¹¹² Cf. Willoughby, pp. 198-200; Dalai Lama, *op. cit.*, p. 71.

irrevocably independent of China was finally demonstrated directly in 1942-43 when the Tibetan Regent, as part of the negotiations involving an attempt to found a supply line from India to China through Tibet during the Second World War, informed President Roosevelt that Tibet "has been free and independent from her earliest history."¹¹³ Although this statement was clearly inaccurate as a statement of historical fact if the words "free" and "independent" are to receive their usual meanings, there can be little doubt that an assertion of full independence of China was intended. This assertion did not pass unchallenged by the Chinese¹¹⁴ or the British,¹¹⁵ who each reiterated their positions of the prior decades. The United States took no action in view of the political complications involved.¹¹⁶ The supply route was never established, and it has been suggested that the original proposal, which had come from China, was from the first a gambit; one further attempt to assert a legal right to authority in Tibet.¹¹⁷ When it appeared that the acquiescence of the British and Americans in the Tibetan refusal to permit the supply line to be run through Tibet except on Tibetan terms might appear as a Tibetan assertion of independence recognised by implication, at least to some extent, by third Powers, it was reported that Chinese troops were preparing to occupy Tibet. The invasion, if indeed ever actually contemplated by China, was never actually launched.¹¹⁸

The reactions of other governments to this first clear attempt by the Lhasa Government to assume an independent international personality are interesting. The Chinese, as might have been expected, maintained that they had a right to enter the territory of Outer Tibet regardless of the pretensions of the Lhasa authorities and that Tibet had never ceased to be legally a part of China.¹¹⁹ The British Government, while pushed by their Indian-based officials to support Tibetan claims to independence,¹²⁰ stopped far short of that in adhering to

¹¹³ *1943, China*, p. 622. The supply route correspondence is set out in *1942, China*, p. 624 *et seq.* and in *1943, China*, p. 620 *et seq.* See also *Question*, pp. 89-91; Robert Ford, *Captured in Tibet*, London (Pan Books), 1958, p. 18.

¹¹⁴ *1943, China*, pp. 626-627, 633-634, 641-642.

¹¹⁵ *Id.* pp. 626-628, 630, 634-636, 638, 639-640, 643.

¹¹⁶ *Id.* p. 629.

¹¹⁷ *Hopkinson*, p. 233. *1942, China*, p. 630. In fact, the Tibetan Government did agree to the transportation of non-military goods to China, but did not agree to permit any foreign supervision of the goods shipped. *1943, China*, pp. 629-630. As "foreign supervision," supervision by Chinese authorities was clearly intended to be forbidden. *Id.* pp. 632-633.

¹¹⁸ *Id.* p. 632 *et seq.*

¹¹⁹ *1942, China*, p. 627; *1943, China*, pp. 621, 641-642.

¹²⁰ *1943, China*, p. 639.

their ambiguous formula about Tibetan autonomy under Chinese suzerainty and an exaggerated notion as to the legal effect of British recognition in Sino-Tibetan relations.¹²¹ The Government of the United States successfully avoided committing itself at all by saying that it had never disputed the Chinese claim while never, on the other hand, supporting it.¹²²

Further steps taken by the Chinese to demonstrate their asserted rights to authority in Tibet did not have any apparent success. A Tibetan Mission to China in 1946 was pressed to attend the Chinese Constituent Assembly and sign the new Chinese Constitution, but the only result of this appears to have been an unpleasant public scene.¹²³ The Chinese Republican Constitution of 1 January 1947,¹²⁴ which appears never to have had practical effect in Tibet, nevertheless clearly contemplates the inclusion of Tibet in the Chinese State.¹²⁵ Tibetan Missions to India in 1947 and to Europe and the United States in 1948 were the objects of Chinese protests to the host countries.¹²⁶ In the United Kingdom the Mission was referred to as "the Tibetan Trade Delegation" and it was reported on in Parliament by the President of the Board of Trade in a written answer to a question in Parliament dated 25 January 1949.^{126a} It appears that the four Tibetan delegates, travelling as a "national delegation," carried only Tibetan travel documents and rejected the company of Chinese officials in visiting officials of the United States, United Kingdom and India.¹²⁷ Their travel documents were accepted by the host countries as suf-

¹²¹ 1942, *China*, p. 626; 1943, *China*, pp. 626-628, 634-636, 637-638, especially para. 3 of the British Note to the United States Department of State dated 22 July 1943 on pp. 635-636. The International Commission of Jurists seems to view the British position as amounting to a recognition of Tibetan independence, but they add no evidence or argument to support this conclusion. *Report*, p. 154.

¹²² 1942, *China*, p. 631; 1943, *China*, pp. 629, 630.

¹²³ *Hopkinson*, p. 233; *Shakabpa, loc. cit.*, pp. 290-291.

¹²⁴ V. P. Dutt, *East Asia 1947-50*, Oxford, 1958, p. 19 *et seq.*; G. W. Keeton, *op. cit.*, Appendix iv, p. 465 *et seq.* The translations differ.

¹²⁵ *Sec. e.g.*, Article 64 (3).

¹²⁶ *Hopkinson*, pp. 231-232; *Harrer*, pp. 247-248; Alexandrowicz-Alexander, *op. cit.*, p. 273; Calvocoressi, *op. cit.*, p. 369, n. 4; Li, *op. cit.*, pp. 402-403; *Peking*, pp. 201-203. *Shakabpa, loc. cit.*, p. 291, points out that one Mission attended the Intra-Asian Conference in New Delhi on 23 March 1947, and the British Government of India raised a Tibetan national flag along with the flags of other attending delegations' countries.

^{126a} 460 H.C. Deb. 5s. 96.

¹²⁷ *Shakabpa, loc. cit.*, pp. 295-297. *Harrer*, p. 248, mentions the Mission buying gold ingots in the United States. If this were true it might have implied some American recognition of governmental status. See 12 United States Code, s. 95a. According to *Shakabpa*, however, although the purchase of gold was discussed it was not in fact made. *Shakabpa* was head of the Tibetan delegation.

ficient.¹²⁸ Responses of the three host countries to the Chinese protests do not appear to have been published.

Thus, by the time of the fall of the Nationalist Government of mainland China in 1949, relations between Tibet and China seemed to have involved complete *de facto* autonomy for the Lhasa Government, coupled with no agreement on classifying the legal relations between Lhasa and Peking. The Chinese Government never in any way conceded any Tibetan right to independence and rested its position on the continuance of the integrity of the state of China, of which Tibet was conceived to be a part, regardless of what was taken to be a temporary lapse of effective Chinese power. It may be noted that from 1911 to 1949 none of China had ever been stably policed by a single government,¹²⁹ and even before 1911 the degree of decentralisation of Chinese administration would make indistinguishable the outward appearance of a local government of an outlying Chinese province from a more or less temporary Chinese military governorship in non-Chinese territory. To the Chinese, the Lhasa Government was apparently sincerely and logically believed to be that of a "war-lord" clique; a type once common in China which in other cases had not been considered as of right to be independent of central authority, even though the degree of centralised control which Peking sought to impose had no precedent in Chinese history.

