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THE SINO-INDIAN BOUNDARY
QUESTION AND INTERNATIONAL LAW

By
K. KRISHNA RAO

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INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

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K. KRISHNA RAO *

It is proposed to consider in this article the Sino-Indian boundary question from the point of view of international law, starting with a brief statement of the relevant facts.

The Alignment of the Boundary

India's northern frontier with China extends over 2,500 miles from north-west Kashmir to the tripartite junction of India, Burma and China near the Talu Pass. The whole frontier is traditional and well known and in some sectors has been demarcated. In the Western Sector it runs along the watershed formed by the Mustagh, the Karakoram and the Kuen Lun ranges to a point east of longitude 80°. Thereafter, it turns south and runs along the watershed through the Lanak pass and along the Chang-Chenmo range. Cutting across the Pangong Tso and the Spanggur Tso, it runs through the Chang pass and along the Kailash range. It then turns to south-west near Demchok and skirting the Hanle mountains cuts across the Para Chu river south of Chumar. It then follows the watershed between the Ganges and the Sutlej to the trijunction of India, Nepal and China. The boundary of Sikkim and Tibet is also a watershed, while the crest of the Himalayas forms the boundary between Bhutan and Tibet. The north-east frontier of India, about 710 miles long from the eastern limits of Bhutan to a point near the Talu Pass, is the northern watershed of the Brahmaputra, excepting where the Lohit, Dihang, Subansiri and Namjang rivers break through.

China claims some 50,000 square miles of Indian territory on the latter's northern boundary. The area claimed includes a major portion of the Aksai-Chin area in Ladakh, a part of the Chang-Chenmo Valley, the portion near "Khurnak," the Demchok area, the Nilang-Jadhang area in Uttar Pradesh, certain small areas like Bara-Hoti, Sangchamalla and Laphtal (also in Uttar Pradesh) and a major part of what is known as the North-East Frontier Agency (NEFA) east

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of Bhutan.¹ The Chinese justification for their present actions seems essentially to be based on the assertions that the Indian boundary settlement was due to the "British policy of aggression against China's Tibet Region," and further that the Sino-Indian boundary itself has never been formally delimited.² The Indian Government firmly holds, however, that the entire length of the boundary has been defined, either by treaty or by custom or by both, and that until recently successive Chinese Governments have never protested against the exercise of jurisdiction by India up to this boundary.³

In regard to the Chinese allegation of the "British policy of aggression," it is evident, even accepting it at its face value, that this allegation is untenable under international law, especially if it be shown that China has recognised and acquiesced in the present Indian boundary.⁴ Further, the British policy was directed towards bringing under its sway the entire territory of India; these frontier areas were not acquired as separate from India.⁵

Delimitation under International Law

As regards the other assertion, it is a recognised principle of international law that an international boundary need not necessarily be formally marked out. Quite apart from the general consensus of opinion on this point of doctrine,⁶ it has found its classic exposition in Max Huber's Award in the *Palmas Case*. He declared in

¹ Government of India: *Notes, Memoranda and Letters exchanged and Agreements signed between the Governments of India and China*, [White Paper I, 1954—59; White Paper II, September—November 1959; White Paper III, November 1959—March 1960; White Paper IV, March 1960—November 1960 (hereinafter cited as White Paper I, II, III and IV)]. See White Paper II, p. 34, and Appendix II for a map of India's frontier showing the areas (roughly) claimed by China at present.

² White Paper II, pp. 52, 57. It may be interesting to note the different meanings given to the terms "Delimitation" and "Demarcation" by Sir Henry McMahon:

"Delimitation I have taken to comprise the determination of a boundary line by treaty or otherwise, and its definition in written verbal terms; 'Demarcation' to comprise the actual laying down of a boundary line on the ground and its definition by boundary pillars or other similar physical means."

(*International Boundaries*, p. 4). For a confirmation of the currency of these terms, see Boggs, *International Boundaries* (1940), p. 32.

³ White Paper III, p. 85.

⁴ See *infra*, pp. 378, 411-414.

⁵ Sir Olaf Caroe, "The Geography and Ethnics of India's northern frontier" (1960) 126 *Geographical Journal*, 298 *et seq.*

⁶ C. H. Stockton, *Outlines of International Law* (1914), p. 120: "Generally boundary lines are defined either by natural characteristics or follow imaginary astronomical lines. If they are not based upon prescription or immemorial custom they are fixed by treaties." J. G. Starke, *Introduction to International Law*, 1958, p. 151: "To the extent that they (boundaries) are recognised expressly by treaty, or generally acknowledged without express declaration, they constitute part of a State's title to territory." (Italics

that case that the delimitation of territorial sovereignty in space may be achieved :

“either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.”⁷

The normal practice has been to accept long-established boundaries. It was recognised that a long-standing relationship with certain territories *ipso facto* conferred on States a historic title to consolidate. The Permanent Court of International Justice, in its Advisory Opinion regarding the delimitation of the Polish-Czechoslovak frontier, upheld the validity of traditional historic and customary frontiers when it declared that:

“with the exception of certain disputed sectors, this frontier seems indeed to have been adopted by the two States *from the very outset as being a natural outcome of the circumstances. Although there is no express provision recognising this frontier [meaning there is no treaty in regard to this matter] the court has no doubt upon the matter.* The very fact that disputes have arisen between the two States with regard to certain points on this frontier seems hardly explicable except on the assumption that everywhere else the frontier between Galicia and Hungary has been adopted as the frontier between Poland and Czechoslovakia.”⁸

It may further be observed that the boundaries of many Latin-American States today are those of the ancient subdivisions under Spanish and Portuguese domination, their delimitation having been made by the authorities of those European Powers many years ago. When two States exercise their State activities and functions in a way appropriate to the territory in question up to certain points, and refrain from exercising these functions beyond these limits, over a long period of years, their conduct or practice cannot but be interpreted as constituting an implied agreement that the line joining these points represents the customary or traditional boundary between their respective territories. What gives validity to the exercise of such State activities and functions over their respective territories is the general conviction that, under the influence of the historical development, the present condition of things is in conformity with

added.) See also in this connection Guggenheim, *Traité de Droit International Public*, Vol. I, p. 380, and Fauchille, *Traité de Droit International Public*, 1925.

⁷ United Nations, *Reports of International Arbitral Awards*, Vol. II. 829, 888 (hereafter cited as R.I.A.A.).

⁸ P.C.I.J., Series B/No. 8, pp. 20-21 (*italics added*).

international order. The conviction is created by the fact of continuous and undisturbed exercise of sovereignty over the respective territories. As has been stated by the arbitrators in the *Grisbadarna Case* between Norway and Sweden, "It is a settled principle of the law of nations that a state of things which is actually existing and has existed for a long time should be changed as little as possible."⁹

Is demarcation necessary?

Much depends upon the terrain in question; where, as with the Himalayas, the entire boundary is for the most part sparsely inhabited and forms the highest mountain range in the world, demarcation would be both impracticable and redundant.¹⁰

This was affirmed by China herself as early as 1847, when, in reply to a British request for a joint commission to demarcate the Kashmir boundary, a Chinese official said: "respecting the frontiers, I beg to remark that the borders of those territories have been sufficiently fixed so that it will be best to adhere to this ancient arrangement and it will prove far more convenient to abstain from any additional measures for fixing them."¹¹

In the light of what is stated above, neither international practice nor the Chinese practice itself in regard to boundary questions supports the assertion made by the Chinese Government that:

"according to internationally accepted principles, an international boundary signifies a demarcation line up to which neighbouring States exercise their sovereignty over their respective territories, and must be jointly defined by the States concerned."¹²

If this were a principle of international law, a majority of boundaries between States, big and small, would have to be reopened for negotiations concerning their limits.

HISTORICAL ORIGIN OF THE SINO-INDIAN BOUNDARY

As far as the right to exercise sovereignty is concerned, it is apparent that India has, in the first instance, an original title to the territory in question. For well over 3,000 years the Himalayas have universally been regarded as the frontier of India.¹³ This has found expres-

⁹ See Scott, *Hague Court Reports* (1932), Vol. I, p. 121 at p. 130.

¹⁰ *White Paper III*, p. 50.

¹¹ *White Paper II*, p. 36.

¹² *White Paper IV*, p. 9.

¹³ Bharatiya Vidya Bhavan. *The History and Culture of the Indian People*, Vol. I, *The Vedic Age* (1951), pp. 105-106, for the account in the *Vishnu Purana* (circa 1500 B.C.) of India's northern frontiers. See also Radha Kumud Mookerji. *Fundamental Unity of India*, 1951, and K. M. Panikkar. *Geographical Factors in Indian History*, 1959, for a general survey of the role of the Himalayas in Indian life.

sion in various Sanskrit Texts as far back as 1500 B.C., and is a recurring theme in the ancient Hindu literature.¹⁴ Apart from showing that even in those days the people of India were acquainted with the geography of the area in question, these writings are also significant in showing that the Himalayas were regarded as the fount of Indian philosophy and wisdom, i.e., that they were closely integrated in the life of the people of India and did not merely form a peripheral part. The *Vishnu Purana*, the *Kena Upanishad*, the *Mahabharatha* and many other Hindu classics all bear witness to this.¹⁵ It has recently been said that: "for centuries thereafter, the striving of the Indian spirit was directed towards these Himalayan fastnesses. . . . The Himalayan shrines are still the goal of every Hindu pilgrim."¹⁶ Further, in the concepts of Sarvabhoomin¹⁷ and Chakravartin,¹⁸ which formed the core of Indian political thought, the Himalayas formed the northern boundary of Bharat (India).

There is, besides, evidence to show that Indian control extended right up to the Himalayan watershed and in some cases even beyond. This was not merely a transitory phenomenon, but has continued through the ages. Thus the Mauryan empire, towards the end of the fifth century B.C., covered the whole of northern India, even including Afghanistan. The Asokan Empire at the beginning of the Christian era, as evidenced by the distribution of Asoka's inscriptions,¹⁹ the Kushan Empire and the Guptan Empire,²⁰ all extended to the present Indian boundary and in some cases, as with the Kushans, beyond it. The Mandasor pillar inscription states that the authority of Yashodavarman, King of Malwa (an Indian State, circa A.D. 530), extended to the Himalayas in the north, the Brahmaputra in the east, the Mahendra mountains in the south and the ocean in the west. At a banquet organised by Yashodavarman for Hieun Tsiang, the famous Chinese pilgrim, one of the vassal kings present was the King of Kamarupa, a Kingdom lying on the north-east frontier of

¹⁴ *White Paper II*, p. 127. In the ancient Sanskrit works, e.g., *Raghuvamsa* and *Mudrarakshasa* (belonging to the Gupta period) the Himalayas were shown as being under the rule of Hindu kings.

¹⁵ *Vishnu Purana*, II, 2, 1: See Bharatiya Vidya Bhavan, *op. cit.* n. 13, and *White Paper II*, pp. 125-126, for the references to other Sanskrit texts

¹⁶ *White Paper II*, p. 125.

¹⁷ K. P. Jayaswal, *Hindu Policy* (1955), pp. 345-348.

¹⁸ *Ibid.* Sarvabhoomin (circa 700 B.C.) meant the territory lying within the natural frontiers and *Sarvbhauma* was one who ruled over it. *Chakravartin* (circa 500 B.C.) meant sovereignty over the land ranging from the Himalayas to Cape Comorin. See also Kautilya's *Arthashastra* (trans. R. Shama Sastry, 1915), Book IX, Chap. 1, p. 338.

¹⁹ *The History and Culture of the Indian People*, *op. cit.*, Vol. II (*The Age of Imperial Unity*) p. 77.

²⁰ Cf. *White Paper II*, p. 128. A detailed account of the extent and range of Indian control in these areas at this period may be had in *White Paper II*, p. 125 *et seq.* Inscriptions, numismatic and philological evidence, all confirm the reality of Indian rule in these areas.

Assam. As seen from the *Mahabharatha* and the *Ramayana*, Kamarupa, in the north-east corner of India, covered the whole of modern Assam and extended from the sea right up to and including the entire range of Assam mountains, and also the eastern part of Nepal.²¹

Hieun Tsiang himself gives first-hand evidence that the present day Kashmir, Ladakh, Nepal and the major part of Assam were ruled by Indian kings. He states, for example, that in Kamarupa, the ruler was a Hindu, Bhaskaravarman, who claimed to be a Kshatriya, a member of a Hindu caste.²²

It must be emphasised that, though these frontier areas frequently changed hands, it was invariably between Indian rulers. The invasion of India was from the north-west, not from the north-east.

During the period of Muslim rule in India, the Mughal rulers consolidated their authority right up to the Himalayas.²³ As far as Ladakh is concerned, it has traditionally been regarded as part of India, even though it had been for some time subject to Tibetan suzerainty. As L. Petech says, ". . . the historical development of Ladakh was indissolubly connected with the destiny of the neighbouring Indian regions while on the contrary the political contacts with Central Tibet were always rare and occasional, in spite of the identity of language and religion."²⁴

The original population of Ladakh was Dardi (Indo-Iranic). With the extension of the Tibetan contact to Ladakh in the eighth century, a Tibetan strain was also introduced.²⁵ The earliest glimpse of Ladakh, apart from that found in the Sanskrit Texts, is when it was part of the Kushan Empire.²⁶ Till the eighth

²¹ *White Paper II*, p. 128; B. K. Barua, *A Cultural History of Assam*, 1951, Vol. I, p. 7 *et seq.* Rai K. L. Barua Bahadur, *Early History of Kamarupa* (Shillong, 1933) I. Innumerable references can be found in Hindu epics to ancient Assam and Kamarupa. On this, see generally, Radha Kumud Mookerji, *Fundamental Unity of India*, 1951.

