

**RESOLVING CLAIMS OF SELF-DETERMINATION:
A PROPOSAL FOR INTEGRATING PRINCIPLES OF
INTERNATIONAL LAW WITH SPECIFIC
APPLICATION TO THE TIBETAN PEOPLE**

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International Committee of Lawyers for Tibet

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A Proposal for Integrating Principles of International Law with
Specific Application to the Tibetan People**

By

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International Committee of Lawyers for Tibet

Pre-Conference Version
December 29, 1992

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TABLE OF CONTENTS

INTRODUCTION	1
I. ABSTRACT LAW OF BALANCING SELF-DETERMINATION CLAIMS: FRAMING THE ISSUES	2
II. SUMMARY OF THESESES	3
III. THE RELEVANT PRINCIPLES	3
A. Analytical Reduction of Seven Principles to Three	5
1. Good-Faith Fulfillment of International Obligations Embraces All the Other Principles	5
2. Cooperation Similarly Embraces All the Other Principles	6
3. Sovereign Equality Also Embraces All the Other Principles	6
4. Peaceful Settlement of International Disputes Is a Restatement of Territorial Integrity with an Acknowledgement of Non-Intervention in Domestic Jurisdiction	7
5. Outcome of the Analytical Reduction: The Relevant Principles are Self-Determination, Territorial Integrity, and Non-intervention in Domestic Jurisdiction	7
B. The Principle of Self-Determination	7
1. Self-Determination Defined	8
a. The Status of Self-Determination in International Law	9
b. Self-Determination and Independence	11
2. What Is a People?	12
a. The Preparatory Documents of International Instruments Indicate that "People" Should Be Broadly Construed	13
III. B. 2. b. Questions of Peoplehood Need Not Be Addressed in Resolving Claims of Self-Determination	13
C. Territorial Integrity	17
1. Territorial Integrity Defined	17
2. The Apparent Conflict Between Territorial Integrity and Self-Determination Is Resolved by the Principle of Governmental Legitimacy	17

a.	The Apparent Conflict Between Territorial Integrity and Self-Determination	18
b.	Territorial Integrity Depends Upon Governmental Legitimacy	19
I)	The Declaration on Principles Incorporates the Principle of Governmental Legitimacy	20
II)	Legitimacy Requires that a Government Be an Authentic Manifestation of Self-Determination	21
III)	Application of the Principle of Governmental Legitimacy Reconciles Territorial Integrity with Self-Determination	23
D.	Non-Intervention in Domestic Jurisdiction	23
1.	Non-Intervention in Domestic Jurisdiction Defined	23
2.	Denial of Self-Determination Justifies Intervention in Domestic Jurisdiction	24
a.	Intervention is Justified by International Friction Which Potentially Endangers International Security	25
b.	Intervention is Justified by Violations of Human Rights	26
III. D. 2. c.	Because Denial of a Claim of Self-Determination Justifies Infringement of Territorial Integrity, It Necessarily Justifies Intervention in Domestic Jurisdiction	28
IV.	APPLICATION OF THE BALANCING ANALYSIS	28
A.	Identification of the Parties and the Grounds and Natures of the Claims	28
1.	Identification of the Parties	28
2.	Identification of the Grounds and Natures of the Claims	29
3.	The Role of Human Rights in Determining the Grounds of the State's Claims .	30
a.	Genocide	30
b.	Cultural Suppression: Linguistic and Religious Discrimination	31
c.	Disruption of a People's Traditional Relationship with its Ancestral Homeland	33
B.	Assessing the Impacts of Alternative Resolutions of the Claims	36

1.	The Possibility of Threats to the Peace: The Problem of the Parties' Violence	36
2.	The Role of Human Rights	38
C.	Balancing the Likely Outcomes of Alternative Resolutions in the Light of International Values	39
V.	APPLICATION OF THE BALANCING ANALYSIS TO TIBET	42
A.	Identification of the Parties and the Grounds and Natures of the Claims	44
1.	Identification of the Parties	44
2.	Identification of the Grounds and Natures of the Claims	46
V. A. 2.	a. Tibet	46
I)	Self-Determination: The Extent of the Claim	46
II)	Territorial Integrity	48
A)	Statehood in International Law	48
B)	Consequences of Statehood	49
C)	Evidence Concerning Statehood	50
1)	Tibet's Relations with Imperial China	50
a)	Ancient History	50
b)	The Mongol Invasion and the Priest-Patron Relationship	51
c)	Tibet's "Second Kingdom"	52
d)	The Dalai Lamas and the Manchu Emperors	53
e)	Conclusions	55
2)	Tibet's Relations with the Nationalist Republic of China ...	56
3)	Tibet's Relations with the People's Republic of China	58
a)	The Seventeen-Point Agreement of 1951	59
b)	Acquisition by Force	62
c)	The Legal Effect of International Recognition	64

V. A. 2. b.	The People's Republic of China	66
	I) Territorial Integrity and Domestic Jurisdiction	66
	II) The Extent of the Claim	67
	III) The People's Republic's Legitimacy	67
	A) Genocide	68
	B) Cultural Suppression: Linguistic and Religious Discrimination	70
	1) Linguistic Discrimination	70
	2) Religious Discrimination	72
	C) Disruption of the Tibetan People's Traditional Relationship with Their Ancestral Homeland	77
	1) Population Transfer	77
	2) Environmental Destruction	83
B.	Assessing the Impacts of Alternative Resolutions of the Claims	90
1.	The Possibility of Threats to the Peace: The Problem of the Parties' Violence	91
a.	The Denial of the Tibetan Claims Threatens the Peace	91
b.	The Tibetans' Violence and Nonviolence	93
2.	The Role of Human Rights	96
a.	Tibet	96
b.	The People's Republic of China	104
I)	The Claims	104
V. B. 2. b. I)	A) Legal Issues Raised by the Tibetans	104
	B) Legal Issues Raised by the People's Republic of China	104
II)	Evidence Concerning the Claims	108
A)	Arbitrary Arrest and Detention	108
B)	Torture	114

C) Extrajudicial Execution	120
D) Forced Abortions and Sterilizations	123
E) Legitimacy Revisited: <u>Jus Cogens</u> and Undermining the Claim of Self-Determination	127
C. Balancing the Likely Outcomes of Alternative Resolutions in the Light of International Values	131

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Application to the Tibetan People***

Pre-Conference Draft

INTRODUCTION

[¶1] This paper, in five parts, proposes an analytical scheme for evaluating and resolving claims of self-determination, and then applies that scheme to the Tibetan people's claim of self-determination. Part One frames the basic issues posed by a balancing analysis. Part Two states the theses for which this paper argues. Part Three defines and analyzes the relevant principles of international law, and Part Four describes the mechanics of applying the balancing analysis to claims of self-determination. Finally, Part Five applies the analysis to a specific claim of self-determination -- that of the Tibetan people.

[¶2] Throughout, this paper assumes a quasi-adjudicatory forum for the resolution of self-determination claims. That is, it assumes a rational (rather than political) determination process in which claims may be resolved by application of known principles to demonstrable facts. This paper is not concerned, however, with determining what international body should constitute that forum nor (except for a brief consideration of the appropriate standard and burdens of proof in ¶¶5-2 through 5-3) with procedural issues related to the resolution of self-determination claims. Rather, it explores the applicable principles and suggests an analytical framework for their orderly application to the facts of specific claims of self-determination.

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I. ABSTRACT LAW OF BALANCING SELF-DETERMINATION CLAIMS: FRAMING THE ISSUES

¶1-1] Any balancing analysis¹ necessarily raises three questions. The first is: On what scale are elements to be balanced? This paper argues that the seven "basic principles of international law"² proclaimed by the United Nations General Assembly, taken together, provide the scale. The principles "are interrelated and each principle should be construed in the context of the other principles"³ in order to avert the danger that "antagonists in the international arena are left to justify their conflicting policies by reference to alternative 'first principles' of international conduct."⁴ This paper argues in ¶¶3-6 through 3-14 that the seven principles can be analytically reduced to three: Self-Determination, Territorial Integrity, and Non-Intervention in Domestic Jurisdiction. This paper then argues in ¶¶3-36 through 3-49 that the apparent conflict between self-determination and territorial integrity can be resolved by applying the principle of legitimacy.

¶1-2] The second question posed by a balancing analysis is: Who are the claimants and what are the grounds of their claims? This paper suggests in ¶¶3-26 through 3-33 that the problem of identifying the claimants of self-determination is among the most vexing issues in international law, but it need not be resolved in order to address such claims. This paper also argues in ¶¶4-10 through 4-21 that at least three kinds of human-rights abuses -- genocide, cultural suppression, and disruption of the self-determination claimants' traditional relationship with their ancestral homeland -- undermine a State's claim of territorial integrity.

¶1-3] The third question posed by a balancing analysis is how is the balancing process conducted? This paper argues in ¶¶4-20 through 4-39 that particular claims must be assessed, in the light of international values, in terms of the likely outcomes of their grant or denial. Thus, not the principles in which claims are grounded, but the likely outcomes of alternative resolutions of competing claims, are balanced. For example, self-determination is not an element to be balanced; rather, the consequences of a particular exercise of self-determination⁵ are balanced against the consequences of forbidding that exercise. Similarly, territorial integrity is not an element to be balanced; the consequences of a particular exercise of territorial integrity are balanced against the

¹ A balancing analysis is the most appropriate for resolving claims of self-determination because the principle of self-determination is neither a moral principle with no legally binding effect nor a peremptory norm from which no derogation is permitted. See ¶¶3-18 through 3-22, *infra*. Moreover, the use of a balancing analysis provides a measure of certainty in assessing potentially dangerous situations, thereby reducing their volatility. See ¶3-23, *infra*.

² Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 GAOR, Supp. 28, U.N.Doc A/8028, at 121 (1970) ("Declaration on Principles").

³ *Id.*

⁴ Lee C. Buchheit, Secession: The Legitimacy of Self-Determination, Yale University Press (New Haven & London 1978) at 33.

⁵ See Declaration on Principles, *supra* n.2: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

consequences of forbidding that exercise.

II. SUMMARY OF THESES

[¶2-1] This paper asserts and argues for the following theses:

[¶2-1(a)] The seven principles announced in the Declaration on Principles can be reduced, for purposes of analysis, to three: Self-Determination, Territorial Integrity, and Non-Intervention in Domestic Jurisdiction (¶¶3-6 through 3-14).

[¶2-1(b)] Self-determination is neither a peremptory norm of international law nor a mere moral principle imposing no legal obligations, but a basic principle of international law to be construed in conjunction with other co-equal principles, the content of each informing the content of the others. Therefore, a balancing analysis is the most suitable for resolving claims of self-determination (¶¶3-18 through 3-23).

[¶2-1(c)] Determining what constitutes a people presents vexing problems of international law to which there is as yet no generally accepted solution, but such a solution is not necessary to the resolution of self-determination claims (¶¶3-26 through 3-33).

[¶2-1(d)] The principles of territorial integrity and self-determination are in apparent conflict, but this conflict can be resolved by applying the principle of legitimacy: An illegitimate government has no cognizable claim of territorial integrity (¶¶3-36 through 3-49).

[¶2-1(e)] Anything which infringes territorial integrity necessarily intervenes in domestic jurisdiction; therefore, anything which justifies infringement of territorial integrity necessarily justifies intervention in domestic jurisdiction (¶¶3-53 and 3-63 through 3-64).

[¶2-1(f)] Denial of a claim of self-determination -- either the refusal to honor a valid claim or the refusal to allow a claimant group to pursue its claim in an appropriate international forum -- justifies both infringement of territorial integrity and intervention in domestic jurisdiction (¶¶3-54 through 3-65).

[¶2-1(g)] Genocide, cultural suppression, and disruption of the self-determination claimants' traditional relationship with their ancestral homeland undermine a State's claim of territorial integrity (¶¶4-10 through 4-21).

[¶2-1(h)] Justification for violence perpetrated by rival self-determination and territorial-integrity claimants must be assessed in terms of the likelihood of threats to the peace; neither the State's nor any third party's intent to violate international law if the self-determination claim is granted is a proper consideration in resolving claims of self-determination (¶¶4-23 through 4-30).

[¶2-1(i)] The self-perpetuating nature of human-rights abuses is a critical factor in assessing the likely consequences of denying a claim of self-determination (¶¶4-31 through 4-33).

III. THE RELEVANT PRINCIPLES

[¶3-1: Summary of Part III] This Part begins with a statement of the seven principles of

international law relevant to the resolution of claims of self-determination (¶¶3-3 through 3-5). It then articulates and explains the reduction in this analysis of those seven principles to three (¶¶3-6 through 3-14). This Part then examines those three resulting principles: Self-Determination (¶¶3-15 through 3-33), Territorial Integrity (¶¶3-49), and Non-Intervention in Domestic Jurisdiction (¶¶3-50 through 3-65).

[¶3-2] This Part elaborates one of the fundamental theses of this paper: Genuine territorial integrity, entitled to non-infringement, derives from a government's being the authentic manifestation of the governed people's exercise of the right of self-determination (¶¶3-36 through 3-49).⁶ That elaboration, however, is predicated upon the examination of the principles of self-determination and territorial integrity which, therefore, precedes the reconciliation of those principles.

[¶3-3] There are seven "basic principles of international law" relevant to this analysis. As proclaimed by the General Assembly of the United Nations in the Declaration on Principles,⁷ these are:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

⁶ This elaboration is not an elevation of self-determination over territorial integrity, but a construction of these principles informed by the content of the other. See ¶¶3-43, *infra*.

⁷ This paper quotes extensively from the Declaration on Principles. Numerous other United Nations instruments also assert the principle and right of self-determination (or related matters), and this paper cites, at various points: the Charter of the United Nations; the Universal Declaration of Human Rights; the Declaration on the Granting of Independence to Colonial Countries and Peoples; the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief; the Declaration on the Elimination of All Forms of Racial Discrimination; the Declaration on the Right to Development; the Charter of Economic Rights and Duties of States, G.A.Res. 3281 (XXX); Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, G.A.Res. 1314 (XIV); the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX) of 21 December 1965; the Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV) of 11 December 1969; the Declaration on the Strengthening of International Security, G.A. Res. 2734 (XXV) of 16 December 1970; the Definition of Aggression, G.A. Res. 3314 (XXIX) of 14 December 1974; and United Nations General Assembly Resolutions 637A (VII), 1188 (XII), and 1803 (XVII).

Additionally, numerous other international instruments describe self-determination and related concepts, and this paper also cites, at various points: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the African Charter on Human and Peoples' Rights; the Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples, Panama 1984); and the Universal Declaration of the Rights of Peoples (Algiers 1976).

The Declaration on Principles, however, is the single international instrument which asserts basic principles of international law and describes their interrelationships. Because this paper is primarily concerned with applying those interrelationships to claims of self-determination, the Declaration on Principles is the primary source of international law discussed.

The duty of States to co-operate with one another in accordance with the Charter;

The principle of equal rights and self-determination of peoples;

The principle of sovereign equality of States; and

The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.⁸

[¶3-4] The General Assembly has also declared that "[i]n their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles."⁹

[¶3-5] Therefore, the first step in the balancing analysis is to determine the nature of, and interrelationships among, those principles in light of which the potential outcomes of self-determination claims are to be balanced. The interrelatedness of the relevant principles is the subject of the following section.

A. Analytical Reduction of Seven Principles to Three

[¶3-6: Summary of Section III.A] This section explains the reduction in this analysis of the seven relevant principles to three. Good-faith fulfillment of international obligations, cooperation, and sovereign equality are not themselves constituent principles in light of which claims are balanced; rather, they describe obligations to comply with the other principles (¶¶3-7 through 3-12). Further, peaceful settlement of international disputes is a restatement of territorial integrity and an acknowledgement of non-intervention in domestic jurisdiction (¶3-13). Thus, the seven principles in effect reduce to three: self-determination, territorial integrity, and non-intervention in domestic jurisdiction (¶3-14).

1. Good-Faith Fulfillment of International Obligations Embraces All the Other Principles

[¶3-7] In the Declaration on Principles, the General Assembly described the principle of good-faith fulfillment of international obligations as imposing on States "the duty to fulfil in good faith [their] obligations under the generally recognized principles and rules of international law." In the same Declaration, the General Assembly also proclaimed the seven principles under discussion to be "basic principles of international law" Therefore, the duty imposed by the principle of good-faith fulfillment of international obligations requires States to comply with all of the other principles announced in the Declaration on Principles.

[¶3-8] The only additional obligation imposed by this principle is to fulfill obligations under international agreements, provided that those obligations are consistent with those arising under

⁸ See also Charter of the United Nations, Art. 2, ¶¶1-4: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles. 1. The Organization is based on the principle of the sovereign equality of all its Members. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

⁹ Declaration on Principles, supra n.2.

the Charter of the United Nations.¹⁰ Thus, the principle of good-faith fulfillment of international obligations embraces all the other relevant principles and creates no additional element affecting the balancing analysis.

2. Cooperation Similarly Embraces All the Other Principles

[¶3-9] The principle of cooperation also embraces all the other relevant principles. By its very terms, it incorporates "the principles of sovereign equality and non-intervention,"¹¹ and it exists "in order to maintain international peace and security,"¹² a goal effectuated by the principles of territorial integrity and peaceful settlement of international disputes.¹³

[¶3-10] The principle of cooperation embraces the principle of self-determination. The principle of cooperation imposes on States a duty to "co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all . . ."¹⁴ As discussed below at ¶¶3-60 through 3-62, self-determination is "a prerequisite to the full enjoyment of all fundamental rights."¹⁵ Therefore, to cooperate in the promotion of universal respect for human rights and fundamental freedoms is to cooperate in the promotion of universal respect for the principle of self-determination.

[¶3-11] The principle of cooperation also embraces the principle of good-faith fulfillment of international obligations. As discussed above at ¶¶3-7 through 3-8, the latter principle applies to all international legal obligations. Although the scope of the duty of cooperation is not so broad,¹⁶ a State which is in breach of its international obligations with respect to a subject to which the duty of cooperation extends cannot be fulfilling that duty of cooperation.

3. Sovereign Equality Also Embraces All the Other Principles

[¶3-12] The principle of sovereign equality embraces all the other relevant principles. The essence of sovereign equality is that States "have equal rights and duties and are members of the

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ As explained in ¶3-13, infra, the principle of peaceful settlement of international disputes is largely a restatement of the principle of territorial integrity.

¹⁴ Declaration on Principles, supra n.2.

¹⁵ G.A.Res. 637A (VII); accord authorities cited in n.95, infra.

¹⁶ As the Declaration on Principles, supra n.2, provides: "(a) States shall co-operate with other States in the maintenance of international peace and security; (b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance; (c) States shall conduct their international relations in the economic, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention; (d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter."

international community,"¹⁷ a principle equally applicable to all duties arising under international law. Moreover, the explication of this principle incorporates several of the other relevant principles.¹⁸

4. Peaceful Settlement of International Disputes Is a Restatement of Territorial Integrity with an Acknowledgement of Non-Intervention in Domestic Jurisdiction

¶13-13 The principle of peaceful settlement of international disputes is largely a restatement of the principle of territorial integrity.¹⁹ Non-peaceful settlement of international disputes can only be "the threat or use of force . . . as a means of solving international disputes,"²⁰ which is prohibited by the principle of territorial integrity. Moreover, by its limitation to international disputes, the principle of peaceful settlement of international disputes acknowledges the principle of non-intervention in domestic jurisdiction. Thus, all considerations relevant to this stage of the analysis and arising out of the principle of peaceful settlement of international disputes is subsumed within the principles of territorial integrity and non-intervention in domestic jurisdiction.

5. Outcome of the Analytical Reduction: The Relevant Principles Are Self-Determination, Territorial Integrity, and Non-Intervention in Domestic Jurisdiction

¶13-14 By virtue of the analytical reduction just described, the relevant principles to this balancing analysis are three: Self-determination, Territorial Integrity, and Non-intervention in Domestic Jurisdiction. These, too, must be construed in the light of their interrelationships.²¹ Therefore, this paper turns next to a closer examination of these three principles.

B. The Principle of Self-Determination

¶13-15: Summary of Section III.B)

This section begins by defining the principle and legal right of self-determination, including an

¹⁷ Declaration on Principles, *supra* n.2.

¹⁸ The Declaration on Principles, *supra* n.2, states: "In particular, sovereign equality includes the following elements: (a) States are judicially equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other states."

¹⁹ See, e.g., Robert Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, 65 Am.J.Int'l L. 713 (1971) at 725: "This principle is the other side of the coin of the obligation not to use force." The affirmative duty to seek peaceful settlement, which is not imposed by the principle of territorial integrity, is not relevant to the analysis at this stage. Rather, a State's fulfillment or breach of that obligation is relevant to the assessment, described below at ¶¶14-22 through 4-39, of the likely outcomes of alternative resolutions of self-determination claims.

²⁰ Declaration on Principles, *supra* n.2.

²¹ Declaration on Principles, *supra* n.2.

examination of its status in international law and its relationship to the achievement of independence (¶¶3-16 through 3-25). This section rejects both the argument that self-determination is a rule of *jus cogens*²² and the argument that it is a mere moral principle imposing no legal obligations, for the same reason: Each of these arguments is inconsistent with the plain language of the Declaration on Principles, according to which each principle "should be construed in the context of the other principles." (¶¶3-18 through 3-22). This section then explores the nature of a "people," in which the right of self-determination inheres, and concludes that determining a "peoplehood" of a group is unnecessary to resolution of its claim of self-determination (¶¶3-26 through 3-33).

1. Self-Determination Defined

¶3-16 The principle of self-determination is formalized as "the principle of equal rights and self-determination of peoples."²³ Self-determination is a legal right of peoples which guarantees their cultural, economic, political and social freedom:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.²⁴

¶3-17 Nor is the Declaration on Principles alone in declaring self-determination a right of peoples:

All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.²⁵

²² *Id.*, "a peremptory norm . . . from which no derogation is permitted," Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (*in force* 1980), Art. 53.

²³ Charter of the United Nations, Art. 1(2); Declaration on Principles, *supra* n.2.

²⁴ Declaration on Principles, *supra* n.2.

²⁵ International Covenant on Economic, Social and Cultural Rights ("ICESCR") and International Covenant on Civil and Political Rights ("ICCPR"), common Art. 1(1); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2625(XV) 1960 ("Declaration on Independence"), ¶ 1.

See also Universal Declaration of the Rights of Peoples (Algiers 1976), Art. 5 (*quoted in* Crawford, ed., *The Rights of Peoples* (Clarendon Press, Oxford 1988) at 187): "Every people has an imprescriptible and unalienable right to self-determination. It shall determine its political status freely and without any foreign interference."

See also Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples, Panama 1984) Art. 1 (*quoted in id.* at 205): "All indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development."

See also Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "[E]very State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the

a. The Status of Self-Determination in International Law

[13-18] Opinions on the status of self-determination in international law vary widely.²⁶ At one extreme, self-determination is nothing more than a moral principle which imposes no legal obligations.²⁷ At the other extreme, self-determination is a principle of ius cogens,²⁸ "a

United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order to promote friendly relations and co-operation among States; and to bring a speedy end to colonialism, having regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations".

See also Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX) of 12 December 1974); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX) of 21 December 1965; Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV) of 11 December 1969; Declaration on the Strengthening of International Security, G.A. Res. 2734 (XXV) of 16 December 1970; Definition of Aggression, G.A. Res. 3314 (XXIX) of 14 December 1974.

See also Rosenstock, supra n.19, at 731: "Many states had never before accepted self-determination as a right. Now it is recognized, as the second paragraph [of the Declaration's treatment of self-determination] asserts, that states have an affirmative duty to promote the realization of the right."

²⁶ See, e.g., Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights (University of Pennsylvania Press, Philadelphia 1990) at 44-45 (emphasis in original; footnotes omitted): "A continuing debate among international lawyers is whether or not there exists a right to self-determination in customary international law, and, if so, whether or not it is limited to colonial situations. Professors Brownlie and Gros Espiell submit that the right to self-determination constitutes ius cogens, a peremptory norm of international law, while Professor Verzijl represents the other extreme in holding that self-determination is 'unworthy of the appellation of a rule of law.'"

²⁷ See, e.g., Leo Gross, "The Right of Self-Determination in International Law," in Martin Kilson, ed., New States in the Modern World, described in Rupert Emerson, Self-Determination, 65 Am.J. Int'l L. 459 (1970) at 461.

²⁸ See, e.g., Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 89-90 (Ammoun, J. sep. opn.); I. Brownlie, Principles of Public International Law (3d ed. 1979) at 83 (describing the principle of self-determination as "one aspect of ius cogens"); H. Gros Espiell, Report on the Right of Self-Determination, U.N. Doc. E/CN.4/Sub.2/405/rev.1 (1980) at 12 ("no one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of ius cogens"); A. Cassese, "Self-Determination of Peoples," in The International Bill of Human Rights: The International Covenant on Civil and Political Rights (1981) ("the general principle of self-determination has become a peremptory norm of international law (ius cogens)").

See generally International Committee of Lawyers for Tibet, The Right of the Tibetan People to Self-Determination: A Preliminary Report (San Francisco 1991) at 10-13.

Cf. Crawford, "The Rights of Peoples: Some Conclusions," in Crawford, supra n.25, at 166: "It was arguable that, notwithstanding the recognition of the category in the Vienna Convention, no actual example of a rule of ius cogens yet existed. That view would not be widely held now, and indeed the recognition of the possibility of peremptory norms of general international law has itself been instrumental in the recognition that certain rules have, or are coming to have, that character. On the other hand it would be generally agreed that there are relatively few peremptory norms of international law falling within the category of ius cogens."

peremptory norm . . . from which no derogation is permitted"²⁹

[¶13-19] Both of these extreme positions are inconsistent with the Declaration on Principles. The General Assembly made clear in that Declaration that self-determination is no mere moral principle, but a "basic principle[] of international law" which recognizes the right of peoples to self-determination and imposes on States the affirmative duty to respect that right:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.³⁰

[¶13-20] The Declaration on Principles also makes clear that self-determination is not a peremptory norm from which no derogation can ever be permitted. Rather, it, like all the other principles elaborated in the Declaration, "should be construed in the context of the other principles."³¹

[¶13-21] That self-determination is neither a mere moral principle nor an absolute edict makes a balancing analysis the most suitable for resolving claims of self-determination.³² If either extreme position on the status of self-determination were correct, self-determination would not be susceptible to a balancing analysis: A principle which imposes no legal obligations has no weight to balance against the legal duties and rights of States; similarly, a peremptory norm from which no derogation is permitted cannot be outweighed by any array of lesser duties and rights.

²⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (in force 1980), Art. 53.

³⁰ Declaration on Principles, supra n.2; see also ICESCR and ICCPR, supra n.25, common Art. 1(1): "All peoples have the right of self-determination."

³¹ Id. See also Aureliu Cristescu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, United Nations (New York 1981) at ¶ 154: "No United Nations instrument confers such a peremptory character on the right of peoples to self-determination." See also Crawford, supra n.28, at 167: "[T]he principle of self-determination . . . is stated in the International Covenant on Civil and Political Rights alongside the other human rights. It is not stated in terms which give it any logical or other priority over those rights. The rights are simply concurrent."

The Declaration on Principles, Cristescu, and Crawford state the current position of international law. For arguments that self-determination is a norm of ius cogens, see note 28, supra.

³² See Brownlie, "The Rights of Peoples in Modern International Law," in Crawford, supra n.25, at 7: "In the case of the protection of group rights, precisely because a very delicate balancing of interests is called for, the existence of an efficient and sensitive legal system is immensely important."

See also International Committee of Lawyers for Tibet, The Right of the Tibetan People to Self-Determination: A Preliminary Report (San Francisco 1991) at 16 (footnotes omitted): "The right to self-determination is not absolute. Where it conflicts with other rights or principles recognized by international law, a process of balancing these rights and their underlying values must take place. This is particularly true in situations where the right of self-determination conflicts with the principle of national unity and territorial integrity. The furtherance of human dignity and human rights is one value that is of paramount importance in this balancing process.

"Conflicting rights and principles must be viewed with the understanding of the interrelatedness of the right to self determination and respect for other fundamental human rights and freedoms."

[¶13-22] By contrast, the Declaration on Principles virtually commands a balancing analysis with respect to self-determination. All of the principles there declared "are interrelated and each principle should be construed in the context of the other principles."³³ This is fundamental to the balancing analysis, which entails construing the principle of self-determination, as applied in particular circumstances, in the context of the principles of territorial integrity and non-intervention in domestic jurisdiction, as applied in those same circumstances.³⁴

[¶13-23] Moreover, a cohesive framework for resolving claims of self-determination in which the claims of all parties can be heard and assessed according to known standards would tend to stabilize international relations and reduce the volatility of potentially dangerous situations.³⁵

b. Self-Determination and Independence

[¶13-24] A crucial aspect of self-determination is that its exercise is not limited to the attainment of national independence:

The establishment of a sovereign and independent State, the free association with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.³⁶

³³ Declaration on Principles, supra n.2.

³⁴ As discussed above at ¶11-3, the principles themselves are not balanced. Rather, the meaning of each sheds light on the meaning of the others so that, taken together, they form the scale on which the likely outcomes of alternative resolutions of self-determination claims are balanced.

³⁵ See Buchheit, supra n.4, at 235: "The danger of the 'demonstration effect' (the recognition of one secession tending to foment other movements elsewhere) should not contribute to the assessment of future disruption. The very existence of a scheme for determining secessionist legitimacy would limit the precedential effect of such a recognition by rendering it explicable in terms of the standards articulated by the international community. It is only when a particular claim is recognized without specifying the circumstances which made it acceptable to the community that other, dissimilar, movements might feel encouraged by the decision."

See also Istvan Bibo, The Paralysis of International Institutions and the Remedies (John Wiley & Sons, New York 1976) at 73: "Self-determination is a stabilizing force in that the strength it gives to situations is greater than [that of] the existing power relationships, and also it can quickly stabilise and make permanent the changes that are provoked by or favourable to it."

See also Prott, "Cultural Rights as Peoples' Rights in International Law," in Crawford, supra n.25, at 93: "[T]he effort to frame rules to meet these claims must meet the same criteria as any other claim for attention in the legal system: they must be formulated in a way that is clear and understandable, that gives adequate notice to those subject to an obligation of the ambit of that obligation, and to those who must administer the rules, of their content."

³⁶ Declaration on Principles, supra n.2.

After quoting this paragraph, Hannum observes: "This flexibility has not yet been utilized to justify emergence from dependent status to any unusual constitutional or other arrangements, but it does represent a rare and welcome recognition of the potential for new inter- and intra-state relations." Hannum, supra n.26, at 41.