The Tibetan position was no less clear. Chinese attempts to exercise any effective authority in Tibet had been more or less consistently rebuffed since 1912 by the possessors of *de facto* power in Lhasa. Furthermore, with growing confidence, the earlier regard for Chinese orders had been replaced by active resistance until, in 1942-43, some 30 years after the expulsion of the Manchu officials, the Tibetan polity had at last clearly repudiated the imputation of any legal subordination to China. The British view remained characteristically ambiguous. While the initial premature recognition of Tibetan "autonomy" under

¹²⁸ Li, *op. cit.*, p. 403; Peking, p. 203; Dalai Lama, *op. cit.*, p. 243; *Report*, pp. 157-158. See also M. J. Mitter, *Betrayal of Tibet*, New Delhi, 1964, p. 14 *et seq.* Photographs of official passports issued by the Lhasa Government of Tibet are inserted after page 48 of Mitter's book, and in end-papers of Shakabpa's book.

¹²⁹ The "degree of unity" which prompted American recognition of the Kuomintang Government of China in July 1928 was broken, if it had ever really existed, by Chinese Communist activities of 1931 and afterwards. The "degree of unity" did not include Kuomintang claims to Tibet. See Snow, *op. cit.*, p. 173; U.S. Department of State Publication 3573 (Far Eastern Series 30), *United States Relations with China*, Washington, 1949, p. 12 *et seq.*; H. M. Vinacke, *op. cit.*, pp. 227-253, 437-456; C. P. Fitzgerald, *Revolution in China*, London, 1952, p. 33 *et seq.* Shakabpa, *loc. cit.*, p. 268 points out that Chiang Kai-Shek's Government in Nanking had no effective control over the Chinese "Governor of Szechuan" in the early 1930s.

an undefined Chinese "suzerainty" was continued,¹³⁰ the content of "autonomy" seems to have developed into identity with "independence,"¹³¹ and under these circumstances it is difficult to perceive any meaning in the classification of "suzerain" at all. The use of the concept of suzerainty, however, suggests that the British Government were reluctant to acknowledge the justifiability of attaching a legal classification of independent statehood to the facts of Tibetan autonomy. Further evidence that the British did not take a firm stand in favour of a Tibetan right to independent existence is to be found in the discussion in the United Nations regarding Tibet in 1950 (about which see below). Even as late as 25 March 1959, during the highly publicised Tibetan uprising but before the Dalai Lama reached India, the British recognition of Chinese suzerainty coupled with Tibetan "autonomy" was repeated in a written answer to a question in Parliament.¹³² Since, in the circumstances, it is impossible to construe this "recognition" as involving a British opinion that the Sino-Tibetan Agreement of 23 May 1951, which purported to extinguish any traces of international personality in the Lhasa Government of Tibet,¹³³ was ineffective in 1959, it must be concluded that the ambiguous British formula of "recognition" cannot be seen as a clear expression of the legal conclusions which the British felt to flow from the facts of Sino-Tibetan relations.

The Indian Government after the independence of India followed the British lead.¹³⁴

The views of the United States were also unclear. Although it appears from the "trade mission" transactions that an implication of recognition of some degree of independent international status for

¹³⁰ 151 B.F.S.P. 89, Note from the Government of the United Kingdom to the Government of China dated 5 August 1943. As noted above, this recognition was first made explicit in 1912. It was implicit in the terms of the Simla Convention of 1914. The restrictions on the suzerain there were very heavy indeed, although the term "suzerainty" itself was left undefined. It was made explicit again in 1912. 470 H.C.Deb. 5s. 255-256, reiterates in full the British Note of 1943 on 14 December 1949. The position was reiterated with no apparent change on 21 June 1950 (476 H.C.Deb. 5s. 1267) and 6 November 1950 (480 H.C.Deb. 5s. 602) (see below).

¹³¹ 1942, *China*, p. 626: "We have over a long period recognised Chinese suzerainty over Tibet, but only on the understanding that Tibet is regarded as autonomous. For many years this Chinese suzerainty has been no more than nominal, and indeed since 1911, Tibet had enjoyed *de facto* independence. . . ."—Statement by the Under Secretary of State for Foreign Affairs in an oral answer to a question in Parliament, 6 November 1950. 480 H.C.Deb. 5s. 602.

¹³² 602 H.C.Deb. 5s. 126.

¹³³ About which see below.

¹³⁴ Statement by Prime Minister Nehru reported in the (London) Times of 17 January 1951, p. 7, col. 2. See also M. Carlyle, ed., *Documents on International Affairs 1949-50*, Oxford, 1953, p. 552, in which the Indian view is stated fully in a note to the Communist Government of China dated 31 October 1950. The series of Notes of which this is a part may also be found in *Question*, p. 132 *et seq.*

the Lhasa Government as of 1949 might logically be made, a very loud silence was maintained whenever the issue arose directly. No other country appears to have taken a public stand on the question of the international status of Tibet in the years immediately prior to 1950.

IV. RELATIONS BETWEEN CHINA AND TIBET: 1950

When the Nationalist Government of China fell in 1949, the end of Tibetan autonomy was in sight. The Nationalist Mission in Lhasa since 1934 was expelled¹³⁵ and long overdue reforms in the Tibetan administration were undertaken by the Lhasa Government.¹³⁶ Tibetan political missions to the United States, United Kingdom, India, Nepal and Communist Government of China were announced, but none of the missions was sent,¹³⁷ and both the United States and the United Kingdom made it clear that they would have refused to receive them. This refusal was ambiguous as to the status of the Lhasa authorities. The replies of both the United States and the United Kingdom to Tibetan overtures were addressed to the "Tibetan Government" at Lhasa, refusing to accept the missions on the grounds that it "was not a suitable moment for receiving such a mission."¹³⁸ As there was no doubt of the intention of Peking to "liberate" Tibet¹³⁹ and outside help, which was to have been sought by the missions, was apparently not to be forthcoming, the Tibetan Government, under few illusions as to their ability to withstand the military force of a united China, began negotiations with China in Lhasa in the spring of 1950. The Tibetan negotiators were instructed to "inform the government of China that the people and government of Tibet . . . will maintain their independence"¹⁴⁰ As the talks continued, during a period of change of venue and without formal warning, on 7 October 1950, Chinese troops began to move into Tibet.¹⁴¹ A month later the Lhasa Government appealed to the United Nations for help,¹⁴² and the question of Tibet was discussed before the General Committee of the

¹³⁵ Harrer, p. 246.

¹³⁶ State, p. 114; Dalai Lama, *op. cit.*, pp. 57-61.

¹³⁷ Ford, *op. cit.*, p. 25; Dalai Lama, *op. cit.*, pp. 74-75.

¹³⁸ State, p. 115.

¹³⁹ That intention was announced by Peking in January 1950. See Hopkinson, p. 234; Harrer, p. 285 *et seq.*

¹⁴⁰ State, pp. 115-116; Shakabpa, *loc. cit.*, pp. 299-300.