²² For Hieun Tsiang's account of Kashmir, Ladakh, Nepal and Assam, cf. *White Paper II*, pp. 128-129 and Watters, *On Ouan-Chawang's Travels in India*, 2 Vols. As to Kamarupa, cf. *ibid.*, Vol. II, p. 187. Hieun Tsiang, who travelled in Kamarupa, circa A.D. 643, describes it as being 1,667 miles in circumference, and from the context it is obvious that it extends right up to the present-day McMahon Line. See also the Kalika Purana and Yogini Tantra, cited in B. K. Barua, *A Cultural History of Assam*, Vol. I, 1951, p. 9 *et seq.*, wherein a detailed account is given of Kamarupa and Bhutan and which is borne out by Hieun Tsiang's account. B. Kakati, in Barua, *op. cit.*, at p. 205, shows that the present-day Tezpur was the seat of King Harjara and his Dynasty; cf. also Barua, *op. cit.*, pp. 15-68, for an account of the political history and administration of Assam.

²³ See S. N. Bhattacharya, *History of Moghul North East Frontier Policy*, 1920.

²⁴ L. Petech, *A Study on the Chronicals of Tibet* (1939), p. 4.

²⁵ See Petech, *op. cit.*, p. 99. See further the statement that Ladakhis do not have the slightest touch of Mongoloid features, *ibid.*, p. 99, n. 6.

²⁶ See Sten Konow (ed.) *Corpus Inscriptionum Indicarum, The Kharosthi Inscriptions*, 1929, Vol. II, Part I, pp. 79-81, cited in Petech, *op. cit.*; p. 100.

century there is no evidence to show that Tibetans were ever in contact with Ladakh, and indeed, in view of the fact that Guge and Baltistan were conquered only in A.D. 707, an earlier date is highly improbable. However, Indian control over Ladakh in this period was reaffirmed, as late as A.D. 733, by Lalitaditya Muktapida. It is significant that Baltistan and Skardo, adjacent to Ladakh, were under Hindu rule in A.D. 737 (i.e., under King Vijayavarman). Even after Tibetan influence reached Ladakh, the latter never constituted an integral part of Tibet.²⁷ After the tenth century A.D. Tibet's influence declined.²⁸ Kashmiri influences were again to be found in the twelfth century A.D. Tributes were sent by Tibet to Kashmir in the 15th century and periodical campaigns were waged by Kashmiri kings right across Ladakh.²⁹

Far from being Tibetanised, the Ladakhi rulers were proud of their Indian descent and bore the name *Sakya* for at least the last three centuries of their rule, and on this descent, they based their sovereignty by Divine Right. Several inscriptions refer in revered terms to the King, Bu-ram-sin-pa³⁰ (Ikshavaku) as the first ancestor of the Ladakhi kings. It is significant that the most ancient of the Tibet chronicles with regard to Ladakh draw upon Hindu sources.³¹ Buddhism was introduced to Ladakh from Kashmir before the Tibetans came.³²

From 1580 onwards, Ladakh was subject to the Skardo rulers,³³ and, with the commencement of Mughal rule in Skardo (1637-38), Ladakh too came under the Mughal Empire.³⁴ The Gyalpo of Ladakh openly took to Islam at the insistence of Aurangzeb. The *Khutba* was struck in the name of the Mughal Emperor. The only Ladakhi coins recovered so far are of the Mughal type, struck in

²⁷ Thomas, *Tibetan Literary Texts and Documents concerning Chinese Turkestan* (1935), Vol. I, p. 282.

²⁸ This Tibetan control was only one of suzerainty and this too elapsed. cf. Petech, *op. cit.*, p. 103; see *Encyclopaedia Britannica* (1957), Vol XIII, p. 584.

²⁹ Petech, *op. cit.*, p. 116 *et seq.*

³⁰ A. H. Francke, *First and Second Collections of Tibetan Historical Inscriptions on rock and stone from Western Tibet, 1906-1907*, Nos. 65, 71, 79, 117, cited in Petech, *op. cit.*, p. 18, n. 1.

³¹ Petech, *op. cit.*, pp. 9-18.

³² *Annual Report of the Archaeological Survey of India* (1905-06), p. 166.

³³ See Petech, *op. cit.*, p. 116 *et seq.*; A. H. Francke, "Rock Inscriptions at Mulhe" (1906) *Indian Antiquary*, pp. 79-80. A Balti Minister, Hussain Mir, lived in the Ladakh Court on behalf of his Sovereign. Ali Mir, circa A.D. 1591-1603, the Ladakhi King being Jam-Dhyans-rnam-rgyal.

³⁴ Petech, *op. cit.*, p. 135. This was reaffirmed in 1665 when Aurangzeb himself went to Kashmir and received a Ladakhi Mission, which repeated the pledge of fealty and tribute which had been made by Sen-ge-rnam-rgyal after the battle of Kharbu.

Kashmir for Ladakh.⁵⁵ From 1842 onwards Ladakh has been an integral part of Kashmir.

After 1846, a number of exploration and survey parties were sent to this region to ascertain the customary frontier, including those under Johnson in 1865, and under Frederick Drew, the then Governor of Ladakh, in 1869. Several other survey parties visited the frontier in the 19th century, and on the basis of their determination the frontier alignment was depicted in successive Indian maps.⁵⁶ An extensive geological survey was made by the Kashmir and Indian authorities in the 20th century. Officials of the Kashmir Government and Indian traders and hunters move freely and openly in this area.⁵⁷

This extension of official activities and control was also effected in respect of China's border with the Indian States of Punjab, Himachal Pradesh and Uttar Pradesh. In the course of the nineteenth century the British had brought these areas completely under their control. Thus Oudh, which had its boundary on the central sector of the Himalayan range, was brought completely under British control by 1856, Garhwal and the neighbouring hill States by 1816,⁵⁸ and the Punjab was annexed in 1849.

The Trigonometrical Survey of India had itself conducted surveys in this area in 1879, and had issued authoritative maps on that basis. Neelang, which adjoins the boundary between India and Tibet in this region, and to which China now lays claim, had

⁵⁵ See *J.R.A.S.* 1943, p. 290.

⁵⁶ For the maps, see, Government of India, *Atlas of the Northern Frontier of India*, 1960, maps 10 to 17.

⁵⁷ See *White Paper II*, pp. 36-37. In fact even a comprehensive tourist guide to this area has been published in India from the turn of the 19th century; see—*Tourist Guide to Kashmir, Skardo etc.* (Lahore, 12th ed., 1920). For Ladakh, see pp. 94, 123—137, where specific details of altitudes, longitudes, route marches, etc., are given.

⁵⁸ Aitchison, *op. cit.*, Vol. XII, p. 2, *et seq.*, p. 21 *et seq.* See *Archaeological Survey Report*, 1907-08, p. 260 *et seq.*, for a discussion on the historical documents of Kulu. See also J. Hutchison and J. Ph. Vogel, *History of the Punjab Hill States*, 1933, Vol. II, No. 2, p. 145, wherein it is shown that Spiti (near Kashmir) was ruled by a Hindu Dynasty of Rajas bearing the Surname Sena. The Parasuram Temple at Nirmand, in Saraj, has a copper plate deed granted by Raja Samudra Sena in the 7th century, circa A.D. 630. *ibid.*, Vol. II, No. 1, pp. 5-6. Spiti was under Ladakh from A.D. 925 onwards. After Ladakh's conquest by the Dogras in 1846, the whole of the Alpine Punjab from the Ravi to the Indus, including Ladakh and Spiti, was transferred in perpetual sovereignty to Raja Gulab Singh, but was transferred again in the same year to the British. See also Francke, *Antiquities of Indian Tibet*, 1907, Vol. I, p. 7; *ibid.*, p. 24, as regards the status of Bushahr State, and Francke, *History of Western Tibet*, 1907, p. 108. While at the time of writing it has not been possible to make full use of the *Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question* (hereinafter cited as *Report*) (Ministry of External Affairs, New Delhi, 1961) the evidence furnished by the Indian side strengthens the above-mentioned points, e.g., see pp. 71—100. On NEFA, see p. 103.

been incorporated into Bushahr State, now part of Himachal Pradesh (India), as far back as A.D. 1667. In 1926, at a meeting of a Boundary Commission of Tibetan, British and local representatives of Tehri, considerable evidence was adduced by the latter in their favour. This included evidence of ownership rights in land, and proof of construction of roads and buildings and collection of land revenues for centuries. The Tibetans, on the other hand, could only demonstrate that their agents had occasionally collected taxes on trade with Tibet.³⁹ This frontier territory has constituted an integral part of India since the incorporation of Tehri in Uttar Pradesh in 1948. Nor was this area under Tibetan control in the preceding years. The Chinese betray lack of knowledge of even the location and extent of the areas they are claiming. They have gone as far as to ask India for details of the latitude and longitude of areas over which they claim to exercise sovereignty.⁴⁰

As regards Assam, the original Hindu Kings of the Varna, Salasthambha and Pala dynasties were slowly displaced by the Ahoms, a branch of the Burmese Shan tribe, in the thirteenth century. But these Ahoms were assimilated into the Hindu fold, accepting its customs and religions and taking Hindu names.⁴¹

The Ahom Rajas entered into agreements with the British in the eighteenth century. By 1842 the entire province of Assam had been completely brought under British rule.⁴² With regard to the hill tribes who occupied the border areas adjoining Tibet, the British policy was to establish political control over, and gradually to extend administration in, those areas.⁴³ Various engagements were entered into with these tribes to further this policy,⁴⁴ culminating in 1912 with the creation of two frontier tracts, the Sadiya and Balipara tracts, each of which was under a Political Officer.⁴⁵ Correspondingly, administration was also effectively extended to these areas which had previously been under the overall political control of the British Indian authorities.

³⁹ *White Paper II*, pp. 48-51; as to the Tibetan "taxes," see *infra*. p. 338, n. 64

⁴⁰ *White Paper II*, *ibid.*

⁴¹ See *White Paper II*, pp. 129-130, R. M. Lahiri, *The Annexation of Assam*, 1954. Alexander Mackenzie. *History of the Relations of the Government with the Hill Tribes of the North East Frontier of Bengal*, 1884, p. 2.

⁴² See E. Gait, *A History of Assam*, 1926, pp. 296-311.

⁴³ *Ibid.*, pp. 312-313, 321-322.

⁴⁴ Aitchison, *op. cit.*, pp. 119-122, 142-165.

⁴⁵ Gait, *ibid.*

This extension of administration was effectively pursued, and further administrative divisions were formed out of the two frontier tracts, including the Tirap frontier tract, formed out of the Sadiya frontier tract in 1942, and the Abhor and Mishmi Hills, formed out of the Balipara tract. In 1954 the Frontier divisions were re-named as Kameng, Subansiri, Siang, Lohit, Tirap and Tuensang, and in 1957 Tuensang was united with the Naga Hills District, the joint area now being known as the Naga Hills and Tuensang area. Specific provision is also made for the tribal areas in the Indian Constitution (6th Schedule). The North East Frontier Agency is constitutionally part of Assam.⁴⁶

THE REAFFIRMATION OF THE CUSTOMARY BOUNDARY IN TREATIES

The boundary between Ladakh and Tibet and the north-eastern boundary between India and Tibet are both covered by treaty provisions. The central sector of the Sino-Indian boundary, i.e., between Punjab, Himachal Pradesh and Uttar Pradesh in India and Tibet, was also implicitly reaffirmed in the 1954 agreement between India and China.⁴⁷

⁴⁶ See D. D. Basu, *Commentary on the Constitution of India*, 1952, pp. 888-900, wherein the constitutional provisions relating to the North-East Frontier area are given.

P. Rubin's statement, "The Sino-Indian Border Disputes" (1960) 9 I.C.L.Q. 96, at 98), that on the north-eastern frontier of India there is a stretch 100 miles wide over which the sovereignty of India or China has not yet been determined, seems to be purely gratuitous. Typical of his reasoning is this misleading statement (p. 106) "...strong Tibetan ties seem to have had an influence in the drawing of the McMahon Line and resulted in its departing from the watershed to include *greater areas* on the Tibetan side." (Italics added.) This would lead the layman to totally misleading conclusions. The reference he gives to *White Paper II*, p. 51, in this connection, only shows that certain specific deviations from the watershed were made in the drawing of the McMahon Line, which itself goes to show the overall validity of the frontier (as also the mutual understanding on which the frontier was drawn up). These areas could certainly not be considered as "greater areas," considering the length of the frontier, and were only concessions made towards Tibetan religious sentiments. Similarly, the Tibetan Government recognised that Hindus attach special significance to Kailash and Lake Manasarovar, and special arrangements are made for the Hindu pilgrims who flock to this place every year. Owing, however, to the relative unimportance of Migytun and other areas to India, these were handed over to the Tibetan authorities. It is also stated in the reference that Migytun is a decaying settlement of six huts and a monastic inn with very little land attached. Mr. Rubin's account of the facts stops with 1921. It is interesting to note that he ignores concrete developments (which he dismisses as "insubstantial assertions of right after 1911") such as the active work done by the Government of India in recent years in openly expanding the responsibilities it had long assumed in this area, undertaking measures for the speedy development of these regions, and provisions thereof in successive five-year plans, and in working out a specific programme for tribal uplift. See Reid, *op. cit.*, and V. Elwin, *A Philosophy for NEFA*, 1959. Also see generally on the whole question, *Report*. A comparison of the evidences furnished by the two sides reinforces the conclusion arrived at above.

⁴⁷ *White Paper I*, p. 98; and on this see *White Paper III*, pp. 91-92.