But see Nettheim, "'Peoples' and 'Populations' -- Indigenous Peoples and the Rights of Peoples," in Crawford, supra n.25, at 119-120: "Yet the UN Charter itself and a number of the General Assembly

¶3-25] Thus, the core of self-determination is not the achievement of sovereign statehood, but the free determination of any political status. The Declaration on Principles makes equally clear, however, that "[t]he establishment of a sovereign and independent State" is one mode of implementing the right of self-determination. The core of the principle is the right; the possible implementations are as varied as the claimants.³⁷ As discussed below at ¶3-40 through 3-49, the potential of self-determination to result in secession is only apparently in conflict with the principle of territorial integrity, and they are reconcilable by the idea of governmental legitimacy. The point here is that the right of self-determination is both broad enough to encompass sovereign statehood and flexible enough to accommodate any freely chosen lesser autonomy.

2. What Is a People?

¶3-26] The question of peoplehood -- what constitutes a people? -- has assumed great importance in considerations of self-determination,³⁸ because it is in peoples that the right of self-determination inheres.³⁹ There is, however, no generally accepted definition of a "people." The

resolutions clearly contemplate that a people exercising their right to self-determination may choose from -- and may even be confined to -- a range of possible outcomes other than independence: these include federal arrangements, regional autonomy, and full integration. It would seem to follow that indigenous 'enclave' peoples may be allowed to claim a right to self-determination only if they renounce independence as one possible outcome. . . . Is it possible to locate objective criteria to distinguish which peoples would have the full range of self-determination options and which would not?"

³⁷ See Brownlie, *supra* n.32, at 4 ("the exercise of [self-determination] involves a range of political models, including the choice of independent statehood or some form of autonomy or associated statehood").

See also Nettheim, *supra* n.36, at 118: "Self-determination is normally thought to permit a people a range of options from absorption within another nation, at one end of the range, to full sovereign independence, at the other."

See also Hannum, *supra* n.26, at 39: "Once the 'self' has been identified, it is abundantly clear that full independence is considered to be the 'normal' result of the exercise of self-determination. While this has been the result in all but a handful of cases of decolonization thus far, it is equally clear, however, that independence is not a necessary result."

See also *id.* at 95: "The content of . . . self-determination varies tremendously, reflecting the diversity of situations in which indigenous peoples find themselves and the diverse character of indigenous groups themselves. Some do aspire to complete independence and statehood, while many others demand autonomy or self-government only in specific areas of competence (such as full control over land and natural resources)."

³⁸ See, e.g., Cristescu, *supra* n.31, at ¶279: "The question of a definition of the term 'people' is of the greatest importance, for it may affect the measures to be taken with regard to particular aspects of the matter, for example, the political aspect of the exercise of the right of self-determination, that is, the right of peoples to choose their international status."

See also Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?" in Crawford, *supra* n.25, at 55: "From the perspective of international law, the key feature of the phrase 'rights of peoples' is not the term 'rights', but the term 'peoples'."

See also Hannum, *supra* n.26, at 30: "Most discussions of 'self-determination' begin with an attempt to break the concept into its component parts: what constitutes the relevant 'self,' and in what manner should its fate be determined?"

³⁹ Charter of the United Nations, Art. 1(2); ICESCR and ICCPR, *supra* n.25, common Art. 1(1); Declaration on Independence, *supra* n.25, ¶ 1; Declaration on Principles, *supra* n.2. See also Crawford, *supra* n.38, at 59: "self-determination is plainly to be thought of as a right of 'peoples' rather than governments."

Charter of the United Nations does not contain such a definition, nor does the Declaration on Principles, the Declaration on Independence, or either of the International Covenants.

**a. The Preparatory Documents of International Instruments
Indicate that "People" Should Be Broadly Construed**

[¶13-27] Some indication of the intended meaning of the term "people" in international instruments is found in the preparatory work which resulted in those instruments. Thus, the secretariat of the United Nations Conference on International Organization, having prepared a list of words and phrases appearing frequently in the draft Charter, observed:

No difficulty appears to arise from the use of the word "peoples" which is included . . . whenever the idea of "all mankind" or "all human beings" is to be emphasized. . . . [Where] the word "peoples" is used in connexion with the phrase "self-determination of peoples" . . . no other word seems appropriate. . . . "[N]ations" is used in the sense of all political entities, states and non-states, whereas "peoples" refers to groups of human beings who may, or may not, comprise states or nations.⁴⁰

[¶13-28] Similarly, in the preparatory work which resulted in the International Covenant on Civil and Political Rights, "[t]he word 'peoples' was understood to mean peoples in all countries and territories, whether independent, trust or non-self-governing. . . . It was thought . . . that the term 'peoples' should be understood in its most general sense and that no definition was necessary."⁴¹ Indeed, "peoples" was substituted for "nations" in Article 1(1) of the Covenant because "'peoples' was considered to be the more comprehensive term."⁴²

**b. Questions of Peoplehood Need Not Be Addressed
in Resolving Claims of Self-Determination**

[¶13-29] Although the comments quoted above from the preparatory documents caution against a narrow construction of the term "people," the fact remains that there are numerous possible

Although Cristescu has quoted a Committee of the United Nations Conference on International Organization, stating that "[e]quality of rights . . . extends in the Charter to states, nations and peoples" (Cristescu, *supra* n.31, at ¶ 260), he has also pointed out that the term "nations" is "covered by the term peoples" (*id.* at ¶ 280) and that the term "States" means "peoples constituted as States" (*id.* at ¶ 286). Thus, his view is in accord with the numerous international instruments that define self-determination as a right of peoples.

⁴⁰ Cristescu, *supra* n.31, at ¶ 262 (quoting Documents of the United Nations Conference on International Organization, CO/156 (vol. XVIII, pp. 657-658)).

⁴¹ M. Bossuyt, Guide to the "Travaux Préparatoires" of the international Covenant on Civil and Political Rights (1967) at 32.

⁴² *Id.* at 35.

definitions of the term.⁴³ That fact should be less problematic than may first appear, however, because the question of a group's peoplehood need not be resolved. Indeed, "whenever in the course of history a people has become aware of being a people, all definitions have proved superfluous."⁴⁴

[¶13-30] The question of a group's peoplehood need not be resolved because it can (indeed, it must) be assumed without affecting the outcome of the balancing analysis. The balancing analysis is concerned with the potential outcomes of alternative resolutions. Those outcomes can be predicted on the basis of objectively demonstrable facts and patterns. Peoplehood, by contrast, is

⁴³ Cristescu has identified four such conceptions of "people": "One body of opinion holds that, in bestowing the title of 'people', no distinction can be made on the grounds that some peoples are under the sovereignty of another country, or live on a particular continent, or possess independent territories, or live in the territory of a sovereign State.

"In another view, the word 'peoples' should be understood to mean all those who are able to exercise their right of self-determination, who occupy a homogenous territory and whose members are related ethnically or in other ways.

"The opinion has also been expressed that the word 'peoples' should designate large, homogeneous national groupings; that the right of self-determination should be accorded only to peoples who lay an informed claim to it; and that politically backward peoples should be placed in the care of an international trusteeship system which would see to it that they develop the capacity to exercise their right of self-determination.

"Yet another body of opinion holds that, for the purpose of defining the word 'people', the principle of self-determination should be considered in application to the following two situations only: first, that of peoples occupying a geographical area which, in the absence of foreign domination, would have formed an independent State (colonial territories, Trust Territories, etc.); and second, the commoner situation of peoples occupying a territory that has become independent, but who may be subjected to new forms of oppression, in particular, neo-colonialism." Cristescu, *supra* n.31, at ¶¶ 270-273.

Similarly, Michalska has identified five common applications of the term "people":

"A 'People' living as a minority (or even as a majority) group all in one state, ruled, however, by another 'people'.

"'People' living as minority groups in more than one state without their own statehood.

"A 'people' living as a minority group in a state but perceiving itself as part of the "people" of a neighbouring state.

"A 'people' or 'nation' forced by external influence to live in separate states.

"A 'people' living as a majority (or even as a minority) group within the limits of a territory with a special status under foreign domination." Anna Michalska, "Rights of Peoples to Self-Determination in International Law," in William Twining, ed., *Issues of Self-Determination* (Aberdeen University Press, Aberdeen 1991) at 75.

⁴⁴ Cristescu at ¶274; *see also* Makinson, "Rights of Peoples: Point of View of a Logician," in Crawford, *supra* n.25, at 74-75: "The question arises, however, whether it is possible to give some general characterization of what is to count as a 'people' that will serve to distinguish 'peoples' from 'lesser' kinds of collectivity for whom it is felt that the right to self-determination cannot reasonably be applied. Of course, it is always possible to do so in a vague manner but that is hardly adequate. It appears, moreover, that there are so many variations and gradations of social bonding as to render extremely arbitrary any attempt to draw a neat dividing line marking off a privileged category, of 'peoples' who bear special rights, and others who do not."

See also Kamenka, "Human Rights, Peoples' Rights," in *id.* at 133: "Nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history."

a subjective perception of self-identity.⁴⁵ The existence and strength of such a perception can only be inferred, not demonstrated. Therefore, a claimant group's peoplehood must be assumed, or the group is faced with proving the undemonstrable.⁴⁶

[¶3-31] Thus, although most scholars agree that subjective identity as a people is essential to peoplehood, they also agree that some objective indicium of peoplehood is necessary to a claim of self-determination.⁴⁷ A group must possess some objective indicium of peoplehood in order to identify itself as a people, because without an objective indicium of peoplehood, a group has no way to form a "collective self-consciousness that separates the 'we' from the 'they.'"⁴⁸ On the other

⁴⁵ See, e.g., Harold S. Johnson, "Self-Determination: Western European Perspectives," in Yonah A. Alexander and Robert A. Friedlander, eds, Self-Determination: National, Regional, and Global Dimensions (Westview Press, Boulder 1980) ("it is the consciousness of a separate-group status which provide[s] the basis for a claim of self-determination"); Przetacznik, The Basic Collective Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace, 8 N.Y. Law School J. of Human Rights 49, 51 (1991) ("a people or group of people that . . . considers itself separate and distinct must also have the right to determine the state in which they will live and the form of government that will be implemented").

⁴⁶ Cristescu has also identified other undesirable consequences of defining the term "people." On the one hand, "any attempt at definition might prove dangerous to subject peoples by providing those who govern them with pretexts for denying them self-determination[.]" (Cristescu, supra n.31, at ¶274.) On the other hand, "various possibilities of interpretation and the consequent uncertainties could in many cases turn the right of peoples to self-determination into a weapon for use against the territorial integrity and political unity of States." (Id. at ¶275.)

⁴⁷ See e.g., Hannum, supra n.26, at 31: "Most discussions of 'self-determination' begin with an attempt to break the concept into its component parts: what constitutes the relevant 'self,' and in what manner is its fate to be determined? The former includes subjective and objective components, in that it is necessary for members of the group concerned to think of themselves as a distinctive group, as well as for the group to have certain objectively determinable common characteristics, for example, ethnicity, language, history, or religion."

Cristescu, after identifying the holders of the right of self-determination as peoples, nations, and states (Cristescu, supra n.31, at ¶ 260), and noting that the term "nations" is "covered by the term 'peoples'" (id. at ¶ 280) and that the term "States" means "peoples constituted as States" (id. at ¶ 286), observed that "[n]ational awareness represents the quintessence of the nation" (id. at ¶ 283).

Similarly, the International Commission of Jurists has stated that peoplehood has "one essential and indeed indispensable characteristic . . . : a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist." International Commission of Jurists, 8 The Review 42, 47 (1972).

See also Johnson, supra n.45, at 89: "it is the consciousness of a separate-group status which provides the basis for a claim for self-determination"; Przetacznik, supra n.45, at 51: "a people or group of people that . . . considers itself separate and distinct must also have the right to determine the state in which they will live and the form of government that will be implemented."

As stated by a group of experts of the United Nations Economic and Social Council, the objective indicia of peoplehood are: "(a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; [and] (g) common economic life[.]" United Nations Economic and Social Council, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations (1990); see also International Commission of Jurists, 8 The Review 42, 47 (1972).

⁴⁸ Harold S. Johnson and Baljit Singh, "Self-Determination and World Order," in Alexander and Friedlander, supra n.45, at 357. See also UNESCO Declaration on Race and Racial Prejudice (1978), Art. 2 (quoted in Crawford, supra n.38, at 57 n.4: "'All peoples have the right to be different, to consider

hand, because no single objective factor is essential to peoplehood,⁴⁹ "a people must itself delineate the purview of its common existence and settle criteria for belonging to the group."⁵⁰

[¶3-32] Thus, as Van Walt has written, a people is "a group of persons, conscious of its own identity, based on common historical, ethnic, cultural, religious and other background. In other words, the concept of self-determination stresses the subjective perception of an affected group, based on its objective characteristics."⁵¹

themselves as different, and to be regarded as such."

⁴⁹ See A. Cobban, The Nation State and National Self-Determination (rev.ed. 1969) at 107; International Commission of Jurists, supra n.47, at 47; Dinstein, "Self-Determination and the Middle East Conflict," in Alexander and Friedlander, supra n.45, at 246.

One often-argued-for exception is territorial connection. United Nations Economic and Social Council, supra n.47; see also International Commission of Jurists, supra n.47, at 47. Whether this characteristic is essential has been widely debated (See e.g., Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int'l L. 198 (1991); A. Cobban, supra; Cristescu, supra n.31, at ¶ 279; Dinstein, supra; International Commission of Jurists, supra, and no generally accepted answer has emerged.

The body of opinion which holds that territorial connection is not essential to peoplehood argues that territorial connection, like any other objective indicium of peoplehood, is "by itself, [n]either essential [n]or sufficiently conclusive to prove that a particular group constitutes a people." International Commission of Jurists, supra, at 47. The contrary body of opinion argues that the territorial principle is necessary to stop "the disintegrating process of self-determination" (Cobban, supra, at 69; see also Brilmayer, supra, which would otherwise be "almost unlimited." (Robert A. Friedlander, Self-Determination: A Legal-Political Inquiry, in Alexander and Friedlander, supra n.45, at 315; see also id., at 308 (quoting [Secretary of State] R. Lansing, The Peace Negotiations: A Personal Narrative (1921) at 97-98: "[A] generalized application of the concept [of self-determination] would be political dynamite which could only result in 'misery' and 'calamity.'"))

A dispersed group may maintain its territorial connection without presently occupying the territory. The Jewish people, for example, maintained their connection by a persistent claim to the territory. Problems arise when another group establishes a territorial connection in conflict with that of the claimant group, as did the Palestinian people in that same example. See also Cristescu at ¶ 279: The term "people" "implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population."

⁵⁰ Dinstein, supra n.49, at 247.

⁵¹ M. C. van Walt van Praag, The Status of Tibet: History, Rights, and Prospects in International Law (Westview Press, Boulder 1987) at 20. Brownlie has come to essentially the same conclusion:

No doubt there has been continuing doubt and difficulty over the definition of what is a "people" for the purpose of applying the principle of self-determination. None the less, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion, and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. . . .

It is my opinion that the heterogeneous terminology which has been used over the years -- the

[¶3-33] The assumption of a claimant group's peoplehood gives that group no advantage as against an opposing State, because the claimant group must still demonstrate that the likely outcome of recognizing its claim of self-determination is in accordance with international values. As discussed in ¶¶4-31 through 4-33 below, in connection with human rights, the assessment of likely outcomes depends largely on past events. In the present connection, this means that a claimant group will have to demonstrate at least some objective indicia of peoplehood in order to show that recognizing its claim of self-determination will conduce results more in accord with international values than will denying that claim.

C. Territorial Integrity

[¶3-34: Summary of Section III.C]

This section begins by defining the principle of territorial integrity (¶3-35). This section then articulates and explains a core thesis of this paper: Only a government which is an authentic manifestation of the governed people's exercise of self-determination can have a cognizable claim of territorial integrity (¶¶3-36 through 3-49).

1. Territorial Integrity Defined

[¶3-35] The principle of territorial integrity is formalized as the "principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."⁵² As discussed at ¶3-13 above, territorial integrity and peaceful settlement of international disputes state, for present purposes, the same obligations. States have duties not to wage or engage in propaganda for wars of aggression, not to violate international boundaries by force, not to acquire or recognize the acquisition of territory by force or threat of force, and not to engage in forcible acts of reprisal.⁵³

2. The Apparent Conflict Between Territorial Integrity and Self-Determination Is Resolved by the Principle of Governmental Legitimacy

[¶3-36: Summary of Subsection III.C.2]

This subsection begins by pointing out the apparent conflict between territorial integrity and self-determination (¶¶3-37 through 3-39). This subsection then articulates and explains one of the basic theses of this paper: Genuine territorial integrity arises out of a government's being the authentic manifestation of the governed people's exercise of the right of self-determination (¶¶3-40 through 3-49).

references to "nationalities", "peoples", "minorities", and "indigenous populations" -- involves essentially the same idea. Once a member of a people or community is expressing political claims in public discourse in Geneva, New York, Ottawa, or Canberra, and using the available stock of concepts so to do, it seems to me that the type of political consciousness involved is broadly the same.

Brownlie, *supra* n.32, at 5-6.

⁵² Declaration on Principles, *supra* n.2.

⁵³ *Id.*

a. The Apparent Conflict Between Territorial Integrity and Self-Determination

[¶13-37] The principle of self-determination has traditionally been seen to conflict with the principle of territorial integrity. This conflict arises most sharply in connection with claims of secession,⁵⁴ because such claims directly threaten the affected States' control of the claimed territory.⁵⁵

[¶13-38] The tension between territorial integrity and self-determination is seen clearly in the text of the Declaration on Principles:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

* * *

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

* * *

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

* * *

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples . . . bearing in mind that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter.

⁵⁴ As discussed at ¶¶13-24 through 3-25 above, however, secession is but one of the modes of implementing the right of self-determination.

⁵⁵ See e.g., Ved P. Nanda, Self-Determination Under International Law: Validity of Claims to Secede, 13 Case W.Res.J. Int'l L. 257 91981) at 266 (quoting L.N.Doc. B.7 21/68/106 (1921)): "to concede the right of territorial separation 'would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.'"

See also Makinson, supra n.44, at 75: "The nightmare of States faced with calls for self-determination is of course the spectre of secession, at least from their own territories, and States have sought to make sure that this would not be permitted by the norm [of self-determination] proclaimed."

See also Triggs, "The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?" in Crawford, supra n.25, at 146: "States are often reluctant to recognize or promote group rights. the most important reason is that to concede special treatment to minorities within a State is perceived as detrimental to national unity and stability. The fear is that, once a minority is recognized and grows in strength, it will demand to secede from the host State or, at least, seek some form of autonomous status. The notion of 'peoples' rights' is thus seen as a challenge to the sovereignty of the nations State and to associated precepts of international law."

See also Hannum, supra n.26, at 71: "[T]here is a fundamental fear on the part of all [countries, and especially newer states, that the recognition of minority rights will encourage fragmentation or separatism and undermine national unity and the requirements of national development."

Every State has the duty to promote through joint and separate action respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle [of equal rights and self-determination of peoples] of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

* * *

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.⁵⁶

[¶13-39] These assertions may at first seem irreconcilable.⁵⁷ No State may engage in any action aimed at disrupting another State's territorial integrity, but each State must support the efforts of peoples deprived of their right of self-determination to achieve (should they wish it) sovereign statehood. A closer examination of the Declaration on Principles, however, reveals that it incorporates the principle of governmental legitimacy and makes that legitimacy a necessary precondition of a State's claim of territorial integrity. Therefore, the principle of governmental legitimacy reconciles the apparent conflict between territorial integrity and self-determination. This paper now turns to that closer examination.

b. Territorial Integrity Depends Upon Governmental Legitimacy

[¶13-40] One of this paper's primary theses is that the territorial integrity recognized in international law is the outcome of an exercise of self-determination. This depends upon two

⁵⁶ Declaration on Principles, supra n.2.

⁵⁷ See U Thant, Report of the Secretary General (1971) (quoted in M.C. van Walt van Praag, Tibet and the Right to Self-Determination, 26 Wayne L. Rev. 279, 299 n. 122 (1979)): "A . . . problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the Charter, is the conflict between the principles of the integrity of sovereign states and the assertion of the right to self-determination, and even secession, by a large group within a sovereign state."

See also Makinson, supra n.44, at 75: "Under any ordinary understanding . . . the acquisition of self-determination by a proper subgroup within a country necessarily divides or at least impairs the unity and territorial integrity of that country; and yet under any use of the term 'people' that still has some connection with ordinary usage, peoples may sometimes find themselves in the position of being such subgroups. What the Covenant[s], i.e., ICCPR and ICESCR, supra n.25, common Art. 1(1) apparently grant[] such people as a right, the Declaration [on Principles, supra n.2] apparently outlaws."

subsidiary points: (1) Only a legitimate government can have a cognizable claim to territorial integrity (discussed in ¶¶3-42 through 3-43 below); (2) A legitimate government is one which originates in a people's exercise of self-determination and effectuates that right by facilitating the people's free determination of their political status and pursuit of their economic, social, and cultural development (discussed in ¶¶3-44 through 3-47 below). The application of this principle obviates the apparent conflict between self-determination and territorial integrity, because a government's claim to territorial integrity is not a claim in opposition to a people's right of self-determination, but a claim to be the authentic manifestation of the people's exercise of that right (¶¶3-48 through 3-49).⁵⁸

(I) The Declaration on Principles Incorporates the Principle of Governmental Legitimacy

¶¶3-41] The Declaration on Principles incorporates the principle of legitimacy as a necessary precondition of a State's claim of territorial integrity:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.⁵⁹

¶¶3-42] Thus, by its very terms, the Declaration accords the right to be secure in territorial integrity only to States which conduct themselves in accordance with the paragraph just quoted.⁶⁰

⁵⁸ Should the government have resulted from an earlier exercise of self-determination, its legitimacy still depends upon its being an authentic manifestation of the governed people's current exercise of the right of self-determination. Self-determination is the right of peoples "freely [to] determine their political status and freely [to] pursue their economic, social and cultural development." ICESCR and ICCPR, supra n.25, common Art. 1(1); Declaration on Independence, supra n.25, ¶ 1. To conclude that a people can exercise the right of self-determination only once does not honor that right; instead, it holds a people to have abandoned that right by its very exercise.

Should the government have the support of a larger group within the governed territory, but should a smaller group seek to exercise self-determination in opposition to that government, the question becomes the government's legitimacy as the government of the smaller group.

⁵⁹ Declaration on Principles, supra n.2.

⁶⁰ See also id. (emphasis added): "Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality, [and c]onvinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter," the General Assembly promulgated the Declaration on Principles.

This requirement is often described as "legitimacy."⁶¹ "The fact that these aspects of the principle must be extracted by an a contrario reading of the paragraph should not be misunderstood to limit the sweep and liberality of the paragraph."⁶² This construction eliminates the otherwise apparent self-contradictions of the Declaration on Principles. Support (unless in a manner independently violating international law) for peoples acting to exercise their right of self-determination against States depriving them of that right can never be a violation of territorial integrity,⁶³ because a State's depriving a people of self-determination undermines that State's claim to territorial integrity.

[¶13-43] Thus, the principles of self-determination and territorial integrity are reconciled, and neither is subordinated to the other.⁶⁴ Rather, a government's being the authentic manifestation of the governed people's exercise of the right of self-determination distinguishes that government's territorial integrity from mere control over a piece of ground, and the government's territorial integrity makes concrete the self-determination which the governed people exercise.⁶⁵

(II) Legitimacy Requires that a Government Be an Authentic Manifestation of Self-Determination

[¶13-44] Legitimacy requires that a government have originated in an exercise of popular will:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁶⁶

[¶13-45] Self-determination includes the right of peoples "freely to determine their political status":⁶⁷ "[T]he freedom of the people of an entity, with respect to their own government, to

⁶¹ See, e.g., Bibo, supra n.35, at 75; Thomas Heberer, "Tibet and the Chinese Concept of Nationhood," in Petra K. Kelly, Gert Bastian, and Pat Aiello, eds., The Anguish of Tibet (Parallax Press, Berkeley 1991) at 50-51.

⁶² Rosenstock, supra n.19, at 732.

⁶³ Compare Emerson, supra n.27, at 466-467: "[T]otal non-intervention has been accepted by the United Nations as one of the highest of principles. A still higher principle, however, has been established by the United Nations which overrides the right of internal self-determination and invalidates the obligation to abstain from interference in what would otherwise be the domestic affairs of other states. This loftiest of principles is covered in the Declaration on Non-Intervention by the injunction that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations." The Declaration on Principles imposes on States a similar duty to "co-operate . . . in the elimination of all forms of racial discrimination and all forms of religious intolerance[.]"

⁶⁴ But see Bibo, supra n.35, at 75: "The principle of territorial stability cannot invalidate that of self-determination, as self-determination is the ultimate governing principle, whereas territorial stability is not so much a principle as the institutional reality of international law."

⁶⁵ Cf. id.: "We could say that compliance with the principle of self-determination is the essence, the real legitimacy of a status quo, while territorial stability stands for formal, institutionalized legitimacy."

⁶⁶ Universal Declaration of Human Rights ("UDHR"), Art. 21(3); accord ICCPR, supra n.25, Art. 25.

⁶⁷ Declaration on Principles, supra n.2.

participate in the choice of authority structures and institutions and to share in the values of society."⁶⁸ Because self-determination is a "basic principle[] of international law,"⁶⁹ its denial justifies remedies even including secession: The right of self-determination includes the right of secession at least in the "special, but very important case . . . of peoples, territories and entities subjugated in violation of international law."⁷⁰

[¶13-46] The same requirement of legitimacy, that "a government represent[] the whole people belonging to the territory,"⁷¹ is plainly impossible unless the State accords civil and political rights universally among the governed population. The Universal Declaration of Human Rights guarantees "the right to take part in the government of [one's] country, directly or through freely chosen representatives,"⁷² thus requiring every government to accord "universal and equal suffrage"⁷³ to the population which it governs.

[¶13-47] Legitimacy also requires States to conduct themselves "in compliance with the principle of equal rights and self-determination of peoples,"⁷⁴ by virtue of which "all peoples have the right freely . . . to pursue their economic, social and cultural development . . ."⁷⁵ Therefore, a government lacks legitimacy unless it accords economic, social, and cultural rights, as well as civil and political rights, universally among its population.⁷⁶

⁶⁸ Friedlander, supra n.49, at 314 (quoting Moore, The Control of Foreign Intervention in Internal Conflict, 9 Va. J. Int'l L. 209, 247 (1969)).

⁶⁹ Declaration on Principles, supra n.2.

⁷⁰ Cristescu, supra n.31, at ¶ 173; but see Heberer, supra n.61 at 51: "the denial of equal participation in the exercise of national rule (but not the denial of national and cultural autonomy) can constitute a justifiable demand for self-determination."

Cf. International Committee of Lawyers for Tibet, supra n.32, at 17: "Thus, the right to self-determination does not appear to apply to peoples who have joined together voluntarily, pursuant to an act of self-determination, to form a State, where that State respects the equal rights of its constituent peoples and the human and democratic rights of the individuals that make up these peoples. Similarly, the right presumably does not apply to minorities which form an integral part of States and enjoy full democratic rights and freedoms by which means they in fact exercise their right to self-determination. In this context, the exercise of equal rights and self-determination by the people in question and the observance of human rights and democratic freedoms by the State must be real, as must the voluntary nature of any form of integration or association between peoples and States."

⁷¹ Declaration on Principles, supra n.2.

⁷² UDHR, supra n.66, Art. 21(1); accord ICCPR, supra n.25, Art. 25(a).

⁷³ Id., Art. 21(3); accord ICCPR, supra n.25, Art. 25(b).

⁷⁴ Declaration on Principles, supra n.2.

⁷⁵ Id.; accord ICCPR and ICESCR, supra n.25, common Art. 1(1).

⁷⁶ See also Final Act of the International Conference on Human Rights, Teheran (United Nations publication, Sales No. E.68.XIV.2) at 4: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

See also Declaration on the Right to Development, G.A.Res. 41/128 (1986) (quoted in Crawford, supra n.25, at 211): "All human rights and fundamental freedoms are indivisible and interdependent; equal

(III) Application of the Principle of Governmental Legitimacy Reconciles Territorial Integrity with Self-Determination

[¶3-48] Because territorial integrity depends upon governmental legitimacy, which in turn depends upon an original and ongoing⁷⁷ exercise of the governed people's right to self-determination, a government which deprives a people of that right lacks a cognizable claim of territorial integrity. Because States have the duty to support exercises of self-determination, and because the duty not to infringe territorial integrity runs only to States with legitimate governments, self-determination justifies infringements of territorial integrity.⁷⁸ Thus, the apparent conflict between territorial integrity and self-determination is resolved by applying the principle of governmental legitimacy: Genuine, cognizable territorial integrity belongs only to a government which is the authentic manifestation of the governed people's exercise of self-determination.

[¶3-49] The implications of this reconciliation for the balancing analysis here proposed are profound. As discussed below at ¶¶4-2 through 4-19, before the potential outcomes of alternative resolutions of self-determination claims can be balanced, the self-determination claims and the claims raised in opposition to them must be established. Therefore, if a claimant group can show that the opposing State lacks legitimacy, the question of balancing is not even reached, because the opposing State has no claim of territorial integrity to raise against the claimant group.

D. Non-Intervention in Domestic Jurisdiction

[¶3-50: Summary of Section III.D]

This section begins by defining the principle of non-intervention in domestic jurisdiction, primarily in terms of its similarity to the principle of territorial integrity (¶¶3-51 through 3-53). This section then elucidates three lines of reasoning which lead to the conclusion that denial of a claim of self-determination justifies intervention in domestic jurisdiction (¶¶3-54 through 3-65).

1. Non-Intervention in Domestic Jurisdiction Defined

[¶3-51] The principle of non-intervention in domestic jurisdiction is formalized as the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter."⁷⁹ The most striking feature of this principle is its similarity to the principle of territorial integrity.⁸⁰ Both safeguard States against interference in their private spheres, and both prohibit armed intrusions into those private spheres.

protection of civil, political, economic, social and cultural rights."

⁷⁷ See note 58, *supra*.

⁷⁸ As discussed below at ¶¶3-53 and 3-63 through 3-64, a government which lacks a cognizable claim of territorial integrity necessarily lacks a cognizable claim of domestic jurisdiction. Therefore, because self-determination justifies infringements of territorial integrity, it necessarily justifies interventions into domestic jurisdiction.

⁷⁹ Declaration on Principles, *supra* n.2.

⁸⁰ See Rosenstock, *supra* n.19, at 726-728.

[¶13-52] The major difference between these two principles is that the principle of non-intervention in domestic jurisdiction prohibits "economic, political [and] any other types"⁸¹ of interventions in "the internal or external affairs of any other State,"⁸² whereas territorial integrity prohibits "the threat or use of force against the territorial integrity or political independence of an State, or in any manner inconsistent with the purposes of the United Nations."⁸³ Thus, the principle of non-intervention in domestic jurisdiction is broader in scope than that of territorial integrity.