¹⁴¹ State, p. 116; Shakabpa, *loc. cit.*, p. 301; Harrer, p. 303; Question, p. 94; Dalai Lama, *op. cit.*, p. 75. It is interesting to note that one of the routes the Chinese followed into Tibet apparently was the Aksai Chin road, lying through the area of Ladakh now in dispute between China and India. The Indians do not appear to have been aware of the use of the road by the Chinese at this time. Note from the Government of China to the Government of India dated 26 December 1959, *Peking Review*, No. 1 of 5 January 1960 (Supplement), pp. 4-5. Several of the more recent Notes make the same assertion.

¹⁴² Note to Correspondents No. 233; see U.N. Docs. A/1549, A/1565 and A/1658.

General Assembly on 24 November 1950.¹⁴³ The delegate of the United Kingdom favoured deferring consideration of the Tibetan problem pending clarification of both the factual and legal situation while a peaceful solution was attempted. The Indian delegate supported the United Kingdom motion, and the question was, after a short discussion, adjourned *sine die*. Both the Chinese (Nationalist) and the Soviet delegates expressed the view that the question was one essentially within the domestic jurisdiction of China.

The Dalai Lama fled from Lhasa on 19 December 1950, but remained in Tibet as negotiations continued. By 15 March 1951, with Tibetan troops still in control of Lhasa and apparently only a handful of Chinese troops in all of Tibet, discussions were still continuing.¹⁴⁴ On 23 April 1951, it was reported in a written answer to a question in Parliament in the United Kingdom that no significant military movements had taken place in Tibet since October 1950, and that a Tibetan delegation was on its way to Peking to negotiate an agreement.¹⁴⁵ Finally, on 23 May 1951, an agreement was signed at Peking which purported to define Sino-Tibetan relations.¹⁴⁶ With the signing of this document a new phase in Sino-Tibetan relations was opened, and therefore the question of whether the Chinese initial intrusion into Tibetan territory constituted a breach of international law had best be treated at once.

The claim to authority in Tibet was a national Chinese claim; it had been pressed by all Chinese governments from very early times and force had been used to assert it whenever desirability and feasibility coincided. The new Communist Government in Peking adopted this nationalistic position in two notes to the Government of India dated 30 October and 16 November 1950.¹⁴⁷ In both notes emphasis was put on the words "Tibet is an integral part of Chinese territory" and "the problem of Tibet is entirely a [the] domestic problem of China." In the second note reference is made to the Common Programme of the Chinese People's Political Consultative Conference (CPPCC) (about which more will appear below) in connection with Tibetan "autonomy," and it was said: "... The regional autonomy granted by the Chinese Government to national minorities inside the country is an autonomy within the confines of Chinese sovereignty." It may be noted that both of these notes preceded the discussion of

¹⁴³ Meeting No. 73; U.N. Doc. A/1534.

¹⁴⁴ *State*, p. 117; Shakabpa, *loc. cit.*, pp. 303-304.

¹⁴⁵ 487 H.C. Deb. 5s. 8.

¹⁴⁶ D. Foliot, ed., *Documents on International Affairs 1951*, Oxford, 1954, p. 577; *Question*, p. 139.

¹⁴⁷ Carlyle, *op. cit.*, p. 550 *et seq.*; *Question*, p. 132 *et seq.*

the Tibetan appeal to the United Nations and the conclusion of the Sino-Tibetan Agreement of May 1951. In view of the history of Chinese attitudes towards Tibet there is no reason to doubt that these notes represented the genuine Chinese Communist attitude in 1950. Nor is there any reason to doubt the sincerity of Peking's rather unrealistic view of the domestic political situation of Tibet,¹⁴⁸ but this view was clearly consolidative, to coin a word, and not acquisitive. It has been convincingly argued that a prospect of economic gain played no significant part in this Chinese action.¹⁴⁹

But, it is clear enough that the Chinese actions in Tibet in 1950 originated wholly from outside the territory of Tibet, and rather than restoring an older, traditionally accepted government, brought in something which was completely new to the people of Tibet. Although there is evidence that the Chinese forces were joined by Khamba levies (the Khamba tribes of the Sino-Tibetan border areas have never been wholly subservient to either the Lhasa or Peking Government)¹⁵⁰ there is no evidence to support the view that the Chinese in Tibet were acting in support of an established claim of right on any other basis than those discussed above, nor did the Chinese ever assert any different justification for their actions. By 1950 it seems clear that the government of Tibet by Chinese authorities was itself radically foreign; a change in a relatively stable order.

Although it can be accepted that Chinese nationalism prompted the invasion of Tibet in 1950, the Chinese view that Tibet legally remained part of the territory of the State of China throughout the years up to and including 1950 is not based on an objective appreciation of the facts. Not only were relations between China and Tibet customarily such that a large amount of local administration was considered by Lhasa at least, and possibly by China as well, to belong by right to the Lhasa Government (and thus the Chinese in 1950 appear to have interpreted this customary relationship into a legal relationship giving to Peking more right to authority than appears justified on strictly historical grounds), but the events of the 39 years which lay between the ousting of Chinese garrisons from Tibet and the Chinese use of force to "liberate" Tibet belie Chinese assertions of continued rights in Tibet divorced from the use of force. Yet, since the question of the

¹⁴⁸ These views did not appear until later as reason for the 1950 activities of China in regard to Tibet, as far as available documentation seems to indicate. For later propaganda see *Question*, pp. 178-182; *Peking Review*, 1959, *passim*. The Chinese in 1951 seem to have been convinced that it was the influence of the British that kept Tibet from joining the body of the Chinese State during the period 1911-51. See Ford, *op. cit.*, *passim*, especially pp. 169-170. The theme is constant in the later propaganda. See *Peking*, *passim*, especially p. 198 *et seq.*

¹⁴⁹ P. B. Henze, *op. cit.*, *passim*.

¹⁵⁰ Ford, *op. cit.*, p. 129.

continued right of the Chinese to use force in Tibet is itself answerable only after determining the legal right of China in Tibet, to attack the problem from this historical ground—*i.e.*, to assert that China had an historical right to use force in Tibet—must lead to circular reasoning in which legal argument becomes impossible however sincere the Chinese views may be. Furthermore, the Chinese arguments, based upon their rights in Tibet under Chinese constitutional law, seem to prejudge the international law position and would support the Chinese view only if Tibetan acquiescence in Chinese exercise of those rights could be shown. Thus, the Chinese line of argument can be accepted only if the view is adopted that *de facto* autonomy over a period of nearly 40 years progressively more and more openly asserted, and during the last 10 years of those years asserted in such a way as to be incompatible with a status of subordination, is insufficient to establish a right to independence under international law.

It is tempting to try to apply the legal principle of prescription to these facts.¹⁵¹ But the traditional concept of prescription probably cannot apply here because there was never any acknowledgment by China that her claim to sovereignty in Tibet was to be let slide. The principle of prescription rests on silence as an implication of consent, but there can be no implication of consent when dissent is explicit.