The Ladakh Sector

As pointed out above, Ladakh has from the earliest times been associated with India, and, from 1580 onwards, was subject to Skardo suzerainty.⁴⁸ The frontier between Ladakh and Tibet has been covered by treaty provisions since 1684, i.e., since the Peace Treaty signed at Tingmosgang after a war between Ladakh and Tibet, in which the Moghuls came to the aid of Ladakh. To quote Petech, writing in 1939, "the border then set stayed unchanged even after the Dogra conquests. The territorial status settled at Tingmosgang has lasted till this day."⁴⁹ Ladakh, to the east of this frontier, constituted a province of Kashmir. It is worth noting that the King of Ladakh in 1683, bDe-legs-rnam-rgyal, was known as Aqabat Mahumud Khan (the name conferred by the Moghuls) which name was borne by all later Kings of Ladakh.⁵⁰ In fact, in 1834, Ts'e-dpal-rnam-rgyal was likewise known by this name.⁵¹

Cunningham, whom Mr. Chou En-lai cites with approval in a different context, states explicitly that the eastern boundary of Ladakh "is well-defined by piles of stones."⁵² Further, this frontier had been traditionally recognised in the seventeenth century itself, as the Tibetan Chronicles indicate.⁵³

In 1841, Gulab Singh, Raja of Jammu, dispatched an army (under Zorawar Singh), which marched up the Indus valley and took possession of the provinces of Rudok and Garo in Tibet. The Tibetans turned to the Chinese who sent an army to their assistance. The two armies met in December in the neighbourhood of the Manasarovar Lake. After an engagement which lasted three days, the forces of Zorawar Singh were routed. The Chinese advanced into Ladakh and laid seige to Leh, but were compelled to retreat to Rudok. The treaty of 1842 was then signed, under which the tradi-

⁴⁸ See *supra*, pp. 380-382.

⁴⁹ Petech, *op. cit.*, pp. 155-158. He also mentions the extent of the territories of Ladakh, based on original Ladakhi and Persian sources. See also the *Encyclopaedia Britannica* (1957), Vol. XIII, p. 584 and *White Paper II*, p. 36. By this treaty, the frontier ran through Demchok. See also in this connection, Z. Ahmed, "The Ancient Frontier of Ladakh" (1960), *The World Today* (July), p. 313 *et seq.*

⁵⁰ Petech, *op. cit.*, p. 159.

⁵¹ *Ibid.*

⁵² Cunningham, *Ladak*, 1854, p. 355.

⁵³ *White Paper II*, pp. 35-36; Petech, *op. cit.* Even the Ladakhi negotiator with the Tibetans in A.D. 1683 had the name, Sakya-rgya-mts'o, the prefix indicating Indian descent. See also Francke, *Antiquities of Indian Tibet*, 1907, Vols. I & II, especially Vol. I, p. 138 *et seq.* Ahmed, *op. cit.*, at p. 316, points out that when Father Desideri, S.J. passed in 1715 from Ladakh to Tibet, the town of Tresciykhang (Tashigong) marked the frontier between the two countries.

tional boundary was reaffirmed.⁵⁴ The parties to the treaties were on the one hand, Shri Khalsaji and Shri Maharaj Sahu Bahadur Raja Gulab Singh, and on the other hand the Emperor of China and the Lama Guru of Lhasa. The boundary was not explicitly defined as it was stated to be "in accordance with old custom."

Francke, who makes a comparative assessment of the Kashmiri, Ladakhi and Tibetan accounts of these campaigns, shows that all the three accounts concur on the reiteration of the customary frontier in the 1842 Treaty.⁵⁵

"Diwan Harichand and Vazir Ratanu succeeded in again conquering the whole of Ladakh [i.e., after the reverses at *Manasarovar*] . . . The strong position of the Tibetans was shortly afterwards turned; and the Lhasan Vazir was glad to be permitted to retire on the single condition that the old boundary . . . be re-established."⁵⁶

The accounts of Cunningham and Francke bear witness to the actuality and extent of Kashmiri control over Ladakh. Thus, Ladakh was divided into five districts over which ruled Thanadhars appointed by Gulab Singh. The districts were Leh, Zanskar, Karguil, Irar and Nubra. The country was held by a few garrisons stationed in different forts erected by Zorawar Singh and his successors. An army was to be stationed by the Ladakh ruler at the behest of Kashmir. A certain portion of the revenues of Ladakh was to be retained for the upkeep of the country, the rest being sent to Kashmir. A Kashmiri minister has been resident in Ladakh from 1846 onwards.

This boundary was again reaffirmed in 1852 in an agreement between the two Garpons, or provincial Governors appointed by the Dalai Lama, and the representatives of the Maharaja of Kashmir. The agreement provided amongst other things, "that the boundary between Ladakh and Tibet will remain the same as before."⁵⁷

It is the present contention of the Government of China that this treaty does not bind them because: (a) China had not sent a representative to participate in the negotiations concerning the conclusion of the 1842 Treaty, nor had she ratified it; (b) the treaty in any case did not define or locate the Ladakh-Tibet boundary and only provided in general terms that Ladakh and Tibet would abide

⁵⁴ Aitchison, *op. cit.*, Vol. XIV, p. 15.

⁵⁵ Francke, *op. cit.*, Vol. I, p. 127. Also *loc. cit.* in n. 38, *supra*.

⁵⁶ Cunningham, *op. cit.*, p. 261.

⁵⁷ K. M. Panikkar, *The Founding of the Kashmir State*, 1953, pp. 146-147.

by each others' frontiers; (c) Sinkiang's consent to the Treaty was not obtained.⁵⁸

It is submitted that none of these arguments is valid. At the outset, it must be remembered that it was due to the assistance of Chinese arms that Tibet was able to repel Zorawar Singh and to conclude the treaty of 1842. The provisions of the treaty make it clear that China was a party.⁵⁹ Even the Tibetan version concurs on this point. The preamble of the treaty clearly mentions the Emperor of China as a party. In such a case no ratification was necessary, nor did the treaty provide for ratification. As the International Court of Justice stated in the *Case of Right of Passage over Indian territory*:

"it is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the 18th century, in the conditions then prevailing in the Indian Peninsula should not be judged upon the basis of practices and procedures, which have since developed only gradually."⁶⁰

Even assuming that China was not a party, she has acquiesced in the provisions of the treaty by her failure at any time to declare that the treaty was invalid, even after its publication (e.g., in all the successive editions of Aitchison's *Treaty Series*). Further evidence of the Chinese acceptance is provided by the fact that the other provisions of the treaty, regarding exchange of goods, were in operation up to 1946 without any hindrance from the Chinese Government.

The question of Sinkiang's consent to the conclusion of the 1842 treaty does not arise. It is strange that the Government of China, while on the one hand holding that Tibet had not the right to conclude treaties, should on the other hand hold that a treaty in which they were mentioned as a party and in which they had in any event acquiesced, was invalid on the ground that Sinkiang was not consulted.

In any case, Sinkiang did not become a province of China till 1884 and China therefore could not claim any right in 1842 in regard to Sinkiang. Even if it were true that the territory of Sinkiang were involved at all, China would and should have raised the question at the time of negotiating the treaty. On the other hand, in view of the fact that China was also a party to the 1842 treaty, she is estopped from now advancing any alleged claim of Sinkiang. Besides, there is enough evidence to show that Sinkiang never extended south of the Kuen Lun mountains.

⁵⁸ *White Paper III*, pp. 61-62; see also *ibid.*, pp. 86-89.

⁵⁹ Aitchison, *op. cit.*

⁶⁰ *I.C.J. Reports (1960)*, p. 6 at p. 37.

A British proposal in 1899 for delimiting the northern frontier between Ladakh and Sinkiang (this did not cover the eastern frontier of Ladakh with Tibet, which was already recognised) clearly mentioned the fact that the northern boundary of Ladakh ran along the Kuen Lun range to a point east of longitude 80° east where it met the eastern boundary of Ladakh. China never objected to this definition; the proposal was not implemented, solely because she did not consider necessary a formal definition of the traditional boundary in this area.⁶¹

As regards the contention that the treaty did not define the boundary, it is submitted, in the light of the history of this boundary, that it was sufficiently known and accepted for 150 years prior to the 1842 treaty. This had been accepted by the Chinese themselves when they stated that it was unnecessary to have a fresh definition of the boundary, as the British suggested, because the boundary was well known.⁶² Further, the map showing the route taken by officials of the Indian Survey Office in 1865⁶³ shows that the customary boundary reaffirmed in treaties was a well-known one. The acquiescence of China for over a century in the present boundary, as also in the publication of a series of official Indian maps showing the boundary⁶⁴ as it is today, cannot but be regarded as conclusive evidence of the latter's validity. There are, besides, acts of administration and rule exercised openly and continually by the Indian authorities in this area for over a century without any protest from China.

⁶¹ *White Paper III*, p. 87 and also see Government of India, *Atlas of the Northern Frontier* (hereinafter cited as *Atlas*), Map 10, wherein a map of the western region of China appended to *Hsi-yu-tu-chih* (compiled in A.D. 1762 on the orders of Emperor Chien-Lung) is shown. See further, Letter of the Prime Minister of India, September 26, 1959, *White Paper II*, p. 34 at pp. 36-37.

⁶² See *supra*, p. 378.

⁶³ See *Atlas*, Map 13.

⁶⁴ On this, see *Atlas*, maps 1 and 2 and also 14 to 17. Mr. Rubin's accounts of Ladakh, *op. cit.*, pp. 102-104, 120-126 will not hold water for any one who knows this place and its history. In the first instance, he appears to be a little confused between the Sikhs and the Dogras. Gulab Singh, a Dogra, (Hindu) and founder of the Kashmiri dynasty, was a dependant of Ranjit Singh's Sikh Government. He was not a Sikh. Although Mr. Rubin professes to present a factual analysis, he does not seem to have referred to the basic sources, i.e., the works of Francke and Cunningham, and also has not taken into account the Treaty of Tingmosgang which bears materially upon the customary frontier, reaffirmed in the 1842 Treaty. Adopting a fanciful explanation where a simpler one would serve, he reads into the 1852 agreement an acknowledgement of Ladakh's "buffer status." As the above account has shown, the political control of Gulab Singh and his successors was firmly established from 1842 onwards. Mr. Rubin construes the religious offering to Lhasa as political subordination. However as Cunningham said, the presents sent annually to Lhasa by the Gyalpo (of Ladakh) were only religious offerings, not an extorted tribute (*op. cit.*, p. 261 et seq.). And on June 13, 1914, Sun

The central sector: the boundary between Punjab, Himachal Pradesh, Uttar Pradesh and Tibet

The Chinese Government have recently stated that the boundary in this area "for the most part conforms to reality."⁶⁵ However, they make claims to certain areas in this sector, i.e., the Spiti area, the Shipki pass, Nilang-Jadhang, Barahoti, Sangchamalla and Lapthal. These areas have been traditionally under Indian control, and this has been confirmed by Article 4 of the 1954 Sino-Indian Agreement, which specified six passes in the area. The *travaux préparatoires* confirm the obvious meaning of the text that these passes were recognised as being on the frontier.⁶⁶

Bhutan

By a Treaty of 1774,⁶⁷ between the Deb Raja of Bhutan and the East India Company, the former agreed to pay the Company an annual tribute. British influence in Bhutan was steadily extended in the course of the nineteenth century, and by 1910 this process was completed.⁶⁸ In that year a treaty was signed⁶⁹ by which the external relations of Bhutan were placed in the hands of the British. In 1949, a fresh Treaty was concluded between India and Bhutan

Pao-Chi, the Chinese Minister for Foreign Affairs, informed the British Minister that "the Tibetans affected to think that they had rights over all places inhabited by Lamaists, but this was not so. The Lamas might have ecclesiastical authority but this did not necessarily mean that these places belonged to Tibet," *White Paper III*, p. 93. The relation of the Ladakhi Lamaists to Lhasa approximates to that of the Roman Catholic to the Vatican; but no one suggests that the Vatican can make territorial claims on Italy. The annual trade missions, which he lists prominently, (impliedly supporting the present Chinese claims) without giving any details, were seasonal barter missions by which Tibetan wool (from which derives the famous Kashmir wool) was exchanged for Indian products. This was a purely commercial transaction. The fact is that Ladakhis had a monopoly of the wool trade. Basing himself upon these vague premises (note the frequent use of the words "apparently," "implying some degree") he holds that China's claims are not invalid. Discussing the 1852 agreement, he relegates to an obscure footnote the statement that "no doubt there are later examples of concrete Kashmiri control in Ladakh" (p. 123, n. 99). **One would have thought that for what purports to be a factual and objective analysis, the examination of manifestations of this control and acquiescence in it or otherwise, by the Tibetans and the Chinese, would have been the main question, not to mention the treaty provisions.** Cf. also *infra*, pp. 413-414 et seq.

⁶⁵ *White Paper III*, p. 72.

⁶⁶ *White Paper I*, p. 99; *White Paper II*, p. 37. India has built a road right up to the Shipki pass, the first of the six border passes and has been maintaining and patrolling the area for many years. After the conclusion of the 1954 Agreement the words "Hindustan-Tibet" were engraved on a rock flanking the pass; cf. *White Paper II*, p. 48.

⁶⁷ Aitchison, *op. cit.*, pp. 80, 89-90.

⁶⁸ *Ibid.*, pp. 86-89. During the visit of the Prince of Wales in 1905-1906, the representative of the Maharaja of Bhutan paid tribute of loyalty.

⁶⁹ *Ibid.*, pp. 100-101.

by which the internal autonomy of Bhutan was recognised.⁷⁰ At the same time Bhutan agreed to be guided by India in her external relations. China had at no time protested against either of these treaties, and has adhered to the traditional boundary between herself and Bhutan. It is difficult to see any grounds on which she can now contest the validity of India's special relations with Bhutan.

