

"Tibet - Its Status and the Right of its People to Self Determination"

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TIBET - ITS STATUS & THE RIGHT OF ITS PEOPLE TO SELF-
DETERMINATION

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The rights of peoples to self-determination

It is clear that the peoples' right to self-determination is one of the most important issues concerning international law at this time. Behind the many "independence" and "liberation" struggles occurring in all parts of the world lie manifestations of the assertion by "peoples" of the right to self-determination. That right is certainly recognised in international law. It appears in the Charter of the United Nations which is expressed in terms of the resolve of the "peoples of the United Nations". In the opening substantive provisions of the Charter, there is a recognition of the peoples' rights to self-determination. The *Universal Declaration of Human Rights* was proclaimed by the General Assembly as a "common standard of achievement for all peoples and all nations". Both the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* commence with a common article 1:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Despite the proclamation of the Charter in the name of the peoples of the United Nations, the organs of that body (as of international law generally) are controlled by nation States. Many States are fearful of, and resistant to, the demands for self-determination by "peoples", whether asserted as a basis for complete political separation and the establishment of a new State (eg Estonia, Bosnia, Palestine and Sri Lanka); the creation of a new State from parts of several States (eg Kurdistan); or the establishment of new and different political arrangements within a State, respectful of the right of a distinct people living in that State to the exercise of the peoples' right to self-determination guaranteed by international law.

One of the organs of the United Nations of growing importance is the Sub-Commission on Prevention of Discrimination and Protection of Minorities. However, that Sub-Commission is also answerable to the representatives of States parties of the United Nations. There is no governmental organisation to which peoples, as such, who assert a deprivation of the right to self-determination, and other peoples' rights guaranteed by international law, can have resort for the determination of their claims where they are disputed. Specifically, there is no international tribunal which can investigate suggested derogations of the peoples' rights, including to self-determination, or derogations from universal human rights which commonly attend the denial of the peoples' right to self-determination.

International tribunals on derogations from basic rights

After the Second World War, the allied powers established the International Military Tribunal at Nuremberg to try alleged war criminals. It provided a precedent for the application of the principle that leaders of governments, and their subordinate

officials, may be held responsible for crimes against humanity and may be brought to account before an international legal body.

Following the judgments of the International Military Tribunal, the General Assembly directed the International Law Commission to formulate principles of international law concerning such crimes so that they could be codified for future generations. In 1949, the International Law Commission expressed what are now known as the Nuremberg Principles. The first of these is that any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Amongst the crimes specified by the International Law Commission as those punishable under international law were crimes against peace, war crimes and crimes against humanity. The International Law Commission has continued its work on this subject. Until lately, little apparent progress has been made because of delays in the consideration of the subject in the General Assembly. No international and governmental machinery has therefore been established whereby international crimes may be impartially determined. More recent reports, in late 1992, suggest that some progress may be expected in this regard within the International Law Commission, arising out of the perceived need to bring to justice certain Libyan citizens accused of involvement in the destruction of a Pan-Am jet over Lockerbie in Scotland. The alleged war crimes in the former States of Yugoslavia also add an element of perceived urgency to the creation of an authoritative international tribunal to adjudicate impartially upon alleged derogations from international law. By resolution 808 in February 1993, the Security Council authorised the Secretary-General of the United Nations to formulate proposals for a permanent international tribunal to try war criminals.

However, even if such a Tribunal were established, it is

unlikely, in the present circumstances of the international legal order, that the United Nations itself, or nation States would establish an international body to receive complaints about derogations from peoples' rights. Too many nation States feel threatened by assertions by minorities within their own borders of claims for self-determination of one sort or another, readily to agree to the creation of such machinery.

Establishment of the Permanent Tribunal of Peoples

It was in these circumstances that, in 1976 at Bologna in Italy the distinguished Italian jurist, Senator Lelio Basso and a group of his associates formulated the *Universal Declaration of the Rights of Peoples*. This declaration was later adopted in Algiers on 4 July 1976, the day of the Bicentenary of the United States of America. The declaration so adopted has become known as the *Declaration of Algiers*. The Declaration contemplated the establishment of a permanent international body which could hear complaints of alleged derogations from peoples' rights in international law, under circumstances which would provide for just procedures and for decisions of jurists and others of international reputation whose integrity would contribute to the acceptance of the body's decisions.