If not prescription, then what? In so far as Chinese claims to authority in Tibet were coupled with actual attempts to assert control, between 1911 and 1950, as has been seen, such attempts were unsuccessful. The most the Chinese statements and actions represent in international law were refusals to recognise a change in legal status between Tibet and China. Doubts as to Tibet's status in 1950 arise, furthermore, because such recognition of its claimed "independence" was refused by all other states in the few instances when the point was put squarely, as has been seen, unless the United States handling of the Tibetan Trade Mission of 1948 can be construed as a recognition of Tibetan rightful independence of China, which is doubtful.

But does recognition matter? There is a strong school of legal thought which holds that recognition is declaratory, and not constitutive of statehood. Under this view the effectiveness of control by an organised government with no constitutional superior over a defined territory and populace is the only legal criterion of the existence of a state.¹⁵² Furthermore, it would seem strange to attempt to justify disturbing a stable international order by the initiation of forcible action

¹⁵¹ Lauterpacht-Oppenheim, *International Law*, Vol. I, 8th ed., London, 1955, pp. 349-350, 575-578; *The Island of Palmas (Miangas) Arbitration* (M. Huber, Arbitrator), 22 A.J.I.L. 867 *et seq.*

¹⁵² Cf. above note 79, *Report*, p. 155.

against an unquestionably existing political society today on the ground merely that that society has not been recognised as a state.¹⁵³ Therefore, the Chinese incursions into Tibet in 1950 may tentatively be classified as a breach of international law. This, of course, assumes that Articles 2 (3), 2 (4) and 2 (6) of the United Nations Charter, taken together, establish or codify a standard against which the actions of Communist China, which is not represented in the United Nations, may meaningfully be measured.¹⁵⁴

Thus, with rather technical reservations, it appears that the Chinese Communist actions in 1950 might logically be classified as a breach of international law. But the quality of theoretical doubts surrounding this hesitant classification, which rests so much on theoretical views of statehood, the legal effect of recognition (or the ineffectiveness of non-recognition), and the legal value of stability in the international order, is enough to dismay an impartial observer.

V. RELATIONS BETWEEN CHINA AND TIBET AFTER 1951

For over six months in 1950–51, while negotiations were pursued, and while the high Tibetan mountain passes remained gripped by winter cold, the Chinese had remained in the lesser places of Tibet. Finally, after about a month's negotiation in Peking, Tibetan plenipotentiaries signed an agreement on 23 May 1951.¹⁵⁵ In this agreement future relations between Tibet and China were determined, and an understanding of the contents of it is essential to any legal evaluation of later events in Tibet.

The key articles are 3:

In accordance with the policy towards nationalities laid down in the Common Programme of the Chinese People's Political Consultative Conference, the Tibetan people have the right of exercising national

¹⁵³ Cf. Lauterpacht, *Recognition in International Law*, Cambridge, 1949, p. 246; Lauterpacht-Oppenheim, *op. cit.*, p. 576.

¹⁵⁴ Cf. L. M. Goodrich and E. Hambro, *Charter of the United Nations*, revised ed., Boston, 1949, p. 109. Even if the Communist Government of China is not deemed to be bound by the terms of the United Nations Charter as such, the prohibition of the use of force in international relations is considered by many to be a rule of customary international law. But the question at issue is whether the Chinese actions in Tibet constitute part of the "international relations" of China (or Tibet) within the meaning of Article 2 (4) of the Charter or its customary law analogue, and whether "international" peace and security was threatened within the sense of Article 2 (6) of the Charter, or whether there was an "international" dispute within the sense of Article 2 (3), or their customary law analogues. Unless this issue can be resolved in such a way as to permit the observer to infer an international personality properly attributable to Tibet at least to some extent distinct from the international personality of China, the rules of international law would not be applicable in theory to the relations between the Governments of Tibet and China.

¹⁵⁵ See above note 146.

regional autonomy under the unified leadership of the Central People's Government,

and 14:

The Central People's Government shall have centralised handling of all external affairs of the area of Tibet. . . .

As might have been expected, the form of the agreement is constitutional rather than international: the Tibetan delegates appear as representatives of a local government within the Chinese State.

This agreement was attacked much later by Tibetan fugitives from Lhasa both as to its overall validity and on the grounds of alleged Chinese violations of individual articles. The attacks on validity as a whole seem to be centred on two arguments: (1) that the seal used by the Tibetan plenipotentiaries was a Chinese forgery; and (2) that the Tibetan signature was obtained under duress of a sort that should invalidate the agreement.¹⁵⁶

The allegation of "forgery" does not seem to fit the circumstances. "Forgery" is, of course, a municipal law concept and applicable in international law only in the sense that a forged paper (or seal) has *prima facie* no binding legal effect. It is a nullity. If there is acquiescence in a treaty, the form of sealing would seem irrelevant. The forms of sealing do not seem to have been considered important in Tibetan history¹⁵⁷ and, in any case, the seals were apparently in proper technical form.¹⁵⁸ It would seem that the reality underlying this particular accusation was merely that the negotiators diplomatically "lost" their seals to avoid the appearance of refusing to affix them.¹⁵⁹ But it was not until eight years later that either side asserted that the binding force at the agreement arose from the technical act of sealing. A ratification of the agreement in Lhasa¹⁶⁰ was apparently conceived to bind Lhasa to it. This ratification was an act not of the negotiator under pressure, but of the Dalai Lama back in Lhasa with his advisers deciding sorrowfully but deliberately that "there was nothing we could do but acquiesce."¹⁶¹ There appears to be no special Tibetan custom depriving

¹⁵⁶ Dalai Lama's statement of 29 June 1959, reported in *Question*, p. 196.

¹⁵⁷ *Portrait*, p. 149.

¹⁵⁸ The Dalai Lama has referred to them as "duplicate Tibetan seals." Dalai Lama, *loc. cit.*, p. 81.

¹⁵⁹ *Report*, p. 163.

¹⁶⁰ *The (London) Times*, 20 November 1951, p. 3, col. 5; Anna Louise Strong, *Tibetan Interviews*, Peking, 1959, pp. 46-47. The Dalai Lama's confirmatory telegram to Mao Tse-tung is dated 21 October 1951. Its text is set out in *id.* p. 47.

¹⁶¹ Strong, *loc. cit.*, p. 46; Dalai Lama, *loc. cit.*, p. 82. The basic policy decision had apparently been made in April 1951, when the Dalai Lama telegraphed Mao Tse-tung his (Dalai Lama's) decision to use his power for the further development of "the Chinese motherland and Tibet under Mao Tse-tung's leadership." Schulemann, *loc. cit.*, p. 443.