Sikkim

The status of Sikkim as a British protectorate was explicitly defined in the Treaty of 1890⁷¹ between China and Great Britain. China also undertook to respect the boundary between Tibet and Sikkim, which has been well established and formally demarcated. These provisions were confirmed by Tibet in the Convention of 1904.⁷² China is thus bound by these Treaties and cannot raise any objection to the position in Sikkim of India, as the successor to Great Britain. As far as China is concerned, "the proper relations between Sikkim and India"⁷³ are laid down in the Treaty of 1890. As between Sikkim and India an agreement was reached in 1950,⁷⁴ which in essence reaffirmed the fact that Sikkim was an Indian protectorate.

The North-east Frontier of India: Validity of the McMahon Line

The central question here relates to the validity of treaties concluded independently by Tibet with Great Britain in 1914. It is well to remember, in this connection, that this is not affected by any subsequent change in the treaty-making capacity of Tibet.

It will be convenient to start with an examination of the substantive meaning of suzerainty. The essence of this concept is its vagueness. It is a survival from the days of feudalism, and today it is practically obsolete. However, it was recognised that a vassal could contract obligations independent of the suzerain. Naples, while nominally under the suzerainty of the Pope, made war and peace like any other independent entity⁷⁵ (*viz.*, her occupation by Napoleon, and her treaty with Austria in 1814, all before the

⁷⁰ Signed on August 8, 1949. Lok Sabha Secretariat, *Foreign Policy of India: Text of Documents*, 1959, pp. 15-20.

⁷¹ Cf. Aitchison, Vol. XII, p. 66; For an account of the connections of Sikkim with India, cf. W. McGovern, *To Lhasa in Disguise*, 1924, pp. 30-41; F. J. Gould, *The Jewel in the Lotus*, 1957, pp. 161-182.

⁷² Aitchison, *op. cit.*, Vol. XIV, p. 23.

⁷³ *White Paper II*, p. 30.

⁷⁴ Lok Sabha Secretariat, *op. cit.*, n. 70, pp. 35-40. The agreement was signed on December 5, 1950.

⁷⁵ *Encyclopaedia Britannica*, 1957, Vol. XIV, p. 81 at p. 83.

termination, in 1818, of the suzerainty of the Pope). Vattel⁷⁶ and Bluntschli⁷⁷ agree upon this capacity of the vassal State, and the latter points out that the suzerain-vassal relationship is inherently transitional; the vassal State frequently develops into a fully independent State. According to W. H. H. Kelke⁷⁸ and G. Scelle,⁷⁹ in the modern conception of suzerainty, the suzerain has no rights over the vassal save those laid down in the treaty establishing this relation. Thus, Scelle states:

“Exactly what vassalage is, and how it affects sovereignty or independence, is difficult to state *a priori*. . . .

“The inability to decide definitely in this matter is chiefly the result of an anachronism. The attempt was made to transfer to modern international relations a notion of feudal law which does not harmonise with the present idea of a State; it could only survive as a skeleton stripped of substance.”⁸⁰

After pointing out that vassalage implies personal union and is not hereditary, he goes on to state that in the modern conception:

“On the contrary, if there is question of a vassal State, the armies are separate, and there may even be occasions for a regular war between the vassal State and the suzerain State; hence it is not possible in this case to conceive of any other ‘union’ of arms than an alliance, that is to say *reciprocal duties* based upon treaty, and not *pre-existing rights*.”⁸¹

This recognition that suzerainty has as many meanings as there are suzerain-vassal relationships is also confirmed by the *Encyclopaedia Britannica*, which states, “in modern times, the term has come to be used as descriptive of relations, ill defined and vague, which exist between powerful and weak States, its very indefiniteness being its recommendation.”⁸² It goes on to point out that definitions of suzerainty are of little use and substantially concurs with Hackworth who says: “the extent of the sovereignty retained by a vassal or a semi-sovereign State is not determined by general rules of international law. It is ascertained in each case by the

⁷⁶ Vattel, *The Law of Nations* (Classics of International Law Series, 1916, Trans. by C. G. Fenwick), Vol. III, pp. 11-12.

⁷⁷ Cited in W. H. H. Kelke, “Feudal Suzerains and Modern Suzerainty,” (1896) L.Q.R. 215 at 222.

⁷⁸ Kelke, *op. cit.*, at p. 227.

⁷⁹ G. Scelle, “Studies on the Eastern Question” (1911) 5 Am.J.Int.L. 144, 394 and 680; (1912) 6 Am.J.Int.L. 86 and 659.

⁸⁰ G. Scelle, “Studies on the Eastern Question” (1911) 5 Am.J.Int.L. 144, at 161.

⁸¹ G. Scelle, “Studies on the Eastern Question” (1911) 5 Am.J.Int.L. 144, at 162.

⁸² *Encyclopaedia Britannica*, 1957, Vol. XXI, pp. 626—667.

facts of the particular case.”⁸³ This is confirmed in practice, as can be seen from the relations of Turkey with its vassal States prior to the First World War. Thus Egypt, while nominally under the suzerainty of Turkey, remained neutral while the latter was at war⁸⁴; and we have the anomalous situation of Great Britain’s ambassador warning the Sublime Porte against an attack on Egypt.⁸⁵

The example of Bulgaria is even more instructive. Though nominally under Turkish suzerainty, Bulgaria had her own diplomatic agents in European capitals and had representatives of other countries in Sofia.⁸⁶ She entered into various treaties independently of Turkey, viz., with Italy, France, Austria, Great Britain and Germany. In a treaty with Austria (December 9/21, 1896) the latter even acknowledged Bulgaria’s right to conclude a customs union.⁸⁷

In 1904, Bulgaria concluded a treaty of alliance and mutual aid with Serbia, which affirmed the independence of their respective States and the security of their ruling dynasties.⁸⁸ The final arbitrator in disputes was to be either the Tsar or the Permanent Court of Arbitration. There was no reference whatsoever to the Porte. Another treaty (of friendship), concluded at the same time, provided for abolishing frontier passports between the two countries and for the mutual development of civil law. Ratifications were exchanged in Serbia on the 24th April, 1904. It is significant that, though Turkey had nothing to do with these treaties, it was held, on a consideration of the political alliance treaty, that it was “formally valid” though, due to bad political relations which had developed between Bulgaria and Serbia, it remained a dead letter.⁸⁹

⁸³ Hackworth, *A Digest of International Law*, 1940, Vol. I, p. 75; see also the *Encyclopaedia Britannica*, loc. cit.

“Definitions of Suzerainty are of little use. Each instrument in which the word is used must be studied in order to ascertain its significance. Even in feudal times, the suzerainty might be merely nominal, an instance in point being the suzerainty or overlordship of the Papacy over Naples. In some cases it may be said that suzerainty brings no practical advantages and implies no serious obligations.”

Although it goes on to say that there is a presumption against the treaty-making power of a vassal State, it must be pointed out that this is only a presumption, and can be rebutted in appropriate cases.

⁸⁴ Oppenheim, *International Law*, 1955, Vol. 1, p. 192, n. 3. Although the learned editor states in the text that vassal States have no treaty-making power, he points out in the footnotes concrete instances to the contrary. See also J. B. Scott (Ed.), *Diplomatic Documents Relating to the Outbreak of the European War*, Part 11, p. 1127 et seq. for official accounts of Egyptian neutrality.

⁸⁵ Scott, *op. cit.*, p. 1149 et seq.

⁸⁶ G. Scelle, *op. cit.*, (1911) 5 Am.J.Int.L. 680, at 693.

⁸⁷ *Ibid.* p. 696.

⁸⁸ E. C. Helmreich, *The Diplomacy of the Balkan Wars, 1912-1913*, 1938, pp. 3-15.

⁸⁹ E. C. Helmreich, *The Diplomacy of the Balkan Wars, 1912-1913*, 1938, p. 10.

Italy, who gave active encouragement to the conclusion of these treaties, does not seem to have considered the consent of the Porte in any way necessary for their validity.⁹⁰ Even Austria-Hungary, who objected to a proposed *Zollunion* between Serbia and Bulgaria (1905), which proposal sparked off the Pig War between Austria-Hungary and Serbia, does not even seem to have considered the Porte's adherence or otherwise as a relevant factor in contesting the validity of this engagement.⁹¹ Turkey's nominal suzerainty over Bulgaria was evidently held as not excluding Bulgaria's capacity to contract independently international obligations of this far-reaching nature.

Bulgaria also attended the Hague Peace Conferences of 1899 and 1907 and signed and ratified conventions, not all of which were similarly acceded to by Turkey.⁹² These Conventions were of a fundamental law-making character. In 1907, the Porte protested against Bulgaria's signature of the Conventions adopted in this Conference. However, the very same Powers which had accepted Turkey's suzerainty over Bulgaria in the 1878 (Berlin) treaty, brushed aside the Turkish protests,⁹³ and it is not on record that any State or any party to the Hague Conventions has regarded Bulgaria's adherence to these Conventions as invalid.

Further evidence is afforded by the example of Tripoli. "The United States took the position that its treaty of 1805 with Tripoli . . . was valid and binding although it was made with the Regency of Tripoli at a time when Tripoli was semi-independent. There was no indication that Turkey, the suzerain, was in any way consulted."⁹⁴ This view eventually prevailed.

Thus, granting that Great Britain had acknowledged China's suzerainty over Tibet, it is only by an examination of the relevant treaties and political developments leading up to the Simla Conventions that the substantive rights of China over Tibet (if any), recognised by Great Britain in 1914, can be ascertained. Tibet's

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Scelle, *op. cit.*, p. 696 *et seq.* See also J. B. Scott (Ed.) *Reports to the Hague Conferences of 1899 and 1907*, 1917, pp. 20, 175. See also the table of signatures and ratifications given therein.

⁹³ Scelle, *op. cit.* p. 697. In the 1907 Conference, Bulgaria was treated on a par with Persia and Switzerland and was also a member of the Permanent Court of Arbitration.

⁹⁴ Hackworth, *op. cit.*, Vol. V, p. 153. See further, the statement in the Harvard Law School's "Research in International Law—Draft Convention on the Law of Treaties—Comment" (1935) 29 *Am.J.Int.L. (Supplement)* 635, at 709. "No decision of an international tribunal has been found which declares that a treaty is invalid for lack of capacity of a party which had previously placed itself under obligation to another State, agreeing not to enter into such a treaty."

declaration of independence in 1913⁹⁵ (which was *after* the British acknowledgment of Chinese suzerainty) would also bear upon this, as also the continued assertion by Great Britain of a right independently to conclude treaties with Tibet even prior to this declaration.⁹⁶ As H. W. Briggs points out, with regard to the international personality of political entities, foreign offices have not been concerned to push juridical logic to its extreme limits⁹⁷ :

“Nascent States, however indeterminate their status politically or legally, do not exist in a vacuum. Legal and political relations of varying intensity with neighbouring or more distant states are an immediate or inevitable necessity and practice even prior to recognition . . . the practice of states of entering into “unofficial” relations with unrecognised states, of concluding international agreements with them, of respecting their territorial limits, and of respecting their power to govern and establish legal relationships within that territorial domain would seem to be predicated, as Lauterpacht admits, upon the possession by the unrecognised community of a ‘measure of statehood,’ i.e. of international legal personality.”⁹⁸

It is evident, in the light of the above, that the powers which a suzerain exercises over its vassal at one stage may increase, diminish or totally disappear at a later stage.

Another question which arises in this connection is the actual nature of the relationship between China and Tibet. Alexandrowicz holds that this was a personal link between the Manchu Emperor and Tibet, and that, with the fall of the Manchu dynasty in 1911, this relationship was automatically terminated.⁹⁹ This view received the approval of the International Commission of Jurists.¹ In any event, a study of China’s relations with her vassal States shows that in several instances the latter had concluded independent agreements with other entities. As Shuhsi Hsu points out, “it has been the practice of China as suzerain not to interfere with her vassals in their relationship with other nations, . . . so long as she was not called upon.”² Morse also states :

“So far does provincial autonomy go that we shall find, in the course of this history, that before, and for many years after.

⁹⁵ International Commission of Jurists, *The Question of Tibet and the Rule of Law*, 1959 (hereinafter cited as *Question*), p. 84.

⁹⁶ See *infra*, pp. 399—402.

⁹⁷ H. W. Briggs, “Recognition of States: Some reflections on Doctrine and Practice” (1949) 43 *Am.J.Int.L.* 113—121.

⁹⁸ *Ibid.*, at p. 117.

⁹⁹ C. H. A. Alexandrowicz, “The Legal Position of Tibet” (1954) 48 *Am.J.Int.L.* 265.

¹ *Question*, pp. 84—85.

² Shuhsi Hsu, *China and Her Political Entity*, 1926, p. 92.

1834, the Imperial Government struggled hard to keep clear of all contact with foreign affairs and required that their discussion and the decision of them should be left absolutely to the officials in the provinces."³

The Treaty of Friendship and Commerce, concluded in 1883 between Great Britain and Korea, which did not contain any reference to Chinese suzerainty, is one example.⁴ This was ratified by Korea and Great Britain independently,⁵ without the participation of China.⁶ Similar treaties were concluded by Germany, Italy and Russia,⁷ not to mention the Japanese treaty with Formosa. Thus it can be assumed that the British, aware of this treaty-making capacity of China's vassal States, were equally convinced of the like capacity of Tibet, especially in a period when no Chinese control existed therein.⁸

In the first instance, there does not appear to be any treaty provision, as between Tibet and China, prohibiting the former from entering into any treaty relations with other entities.⁹ This is confirmed by the actual practice of Tibet, especially in relation to India.