This was the origin of the Permanent Tribunal of Peoples. It was inaugurated in Bologna, Italy on 24 June 1979. Its permanent office is in Rome. As provided by its statute, its mission is "to promote universal and effective respect for the fundamental rights of peoples by determining whether those rights have been violated, by examining the causes of such infringements and by pointing out to world public opinion the authors of these violations".

The sources of the principles applied by the Tribunal are international customary law as elaborated by the *Charter of the*

United Nations, the *Universal Declaration of Human Rights*, the *International Covenants on Human Rights* and other international conventions relevant to the rights of peoples and the duties of states, organisations and individuals in relation to such rights (eg the *Convention for the Prevention and Suppression of the Crime of Genocide*).

In the past, the Tribunal has comprised many distinguished jurists. However, the Tribunal is not limited in its composition to international lawyers. Its members have included philosophers, theologians and others deemed suitable for appointment by reason of their reputation and commitment to universal principles of human rights. Amongst the members of the Tribunal are several Nobel prize-winners in various categories and noted writers (eg Professors Noam Chomsky, Gunnar Myrdal and Sean McBride). Amongst the important decisions of the Tribunal in the past have been that concerning a complaint against the Governments of the Philippines and United States of America brought by certain Filipino people and the Bangsa Moro people of the Philippines. See Permanent Peoples' Tribunal, Session on the Philippines, *Philippines - Repression and Resistance*, KSP, 1980, London. The record of investigations by the Tribunal illustrates that some of the global "hot-spots" for derogations from the peoples' right of self-determination have come under its scrutiny: Western Sahara (1979); Eritrea (1980); East Timor (1981); Armenia (1984); and Brazilian Amazonia (1990).

Complaint by the Tibetan people

In June 1992, an accusation was lodged with the Tribunal on behalf of the people of Tibet. The accusation was brought by the Government of Tibet in exile, against the People's Republic of China (PRC). The current President of the Tribunal, Professor François Rigaux, Emeritus Professor of Law of the Catholic University of

Louvain, Belgium, convened a Session of the Tribunal. It was held in Strasbourg, France between 16-20 November 1992. The writer was appointed to the Tribunal and participated in the Session. What follows is a description of the procedures and the conclusions of the Tribunal in the Session on Tibet.

Amongst the other members of the Tribunal for the Session on Tibet were Professor Richard Baumlín, Professor of Constitutional Law of the University of Berne (Switzerland); Professor Madjid Banchikh, Professor of International Law, University of Algiers (Algeria); Professor Ward Morehouse, Chairman of the Council on International and Public Affairs, New York (United States of America); Professor Makoto Oda, State University New York (Japan); Professor John Quigley, Professor of International Law, Ohio State University (USA) and the Ven. Sulak Sivaraksa (Thailand). In all, twelve members of the Tribunal participated.

At the outset of the Tribunal's hearing, the Secretary-General (Dr G Tognoni) reported a communication he had had with the Consul-General of the PRC in Milan, Italy. Whilst the PRC did not take part in the Session of the Tribunal, it formally placed before the Tribunal a series of publications in which the claim of the PRC to sovereignty over Tibet was expressed. In due course, the Secretary-General tabled the documents provided by the PRC to the Tribunal. There being no representative for the PRC, the Tribunal, from its own resources, provided for the representation before it of the interests of the PRC. This was done by an English barrister, Mr Andrea O'Shea, who had expertise in international law and knowledge of the detail of the PRC's claim in respect of Tibet.

The accusation made on behalf of the Tibet peoples fell into three categories. The first was that the entry of Chinese military forces into Tibet in 1949-50 was an invasion by the PRC of an

independent state, contrary to international law, and that the presence thereafter in Tibet of the Peoples' Liberation Army (PLA) was in breach of international law.

Secondly, it was contended that, in breach of international law, the PRC was continuing to deprive the people of Tibet of their fundamental right to self-determination and was transferring populations of non-Tibetan people into the former territory of Tibet in violation of international law and so as to alter the conditions for the legitimate exercise of the rights of the Tibetan people to self-determination.

Thirdly, it was complained that serious repeated and fundamental breaches of basic human rights had occurred, directed at the Tibetan people collectively and at individual Tibetan protesters in particular. Additionally, it was complained that there were serious derogations from the environmental rights of the Tibetan people by the degradation of the environment resulting from large scale agriculture, population transfers, the dumping of nuclear wastes and deforestation.