Chinese-made seals *per se* of efficacy. On the contrary, during the years of Tibetan autonomy it seems to have been a minor question whether a seal *not* given by the Chinese was authoritative in Tibet.¹⁶²

As to the allegations of duress, it is difficult to believe that any personal threats were made against the Tibetan principal negotiator.¹⁶³

The question seems to boil down to a legal issue as to whether the threat of force against Tibet as an international entity is the sort of "duress" that makes an agreement void or voidable.¹⁶⁴ The International Law Commission's Draft Articles on the Law of Treaties adopted on 18 July 1966¹⁶⁵ provides in Article 49 that a treaty "is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations." But was the Chinese use of force against Tibet a violation of the principles of the Charter? To be consistent with the previous analysis, it would have to be concluded that it probably was such a violation, but this conclusion rests upon classifying Tibet in 1951 as "state," since the territorial integrity or political independence only of "any state" are protected by the principle enunciated in Article 2 (4) of the Charter, and only in "international disputes" are peaceful means prescribed by Article 2 (3). A further hesitation should be pointed out. A Chinese move into Tibet in 1950 was in fact brought before the United Nations¹⁶⁶ and the failure of the General Committee of the General Assembly then to consider this a possible violation of the principles of the United Nations Charter might be taken as evidence that the international community felt no such violations were occurring, quite apart from any hesitations about the legal status of Tibet. However, that inference would seem to be more than the circumstances of the debate in the United Nations would warrant, and the better conclusion is probably that under the view of international law which was urged by a group of very eminent international lawyers operating as a body to consider abstract rules divorced from specific cases, the Agreement of 23 May 1951 was void in its inception because of duress.¹⁶⁷

¹⁶² *Portrait*, p. 149; Dalai Lama, *loc. cit.*, p. 69.

¹⁶³ It is possible, although not probable, and, in view of the ratification, irrelevant, that he was corrupted by promises of personal advantage. His career in Tibet under the Chinese has been spectacular: he was made Secretary-General and Deputy Chairman of the new Chinese administration and in 1965 succeeded the Dalai and Panchen Lamas as Chairman of the "Tibet Autonomous Region of China." *Question*, p. 20; *Peking*, p. 108; *New York Times* dated 10 September 1965, p. 4, col. 5.

¹⁶⁴ *Cf. Report*, p. 164.

¹⁶⁵ 61 A.J.I.L. 263 (1967).

¹⁶⁶ See above text relevant to note 143.

¹⁶⁷ It has been suggested by a reader of a preliminary version of this paper that the failure of either party to register the agreement with the United Nations may be significant. That suggestion seems empty, since the duty to register treaties and international agreements under Article 102 of the Charter applies only to members

If the foregoing argument is correct, and the Agreement of 23 May 1951 was void in its inception, it becomes necessary to examine the assertion that this would legally result in returning Tibet to a status of independence. There seem to be two difficulties with that assertion. First, the status of Tibet in 1951 was merely *probable* independence, with considerable doubt arising from conflicting legal views as to the function of recognition in international law. Those doubts were certainly not resolved in favour of Tibetan independence by the actions of third states after the "void" agreement was implemented: India in 1954, and Nepal in 1956, recognised Chinese sovereignty over the territory of Tibet.¹⁶⁸ The second point, consequent on the first, is that even if the Agreement of 23 May 1951 is void, the events since 1951 are not a nullity. Although it is doubtful that China could justify its present

of the United Nations. Tibet has never been a member nor is the Government of the Chinese People's Republic represented in the U.N. In any case failure to register a treaty or international agreement does not void it; it merely makes it improper to invoke that treaty or agreement before any organ of the United Nations. Neither party has attempted to invoke it there. If an attempt were made to invoke it there, there would remain the question of whether it is better viewed as a "treaty" or a constitutional document—the failure to register it may be taken as evidence that both China and Tibet regarded it as a constitutional document and not a treaty or international agreement. Yet, although that is undoubtedly the view of China, it seems unlikely that that view is now taken by the Dalai Lama's supporters. Thus, to the extent that the point is significant, it would ironically add a scintilla more to the hesitations expressed with regard to the tentative conclusion that the Agreement is void.

In the argument above, based on the views of the International Commission of Jurists, the position most favourable to the Dalai Lama's supporters has been set forth and adopted for purposes of this discussion. For the sake of completeness two counterarguments should be pointed out. First, the views of the International Commission of Jurists, published in 1967, do not reflect agreement as to the state of law in 1951, when the coercion was applied and the Sino-Tibetan Agreement concluded. The views of the Special Rapporteur of the Commission, Sir Hersch Lauterpacht, advocating in 1953 the "rule" that was eventually adopted in the 1967 draft as Article 49, were strongly disputed in 1958 by his successor as Special Rapporteur, Sir Gerald Fitzmaurice. Compare U.N. Doc. A/CN.4/63 and A/CN.4/115. An interesting summary of the two arguments is in R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963, p. 57 *et seq.* Second, the views of academics as to the existence or precise formulation of a "rule" of international law are not always persuasive in the harsh world in which those "rules" must be applied. There are even cases in which academic formulations of "rules" have been adopted by states in so-called law-making treaties, only to be ignored without apology or explanation being felt necessary. Cf. Delbert D. Smith, "The Geneva Prisoner of War Convention: An Appraisal," 42 *N.Y.U. Law Rev.* (1967) 880; A. P. Rubin, "The Seizure of the PUEBLO; Some International Law Aspects," *U.S. Cong. Rec.* for 6 February 1968, p. E523, n. 17; G. Weissberg, "Fisheries, Foreign Assistance, Custom and Conventions," 16 (3) *International and Comparative Law Quarterly* (1967) 704.

¹⁶⁸ C. Bell, *Survey of International Affairs, 1954*, Oxford, 1957, p. 245. The text of the Agreement which implied this recognition is in the Government of India White Paper, *Notes, Memoranda and Letters Exchanged and Agreements Signed Between the Governments of India and China, 1954-1959*, New Delhi, 1959, beginning on p. 98. The Nepalese recognition can be seen in Chinese People's Institute of Foreign Affairs, *New Developments in Friendly Relations Between China and Nepal*, Peking, 1960, p. 1.

position in Tibet on the basis of the Agreement, China may be able to justify its position legally by appealing to the general bias for stability of the international legal order. China's administration of Tibet has not been, either in form or in the apparent views of either Chinese or Tibetans, a temporary administration equivalent to a military occupation.¹⁶⁹ It has been, with the active co-operation of all concerned for eight years (1951 to 1959), a constitutional arrangement openly assimilating Tibet into the state of China.

In these circumstances, while it is possible to agree with the contention of the Dalai Lama and his supporters that the 1951 Agreement can be regarded as legally void in its inception, it is difficult to conclude from that voidness that the present status of Tibet is one of rightful independence of China.

As to the interpretation of individual items: assuming that the Agreement of 1951 as a whole can be considered as binding on the polity of Lhasa in practice, if not in theory, the key to determining the extent of autonomy remaining to Lhasa under Article 3 would seem clearly to depend upon the policy laid down in the Common Programme of the CPPCC. This Common Programme was announced on 29 September 1949 by the victorious Communist Government of China as part of the establishment of the new régime.¹⁷⁰ Article 51 of the Common Programme provides that:

Regional autonomy shall be carried out in the areas where national minorities are congregated, and autonomous organs of the various nationalities shall be set up. . . . The various nationalities shall have an appropriate number of representatives in the local organs of state power . . . in the autonomous area. . . .