The first convention relevant for our purpose is the 1842 treaty referred to above. The conclusion could be drawn that, by allowing Tibet to sign the treaty, China concurred in the former's right and power to take part in such formal legal transactions. This power of Tibet is also seen in her independent conclusion of the 1852 agreement with the Maharaja of Kashmir.¹⁰

The next treaty to which Tibet was a party was the 1856 peace treaty with Nepal, at the termination a war between the two.¹¹

³ J. B. Morse, *The International Relations of the Chinese Empire, 1834—1860*, 1910, p. 9 (Italics added). It may be mentioned that the status of Tibet was not even that of a province; ties with China were much more loose.

⁴ E. V. G. Kiernan, *British Diplomacy in China, 1880 to 1885*, 1939, pp. 104—110.

⁵ *Ibid.* pp. 109-10; The text of the treaty may be found in *British and Foreign State Papers LXXIV*, p. 86. By Art. 1, if either Power should be in difficulty with a third, the other was to use its good offices, and by Art. 2 (1), diplomatic representatives of both parties were to enjoy, in the other's territory, the same freedom as enjoyed by the representatives of other States. By Art. 8, warships of both parties were to be free to visit the ports of the other.

⁶ Kiernan, *op. cit.*

⁷ Italian Treaty of June 26, 1884 B.F.S.P. LXXV, p. 308; Russian Treaty June 25th, July 7th, 1884, B.F.S.P., LXXV, p. 510; German Treaty, B.F.S.P., LXXIV, p. 633.

⁸ See *infra*, note 21.

⁹ *Question*, p. 75, and see also *supra*, p. 391.

¹⁰ *Loc. cit.*, *supra*, note 57.

¹¹ Aitchison, *op. cit.*, Vol. XIV, p. 43, n.; Although Mr. Rubin, *op. cit.*, at p. 114, admits that in this treaty, "no apparent differentiation is made between the status of Tibet and the status of Nepal with regard to China," and goes on to hold that from the form and content of the treaty, Nepal was regarded as in no way tied to China constitutionally, he ignores the implications of this for the treaty-making capacity of Tibet.

Quite apart from the fact that China, if she did affect to have any control over Tibet's foreign relations, did not interfere in the Nepal-Tibet war, she also acquiesced in the equal status which Nepal and Tibet accorded to each other in this treaty. Also, extra-territorial privileges were granted to Nepal by Tibet.¹² The legal position appears to be that Tibet and Nepal were on the same footing in relation to China. Evidence that the People's Republic of China recognised the validity of this treaty is afforded by the 1956 treaty between Nepal and China, by which the extra-territorial privileges accorded to the former in Tibet were renounced, thus confirming that treaties concluded by Tibet without the mediation of China had continued validity until abrogated and replaced by other provisions in regard to the same subject.¹³ The example of Tripoli further bears upon this situation. On September 3, 1908, Mr. Adee, acting U.S. Secretary of State, wrote thus to the then U.S. Ambassador in Turkey, regarding the validity of the treaties concluded by Tripoli :

¹² i.e., by virtue of Article 7 of this treaty; *loc. cit.* in Aitchison, *op. cit.*, Vol. XIV, p. 50, n.

"The Gurkha Bharadar residing at Lhasa will not interfere in the disputes of the subjects, merchants, traders, etc. etc. of the Government of Tibet, who may quarrel amongst themselves, neither will the Tibetan Government interfere in any disputes between subjects of Gurkha Government, Kashmiris of Nepal, etc. etc. who may be residing within the jurisdiction of Lhasa, but whenever quarrels may occur between Gurkha and Tibetan subjects, the authorities of the two States will sit together and will jointly adjudicate them; and all *Amdani* (by this term is meant income resulting from fines, confiscations, etc.) will, if paid by subjects of Tibet, be taken by that Government, and if paid by Gurkha subjects, Kashmiris of Nepal, etc. will be appropriated by the Gurkha Government."

It may be added that the Nepal-Tibet war (at the conclusion of which the above peace treaty was signed) was due to the exasperation of the Nepalese "with the treatment of their subjects at Lhasa"; Northey and Morris, *The Gurkhas*, 1928, p. 57.

¹³ See G. Jain. *India meets China in Nepal*, 1960. Appendix F for the text of the treaty. Article 3 provides that "All treaties and documents which existed in the past between China and Nepal including those between the Tibet region of China and Nepal are hereby abrogated." This is a clear admission by China that Tibet had the power, without the intermediary of China, to conclude treaties with foreign States. If it were true that Tibet had no such power, there would have been no need to abrogate treaties between her and Nepal, which in that even would have been void *ab initio*. The provisions of Art. 7 of the 1856 treaty were replaced by the following provisions under para. 3 in the exchange of letters:

"Nepalese nationals in the Tibet region of China and Chinese nationals in Nepal shall be subjected to the jurisdiction of the government of the country of residence, observe the laws and regulations of the country of residence, pay taxes to that government and respect the local customs. All civil and criminal cases or disputes in which nationals of one party in the territory of the other may be involved shall be dealt with by the government of the country of residence."

See also, *Asian Recorder*, New Delhi, Vol. for 1956, pp. 1070-1071, for a summary of the 1956 treaty.

“That by making with Great Britain, France and Italy, treaties in effect abrogating the earlier Tripolitan treaties with these governments and extending over Tripoli the general treaties of the Ottoman Empire, Turkey recognised that until Tripolitan treaties were so terminated or abrogated they were of full force and vigour.”¹⁴

The Convention of 1890

This convention between Great Britain and China relating to Sikkim and Tibet was signed at Calcutta on March 17, 1890,¹⁵ by the representatives of the Chinese and the British Governments. The instruments of ratification were exchanged at London on August, 27, 1890. The treaty delimited the boundary between Sikkim and Tibet and by Article 3, both the governments “engaged reciprocally to respect the boundary as defined in Article I and to prevent acts of aggression from their respective sides of the frontier.” In accordance with Article IV, regulations regarding trade, communications and pasturage were appended to the convention. However, they were never implemented either by China, which did not have the requisite power to implement them in Tibet, or by Tibet, which did not recognise the validity of the convention and the regulations. Subsequent events indicated that the convention remained a dead letter, and that China’s power to conclude binding treaties on behalf of Tibet was illusory. Similarly, the 1893 Trade Regulations were inoperative; the Tibetans went so far as to inform a British Commissioner that ‘as the Convention had been signed by the Chinese only, the Tibetan Government refused to recognise it as effective in Tibet.’¹⁶

Convention between Great Britain and Tibet, 1904

The preamble to the convention¹⁷ states that the convention was concluded to “resolve” the “doubts and difficulties [which] have arisen as to the meaning and validity of the Anglo-Chinese Convention of 1890, and the Trade Regulations of 1893 and as to the liabilities of the Tibetan Government under these agreements.” It is significant that the convention mentions “Government of Tibet” and that the Chinese seal appears nowhere in the treaty.

¹⁴ Hackworth, *op. cit.*, 1943, Vol. V, pp. 364-365.

¹⁵ Aitchison, *op. cit.*, Vol. XII, pp. 66-67.

¹⁶ *Question*, *op. cit.*, pp. 77-78; see also Aitchison, *op. cit.*, Vol. XIV, pp. 17-18, For the text of the Regulations, see Aitchison, *op. cit.*, p. 67.

¹⁷ Aitchison, *op. cit.*, Vol. XIV, p. 23. Mr. Rubin, *op. cit.*, p. 112, states that “The treaty of 1890 was accepted in its entirety by the Lhasa Government of Tibet in 1904.” However, he omits to mention the background against which this was accepted, thereby giving the impression that Tibet never questioned China’s authority.

The important provisions of the treaty were that the Government of Tibet “engages to respect the Anglo-Chinese Convention of 1890 and to recognise the frontier between Sikkim and Tibet as defined in the said convention and to erect boundary pillars accordingly.” This provision carries the clear implication that any treaty concluded by China on behalf of Tibet could not be binding on the latter, and would not be implemented by her. Also the Chinese Amban was in fact present when the Convention was signed by the representatives of Great Britain and Tibet, thus bearing witness to the existence of the independent power of Tibet to conclude treaties with foreign countries. In this connection attention is to be drawn to Article 9, which is worth quoting in full:

‘IX. 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 concessions 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 cash, shall be pledged or assigned to any Foreign Power, or to the subject of any Foreign Power.’

Convention between Great Britain and China, 1906

The preamble to the Convention of April 27, 1906,¹⁸ between Great Britain and China, referred to “the refusal of Tibet to recognise the validity of or to carry into full effect the provisions of the Anglo-Chinese Convention of March 17, 1890, and Regulations of December 5th, 1893” and also bore witness to the fact that the 1904 Convention between Tibet and Great Britain was validly concluded and was in operation. In fact, Article 1 of the Convention confirmed the 1904 Convention. If it were true that China had the power to conclude treaties on behalf of Tibet, the Convention of 1906 should have confirmed the Anglo-Chinese Convention of 1890, and not the Anglo-Tibetan Convention of 1904. On the contrary, if the position taken by the People’s Republic of China were correct in this regard, the 1906 Convention should have provided for cancellation of the 1904 Convention between Tibet and

¹⁸ Aitchison, *op. cit.*, Vol. XIV, p. 27.

Great Britain, as the latter would be a standing testimony to the incapacity of China to contract binding obligations on behalf of Tibet.

By confirming Article IX of the 1904 Convention, China recognised the extent of British interest in Tibet, as set out in the above-mentioned article. Articles I and II of the 1906 Convention also recognised this, and confirmed Britain's right to take steps to secure the enforcement of the Lhasa Convention.

It will be worthwhile now to take stock of the political developments. Great Britain had tried, till the turn of the nineteenth century, to treat with China on questions regarding Tibet. However, in view of the Chinese inability to bind Tibet by their actions, and in view of the continued violation of the Sikkim boundary and disregard of the Sikkim Convention by Tibet, Great Britain was obliged to deal directly with Tibet on all matters pertaining to the latter, including the maintenance of stability and peace on the Tibetan boundary. The Lhasa Convention was clearly designed towards this end. Thus, in the 1908¹⁹ Indo-Tibetan trade agreements, Tibet was also a party to the agreement; this was in order to provide for the possibility of her disclaiming any responsibility under a convention concluded directly between China and Great Britain.

In 1911, with the fall of the Manchu dynasty, Chinese troops in Tibet were expelled. The President of the Chinese Republic, Yuan Shih-kai, made a declaration that Tibet would be regarded thereafter as a Chinese province. Great Britain protested and in a note stated that while China had suzerainty over Tibet, "Great Britain could not consent to the assertion of Chinese sovereignty over a State *enjoying independent treaty relations with her*" (italics added) and went on to demand that China refrain from sending any armed forces into Tibet. The Chinese, in reply, stated that they had "no intention of converting Tibet into another province of China and that the preservation of the traditional system of Tibetan Government was as much the desire of China as of Great Britain."²⁰ There was no denial whatsoever expressed of the British right to have independent treaty relations with Tibet.

¹⁹ Aitchison, *op. cit.*, Vol. XIV, p. 28.

²⁰ See *Question*, p. 81 *et seq.*; N. Singh and M. K. Nawaz, "The Contemporary Practice of India in the Field of International Law" (1960) 1 *International Studies*, 282-283. The official statement of the *Waichiaopu* mentions this exchange of notes. The statement therein that China's despatch of troops to Tibet was in fulfilment of her obligations to Britain is significant. If China had claims to control over Tibet, she need not derive the validity of her actions from treaty relations with Britain. The tenor of the note fully supports the view that British rights and interests in the stability of, and peace in, Tibet, were fully recognised. This statement is quoted in full, in the *China Year Book* (ed. H. G. W. Woodhead), 1921-22, p. 611.

Towards the end of 1912, there were continuous skirmishes on the Sino-Tibetan frontier and, in 1913, Tibet declared her full independence. It was to resolve this conflict that the Simla conference was called by Great Britain. It is important to stress that in this period there was no Chinese control whatsoever in Tibet.²¹

As the Prime Minister of India pointed out in his reply of September 26, 1959, to Mr. Chou En-lai:

"The arrangements for the Simla Conference were made with the full knowledge and consent of the Government of China. The Foreign Minister of China wrote to the British representative on the 7th August, 1913, that the Chinese plenipotentiary would proceed to India 'to open negotiations for a treaty jointly' with the Tibetan and British plenipotentiaries. It is clear from the proceedings of the conference that not only did the Chinese representative fully participate in the Conference but that the Tibetan representative took part in the discussions on an equal footing with the Chinese and the then British Indian representatives."²²

The fact that China was prepared to conclude a treaty *jointly* with Tibet clearly established that Tibet had the power to conclude treaties not only with the United Kingdom, but also with China. This legal position should be considered as having been accepted by China when she participated in the Conference.

It is also significant that the preamble to the 1914 Convention refers to the participants as "*several States on the Continent of Asia*"²³ and also refers to their "*several governments.*" Tibet was treated as a distinct State having the power to conclude treaties with other States on an equal footing. The form in which the Simla Conference was held, and the equal status accorded to the Tibetan plenipotentiary,²⁴ superior to that accorded to him at the signing of the Anglo-Tibetan trade agreement, all tend to confirm this.

That the British Government considered Tibet as independent of China at the moment of the signature of the Simla Convention can be seen from the statement of the British plenipotentiary to the Chinese plenipotentiary: "until the seal of the Tibetan plenipotentiary has actually been affixed to an agreement such as was

²¹ See the evidence given in *Tibet and the Chinese People's Republic, Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet*, 1960, pp. 143-144.

²² *White Paper II*, p. 38.

²³ Aitchison, *op. cit.*, Vol. XIV, p. 35 *et seq.* (italics added).