[¶13-53] It follows from the content of these two principles that anything which infringes a State's territorial integrity constitutes an intervention in that State's domestic jurisdiction. In order to violate the principle of territorial integrity, a State must use or threaten force against another or propagandize for a war of aggression.⁸⁴ This would necessarily violate the principle of non-intervention in domestic jurisdiction, which also prohibits "armed intervention and . . . attempted threats against the personality of a State"⁸⁵ and the fomenting or inciting of "armed activities directed towards the violent overthrow of the regime of another State"⁸⁶

2. Denial of Self-Determination Justifies Intervention in Domestic Jurisdiction

[¶13-54: Summary of Subsection III.D.2] Three independent lines of reasoning compel the conclusion that a claim of self-determination justifies intervention in a State's domestic jurisdiction: (1) Denial of a claim of self-determination can endanger international security, thereby justifying intervention in domestic jurisdiction (¶13-55

⁸¹ Declaration on Principles, supra n.2.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id. The reverse, however, is not the case. An action such as the use of economic, political, or other non-military measures to obtain from a State "the subordination of the exercise of its sovereign rights" (Declaration on Principles) would violate the principle of non-intervention in domestic jurisdiction without violating the principle of territorial integrity.

A related issue is what non-military United Nations actions constitute interventions at all. It is clear that the inclusion of an item among the agenda of a United Nations organ and the ensuing discussion of that item cannot constitute intervention in a state's domestic jurisdiction, no matter what the subject matter of the discussion. (Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations (Oxford University Press, London 1963) at 69-70.) It is also clear that a United Nations investigation into a situation within a state does not constitute such an intervention, a position which the Security Council has adopted. (Id. at 70 and 78 (citing at the latter point a Security Council resolution establishing a subcommittee to ascertain whether the "Spanish situation" of 1946 had "led to international friction and endanger[ed] international peace").)

Whether United Nations recommendations and resolutions constitute such interventions, however, remains unclear. Some scholars argue that they do not, because "intervention is limited to coercive measures," (id. at 70) and "[t]here is no legal obligation to accept a recommendation" (Id. at 70 n. 51 (internal quotation omitted).) Others claim that this interpretation renders domestic jurisdiction meaningless, because the right of states to be free from coercion in their internal affairs "would exist even if no reference to matters of domestic jurisdiction existed in the Charter." (Id. at 71 (footnote omitted).)

through 3-59); (2) Denial of the right of self-determination is a violation of human rights, justifying intervention in domestic jurisdiction, because self-determination is a prerequisite to the enjoyment of human rights (¶¶3-60 through 3-62); (3) Because anything which justifies infringement of territorial integrity necessarily justifies intervention in domestic jurisdiction, and because denial of a claim of self-determination justifies infringement of territorial integrity, denial of a claim of self-determination justifies intervention in domestic jurisdiction (¶¶3-63 through 3-64).

**a. Intervention is Justified by International Friction
Which Potentially Endangers International Security**

[¶3-55] The argument that international friction which potentially endangers international security justifies intervention in domestic jurisdiction begins with the recognition that "the principle of equal rights and self-determination of peoples . . . is of paramount importance for the promotion of friendly relations among states,"⁸⁷ and that disregard for the right of self-determination undermines the basis of friendly relations among nations.⁸⁸ Indeed, the Charter of the United Nations explicitly declares that the existence of a threat to peace supersedes domestic jurisdiction.⁸⁹

[¶3-56] The Security Council has determined that this exception to domestic jurisdiction extends to matters "which concern the maintenance of international peace and security and the smooth and efficient working of the United Nations as the instrument mainly responsible for performing this duty."⁹⁰ The Security Council has also determined that its jurisdiction extends to matters which have "led to international friction and [which] if continued might endanger international peace and security[.]"⁹¹

[¶3-57] The subtleties of United Nations law concerning the level of threat necessary to justify interventions of various kinds need not be explored here.⁹² It is enough for present purposes to

⁸⁷ Declaration on Principles, supra n.2.

⁸⁸ G.A.Res. 1188 (XII), described in Higgins, supra n.86, at 93.

⁸⁹ United Nations Charter, Art. 2(7).

⁹⁰ Higgins, supra n.86, at 78 (quoting SCOR, first year, first series, no. 2, 39th meeting, Spec. Suppl., pp. 1 and 2, ¶ 4).

⁹¹ Higgins, supra n.86, at 121 (quoting Res. S/4300 (1960)); see also id. at 78.

⁹² Higgins summarizes the matter as follows:

If a matter is giving rise to apprehension relating to the maintenance of peace and security, but is a potential threat rather than an actual threat, and is causing international friction rather than a breach of the peace, then -- in spite of an objection under Article 2(7) -- the Security Council may recommend measures under Chapter VI, for the question has become one of international concern; if the question has given rise to a finding under Article 39, then enforcement measures under Chapter VII may be ordered, and Article 2(7) ceases to be operative. If there has been a finding under Article 39, and the Security Council decides to make recommendations or to apply provisional measures under Article 40 rather than to order an enforcement action under Articles 41 and 42, then the situation -- being one which is 'ripe for enforcement action', even though such action has not been ordered -- also becomes unfettered by the reservation in Article

observe that international concern properly extends to "any situation or any dispute which, in terms of [United Nations Charter] Art. 34, 'might lead to international friction and give rise to a dispute' or which, in the terms of Art. 14, might be 'deemed likely to impair the general welfare or friendly relations among nations'."⁹³

[¶3-58] That the denial of claims of self-determination often results in threats to the peace is undeniably clear. As Professor Bibo has written:

[V]iolation of self-determination provokes effects that reach beyond the population concerned, extending to rival countries and their populations. . . . Minorities who are disloyal, or allegedly so, provide an excuse for the suspension of freedoms which harms the democracy of the whole country. Claims to self-determination which have not been peacefully satisfied may cause policies that are dangerous and anti-democratic, externally and internally. Finally, a hopeless claim to self-determination will lead peoples to embark on disillusioned movements and ideologies which turn against freedom.⁹⁴

[¶3-59] The denial of a claim of self-determination threatens the peace and endangers international security. Threats to the peace and dangers to national security justify intervention in domestic jurisdiction. Therefore, the denial of a claim of self-determination justifies intervention in domestic jurisdiction.

b. Intervention is Justified by Violations of Human Rights

[¶3-60] The argument that violations of human rights justify intervention in domestic jurisdiction begins with the proposition, solemnly declared by the General Assembly, that self-determination is "a prerequisite to the full enjoyment of all fundamental rights."⁹⁵

2(7). However, if there is no finding, implied or expressed, under Article 39, and there is only a question of international friction, no recommendations under Chapter VII may be made in the face of an objection on grounds of domestic jurisdiction; though in certain circumstances, where the element of international concern becomes pronounced, action may be available to the Council under Chapter VI.

Higgins, *supra* n.86, at 90.

⁹³ Higgins, *supra* n.86, at 89 n.37.

⁹⁴ Bibo, *supra* n.35, at 73; see also Buchheit, *supra* n.4, at 2 n.2 ("the insistence by polyethnic States on unitary, centralized government at the expense of a communal sentiment among their ethnic minorities contributes to social maladjustment"); Crawford, *supra* n.38, at 62: "Of course, there is a practical relationship between the maintenance of general human rights, individual or collective, and the existence of a state of peace, if not friendly relations, between States."

⁹⁵ G.A.Res. 637 A (VII).

Accord Charter of the United Nations, Art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among states based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms".

Accord 10 U.N. GAOR, Annexes, Agenda Item No. 28(11), 14 U.N. Doc. /2829 (1955): "prerequisite to the enjoyment of all the rights and freedoms of the individual".

Accord Question of Human Rights of Peoples and Nations Subject to Population Transfer,

[¶13-61] Violations of human rights have long been regarded as proper matters of international concern. Indeed, "as early as 1954 the [General] Assembly was taking it upon itself to criticize the laws of a member country -- a subject normally reserved to the domestic domain -- because they contravened the Charter provisions on human rights."⁹⁶ "Similarly, the emphasis upon human rights proscriptions in the ICJ's opinion in the Namibia case [I.C.J. [1971] 16] suggests that the internal condition of human rights and of the quality of international public order are interrelated and that grave deprivations of human rights are a legitimate cause for international concern."⁹⁷

[¶13-62] Violations of human rights are a proper matter of international concern and justify intervention in domestic jurisdiction.⁹⁸ Self-determination is a prerequisite to the enjoyment of human rights.⁹⁹ Therefore, self-determination must also be a proper matter of international concern, justifying at least the same level of intervention.

U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "[T]he fundamental right to self-determination . . . is a prerequisite of the enjoyment of all other human rights and freedoms".

Accord Cristescu, supra n.31, at ¶ 256: "The universal realization of the right of peoples to self-determination is of great importance for the effective guarantee and observance of human rights".

Accord H. Gros Espiell, supra n.28, at ¶ 59: "Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings."

See also Resolution on Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms (1977) G.A.Res. 32/130 ¶11(e) (quoted in Crawford, supra n.25, at 189-190): "In approaching human rights questions within the United Nations system, the international community should accord, or continue to accord, priority to the search for solutions to the mass and flagrant violations of human rights of peoples and persons affected by situations such as those resulting from apartheid, from all forms of racial discrimination, from colonialism, from foreign domination and occupation, from aggression and threats against national sovereignty, national unity and territorial integrity, as well as from the refusal to recognize the fundamental rights of peoples to self-determination and of every nation to the exercise of full sovereignty over its wealth and natural resources[.]"

⁹⁶ Higgins, supra n.86, at 120.

⁹⁷ Eisuke Suzuki, Self-Determination and World Public Order: Community Response to Territorial Separatism, 16 Va.J. Int'l L. 779 (1976) at 836-837 (footnote omitted).

⁹⁸ Hannum, supra n.26, at 20 (footnote omitted): "It . . . is clearly legitimate for international bodies to consider the human rights situation in any country, as human rights cannot be said to fall 'essentially within the domestic jurisdiction' of a state within the meaning of article 2(7) of the UN Charter."

⁹⁹ G.A.Res. 637 A (VII); accord Charter of the United Nations, Art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among states based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms"; 10 U.N. GAOR, Annexes, Agenda Item No. 28(11), 14 U.N. Doc. /2829 (1955): "prerequisite to the enjoyment of all the rights and freedoms of the individual"; Cristescu, supra n.31, at ¶ 256: "The universal realization of the right of peoples to self-determination is of great importance for the effective guarantee and observance of human rights"; H. Gros Espiell, supra n.28, at ¶ 59: "Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings."

**c. Because Denial of a Claim of Self-Determination
Justifies Infringement of Territorial Integrity,
It Necessarily Justifies Intervention in
Domestic Jurisdiction**

[¶3-63] As discussed in ¶¶3-53 above, anything which infringes a State's territorial integrity necessarily constitutes an intervention in that State's domestic jurisdiction. Therefore, anything which justifies infringement of territorial integrity necessarily justifies intervention in domestic jurisdiction.

[¶3-64] As discussed in ¶¶3-40 through 3-49 above, because States have the duty to support exercises of self-determination, and because the duty not to infringe territorial integrity runs only to States with legitimate governments, the denial of a claim of self-determination justifies infringements of territorial integrity. Because anything which justifies infringement of territorial integrity necessarily justifies intervention in domestic jurisdiction, the denial of a claim of self-determination must justify intervention in domestic jurisdiction.

[¶3-65] All three of these lines of reasoning apply with equal force to the denial of a claimant group's right to pursue its claim in an appropriate international forum as to the denial of a claimant group's right to implement a claim whose validity has been determined. To allow a State to prevent a group's bringing its claim would be to allow the State to determine the claim without resort to international bodies, which would undermine the fundamental purpose of providing such bodies -- to promote the peaceful resolution of claims of self-determination. Critical to the success of the international mechanism is universal (or, at least, near-universal) respect for its outcomes. This respect will only arise from a widespread perception that claims of self-determination are resolved in accordance with international law and basic norms of justice, which in turn requires that interested parties not wield the decision-making power.

IV. APPLICATION OF THE BALANCING ANALYSIS

[¶4-1: **Summary of Part IV**] This part examines the mechanics of the balancing process, which are: (1) Identification of the parties and the grounds and natures of the claims (¶¶4-2 through 4-21); (2) Assessing the impacts of alternative resolutions of the claims (¶¶4-22 through 4-33); and (3) Balancing the impacts of alternative resolutions of the claims in the light of international community values (¶¶4-34 through 4-39).

A. Identification of the Parties and the Grounds and Natures of the Claims

[¶4-2: **Summary of Section IV.A**] This section examines issues arising in connection with identifying the parties in a dispute concerning self-determination, identifying the grounds of the claims raised by each party to the dispute, and identifying the natures of the claims raised on those grounds. In particular, this section examines the role of human rights in determining, in light of the principle of legitimacy discussed in ¶¶3-40 through 3-49 above, whether a State has a cognizable claim of territorial integrity.

1. Identification of the Parties

[¶4-3] A dispute concerning self-determination involves at least the group claiming the right and

the entity, typically a State, opposing the self-determination claim. Matters can become further complicated by the involvement of more than two parties to the dispute, as discussed in ¶4-6 below.

[¶4-4] As discussed in ¶¶3-16 through 3-17 and 3-26 above, the right of self-determination inheres in peoples. Therefore, claimants of the right of self-determination are necessarily peoples. As discussed in ¶¶3-26 through 3-33 above, peoplehood presents some of the most vexing problems involved in the concept of self-determination. As also discussed there, however, for purposes of applying the balancing process to claims of self-determination, it can be assumed that the claimant group has established its existence as a people.

[¶4-5] Similarly, because the rights of territorial integrity and domestic jurisdiction inhere in States,¹⁰⁰ the claimants of those rights are necessarily States.

[¶4-6] Claims of self-determination can also conflict with other claims of self-determination when more than two parties are involved in the dispute. Thus, for example, the Serbs and the Croats of the former Yugoslavia both raised claims of self-determination in opposition to the Yugoslav government's claim of territorial integrity.¹⁰¹ They also, however, raised claims of self-determination in opposition to each other's claims of self-determination.¹⁰²

2. Identification of the Grounds and Natures of the Claims

[¶4-7] Claimants of the right of self-determination necessarily rely on the principle of self-determination, described in ¶¶3-16 through 3-25 above. A claim of self-determination can be a claim to any status more autonomous than the status quo, up to and including a claim to complete independence (sovereign statehood).¹⁰³

[¶4-8] Conversely, States opposing claims of self-determination necessarily rely on territorial integrity and/or non-intervention in domestic jurisdiction, described in ¶¶3-35 and 3-50 through 3-53 above. The claim of such a State can be directed toward any status for the group claiming self-determination less autonomous than complete independence.¹⁰⁴

[¶4-9] It is crucial to determine what the claimants are seeking, because the assessment of the

¹⁰⁰ Charter of the United Nations, Arts. 2(1) and 2(7); Declaration on Principles, supra n.2.

¹⁰¹ A State cannot raise a claim of domestic jurisdiction against a people contained within that State because by denying the claim of self-determination, the State necessarily contends that the rights and conditions of the contained people are a matter within the State's domestic jurisdiction.

¹⁰² A related point is that a claim of self-determination can be raised in opposition to multiple claims of territorial integrity, as the Kurds' claim of self-determination opposed the claims of Iran, Iraq, and Turkey to territorial integrity.

¹⁰³ See Declaration on Principles, supra n.2 (emphasis added): "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

¹⁰⁴ If the State concedes the claimant group's right to complete independence, there is, of course, nothing left to resolve.

impacts of alternative resolutions depends largely upon the alternatives considered. Thus, for example, a claim for self-determination exercised in the freedom to practice a religion openly poses lesser risks of international instability than does a claim for self-determination expressed in the establishment of a sovereign State. Conversely, a claim of territorial integrity which allows substantial autonomy for the claimants of self-determination poses lesser risks of threats to peace and violations of human rights than does a claim of territorial integrity which allows no autonomy for the claimants of self-determination.

3. The Role of Human Rights in Determining the Grounds of the State's Claims

¶14-10 It is also crucial to examine the grounds of claims of territorial integrity and non-intervention in domestic jurisdiction. If the State claiming these rights is not entitled to them because of its illegitimacy (see ¶¶3-40 through 3-49, *supra*), then the assessment of the impacts of alternative resolutions need never be reached. An illegitimate government has no cognizable claim to territorial integrity or non-intervention in domestic jurisdiction, so no alternative resolution can be grounded in such a claim.¹⁰⁵

¶14-11 The issue of legitimacy arises most sharply when a government is accused of human-rights abuses calculated to undermine claims of self-determination. This subsection discusses three such abuses: genocide, cultural suppression, and disruption of the claimant group's traditional relationship with its ancestral homeland.

a. Genocide

¶14-12 Foremost among human rights violations calculated to undermine a claim of self-determination is genocide. Genocide necessarily violates the right of self-determination, because it consists only in certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such[.]"¹⁰⁶ Genocide does not require killing. Rather, it embraces five kinds of conduct, if committed with the intent just described: "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [and] (e) Forcibly transferring children of the group to another group."¹⁰⁷

¶14-13 If a state has committed genocide, no balancing is necessary to determine that the victimized people is entitled to exercise its right to self-determination. As discussed in ¶¶3-18 and 3-21 through 3-22 above, any rule of jus cogens -- that is, any peremptory norm of international law

¹⁰⁵ Human rights also play a critical role in claims of self-determination. Because legitimacy is a principle applicable only to States (see ¶¶3-41 through 3-42, *supra*), however, the role of human rights in claims of self-determination is a factor in assessing the impacts likely to arise from the granting of such claims (see ¶¶4-31 through 4-33, *infra*).

¹⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (*in force* 1951) ("Genocide Convention"), art. II.

¹⁰⁷ *Id.* Under the Genocide Convention, *supra* n.106, the following acts are prohibited: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; and (e) Complicity in genocide." *Id.*, art. III.

from which no derogation is permitted -- is not susceptible to a balancing analysis, because it cannot be outweighed by any array of rights and duties.

[¶4-14] "Genocide is universally recognized as violating jus cogens: Genocide is a crime against humanity."¹⁰⁸ Its prohibition is "recognized by civilized nations as binding on States, even without a conventional obligation."¹⁰⁹ Therefore, no other consideration can cloak a genocidal state in the protection of territorial integrity.¹¹⁰ Indeed, a people victimized by genocide is entitled to exercise its "legal right of revolution; that is to say, that under the principle of self-determination the peoples of a territory must be allowed -- if absolutely necessary by forceful means -- to replace the government by one of their own choice."¹¹¹

b. Cultural Suppression: Linguistic and Religious Discrimination

[¶4-15] Another set of human rights abuses calculated to undermine a claim of self-determination is that aimed at suppressing the claimant group's distinctive culture. Although these abuses vary depending on what most strongly binds together the claimant group's distinctive culture, the most common are the suppression of the claimant group's language and the suppression of its religion. A State's history of linguistic or religious suppression weighs heavily against its claim of territorial integrity, because such suppression violates fundamental international law.

[¶4-16] Because the suppression of a group's distinctive language, religion, and other aspects of

¹⁰⁸ Karen Parker and Lyn Beth Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 *Hast. Int'l Comp. L. Rev.* 411 (1989) at 430 (footnotes omitted); see also Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights (University of Pennsylvania Press, Philadelphia 1990) at 20 (footnote omitted): "At least some fundamental human rights norms have achieved the status of customary law or jus cogens, including the prohibition against genocide"

¹⁰⁹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23; see also Case 9647, *Inter-American Commission on Human Rights* 147, 169, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987) (genocide "achieves the status of jus cogens precisely because it is the kind of rule that it would shock the conscience of mankind . . . for a State to protest"); Crawford, supra n.38, at 59: "There can be no doubt that international law recognizes the obligation of States not to commit or condone genocide."

¹¹⁰ Application of the principle of legitimacy conduces the same result: Legitimacy requires adherence to the principle of self-determination, and genocide violates the right of self-determination; therefore, a government which engages in genocide loses (at least with respect to that people) any legitimacy it may have had and has no cognizable claim of territorial integrity.

¹¹¹ Higgins, supra n.86, at 211; see also Emerson, supra n.27, at 474 ("a right of revolution, justified by an appeal to principles of higher law").

Compare Universal Declaration of the Rights of Peoples (Algiers 1976) Art. 6 (quoted in Crawford, supra n.25, at 187): "Every people has the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime."

But see Hannum, supra n.26, at 48-49 (emphases in original; footnotes omitted): "This does not imply, however, that any non-colonial 'people' or minority within an existing state has yet acquired the right to independence or self-determination under international law. Although several authors have argued that some form of a 'right to secession' should be recognized as part of the right to self-determination, constant state practice and the weight of authority require the conclusion that such a right does not yet exist."

its culture undermines the group's cohesiveness,¹¹² the cultural rights of minorities are accorded special protection in international law:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹¹³

[¶14-17] Moreover, achieving "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"¹¹⁴ is among the constitutive purposes of the United Nations. Discrimination on grounds of language or religion is prohibited by the Universal Declaration of Human Rights¹¹⁵ and by the International Covenant on Civil and Political Rights,¹¹⁶ and discrimination on the ground of religion is also prohibited by the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.¹¹⁷ As discussed in ¶13-47 above, a government is legitimate only if it accords cultural

¹¹² See Hannum, *supra* n.26, at 111: "Linguistic and educational rights also are of particular significance to groups, as they constitute the vehicles through which culture is transmitted."

¹¹³ ICCPR, *supra* n.25, Art. 27.

See also Universal Declaration of the Rights of Peoples (Algiers 1976) Art. 13 (quoted in Crawford, *supra* n.25, at 188): "Every people has the right to speak its own language and preserve and develop its own culture, thereby contributing to the enrichment of the culture of mankind."

See also Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples, Panama 1984) Art. 14 (quoted in *id.* at 206): "The indigenous peoples have the right to receive education in their own language or to establish their own educational institutions. The languages of the indigenous peoples are to be respected by the states in all dealings between the indigenous people and the state on the basis of equality and non-discrimination."

Compare Crawford, *supra* n.38, at 60-61: "By definition, a 'minority' implies the existence of a 'majority' (not necessarily a coherent one, since it could be made up by a collection of other minorities). By contrast, the notion of a 'people' says nothing about the relationship of that people to other peoples inhabiting the same State or territory. Thus an individual might have rights as a member of a minority which coexist with rights that person enjoys as a member of (the same or a broader) group properly classified as a 'people', for the purpose of the right to self-determination, or for some other purpose."

Compare also Nettheim, *supra* n.36, at 114 (quoting U.N.Doc. E/CN.4/Sub.2/1983/22 (Working Group on Indigenous Populations in Geneva)): "[T]he following structure . . . gives some indication of the way in which those attending the meeting perceived the claims/rights of indigenous populations: 'The right to life, to physical integrity, and to security of the indigenous populations. The right to land and to natural resources. The right to autonomy or self-determination, and political institutions and representation of indigenous populations. The right to develop their own cultural traditions, language, religious practices, and way of life. The economic and social rights of the indigenous populations.'"

¹¹⁴ Charter of the United Nations, Art. 1(3).

¹¹⁵ UDHR, *supra* n.66, Arts. 2 and 18.

¹¹⁶ ICCPR, *supra* n.25, Arts. 2 and 18.

¹¹⁷ Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A.Res. 36/55 (1981), Art. 2(1).

rights universally among its population. Therefore, systematic linguistic or religious discrimination¹¹⁸ renders a government illegitimate and negates that government's claim of territorial integrity.

c. Disruption of a People's Traditional Relationship with its Ancestral Homeland

[¶4-18] A third set of human rights abuses calculated to undermine a claim of self determination is that aimed at disrupting the claimant group's traditional relationship with its ancestral land. This connection of a people with its land is central to self-determination,¹¹⁹ because "[a] relationship to specific land . . . [is] part of what human dignity means in those civilizational settings associated with indigenous peoples"¹²⁰ Indeed, "the removal of indigenous peoples from their lands or the destruction of their lands . . . cause[s] physical and cultural annihilation because land is an integral part of . . . cultural cohesiveness."¹²¹

[¶4-19] One way to disrupt a people's traditional relationship to its ancestral land is to diminish the exclusivity of the people's occupancy of that land.¹²² Only the transfer of children from a group to another group is legally "genocidal."¹²³ Other population transfers -- of group members

¹¹⁸ Compare Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "Conscious that population transfer in its application is often discriminatory and that it inherently leads to systematic and widespread discrimination".

¹¹⁹ See G.A.Res. 1803 (XVII), Preamble (describing "the permanent sovereignty of peoples and nations over their natural wealth and resources as a basic constituent of the right to self-determination").

See also Declaration on the Right to Development, G.A.Res. 41/128 (1986) (quoted in Crawford, supra n.25, at 209): "[T]he full realization of the right of peoples to self-determination . . . includes, subject to relevant provisions of both International Covenants on Human rights, the exercise of their inalienable right to full sovereignty over all their wealth and natural resources."

On the ongoing dispute over whether territorial connection is an indispensable element of peoplehood, see note 49, supra.

¹²⁰ Richard Falk, Revitalizing International Law (Iowa State University Press, Ames 1989) at 217.

¹²¹ Parker and Neylon, supra n.108, at 431 (footnote omitted); see also Hannum, supra n.26, at 91 (footnote omitted): "Indigenous peoples universally emphasize the spiritual nature of their relationship with the land or earth, which is basic to their existence and to their beliefs, customs, traditions, and culture. While the economic benefits that may be obtained from exploitation of natural resources are of increasing importance to many indigenous communities, land is not merely a possession or a means of production."

¹²² Compare Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "Noting with deep concern that population transfer contributes to the disappearance of distinct characteristics of a people and threatens the disappearance of a people's or nation's national identity,".

¹²³ Genocide Convention, supra n.106, Art. II(e).

out of their land or of non-members into it¹²⁴ -- serve both to sever the group's connection to its ancestral land and to dilute the claim of self-determination¹²⁵ by filling the claimant group's territory with non-members.¹²⁶ It has been suggested that such population transfers should also be considered international crimes,¹²⁷ and noted that "original inhabitants and nations into whose territory settlers are being moved or peoples who are being displaced are threatened with genocide[.]"¹²⁸

[¶14-20] Another means of destroying a people's traditional connection to its ancestral land is to destroy that land or to rob it of its natural resources.¹²⁹ At least the latter plainly violates

¹²⁴ See Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "[P]opulation transfer, includ[es] the removal of people and the implantation of settlers"

¹²⁵ Compare id.: "Disturbed that the practice of population transfer constitutes a violation of the right to self-determination, including its most fundamental aspect, the right to exist as a people"

¹²⁶ See R.S. Bhalla, "The Right of Self-Determination in International Law," in Twining, supra n.43, at 91 (self-determination "vests only in indigenous peoples as such, not in whoever happens now to inhabit colonized territories alongside of the indigenous population").

¹²⁷ See, e.g., Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O. Doc. A/2/1991/2 (General Assembly, The Hague 1991):

Considering that population transfer, including the removal of people and the implantation of settlers, through its practice and effects constitutes a violation of human rights of the removed people, the original inhabitants and the settlers, as well as international law,

* * *

Recognizing that the removal of people may constitute a crime against humanity, [etc.]

See also Communique [on the Conference "Human rights Dimensions of Population Transfer] (U.N.P.O. Office of the Secretary General, The Hague 1992) ¶ 4: "The conference condemns in the strongest terms the practice of population transfer, a practice which should be considered a crime against humanity which violates fundamental human rights of individuals and peoples, including the right to self-determination."

See also Report of the International Law Commission, G.A.O.R. 46th Session Supp. 10, U.N.Doc. A/46/10 (Draft Code of Crimes Against the Peace and Security of Mankind, Draft Art. 22): "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" is "an exceptionally serious war crime";

See also Geneva Convention Relative to the Protection of Civilian Persons in time of War (1949) Art. 49: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. . . . The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

See also UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Resolution 1992/28, U.N. Doc. E/CN.4/Sub.2/1992/L.40: "the practice of population transfer is discriminatory in its application and . . . inherently leads to widespread and systematic discrimination".

¹²⁸ Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991).

¹²⁹ See Hannum, supra n.26, at 112: "Seizure of land, for population expansion or the exploitation of natural resources, is perhaps the most common complaint of indigenous peoples[.]"

international law: "All peoples may, for their own ends, freely dispose of their natural wealth and resources In no case may people be deprived of its own means of subsistence."¹³⁰ It has even been suggested that such acts should be considered genocidal.¹³¹

¹³⁰ ICESCR, supra n.25, Art. 1(2); see also Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, G.A.Res. 1314, 13 U.N. GAOR, Supp. 18, 27, U.N.Doc. A/4090 (1958); Charter of Economic Rights and Duties of States, G.A.Res. 3281 (1974).

See also Universal Declaration of the Rights of Peoples (Algiers 1976) Art. 8 (quoted in Crawford, supra n.38, at 188: "Every people has an exclusive right over its natural wealth and resources. It has the right to recover them if they have been despoiled, as well as any unjustly paid indemnities."

See also Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples, Panama 1984) Art. 9 (quoted in Crawford, supra n.25, at 204): "Indigenous people shall have exclusive rights to their traditional lands and its resources: Where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned."

Compare African Charter on Human and Peoples' Rights, Art. 21 (quoted in id. at 198: "'(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2) In case of spoliation the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.'"

The African Charter also provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." Art. 24 (quoted in id. at 199). Crawford comments that "we are here at the outer limits of justiciability of rights of this general kind." Crawford, supra n.38, at 66 (footnote omitted).

¹³¹ Parker and Neylon, supra n.108, at 431. This would require an expansive interpretation of the Genocide Convention. Two possible avenues for such expansion are "[c]ausing serious bodily or mental harm to members of the group" and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," Art. II. The latter has been alluded to by the United Nations Human Rights Subcommission:

Recalling the Convention on the Prevention and Punishment of the Crime of Genocide, which defines the act of genocide to include "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part",

Disturbed by reports concerning the implantation of settlers and settlements in certain countries, including occupied territories, with the aim of changing the demographic structure and the political, cultural, religious and other characteristics of those countries or with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, [etc.]

U.N.Doc. E/CN.4/Sub.2/1991/28.

Crawford observes that "the Convention is not concerned with 'cultural genocide' or what has been described as 'ethnocide', in the sense of the destruction or disappearance of the distinctive values, traditions, or culture of a group, as distinct from the survival of the members of the group as individuals, and its continued existence as a group assuming its members so wish." Crawford, supra n.38, at 59-60 (footnotes omitted). He adds, however, that "acts of genocide as defined in the Convention may well take place with a view to the forced assimilation or destruction of the culture of a group, so that to this extent the two concepts are linked." Id. at 60 n.9.

Compare Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights (University of Pennsylvania Press, Philadelphia 1990) at 93 (footnote omitted): "The physical genocide of the nineteenth century has largely given way to continuing assaults by governments and private parties on indigenous lands and their sub-soil mineral and oil deposits."

[¶4-21] Disrupting a people's traditional relationship with its traditional homeland violates the principle of self-determination by undermining a people's cultural cohesiveness,¹³² thereby inhibiting that people's free pursuit of its cultural development.¹³³ Because legitimacy requires a State to conduct itself in accordance with the principle of self-determination,¹³⁴ a government which disrupts a people's traditional relationship with its ancestral homeland thereby loses its legitimacy.