But the content of this "regional autonomy" was small indeed in so far as it depended upon the scope of authority of the "local organs of state power." Article 15 of the Common Programme says:

All levels of organs of state power shall put into practice democratic centralism. . . . The people's government of the lower level shall obey the people's government of the higher level and all local people's governments throughout the country shall obey the Central People's Government.

Article 16 says:

The jurisdiction of the Central People's Government and the local people's governments shall be defined in accordance with the nature

¹⁶⁹ See above note 78.

¹⁷⁰ Set out in Dutt, *op. cit.*, pp. 14, 157 *et seq.*

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of the various kinds of affairs and shall be prescribed by decrees of the Central People's Government Council so as to benefit both national unification and conform to the needs of local circumstances.

Article 19 says:

People's supervisory organs shall be set up in the people's governments . . . to supervise the execution of duties by the various levels of state organs. . . .

Thus it may be seen that "national regional autonomy," as envisaged by the Chinese in drafting Article 3 of the Sino-Tibetan Agreement of 1951, was a very different thing from the "autonomy" apparently enjoyed by Lhasa just before then. Article 3 of the 1951 Agreement, by incorporating the concept of "national regional autonomy" into the relations between Tibet and China, and linking that concept to the Common Programme of the CPPCC, did not safeguard any existing Tibetan authority, but rather served the legal purpose of fitting Tibet into a scheme of centralisation. It is impossible to think that the Tibetan authorities were unfamiliar with the Common Programme in 1951, and in any event, the express reference to it in Article 3 of the 1951 Agreement (it is referred to in other articles of that agreement as well) precludes a contrary assumption. Therefore, it must be concluded that the complete submergence of the Tibetan polity in the overall centralised government of Communist China was effected by the terms of the 1951 Agreement. Since Article 3, thus, terminated any constitutional authority the Lhasa Government may have had independently of a delegation of power from the central authorities at Peking, and Article 14 clearly ended whatever international personality had been assertable by the Lhasa Government, it is difficult, if not impossible, to resist the conclusion that in practice, under the Agreement of 23 May 1951, the polity of Tibet was merged with the polity of Communist China both internationally and constitutionally.

In the face of a mass of evidence,¹⁷² it becomes necessary now to determine if any international delict has been committed by China in Tibet by her possible breach of some of the terms of the 1951 Agreement. Assuming that the foregoing argument is correct in concluding that Tibet does not exist as a subject of international law, it is necessary to determine whether Chinese actions in Tibet, if correctly reported, constitute a violation of international law by virtue of their effect on individuals or groups otherwise entitled to the protection of international

¹⁷² *Question*, pp. 17-71, 143-162, 192-208; Raja Hutheesing, ed., *Tibet Fights for Freedom*, Calcutta, 1960, *passim*.

law.¹⁷³ But prior to the adoption of the United Nations Charter, apart from specific treaties none of which appears to be applicable to the current instance, human rights did not form part of the body of accepted international law.¹⁷⁴ Since Communist China cannot probably be considered as directly bound by the terms of the Charter,¹⁷⁵ it appears that only to the extent that the human rights provisions of the Charter (or other conventions by which the State of China is not bound) are statements of general or customary international law can they be considered applicable in the present case. This extent is the subject of a good deal of controversy, and the extent to which even members of the United Nations are bound by the humanitarian terms of the Charter has been the subject of considerable doubt.¹⁷⁶

¹⁷³ The possibility that China breached the standard of behaviour probably required by international law of a government dealing with insurgents has not been considered due to a lack of reliable information on the true state of affairs in Tibet. Even were adequate and reliable information available, the relations between insurgents and the government against which they are fighting, being internal by definition, the conditions in which international law can be said to apply seem to be unclear. Cf. H. Lauterpacht, *op. cit.*, pp. 239-240, 243-246; T. C. Chen, *op. cit.*, pp. 400, 407.

Colonel G. I. A. D. Draper has pointed out to the author that common Article 3 of the four Geneva Conventions of 1949 to ameliorate the conditions of victims of armed conflict certainly carries into international law some humanitarian limitations on the rights of a government engaged in an "armed conflict not of an international character." The Communist Government of China has adhered to these Conventions. It is a question of fact, however, whether these provisions have been violated by the Chinese Communists in Tibet. It does not appear to be on public record that any truly impartial person or organisation has requested permission to enter Tibet to determine whether the facts will support the conclusion that China has violated the provisions of those Conventions. The case seems probable, but is certainly not proved.

¹⁷⁴ Lauterpacht-Oppenheim, *op. cit.*, p. 641; however, see A. Mandelstam, "La Généralisation de la Protection Internationale des Droits de l'Homme, 11 *Revue de Droit International et Législation Comparé*, 3e Ser. (1930), 297, 699. The asserted right of humanitarian intervention has enjoyed a long and chequered career in international law, but except when the intervening state had some other interest than humanity it is difficult to find cases in which the asserted right has been exercised. See E. C. Stowell, "La Théorie et la Pratique de l'Intervention," 40 *Hague Recueil* (1932) 91. The same author, in his classical work, *Intervention in International Law*, Washington, 1921, while upholding a legal right to "humanitarian intervention" (p. 51 *et seq.*) cites an extremely long and impressive list of publicists who disagree with him in this point (footnotes 12 and 13 on pp. 58-62). In any event, he bluntly denies the legality of interference in support of insurrection against a recognised government (p. 345).

¹⁷⁵ Goodrich and Hambro, *op. cit.*, p. 109. It may be argued that since Communist China has repeatedly sought the right to represent the State of "China" in the United Nations, her acquiescence in the terms of the Charter may be implied. However, in view of the repeated rejection of Communist China's claim by the United Nations, it may be doubted that the Peking Government is bound by the terms of the Charter as such. An *opinio juris* appears to have been expressed by the international community that whatever the Peking Government may in fact represent, it does not at this time represent the "Republic of China" mentioned in Article 23 of the Charter.

¹⁷⁶ See *Fujii v. The State of California* (1952) 242 Pac. 2d 617; M.S. Rajan, *United Nations and Domestic Jurisdiction*, Calcutta, 1958, pp. 390-392, 396-397; Goodrich and Hambro, *op. cit.*, pp. 320-321.