²⁴ *Ibid.*

now under consideration, the status of Tibet was that of an independent nation recognising no allegiance to China."²⁵

Although China repudiated the initialling of her own plenipotentiary, her sole point of contention related to the boundaries between Inner and Outer Tibet;²⁶ (there was no denial by her of Tibet's autonomy). Nor can she claim ignorance of the location of the McMahon Line, as her representative had initialled the map delineating it.²⁷ It is remarkable that the Chinese should persist

²⁵ See *The Boundary question between China and Tibet: A Valuable Record of the Tripartite Conference between China, Britain and Tibet held in India, 1913-1914* (Peking, 1940), p. 14. See further the statement of Sir Henry McMahon on April 27, 1914, to Ivan Chen, the Chinese plenipotentiary: "the Simla Convention contemplated the re-establishment of Chinese suzerainty over a vast tract which had seceded from the (Chinese) Republic. . . ." *ibid.*, p. 120.

²⁶ Statement of the Waichioapu given in the *China Year Book*, *op. cit.*, at p. 619.

²⁷ *Atlas*, *op. cit.*, Map No. 23. Mr. Lamb in "The Indo-Tibetan Border" (1960) *The Australian Journal of Politics and History*, May, p. 280, makes the rather astonishing statement that the McMahon Line "ran through territory which had never been visited by Europeans, let alone surveyed." One can but refer him to V. Elwin, *India's North-East Frontier in the 19th Century*, 1959, wherein accounts of the numerous explorations made in this area by both Indian Government officials and private individuals in the 19th century are given. Surveys had been made as early as 1867. In particular, this section of the boundary had been extensively surveyed in 1912-13; see *Records of the Survey of India*, Vol. IV (*Explorations on the North-Eastern Frontier, 1911-12-13*), 1914; Boggs, *op. cit.*, pp. 145-146; Sir Olaf Caroe, the *Guardian*, February 13, 1960. See also, Appadorai and others, "Bases of India's Title on the N.E. Frontier," (1960) *I. International Studies*, 351 at 370, 384. Though the surveys were not then as comprehensive as those made in some other parts of India, they were more than adequate and were made in the conviction that these areas constituted parts of India. The Tibetans and the Chinese have made no such efforts (see *infra*, n. 77). Apart from the surveys made by the British, see Lahiri, *op. cit.*, p. 208 *et seq.*, and Barua, *op. cit.*

The McMahon Line boundary is *not* an arbitrary line drawn up unilaterally. Mr. Rubin, who has been cited with approval by Mr. Lamb, states that in drawing the McMahon Line, allowances had been made for Tibetan sentiments. (See *supra*, n. 46, as to Mr. Rubin's arguments.) The reference which he gives in this connection, runs thus:

"The Indo-Tibetan boundary drawn at the Simla Conference departed from the watershed in the Subansiri area in order to leave in Tibet the sacred lakes of Tso Karpo and Tsari Tsarpa, the village of Migyitun to which Tibetans attach importance as the starting point of the twelve-year pilgrimage, the route from Migyitun to the lakes, and another shorter pilgrimage route known as Tsari Nyingpa. The boundary alignment on current Indian maps carefully leaves these territories in Tibet. The international boundary here runs just south of the village of Migyitun. Longju which is entirely distinct from Migyitun lies 1½ miles further south of the border . . ."

(*White Paper II*, p. 51; Rubin, p. 106.) Mr. Lamb's contention is hardly compatible with this sort of careful adjustment of interests, which is borne out by the exchange of notes between the Tibetan and British Plenipotentiaries (Aitchison, *op. cit.*, Vol. XIV, pp. 34-35; see also *infra*, n. 29.) Mr. Rubin himself states, "It does appear, however, that India has been stationing police forces along the McMahon Line for a number of years. . . ." (*op. cit.*, at p. 107). One fails to see what more could be needed to confirm the extinction of any possible claims that China might have had in this region.

with the argument that they were completely unaware of the existence of the McMahon Line. This would lead to the logical conclusion that both they, as well as their then plenipotentiary, were unaware of the frontiers of Tibet. This, however, might well be the true position, as China was not at that time in any way interested in the boundary between Tibet and India. She had no control over Tibet in this period, as the very rationale of the Simla Conference indicated. The fact that China did not refer to the McMahon Line in her proposals of 1919 regarding Tibet, is in conformity with this line of reasoning.²⁶ Further, in the fourth edition of Aitchison's *Treaty Series*, the McMahon Line has been categorically reaffirmed thus:

".....the frontiers between India and Tibet on the Assam and Burma borders, which have been accepted by His Majesty's Government and the Tibetan Government, laid between the

²⁶ *White Paper II*, pp. 38-39.

Besides, the essence of consensual obligations lies in the mutual aims and desires of the parties, the expression of which need not adhere to any rigid form; e.g., "From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes" (1931) P.C.I.J. Ser. A/B No. 41, p. 47 (*Austro-German Customs Union case*). There can be no doubt as to the existence of this desire animating both British India and Tibet. And the latter had the power to contract obligations on her own behalf, a fact China had acknowledged by accepting the form and credentials of the Tibetan Plenipotentiary. In the *Residence at Rio-Martin Case* (*Annual Digest of Public International Law Cases*, 1923-24, case No. 8), Judge Huber held that an exchange of letters between authorised British and Moroccan negotiators was an internationally binding agreement which bound France when she became the Protecting Power of Morocco. J. L. Weinstein, (1952) 29 *Brit. Year Book Int.L.* 205-227, proves that even matters of vital importance have been concluded by means of exchange of notes, e.g. (1) Termination by the United Kingdom of perpetual leases in Japan, March 25, 1937 (1937) *U.K. Treaty Series* No. 29, Cmd. 5548; (2) Renunciation of extra territorial judicial rights in Albania by the United Kingdom, Feb. 6, 1926 (1926) *U.K. Treaty Series* No. 3, Cmd. 2616; (3) Transfer of responsibility from American Military Government in Italy to Italian Government, Sept. 3, 1947 (1950) 67 *U.N. Treaty Series* p. 15. See also H. Blix, "The Requirement of Ratification" (1953) 30 *Brit. Year Book Int.L.* 359-360. Thus, even the exchange of notes between authorised British and Tibetan Plenipotentiaries, which was confirmed on several occasions, e.g., in the adoption of the Simla Convention on July 3, 1914 (*Atlas*, Map 24, Aitchison, *op. cit.*, Vol. XIV, pp. 34-35) must be deemed to be binding on the two parties; also *loc cit.*, *infra*, n. 29. See also A. D. McNair, *The Law of Treaties*, 1938, p. 47.

The 1907 Convention between Great Britain and Russia—*British and Foreign State Papers*, 1906-1907, Vol. C., pp. 558-559, which has been cited by China in this connection, is quite irrelevant, as China (not being a party to the Convention) cannot claim rights in this respect. Moreover, the Russian Government was kept informed throughout of the negotiations in progress at Simla in 1914 and were supplied with a copy of the Convention. No objection whatsoever was raised by them. *White Paper III*, p. 96.

See also McNair, *op. cit.*, p. 93 *et seq.*, for the effect on a multi-partite Convention of the refusal of the one of the parties to ratify it. This refusal does not, in any way, affect the validity of this Convention between the other two parties. See also G. Fitzmaurice, "Do Treaties need ratification?" (1934) 15 *Brit. Year Book Int.L.* 113.

eastern border of Bhutan and the Isurazi Pass on the Irrawaddy-Salween water-parting. West of the Brahmaputra bend this frontier for the most part follows the main axis of the Himalayas and east of that point includes all the tribal territory under the political control of the Assam and Burma Governments. This frontier throughout stands back some hundred miles from the plains of India and Burma."²⁹

It is important to remember in this context, that the McMahon Line only applied the coping-stone to the actual ethnic, natural and administrative frontiers as established by British-Indian control prior to 1914.³⁰ The McMahon Line was confirmed in 1936 and 1938 by Tibetan representatives and has been observed till recently, when the Chinese began their present incursions into Indian territory.³¹ Article I of the seventeen-point agreement of May 23, 1951, between the People's Republic of China and Tibet states, ". . . the Tibetan people shall *return* to the big family of the Motherland—the People's Republic of China."³² The use of the word "return" shows that till this agreement was concluded, the People's Republic of China considered that Tibet was not included in their domains. A study of Tibet's relations with China and India from 1914 to 1950 confirms this, and would show that during this period Tibet was definitely controlling her own destinies, that Britain was in the habit of dealing directly with Tibet, and that China fully acquiesced in this state of affairs.³³

It is submitted, in view of the above developments that the assumption of a more complete governmental control by China

²⁹ Aitchison, *op. cit.*, Vol. XIV, p. 21. Besides, the intention of the Tibetans themselves in securing a definite trouble-free and mutually agreeable boundary is seen from the exchange of notes.

"As it was feared that there might be friction in future unless the boundary between India and Tibet is clearly defined, I submitted the map which you sent me in February last, to the Tibetan Government at Lhasa for orders. I have now received orders from Lhasa, and I accordingly agree to the boundary as marked in red in the two copies of the maps signed by you subject to the conditions mentioned in your letter dated the 24th March, sent to me through Mr. Bell. I have signed and sealed the two copies of the maps. I have left one copy here and return herewith the other."

(Text of the note sent by Lonchen Shatra, Tibetan Plenipotentiary, to the British Plenipotentiary, March 25, 1914, Aitchison, *op. cit.*, pp. 34-35.)

³⁰ See *infra*, pp. 412-414, for an account of the open and unchallenged exercise of Governmental functions by India in these areas, and *supra*, p. 401, n. 27, for some of the surveys made before 1914 and the references given therein. The tribes inhabiting this frontier are of separate stock from the Tibetans; the latter in fact referred to them as *Lopas*, a term of contempt (*White Paper II*, p. 40). Ethnically they are akin to the tribes which inhabit Rajasthan, Madhya Pradesh and Orissa.

³¹ *White Paper III*, p. 96; as to the "protests" made by the Kuomintang Government in 1946-47, see *ibid.*

³² *Question*, *op. cit.*, p. 140 (italics added).

³³ See, *Tibet and the Chinese People's Republic*, *op. cit.*, pp. 143-144, 149-162.

over Tibet does not, and cannot, invalidate earlier treaties concluded by Tibet with India.³⁴

INTERNATIONAL LAW AND MOUNTAIN BOUNDARIES

Although the concept of natural boundaries has been criticised on the grounds that it is politically charged,³⁵ this does not in any way detract from its inherent merit and validity. Natural boundaries have been in frequent use, where practicable, from the days of the Romans onwards. Thus the Roman historian Siculus Flaccus refers to rivers, mountain-tops and watersheds as boundaries of prefectures and provinces. In addition, the opinions of Greek and Latin writers were unanimous that natural boundaries were the most common.³⁶

That this also holds good today is attested to by Professor Hyde, who points out that:

“(1) Mountain boundaries are much more numerous in Europe than river boundaries. (2) Mountain boundaries persist for the greatest periods of time. (3) Where mountains are unavailable, the Europeans use divides in plains, even if

³⁴ See the communication of the U.S. Acting Secretary of State to the Ambassador in Turkey regarding the Tripoli Question, “After a careful consideration of the whole subject of the relationship of Tripoli to Turkey, the Department finds as follows:

“1. That the treaty of 1805 was made with all necessary formalities. 2. That prior to 1835, as well as after that date the real sovereignty over Tripoli rested in the Ottoman Porte. 3. That inasmuch as prior to 1835 the Ottoman Porte permitted Tripoli to make war and peace and negotiate treaties, the treaties so negotiated must be considered as binding upon Turkey as well as upon Tripoli. 4. That the affair of 1835 was not in any proper sense a conquest by Turkey of Tripoli, but was merely the assumption by Turkey of a more complete governmental control over Tripoli. 5. That this being the true nature of the affair of 1835, Turkey cannot treat the earlier Tripolitan treaties as abrogated by conquest. 6. That Turkey herself, from 1835 until 1873, appears to have considered all treaties made with Tripoli prior to 1835 as binding upon her, Turkey, 7... 8. As a resultant of the foregoing, it follows that the American treaty of 1805 must be considered as of full force and vigour until it shall be abrogated by a new treaty with the Ottoman Porte.”

Hackworth, *op. cit.*, Vol. V, pp. 364-365. For item 7 above, see *supra*, p. 396. Similarly, China, by the 1956 treaty mentioned above, has recognised that the treaty of 1856 between Nepal and Tibet granting extra-territorial privileges for the former in the territory of the latter was binding and valid until abrogated by a fresh treaty. Consequently, she *cannot argue* that the treaty between India and Tibet has no validity. The fact that Tibet did not enter into extensive treaty relations with other States is explained by her relative isolation and geographical inaccessibility. This cannot vitiate the general principle illustrated above.

³⁵ See S. B. Jones, *Hand-Book on Boundary making*, 1945, pp. 7-8. However, Jones admits that this does not exclude natural boundaries from being suitable boundary sites. See also Boggs, *op. cit.*, p. 9 *et seq.*

³⁶ Adami, *National Frontiers in relation to International Law*, 1922 (trans. T. T. Behrens) pp. 3-4.

rivers are present nearby and these boundaries on divides persist for centuries.”³⁷

He also refers to the adoption, and to the permanence, of mountain boundaries in North America, and comes to the conclusion that:

“Arbitrators burdened with the task of adjudicating in territorial disputes have, when clothed with the requisite jurisdiction, been disposed to look favourably and with a decided preference upon mountain boundaries as *appropriate* as well as *natural* boundaries between States.”³⁸

The convenience of limiting the territories of States on this basis is manifest, especially when the nature of the terrain itself offers such a ready-made line, well marked and uninterrupted. The Himalayas are one of the most effective boundaries on earth and few, if any, land frontiers can claim so strong a sanction of long and unbroken tradition.³⁹

The watershed principle

It is universally accepted that, where a mountain range forms the boundary, the watershed constitutes the frontier, failing special treaty arrangements. The decisions of courts, State practice, and the opinions of publicists, confirm this. The following few examples will illustrate this point.