B. Assessing the Impacts of Alternative Resolutions of the Claims

[¶4-22: Summary of Section IV.B] The second step in the balancing process is to assess the impacts of alternative resolutions of the claims. Of the numerous possible impacts of alternative resolutions of the claims, only the two most likely to arise in connection with claims of self-determination are examined here. These are the possibility of threats to the peace (¶¶4-23 through 4-30) and the possibility of increased or reduced violations of human rights (¶¶4-31 through 4-33).

1. The Possibility of Threats to the Peace: The Problem of the Parties' Violence

[¶4-23] The averting of threats to the peace and the concomitant maintenance of international security and friendly international relations is arguably the most fundamental value of the international community. It is the first of the constitutive purposes of the United Nations,¹³⁵ and it underlies the Charter's assertion of the principle of self-determination.¹³⁶ It is the first matter discussed in the Preamble to the Declaration on Principles, and it is expressly incorporated into the Declaration's treatment of four of the seven enumerated "basic principles of international law."¹³⁷

¹³² See ¶4-16 and note 112, *supra*.

¹³³ Declaration on Principles: "By virtue of the principle of . . . self-determination . . . all peoples have the right freely . . . to pursue their . . . cultural development"

Accord ICESCR and ICCPR, *supra* n.25, common Art. 1(1): "All peoples have the right of self-determination. By virtue of that right they . . . freely pursue their . . . cultural development."

Accord Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991): "[T]he fundamental right to self-determination . . . is the right of peoples . . . freely . . . to pursue their . . . cultural development"

¹³⁴ See ¶3-47, *supra*.

¹³⁵ Charter of the United Nations, Art. 1(1).

¹³⁶ *Id.*, Art. 1(2); see also Declaration on Independence, *supra* n.25: "Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples"

¹³⁷ Declaration on Principles, *supra* n.2. Territorial integrity requires States to "comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and [to] endeavour to make the United Nations security system based on the Charter more effective." Peaceful settlement of international disputes requires each State to "settle its disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered." Cooperation requires States "to co-operate with one another . . .

[¶4-24] The possibility of threats to the peace in connection with claims of self-determination and opposing claims of territorial integrity/non-intervention in domestic jurisdiction poses in particular the problem of the parties' own violence -- the provocative and the justified violence of the group claiming self-determination, and the oppressive and the justified violence of the State claiming territorial integrity and non-intervention in domestic jurisdiction.

[¶4-25] One group of issues is raised by the violence of a group claiming self-determination and the violent response of the State. "A group living in a democratic, non-discriminatory society that undertakes a campaign of terrorism merely to draw attention to its claim or to coerce its governors into accepting its demands -- thus compelling the authorities to enforce security measures -- cannot be seen as the victims of 'oppression.'"¹³⁸ In accordance with this idea, the Declaration on Principles twice prohibits outside States from encouraging or participating in such activities in any way,¹³⁹ and the Charter of the United Nations guarantees to States the right of self-defense.¹⁴⁰

[¶4-26] On the other hand, the international community must not give states *carte blanche* to "enforce security measures" in any manner they please.

The best rule therefore would seem to be this: where the claimant group has not been driven to utilize violence as a justifiable means of self-defense against an oppressive State (that is, where the secessionists have unnecessarily and without adequate provocation adopted violence as a means of attaining their goal) then the State may exercise its prerogative of attempting to suppress the secession without the resulting disturbance becoming a factor in the calculation of current disruption. However, should a governing State in this position engage in a savage campaign needlessly causing injury to the lives, property, and human dignity of the insurgents . . . then the fact of this excessive brutality, above that excusable as reasonably necessary to counter the secession, will enter the calculation.¹⁴¹

[¶4-27] Another group of issues is raised by the assertion that a State's denial of a claim of self-determination is causing a threat to the peace. Faced with such an assertion, the State might respond by arguing that granting the claim would cause a greater threat to the peace. The State

in order to maintain international peace and security" Sovereign equality imposes on every State "the duty . . . to live in peace with other States."

¹³⁸ Buchheit, *supra* n.4, at 236.

¹³⁹ "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. . . . Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

¹⁴⁰ Charter of the United Nations, Art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

¹⁴¹ Buchheit, *supra* n.4, at 237.

ought to bear a heavy burden of persuasion on this issue. Some of this inheres in the comparison: The magnitude of a threat to peace arising from a not-yet-existing state of affairs is necessarily conjectural, so it must be reduced to proportionality with its likelihood.

[¶4-28] Moreover, the opposing party should not be permitted to adduce its own contemplated behavior, should the claim of self-determination be granted. There is no basis in reason or in law for allowing as a defense the assertion that if the claim is granted, the opposing party will disrupt the peace. This is different from consideration of the parties' violent behavior in assessing the disruptions likely to arise from the denial of the claim. There, violent behavior must be examined in the light of prior events to distinguish the justified from the unlawful. Here, however, the grant of the claim operates as a legally final resolution of prior related conflicts. Therefore, only some future belligerent conduct by the claimant group could justify future violent behavior by the opposing party.¹⁴²

[¶4-29] Furthermore, the breadth of the international community's authority to deal with threats to the peace renders a chronic, unresolved claim of self-determination inherently disruptive. As discussed in ¶3-56 above, the Security Council has determined that its jurisdiction extends to matters which have "led to international friction and [which] if continued might endanger international peace and security[.]"¹⁴³ Therefore, "even where the group does not suffer any severe persecution and is unlikely to follow a course of armed rebellion, the simple presence of an unsatisfied nationalism or the unfulfilled desire of an ethnic group for self-government is to a limited extent a cause of international concern."¹⁴⁴

[¶4-30] Finally, each party to a dispute should be required to demonstrate that no lesser alternative to its claim would effectuate the peaceful and just resolution of the dispute. The group claiming self-determination, therefore, should have to show no measures less onerous to the opposing State than the complete grant of the group's claim are available to reduce the threat to the peace arising from the denial of the claim below that arising from its grant. Conversely, the opposing State should be required to demonstrate that no other measures less onerous to the claimant group than the ongoing denial of its claim are available to reduce the threat to the peace arising from the grant of the claim below that arising from its denial. If such less onerous alternatives are available, both international objectives -- vindicating the right of self-determination and averting threats to the peace -- can be achieved.

2. The Role of Human Rights

[¶4-31] It will often be the case that a group claiming self-determination has no political history of indicating its future attitude toward human rights. Of course, if a claimant group has engaged

¹⁴² A related issue is the potential violence of third parties. In order "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Charter of the United Nations, Art. 1(1)), the international community should refuse to allow either party to a dispute to benefit from, or to suffer by, a third party's announced intent to resort to violence. Therefore, the potential for violence by third parties should be disregarded in assessing the impacts of alternative resolutions of competing claims of self-determination and territorial integrity.

¹⁴³ Higgins, supra n.86, at 121 (quoting Res. S/4300 (1960)) (emphasis added); see also id. at 78.

¹⁴⁴ Buchheit, supra n.4, at 235-236.

in unjustified violence in support of its claim, that fact may indicate future disrespect for human rights. On the other hand, if a claimant group has deliberately eschewed violence despite ample provocation, that fact supports a very optimistic prediction of its human-rights record. Somehow, the claimant group must demonstrate its willingness to respect human rights.¹⁴⁵ This could be done, for example, by adopting a tentative constitution in which international legal norms figure prominently.

[¶4-32] The government against which the group has lodged its claim, on the other hand, is likely to have had a substantial history, on the basis of which its future conduct can be predicted. Therefore, human rights violations come to the fore in the assessment of the likelihood of disruption from denial of the claim of self-determination.

[¶4-33] Preliminarily, of course, human rights violations are inherently disruptive.¹⁴⁶ More significant, however, is the self-perpetuating nature of human rights abuses. When a state denies a claim of self-determination, the claimant group's disaffection with the state increases. Such disaffection is likely to be met by yet severer human rights violations. Any assessment of the likelihood of disruption arising from the denial of a claim of self-determination must take this cycle into account. Thus, in an all-too-familiar pattern, a claim of self-determination is met with the suppression of speech, press, and assembly. The claimants persist in that conduct, and the government responds with arbitrary arrest, incommunicado detention, torture, and murder. The escalation of these events culminates in a war of national liberation, in a mass exodus of refugees, or in genocide.¹⁴⁷ This is a critical factor in assessing the likelihood of disruption ensuing from the denial of a claim of self-determination: Human rights abuses create the conditions for their own perpetuation.

C. Balancing the Likely Outcomes of Alternative Resolutions in the Light of International Values

[¶4-34] Once the likelihoods of disruption from the potential outcomes have been determined, they must be compared in an assessment of which outcome is likely to be more in conformity with international values. This element of the balancing analysis encourages both sides to avoid unnecessary violence:

One of the benefits of developing a rational scheme for the determination of secessionist legitimacy is that the international community has a unique opportunity to structure its guidelines so as to avoid placing a premium upon an unnecessary resort to

¹⁴⁵ *Id.* at 233; *cf.* United Nations Charter, art. 4(1): "Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

¹⁴⁶ Buchheit, *supra* n.4, at 235: "Should the group be the victim of discriminatory oppression involving, for example, the deprivation of human rights and political freedoms, the international community, with its recent sensitivity to such behavior, might find the situation inherently offensive."

¹⁴⁷ See Hannum, *supra* n.26, at 118: "It is . . . essential to realize how many ethnic and other conflicts have originated and been exacerbated by the gross violation of what one might term 'ordinary' human rights. where discrimination and violent assaults on the minority by majority mobs and/or government security forces escalate a conflict to the level where survival of the minority becomes an issue, it is hardly surprising that political compromises become impossible 'sell-outs' thousands of deaths later."

violence by either party. The assessment of current disruption^[148] can sometimes offset the international concern for the future disruption likely to result from secession and, under this analysis therefore, a greater amount of present disturbance operates to the advantage of the secessionist's claim. The scheme consequently inhibits a State's willingness to inflict oppression upon its minorities.¹⁴⁹

[¶4-35] Moreover, this aspect of the balancing process acknowledges the stabilizing potential of self-determination: "Self-determination is a stabilizing force in that the strength it gives to situations is greater than [that of] the existing power relationships, and also it can quickly stabilise and make permanent the changes that are provoked by or favourable to it."¹⁵⁰

[¶4-36] As discussed in ¶¶3-36 through 3-49 above, the principles of self-determination, territorial integrity, and non-intervention in domestic jurisdiction are not mutually contradictory, but reconcilable by the principle of legitimacy. So reconciled, these principles state a paramount value of the international community: Promoting harmony among nations whose governments are the authentic manifestations of the governed peoples' exercises of their rights of self-determination.¹⁵¹

¹⁴⁸ That is, the disruption that already exists and is likely to continue if the claim is denied.

¹⁴⁹ Buchheit, *supra* n.4, at 237-238.

¹⁵⁰ Bibo, *supra* n.35, at 73.

¹⁵¹ See Charter of the United Nations, Art. 1: "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

See also UDHR, *supra* n.66, Preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law," etc.

See also ICCPR and ICESCR, *supra* n.25, common Preamble: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms," etc.

See also Declaration on Principles, *supra* n.2: "Recalling in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations . . . Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development, Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations . . . Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount

[14-37] Thus, at the extremes, the proper outcomes are clear. If a people with a strong sense of self-identity and a long history of political and cultural unity in connection with a defined territory seeks to exercise its right of self-determination against a government which has engaged in systematic human rights abuses, the claim of self-determination should be granted.

[14-38] Conversely, if a mere aggregation of individuals with no established historical or cultural connection seeks separation from a government which originated in an act of self-determination and which accords due respect to human rights and fundamental freedoms, the claim should be denied.

[14-39] The hard cases, of course, lie between these extremes. It is not the purpose of this paper to suggest some talismanic formula for resolving claims of self-determination, but to propose a scheme for doing so. Ultimately, the resolution of self-determination claims must be guided by international goals and policies but shaped by the factual contexts in which the claims arise.¹⁵²

importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality," etc.

See also Declaration on Independence, supra n.25: "Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," etc.

See also Buchheit, supra n.4, at 226-227: "To the extent that the Charter embodies a first principle . . . that principle would seem to be a maximization of international harmony coupled with a minimization of individual human suffering. . . . When phrased in the more familiar negative fashion, this principle amounts to a doctrine of noninterference in the internal affairs of a State unless, by its treatment of its own subjects, the State transgresses a collective sense of the minimum requirements of human dignity and social order."

See also Suzuki, supra n.97, at 792 (footnotes omitted): "[A] basic community policy regarding claims for separation should be to foster conditions necessary for the development of optimum public order while maintaining minimum order through either the creation or denial of a separate territorial entity. Optimum public order here refers to a public order system in which the basic values of human dignity are widely produced and widely shared. The development of optimum public order must complement the maintenance of minimum public order."

¹⁵² See Brownlie, supra n.32, at 16: "The rights and claims of groups with their own cultural histories and identities are in principle the same -- they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary."

V. APPLICATION OF THE BALANCING ANALYSIS TO TIBET

[¶5-1: **Summary of Part V**] This Part applies the analysis proposed in Parts One through Four to the Sino-Tibetan dispute. This Part generally mirrors the structure of Part Three, identifying the parties to the dispute and the grounds and natures of their claims, assessing the impacts of alternative resolutions of those claims, and balancing those impacts in the light of international values. The Tibetans' claim of territorial integrity and initial challenges to the People's Republic's legitimacy are addressed in the identification of the grounds and natures of the claims; a further legitimacy challenge is addressed in connection with the role of human rights. In that connection also, a great deal of specific evidence is examined. This Part begins with a brief discussion of the appropriate standard and burdens of proof.

[¶5-2] Because the nature of a quasi-adjudicative forum is to resolve claims by application of known principles to demonstrable facts, it must be determined who must prove the necessary facts and what quantum of evidence constitutes proof, respectively, the burden of proof and the standard of proof. For a claim of self-determination, the appropriate standard of proof is "very high,"¹⁵³ because of the "grav[ity of the] matters asserted."¹⁵⁴

[¶5-3] The burden of proof appropriately rests on the claimant, and shifts to the opponent only when the claimant has made a prima facie case for the claim.¹⁵⁵ In the case of Tibet and the People's Republic of China, however, there is an additional complication. The People's Republic is in exclusive control of the most reliable evidence. It controls access to Tibet,¹⁵⁶ restricts contact

¹⁵³ Permanent Tribunal of Peoples Session of Tibet, Verdict (Strasbourg 20 November 1992) at 13.

¹⁵⁴ Id.: "The Tribunal also accepted that the subject of the accusation had to be established to a very high standard of proof, appropriate to the grave matters asserted. Unless so established the matters asserted were disregarded by the Tribunal."

¹⁵⁵ Id. at 12: "The Tribunal accepted that the burden of proving matters asserted in the accusation rested exclusively upon the representatives of the people of Tibet. It was not for the PRC to disprove such accusation, except in so far as the matter asserted had first been established on a prima facie basis by the Accuser at the end of its case and the PRC had been so informed."

¹⁵⁶ The International Campaign for Tibet, The Long March: Results of a Fact Finding Mission in Tibet (Washington, DC September 1991) at 25: "Access to eastern Tibet by foreigners is controlled by Chinese authorities. During our three and a half weeks in eastern Tibet, we rarely came into contact with a Tibetan while making daily arrangements in travel agencies, bus stations, hotels and Public Security Bureaus (PSB). Most of eastern Tibet, particularly portions near the TAR and where there have been recent revolts, is closed to foreigners. Ngaba County, for example, where there is much 'counter-revolutionary' activity, is off-limits not only to foreigners, but also to Tibetans and Chinese who do not live there. The military stops every bus and car entering the county and checks everybody's documents. Travellers frequently are told that visiting a certain town or region is 'not convenient,' but it is clear that travel restrictions are designed to prevent Westerners from visiting areas where Tibetans are a majority and have staged demonstrations in recent years."

See also Tibet Information Network, Reports from Tibet: March-September 1992 (London 2 October 1992), "February: Text of a Statement given by a Tibetan in Lhasa," at 16: "There was an ordinance from the Chinese leader at the beginning of February 1992 that tourists can stay only in those big hotels and that not a single foreigner can stay in Tibet in the period from 25th February till 15th March."

See also Asia Watch, Violations of Political and Civil Liberties in Tibet in 1991 (New York 18 December

between Tibetans and such foreigners as it permits into Tibet,¹⁵⁷ refuses to allow outside delegations to visit Tibet,¹⁵⁸ and considers the furnishing of human rights information to outsiders a criminal act.¹⁵⁹ Because more reliable evidence than that presented by either party could be

1991), submitted 17 January 1992 to the Secretary-General of the United Nations pursuant to Sub-Commission Resolution 1991/10, at ¶ 12: "Access to the TAR remains extremely limited. Foreign journalists are routinely hampered from visiting."

¹⁵⁷ Human Rights Advocates, The Situation in Tibet: A Survey of Current Human Rights Violations, Including Denial of the Right to Self-Determination (Berkeley), submitted 17 January 1992 to the Secretary-General of the United Nations pursuant to Sub-Commission Resolution 1991/10: "The PRC regulates the flow of information in and out of Tibet by closely supervising and restricting contact with foreign tourists, journalists and human rights workers (and sometimes completely closing Tibet's border to such visitors); and punishing Tibetans for speaking freely with foreigners about forbidden subjects such as independence[.]"

¹⁵⁸ Tibet Information Network, supra n.156, "15 April: Delegations Blocked: Slowdown on Human Rights Visits," at 18: "Last week the Chinese refused to allow two US Congressmen to visit Tibet, and this week the Australian Foreign Minister hinted at growing unease in Beijing about an Australian delegation due to visit China later this year."

See also Asia Watch, supra n.156, at ¶¶ 12-13: "While at least three international delegations visited Tibet during the year to discuss the human rights situation, those visits were tightly controlled. An Australian government delegation ended a thirteen-day visit to China and Tibet on July 26; despite repeated requests, it was not able to get access to Drapchi prison, although it was given specific information about a dozen Tibetan prisoners. A delegation under the auspices of the National Committee on U.S.-China Relations, in which Asia Watch took part, visited Tibet between July 31 and August 8 [1991]. The group did gain access to Drapchi, but virtually all male prisoners had been removed from their cells before the visit. . . . Ambassador Lilley called his visit to Drapchi in March 'as phony as a three-dollar bill.'

"It is clear that no accurate portrayal of the numbers in prison or the conditions under which they are held is possible until outside human rights or humanitarian organizations have regular access to these prisons."

¹⁵⁹ Human Rights Advocates, supra n.157, at 9-10: "There is also evidence of retaliation against Tibetan human rights monitors. In September 1989, Tibetan Ngodrup was sentenced to 11 years' imprisonment and four years' deprivation of political rights for collecting what appears to be basic human rights data. More recently, Tibetan doctor Jampa Ngodrup was sentenced to 13 years in prison for collecting the names of persons arrested or injured during two independence demonstrations in Lhasa in 1988. Because this information was allegedly gathered for dissemination outside Tibet, the doctor was charged with 'stealing or secretly gathering or providing intelligence for an enemy.'"

Id. at 10: "The PRC regulates the flow of information in and out of Tibet by . . . treating certain information-gathering as 'espionage'; criminalizing political dissent and the expression of independence sentiments; and suppressing peaceful demonstrations with excessive, sometimes lethal, force."

See also Asia Watch, supra n.156, at ¶ 4: "Several Tibetans are serving prison sentences for trying to pass human rights information on to foreigners. One of them, Jampa Ngodrup, 45, a doctor . . . in Lhasa, was detained on October 20, 1989 and formally arrested on August 13, 1990. He was accused of having, at the end of 1988, arranged for a colleague to collect a list of all those arrested during the March 5, 1988 in Lhasa. He then allegedly passed the list to a Tibetan woman whom the trial documents describe as a 'foreign resident.' The woman, in turn, gave Jampa Ngodrup a list of those injured and arrested in the December 10, 1988 protests, which he copied. He was accused of being a foreign agent and sentenced on December 24, 1990 to thirteen years in prison."

See also Amnesty International, People's Republic of China: Repression Tibet 1987-1992 (London May 1992) at 24-25 (brackets in original): "The following are excerpts of the Lhasa Municipal Intermediate Court verdict on the case of Jampa Ngodrup: ' . . . In the opinion of this court, defendant Jampa Ngodrup, harbouring counter-revolutionary intent, compiled a list of people detained in the disturbances and passed

made available if the People's Republic were willing to allow investigation of the matters asserted, its failure to do so at least diminishes the credibility of its evidence¹⁶⁰ and arguably constitutes a failure to rebut the Tibetan case.¹⁶¹

A. Identification of the Parties and the Grounds and Natures of the Claims

[¶5-4: Summary of Part V.A] This section begins with a brief description of the parties to the dispute (¶¶5-5 through 5-7). It then examines the grounds and natures of the claims made by Tibet (¶¶5-8 through 5-67) and the People's Republic of China (¶¶5-68 through 5-101). Included within the former is an examination of the evidence concerning Tibet's claim of independent statehood (¶¶5-19 through 5-67). Included within the latter is an examination of the evidence concerning three challenges made to the legitimacy of the People's Republic as the government over the Tibetans (¶¶5-71 through 5-101).

1. Identification of the Parties

[¶5-5] The Tibetans are the claimant group, and the People's Republic of China is the opponent State. The claims raised are made on behalf of the whole Tibetan people, not just those in exile and those living in the Tibet Autonomous Region, and not on behalf of the government-in-exile. Therefore, it is unnecessary to consider the legal authority of the government-in-exile.¹⁶² Therefore also, should the Tibetan claims prevail, the rights recognized must be exercised by the

them on to others, thus undermining the law and violating the [laws of] secrecy."

¹⁶⁰ See "China Hiding Abuses in Tibet" (Agence France Presse 5 November 1992): "The Dalai Lama's government-in-exile Thursday [5 November 1992] accused China of violating human right in Tibet and of trying to cover up the situation there by barring an Australian team from visiting Lhasa.

"A statement said there was no reason to stop the Australian human rights delegation from going to the Himalayan kingdom 'if everything is normal in Tibet and if the human rights of the Tibetan people are being respected.'

"The Chinese government's action only goes to show that they have something to hide in Tibet,' said the statement issued by the government-in-exile, based in the northern Indian hill town of Dharamsala.

* * *

"The statement heaped scorn on China's claims that Tibet was 'normal, stable and . . . all Tibetans are happy under Chinese rule.'"

See also Tibet Information Network, *supra* n.156, "February: Text of a Statement given by a Tibetan in Lhasa," at 16: "This proves that there is not freedom and that they want to hide the truth by restricting the tourists."

¹⁶¹ Assuming, that is, that the Tibetan case is *prima facie* established.

¹⁶² See Permanent Tribunal of Peoples, *supra* n.153, at 10: "Th[e] accusation was lodged with the Tribunal by the representatives of the government of Tibet in Exile. It is unnecessary to the Tribunal to explore sterile arguments about the authority of that government or its support within Tibet. In the nature of things, that support is impossible to measure with precision. The accusation was deemed admissible in so far as it was brought by a responsible and *bona fide* body on behalf of the people of Tibet. It is their rights which are in contention and which legitimately attract the jurisdiction of the Tribunal to hear and determine the accusation brought in their name."

whole people.¹⁶³

[¶5-6] Although, as discussed in ¶¶ 3-19 through 3-33 above, it need not be necessary and may not be possible for the claimant group to establish its status as a people, the Tibetans have an overwhelmingly strong case in this regard.¹⁶⁴ Indeed, no one seriously disputes their peoplehood,¹⁶⁵ and this paper proceeds on the assumption that their peoplehood has been established. The claim of the People's Republic to statehood is not disputed.

¹⁶³ Id. at 15: "The right of self determination must be exercised not only by the Tibetan people now residing in what the People's Republic of China calls the 'Tibet Autonomous Region' but also the Tibetans residing in parts of historic Tibet that have been added to neighboring provinces."

¹⁶⁴ See Margit Roos-Collins, The Relationship Between Environmental Management and Human Rights in Tibet (International Committee of Lawyers for Tibet, San Francisco 14 July 1992) at 2 (citing Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1991/10, Situation in Tibet, U.N. Doc. E/CN.4/1992/37 23 August 1991): "The Sub-Commission has determined that the Tibetans are a 'people' distinct from the Chinese. In its resolution 1991/10 entitled 'Situation in Tibet,' the Sub-Commission referred to the 'distinct cultural, religious and national identity of the Tibetan people' and called upon the Chinese government to respect fully the Tibetans' 'fundamental human rights and freedoms.'"

See also Lodi G. Gyari, Opening Statement Before the Permanent Peoples' Tribunal Session on Tibet (International Campaign for Tibet, Washington DC 1992) at 8: "Tibetans are . . . indisputably a people. They possess all the necessary objective, identifiable criteria to identify them as a distinct people, including distinct language, religion, culture, traditions and customs, history, and territory. Tibetans also meet all other subjective criteria, such as shared preferences, values and common destiny."

See also Human Rights Advocates, supra n.157, at 12: " [T]he Tibetan people has objective characteristics of peoplehood distinguishing it from the people of China. The Tibetans inhabit a geographically distinct territory, the Tibetan plateau; their unique culture has existed and developed for centuries, subject to only occasional outside influences; they constitute a distinct racial or ethnic group; their language, part of the distinct Tibeto-Burmese group, differs from that of China in both spoken and written form; their religion, a specialized development of Mahayana Buddhism, is distinct from that of China; and the Tibetans have a separate history."

See also Permanent Tribunal of Peoples, supra n.153, at 9: "The people who inhabit Tibet were, until the events [which are] the subject of this accusation, overwhelmingly indigenous peoples speaking the Tibetan language. They now number about 6 million. Shaped by their environment, they are a hardy people with a culture profoundly affected by their almost universal adherence to Buddhism and their re[v]erence for a spiritual and temporal leader, the Dalai Lama, who was widely believed by them to be a living re-incarnation of a Divine Being."

¹⁶⁵ See, e.g., Chimi Thonden, Population Transfer Into Tibet (International Committee of Lawyers for Tibet, San Francisco 19 September 1992) at 6: "The fact that Tibetans are a distinct people with a language, culture, religion and historical heritage separate from China is not disputed. Chinese officials frequently refer to the distinct characteristics of the Tibetan people, their culture and history."

See also Permanent Tribunal of Peoples, supra n.153, at 14: "There is widespread agreement that the Tibetan people are a distinctive people. Even the People's Republic of China recognizes Tibetans as a 'minority nationality.'"

See also U.N. Docs. E/CN.4/Sub.2/1989/SR.18 at 13 ¶ 62 and E/CN.4/1990/NGO/8 at 3 ¶ 8; International Commission of Jurists, Tibet and the Chinese People's Republic: A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet (Geneva 1960) at 143; van Walt van Praag, supra n.51, at 282 nn. 43-45.

2. Identification of the Grounds and Natures of the Claims

[¶5-7: **Summary of Part V.A.2**] This section examines the grounds and natures of the claims made by Tibet (¶¶5-8 through 5-67) and the People's Republic of China (¶¶5-68 through 5-101). Included within the former is an examination of the evidence concerning Tibet's claim of independent statehood (¶¶5-19 through 5-67). Included within the latter is an examination of the evidence concerning three challenges made to the legitimacy of the People's Republic as the government over the Tibetans (¶¶5-71 through 5-101).

a. Tibet

[¶5-8: **Summary of Part V.A.2.a**] The Tibetans raise claims of self-determination and territorial integrity. The right of self-determination can be exercised in a multiplicity of ways, so the extent of the Tibetan self-determination claim must be examined, as must the possibility of lesser alternatives discussed in ¶ 4-30 above.¹⁶⁶ The territorial integrity claim, however, is subject to neither of these considerations. If the Tibetan territorial integrity claim prevails, the People's Republic has no claim to raise in opposition. Therefore, if the Tibetan territorial integrity claim prevails, the Tibetans are entitled, *ipso facto* to complete independence. This part examines the extent of the Tibetan claim of self-determination and the grounds of the Tibetan claim of territorial integrity.

(I) Self-Determination: The Extent of the Claim

[¶5-9] As discussed in ¶¶ 3-24 through 3-25 above, "[t]he establishment of a sovereign and independent State, the free association with an independent State of the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."¹⁶⁷ In order to assess the impacts of alternative resolutions of the claim, to balance the likely outcomes in terms of international values, and to consider the possibility of lesser alternatives, it is necessary to identify exactly what mode of implementation the Tibetans are seeking.

[¶5-10] The ultimate mode of implementation must be determined by the Tibetan people.¹⁶⁸ Because such a determination cannot presently be made, however, the extent of the claim must be gleaned from the statements of the Tibetan Government-in-Exile. That government is divided on

¹⁶⁶ But see n. 381, *infra*.

¹⁶⁷ Declaration on Principles, *supra* n.2.

¹⁶⁸ See Permanent Tribunal of Peoples, *supra* n.153, at 24: "To break the impasse of derogations from international law and further grave violations of human rights found by it, the Tribunal appeals to the Secretary General of the United Nations to establish appropriate machinery to permit the conduct within Tibet of an act of self-determination to determine the future political arrangements of Tibet and its association, if any, with the People's Republic of China."

See also Tenzin Gyatso (His Holiness the Fourteenth Dalai Lama), "The Strasbourg Statement: An Address to Members of the European Parliament," in Kelly, Bastian, and Aiello, *supra* n.81, at 269.

the question,¹⁶⁹ so the various alternatives presented must be considered. The consideration of each for the purposes just identified is reserved to the sections dealing with those matters. Here, the point is simply to identify the modes of implementation which must be considered.

[¶15-11] The Tibetan Assembly of People's Deputies is apparently unwilling to settle for anything less than complete independence,¹⁷⁰ a position which seems to have substantial popular support.¹⁷¹ The Dalai Lama, however, has taken a more circumspect approach to that question. He has said that "[t]he Tibetan people must once again be free to develop culturally, intellectually, economically, and spiritually,"¹⁷² but also that "the future status of Tibet" is negotiable.¹⁷³ He has called for Tibet to become a "self-governing political entity . . . in association with the People's Republic of China,"¹⁷⁴ in which the People's Republic "could remain responsible for Tibet's foreign policy,"¹⁷⁵ although Tibet would have its own Foreign Affairs Bureau for "non-

¹⁶⁹ See Tibet Information Network, supra n.156, "27 June: Chinese Resume Contact with Tibetans," at 16: "Gyalo Thondup was the senior minister of the Kashag or cabinet of the exile Government until last month when he resigned temporarily to allow a Government commission to hold an investigation into ministers' alleged manipulation of exile policy.

"He is widely expected to resume his post as senior minister later this summer, even though his own policy, which favours compromise with the Chinese instead of claiming independence, has been publicly challenged by both the exiles' parliament in India and by Thubten Norbu, another of the Dalai Lama's brothers."

¹⁷⁰ Id.

¹⁷¹ Dicky T. Tenley, "Tibetan Youth: 'The Future Denied to Us,'" in Kelly, Bastian, and Aiello, supra n.61, at 43: "The demonstrations in Lhasa since the Fall of 1987 in Lhasa and other parts of Tibet show clearly that we are not seeking an improvement in living conditions, higher wages, or the like, but rather at the risk of our lives we are expressing that we are no longer willing to live under Chinese foreign rule. We must have independence in Tibet.

