

TIBET . AN INTERNATIONAL CONSULTATION

LONDON 7 JULY 1990

SESSION 3: THE KEY ISSUE FOR THE 1990's:

THE RIGHTS OF PEOPLES: THE CASE OF TIBET

TIBET - AN INTERNATIONAL CONSULTATION

LONDON, 7 JULY 1990

SESSION 3: THE KEY ISSUE FOR THE 1990s:

THE RIGHTS OF PEOPLES: THE CASE OF TIBET

TIBET IN CONTEXT - THE RIGHTS OF PEOPLES

The Honourable Justice Michael Kirby CMG*
Australia

In his speech in December 1989 accepting the Nobel Peace Prize, His Holiness the Dalai Lama encapsulated the assertion of the right of the Tibetan peoples to live in harmony with - but distinct from - the Chinese peoples:

"Any relationship between Tibet and China will have to be based on the principle of equality, trust and mutual benefit. It will also have to be based on the principle which the wise rulers of Tibet and China laid down in a treaty as early as 823 AD carved in the pillar which still stands today in the front of the Jokhang, Tibet's holiest shrine in Lhasa, that 'Tibetans will live happily in the great land of Tibet, and the Chinese will live happily in the great land of China'".¹

* President of the Court of Appeal of New South Wales, Australia. Commissioner and Member of the Executive Committee of the International Commission of Jurists (ICJ); President of the Australian Section of the ICJ; Commissioner of the World Health Organisation Global Commission on AIDS. Personal views.

To that ancient prayer I dedicate these remarks.

I speak not as a politician; nor as a national representative. But as a jurist concerned about the rule of law and respect for human rights. Last November, just before the Nobel ceremony took place, another international meeting convened. This one was at UNESCO headquarters, Paris. Its purpose was to review the notion of the rights of peoples in international law. The participants were of the highest calibre - from every corner of the world and many cultures. The issue was sensitive because attention to the "rights of peoples" was one of the reasons given by the State Department of the United States of America for the withdrawal of that country from UNESCO. The representatives of the United States had described the notion of peoples' rights as "exceedingly vague and ill-defined ... [laying] stress on collective rights [which] tend to strengthen the prerogatives of the non-democratic state at the expense of human rights of individuals".

The experts in Paris therefore reviewed critically the developments of international law. They examined the Charter of the United Nations, the International Human Rights Covenants and the developing customary law of nations. They concluded unanimously that peoples as such do have rights; that their rights are recognised in international law; and that some of them are now beyond dispute: most especially the peoples right to self-determination.

The foregoing conclusions should cause no surprise. Indeed, as the experts noted, it was somewhat ironic that opposition to the notion of peoples' rights should be voiced in the United States of America. That country's Revolution in 1776 was itself an assertion of the rights of a people - as well as of individual human rights. The Declaration of Independence of the United States begins with the famous words:

"When in the course of human events it becomes necessary for one people to dissolve the political bonds which have connected them with another ..."

Furthermore, it was the insistence of Presidents Wilson and Roosevelt that oppressed and colonial peoples should have the right to exercise self-determination which led to the Allied war aims in the First and Second World Wars. These moulded the post-war world. They profoundly influence the United Nations Charter. It must be noted that this is not (as other treaties are) a compact of states. It is a compact expressed in the name of the people of the world. It begins:

"We the peoples of the United Nations, determined ..."

As the experts in Paris pointed out, the authority of the United Nations Charter - and of all that has flowed from it - is therefore founded, ultimately, not upon the member states, as such, but upon the peoples of the United Nations. Furthermore, the second of the specified purposes of the United Nations includes:

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

The human rights covenants give similar priority and emphasis to the peoples' right to self-determination.

The conclusion of the experts should therefore cause no surprise. Peoples rights exist. They extend beyond the right of self-determination. They include, for example, the right to existence recognised in the Genocide Convention. They also extend to other rights which are now elaborated in the process of the development of regional instruments such as the African Charter of Human and Peoples' Rights. They are reflected in resolutions of the General Assembly of the United Nations, including upon Tibet. As we said in Paris:

"The debate amongst experts is no longer whether peoples' rights are recognised by international law. Clearly they are. The debate now is about their content."²

Peoples' rights are an alternative to the stateism which has traditionally beset international law. They represent a freedom notion. For the idea equips people with rights even against the states in which they live and against current governments, some of which would collect them together in uncomfortable, uncongenial groupings indifferent to their links of history, culture and language. The rights of peoples are also a weapon against governments which would endeavour to suppress the magnificent variety of popular culture and autocratically organise or confine peoples in states and governments which oppress them and derogate from the powerful links which bind a people together. It is a particularly useful notion in preserving endangered cultures, languages, monuments and artefacts. It is specially needed in international law as a notion to protect indigenous people against invaders or settlers and minority peoples against crude oppressive majorities.