However, in view of the express provisions of the 1951 Sino-Tibetan Agreement and the humanitarian provisions of the Common Programme of the CPPCC,¹⁷⁷ it may be said that China has signified her acceptance of and participation in the humanitarian provisions of international law at least to some extent. But since, to the Chinese, both these documents were intended as purely internal, the extent to which they may be used to justify international competence to examine Chinese conformity with her announced principles must be considered doubtful, for, except as noted in footnote 173 above, China appears never to have expressly or by implication undertaken any international obligations in this field.¹⁷⁸ Article 2 (6) of the United Nations Charter, which directs the Organisation to ensure that states which are not Members of the United Nations shall act in accordance with the principles of the Charter, expressly restricts that competence to situations in which it may be necessary for the maintenance of international peace and security. Since Sino-Tibetan relations appear not to be legally classifiable as international, and since no threat to the peace and security of any other political entities has been alleged to result from Chinese activities in Tibet since 1951, it seems doubtful that this article can be used to bring about an international competence not otherwise felt to exist. Thus it appears that although Chinese violation of what seems to be generally regarded as some sort of moral limitation on the rights of governments may in fact exist,¹⁷⁹ it is only to the extent that such a

¹⁷⁷ See especially Articles 5, 49 and 53 of the CPPCC. It must be remembered, however, that these words mean only what their authors intended them to mean, and thus Article 41, dealing with the substitution of Communist ideology for "fascist" must be regarded as a strong qualification. The humanitarian terms of the 1951 Agreement are looked at in *Question*, pp. 35-53.

¹⁷⁸ Of course, one of the sources of international law is normally considered to be "the general principles of law recognised by civilised nations" (Statute of the International Court of Justice, Article 38 (1) (c)). This "recognition" is normally considered to be indicated by the adoption of a rule by the municipal law of the preponderance of civilised states. See H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927, p. 62 *et seq.*; A. Verdross, "Les Principes Généraux de Droit Considérés comme une Source du Droit des Gens," 7 *Revue de Droit International* (1931) 446, esp. thesis 3 on p. 455; A. Verdross, "Les Principes Généraux du Droit et le Droit des Gens," 13 *Rev. de Dr. Int.* (1934) 484. However, even if a rule of international law can be found which forbids the sort of acts under discussion, unless the qualification of Tibet as a state were attempted it would be difficult to find a state with standing to raise the matter against China a tribunal with standing to hear about it. It may be noted in passing that Article 2 (7) of the Charter of the United Nations expressly withholds authority from the Organisation to "intervene in matters which are essentially within the domestic jurisdiction of any state" and no member (*a fortiori*, no non-member) is required to submit such matters to settlement under the Charter.

¹⁷⁹ *Question*, pp. 58-67.

moral delinquency is felt to import a legal delinquency¹⁸⁰ that China might, by virtue of her acts directed against individuals or groups within her own borders, be considered as having violated international law. Even if there has been a legal delinquency growing out of common Article 3 of the 1949 Geneva Conventions to ameliorate the condition of victims of armed conflict, no international person with standing to present a case has done so, and no tribunal appears to be available to consider the evidence.

It has been suggested that special circumstances creating an international competence to look at the actions of a government directed against its own nationals, or others for whose interest no particular second state will care, might exist with regard to allegations of actions which might violate a customary law of genocide.¹⁸¹ But the only tangible evidence of an *opinio juris* as to the definition of the crime of genocide and its legal implications is the Genocide Convention adopted by the General Assembly of the United Nations on 9 December 1948.¹⁸²

There is considerable doubt as to whether the Genocide Convention does codify any customary international law of genocide.¹⁸³ The resolution of the General Assembly of the United Nations which purports to "confirm" the existence of a customary international law crime of "genocide" is, of course, merely a resolution and not a binding

¹⁸⁰ On the differentiation between morality and law in this sort of context, see Lauterpacht-Oppenheim, *op. cit.*, p. 8; J. L. Brierly, *The Basis of Obligation in International Law*, Oxford, 1958, p. 14; A. Verdross, "Règles Générales du Droit International de la Paix," 30 *Hague Recueil* (1929) 275 at p. 293.

¹⁸¹ *Question*, pp. 68-71.

¹⁸² U.N. Doc. A/810, pp. 174-177; *Question*, pp. 72-74. Article II of the Convention defines "Genocide" as

"... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

Article III of the Convention says:

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide."

Articles IV-VI refer to "persons" who commit genocide. The only obligations of states under the Convention are to enact appropriate legislation and to grant extradition "in accordance with their laws and treaties in force" in appropriate cases.

¹⁸³ J. L. Kunz, "The United Nations Convention on Genocide," 43 *A.J.I.L.* (1949) 738 at pp. 740-741.

statement of existing law.¹⁸⁴ Therefore there is considerable doubt whether, even if the facts in question fit the Convention's characterisation of "genocide," an international complaint against China (which has not ratified the Convention) could be made.¹⁸⁵

There are more serious problems. First, the Genocide Convention is not a yardstick applicable to acts of states, but is concerned only with acts of individuals¹⁸⁶; a Soviet amendment to the Convention which would have forbidden the plea of superior command to one accused of acts otherwise constituting "genocide" was rejected when the Convention was framed¹⁸⁷ thus giving a basis for an interpretation of the Convention exempting from its purview acts done under colour of state authority except for a negligible number of possible cases. Secondly, after a long debate, all forms of cultural and political persecution were specifically eliminated from the intended definition of the crime¹⁸⁸; thus a specifically racist intent, similar to that of the Nazis' intent in submitting what were intended to be the entire Jewish, Gipsy and other "racially inferior" populations to sterilisation or death,¹⁸⁹ would have to be demonstrated before the crime of "genocide" could be imputed to Chinese or Tibetan individuals acting in Tibet. Thirdly, a specific intent to commit the crime defined by the Convention is required by the Convention before the charge will lie¹⁹⁰; in the circumstances, the burden of proving the *mens rea* would appear to be almost impossible. Fourthly, the extraordinary vagueness of the Convention, which uses the words "conspiracy," "attempt," "complicity" and "incitement" with no attempt at definition, makes its practical application in most conceivable cases difficult if not impossible.¹⁹¹ In these circumstances, it must be concluded that an accusation of the crime of "genocide" cannot be made against the State or Government of China, and that the accusation which may be made against some individuals acting in Tibet is not likely to fall within the Convention's definition of "genocide" or any known customary international law analogue.¹⁹²

But what about Chinese activities against Tibet as an entity in

¹⁸⁴ *Id.* at pp. 741-742; Goodrich and Hambro, *op. cit.*, p. 152. The Resolution is Number 96 (I) of 1946.

¹⁸⁵ Kunz, *op. cit.*, p. 742. The Nationalist Government of China has ratified the Convention, but the Communist Government of China has neither ratified it nor otherwise acceded to it.

¹⁸⁶ *Cf.* R. Lemkin, "Genocide as a Crime under International Law," 41 A.J.I.L. (1947) 145 esp. p. 150; G. A. Finch, "The Genocide Convention," 43 A.J.I.L. (1949) 732, esp. p. 733.

¹⁸⁷ Kunz, *op. cit.*, p. 743.

¹⁸⁸ *Id.* pp. 742-743; Finch, *op. cit.*, p. 734.

¹⁸⁹ *Cf.* Lemkin, *op. cit.*, p. 147; Finch, *op. cit.*, pp. 733-734.

¹⁹⁰ *Cf.* Kunz, *op. cit.*, p. 743.