"It is therefore a fundamental misunderstanding when the problem of Tibet, as is occurring more and more in the West, is reduced to the question of human-rights abuses. Our disappointment was great when we had to recognize that our Government-in-Exile was prepared to compromise on this point."

See also Thonden, supra n.165, at 1 (footnote omitted) (quoting Sidney Jones, Executive Director of Asia Watch, "Human Rights in Tibet," Testimony before the Senate Foreign Relations Committee (28 July 1992) at 1): "'There is no pro-democracy movement in Tibet; it is a pro-independence movement, and every single political prisoner there -- without exception, to our knowledge -- is detained for some form of pro-independence activity. Tibet is also different from most of China in that policies which are not in and of themselves repressive become discriminatory and potentially disastrous when applied by a dominant ethnic group to a less powerful one.'"

See also Asia Watch, supra n.156, at ¶ 14: "In Tibet, virtually every man and woman detained on counterrevolutionary charges was arrested for engaging or being suspected of engaging in pro-independence activities."

¹⁷² Tenzin Gyatso (His Holiness the Fourteenth Dalai Lama), "Five-Point Peace Plan for Tibet," in Kelly, Bastian, and Aiello, supra n.61, at 291.

¹⁷³ Id. at 292.

¹⁷⁴ Gyatso, supra n.168, at 302.

¹⁷⁵ Id.

political¹⁷⁶ purposes.¹⁷⁷

[¶5-12] These assertions of willingness to accept something less than complete independence are not entirely clear. The relevant point, however, is that this willingness affects various determinations made in the course of resolving the claim. Thus, a willingness to accept some form of association with the People's Republic tends to lessen the threat to peace (if any) which might result from the grant of the claim. It also enables the People's Republic to suggest alternatives short of independence which, it could plausibly argue, would satisfy the primary interests of the Tibetans.

(II) Territorial Integrity

[¶5-13: Summary of Part V.A.2.a.(II)] The Tibetans' claim of territorial integrity derives from their claim that, before the People's Republic entered, Tibet was an independent state. This section discusses the requirements of statehood (¶5-14), the presumption of the continuity of states in international law (¶5-15), and the legal consequences of statehood (¶¶ 5-16 through 5-18) and examines the evidence on the question of Tibet's statehood (¶¶5-19 through 5-67)

(A) Statehood in International Law

[¶5-14] The four requirements of statehood in international law are population, territory, government exercising effective control over that population and territory, and the capacity to enter into relations with other States.¹⁷⁸ These requirements, however, are not absolute. In particular, the requirement of effective control is obviated in cases of foreign conquest.¹⁷⁹ Fundamental principles of international law remain supreme, and self-determination is an international legal principle of the highest order. Therefore, "whereas the creation of a State in accordance with the principle of self-determination lends support to a claim to independent statehood, the creation of such an entity in violation of that principle may create an obstacle thereto."¹⁸⁰

[¶5-15] Also of critical importance in the case of Tibet is the presumption of the continuity of

¹⁷⁶ Id.

¹⁷⁷ This is apparently no longer the Dalai Lama's position, although his current position is not clear. See Tibet Information Network, supra n.156, "27 June: Chinese Resume Contact with Tibetans," at 16: "In August 1991 the Dalai Lama withdrew his 1988 offer to accept China's control of defence and foreign policy in Tibet, but he has continued to hint that he will accept less than independence."

See also I Tibet Brief... 3 (International Committee of Lawyers for Tibet, San Francisco, Fall 1991) at 3 (quoting Tibet Information Network): "The Dalai Lama, on a 19th August [1991] visit to the Swiss capital of Berne, formally withdrew his 1988 offer to accept less than full independence from the PRC. The concessions he had offered to encourage the Chinese government to negotiate had been rejected, said the exiled Tibetan leader."

¹⁷⁸ International Commission of Jurists, supra n.165, at 143; van Walt van Praag, supra n.51, at 93.

¹⁷⁹ Marek, Identity and Continuity of States in Public International Law (Geneva 1968) at 8 (quoted in van Walt van Praag, supra n.51, at 243 n. 27): "Belligerent occupation is precisely the classical case, where the principle of effectiveness is relegated to the background and yields its place to contrary rules of international law."

¹⁸⁰ van Walt van Praag, supra n.51, at 99.

states. States are presumed in international law to remain in existence once established, a presumption which can be rebutted, if at all, only by legal settlement or "forcible total subjugation."¹⁸¹ Therefore, the question posed by the People's Republic -- "at what time has China ever lost its sovereignty over Tibet?"¹⁸² -- does not arise in law until that posed by Tibet -- "[w]hen and why did Tibet become a part of China?"¹⁸³ -- has been adequately answered.

(B) Consequences of Statehood

[¶5-16] As already noted, one consequence of statehood is the entitlement of the state to territorial integrity. If Tibet is a state, entitled to territorial integrity,¹⁸⁴ the People's Republic has no claim to raise in opposition to Tibet. As discussed in ¶ 3-35 above, the principle of territorial integrity requires states not to wage or engage in propaganda for wars of aggression, not to violate international boundaries by force, not to acquire or recognize the acquisition of territory by force or threat of force, and not to engage in forcible acts of reprisal.¹⁸⁵ It is not possible for more than one state to be entitled to territorial integrity in respect of the same territory, because the movement of military forces into that territory would be a simultaneous exercise of the acting state's domestic jurisdiction and a violation of the non-acting state's territorial integrity. Thus, the same act would be simultaneously permitted and prohibited by international law, an incoherent result.

[¶5-17] Another important consequence of statehood is that it implicates the provisions of the Fourth Geneva Convention relating to the treatment of civilians in occupied territories.¹⁸⁶ The effect of these international legal norms is noted at footnote 351 below, in connection with population transfer.

[¶5-18] A final consequence of statehood is that if Tibet is a state, it has two claims -- self-determination and territorial integrity -- to raise against the People's Republic's one. Thus, if the competing claims of territorial integrity cannot be resolved because they are equivalent, Tibet's self-

¹⁸¹ Id. at 100.

¹⁸² U.N. Doc. E/CN.4/1991/73 at 2 ¶ 4.

¹⁸³ van Walt van Praag, "Tibet: An Occupied Country," in Kelly, Bastian, and Aiello, supra n.61, at 61.

¹⁸⁴ Self-determination, of course, does not require statehood. Indeed, it embraces "[t]he establishment of a sovereign and independent state" (Declaration on Principles, supra n.2), plainly inapplicable to an already-existing state.

See also, e.g., Human Rights Advocates, supra n.157, at 14: "Regardless of Tibet's status when China began to occupy it in 1949, Tibetans now have a right to self-determination under established principles of international law. It is widely agreed that people subject to colonial or alien domination is denied its right to self-determination. There is compelling evidence that the Tibetan people live in a situation of colonial or alien domination and exploitation, and thus must be accorded their right to self-determination."

¹⁸⁵ Declaration on Principles, supra n.2.

¹⁸⁶ Memorandum, Hearing on "US and Chinese Policies Toward Occupied Tibet (United States Senate, Foreign Relations Committee, Washington, DC 24 July 1992) ("Senate Memorandum") at 9: "If one accepts that Tibet is an occupied country, then China is in violation of several articles of the Fourth Geneva Convention of 1949, which forbid an occupying power to transfer or deport its civilian population into the territory it occupies. The PRC ratified this convention in 1956."

determination claim is strengthened in relation to the People's Republic's territorial integrity claim. That is, if the territorial integrity claims cannot be resolved, the question becomes which of the parties has a superior claim based on other principles of international law. Because the People's Republic has no other claim to raise, the effect of this is to render Tibet's self-determination claim essentially unopposed.

(C) Evidence Concerning Statehood

[¶5-19: Summary of Part V.A.2.a.(II)(C)] This section examines the evidence concerning Tibet's claim to statehood. In accordance with the presumption of the continued existence of states,¹⁸⁷ this section begins with the earliest period of Tibetan history. It then proceeds through that history through the entry of the People's Liberation Army in 1950. This section analyzes the evidence adduced by both parties and states conclusions at the end of each relevant historical period.

(1) Tibet's Relations with Imperial China

[¶5-20: Summary of Part V.A.2.a.(II)(C)(1)] This section examines Tibet's relations with imperial China from Tibet's earliest history to the Nationalist Revolution. Before the Mongol invasion in the thirteenth century, Tibet was unquestionably an independent state (¶¶5-21 through 5-22). The ruling lamas of Tibet and the Mongol leaders who subsequently became emperors of China entered into a priest-patron relationship which entailed mutual obligations and reciprocal legitimation of authority, but was in many respects not within traditional concepts of Western-oriented international law (¶¶5-23 through 5-27). This relationship ended with the formation of the secular Tibetan state (¶¶5-28 through 5-29). It was reestablished in the eighteenth century, but the Ming Emperor defaulted on his obligations under it in the nineteenth century, and both parties repudiated it in the twentieth century (¶¶5-30 through 5-35). Thus, at the time of the Nationalist Revolution, Tibet was an independent state (¶¶5-36 through 5-38).

(a) Ancient History

[¶5-21] The founding of the Tibetan nation is traditionally dated 127 B.C.¹⁸⁸ No question of Chinese domination of Tibet can arise from Tibet's most ancient history. By the eighth century, Tibet had become the most powerful nation in Asia, as was recognized by Chinese court historians.¹⁸⁹ Indeed, Tibet during this period conquered several Chinese provinces,¹⁹⁰ hardly the act of a subordinate. At the weakening of the Tibetan State in the ninth century, these provinces were retaken by China.¹⁹¹ The Chinese Tang Dynasty collapsed shortly thereafter, in

¹⁸⁷ This presumption defeats the argument that "[w]hat view one takes . . . depends on where one opens the history book." Chris Mullin and Phuntsog Wangyal, The Tibetans" Two Perspectives on Tibetan-Chinese Relations (Minority Rights Group, London, 2d ed. 1983) at 7. Rather, once a state comes into existence, the subsequent "pages" of the "history book," unless they reveal a legal settlement or "forcible total subjugation" (van Walt van Praag at 100), are written subject to the presumed continuity of that state.

¹⁸⁸ Gyatso, supra n.168, at 301.

¹⁸⁹ van Walt van Praag, supra n.51, at 119.

¹⁹⁰ Mullin and Wangyal, supra n.187, at 7; Gyatso, supra n.168, at 301.

¹⁹¹ Hugh E. Richardson, Tibet and its History (Shambhala, Boulder and London, 2d ed. 1984) at 32.

A.D. 905¹⁹² or 907.¹⁹³

[¶15-22] Thus, as of the ninth century, the Tibetan state was clearly established. Therefore, the question with which the remainder of this section is concerned is whether any subsequent events subordinated Tibet to China so as to extinguish the sovereignty of the Tibetan state.

(b) The Mongol Invasion and the Priest-Patron Relationship

[¶15-23] There was no official contact at all between the subsequent Chinese governments and any rulers of Tibet proper until the appearance of the Mongols in the twelfth century¹⁹⁴ and their subsequent invasion of Tibet. In 1249, the pre-eminent Sakyapa Lama, Pandita, was appointed Viceregent of Tibet by Godan Khan.¹⁹⁵ In 1253, Pandita was succeeded by Phagpa, whose secular authority was conferred upon him by Kublai Khan.¹⁹⁶ In 1260, Kublai Khan took control of China, which culminated in his founding of the Mongol Yuan Dynasty in 1279.¹⁹⁷

[¶15-24] Thus, the union of Tibet and China under one empire was the result of their both having been overrun by the same foreign invader. Whatever the relationship of Tibet to the Yuan Dynasty, it was a relationship between the Tibetans and the Mongols, not the Tibetans and the Chinese, and it was established before the Mongol conquest of China.¹⁹⁸ Nonetheless, the People's Republic claims that by virtue of the Mongol invasion, Tibet became "an administrative region of China and inalienable part of the Chinese territory."¹⁹⁹ This position -- that when two nations are invaded by the same power, one of the invaded nations acquires sovereignty over the other -- is incomprehensible.

[¶15-25] The relationship established between the Mongol Khans and the Tibetan lamas merits close attention because it is the foundation of the People's Republic's claim to suzerainty over Tibet. Suzerainty²⁰⁰ is an international relationship recognized in international law, but its

¹⁹² Id.

¹⁹³ R. A. Stein, Tibetan Civilization, trans. J.E. Stapleton Driver (Stanford University Press, Stanford 1972) (originally La Civilisation tibétaine, Dunod Editeur (Paris 1962)), at 70.

¹⁹⁴ Richardson, supra n.191, at 33.

¹⁹⁵ Id. at 34; Stein, supra n.193, at 78.

¹⁹⁶ Helmut Hoffmann, The Religions of Tibet, trans. Edward Fitzgerald (MacMillan Co., New York 1961) at 138; Richardson, supra n.191, at 34; Stein, supra n.193, at 78.

¹⁹⁷ Richardson, supra n.191, at 34; Stein, supra n.193, at 78.

¹⁹⁸ van Walt van Praag, supra n.51, at 121.

¹⁹⁹ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2.

²⁰⁰ See Black's Law Dictionary (West Publishing Co., St. Paul 5th ed. 1979) at 1298: "Suzerain. In French and feudal law, the immediate vassal of the king; a crown vassal; a tenant in capite. . . . [¶] A nation that exercises political control over another nation in relation to which it is sovereign. [¶] Term is used as descriptive of relations, ill-defined and vague, which exist between powerful and dependent states; its very

applicability to Sino-Tibetan relations is dubious. The institution established by the Khans and the lamas was Asian, not Western. It was not the relationship of vassal and suzerain, or subordinate and superior, but of priest and patron.

[¶15-26] The priest-patron relationship, cho-yon, is "a uniquely Buddhist and Central Asian religio-political institution, which cannot be categorized or defined adequately in current international legal terms and must therefore be regarded as a sui generis relationship."²⁰¹ Like feudal suzerainty, cho-yon is a personal bond, but unlike feudal suzerainty, it is a bond between equals.²⁰² Like feudal suzerainty, cho-yon involves an investiture of secular authority in the lama by the Khan, but unlike feudal suzerainty, cho-yon entails reciprocal legitimation of authority:

[T]he source of the Lama's temporal authority over Tibet was vested outside Tibet, with the Mongol Khagan. The Khagan, in turn, derived the legitimacy of his Imperial rule from the religious position or mandate recognized by the Tibetan Lama.²⁰³

[¶15-27] Most importantly, the cho-yon relationship imposes obligations on both parties to it. Its constitutive elements are the patron's commitment to protect his priest and the priest's commitment to fulfill his patron's spiritual needs.²⁰⁴ This relationship was epitomized by Phagpa and Kublai Khan; the latter made the former his personal chaplain, as well as Viceregent of Tibet.²⁰⁵ As discussed in ¶¶15-34 through 5-35 below, subsequent patrons (or putative patrons) completely defaulted on their obligation to protect their priests (the role of priests eventually being assumed by the Dalai Lamas), and the cho-yon relationship was repudiated by the Thirteenth Dalai Lama.

(c) Tibet's "Second Kingdom"

[¶15-28] The decline of the Mongol Yuan Dynasty in the fourteenth century saw the revival of Tibet's complete independence. The Sakyapa monastic order lost its domination of Tibet in 1349,²⁰⁶ when Changchub Gyaltsen established the "Second Kingdom."²⁰⁷ The new Tibetan ruler

indefiniteness being its recommendation. While protecting and protected states tend to draw nearer, the reverse is true of suzerain and vassal states; a protectorate is generally the preliminary to incorporation; suzerainty, to separation. [¶] It is said that suzerainty is title without corresponding power; protectorate is power without corresponding title."

²⁰¹ van Walt van Praag, supra n.41, at 123.

See also Permanent Tribunal of Peoples, supra n.153, at 21: "As for Tibet's relations with China, the Western concepts of 'suzerainty' [sic] and 'vassalhood' are inadequate. It makes more sense to seek analogies for Tibet with other political entities such as the kingdoms of ancient Africa or pre-Columbian America, or of Asia or even China itself."

²⁰² van Walt van Praag, supra n.51, at 120; International Commission of Jurists, The Question of Tibet and the Rule of Law (Geneva 1959) at 84.

²⁰³ van Walt van Praag, supra n.51, at 121.

²⁰⁴ Id. at 123.

²⁰⁵ Richardson, supra n.191, at 34.

²⁰⁶ Id.; van Walt van Praag, supra n.51, at 121.

established himself not only without Mongol assistance, but at the expense of the very Sakyapa order which Yuan was sworn to protect.²⁰⁸ Moreover, he did so, and was firmly established as the sole ruler of Tibet, almost two decades before the next Chinese dynasty, the Ming, was founded in 1368.²⁰⁹

[¶15-29] The Ming Dynasty (1368-1644) had no special relationship with the Government of Tibet at all. Indeed, "the first Ming emperor referred to Tibet as a foreign state, in language that was unequivocal."²¹⁰ The cho-yon relationship, to the degree that it persisted at all,²¹¹ was between the lamas and the emperors. Tibet was not, however, governed during this time by the lamas. Changchub Gyaltzen and the monarchs who followed him for almost 300 years were secular rulers,²¹² and they made no obeisance to Ming whatsoever.²¹³

(d) The Dalai Lamas and the Manchu Emperors

[¶15-30] The secular monarchs of Tibet's "Second Kingdom" ruled Tibet until 1642, when the Mongols, with the backing of the Gelukpa hierarchs, overthrew King Karma Ten-Kyong and united Tibet under the Dalai Lama.²¹⁴ Gusri Khan was pronounced king, and the Fifth Dalai Lama was made Viceregent.²¹⁵ Although the Manchu Qing Dynasty was founded in 1644, Gusri Khan, a Mongol, continued as king until his death in 1655. Thus, the Manchu Qing Dynasty had, at that time, no relationship of superiority whatever with Tibet.

[¶15-31] After Gusri Khan's death, the Fifth Dalai Lama assumed complete control of temporal

²⁰⁷ Richardson, supra n.191, at 306; see also Tsung-Lien Shen and Shen-Chi Liu, Tibet and the Tibetans (Stanford University Press, Stanford 1953) at 106 and van Walt van Praag, supra n.51, at 121-122.

²⁰⁸ van Walt van Praag, supra n.51, at 122.

²⁰⁹ Richardson, supra n.191, at 35; van Walt van Praag, supra n.51, at 121.

²¹⁰ Asia Watch, Human Rights in Tibet (New York and Washington, D.C. February 1988) at 5.

²¹¹ The various Tibetan sects had all adopted patrons among Mongol nobility (see Stein, supra n.193, at 78-82), and evidence concerning the persistence of those relationships is unclear. As discussed in ¶15-32 below, cho-yon was reestablished between the Dalai Lamas and the Manchu Qing Dynasty in the eighteenth century.

²¹² Richardson, supra n.191, at 36.

²¹³ Id.; van Walt van Praag, supra n.51, at 122.

²¹⁴ Roger Hicks and Ngakpa Chogyam, Great Ocean: An Authorized Biography of the Buddhist Monk Tenzin Gyatso, His Holiness the Fourteenth Dalai Lama (Penguin Books, London 1984) at 31; Tenzin Gyatso, Freedom in Exile: The Autobiography of the Dalai Lama (HarperCollins, New York 1990) at 1-2; Richardson, supra n.191, at 41 and 307; Stein, supra n.193, at 82.

²¹⁵ Richardson, supra n.191, at 41 and 307; Stein, supra n.193, at 82-83.

affairs in Tibet and wielded it without interference from outside powers, either Mongol or Chinese.²¹⁶ His successors continued this independence well into the period of the Qing Dynasty (1644-1911). Early in the eighteenth century, a Jesuit living in Tibet said of the Dalai Lama: "He rules not only over religious, but over temporal matters, as he is really the absolute master of all Tibet."²¹⁷ A better description of effective control over population and territory can hardly be imagined.

[¶15-32] The cho-yon relationship was established between the Dalai Lamas of Tibet and the Manchu Emperors of China as a consequence of the Dzungar invasion of Tibet in 1717. The events leading up to the invasion are convoluted, and the evidence is, at best, sketchy. The critical point is that the Manchu Emperor explicitly declared that the justification for his military intervention in 1720 (by which the Dzungars were defeated) was the protection of his priest, the Dalai Lama.²¹⁸ China's claims to Tibet have often been based on the Treaty of 1720,²¹⁹ the very actuality of which is disputed.²²⁰ If there was such a treaty, its terms cannot be ascertained, because it is no longer in existence.²²¹

[¶15-33] The extent of Manchu control over Tibet during the eighteenth and nineteenth centuries is hotly debated. On one hand, it is clear that imperial officers (Ambans) were assigned to Lhasa from the Imperial Court at Beijing. On the other hand, it is not clear what role they played there. That role appears to have reached its peak in 1793, when the Ambans were given authority over Tibet's foreign affairs.²²² This had no effect, however, on Tibet's internal sovereignty, as the Regent who ruled Tibet from 1819 to 1844 "was able to exert well-nigh absolute rule without any interference from the Ambans."²²³

[¶15-34] Because the nominal authority of the Ambans extended only to Tibet's foreign affairs, the

²¹⁶ Richardson, supra n.191, at 42.

See also Senate Memorandum, supra n.51, at 2: "Manchu influence did not last for very long and was entirely ineffective by the time the British briefly invaded Tibet in 1903-1904, and ceased entirely with the overthrow of the Qing dynasty in 1911."

²¹⁷ I. Desideri, S.J., An Account of Tibet, ed. F. De Filippi (London 1932) at 206 (quoted in van Walt van Praag, supra n.51, at 123).

See also Senate Memorandum, supra n.186, at 2: "[T]he Tibetans were in charge of their government and controlled their own territory during this period. The Tibetan government maintained international relations with all neighboring countries, most of whom had diplomatic representatives in Lhasa."

²¹⁸ van Walt van Praag, supra n.51, at 124.

²¹⁹ West German Bundestag Reference and Research Services, "The Legal Status of Tibet," in Kelly, Bastian, and Aiello, supra n.61 ("Bundestag"), at 74.

²²⁰ See International Commission of Jurists, supra n.202, at 75: "[U]ntil 1908 there is no recorded treaty between Tibet and China regulating their relations since 1247"

²²¹ Bundestag, supra n.219, at 74.

²²² van Walt van Praag, supra n.51, at 126.

²²³ Richardson, supra n.191, at 71.

critical question becomes Tibet's capacity to enter into international relations during this period. The Tibetans were involved in two wars during the nineteenth century and concluded treaties with their opponents, the Dogras and the Gorkhas.²²⁴ The treaty with the Gorkhas is discussed below in connection with the legal effect of international recognition. Here, the important point is that the failure of the Qing Emperor even to attempt to help Tibet was a complete abdication of his role as patron and protector, and Tibet's assumption of actual power over its own foreign affairs was a recognition of that abandonment.

[¶5-35] The Qing Dynasty's abandonment of its patronage of the Dalai Lamas was formalized in 1910, when the Manchu Emperor Hsuan T'ung officially denounced the supposed object of his devotion, the Thirteenth Dalai Lama.²²⁵ The Qing Dynasty, and millennia of Chinese imperial history, came to an end with the revolution of 1911. At that time, "both Tibet and Mongolia acted on the assumption that the structure linking them in one realm was defunct, and established themselves as independent states."²²⁶

(e) Conclusions

[¶5-36] Tibet was, in its earliest history, the pre-eminent power in Asia, its independence unquestioned. The cho-yon relationship established between the Sakyapa Lamas of Tibet and the Mongols who later became emperors of China ceased being the framework of Tibetan government with the establishment of the "Second Kingdom" in 1349. The monarchs of the "Second Kingdom" conducted the internal and foreign affairs of Tibet without interference throughout the Chinese Ming Dynasty and well into the Manchu Qing Dynasty.

[¶5-37] The later cho-yon relationship established between the Dalai Lamas of Tibet and the Manchu Emperors of China was abandoned by the Qing Dynasty in fact in 1842, when the Emperor failed to assist Tibet in its conflict with the Dogras. This was repeated in 1856 in Tibet's conflict with the Gorkhas. Although it has no precise analog in international law, cho-yon is fundamentally a consensual relationship. Judged by the standards of international law, that relationship, and any Chinese claims deriving from it, were extinguished by the Qing Emperor's failure to fulfill its duty of protection:

A fundamental rule of law governing such relations is the exceptio non ad impleti contractus, which is formulated in Article 60 of the Vienna Convention on the Law of Treaties as follows: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty," where a material breach is defined as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Needless to say, the Emperor's actions [constituted] such a violation.

... The logical consequence of the nature of the cho-yon relationship was its

²²⁴ International Commission of Jurists, supra n.165, at 154; van Walt van Praag, supra n.51, at 128.

²²⁵ van Walt van Praag, supra n.51, at 133.

²²⁶ Asia Watch, supra n.210, at 6-7. Mongolia and Tibet entered into a Treaty of Friendship and Alliance in 1913. Herold, supra n.226, at 8.

automatic extinction along with the passing away of the last Qing Emperor.²²⁷

[15-38] Thus, at the inception of the Nationalist Republic of China, Tibet was a fully functioning independent state, whose former relationship with China had been dissolved by various actions of both parties. Therefore, any claim of the People's Republic to sovereignty (or suzerainty) over Tibet must derive from events subsequent to China's imperial period.

(2) Tibet's Relations with the Nationalist Republic of China

[15-39] When the Qing Emperor denounced the Thirteenth Dalai Lama in 1910, he also installed Chinese garrisons in Tibet. The Tibetans forcibly drove them out in 1911,²²⁸ an unmistakable act of national sovereignty. In 1912, the Thirteenth Dalai Lama formally proclaimed Tibet's independence.²²⁹ The following year, representatives of Great Britain, China, and Tibet participated in the Simla Conference. The Tibetan representative had "the right to decide all matters which may be beneficial to Tibet,"²³⁰ and each representative was "a properly accredited plenipotentiary whose powers were accepted formally by the other participants in the Conference."²³¹

[15-40] Tibet's conduct vis-a-vis the Republic of China was for the life of that Republic an unbroken chain of assertions of national sovereignty.²³² In 1926, the Tibetan representative to

²²⁷ van Walt van Praag, *supra* n.51, at 135.

See also Permanent Tribunal of Peoples, *supra* n.153, at 22: "What[ever] personal links there may have been between the Dalai Lama and the Mongol and Ching emperors, the Tibetan people have always been a distinct entity even when associated with China. With the coming of the Republic of China in 1911, the former links were dissolved. China changed into a secular and national state as a result of a revolution in which the Tibetan people did not participate. The Chinese republic could not maintain that the former links could be transformed into a situation whereby the Tibetan people belong to the people of the new state."

²²⁸ Bundestag, *supra* n.219, at 75; Herold, *supra* n.226, at 7.

²²⁹ *Id.*; Senate Memorandum, *supra* n.186, at 2.

²³⁰ International Commission of Jurists, *supra* n.165, at 149 (quoting a Note from the Government of India to the People's Republic of China).

²³¹ Richardson, *supra* n.191, at 107.

See also Permanent Tribunal of Peoples, *supra* n.153, at 21: "[I]t is *a priori* difficult to understand how an agreement could have been concluded as a treaty between the Tibetan authorities and Great Britain if Tibet were not an autonomous state, whatever its links to China might be."

²³² See Senate Memorandum, *supra* n.186, at 2 (ellipses in original): "A more expansive view of the British position, officially conveyed in June 1943 through the Dominion Office to Canada, Australia, New Zealand and South Africa is instructive:

Tibetans are a different race from Chinese and have a different religion, language and culture. They have never been absorbed culturally by the Chinese ... For over thirty years they have enjoyed de facto independence and do not wish to be resubjugated. Their memories of Chinese rule are those of disorder and incompetence, whereas the Dalai Lama's administration has great moral authority ... there appear to be few grounds on which China can justifiably assert unqualified control over a nation isolated by geography, already self-governing and determined to retain the same independence that China now advocates for other countries of the Far East such as Burma and the Malay States."

a multinational conference on boundaries participated as a fully equal member.²³³ In 1928, the Kuomintang Government, effectively conceding Tibet's independence, invited Tibet to join the Republic of China.²³⁴ This invitation was ignored, and China in 1931 unilaterally declared Tibet a province of the Republic. Open hostilities followed in 1931 and 1932, when the Kuomintang Government tried to assert authority over Kham and Amdo in eastern Tibet, but was unsuccessful.²³⁵

[15-41] By 1936, the only Chinese remaining in Lhasa were a delegation sent to offer condolences on the death of the Thirteenth Dalai Lama, and these were not permitted to travel freely outside Lhasa.²³⁶ Also in 1936, the Tibetans drove the Chinese Communists (who were, of course, not yet in control of China) from Kham.²³⁷ In 1943, Tibet set up its own office for external affairs and issued passports which were internationally recognized as valid travel documents.²³⁸ In 1947, two Tibetan representatives travelled on Tibetan passports to the Asian Relations Conference in New Delhi, where they participated as equals and at which the national flag of Tibet was flown.²³⁹ In 1948, Tibetan passports were recognized as valid travel documents by Great Britain, France, India, Italy, and the United States.²⁴⁰ "Treating Tibet as a sovereign state, Britain maintained a permanent diplomatic mission in Lhasa from 1933 until 1947. Independent India then maintained its diplomatic mission there, until the Chinese invasion."²⁴¹

[15-42] Near the end of the Nationalist Republic, there occurred two events on which the People's Republic lays great stress. In 1946, a constituent assembly approved a new constitution for the Republic, a constitution which specifically designated Tibet a province of the Republic.²⁴² The 1931 constitution had also done so,²⁴³ but the striking difference is that Tibetans attended the

See also Human Rights Advocates, supra n.157, at 12: "Tibet at that time [1949] had long displayed the criteria of statehood, including its own head of state; flag; passports; army' systems of judiciary, post, and customs; taxation and monetary policy; its own effective government; and capacity to conduct its own international relations."

²³³ International Commission of Jurists, supra n.165, at 150.

²³⁴ International Commission of Jurists, supra n.202, at 88. This was apparently done at the urging of the Panchen Lama. Herold, supra n.226, at 9.

²³⁵ International Commission of Jurists, supra n.202, at 88.

²³⁶ Hugh E. Richardson, "The Independence of Tibet," in Kelly, Bastian, and Aiello, supra n.61, at 34.

²³⁷ International Commission of Jurists, supra n.202, at 88.

²³⁸ Bundestag, supra n.219, at 75.

²³⁹ International Commission of Jurists, supra n.165, at 157.

²⁴⁰ Mullin and Wangyal, supra n.187, at 7.

²⁴¹ Gyari, supra n.165, at 3.

²⁴² International Commission of Jurists, supra n.165, at 147-148.

²⁴³ Mullin and Wangyal, supra n.187, at 7.

1946 assembly.²⁴⁴ Therefore, according to the People's Republic, Tibet is bound by its action to acknowledge the sovereignty of Beijing. Similar conclusions are drawn from the attendance of Tibetans at the National Assembly of 1948.