The Tribunal's procedures followed strictly the rules of procedural fairness (natural justice) with which lawyers in common law countries would be familiar. The complaint was signalled in advance to the PRC and it was provided, as the party accused, with an opportunity to appear. In default of appearance, a trained lawyer was provided to present its case. The determination was limited to evidence formally proved in public before the Tribunal at its Strasbourg Session. All written evidence tendered was marked and the members of the Tribunal confined their decision to material placed before them during the Session. The representative of the PRC was afforded the opportunity to question all witnesses for the Accusation. The Tribunal accepted that the burden of proving matters

lay upon the Accusation. Matters in contest had to be established to a very high standard of proof appropriate to "the grave matters asserted". Before conclusions were drawn, the Tribunal gave the representatives of both parties a fair opportunity to be aware of the Tribunal's considerations. The Tribunal's published Verdict sets out the procedures adopted by the Tribunal in reaching its conclusions.

Tribunal's Verdict: Tibet's status in international law

The balance of the Verdict of the Tribunal is divided into three parts. The first deals with the right of self-determination. After reciting relevant international law, the Tribunal accepted as a "description" of a "people" the features adopted by a UNESCO Expert Committee. See UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, *Final Report and Recommendations*, 22 February 1990. This report accepts four criterion:

1. Commonalities of history, language, culture, ethnicity etc;
2. Numerousness of the people concerned;
3. Institutions to give expression and effect to the commonalities; and
4. The will of the people involved to assert their right to self-determination.

By these criterion, the Tribunal concluded that the Tibetan people on the evidence presented, were a "people" for the exercise of the right to self-determination guaranteed by international law.

The Tribunal then concluded that the Tibetan people were being denied the right to self-determination by the PRC's government in Tibet. That right belonged to the people and not to the government. It extended to people living in what the PRC now calls the "Tibet

Autonomous Region" and Tibetans residing in parts of historic Tibet now purportedly added to neighbouring Chinese provinces.

The Tribunal's *Verdict* then turns to the alleged violations of human rights as established by the evidence. It did not accept the Accusation's case that the policies of the PRC on family planning in Tibet had been proved to amount to deliberate genocide against the Tibetan people. However, it did accept the evidence placed before it of torture and mistreatment practised by the PRC's public order forces and authorities against individual Tibetans. It pointed out that the Chinese government has adhered to the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment*. Upon this basis it found that China was in violation of its international obligations by failing effectively to stop torture and mistreatment and to sanction those found responsible.

So far as other accusations of human rights derogations were concerned, the Tribunal noted that, although China was not a party to the *International Covenant on Civil and Political Rights*, the Foreign Minister of China had declared in April 1990 that "China has always attached importance to the United Nations Conventions and Covenants regarding human rights". Accepting that universal human rights principles were now part of customary international law, the Tribunal concluded that the specified breaches of human rights brought China into violation of the fundamental rights of the Tibetan people and individuals in Tibet, under international law.

So far as degradation of the environment of Tibet was concerned, the Tribunal expressed itself unable to reach final conclusions on allegations of radioactive pollution arising from the Chinese extraction of uranium in the Eastern Tibetan plateau of Amdo. However, it called for an urgent and neutral international

investigation of the complaints having regard to their potential seriousness for the peoples of Tibet, China and surrounding countries.

From the viewpoint of international law, perhaps the most interesting part of the Tribunal's decision is the section dealing with the international status of Tibet. The Tribunal concluded that according to a strict interpretation of international law it was difficult to derive firm conclusions about the international status of Tibet at the time when it was invaded by PLA forces in 1949-50. The Tribunal suggested that the relationship of Tibet with China over history was *sui generis*. It did not fit into western European notions according to which the features of nation states have traditionally been determined. The tribunal acknowledged the differing views over whether Tibet was a vassal State or enjoyed international legal personality. It concluded that western legal concepts of "suzerainty" and "vassalhood" were inadequate for describing the relationship of Tibet and China in history. However, it determined that the break of control of more than 40 years, the substitution for the Emperor of China of the Republic of China and later the People's Republic of China effectively severed the personal links between the Emperor and the Dalai Lama. These could not be transformed "into a situation whereby the Tibetan people belonged to the people of the new State", at least without the consent of the Tibetan peoples.