In the Island of Timor arbitration, the Court found in favour of the Netherlands and held that the summit line favoured by the latter between the sources of two rivers had the advantage of being “sufficiently natural to be surveyed on land without great practical difficulties.”⁴⁰

The watershed principle was also adopted in the awards relating to the boundary settlements between Colombia and Costa Rica,⁴¹ Argentina and Chile,⁴² and Guatemala and the Honduras.⁴³ The Judicial Committee of the Privy Council in its opinion on the Labrador Boundary confirmed the widespread acceptance of the watershed principle in North America.⁴⁴

State practice also abounds with examples of the implementation of the watershed principle. As early as 1824, the then British

³⁷ C. C. Hyde, *International Law Chiefly as Applied and Interpreted by the United States*, 1951, Vol. I, pp. 441-442; see also the references given therein.

³⁸ Hyde, *op. cit.*, p. 443 (italics added).

³⁹ See *supra*, pp. 377-378.

⁴⁰ Scott, *Hague Court Reports*, 1916 (1932), Vol. I, p. 383.

⁴¹ Adami, *op. cit.*, p. 9.

⁴² *British and Foreign State Papers*, Vol. XCV, p. 162.

⁴³ For the Award of Jan. 23, 1933, see 2 R.I.I.A., p. 1322.

⁴⁴ 137 *Law Times Reports*, 187.

Foreign Secretary, Mr. George Canning, wrote regarding the boundary between British and Russian possessions in Alaska: "it is obvious that the boundary of mountains, where they exist, is the most natural and effectual boundary."⁴⁵ An examination of the correspondence and of the settlement effected would show that the watershed principle was adopted.

This principle has been implemented in the boundaries of Chile-Argentina,⁴⁶ Brazil-Venezuela⁴⁷ and between Brazil and two of the Guianas.⁴⁸ In Europe, we find this principle in the boundary settlements between France and Spain⁴⁹ and between France and the former kingdom of Sardinia.⁵⁰ In Africa, we find it in the boundary between the former Belgian Congo (now Republic of the Congo) and Northern Rhodesia,⁵¹ and between the former Anglo-Egyptian Sudan and the former Belgian Congo.⁵² To the north of the Mbomu River, the boundary between the former Anglo-Egyptian Sudan and the former French Equatorial Africa⁵³ likewise follows the Congo-Nile watershed northward, a little beyond latitude 9° North.

China's Acceptance of the Watershed Principle

In the first instance, attention must be drawn to the observation of Mr. Tung (formerly secretary to the Central Political Council of the Chinese National Government), who states that "An examination of the Chinese boundary treaties shows no essential difference between the Chinese and the general international practices with regard to the rules of delimiting boundaries."⁵⁴

⁴⁵ See *Proceedings*, Alaskan Boundary Tribunal, Appendix to *Case of the United States*, Vol. II, p. 210. Regarding the line of demarcation between Russian and British possessions in North America and for the demarcation adopted in the Anglo-Russian Convention, Feb. 28 (16), 1825, see Malloy's *Treaties, Conventions etc.*, 1909, Vol. II, p. 1521 (for the Convention between the U.S.A. and Russia of March 30, 1867, wherein the above line of demarcation is adopted). Cited in Hyde, *op. cit.*, p. 441, s. 136, n. 1.

⁴⁶ Boggs, *op. cit.*, p. 75 *et seq.*

⁴⁷ Boggs, *ibid.*

⁴⁸ *Ibid.*

⁴⁹ Adami, *op. cit.*, p. 9.

⁵⁰ *Ibid.* vide the Boundary Treaty of Turin, March 24, 1790, between France and the kingdom of Sardinia, wherein the watershed principle is affirmed. "The King of Sardinia and the Very-Christian King, animated by the same feelings, have considered that nothing could more efficaciously satisfy so salutary a purpose, as an exact general and final settlement of the boundaries which should in future separate their respective States and countries; these should be fixed, as far as the situation of the ground permits, by the course of rivers or by the watershed (*per les eaux pendantes*) and this principle should be facilitated by a straightening out or by an exchange between the various 'enclaves'...."

⁵¹ *Ibid.*, p. 9.

⁵² See Boggs, *op. cit.*, pp. 167-168.

⁵³ *Ibid.*

⁵⁴ Tung, *China and some Phases of International Law*, 1940, p. 14.

(1) Article I of the Treaty of Ninchu or Nerchinsk, signed on August 27, 1689, between China and Russia lays down that:

“the boundary from the source of that river (cordillera) to the sea will run along the top of the mountain chain in which the river rises. The jurisdiction of the two empires will be divided in such a way that the valleys of all the rivers or streams flowing from the southern slope of these mountains to join the Amur shall belong.....to the empire of China, while the valleys of all the rivers flowing down from the other or northern side of these mountains shall be similarly under the rule of His Majesty the Czar of the Russian Empire.”⁵⁵

(2) The Convention between Great Britain and China of 1890 (relating to Sikkim and Tibet) prescribes, in Article I, that

“the boundary of Sikkim and Tibet shall be the crest of the mountain range separating the waters flowing into the Sikkim Teesta and its affluents from the water flowing into the Tibetan Mochu and northwards into other rivers of Tibet. The line commences at Mount Gipmochi on the Bhutan frontier and follows the above mentioned water-parting to the point where it meets Nipal territory.”⁵⁶

(3) The Convention between France and China of June 20, 1895, complementary to the Convention for the delimitation of the frontier between Tonkin and China of June 26, 1887, recognises that the watershed should form the boundary between Tonkin and China.⁵⁷

(4) The Conventions between Great Britain and China of 1894 and 1897 refer, in Article III, paragraph 3, to the ‘line of water-parting between the tributaries of the Salween and the Mekong Rivers’ as forming the boundaries.⁵⁸

The agreement of January 28, 1960, between China and Burma,⁵⁹ and the treaty of March 21, 1960, between China and Nepal,⁶⁰ also follow the watershed principle as agreed to in the earlier treaties, or as accepted in practice for a long time. The Sino-Burmese boundary alignment runs along the McMahon Line from near the Talu Pass (latitude 20° 40' North) for about 120 miles following the southern

⁵⁵ See French text in Hertslet, *China Treaties*, 1908, p. 437.

⁵⁶ Aitchison, *op. cit.*, Vol. XII, p. 66.

⁵⁷ See French text in Hertslet, *op. cit.*, No. 49, pp. 314-317 and No. 52, pp. 321-323.

⁵⁸ *Ibid.* Nos. 20, 22.

⁵⁹ For the text of the agreement, see *China Today*, 1960, No. 7.

⁶⁰ See *Peking Review*, March 29, 1960, for the text of Agreement. See also the *Hindustan Times*, Delhi, March 26, 1960.

watershed of the Irrawaddy. It is difficult to understand how this section of the McMahon Line can be accepted and the rest rejected.⁶¹

Opinions of Jurists

According to Bluntschli, "when two countries are separated by a mountain chain, it is, in case of doubt, admitted that the highest ridge and the watershed line mark the boundary."⁶² Taylor states likewise:

"where there is real doubt or ignorance as to a frontier and no express agreement concerning it, certain general rules have been accepted which may be summarised as follows: Where two States are separated by ranges of mountains or hills the water divide marks the boundary line or frontier."⁶³

Oppenheim,⁶⁴ Fiore,⁶⁵ and virtually all the other leading publicists⁶⁶ agree on the validity of the watershed principle. It is submitted that, in the light of all these illustrations and opinions, the watershed principle is firmly rooted in international law, and that in mountainous regions no other general principle is in existence. This principle has been adopted by China in several boundary con-

⁶¹ The watershed principle was also incorporated in the boundary alignment confirmed in the 1914 Simla Convention, which is binding on China. The exchanges at the Conference between the Assistant British Plenipotentiary and the Chinese Plenipotentiary confirm that the watershed principle was accepted by China in this regard. Mr. Rose to Mr. Chen:

"I pointed out the advantages of the watershed which had been utilised in defining the frontier lines, and repeated your earnest desire that these watersheds should be used as frontier limits wherever possible, as they were permanent and intelligible to the mind of the local tribesmen whilst they avoided the necessity for elaborate frontier commissions."

Mr. Chen in reply said that he "quite appreciated these facts" and added that "the policy of a watershed frontier would be more consistently followed if the line between Inner and Outer Tibet followed the mountain range on the west of the Tangtse leaving Derge and Narong in Inner Tibet." *The Boundary Question between China and Tibet: A Valuable Record of the Tripartite Conference between China, Britain and Tibet held in India, 1913-14* (Peking, 1940) pp. 108-109 (italics supplied). See also *The Times*, February 2, 1960, wherein the acceptance of the McMahon Line in relation to the Sino-Burmese Agreement (*supra*, loc. cit. note 59) is brought out. The Chinese characterised it as the "traditional customary line." See also the *Statesman* (New Delhi), August 7, 1960; Col. Bathan an official Burmese spokesman said that the Sino-Burmese border problems had been settled on the principle of *natural features and watershed lines*.

⁶² Cited in Adami, *op. cit.*, p. 8.

⁶³ K. Taylor, *A Treaties on Public International Law*, 1901, pp. 298-299.

⁶⁴ Oppenheim, *op. cit.*, Vol. I, p. 534.

⁶⁵ Fiore, *International Law Codified* (trans. E. M. Borchard), 1918, p. 418.

⁶⁶ e.g. see C. G. Fenwick, *International Law*, 1952, p. 371; Hyde, *op. cit.*, Vol. I, p. 441; R. Foulke, *International Law*, Vol. I, 1920, pp. 298-299; Hershey, *Essentials of Public International Law*, 1921, p. 175. Also see *supra*, pp. 376-377.

ventions, and especially in relation to her frontiers with India, Nepal, Sikkim, Bhutan and Burma. Consequently, even assuming that some doubt pertains as to the exact alignment of the Sino-Indian boundary in certain specific areas, it is the watershed principle that should apply. For, even viewing China's alleged claims with the utmost latitude, in no instance can it be said that they outweigh India's title.

THE EXERCISE OF STATE FUNCTIONS

The main point in the whole issue is precisely how far valid legal titles have been acquired by any State before the recent activity began. As far as the exercise of State functions over the areas in question is concerned, the World Court has asserted that what is required is "a manifestation of State authority or the exercise of State functions." The term "possession of the territory" was read by the Court as meaning possession in sovereignty rather than necessarily physical occupation. Professor Waldock has pointed out that:

"The emphasis has shifted from the taking of physical possession of the land and the exclusion of others to the *manifestation and exercise of the functions of government* over the territory. . . . The cases make it plain that today the decisive test of the effectiveness of an occupation is whether the claimant has in fact displayed state functions in regard to the territory sufficiently to assure to other States 'the minimum of protection of which international law is the guardian.' Accordingly, it is effective activity by the State either internally within the territory or externally in relations with other States which is the foundation of a title by occupation, not settlement and exploitation."⁶⁷

This does not mean that there may not be considerable variation in the degree of display of State activity required in different cases to support a title to territory. As Max Huber pointed out in the *Island of Palmas Case*:

"sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity necessarily differ according as *uninhabited or inhabited regions* are involved."⁶⁸

⁶⁷ C. H. M. Waldock, "Disputed Sovereignty in the Falkland Island Dependencies" (1948) 25 Brit. Year Book Int.L. 311, 317.

⁶⁸ 2 R.I.A.A., p. 829 (*italics added*).

The same principle was followed in the *Eastern Greenland Case*.⁶⁹ It must also be remembered, in connection with Chinese incursions into India, that "such acts may have legal significance only if the territory concerned was either previously *res nullius* or was already the subject of a title held by the State committing the acts."⁷⁰ But if the territory was already subject to another's sovereignty, such acts are plainly, as the Permanent Court of International Justice said of Norway's attempted occupation of Eastern Greenland, illegal and invalid.⁷¹

In the present case, the territory in question is, for the most part, barren and mountainous, and by its very nature forms a less likely subject for any State activity than plains and valleys. Having regard to this factor, the various sovereign acts performed by the British and, later, the Indian authorities were more than adequate.

The constitutional provisions, provisions in the five-year plans for the development of these areas, the surveys, periodic patrolling, etc., are more than sufficient evidence of India's *will and intention* to act as sovereign in these areas. No such activities have been undertaken by China. India can legitimately claim an original title, based on historical and immemorial right, which has been made absolute over the centuries by a process of historical consolidation.⁷² As an eminent authority has observed:

"First, consolidation of title is normally a gradual process. Secondly, in the beginning, every title is necessarily a relative title, and its holder aspires to transform it into an absolute title. Thirdly, the more absolute a title becomes, the more it

⁶⁹ Series A/B, No. 53. See also *Minquiers and Ecrehos Case*, *I.C.J. Reports* 1953, p. 53, wherein it is pointed out that the criteria necessary for establishing effective occupation varied according to the nature of the territory. See also the individual opinion of Judge Basdevant, *ibid.* at p. 78, who points out that effective military control does not require stationing of troops in desolate and uninhabited places; see also *ibid.* p. 55 *et seq.*, and Series A/B, No. 53, p. 45 *et seq.*, for a discussion of the nature of the exercise of State jurisdiction. See also the *Clipperton Island Case*, text given in (1932) 26 *Am.J.Int.L.* 390.

⁷⁰ Series A/B, No. 53.