[15-43] The Tibetans, however, claim that those Tibetans who attended the assemblies were not empowered to recognize Chinese sovereignty, nor did they do so. Indeed, the leader of the Tibetan delegations expressly disavowed any such action:

We attended the assembly in order to study the behaviour of the Khamba and Tibetan emigrants who attended the assembly as pretended Tibetan representatives. But we did not recognise or sign the new constitutional law (Shenfa) which was then made.

In 1948 our mission in Nanking, namely the Khandon Losum, also attended the Chinese assembly as visitors but no special representative was deputed from Lhasa, and they similarly did not recognise or sign the resolution of the assembly.²⁴⁵

[15-44] In 1949, when Mao Dzedong's Communist armies overthrew the Kuomintang Government, Tibet expelled all Chinese representatives.²⁴⁶ Thus, Tibet, which had functioned fully independently during the whole of the Nationalist Republic, continued to assert its sovereignty over its own affairs as the People's Republic came into being. Therefore, any claim of the People's Republic to sovereignty (or suzerainty) over Tibet, must derive from events which occurred during the existence of the People's Republic.²⁴⁷

(3) Tibet's Relations with the People's Republic of China

[15-45: Summary of Part V.A.2.a.(II)(C)(3)] After the
People's Republic entered Tibet, it promulgated the Seventeen-Point Agreement of 1951. The People's Republic's presence in Tibet, though far too violent to support a claim of acquisition by usucaption (which requires a "continuous and peaceful display of territorial sovereignty"²⁴⁸), could form the basis of an argument for acquisition by conquest and annexation. The People's Republic has made much of the fact that "not a single country in the world has ever recognized the so-called

²⁴⁴ International Commission of Jurists, supra n.167, at 147; Mullin and Wangyal, supra n.187, at 7.

²⁴⁵ International Commission of Jurists, supra n.165, at 148.

²⁴⁶ Richardson, supra n.236, at 35.

²⁴⁷ See Office of the Representative of His Holiness the Dalai Lama, Human Rights in Tibet Today (Geneva), submitted 17 January 1992 to the Secretary-General of the United Nations pursuant to Sub-Commission Resolution 1991/10 ("Office of Tibet"), at 6-7: "A study of Tibetan history will show that Tibet was in fact never annexed by China before 1949, despite periods of considerable influence and even intervention in Tibet's affairs by some foreign emperors of China. Tibet did come under the influence of Mongol emperors who conquered China seven hundred years ago, and then again under the influence of Manchu emperors who also conquered China. . . . Since the overthrow of the Manchus in China in 1911, moreover, Beijing had no authority at all in Tibet, and Tibet behaved in every respect as a fully independent state and was recognized as such by countries with whom it chose to develop relations."

But see Permanent Tribunal of Peoples, supra n.153, at 21: "When the 'invasion' by China occurred in 1950, it was difficult therefore, on the materials before the Tribunal, to affirm with certainty that Tibet was a State."

²⁴⁸ Bundestag, supra n.219, at 78 (emphasis added).

'independence of Tibet'.²⁴⁹ This section considers in turn the legal effects of the 1951 Agreement, the forcible occupation of Tibet, and the failure of the international community to recognize Tibet's Government-in-Exile.

(a) **The Seventeen-Point Agreement of 1951**

[¶5-46] The Tibetans claim that the 1951 Agreement is void because it was executed under the following circumstances. Mao Dzedong founded the People's Republic on 24 October 1949. In accordance with an announcement made by Radio Beijing on 1 January 1950, the People's Liberation Army made an incursion, which was resisted, into Tibet in May of 1954 and invaded in full force in October, overwhelming the Tibetan army of 8,500 and moving on to Lhasa.²⁵⁰ Tibet appealed to the United Nations, but received no response.²⁵¹

In April 1951, a Tibetan delegation headed by Ngabo Ngawang Jigme, the Governor of Chamdo, arrived in Beijing.²⁵² The delegation had been empowered only to negotiate, not to sign anything on behalf of the Dalai Lama, who had kept the seals of state with him in Tibet.²⁵³ The delegation refused to sign the first proposed agreement, because it maintained that Tibet was an "integral" part of China.²⁵⁴ The following month, the People's Republic put forward a new proposal. With Chinese troops occupying large parts of Tibet,²⁵⁵ and threatened with personal violence against themselves and military retaliation against Tibet,²⁵⁶ the Tibetan delegation acceded.²⁵⁷

[¶5-47] The legal question presented by the claim is whether a treaty signed under such circumstances is binding. The resoundingly clear answer from international law is that the 1951

²⁴⁹ U.N. Doc. E/CN.4/1990/68 at 2 ¶ 1; see also Reply of the Permanent Representative of the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2: "No country in the world has ever recognized the so-called 'independence in Tibet'."

See also Senate Memorandum, supra n.186, at 6: "More recently, in written answers by Secretary of State James Baker to questions submitted by Senator Simon at a February 5th, 1992 Senate Foreign Relations Committee hearing, the Administration position held simply that 'US policy accepts the Chinese position that Tibet is part of China.'"

²⁵⁰ John F. Avedon, In Exile From the Land of Snows (Alfred A. Knopf, New York 1984), at 26-32; Gyatso, supra n.214, at 49-53; Mullin and Wangyal, supra n.187, at 7; Richardson, supra n.191, at 182-184.

²⁵¹ Gyatso, supra n.214, at 53; Richardson, supra n.191, at 186.

²⁵² Avedon, supra n.250, at 35.

²⁵³ Gyatso, supra n.214, at 64.

²⁵⁴ Avedon, supra n.250, at 35.

²⁵⁵ Richardson, supra n.191, at 189.

²⁵⁶ Avedon, supra n.250, at 35.

²⁵⁷ But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2: "[T]he two sides sent delegations and conducted friendly negotiations. Agreement was reached"

Agreement has no legal effect at all.²⁵⁸ Bluntly put, the claim is that "Tibet signed at pistol-point."²⁵⁹ A treaty signed while the armed forces of one party are occupying the territory of another in violation of international law is, under Article 52 of the Vienna Convention on the Law of Treaties, absolutely void.²⁶⁰ The only situations in which a treaty may lawfully be imposed upon a party whose territory is forcibly occupied are (1) where the occupying power is using force against an unlawful aggressor and (2) pursuant to a Security Council resolution.²⁶¹

[¶15-48] The treaty was also concluded by delegates who exceeded their authority in so doing. That accession to a treaty was made by the ultra vires act of a representative is legal ground for a state to invoke relative nullity,²⁶² which is automatically cured by the party's formal acceptance of the treaty's terms or by conduct manifesting such acceptance.²⁶³ Although the conduct of the Tibetan government between 1951 and 1959 may have been sufficiently accommodating to be considered an acceptance of the Agreement,²⁶⁴ the legal effect of that conduct is dubious, because it was the product of continuing duress.²⁶⁵

[¶15-49] The Fourteenth (present) Dalai Lama repudiated the Agreement in 1959.²⁶⁶ To the extent that the repudiation was based on his representatives' lack of authority, it may or may not have had legal effect, depending on whether the Tibetan government had impliedly accepted the Agreement, thereby curing the relative nullity deriving from its having been acceded to by representatives lacking the requisite authority. Insofar as the repudiation was based on the coercion or Tibet's accession to the Agreement however, it rendered the Agreement an absolute nullity. Eduardo Jimenez de Arechaga, President of the International Court of Justice, has explained the distinction:

If the treaty is tainted with relative nullity by reason of a defect of capacity, error, fraud

²⁵⁸ But see Id. at 2: "This Agreement is an important and legally binding document for the Government of new China to settle its domestic ethnic question."

²⁵⁹ International Commission of Jurists, supra n.202, at 96.

²⁶⁰ Bundestag, supra n.219, at 76; van Walt van Praag, supra n.51, at 154.

²⁶¹ van Walt van Praag, supra n.51, at 179.

²⁶² Id. at 153-154.

²⁶³ Id. at 165.

²⁶⁴ See Edward Lazar, "Accommodation or Independence," in Kelly, Bastian, and Aiello, supra n.61, at 307: "It is often noted that after the 1949-50 Chinese invasion the Seventeen-Point Agreement between China and Tibet was signed under duress, did not involve consultation with the Tibetan government in Lhasa, and that the treaty used false Tibetan seals. This is undoubtedly true -- but then why did the Tibetan government work within the framework of an unauthorized anti-Tibet agreement for the next ten years? Why didn't the Tibetan leadership, which had left Lhasa, go into exile and rally the world community to the cause of Tibet when the act of colonialism was freshly committed and had the attention of the world?"

²⁶⁵ International Commission of Jurists, supra n.202, at 97 n.20.

²⁶⁶ Id. at 97 and 99; Avedon, supra n.250, at 58; Gyatso, supra n.214, at 141; van Walt van Praag, supra n.51, at 165.

or corruption, the injured party is free to invoke or not to invoke the invalidity of its consent, and it could agree to confirm the act -- expressly or impliedly. On the other hand, if a treaty has been procured by force or in breach of a rule of ius cogens there is no question of waiver or of estoppel resulting from the conduct of the state victim. This state or any other state may at any time allege the invalidity of a treaty obtained through duress or in violation of ius cogens.²⁶⁷

[¶5-50] The People's Republic does not dispute the international law on this point, but the facts. It claims that the 1951 Agreement was the product of free negotiation, and that its movement into Tibet was welcomed:

After the founding of new China in October 1949, it [was] the Chinese Government's responsibility as well as the shared demand of the Chinese nationalities, including the Tibetans, to liberate its own territory Tibet, expel the imperialist forces, remove outside obstacles preventing the Tibetan people from enjoying rights of equality and freedom, and safeguard China's sovereignty and territorial integrity. Under such circumstances, through the concerted efforts of the Central People's Government and the Local Government of Tibet, the two sides sent delegations and conducted friendly negotiations. Agreement was reached on various matters related to the peaceful liberation of Tibet and the Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet was signed on 23 May 1951. This Agreement is an important and legally-binding document for the Government of new China to settle its domestic ethnic question. On 24 October of the same year, the Dalai Lama, as the highest leader of the local government of Tibet at the time, sent a telegram to Chairman Mao Zedong of the Central People's Government to express his complete approval of and support to this Agreement and his willingness to implement it. The local government of Tibet had also indicated on many occasions the same attitude.²⁶⁸

[¶5-51] No one but the People's Republic disputes that the 1951 Agreement was procured by force. Even the People's Republic acknowledges that the People's Liberation Army had moved into Tibet. It has supported no claim that it did so in order to combat an unlawful aggressor, because

²⁶⁷ E. J. Arechaga, "International Law in the Past Third of a Century," Recueil Des Cours 159 (1978) at 68 (quoted in van Walt van Praag, supra n.51, at 165).

²⁶⁸ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2.

See also Permanent Tribunal of Peoples, supra n.153, at 9: "The People's Republic of China contends that this establishment of its authority in Tibet was both lawful and popular. It was lawful, being nothing more than the re-establishment of Tibet as part of China, as it had long been regarded throughout earlier centuries. The Tibetans, according to this view, were one of the five principal ethnic groups making up the State of China. The events of 1949 and 1950, after a period of political weakness on the part of China, merely restored the long standing relationship of Tibet with China, as part of it. In addition, this position was soon thereafter accepted by a treaty signed by representatives of the Dalai Lama and of Tibet (The Agreement of the Central People's Government and the Local Government of Tibet on measures for Peaceful Liberation of Tibet, 23 May 1951). Moreover, according to the People's Republic of China its action was popular and is still so. The PLA was welcomed as liberators. A cruel regime of serfdom and religious autocracy was replaced by modern secular government. Roads, hospitals and other facilities were provided and the material conditions of the people of Tibet -- although still the poorest in China -- was [sic] significantly improved."

the claimed aggressors are unnamed "imperialist and colonial forces." Therefore, the Agreement was void ab initio and repudiable at any time. It was repudiated in 1959, leaving it without even the legal effect of waiver or estoppel. Thus, no claim by the PRC to sovereignty over Tibet can be supported by the Agreement.

(b) Acquisition by Force

[¶15-52] The People's Republic claims that 1951 marked the "peaceful liberation"²⁶⁹ and that in 1959, when the Dalai Lama went into exile, "the Tibetan people thus completely freed themselves from their untold sufferings under the slave owners, attained for the first time their human rights and fundamental freedoms, and started to enjoy their citizen's and political rights guaranteed by the Constitution of China and all the economic, social and cultural rights."²⁷⁰

[¶15-53] To describe these years in Tibetan history as peaceful flies in the face of all the evidence. Particularly between 1956 and 1958, eastern Tibet was one giant battlefield. The guerrillas, with their limited numbers and arms, concentrated on ambushing small PLA outposts and vulnerable PLA convoys. They were able to mount occasional large assaults, such as that on Tsetang, a PLA garrison of 3,000 troops, which the Tibetans overwhelmed in autumn of 1958.²⁷¹ For the most part, however, they confined themselves to small-scale operations. These were not entirely without violations of international law. When they recaptured Dengkog during the original invasion, for example, they "slaughter[ed] to a man the Chinese force of around six hundred soldiers."²⁷²

[¶15-54] The Tibetan transgressions, however, fade into insignificance beside the actions of the People's Republic. The atrocities committed by the People's Republic in eastern Tibet are described in detail in the reports made by the International Commission of Jurists in 1959 and 1960. The following two summaries give the substance of those reports:

From their fields in Kanze and Chengdu waves of Illyushin-28 bombers flew sorties across Kham, while huge mechanized columns moved overland shelling into rubble scores of villages, inhabited mainly by old men, women and children.

... The obliteration of entire villages was compounded by hundreds of public executions, carried out to intimidate the surviving population. The methods employed included crucifixion, dismemberment, vivisection, beheading, burying, burning and scalding alive, dragging the victims to death behind galloping horses and pushing them from airplanes; children were forced to shoot their parents, disciples their religious teachers.

Everywhere monasteries were prime targets. Monks were compelled to publicly copulate with nuns and desecrate sacred images before being sent to a growing string of

²⁶⁹ National Minorities Questions Editorial Panel, Questions and Answers About China's Minority Nationalities (New World Press, Beijing 1985) (abridged as "China Does Not Deny Human Rights in Tibet," in William Dudley and Karen Swisher, eds., China: Opposing Viewpoints (Greenhaven Press, San Diego 1989)) ("Minorities Panel") at 145; U.N. Docs. E/CN.4/1988/SR.27 at 9 ¶ 47, E/CN.4/1991/73 at 2 ¶¶ 2-3, and E/CN.4/1992/37 at 2.

²⁷⁰ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2.

²⁷¹ Richardson, supra n.191, at 206.

²⁷² Avedon, supra n.250, at 31.

labor camps in Amdo and Gansu. In the face of such acts, the guerrillas found their ranks swollen by thousands of dependents, bringing with them triple or more their number in livestock. So enlarged, they became easy targets for Chinese air strikes.

Simultaneously, the PLA threw wide loops around Tibetan-held districts, attempting to bottle them up and annihilate them one pocket at a time. The tide of battle turning against them, a mass exodus comprised of hundreds of scattered bands fled westward, seeking respite within the precincts of the Dalai Lama.²⁷³

As well as using aircraft to bomb towns and villages, whole areas were laid waste by artillery barrage. The result was that thousands of people from Kham and Amdo had fled to Lhasa and were now camped on the plains outside the city. Some of the stories they brought with them were so horrifying that I did not really believe them for many years. The methods that the Chinese used to intimidate the population were so abhorrent that they were almost beyond the capacity of my imagination.

It was not until I read the report published in 1959 by the International Commission of Jurists that I fully accepted what I had heard: crucifixion, vivisection, disembowelling and dismemberment of victims was commonplace. So too were beheading, burning, beating to death and burying alive, not to mention dragging people behind galloping horses until they died or hanging them upside down or throwing them bound hand and foot into icy water. And, in order to prevent them shouting out 'Long live the Dalai Lama', on the way to execution, they tore out their tongues with meat hooks.²⁷⁴

[15-55] The People's Republic simply denies this.²⁷⁵ Nonetheless, the overwhelming bulk of the evidence demonstrates the forcible nature of the People's Republic's acquisition of Tibet. Thus, the question of the legality of such a forcible acquisition is squarely raised. As classically understood, international law recognized acquisition of territory by conquest and annexation.²⁷⁶

[15-56] The United Nations Charter, however, has dramatically changed the legal situation:

Under classic international law, the freedom of annexation was derived from the right to wage war. In the meantime that right to wage war has been superseded by the ban on the use of force (Article 2(4), UN Charter). Thus the freedom of annexation, too was transformed into a ban on annexation.²⁷⁷

[15-57] Conquest and forcible annexation are the very opposite of the "international peace and

²⁷³ Avedon, supra n.250, at 47-48 (one paragraph in original).

²⁷⁴ Gyatso, supra n.214, at 124 (one paragraph in original).

²⁷⁵ See, e.g., Permanent Tribunal of Peoples, supra n.153, at 9: "[A]ccording to the People's Republic of China, its action was popular and is still so. The PLA was welcomed as liberators."

²⁷⁶ Bundestag, supra n.219, at 76; van Walt van Praag, supra n.51, at 178.

²⁷⁷ Bundestag, supra n.219, at 76.

See also van Walt van Praag, supra n.51, at 183: "[C]laims to territory based solely on the effective but illegal use or threat of force are rejected by the overwhelming majority of States as contrary to modern international law."

security²⁷⁸ and "friendly relations among nations"²⁷⁹ to which the United Nations is dedicated. Therefore, the military occupation of a country cannot result in the lawful acquisition of that country's territory under United Nations principles:

To brand as illegal the use of force against the "territorial integrity" of a State, and yet at the same time to recognize the rape of another's territory by illegal force as being itself a root of legal title to the sovereignty over it, is surely to risk bringing the law into contempt. For it is not simply a question whether it is possible to allow a title which cannot be pleaded without incidentally exhibiting the illegality. Nor is it merely a question of the limits of the maxim *ex injuria jus non oritur*. The question is whether an international crime of the first order can itself be pleaded as title because its perpetration has been attended with success.²⁸⁰

[15-58] Thus, the People's Republic of China's invasion of Tibet and its continuing military occupation²⁸¹ afford no support for any claim by the People's Republic to sovereignty over Tibet. Remaining to be considered are the consequences of the international community's failure to recognize Tibet's independence.

(c) The Legal Effect of International Recognition

[15-59] The People's Republic relies heavily on the fact that "not a single country in the world has ever recognized the so-called 'independence of Tibet'."²⁸² This contention is neither legally relevant nor factually supported.

[15-60] The existence of states does not depend in the slightest on recognition by other states. As stated succinctly in Article 3 of the Inter-American Convention on the Rights and Duties of

²⁷⁸ United Nations Charter, Art. 1(1).

²⁷⁹ *Id.*, Art. 1(2).

²⁸⁰ R. Y. Jennings, The Acquisition of Territory in International Law (Manchester, 1963) at 4 (quoted in *van Walt van Praag* at 180-181).

²⁸¹ See Human Rights Advocates, supra n.157, at 13-14: "China's occupation of Tibet, which began in 1949, reveals many of the characteristics of a colonial relationship. Among these are: occupation through force by an occupying people that is ethnically, linguistically or culturally distinct from the occupied people; administration of the occupied territory by the colonial power; systematic discrimination against the occupied people; economic exploitation of those occupied; use of excessive force to stifle dissent; and deprivation of fundamental human rights belonging to a majority of the occupied people."

See also Permanent Tribunal of Peoples, supra n.153, at 11: "[P]rior to the entry of Chinese military forces into Tibet in 1949-50, Tibet was an independent state for the purposes of international law, so that the Chinese forces, having entered without the invitation or permission of the lawful government of Tibet, did so in violation of international law and continue to violate international law by remaining in Tibet to this day, effectively as an occupying army[.]"

²⁸² U.N. Doc. E/CN.4/1990/68 at 2 ¶ 1; see also Reply of the Permanent Representative of the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2: "No country in the world has ever recognized the so-called 'independence in Tibet'."

States.²⁸³

The political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, [to] administer its services, and to define the jurisdiction and competence of its courts.²⁸⁴

[¶5-61] Nor is this principle without relevant precedent in operation. Bhutan, for most of this century, maintained diplomatic relations only with Tibet and India. Nonetheless, its independence during that time was unquestioned.²⁸⁵ Similarly, Tibet maintained continuous diplomatic relations at least with Britain and Nepal during the entire life of the Nationalist Republic of China.

[¶5-62] The converse of this principle is that recognition by other states of the People's Republic's claim to sovereignty over Tibet would in no way enhance the legal validity of that claim. The United Nations Charter's legal prohibition of war, beyond necessarily prohibiting annexation by force, requires that acquisitions by illegal force "not ultimately acquire legitimacy through the consolidating effect of recognition by third states."²⁸⁶

[¶5-63] This converse principle has also been applied in this century, to Albania, Austria, Czechoslovakia, and Ethiopia after World War II. "Despite the extension of recognition of the Italian and German annexations of these States by the international community, the reconstituted States were considered to be not new entities but continuations of the earlier independent States."²⁸⁷

[¶5-64] Moreover, the evidence demonstrates that, although no state recognizes the Tibetan Government-in-Exile, several nations have recognized Tibet's independence from China, and the United Nations has acted on the basis of that recognition.

[¶5-65] During the nineteenth and twentieth centuries, several nations recognized the independence of Tibet in various ways. As described in ¶¶5-39 through 5-41 above, the British Government formally recognized Tibet as an equal participant in the 1914 Simla Conference, the Nationalist Republic of China effectively conceded Tibet's independence in 1928, and Tibetan passports were honored by Britain, France, India, Italy, and the United States after the Second World War.²⁸⁸ Worth mentioning also are Tibet's national currency and postal authority.²⁸⁹

²⁸³ Montevideo, 1933; U.S.T.S. No. 881.

²⁸⁴ Quoted in van Walt van Praag, supra n.183, at 64.

²⁸⁵ van Walt van Praag, supra n.183, at 64.

²⁸⁶ Bundestag, supra n.219, at 77.

²⁸⁷ van Walt van Praag, supra n.51, at 277 n.193.

²⁸⁸ See also Permanent Tribunal of Peoples, supra n.153, at 22: "As for the recognition of the international personality of Tibet by other states, it was manifested up to 1949 by sporadic acts and in a limited geographical context. These acts could not have been unknown to the PRC, which was a party to certain international agreements concluded by Tibet."

[¶5-66] Most notably, in 1856, Tibet concluded a treaty with Nepal (i.e., with the Gorkhas) in 1856, and one with Mongolia in 1913, as mentioned in ¶5-34 and footnote 225 above. When Nepal applied for United Nations membership in 1949, questions were raised concerning Nepal's sovereignty. Nepal successfully bolstered its claim to nationhood by pointing to its power to make war and conclude the 1856 treaty with Tibet, and by listing Tibet as one of six countries with which it had "established diplomatic relations."²⁹⁰ It is, to say the least, odd that the United Nations can infer from a treaty the international relational capacity of one of its parties but not of the other.

[¶5-67] Tibet's lack of international recognition does not diminish its claim to statehood, nor does it enhance the People's Republic's claim to sovereignty. The Seventeen-Point Agreement of 1951 is without legal effect, and the People's Republic's occupation of Tibet is an ongoing affront to fundamental principles of international law. Therefore, nothing in Sino-Tibetan relations since the founding of the People's Republic supports its claim to sovereignty over Tibet. Moreover, Tibet's history of national identity (whether or not cognizable as legal personality) is also evidence of social cohesion, which is relevant to the likely outcomes of granting the Tibetans' claim of self-determination, regardless of the resolution of their claim of territorial integrity.

b. The People's Republic of China

[¶5-68: Summary of Part V.A.2.b]

This section describes the nature and extent of the claim made by the People's Republic of China to sovereignty over Tibet (¶¶5-69 through 5-70). It then examines the evidence concerning three challenges made to the legitimacy of the People's Republic as the government over the Tibetans (¶¶5-71 through 5-101).

(I) Territorial Integrity and Domestic Jurisdiction

[¶5-69] The People's Republic of China's claim to sovereignty over Tibet is grounded in the principle of territorial integrity.²⁹¹ It also embraces the principle of non-intervention in domestic jurisdiction.²⁹² As discussed in ¶¶3-53 and 3-63 above, however, anything that justifies infringement of territorial integrity necessarily justifies intervention into domestic jurisdiction. Thus, granting the Tibetan claim of self-determination or the Tibetan claim of territorial integrity negates the People's Republic's claim of territorial integrity, rendering the People's Republic's claim

²⁸⁹ U.N. Doc. E/CN.4/Sub.2/1989/SR.18 at 13-14 ¶ 62.

²⁹⁰ van Walt van Praag, *supra* n.51, at 139-140.

See also Gyari, *supra* n.164, at 3 (footnote omitted): "When Nepal applied to the United Nations for membership, it used, as an example of its own sovereignty, its longstanding diplomatic relations with Tibet, specifically referring to a[n] 1856 treaty that Nepal signed with Tibet, and to Nepal's power to make peace with Tibet."

²⁹¹ See, e.g., Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2: "After the founding of new China in October 1949, it [was] the Chinese Government's responsibility as well as the shared demand of all the Chinese nationalities, including the Tibetans, to . . . safeguard China's sovereignty and territorial integrity."

²⁹² See, e.g., Avedon, *supra* n.250, at 15 (quoting Beijing's response to a protest lodged by the Government of India against the invasion of Tibet): "[T]he problem of Tibet is entirely the domestic problem of China. No foreign interference will be tolerated."

of domestic jurisdiction moot.

(II) The Extent of the Claim

[15-70] The People's Republic claims complete sovereignty over Tibet.²⁹³ The People's Republic claims to have implemented a policy of "[r]egional national autonomy . . . where[by] minority people liv[ing] in compact communities . . . [can] practice regional national autonomy, set up organs of self-government and exercise autonomous rights."²⁹⁴ The veracity of that claim is discussed below in connection with the various autonomous rights allegedly granted²⁹⁵ which are relevant to the claims raised. Whatever that veracity, the People's Republic has never acknowledged an international legal obligation to accord the Tibetans any degree of autonomy.

(III) The People's Republic's Legitimacy

[15-71: Summary of Part V.A.2.b.(III)]

This section examines three kinds of conduct alleged by the Tibetans to have been undertaken by the People's Republic and to have rendered the People's Republic an illegitimate government over the

²⁹³ See, e.g., Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 2: "China possesses complete sovereignty over Tibet."

See also Position Document of China on the So-Called "Tibetan People's Right to Self-Determination," U.N. Doc. E/CN.4/1991/73 at 2: "As is known to all, Tibet is an inalienable part of China's territory. . . . This is entirely China's internal affairs." See also Position Document on the Question of Tibet, U.N. Doc. E/CN.4/1990/68 at 2: "At present, Tibet is an autonomous region, same as a province, in the People's Republic of China."

²⁹⁴ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 14.

²⁹⁵ See *id.* at 15-16: "These rights include the following main contents:

- (a) The right entrusted by the State to formulate local regulations. . . .
- (b) The right to enforce State laws and policies, and formulate and implement special policies and measures in accordance with the actual situation in the locality. . . . With regard to education, boarding schools for children of farmers and herdsmen are free in terms of tuition fee, food and accommodation.
- (c) The right to ensure the Tibetan people to freely use and develop their own spoken and written languages [entire sentence sic]. . . .
- (d) Major responsible posts at all levels of [the] region's governmental and judicial departments are held by Tibetans. . . . Most post at different levels of people's congresses, governments, courts and procurator's officers [sic] are also held by Tibetans.
- (e) The right to manage and independently arrange local economic projects.
- (f) The right to independently administer local education, culture, public health and [to] develop local culture.
- (g) The right to independently protect, exploit and use local natural resources according to the law.
- (h) The autonomous right to carry out foreign economic relations and trade. Tibet has cooperated with a number of foreign countries and experts from international agencies in feasibility studies on how to exploit and use geothermal and hydraulic resources on [the] Tibetan plateau and process livestock products. . . . In order to promote Tibet's foreign economic relations and trade, the central government has adopted special policies, stipulating that the import and export tax for commodities in the Tibetan region is lower than the national tax rate and that all the foreign income is to be kept by Tibet."

Tibetans: genocide (¶¶5-72 through 5-78), cultural suppression (¶¶5-79 through 5-89), and disruption of the Tibetans' traditional relationship with their ancestral homeland (¶¶5-90 through 5-102). This section concludes that the People's Republic's former genocide, whatever its current conduct, deprived it of its legitimacy, which it has never regained; that although the evidence is not dispositive with respect to linguistic discrimination, the Tibetans have made a prima facie case of illegitimacy by virtue of religious discrimination; that the Tibetans have made a prima facie case of illegitimacy by virtue of disruption of the Tibetans' traditional relationship with their ancestral homeland, both through population transfer and through environmental destruction; and that the People's Republic has failed to rebut those claims.

(A) Genocide

[¶5-72] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

[¶5-73] The International Commission of Jurists determined in 1960 "that acts of genocide had been committed in Tibet in an attempt to destroy the Tibetans as a religious group"296 The ICJ made four principal factual findings:

- "(a) That the Chinese will not permit adherence to and practice of Buddhism in Tibet;
- "(b) that they have systematically set out to eradicate this religious belief in Tibet;
- "(c) that in pursuit of this design they have killed religious figures because their religious belief and practice was an encouragement and example to others; [and]
- "(d) that they have forcibly transferred large numbers of Tibetan children to a Chinese materialist environment in order to prevent them from having a religious up-bringing."²⁹⁷

[¶5-74] Whether the People's Republic is still engaged in genocidal policies is not clear. The Permanent Tribunal of Peoples, for example, recently considered allegations of genocide based on the People's Republic's policies of forced abortion and sterilization and concluded: "On the materials provided, it has not been established that the measures and methods of abortion and sterilization used in Tibet [are] discriminatory or carried out to destroy a part of the Tibetan population."²⁹⁸ On the other hand, it was announced as recently as 20 May 1990 that 1,500 more

²⁹⁶ International Commission of Jurists, supra n.165, at 3.

²⁹⁷ Id. at 13-14. The transfer of children for education in China proper also raises questions of linguistic discrimination, because Tibetan children relocated to China proper are almost certainly not taught in Tibetan. As discussed in ¶¶ 5-81 through 5-82 below, however, Tibetan children in Tibet are also not taught in Tibetan. Because the intent to destroy Tibetans as a linguistic group cannot be established (see ¶5-83, infra), the transfer of Tibetan children to China proper for education is not demonstrably genocidal on that ground. Because the People's Republic's intent to destroy Tibetan Buddhism is abundantly clear (see ¶¶5-84 through 5-89, infra), however, the transfer of Tibetan children to China proper is, on that ground, demonstrably genocidal under Article II(e) of the Genocide Convention (n.106, supra).

²⁹⁸ Permanent Tribunal of Peoples, supra n.153, at 17.