Nevertheless, from the viewpoint of the rights of peoples to self-determination, the Tribunal was not in doubt. The Tibetan people were a "people" for international law purposes. They had been deprived of their right to self-determination. International law required that they be accorded that right. No principle of international law deprived them of the enjoyment of that right. It

was for the Tibetan people to determine whether they would live in some form of association with the PRC or in an entirely separate Tibetan nation State.

The formal decision of the Tribunal followed the style of European Court decisions. It comprised a list of ultimate findings made by the Tribunal. According to the conventions of the Tribunal, dissents by individual members have not so far been permitted. There was, in any case, no such dissent. The Tribunal decision was expressed unanimously on behalf of all members of the Session on Tibet.

The Tribunal attached to its decision a series of recommendations. These included a request that the decision be drawn to the attention of the Secretary General of the United Nations and other relevant international agencies so that urgent attention might be given at least to the complaints of ethnic genocide and dangerous radioactive pollution which could not be proved but were sufficiently serious to warrant further investigation.

Other international initiatives on Tibet

The claim of the people of Tibet to the exercise of their right to self-determination has attracted a great deal of attention in Australia and beyond. In July 1991 a delegation from Australia to the People's Republic of China was permitted to enter Tibet. The delegation's report was tabled in the Australian Federal Parliament on 9 September 1991. See *Report of the Australian Human Rights Delegation to China, September 1991*. Chapter 5 of the report is devoted to findings on Tibet. According to the delegation, whose report was admitted in evidence before the Tribunal in Strasbourg:

"Tibetans unconnected with the government overwhelmingly opposed Chinese control of Tibet, sought independence and the return of the Dalai Lama were unequivocal about lack of religious freedom and civil and political rights and

talked of a lack of justice, education, employment and freedom of expression, as well as restrictions on movement. They asserted that Tibetan culture and religion were gradually being submerged by the sheer weight of Chinese influences."

By resolutions passed in the Senate in December in 1990 and the House of Representatives in 1991, the Australian Parliament endorsed the call for the cessation of practices which deprived the Tibetan people of their fundamental human rights and freedoms. The Parliamentary Resolutions called upon the Chinese Government to enter into "earnest discussions, without preconditions, with the Dalai Lama and his representatives". The Dalai Lama visited Australia in May 1992, conducted numerous large public instructions and was received by the Prime Minister (Mr P Keating).

A second such Australian delegation to China in October 1992 was denied admission to Tibet by the PRC authorities.

The 1991 Australian Delegation's conclusions about Tibet are separately confirmed by reports of human rights bodies, dating back to a report of the International Commission of Jurists (ICJ) in 1959. See ICJ, *The Question of Tibet and the Rule of Law*, Geneva, 1959. More recent reports on the human rights situation in Tibet include those of Amnesty International, *People's Republic of China: Suppression of Tibet 1987-1992*, London, 1992; Asia Watch, *Merciless Repression: Human Rights in Tibet 1990*; Lawasia, *Defying the Dragon: China and Human Rights in Tibet 1991*. As an apparent response to these reports, the People's Republic of China published in September 1992 a White Paper, *Tibet: Its Ownership and Human Rights Situation*. By reference to an account of Tibetan history, this paper asserts established Chinese "ownership" of Tibet. It states that "Tibetan independence brooks no discussion". It accuses the Dalai Lama's "clique" of separatist activities. It condemns the alleged "feudal serfdom" in the old "theocratic" Tibet.

It praises the economic developments and improved living standards achieved under PRC rule. And it asserts scrupulous observance of religious freedom; improvement in public health and protection of the living environment in Tibet under the PRC.

As a sequel to the decision of the Permanent Tribunal of Peoples, a meeting of international lawyers was held in London in January 1993. Australian participants included Professor James Crawford, formerly Dean of the Faculty of Law at the University of Sydney and now Professor of International Law at the University of Cambridge. A team of Australian lawyers participated, including Mr John Dowd QC (Chairman of the Australian Section of the ICJ), Judge Peter Grogan of Sydney and the writer. The conference approved a Statement which reached conclusions somewhat similar to that of the Tribunal. Amongst the novel recommendations made was one that the United Nations Commission on Human Rights should appoint a Special Rapporteur on Tibet as a matter of urgent priority and another calling on the ICJ in Geneva to conduct a new high level mission to Tibet by independent experts of unquestioned integrity. But would they be afforded entry to Tibet by the PRC?