⁷¹ Series AB, No. 53. See in this connection *The Case Concerning Sovereignty over Certain Frontier Land*, (1959) *I.C.J. Reports*, pp. 229-230, wherein it was held that acts of administration by the Netherlands in the frontier area were contrary to the Boundary Convention and insufficient to displace the Belgian sovereignty recognised by that Convention. The significance of this pronouncement for the various treaties by which Tibet and China have recognised various sectors, and the whole of the present Sino-Indian boundary, is obvious. Further, the principle that "No one can be allowed to take advantage of his own wrong" is accepted in international law. See the award in the *Montijo Case* (1875), Moore, *History and Digest of the International Arbitrations to which the United States has been a party*, 1898, Vol. II, p. 1421 at p. 1437, cited in B. Cheng, *The General Principles of Law as applied by International Courts and Tribunals*, 1953, pp. 149.

⁷² *Anglo-Norwegian Fisheries Case*, (1951) *I.C.J. Reports*, p. 138.

rests on multiple formations. Its constituent elements may be as varied as the devices which, at any time, international law makes available for the purpose of making such a title valid against third States."⁷³

CONCLUSION

The Indian title to these areas is, in marked contrast to any alleged title that China might claim, based on several such criteria, i.e.:

- (1) Historic rights derived from close association with, and possession of, these areas dating from long before the Christian era.
- (2) Conformity of India's northern frontier with the principles of international law and international practice concerning natural boundaries and watersheds.
- (3) Treaty and Custom, which clearly demonstrate that both India and China accepted these frontiers; India has openly exercised sovereign powers in the frontier area at the time when China started making claims and intrusions.
- (4) In particular, the Simla Convention of 1914 which is binding on India, Tibet and China.
- (5) Recognition by China of the Sino-Indian frontier as asserted by India.

This process of historical consolidation, apart from the display of effective control and the animus to act as sovereign,⁷⁴ is significantly buttressed by China's recognition of, or at least acquiescence in, the Sino-Indian frontier as asserted by India.

The Prime Minister of India pointed out to Mr. Chou En-lai, in his letter of December 14, 1958 that, with regard to the discussions they had in 1956:

⁷³ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, 1957, p. 292. See Report, esp. p. 302 *et seq.*, for evidence furnished by the Indian side of administration in the past as well as in recent times. This may be compared with the evidence put forward by the Chinese side. It is important that whereas the Indian side answered every single question put to them, the Chinese could only answer 59 of 118 questions put by the Indian side, regarding the alignment of the boundary. This goes to underline the greater and sustained interest of India in this area. See also *ibid.*, p. 259 *et seq.*, on the Chinese evidence, and pp. 238-239.

⁷⁴ "The Permanent Court in the *Eastern Greenland Case* . . . referred to a title derived from 'continued display of authority' involving two elements each of which must be shown to exist. These elements are (1) the intention and will to act as sovereign (i.e. *animus occupandi*); (2) some actual exercise or display of such authority (i.e. *corpus occupandi*)."

Waldock, *op. cit.*, p. 334.

"You told me then that you had accepted this McMahon Line border with Burma and, whatever might have happened long ago, in view of the friendly relations which existed between China and India, you proposed to recognise this border with India also. You added that you would like to consult the authorities of the Tibetan region of China and you proposed to do so.

"Immediately after our talk, I had written a minute so that we might have a record of this talk for our personal and confidential use. I am giving below a quotation from this minute:

"Premier Chou referred to the McMahon Line and again said that he had never heard of this before though of course the then Chinese Government had dealt with this matter and not accepted that line. He had gone into this matter in connection with the border dispute with Burma. Although he thought that this line, established by British Imperialists, was not fair, nevertheless, because it was an *accomplished fact* and because of the friendly relations which existed between China and the countries concerned, namely, India and Burma, the Chinese Government were of the opinion that they should give recognition to this McMahon Line. They had, however, not consulted the Tibetan authorities about it yet. They proposed to do so.'"⁷⁵

⁷⁵ *White Paper I*, pp. 49-50: It has been held by the World Court that an assurance given by a competent official is binding on his Government, e.g., see the *Eastern Greenland Case*, Series A/B, 53, *cit. supra*, for the decision of the Court regarding the Ihlen Declaration. Further, China cannot on the one hand, hold that she is now sovereign over Tibet, and on the other hand hold that her recognition depended for its validity on consultations with the "local authorities." See further the statement in Mr. Chou En-lai's letter of September 8, 1959:

"China and India are both countries which were long subjected to imperialist aggression. This common experience should have naturally caused China and India to hold an identical view of the above-said historical background and to adopt an attitude of mutual sympathy, mutual understanding and fairness and reasonableness in dealing with the boundary question. The Chinese Government originally thought the Indian Government would take such an attitude. Unexpectedly to the Chinese Government, however, the Indian Government demanded that the Chinese Government give *formal recognition to the situation created by the application of the British policy of aggression against China's Tibet region as the foundation for the settlement of the Sino-Indian boundary question.*"

White Paper II, p. 27 (italics added). The statement indicates that China had accepted the present Sino-Indian boundary as *conforming to the factual situation*, but now wants its revision on the ground that China is now a big power. The principle of *pacta sunt servanda*, however, still holds good. See B. Cheng, *General Principles of International Law as applied by International Courts and Tribunals*, 1953, pp. 112-114 and 119. It has been recognised that certain categories of treaties, dispositive treaties, are especially binding on States as they create real rights and obligations. Frontier settlements come under this category. See D. P.

This would indicate that China had accepted the McMahon Line as conforming to the factual situation, but that she now wants a revision of the existing frontier. It has been accepted by the World Court that an assurance given by a competent official is binding on his government.

Moreover, as the Government of India pointed out:

"The Government of China were then fully aware of the alignment of the international boundary as shown on official Indian maps. They must also have been aware of the authoritative declaration made in 1950 by the Prime Minister of India on the subject of India's frontiers. Besides, the Government of China were aware that the Constitution of the Republic of India, adopted after lengthy discussions in open sessions of the Constituent Assembly, made specific mention in its Sixth Schedule of the Tribal areas of Assam and the North East Frontier Agency, which the Chinese Government now seek to claim as Chinese territory. In the 1954 Agreement the Chinese Government affirmed their respect for the territorial integrity of India. In the circumstances mentioned above they could not have done so if they intended to raise a demand subsequently for large areas of Indian territory."⁷⁶

O'Connell, *The Law of State Succession*, 1956, pp. 50-51. The reference to imperialist aggression is misleading, for Great Britain brought within her sway only those areas which had been traditionally recognised as part of India. One would have thought that the general and peaceful acceptance of this boundary over this long period of time would have obviated any possible claims in this regard. But if such contentions are to be raised, one could as well go back to the days of the Kushan and Asokan empires, when Khotan and Kashgar were under Indian rule. Besides it is a principle of good faith that

"a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel' or by any other name, it is one which courts of law have in modern times most usefully adopted."

England, Court of Exchequer: *Cave v. Mills* (1862), E. T. Hurlstone and J. P. Norman. *The Exchequer Reports*, 1856-1862. Vol. VII, p. 913 at p. 927. See (*The Mechanic*) *Atlantic and Hope Insurance Companies Case*, Moore, III *Int. Arbitration Digest* 1898, p. 3221 at p. 3226, the *Serbian Loans Case*, 1929, Series A, No. 20/21, pp. 38-39 and also the *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case*, 1923, I R.I.A.A., p. 369 at pp. 383-384 (cited in Cheng, *op. cit.*, pp. 141-143).

⁷⁶ *White Paper III*, p. 92; for text of the agreement see *White Paper I*, p. 98. The World Court has on more than one occasion had resort to the preambles of treaties for establishing the nature of the obligations of the Parties, e.g., *Pajzs, Czaky and Esterhazy Case*, 1936, Ser. A/B, No. 68, p. 60; *The Asylum Case*, I.C.J. Reports 1950, p. 266 at pp. 276, 282, and the *Rights of U.S. Nationals in Morocco Case*, I.C.J. Reports 1952, p. 176. In the latter, the Court held that it is common ground between the parties that the characterisation of the Status of Morocco, as resulting from the General Act of Algeciras of April 7, 1906 is respect for the three principles stated in the Preamble of the Act, namely: its sovereignty, integrity of its domains, and economic liberty without any inequality. In its Advisory Opinion on the *International Status of South West Africa*

Thus even assuming there are deficiencies in the Indian title, China is estopped from contesting India's right to exercise sovereignty up to the frontiers as shown on official Indian maps, which are accepted as valid by virtually every other State. The fact that India undertook expenditure in these areas for their development, patrolling etc., in the conviction that these areas belonged to her,⁷⁷ and that China, in spite of alleged claims to these areas, continued to acquiesce in the performance by India, for many years past, of all the substantive functions relating to administration,⁷⁸ cannot but be conclusive proof of the extinction of any Chinese claims which might have existed. It is in this light that the contention of Mr. Rubin, that "the Chinese might honestly consider themselves to be defenders of legal rights"⁷⁹ in crossing India's northern frontiers, must be considered. For, "however weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognised the title from contesting its validity at any future time."⁸⁰

(*I.C.J. Reports*, 1950, p. 128 *et seq.*) the Court opined that declarations made by South Africa to the League and the United Nations, constituting recognition of the continuation of her obligations under the mandate. See also Oppenheim, *op. cit.*, Vol. I, p. 872, who states that declarations, whereby parties undertake to pursue in future certain lines of conduct, differ in no respect from treaties. In view of China's reaffirmation on several occasions of her respect for the territorial integrity of India (e.g., see Joint Statement of the Prime Ministers of India and China, *Keesing's Archives*, 1954, 13661 A—which was signed even before the first of the border incidents had taken place—Final Communiqué of the Bandung Conference, 1955, *Keesing's Archives*, 1955, 14184), it is submitted that she has accepted and recognised the frontier as affirmed by India. It would be absurd to suggest that she could have made such categorical statements and at the same time have had mental reservations as to some 50,000 square miles of Indian territory. See also the dictum of the World Court in the *Anglo-Norwegian Fisheries Case*, (1951), *I.C.J. Reports*, p. 139.

⁷⁷ See the Award in the *Grisbadarna Case*, *loc. cit.*, in note 9, *supra*, at p. 130, wherein such expenditure by Sweden was held to be further evidence of the validity of her title, which she had been exercising in good faith. Sweden had no doubts in this regard, and incurred considerable expense in the administration of the disputed area, while Norway showed much less solicitude. In the present dispute, the Indian authorities have all along gone to much pains and expenditure in the administration of the frontier areas, in regulating conditions for travel and in holding themselves responsible for the safety of foreigners travelling in these areas. Tibet and China on the contrary have shown little if any concern for these areas. For instance, there is no indication that they have undertaken surveys of the areas under dispute; as pointed out above, the Chinese have relied on India for information regarding the location of places they lay claim to. *Supra*, p. 383, n. 40.

⁷⁸ See *Minquiers and Ecrehos Case*, *op. cit.*, Pleadings, Vol. II, p. 364 *et seq.* Counsel for the U.K. argued that inasmuch as France allowed the United Kingdom to perform all substantive functions relating to administration of these islands, she must be deemed to have acquiesced in the latter's title to these islands. It may be added that the judgment was completely in favour of the United Kingdom; *I.C.J. Reports*, 1953, p. 53 *et seq.*

⁷⁹ Rubin, *op. cit.*, p. 125.

⁸⁰ Schwarzenberger, *op. cit.*, pp. 299-300. In pointing out the function of good faith and its relation to acquiescence, the learned writer states that "Their uniform function is to create estoppels which prevent States from contesting titles which they have previously recognised or in which they

The question also arises as to the legality of the manner in which China has pressed her alleged claims. The Chinese incursions into India, to say the least, demonstrate a flagrant disregard of the principle of good faith.⁸¹ In the face of China's frequent resorts to violence, it is clear, as Joseph L. Kunz points out, that "India has a right of self-defence under Article 51 against the invasion of its borders by Chinese troops, even if 'only' a few Indians are killed and captured."⁸²

have acquiesced," "Titles to Territory" (1957) 51 Am.J.Int.L. 323 (italics added). See also the opinion of the U.S. member of the Alaska Boundary Tribunal, Cmd. 1871 (1904) p. 87, on the role of acquiescence. In the *Venezuelan Preferential Claims Case*, 1904, No. II, Scott, *Hague Courts Reports*, op. cit., Vol. I, p. 56 et. seq., the absence of "protest by the Government of Venezuela and by the neutral powers against the pretensions of the blockading powers to a preferential treatment either at the moment of cessation of the war against Venezuela or immediately after the signature of protocols (for arbitration)" was taken note of. In the *Palmas Case*, op. cit., acquiescence by Spain and later, the United States in the exercise of territorial rights by the Netherlands over the Talautse Isles and their dependencies was held to be a conclusive factor in establishing the Netherlands' title.

See generally on this, McGibbon, "The Scope of Acquiescence in International Law" (1954) B.Y.B.Int.Law 20 and "Estoppel in International Law" (1958) 7 Int. & Comp. L.Q. 468; D. W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) B.Y.B.Int. Law 176 and *supra*, p. 412, n. 75.

- ⁸¹ See the statement of the Permanent Court of Arbitration in the *Venezuelan Preferential Claims Case* (1904), that "the Principle of Good Faith ought to govern international relations." Scott, op. cit., *Hague Court Reports*, Vol. I, p. 55, at p. 60. See *Lighthouses Case*, 1934, Sep. Op. by Séfériadès, Series A/B, No. 62, p. 47; *Germano-Lithuanian Arbitration* 3, R.I.A.A., p. 1719 at p. 1751. See also, B. Cheng, op. cit., p. 140 et seq., wherein these and other cases are discussed.
- ⁸² J. L. Kunz, "Sanctions in International Law" (1960) 54 Am.J.Int.L. 334.