Tibetan children would be relocated to China for their entire secondary school careers.²⁹⁹ This is plainly a prohibited act under Article II(e) of the Genocide Convention, which prohibits "[f]orcibly transferring children of the [victimized] group to another group". As this appears to be precisely the policy found by the International Commission of Jurists to be intended to prevent the children from receiving a religious upbringing,³⁰⁰ it should be presumed, in the absence of contrary evidence, to be a manifestation of the same intent.

[¶5-75] Regardless of its current conduct, however, the People's Republic's former genocide against the Tibetans renders the government of the People's Republic illegitimate with respect to them.³⁰¹ As discussed in ¶¶ 4-12 through 4-14 above, genocide violates the victimized people's right of self-determination and violates ius cogens. Thus, the illegitimacy of a government engaged in genocide is plain. The issue then becomes whether a government which abandons a former policy of genocide thereby regains its legitimacy.

[¶5-76] There are at least two reasons to conclude that the abandonment of a policy of genocide does not restore a government's legitimacy. First, no statute of limitations can be applied to the crime of genocide.³⁰² If the perpetrator of genocide cannot escape liability for that crime no matter how much time elapses, it follows that the legal effects of genocide on its perpetrator are not erased by the passage of time. Simply put, a government which engages in genocide has no right to govern, and cannot recover that right by simple inaction.

[¶5-77] Second, and related, genocide necessarily violates the right of self-determination.³⁰³ Genocide is "a denial of the right of existence of entire groups,"³⁰⁴ and "[a]fter the right of every people to existence . . . there is no right of peoples more fundamental than the right to self-determination."³⁰⁵ Because legitimacy requires respect for the right of self-determination,³⁰⁶ a genocidal government is illegitimate. Because legitimacy requires that a government originate in an act of self-determination by the governed people,³⁰⁷ a government which has lost its legitimacy can regain it only by such an act. The passage of time is not such an act, so it cannot restore a

²⁹⁹ Michele Bohana, "U.S. Foreign Policy and the Violation of Tibet," in Kelly, Bastian, and Aiello, supra n.61, at 86.

³⁰⁰ International Commission of Jurists, supra n.165, at 14.

³⁰¹ This paper is concerned only with the legitimacy of the People's Republic as the government of the people of Tibet. As noted in ¶5-6 above, the People's Republic's claim to statehood is undisputed. For the purposes of this paper, the People's Republic's legitimacy as the government of the people of China need not be addressed.

³⁰² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. Res. 2391 (XXIII), Article I.

³⁰³ See ¶ 4-12, supra.

³⁰⁴ International Commission of Jurists, supra n.165, at 12 (quoting G.A. Res. 96 (I)).

³⁰⁵ Permanent Tribunal of Peoples, supra n.153, at 14.

³⁰⁶ See ¶¶ 3-44 through 3-47, supra.

³⁰⁷ See ¶ 3-44, supra.

genocidal government's legitimacy.

[¶5-78] Thus, because the People's Republic committed genocide against the Tibetans, it lost whatever legitimacy it may ever have had as their government. Because the Peoples' Republic has never permitted the Tibetans to exercise their right of self-determination in choosing their own government, it has never regained such legitimacy as it may have possessed. Therefore, as respects the Tibetan people, the People's Republic is an illegitimate government.

**(B) Cultural Suppression:
Linguistic and Religious Discrimination**

[¶5-79: Summary of Part V.A.2.b.(III)(B)]

T h i s

section examines two forms of cultural suppression alleged by the Tibetans to have been undertaken by the People's Republic. As to linguistic discrimination (¶¶5-80 through 5-83), this section concludes that, although it is clear that the Tibetan language is in some danger of falling into desuetude, it is not clear that this is the result of a deliberate policy on the part of the People's Republic. As to religious discrimination (¶¶5-84 through 5-89), however, this section concludes that the Tibetans have made a prima facie case for their claims and that the People's Republic has failed to rebut that claim.

(1) Linguistic Discrimination

[¶5-80] Preventing a group from speaking its language violates international law.³⁰⁸ Indeed, it is directly contrary to one of the constitutive purposes of the United Nations.³⁰⁹ In Tibet, the most alarming means of preventing people from speaking their native language is preventing them from learning it. As of 1987, the People's Republic had acknowledged that there is no education in Tibetan beyond elementary school.³¹⁰ In that same year, however, the People's Republic adopted policies apparently designed to remedy this situation, and implementing regulations were

³⁰⁸ ICCPR, supra n.25, Art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or use their own language."

See also Universal Declaration of the Rights of Peoples (Algiers 1976) Art. 13 (quoted in Crawford, ed., The Rights of Peoples (Clarendon Press, Oxford 1988) at 188): "Every people has the right to speak its own language and preserve and develop its own culture, thereby contributing to the enrichment of the culture of mankind."

See also Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples, Panama 1984) Art. 14 (quoted in id. at 206): "The indigenous peoples have the right to receive education in their own language or to establish their own educational institutions. The languages of the indigenous peoples are to be respected by the states in all dealings between the indigenous people and the state on the basis of equality and non-discrimination."

See also Hannum, supra n.26, at 111: "Linguistic and educational rights also are of particular significance to groups, as they constitute the vehicles through which culture is transmitted."

³⁰⁹ United Nations Charter, Art. 1(3): "To achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . language"

³¹⁰ Beijing Review, 7-13 December 1987 (quoted in U.N. Doc. E/CN.4/1990/NGO/9 at 3 ¶ 10).

issued thereafter.³¹¹

[¶5-81] Sadly, the most recent available evidence indicates that these policies and regulations either have not been implemented or have not been successful. According to a fact-finding team that visited eastern Tibet in June and July of 1991, all schools are conducted in Chinese, at least in areas where Chinese and Tibetans live, and Tibetan is offered only as a second language, and only in secondary school.³¹² Moreover, despite the broad scope of the provisions adopted by the People's Congress, all government institutions,³¹³ all necessary documents (receipts, permits, and such),³¹⁴ and the daily loudspeaker programming³¹⁵ are all in Chinese.³¹⁶

[¶5-82] The result of these practices in Tibet is that "Tibetans are becoming illiterate in their own language but are actively encouraged to learn how to read and write in Chinese":³¹⁷

³¹¹ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 15-16: "In 1987, the people's congress of the autonomous region adopted several provisions concerning the study, usage and development of Tibetan language, and set the principle of using both Tibetan and Chinese languages with Tibetan as the main language. A working committee on Tibetan language was also established. In October 1988 the detailed rules on implementing these provisions were issued by the autonomous region's government."

³¹² International Campaign for Tibet, *supra* n.156, at 14: "In larger towns where there is a mix of Chinese and Tibetans, the academic infrastructure is geared towards the Chinese settlers. The schools are all conducted in Chinese and primary schools usually do not teach any Tibetan language whatsoever. Secondary schools offer either Tibetan or English as a second language to Tibetan students. All Chinese students choose English. Tibetans choose between Tibetan and English."

³¹³ *Id.* at 17-18: "All government institutions -- banks, post offices, bus stations, police stations, tax bureaus, etc. -- are primarily staffed by Chinese, and thus Chinese is the operative language. Written materials are rarely translated into Tibetan. . . . On several occasions we were approached in public facilities by Tibetans who, upon realizing that we spoke Chinese, requested our assistance. For example, in bus stations, the only ticket seller is usually Chinese, all signs are only in Chinese, the tickets are only in Chinese and the announcements are only in Chinese."

³¹⁴ *Id.* at 18: "Of the more than 50 tickets, brochures, receipts, instructions and permits that we collected during the course of our trip, not one was in Tibetan."

³¹⁵ *Id.* at 17: "One particularly widespread and striking mode of mass education is the loudspeakers which carry Chinese news, programs and music. Every sizeable town had an extensive network of loudspeakers which were turned on promptly at 7:30 a.m. and turned off at dusk. We never heard any Tibetan language or Tibetan music programming."

³¹⁶ The People's Republic emphasizes its publication of "more than 1,200 varieties and 25.6 million volumes of books, of which 80 per cent are in the Tibetan language . . . [and] 200 kinds and over 1 million copies of Tibetan classics." (U.N. Doc. E/CN.4/1992/37 at 22.) According to the fact-finding team, however, these otherwise commendable activities do not address the problem that Tibetans are growing up without learning how to speak Tibetan" (International Campaign for Tibet, *supra* n.156, at 18.)

³¹⁷ International Campaign for Tibet, *supra* n.156, at 14.

This universal use of Chinese in offices, businesses, government and universities has rendered the written Tibetan language virtually useless even in areas where the Tibetans remain a majority of the population. At this rate, Tibet is fast becoming a quaint, folk language in increasingly nationalized Tibetan communities. It will be read and written only by an insignificant percentage of the Tibetan population. What Tibetans find disheartening is that the policies show no signs of changing. Some Tibetans told us it was a policy of "linguicide."³¹⁸

[15-83] The deliberate extinction of the Tibetan language clearly violates the international instruments cited above. On the evidence, however, it cannot be determined whether the threat to the Tibetan language is the product of policies directed toward that end or of well-intentioned plans badly bungled in execution.

(2) Religious Discrimination

[15-84] No such evidentiary gap exists with respect to religious discrimination. Simply put, "[i]t is official Chinese policy to restrict the propagation of Tibetan Buddhism."³¹⁹ The People's Republic has destroyed more than 6,000 monasteries in Tibet,³²⁰ though it has reconstructed and reopened some of them.³²¹ The People's Republic usually describes its destruction of the monasteries as a "mistake" of the Cultural Revolution.³²² In fact, the destruction began much earlier, and "[m]ore than half of Tibet's 6,000 monasteries were dismantled and destroyed before China's Cultural Revolution began in 1966."³²³ The Cultural Revolution was, however, the worst time for Buddhist institutions in Tibet, and by 1976, only twelve monasteries remained intact.³²⁴

[15-85] The People's Republic is widely reported as maintaining a system designed to give it strict control over all religious institutions and communities in Tibet. Party organs and government

³¹⁸ *Id.* at 18.

³¹⁹ Human Rights Advocates, *supra* n.157, at 5.

³²⁰ Senate Memorandum, *supra* n.186, at 9: "The PRC's assaults on Tibetan Buddhism are well documented, with more than 6,000 monasteries destroyed since the Chinese occupation."

³²¹ Tibet Information Network, *supra* n.156, at 28: "January 20: Norbu said that there are 34,000 monks and nuns and 1,425 monasteries and shrines in the TAR."

³²² *See, e.g.*, U.N. Doc. E/CN.4/1988/SR.27 at 9 ¶ 47.

Cf. Testimony of L. Desaix Anderson, Principal Deputy Assistant Secretary of State for East Asian and Pacific Affairs, before the United States Senate Foreign Relations Committee, 28 July 1992: "Tibet suffered terribly -- as did the rest of China -- from the depredations of the Cultural Revolution, dating roughly from 1966-76. Monasteries were destroyed, books were burned, and practicing Buddhists were thrown in jail. [¶] "The Chinese government began to reverse the reprehensible actions of that period in the early 1980's The result was a revival of Tibetan Buddhism and a rebirth of the Lhasa monasteries. Displays of religious veneration toward the Dalai Lama are tolerated, and his photograph is prominently displayed in temples and, reportedly, even in some government offices."

³²³ Thonden, *supra* n.165, at 2-3.

³²⁴ *Id.* at 3.

agencies control all religious affairs,³²⁵ and the monasteries are often under the charge of the very officials who oversaw their looting and destruction during the Cultural Revolution.³²⁶ Numerous sources indicate that the government has placed informants and security offices within monasteries, keeps monasteries under constant surveillance, and asserted its control over all internal monastic functions.³²⁷

[115-86] It is also widely reported that the People's Republic restricts the practice and teaching of Buddhism,³²⁸ restricts admission to monasteries and subjects monastic candidates to political

³²⁵ Ackerly, "Hu Yaobang to Hu Jintao: Persecution of Tibetan Buddhism in the 1980s," in Kelly, Bastian, and Aiello, supra n.61, at 135; International Campaign for Tibet, Forbidden Freedoms: Beijing's Control of Religion in Tibet (Washington DC, September 1990) at 19-30.

³²⁶ Ackerly, supra n.325, at 134-135; Bohana, supra n.299, at 87.

³²⁷ See LAWASIA and Tibet Information Network, Defying the Dragon: China and Human Rights in Tibet (Manila and London, March 1991) at 11-12 (footnotes omitted): "The duties of the Nationalities and Religious Affairs Commission, the principal organ of central government control of religious affairs, include approving reconstruction projects, screening prospective novices and monitoring financial records. Government appointed monks form Democratic Management Committees . . . that oversee the implementation of the government's religious and political policies, and operate as the monastic eyes and ears of the security police."

See also Office of Tibet, supra n.247, at 3: "In recent years monasteries and nunneries have been closely monitored by the security apparatus. In some cases this is achieved by permanent police stations set up in the monasteries (Drepung, Gaden and Sera in Lhasa) or nunneries. In other cases it is accomplished by secret police and inside informers."

See also International Campaign for Tibet, supra n.325, at 50-51 (footnotes omitted): "Work teams, known in Tibetan as 'ledhon rukhag,' are special units of cadres from government departments and enterprises whose task is to conduct political education and investigation. . . .

. . . During these meetings, monks are forced to discuss their views on the demonstrations, the Dalai Lama, and Tibetan independence. Once the work team identifies the likely dissidents, the PSB [Public Security Bureau] arrests, interrogates, and imprisons the suspects. Interrogations are carried out by work teams, PSB, prison guards and torture specialists who ask questions about political ideas which are designed to gauge the depth of knowledge and sophistication of the individual. The more thoughtful and intelligent one's answers, the more likely the person would be arrested, or the less likely they would be released."

See also International Fellowship of Reconciliation, Tibet: A Contribution to the Secretary General's Report Following the Resolution of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Aklmaar), at 4: "Monks and nuns have been expelled from their monasteries. Many of the monasteries near Lhasa are under constant police and military watch. It is widely thought that police spys [sic] have been brought into the monasteries."

See also Human Rights Advocates, supra n.157, at 5: "The Chinese have sought . . . to involve the Democratic Management Committees in the process of selecting abbots in the monasteries."

³²⁸ See Office of Tibet, supra n.247, at 3: "Religious practice is being reduced to external ritualistic manifestations of faith only, by restricting the educational activities of monks and nuns and making it extremely difficult to seriously study Buddhist philosophy."

See also Human Rights Advocates, supra n.247, at 5: "China prohibits the practice of Buddhism outside of monasteries and other places officially designated for religious services, and in Lhasa it has allowed only certain teachers to give public teachings within monasteries and nunneries, subject to the current political climate."

See also International Committee of Lawyers for Tibet, supra n.28, at 8 (footnotes omitted): "Most monks are prohibited from giving public teachings to large Tibetan gatherings. Conducting religious services

screening,³²⁹ and controls the expenditure of funds collected by the monasteries.³³⁰ The People's Republic denies these claims,³³¹ citing Article 36 of its own Constitution.³³² The evidence in

outside of designated religious sites is prohibited by Chinese law."

See also LAWASIA and Tibet Information Network, supra n.327, at 8 (footnotes omitted): "The Chinese government prohibits the propagation of religion outside of monasteries and other 'places designated for religious services'. Whether religious teachings or ceremonies are permitted within monasteries, however, depends largely on local County and District officials. . . . Gatherings that are too large, or too enthusiastic, or which could be a focus for nationalist sentiment, run the risk of being summarily banned. The 'conduct of religious activities on an excessively large scale' has been branded as 'abnormal'. 'Regarding these activities the policy of freedom of religious belief is not to protect them but to constrain them.'"

See also id. at 10: "[A] long standing ban on religious prayers or texts written by the Dalai Lama, or invoking the aid of certain protective deities, was renewed in 1989, particularly in monasteries in the Lhasa region."

See generally International Campaign for Tibet, supra n.325, at 43-49.

³²⁹ See Human Rights Advocates, supra n.157, at 6: "The Chinese government has established obstacles to admission into the clergy, at least in the larger, urban monasteries, where novices must be screened for political background and must obtain permission from the state before officially joining a monastery. Larger monasteries are generally given quotas for novices, and since 1988, it appears that all monasteries and nunneries in the TAR have been barred from officially accepting any new monks or nuns."

See also International Campaign for Tibet, supra n.325, at 59: "Qualifications for admission include some, but not necessarily all, of the following:

1. The candidate should be at least 18 years old.
2. The candidate should 'love' the country and the Communist Party.
3. The candidate's parents must give their consent.
4. Formal approval by the monastery's DMC ["Democratic Management Committee"] must be obtained.
5. Local authorities must give their consent.
6. County or provincial authorities must give their consent.
7. A clearance from the Public Security Bureau must be obtained.
8. The candidate and the candidate's parents should have a good political background.
9. The candidate must have been raised in a certain geographic area."

See also LAWASIA and Tibet Information Network, supra n.327, at 14 (footnote omitted): "Tibetans wishing to join larger, urban monasteries . . . have often had to bribe and cajole local officials at the Township, District and County levels to obtain approval. At the very least, admission to a major monastery involves a monastic teacher agreeing to take the applicant on as a student, and the Democratic Management Committee and local police vetting the political background of the applicant and his/her family.

". . . The larger monasteries usually have quotas for the number of official monks that can be admitted each year."

See also Office of Tibet, supra n.247, at 3: "The authorities have also set ceilings for the admission of new monks and nuns, and these political bodies are often involved in deciding upon individual applications."

See also Tibet Information Network, supra n.156, at 29: "September 14: Vice Chairman of the TAR, Phuntsog Tseten, says that the struggle against splittism is 'still very grave and complicated' and that therefore the management of monasteries must be 'strengthened' and monks and nuns 'educated to be patriotic'. The local Buddhist Association had already sent 15 groups to educate some 2,900 students in 35 monasteries since 1987."

³³⁰ Ackerly, supra n.325, at 135; International Campaign for Tibet, supra n.325, at 41-43.

³³¹ See, e.g., U.N. Docs. E/CN.4/1988/SR.27 at 10 ¶ 50 and E/CN.4/1988/SR.30 at 12 ¶ 37.

support of the Tibetans' assertions, however, is ample to support a prima facie case. Therefore, it falls to the People's Republic to rebut that case with evidence, not with mere assertion. Such evidence could easily be produced if it exists, but the People's Republic refuses to allow anyone to investigate the situation.

[115-87] The most serious accusation concerning the People's Republic's treatment of religious institutions and communities is that the People's Republic has taken control of the search for reincarnations.³³³ This policy cuts to the heart of Tibetan Buddhism. All of the major religious

³³² "Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion. The State protects normal religious activities." (Quoted in U.N. Doc. E/CN.4/1989/44 at 11 ¶ 37.)

Cf. LAWASIA and Tibet Information Network, supra n.327, at 11 (footnotes omitted): "The Chinese Constitution stipulates that the state only protects 'normal religious activities'. 'Superstitious' religious beliefs and activities are considered to be 'illegitimate' and are therefore usually prohibited. . . .

"The Tibetans' reluctance to kill insects that attack crops is classified as superstitious because it is said to impede economic production. Recently, an article written by a scholar at the Academy of Social Sciences in Lhasa, one of the key research institutions in Tibet, was rejected by the censorship committee because it discussed the phenomenon of oracles going into trance and the tantric practices of high lamas."

³³³ See Human Rights Advocates, supra n.157, at 5: "The Chinese have sought to exercise control over the selection of reincarnate monks, including the reincarnation of the Panchen Lama"

See also International Campaign for Tibet, supra n.325, at 66-67 (footnotes omitted): "Under Chinese rule, public recognition of these reincarnations has been prohibited. In 1985, it was reported that reincarnated monks recognized before 1959 will be treated as such, but no new reincarnations will be recognized. In 1988, a western delegation to Tibet was informed of an upcoming meeting at which the best method of prohibiting Tibetans from recognizing reincarnations would be discussed. . . .

* * *

"In recent years, instead of banning this practice, the authorities now appear to be allowing it if it is conducted under their close supervision. Authorities in Kham appear now to condone discovering reincarnations but they vehemently condemn Tibetans in exile recognizing reincarnations of monks in exile who have died 'in China' Following the death of the Panchen Lama, Li Peng ordered that the search for his reincarnation be restricted to areas within China's borders and that it be conducted by a government-organized committee."

See also LAWASIA and Tibet Information Network, supra n.327, at 9 (footnotes omitted): "The search for young children in whom a 'tulku' has been reincarnated was prohibited for many years. Although the policy on this has not been clarified, it seems that the search for 'tulkus', under strict government control, is now sometimes tolerated.

"In an attempt to institutionalise and control the process, China characterises the recognition of 'tulkus' not as a religious question , but as an issue of sovereignty. The 'Dalai clique' has been accused of interfering in religion in Tibet by recognising reincarnations of 'tulkus' in Spain and America.

"Therefore, China announced in 1989 that 'according to Chinese law and Buddhist tradition', the search for the reincarnation of the Panchen Lama, who died January 1989, would take place only within the boundaries of the PRC and under government supervision."

See also International Campaign for Tibet, supra n.156, at 24: "One critical area of Tibetan Buddhism is the manner of selection of both reincarnate monks (such as the Dalai and Panchen Lamas) upon their death and the selection of abbots. Chinese are increasingly attempting to control the selection process. We received testimony from a monastery in Dhartsedo which reveals an alarming degree of Chinese government interference into this intimately religious Tibetan tradition. The abbot of Dhartsedo's monastery passed away and the manager of the monastery explained that under the 'new method' the next abbot would be selected based on:

1. educational level;

figures -- the Dalai and Panchen Lamas, the head lamas of other sects, and virtually every high-ranking lama in any sect (a total of about 4,000 before the invasion³³⁴) -- are believed to be ongoing reincarnations of various enlightened beings.³³⁵ Because the Dalai Lama is a reincarnation, control over the search for reincarnations means control over the selection of the next Dalai Lama. Because the Dalai Lama is both spiritual and temporal head of Tibet, control over his selection means control over the cultural development of Tibetan society.

[¶15-88] The People's Republic formerly denied this accusation.³³⁶ In June of 1992, however, "Xinhua announce[d] that the selection of all 'living Buddhas' must be 'approved by the central government' and officially recognise[d] the 17th Karmapa."³³⁷ The following month, the People's Republic seemed to reverse itself, stating that its "Government . . . respects the system of reincarnation of the living Buddha in Tibetan Buddhism."³³⁸ Thus, its current position is not clear. Again, however, the Tibetans have established a prima facie case for their accusation, so it falls to the People's Republic to adduce contrary evidence. The People's Republic has not done so.

[¶15-89] Thus, the Tibetans have established a prima facie case of religious suppression. That suppression violates a multitude of international legal norms.³³⁹ As discussed in ¶ 3-46 above, a government is legitimate only if it accords civil and political rights universally among the governed population. By suppressing the Tibetans' religion, the People's Republic fails to meet this criterion. Therefore, as respects the Tibetan people, the People's Republic is an illegitimate government.

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2. leadership ability;
 3. approval of the monastery's democratic management committee (whose membership is chosen or approved by the authorities); and
 4. approval of the Kanze Prefecture Religious Bureau (zhong jiao ju).

"These criteria are similar to those for recognizing the reincarnation to the Panchen Lama. The Panchen Lama, who died in 1989, is the second highest religious figure in Tibetan Buddhism following the Dalai Lama. Li Peng, in announcing the criteria that would be used to select the reincarnation, said that Beijing's State Council must ultimately approve the choice."

³³⁴ Avedon, supra n.250, at 15.

³³⁵ Id.; Gyatso, supra n.214, at 2 and 8-9.

³³⁶ See, e.g., U.N. Docs. E/CN.4/1988/SR.27 at 10 ¶ 50 and E/CN.4/1990/SR.22 at 22 ¶ 99.

³³⁷ Tibet Information Network, supra n.156, at 29.

³³⁸ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 24.

³³⁹ E.g., United Nations Charter, Art. 1(3); UDHR, supra n.66, Arts. 2 and 18; ICCPR, supra n.25, Arts. 2 and 18; Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, supra n.117, Art. 2(1).

**(C) Disruption of the Tibetan People's Traditional
Relationship with Their Ancestral Homeland**

[¶5-90: Summary of Part V.A.2.b.(III)(C)] This section examines two interconnected policies, population transfer (¶¶5-91 through 5-96) and environmental destruction (¶¶5-97 through 5-102), alleged by the Tibetans to have been undertaken by the People's Republic in order to undermine the Tibetans' claim of self-determination. This section concludes that the Tibetans have made a prima facie case for both claims and that the People's Republic has failed to rebut those claims.

(1) Population Transfer

[¶5-91] As discussed in ¶ 4-19 above, population transfers sever the original inhabitants' connection to their ancestral land and dilute their claim of self-determination by filling their territory with members of another group.³⁴⁰ Population transfer is not merely a policy of allowing emigration;³⁴¹ rather, it is a deliberate program by the government directed at a distinct group:

Population transfer can be defined as a systematic state policy towards ethnically, religiously or racially distinct people currently under that state's control. It is defined as the movement of large numbers of people from one territory to another with the passive or active acquiescence of the controlling government. . . . the issue of population transfer has been brought forward by affected peoples as the greatest single threat to their survival

No legal or other mechanism for dealing adequately with the human rights violations inherent in this practice exists.³⁴²

³⁴⁰ See Thonden, supra n.165, at 2 (footnote omitted) (quoting Testimony of Sidney Jones, Executive Director of Asia Watch, before the United States Senate Foreign Relations Committee, 28 July 1992): "The practice [of population transfer] is a significant factor in the growing unrest in Xinjiang and Inner Mongolia, where population transfer has already 'virtually destroyed the social fabric' of the Uighurs and Mongols. If the practice continues, Tibetans may suffer a similar fate."

See also id., at 10 (footnote omitted): "In Eastern Turkestan, which the Chinese now call Xinjiang, the Chinese population has grown from 200,000 in 1949 to between 5.3 and 7 million, probably surpassing the 6 million native Uighurs. In the wake of the Chinese colonization of Inner Mongolia, Chinese now outnumber the Mongols by 8.5 million to 2 million in the Inner Mongolia Autonomous Region."

See also Human Rights Advocates, supra n.157, at 3: "The PRC promotes a colonialist occupation through what appears to be a deliberate policy of population transfer. . . . This population transfer threatens the survival of the Tibetans' national, cultural and religious identity, and so constitutes a grave violation of their right to self-determination."

³⁴¹ But see Testimony of L. Desaix Anderson, Principal Deputy Assistant Secretary of State for East Asian and Pacific Affairs, before the United States Senate Foreign Relations Committee, 28 July 1992 at 3-4: "Beijing's economic and aid efforts in the Tibetan Autonomous Region have produced greater prosperity over the past ten years. A side effect has been an influx of Han Chinese and Hui (Chinese Moslems) traders and small businessmen, fueling Tibetan fears of being overwhelmed in their homeland. . . ."

"In the ethnically more homogeneous area of the Tibetan Autonomous Region, most non-Tibetan migrants are temporary residents, including ethnic Han security forces, who are most prominent in Lhasa, and who rotate back to their home bases. . . . There does not appear to be a conscious Chinese government policy of attempting to Sinicize Tibet."

³⁴² Thonden, supra n.165, at 4 (footnote omitted).

[¶5-92] It is widely recognized that population transfer is an inherently discriminatory practice.³⁴³ It has also been recently recognized that there is a close connection between population transfer and genocide.³⁴⁴ Nonetheless, only the transfer of children out of the affected group is legally genocidal,³⁴⁵ although an international instrument currently being drafted would make population transfer an international crime.³⁴⁶

[¶5-93] There is an abundance of evidence indicating that the People's Republic is engaged in a massive program of transferring Han Chinese into Tibet. Indeed, the People's Republic makes no

³⁴³ See Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers and Settlements, *supra* n.127, at 2: "Aware that the practice of population transfer inherently leads to widespread and systematic discrimination[.]

See also Thonden, *supra* n.165, at 4: "Population transfer policies often single out specific ethnic, racial or religious groups in clear violation of the anti-discrimination principles laid down in the International Convention on the Elimination of All Forms of Discrimination, to which the PRC is a party. Population transfer can lead to discrimination against the original inhabitants in the spheres of housing, employment, education, health care, the use of language and national customs."

See also *id.*: "Poverty, homelessness, illiteracy, and increased mortality rates can be the direct results of population transfer programs. In this way, peoples may be systematically reduced to a powerless minority who are treated as second-class citizens in their own country and who are denied opportunities to actively participate in social and political processes."

See also *id.*: "New goods are introduced, designed to meet the needs of the settler population. Business opportunities can be given to the settlers. The original population, on the other hand, may only be able to obtain business permits and travel allowances with great difficulty."

³⁴⁴ Draft Resolution, *supra* n.127, at 2-3: "Recalling also the International Covenant on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide, which defines the act of genocide to include deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

* * *

"Disturbed by reports concerning the implantation of settlers and settlements in certain countries, including occupied territories, with the aim of changing the demographic structure and the political, cultural, religious and other characteristics of those countries or with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such[.]

See also Question of Human Rights of Peoples and Nations Subject to Population Transfer, U.N.P.O.Doc. A/2/1991/2 (Office of the Secretary General, The Hague 1991).

³⁴⁵ Genocide Convention, *supra* n.106, Art. II(e).

³⁴⁶ Draft Resolution, *supra* n.127, at 3: "Having in mind that the draft Code of Crimes against the Peace and Security of Mankind currently being elaborated by the International Law Commission states, in article 21, that compulsory population transfer constitutes an international crime[.]"

Cf. Clare Palley, Population Transfer and International Law [unpublished draft] at 23: "Population transfers in noninternational armed conflicts will, as the law now stands, be unlawful only if the State is a party to Additional Protocol 1 [to the Fourth Geneva Convention], or the particular transfer is contrary to international customary law, being in violation of human rights by reason of constituting a gross and consistent pattern of violations of human rights, or being systematically discriminatory, or being in violation of self-determination, or being genocidal in intent or effect."

secret of its intention to induce Chinese to move to Tibet.³⁴⁷ Observers of the situation in Tibet agree that the population of Chinese settlers there is increasing rapidly.³⁴⁸

³⁴⁷ See Tibet Information Network, supra n.156, at 30: "Beijing Review stated the current position in September 1992:

"Large numbers of technicians including scientists, engineers, managerial personnel, teachers and medical workers have been encouraged to take their skills to Tibet'. (Beijing Review Sept 28th 1992 p 41)."

See also id. at 28 (brackets and ellipsis in original): "July 27: In an 'important speech' Chen Kuiyuan calls for inland Chinese to come help open up Tibet: Tibet has 'a shortage of qualified personnel, particularly management personnel . . . and those who know how to develop village and town enterprises and a commodity economy'. 'We should open our job market [in Tibet] to all fellow countrymen'. Continuing to be tough with splittists is essential for economic reform, he adds.

"September 5: China's Vice-Minister of Personnel visits Tibet to announce incentives for Chinese cadres who go to work in Tibet, promising higher wages and guaranteed jobs when they return to China."