Peoples' rights must not be used to derogate from individual human rights but to support them and to nurture the environment in which they can flourish. Far from justifying anti-democratic actions by states against peoples, peoples' rights assert and protect peoples from anti-democratic actions against them, whether by a state or by another people.³

If any one is in doubt about the existence of the rights of peoples, one can say with the memorial to Christopher Wren in this great city: circumspice. Look around! The lifetime of most of us has been a brilliant drama of the assertion of the rights of peoples. The world since 1945 has profoundly changed. The empires - the mightiest of them ruled from this city - have given way to post-colonial independence. For the most part this has been an imperfect, but still real, reflection of the rights of peoples to determine their own fate. It is imperfect because of colonial boundaries, economic and cultural influences and frequent oppression by post-colonial rulers. But the notion of foreign powers ruling others, based on history, a supposed "civilizing" role or economic advantage has been discredited.

The centrepiece of the post-war international era has undoubtedly been the concept of self-determination. Particularly self-determination of peoples formerly part of a former colonial empire. The notion is not racial. It is not confined to empires in which Europeans ruled Asians. It is a notion inhering in the very dignity of individuals and the integrity of distinct peoples. It applies as much to the claim of a European power to a historic, political or economic control of an Asian people as it does to one Asian people making the same claim over other Asian people for historic, strategic, political or economic reasons. The principles of law - including international law - must be applied neutrally. Principles have no racial colour or geographical confinement.

Strength is given to this assertion by the effort of the expert meeting in Paris to settle one of the main controversies which has surrounded the notion of peoples' rights. Who are a "people" for the purpose of the right to self-determination, for example? How does one define the group who enjoy this right? Fears about this controversy have led some observers to describe the notion of peoples' rights as subversive. It is said that it undermines settled borders, national sovereignty and even international peace and security.

But where individual, national or international arrangements are based upon intolerable relationships, individuals and peoples rebel. It is not in the human spirit indefinitely to tolerate the unacceptable. There could be no more vivid illustration of this fact than the extraordinary developments which the world has witnessed in the last 18 months in

Eastern Europe. The popular movements there were made up of individuals asserting their own fundamental human rights. There were many heroes in that movement. But individuals acting in isolation or in small groups cannot explain the assertion of group will which has been demonstrated by the popular movements that have spread from Czechoslovakia in the West through Germany, Hungary, Poland, Romania and Bulgaria, through the Baltic lands, Georgia, Moldavia, Armenia and Azerbaijan, through the great land of Russia to Uzbekistan in the East. It is a movement which even reached China. These are the movement of peoples, reawakened and reasserting their group relationships.

The experts in Paris acknowledged that there was a need for further efforts to define the notion of "peoples" for the purposes of peoples' rights. They provided a description which collected the following characteristics. They are characteristics which, I suggest, apply to the peoples of Tibet:

"A people for the rights of peoples in international law, including the right to determination, has the following characteristics:

- (1) A group of individual human beings who enjoy some or all of the following common features:
 - (a) A common historical tradition;
 - (b) Racial or ethnic identity;
 - (c) Cultural homogeneity;
 - (d) Linguistic unity;
 - (e) Religious or ideological affinity;
 - (f) Territorial connection;
 - (g) Common economic life.
- (2) The group must be of a certain number who need not be large (eg the people of micro States) but must be more than a mere association of individuals within a State;
- (3) The group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or

consciousness; and

- (4). Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.

By every one of those criteria the people of Tibet are a "people" in international law. To deny such a people the rights of peoples, notably the right to self-determination, is thus an apparent breach of international law. There are no armies to uphold international law. No international sheriff can be sent to enforce the rule of international law. But there is the force of public opinion throughout the world. There is the power of ideas. And there is the will of the peoples affected. The power of these forces has lately been demonstrated in so many lands. That power - and its successful manifestations - must provide a source of encouragement to all who watch the events in Tibet with anxiety and sympathy.