¹⁹¹ *Id.*

¹⁹² *Cf. id.* pp. 745-746.

international law, for, as has been seen, the status of Tibet in 1950, may, at least for some purposes, legally be considered to have been statehood with some degree of justification? It has been argued that Chinese violation of the 1951 Agreement, assuming its validity in practice despite its theoretical voidness, should end Chinese legal ability to cite that agreement against Tibetan assertions of rightful independence, *i.e.*, that violation of the humanitarian and constitutional provisions of the agreement by one party should release the other from the constitutional and international law effects.¹⁹³ As noted above, it is the stable practice under the terms of the agreement rather than its technical binding force that makes it pertinent. Therefore, the arguments of the Dalai Lama's supporters here seem irrelevant to any real issues. But even assuming their relevance it is difficult to see how this argument can logically be applied in the present case. Were the 1951 Agreement solely an international document, by which supervision and control over the international affairs of the international entity of Tibet were granted under stated conditions not touching on the political identity of Tibet, then there might have been more substance to the argument.¹⁹⁴ As it is, of course, the concession of control by Tibet in 1951 did not stop at Article 14 but included also the constitutional terms of Article 3. The agreement as a whole, considering the vastly greater effect of Article 3 than of Article 14 (and in context the two articles must be viewed as complementary and certainly not as contradicting or detracting from each other's force), appears to have set up a constitutional pattern which cannot logically be classified as international. Accordingly, since an international delict can result only from the breach of an international obligation, and since China's obligations to Tibet under the Agreement of 1951 cannot be considered to be international, however much China may have breached her constitutional obligations (as Tibet appears to have breached hers in 1911) and however compelling the humanitarian and moral case appears to be, it does not appear that the Communist

¹⁹³ *Question*, pp. 99, 202; *Report*, p. 165; Dalai Lama, *op. cit.* p. 245.

¹⁹⁴ But even so, not very much substance considering the context. See, *e.g.*, the analyses of similar arrangements between Great Britain and the Indian Princely States in Cmd. 3302 (1928-29). The case of Tibet seems *a fortiori*, as no part of Tibetan "sovereignty" was purportedly retained through the legal adjustments. It is believed that a careful analysis will show the role of suzerainty, volitional acquiescence in new encroachments upon what remained of the sovereignty of the Indian Rulers, has never played a significant part in determining the rights of the Paramount Power, despite repeated soothing assertions to the contrary. Of the many legal works in this field the following are outstanding: W. E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, Oxford, 1894; Sir H. Jenkins, *British Rule and Jurisdiction Beyond the Seas*, Oxford, 1902; Sir William Lee-Warner, *The Native States of India*, London, 1910; J. Westlake, "The Native States of India," 26 *Law Quarterly Review* (1910) 312 (reprinted in *The Collected Papers of John Westlake on Public International Law*, Cambridge, 1914, p. 620 *et seq.*).

Government of China violated customary international law by its actions in Tibet since 1951.

The situation in Tibet was debated in the General Assembly of the United Nations on 20 and 21 October 1959. Although many of the delegates took the opportunity to condemn China's activities, as they understood those activities to be a violation of the human rights provisions of customary international law, the Resolution passed by the General Assembly on 21 October 1959 avoids any suggestion that China's actual presence in Tibet was a violation of international law or that Tibet was not a part of the state of China. Even this Resolution was not overwhelmingly popular with members of the United Nations as 26 states abstained from voting, including India, Nepal and Great Britain.¹⁹⁵ The question of Tibet was proposed by Thailand and the Federation of Malaya for further consideration by the General Assembly of the United Nations on 19 August 1960,¹⁹⁶ but pressure of work prevented this.¹⁹⁷

At the sixteenth session of the General Assembly in 1961, the question of Tibet was again debated. On 20 December 1961, the General Assembly adopted a Resolution by a vote of 56 to 10 with 29 abstentions which expressed concern "at the continuation of events in Tibet, including the violation of the fundamental human rights of the Tibetan people" and purported to renew the 1959 "call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination."¹⁹⁸ The word "China" does not appear in the Resolution and, as

¹⁹⁵ The debates are reported in the *Official Records of the General Assembly Fourteenth Session, Plenary Meetings*, New York, 1959, p. 469 *et seq.*; U.N. Doc. A/PV. 831, 832, 833 and 834. The Resolution is 1353 (XIV). The record of the vote is on p. 528 of the Official Records.

The Debate in the General Committee of the General Assembly on inclusion of the Tibetan question as an agenda item for the General Assembly is in U.N. Doc. A/BUR/SR. 124. U.N. Doc. A/4234 contains the request for inclusion of this item submitted by Ireland and Malaya. The Draft Resolution submitted by those two countries, U.N. Doc. A/L. 264, was adopted without change. See the Annex to the Official Records cited above, Agenda Item 73.

¹⁹⁶ U.N. Doc. A/4444. The item was accepted into the Agenda by the General Committee as Agenda Item 79 after a short debate. U.N. Doc. A/BUR/SR. 127 at pp. 5-6. It actually became Agenda Item 78 in the Report of the General Committee, U.N. Doc. A/4520.

¹⁹⁷ U.N. Doc. A/PV. 995 at pp. 508-510. See, for further background, *U.N. Review*, Vol. VIII, No. 10, October 1961, p. 59.

¹⁹⁸ At the request of Malaya and Thailand, U.N. Doc. A/4848, the item was inscribed in the agenda of the General Assembly as Agenda Item 83 after a short debate in the General Committee. U.N. Doc. A/BUR/SR. 136. The debate is in U.N. Docs. A/PV. 1084 and A/PV. 1085. The record of the vote is in U.N. Doc. A/PV. 1085, in *Official Records of the General Assembly, Sixteenth Session, Plenary Meeting*, New York, 1962, p. 1138. Great Britain voted for the Resolution, although India and Nepal continued to abstain. The Resolution was Number 1723 (XVI) and is that submitted by El Salvador, Malaysia, Ireland and Thailand as U.N.

was the case in 1959, there is no suggestion in the General Assembly's Resolution that China's rule in Tibet is as such a violation of international law or that Tibet is not a part of the state of China. Still, in view of the emphasis on "self-determination," which did not appear in the earlier Resolution and was brought into the 1961 Resolution as an example of a "human right," it is difficult to avoid concluding that the concept of "human rights," as applied in the United Nations to restrict the scope of Article 2 (7) of the United Nations Charter, is very broad indeed. But these questions of United Nations competence, and the impact of the Tibet Resolutions on them, are matters with which the present paper does not propose to deal.¹⁹⁹

Doc. A/L. 376 without change. The Draft Covenant on Economic, Social and Cultural Rights of May 1953, U.N. Doc. E/2447, pp. 39-50, provides in Article 1 that "All peoples and all nations shall have the right of self-determination . . ." The terms "peoples" and "nations" are not defined in the Covenant. The Covenant has not come into legal force.

¹⁹⁹ A distinction has been drawn between the positive competence of the United Nations and the application of customary rules of international law to the question of the international position of Tibet. This paper deals solely with the latter subject. Discussion of the U.N. competence and practice in questions of human rights may be found in Rajan, *op. cit.*, p. 298 *et seq.* and R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, London, 1963, esp. pp. 123-125.