I do not say that the right of peoples, even to self-determination, are without difficulties. For example, if by forced settlement or "repatriation" a territory, once belonging to a distinct people, is resettled by another, a point may be reached where the geographical boundaries of a distinct people must be redrawn. In this regard, the resettlements of Chinese people in Tibet presents a problem no different from the earlier scattering of the Armenians or the settlement of Russians in Lithuania, Poles in former East Prussia or Israelis in the Occupied Territories of Palestine. It adds an element of urgency to tackling these problems.

Secondly, there is an obvious danger that the rights of peoples, even to self-determination, will be distorted into the nationalism that has been such a blight upon human existence this century. As the Dalai Lama himself has observed⁴ there are various options available for different peoples to live together in a relationship with each other but with recognition and respect for the distinctiveness of each. It will be a tragedy if the revived rights of peoples were to threaten not only individual human rights but also peace, stability and mutual respect in the international community. Fortunately, the leaders of Tibet recognise this. They do not deny the need for Tibet to live in harmony with China.

Thirdly, a "people" for the purposes of the rights of peoples, may change over time, coalesce with other people for the sake of preservation or self-protection or may even become extinct by intermarriage or the abandonment of cultural, linguistic or other links. Some links may change and some may be discarded as inappropriate to modern conditions. Science and civilization may work changes. So may modern notions of human rights where they clash with a

traditional right of a people. But so long as common identity endures - as undoubtedly it does in the case of the Tibetan people - the advent of change is unremarkable. All peoples, like all individuals, are certainly changing. That is the nature of existence.

Fourthly, the lesson of Tibet should teach us to be alert to derogations from the rights of peoples, wherever they occur. I have mentioned some well-known cases. Sadly, Hong Kong is another case where the right to self-determination has been ignored by China. The people of Hong Kong have been given no democratic opportunity to decide their fate after 1997. This is a unique departure by the United Kingdom from a principle which it has honourably upheld in the case of every other colony liberated in recent times. Historical claims to territory which cannot pass the modern principle of self-determination, should be consigned to the history books. So it was when Guatemala claimed what is now Belize. So it was when Spain claimed Gibraltar but the majority of its citizens opted for association with the United Kingdom. So it was when Argentina sought to take the Falkland Islands. What is so different in the case of Hong Kong and - even more clearly - Tibet? The answer, in point of principle, is nothing. There is a plain departure from the principle of self-determination in each case.

It is time that the international community returned to principle. China is a mighty power. But ultimately it, too, must conform to international law. Recent events elsewhere give cause for confidence that the rights of peoples cannot be indefinitely ignored. And that includes the right to self-determination of the people of Tibet.

In 1955, five years after the conquest of Tibet by the Peoples Liberation Army of China, the author Peter Fleming wrote:

"It is unlikely that their conquerors will be able to alter the Tibetan character, so curiously compounded of mysticism and jollity, of shrewdness and superstition; of tolerance and strict convention."⁵

Time has borne out that prediction. For the survival of a precious people - more important to this world's varied environment than its rare flora and fauna and more priceless than human monuments and artefacts - we must hope that it will continue to be so. We must work towards the day when the truth of this message is brought home to, or realised by, the equally precious and special Chinese people. The very definition of freedom is variety and diversity. Let us hope that we will soon see it restored on the Tibetan plateau.

ENDNOTES

1. Acceptance speech by His Holiness the Dalai Lama on December 10, 1989, published: Tibet, Office of Information and International Relations, Nobel Peace Prize Award Ceremony 1989, Speeches, Dharamsala, India, 11 at 13.
2. UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, February 1990, mimeo (89/CONF .602/7, 6 (para 19)). See also J Crawford (ed) The Rights of Peoples, Oxford, Clarendon Press, 1988. Cf note (1990) 39 ICLQ 236.
3. Ibid (para 20).
4. HH the Dalai Lama, Tibet, China and the World, a compilation of interviews, Narthang Publications, Dharamsala, India, 1989, 37 ("The Tibetan people want complete independence, but the Chinese will never accept that. As the free spokesman, I have every right to make suggestions. My idea is that it is worthwhile to find some middle way, one important aspect being equal rights." See also statement of His Holiness the Dalai Lama on the Thirty-First Anniversary of the Tibetan National Uprising Day in (1980) 21 Tibetan Bulletin No 2, 1.
5. P Fleming, introduction to H Harrer, Seven Years in Tibet, Hart-Davis, London 1955, x.