See also Thonden, supra n.165, at 7 (footnote omitted) (quoting Deng Xiaoping, during meeting with President Jimmy Carter, 29 June 1987, reported by Reuters, Beijing, 30 June 1987): "Even Deng Xiaoping has admitted that Chinese were being encouraged to move into Tibet because, according to China's supreme leader, the local population 'needs Han immigrants as the [Autonomous] region's population of about two million was inadequate to develop its resources."

See also id. at 9: "In 1988 a communist party official stated that the goal of development in Tibet was that the west should supply the raw materials for the development of eastern China, while at the same time becoming a ready market to consume goods and commodities produced by the east."

See also id. at 10: "A report entitled 'Movement Westward', issued by the Chinese Embassy in New Delhi, highlights Beijing's intention to 'change both the ecological imbalance and the population lack' not just in Tibet but also in other 'sparsely populated outlying regions.' Chinese migration should be welcomed by the local population, according to the Embassy report, and should result in a population increase of 60 million over the next 30 years in those regions. The report adds: 'This is a very conservative estimate. As a matter of fact, the increase might swell to 100 million in less than 30 years.'"

But see van Walt van Praag, Population Transfer and the Survival of the Tibetan Identity (rev. ed. 1988) at 15: "The government in Beijing officially denies the existence of a policy to relocate Chinese in Tibet."

³⁴⁸ See Tibet Information Network, supra n.156, at 31-32 (brackets in original): "'Han Chinese migration is overwhelming the place -- for example, in Gyantse alone there are about 50 people from Henan running jaozi [dumplings] restaurants and other such things. If you have got this many there [in Central Tibet], imagine what it is like in Chamdo further east, closer to China . . .'"

See also Thonden, supra n.165, at 6 (footnotes omitted): "Chinese government sources give the Tibetan population of the TAR as 1.9 or 2.1 million and the number of registered Chinese colonizers as 76,000. But independent observers report that at least 100,000 Chinese live in Lhasa alone, outnumbering Tibetans two to one. . . . Tibetans and western tourists report that there are some 85,000 Chinese in Nagchu, 320,000 in the Chamdo area, 170,000 in the Shigatse area, 93,000 in Lhoka, and 150,000 in Ngari."

See also Human Rights Advocates, supra n.157, at 3: "Thousands of civilian Chinese have moved into Tibet with the active encouragement of the PRC government. In all major Tibetan cities -- which are the economic, political, and cultural centers of the distinct Tibetan people -- Chinese now appear to outnumber Tibetans. In some of the most fertile agricultural areas, particularly those of the eastern provinces of Kham and Amdo, Chinese settlers have established farms and pushed Tibetans into less fertile and less accessible areas."

See also International Committee of Lawyers for Tibet, supra n.28, at 14-15 (footnotes omitted): "The Chinese government has encouraged the transfer of Chinese into Tibet with the object to reduce the Tibetan people to an insignificant minority in their own country and to irreversibly Sinicize Tibet. Initially, the movement of Chinese was limited primarily to the eastern parts of Tibet, which are now incorporated in the neighboring provinces of Qinghai, Gansu, Sichuan and Yunnan. But since 1983, a massive resettlement movement of Chinese immigrants into the Tibet Autonomous Region has been taking place. While China

[15-94] The populations of Tibetans and Chinese in Tibet, both Tibet proper and the Tibet Autonomous Region, are subjects of great disagreement.³⁴⁹ This disagreement, however, is over a side issue. The primary fact is the pattern of continuous influx, not the exact numbers involved:

The number of Chinese in Tibet is disputed but whether there are 4 million or 7 million in the whole of Tibet, the problem remains basically the same. The issue is not simply how many Chinese are in Tibet, but what their roles are and what the implications of their presence are. Too often commentators get caught up in arguing about figures instead of analyzing the social, cultural, political, and environmental implications of having significant Chinese populations in Tibet.³⁵⁰

[15-95] Among those implications is the widespread discrimination in virtually every area of life which has often been reported.³⁵¹ A fact-finding mission to eastern Tibet in June and July of 1991

has characterized its immigrants as 'skilled labor' sent to develop Tibet for the Tibetans and then leave, in fact many have proved to be young, poorly educated men encouraged to settle in Tibet, intermarry, and take up farming or small businesses. Highly favorable economic and social incentives have been successfully offered to prospective settlers. This migration threatens the very existence of the Tibetans as a people. Chinese civilians already outnumber the existing Tibetan population. They live in segregated self-contained communities or settle in the most fertile lands in the country."

See also International Campaign for Tibet, supra n.156, at 9: "All of the larger towns that we visited are now inhabited by a majority of Chinese. These towns include Dhartsedo (Ch: Kanding), Dongfang, Toawu (Ch: Dao Fu), Trango (Ch: Luho), Kanze (Ch: Ganze), Barkham (Ch: Maerkang), Hongyuan and Zioge (Ch: Roergai)."

³⁴⁹ See Tibet Information Network, supra n.156, at 32 (second brackets in original): "'The official urban population of Lhasa city proper is 120,000 and they now admit a Han floating pop[ulation] of 40-50,000. But locals say it is as high or higher than the official population [ie, over 120,000]."

See also Thonden, supra n.165, at 5: "Only the Chinese who have formally registered as residents in Tibetan areas are included in official immigrant figures. Most recent settlers in Tibet have not registered and, consequently, do not figure in China's Tibet statistics. Population figures are further convoluted because Tibet was split up after the invasion, with much of its territory being incorporated into neighboring Chinese provinces. The Tibet Autonomous Region (TAR) accounts for less than half of Tibet's territory prior to 1949"

See also id. at 6 (footnote omitted): "These figures do not include Chinese military personnel, nor do they include the inmate population of China's -- indeed the world's -- largest prison camps complex, the so-called 'Qinghai Gulag', which is currently estimated to include several million inmates."

See also Human Rights Advocates, supra n.157, at 4: "These [PRC] statistics, however, have in the past been misleading for two reason. First . . . by 'Tibet' the PRC means that area which it describes as the Tibet Autonomous Region (TAR) . . . ; by far the largest concentration of Chinese settlers live in eastern and northern Tibet, outside the TAR. Second, official statistics are believed to omit a large number of Chinese settlers, who have not registered as residents of Tibet, in some cases out of fear of losing privileges in China."

The People's Republic's own figures indicate that the Chinese population in the Tibetan Autonomous Prefectures and Counties in Gansu, Qinghai, Sichuan, and Yunnan has risen from 426,000 in 1953 to 1,449,000 in 1982. LAWASIA and Tibet Information Network, supra n.327, at 78.

³⁵⁰ Testimony of Jeffrey Hopkins Before the United States Senate Foreign Relations Committee (28 July 1992) at 8.

³⁵¹ See International Committee of Lawyers for Tibet, supra n.28, at 15 (footnote omitted): "Discrimination against Tibetans is practiced openly in Tibet and is apparent to most visitors to the country. The Chinese today control the industrial, entrepreneurial, and commercial sectors of the economy as well as

made the following observations:

"The town of Liang He Gu (Mouth of Two Rivers) was built in the 1960s to extract lumber from the region. Its 100-odd inhabitants, all of whom are Chinese, were sent (fenpei) -- for life -- to this area where no Chinese had ever settled before 1950. The government-run work unit (danwei) trucks in all of their food from Chengdu, a rigorous two-day journey over mostly dirt roads. There is a basic health clinic and a guest house. The government insures their children get a better education than they otherwise would, according to residents, and allows flexibility so that workers can choose to have their children remain in their hometown. The town has running water in a communal kitchen and plenty of electricity but no satellite dish so at night they talk and play games instead of watching television. (A satellite dish has been promised.) Workers get a salary 10-20% above what they would get in China and extraordinarily long holidays -- 2 months, with the government paying for their transportation back to their hometown. At age 50, the official retirement age in China, most workers will leave Liang He Gu and spend the rest of their days living off their pension in the lowlands.

"Dhargye, a Tibetan town of comparable size, has no electricity, no health clinic, and nobody on a government salary or with any government benefits (holiday, pension, etc.). There was a school, which apparently taught mostly Chinese, but it was closed. The classroom floors were covered with trash and the desks had a layer of dust on them. The teacher was 'off doing business,' according to the townspeople and they did not think he would be back tomorrow or the next day. The main road from Kanze to Dege (and from there to Lhasa) lay half a mile away and the dirt track to the town looked as if it was rarely used by a motorized vehicle. The children were almost all barefoot, the houses built of mud bricks, and an old electricity pole with no connecting wires stood next to a murky, lime-green pond in the center of the village. With no evidence of any modern improvements in the town, it is entirely possible that the town may have reached its current state of 'development' by the turn of the century."³⁵²

[¶5-96] The evidence of population transfer is very strong, as is the evidence of concomitant discrimination. There is also very strong evidence that the economic development occurring in Tibet inures entirely to the benefit of Chinese settlers and Chinese in China, and not to the

some of the agricultural sector. They receive separate and better education and health care than Tibetans. In the economic, social and political fields Tibetans are being subjected to systematic discrimination."

See also Thonden, supra n.165, at 8 (footnote omitted): "Chinese officials at the Forestry Bureau in Trango, for example, candidly admitted to a fact-finding team in 1991 that the Forestry Bureau only serves Chinese settlers, providing them with 1100 jobs, including housing, meals, laundry, long vacations, and paid transport back to their hometowns."

See also id. at 9: "Chinese workers receive larger 'hardship' bonuses, preference for accommodation in the Work Unit compound, and three months paid vacation every one and a half years. Within mixed Tibetan and Chinese work units, Tibetans dominate the manual, unskilled positions, while Chinese fill most of the executive posts."

See also International Campaign for Tibet, supra n.156, at 19: "The availability and quality of medical services depends largely upon the presence of Chinese settlers. With the settlers come such services and if there are sufficient numbers of Chinese settlers and higher Party cadres, the hospital will have more modern facilities and equipment, and better Chinese doctors."

³⁵² International Campaign for Tibet, supra n.156, at 19.

Tibetans.³⁵³ Taken together, this evidence establishes a prima facie case "[t]hat the population transfers from the People's Republic of China into the territory of Tibet of non Tibetan peoples is directed towards undermining the ethnic and cultural unity of Tibet[.]"³⁵⁴ This is an unquestionable violation of the Tibetans' right of self-determination.³⁵⁵ Because a government is legitimate only if it respects the right of self-determination,³⁵⁶ the People's Republic is, as respects the Tibetan people, an illegitimate government.

³⁵³ See, e.g., Thonden, supra n.165, at 7 (footnote omitted): "The PRC motives behind this enormous and costly undertaking are manifold. the Chinese word for Tibet, Xizang, translates as 'Western Treasure House' or 'Western Store House'. . . . While the PRC publicizes its strategies to help the 'backward' Tibetan regions, in fact Tibet's wealth of natural resources enriches China. . . . According to one survey published by the Chinese, Tibet has the world's largest deposits of uranium and borax, half the world's supply of lithium, the second largest copper deposits in Asia, and the largest supplies of iron and chromite in China." See also id. (footnote omitted): "The Chinese government asserts ownership over all forested land and therefore does not pay the Tibetans for the value of the timber extracted."

³⁵⁴ Permanent Tribunal of Peoples, supra n.153, at 23. See also Gyari, supra n.164, at 11: "By manipulating the demographics of Tibet, the Chinese government is able to control the disputed territories and maintain policies to sinocize Tibet. The systematic assimilation of Tibet threatens not only the culture and way of life of the Tibetan people, but also the very existence of Tibetans as a people. This is a clear example of colonialist behavior."

See also Tibet Information Network, supra n.156, at 31: "A hand-printed poster produced by a Tibetan underground group (Cholsum Thuntsok -- the Unified Committee of the Three Provinces of Tibet) and distributed on 27th August 1992 also refers to this issue:

" . . . Nowadays China is opening up the whole of Tibet on the pretext of economic development, but in reality it is doing it in order to deny Tibetans rights and work through the endless transfer of Chinese people to live here. It is clear that this is to make it impossible for Tibetans to live in their own land. For example, at the moment the Tibetan towns and the farming and pastoral areas are teeming with Chinese; different Chinese military army personnel are stationed along the borders and in every corner. . . ."

See also Thonden, supra n.165, at 8: "Out numbering and assimilating the Tibetans with loyal and patriotic Chinese renders the area politically stable -- a necessary precondition for the government's development plans to succeed. Isolating Tibetan resistance movements or intimidating those groups by an overwhelming military presence effectively counters movements for independence or self-determination. . . . This systematic Sinocization of Tibet threatens not only our culture and way of life, but even our very existence as a people."

³⁵⁵ See International Committee of Lawyers for Tibet, Tibet and the United Nations (San Francisco 1991) at 1: "There can be no question that the PRC today denies Tibetans their right to self-determination. . . . [I] Perhaps the cruelest mark of this denial of self-determination lies in the deliberate policy of population transfer of Chinese into Tibetan territory."

Because Tibet is a rightful state, unlawfully occupied by the People's Republic, the population transfer also violates Article 49 of Geneva Convention IV: "The Occupying Power shall deport or transfer parts of its own civilian population into the territory it occupies." The People's Republic ratified this Convention in 1956. (van Walt van Praag, supra n.347, at 25.) See also Senate Memorandum, supra n.186, at 9: "If one accepts that Tibet is an occupied country, then China is in violation of several articles of the Fourth Geneva Convention of 1949, which forbid an occupying power to transfer or deport its civilian population into the territory it occupies. The PRC ratified this convention in 1956."

³⁵⁶ See ¶¶ 3-44 through 3-47, supra.

(2) Environmental Destruction

[15-97] The People's Republic's treatment of the Tibetan environment is a cause for great concern. "The PRC systematically exploits Tibet's natural resources for its own benefit, and without popular participation in governmental decisionmaking. . . . Among the most detrimental practices are massive deforestation, mining of uranium and other minerals, and nuclear weapons development."³⁵⁷ The use of toxic chemicals in farming has also become a serious problem.³⁵⁸

[15-98] Numerous international legal rights have been associated with environmental issues,³⁵⁹ and numerous international instruments recognize a people's right to control its environment and natural resources.³⁶⁰ The People's Republic, however, does not allow the Tibetans to participate

³⁵⁷ Human Rights Advocates, *supra* n.157, at 14-15.

³⁵⁸ Permanent Tribunal of Peoples, *supra* n.153, at 18: "The methods used in the management of the natural resources of Tibet appear to have been affected, at least in certain parts of Tibet, by the use made by the Chinese authorities of toxic fertilizers and pesticides particularly in the harvesting of commercial agriculture. Unless immediately terminated, this widespread practice is likely to result in grave environmental consequences for pasture lands, seriously derogating from the environmental rights of the Tibetan people and causing damage to their fragile high-altitude eco-system."

³⁵⁹ Roos-Collins, *supra* n.164, at 1-2 (first brackets in original): "As discussed in the Preliminary Report to the Sub-Commission submitted . . . on 2 August 1991 . . . the international community has acknowledged a number of substantive human rights that can be impacted by environmental abuse. It has also acknowledged procedural rights, the restriction of which can worsen environmental degradation by diminishing relevant communication between decision-makers, affected parties, and technical experts. These rights are accorded varying degrees of recognition and enforce-ability under international law. Some of the rights most closely related to environmental issues and discussed in the Preliminary Report include:

- * the right to life
- * the right to health
- * the right to development
- * the right of peoples to self-determination
- * the right to freedom
- * the right to equality
- * the right to adequate conditions of life
- * the right to suitable working conditions
- * the right to decent living conditions
- * the right [of everyone] to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care
- * the right of information
- * the right of peaceful assembly
- * the right of association
- * the right to freedom of expression [and]
- * the right to take part in the conduct of the public affairs of one's country, directly or through freely chosen representatives[.]"

³⁶⁰ ICESCR, *supra* n.25, Art. 1(2): "All peoples may, for their own ends, freely dispose of their natural wealth and resources In no case may a people be deprived of its own means of subsistence."

See also Universal Declaration of the Rights of Peoples (Algiers 1976) Art. 8 (quoted in Crawford, *supra* n.38, at 188: "Every people has an exclusive right over its natural wealth and resources. It has the right to recover them if they have been despoiled, as well as any unjustly paid indemnities."

See also Declaration of Principles of Indigenous Rights (World Conference of Indigenous Peoples,

in the decision-making which concerns their environment.³⁶¹ Indeed, should the Tibetans try to influence an environmental decision, they risk punishment and even disappearance.³⁶²

[15-99] The People's Republic has been deforesting Tibet at an alarming rate.³⁶³ The deforestation is generally accomplished by clearcutting, which results in enormous waste and rapid desertification.³⁶⁴ It also causes floods and landslides,³⁶⁵ not only in Tibet and China, but in

Panama 1984) Art. 9 (quoted in *id.* at 204): "Indigenous people shall have exclusive rights to their traditional lands and its resources: Where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned."

See also Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, G.A.Res. 1314, 13 U.N. GAOR, Supp. 18, 27, U.N.Doc. A/4090 (1958); Charter of Economic Rights and Duties of States, G.A.Res. 3281 (1974).

³⁶¹ Human Rights Advocates, *supra* n.157, at 14-15: "The PR: systematically exploits Tibet's natural resources for its own benefit, without regard for ecological consequences, and without popular participation in governmental decisionmaking."

But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 27: "Environmental departments have adopted a series of measures to protect biological environment, such as the construction of Yangzhuoyong Lake power station, Shannan Luobusalu Iron Mine and other big projects. All of them are being carried out under strict inspection and management in accordance with the law of environmental protection. The refuse site that is near Lhasa has been removed so as to reduce the pollution of the Lhasa river."

³⁶² Roos-Collins, *supra* n.164, at 10 (footnotes omitted): "The hill behind the Trachen-Ma Temple in Riwoche is considered particularly sacred by Tibetan Buddhists. When the Chinese determined that the hill was rich in uranium, miners were brought in. Tibet's leaders protested unsuccessfully to Beijing. The mining was considered a sufficiently serious matter that, in early 1988, Tibetans rioted, were taken away for interrogation by the Chinese, and did not return."

³⁶³ Permanent Tribunal of Peoples, *supra* n.153, at 18: "The evidence . . . disclosed problems of the environment of Tibet which threaten the right of the Tibetan people to subsist and to survive in their own land. It appears from the evidence that important parts of Tibet have been the subject of rapid deforestation. . . . Unless this is immediately discontinued and remedied this practice of deforestation will lead to climatic changes having potential [sic] impacts on the environment which are very considerable, affecting the people of Tibet but also people in places far away."

But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 26: "The Autonomous Region issued 'The Regulations on the Protection of the Forest in Tibet Autonomous Region', 'Eight Rules on the Prevention of Fire by the Office of Forestry of the Tibet Autonomous Region', [and] 'Provisional Regulations on Inspection of the Wood Transportation in the Tibet Autonomous Region'."

This is the People's Republic's entire response on the subject of forest protection. As a general matter, the People's Republic tends to respond to factual allegations by reciting its legal provisions. This is entirely inadequate, because at issue is whether those provisions are being carried out, not whether they have been enacted.

³⁶⁴ Roos-Collins, *supra* n.164, at 6 (footnotes omitted): "No effort is made to log selectively. All trees and even shrubs are cut down in an area and those not considered valuable as timber are left on the ground. . . . The clearcut areas are typically hilly and the resulting soil erosion has become enormous. One-third of the river valleys logged in the prime, southeastern Tibetan forests are now classified by Chinese forestry officials as semi-desert due to the severity of soil loss."

neighboring countries as well.³⁶⁶ The timber taken from Tibet does not inure to the Tibetans'

Revegetation of that land will be extraordinarily difficult in a human, as opposed to geological, time frame."

See also id. at 6 n. 33: "The Vice Minister of Forestry for China conceded as much when he wrote that reforestation was 'feasible in those places where there is proper soil and optimum moisture, temperature and man power,' whereas in places with poor soil, 'afforestation must be economically appraised.' . . . In other words, once the soil erosion and desertification process has progressed to a certain point, successful reforestation can become too difficult to be financially viable. Successful reforestation can be challenging even where natural circumstances support it; the potential to reclaim clearcut forest must be measured in part by the statistic that between 1949 and 1988, 231 million acres of new forests were planted throughout China, but only 69 million acres, or 30% of these remain."

See also id. at 6-7 (footnotes omitted): "As China's Vice Minister of Forestry wrote, even a reduction of the forest cover from 30% in the early 1950's to 18.8% in the mid-1980's, as happened in portions of Tibet, was sufficient to increase 'environmental degradation due to higher wind speeds, more severe drought, less snow, and a shorter frost-free season.' By 1989, the same area (now western Sichuan province) was reportedly reduced to 9% forest cover. Given a report that forest cover in the Tibet Autonomous Region had been reduced from 20% in 1950 to 10% in 1980, one wonders whether it, too, was reduced by half again in the 1980's."

See also Minority Rights Group, The Situation in Tibet: Submission to the Secretary-General Under Resolution No. 10 of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, August 1991 (London) at 8: "The same is said of timber left behind by logging teams that raze entire slopes and load only the logs nearest the road. If a Tibetan is caught taking leftovers, it is 'Stealing from the motherland.'"

³⁶⁵ Thonden, supra n.165, at 8: "Widespread deforestation has also wreaked ecological havoc, contributing to the devastating floods and landslides in 1981 and '82."

See also International Campaign for Tibet, supra n.156, at 26: "We passed numerous narrow valleys which disgorged massive mudslides into valleys. These slides bury farmers' fields and roads, pour dirt into rivers and prevent replanting for many years."

³⁶⁶ Roos-Collins, supra n.165, at 7-8 (citing Velasquez Rodriguez Case, at 70, OAS Doc. OAS/Ser.L/V/III.19, doc. 13 (31 August 1988)): "The impacts of clearcutting and lack of reforestation are experienced not solely in Tibet. . . . The impacts are international because the forested, eastern portion of Tibet serves as the source for at least five major Asian rivers: the Brahmaputra in India and Bangladesh; the Salween in Myanmar; the Mekong of Laos, Thailand, Cambodia and Vietnam; and the Huangho (Yellow) and Yangtse rivers of China. . . .

* * *

". . . In this instance, the acts of the Chinese government are impacting the human rights not only of their own peoples but also of the people in neighboring countries. While the impacts are one step removed from the logging actions, the cause and effect relationship is sufficiently well-established that current logging practices should be regarded as a violation of these rights [to life and health, to a secure living and working situation, and to development] since governments have an obligation under human rights law to alter their actions if necessary to prevent foreseeable harm."

See also Gyari, supra n.164, at 6: "Deforestation, desertification, unsustainable agricultural policies, and inadequate reforestation have left the areas vulnerable to erosion, which has aggravated devastating floods not only in Tibet, but downstream in China, India and Bangladesh."

See also International Campaign for Tibet, supra n.156, at 26 (footnote omitted): "The environmental consequences of clearcutting is [sic] evident everywhere. The Dharto (Ch: Dadu) River is filled with silt year round. We passed numerous narrow valleys which disgorged massive mudslides into valleys. These slides bury farmers' fields and roads, pour dirt into rivers and prevent replanting for many years. Erosion on hillsides and around smaller and medium sized streams is widespread. The extent to which this contributes to flooding in China and neighboring countries is in dispute. There is a sense that it must have had some effect, but so far only a few Chinese scientists who have the best access to the region and to information, have

benefit at all,³⁶⁷ which puts Tibet in the economic position of a colony.³⁶⁸ This practice of deforestation not only deprives the Tibetans of their natural wealth, it also robs them of the capacity for sustainable development and the right to base that development on their own cultural values.³⁶⁹

dared to express this concern."

³⁶⁷ Roos-Collins, *supra* n.164, at 4-5 (brackets in original; footnotes omitted): "The great majority of the timber is sent out of Tibet. . . . The Chinese government asserts ownership over the forested land and so does not pay the Tibetans for the value of the timber extracted. Indeed, with so much raw lumber exported from the region, '[forestry officials admit that the profits of the industry do not go to municipal or county levels and little goes to the prefectural level.]' Many lumber jobs go to Chinese settlers and some felling is done without compensation by prison labor."

See also LAWASIA and Tibet Information Network, *supra* n.327, at 89: "It is clear that the natural resources of Tibet are being exploited by state enterprises for the benefit of the Chinese state. The most obvious example is the massive deforestation that has taken place in eastern Tibet, principally in Sichuan province. Whole hillsides, which 40 years ago were covered with spruce and pine forests, have been denuded. In the Markham region the government has been forced to move logging operations another 80 kilometres west of the town to have access to unlogged areas. Locals say that except for a few easily accessible flat areas, there is little evidence of reforestation. Throughout the year logs clog the fast flowing rivers, many headed for Chengdu, or are sent by road to Chinese cities for processing. Through a strict system of logging licences and fines for illegal felling, the government retains control of the timber industry and hence the profits."

See generally Gyari, *supra* n.164, at 7: "It is extremely questionable how much development projects in Tibet actually benefit the Tibetan people, as opposed to the Chinese settlers. A recent International Campaign for Tibet fact-finding mission to Tibet interviewed Tibetans concerning several United Nations programs that are actively promoting Chinese settlers to move to Tibet. The Tibetans responded that they definitely do not support international funding which assists the Chinese settlers in Tibet, even though it occasionally benefits Tibetans.

"Non-Chinese foreigners engaged in Tibetan development projects often characterize development patterns as 'colonialist', citing Chinese chauvinisms, favoritism towards other Chinese, and lack of knowledge or appreciation of Tibetan culture, as major barriers to sustainable development."

³⁶⁸ International Campaign for Tibet, *supra* n.156, at 25-26 (first brackets in original; footnotes omitted): "The lumber industry was started by the Chinese within years after the invasion. The principal limitation to extracting lumber and Tibet's other natural resources has been the poor transportation network. Of the resources devoted to develop Tibet by the central government, funds for transportation to exploit Tibet's natural resources have always been paramount. We found a situation identical in many respects to a colonial relationship where natural resources are being extracted and transported great distances in raw form with little benefit to, or consideration of the effects on, the indigenous population. . . .

"An economic analysis of the relationship between the Tibetan prefectures and inland provinces substantiates a colonial relationship. According to Chinese documents we have collected, two thirds of one of Ngaba's main forested area[s] have already been harvested, totalling 6,200,000 cubic meters. . . . The Rangtang Forestry Bureau, which has deforested an adjacent region, boasts that it has provided the state 62,020,000 yuan of 'tax and profit which are [sic] 14 times as much as the national investment.' The Aba Forestry Transportation Company has provided the state with 10,940,00[0] yuan tax and profit between 1956 and 1988. The purpose of all of the county and prefectural level forestry bureaus is, in their own words, 'to provide lumber for the country.' . . . Forestry officials admit that the profits of the industry do not go to municipal or county levels and little goes to the prefectural level."

³⁶⁹ Roos-Collins, *supra* n.164, at 7: "The Chinese government is taking not only Tibet's current timber wealth; it is also taking away Tibet's future ability to develop a sound forest products management program because it is destroying the capacity of the land to support forests. This is a direct violation of the right of

[15-100] The People's Republic is also extracting minerals from Tibet's vast reserves,³⁷⁰ which results in contamination of water supplies,³⁷¹ and perhaps other environmental damage.³⁷² The

the Tibetan people to self-determined, sustainable development."

See also

id.: "The wholesale destruction of forests is antithetical to Tibetan culture. The Tibetans are devout Buddhists who aspire to a society in which all life forms are respected and protected. According to this view, the natural environment, including all flora and fauna, should be disturbed as little as possible."

³⁷⁰ LAWASIA and Tibet Information Network, supra n.327, at 88 (footnotes omitted): "The TAR reportedly holds China's largest iron ore deposit and the second largest deposit of copper in Asia, as well as large amounts of other minerals including gold, borax, chromite, lead, silver, mercury, coal, corundum and mica."

See also Roos-Collins, supra n.164, at 9 (footnote omitted): "[Tibet] also has more than 40% of China's present supply of bauxite, gold, and silver, and extensive reserves of oil, coal, tin and zinc."

See also Tibet Information Network, supra n.156, at 13: "In 1990 the Chinese government announced that more than 200 uranium deposits had been discovered in its southern and western regions, according to the official newspaper 'China Daily' on 28th May."

³⁷¹ Tibet Information Network, supra n.156, at 13: "11 September: Tibetans Dying From Uranium Mine Waste

"A high proportion of Tibetan villagers living near what is believed to be a Chinese uranium mine have died after drinking water polluted by waste from the mine, according to detailed reports from Tibetans in the village.

"In the past three hours at least 35 of the approximately 500 people in the village have died within a few hours of developing a fever, followed by a distinctive form of diarrhoea; six of the victims died within three days of each other.

* * *

"They die after one or two days; some die after 5 days; a few survive. There have not been deaths from other villages in the area, which are further away from the mines', he ["a villager interviewed on several occasions by T.I.N. . . . [and] trained in Tibetan medicine" (13)] said.

* * *

"The evidence suggests that the rains wash lethal waste from the mine works into the water supply, and locals say that they have been told unofficially by some Chinese officials not to drink the water from streams flowing from the mining area.

"The village is in the eastern part of the Tibetan plateau, traditionally known as Amdo but now administered under the Chinese province of Sichuan. . . .

". . . But they [Tibetan villagers] say that the Chinese miners wear protective clothing and work only two hour shifts, suggesting that uranium, or another radioactive substance, is being extracted.

* * *

"'People started to become ill in 1980; at about the same time the nearby forest started to dry up,' said the informant. . . .

* * *

"In 1984 a Tibetan official in the mining team came to the village and told them that the mineral which was being extracted was gold, and was not poisonous. Villagers say that he told them it was quite safe to drink the water. 'We asked him to drink some of the water with us, but he wouldn't', the Tibetan said."

But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 26-27: "According to the inspection of the river and soil at Dagong county and Lhasa which are situated at the upper part of the Lhasa River, and the joining place of Lhasa River and the Yarlung Tsangpo River, the water's acidity and alkalinity, hardness and consumption of the oxygen have no change above three points. There is no pollution in the rivers of lead, zinc copper or artificial radioactive pollution. There is no nuclear pollution at all."

minerals extracted from Tibet also do not inure to the Tibetans' benefit, making the People's Republic's mining program a form of colonialism.³⁷³

[¶15-101] Indeed, the People's Republic's entire treatment of the Tibetan environment is a clear case of colonial domination.³⁷⁴ This domination violates the Tibetans' right of self-determination by preventing them from freely disposing of their natural wealth and resources. Therefore, the People's Republic's ruination of Tibet's environment renders the People's Republic an illegitimate government as respects the Tibetans.

³⁷² See Permanent Tribunal of Peoples, *supra* n.153, at 19: "Many grave allegations were received by the Tribunal concerning radio-active pollution in Tibet resulting from the extraction of uranium in the Eastern part of the Tibetan plateau of Amdo, presently administered by China as part of its territory outside Tibet. It was also asserted that nuclear facilities in Central Tibet[,] as well as the deposit of nuclear and toxic wastes in Tibet[,] together with large-scale mining activities, had caused grave and lasting damage to the environment. If these allegations are correct they involve a most serious derogation from the fundamental rights of the Tibetan people perpetrated by the authorities of, or under the control of the People's Republic of China. The Tribunal is not in a position to reach concluded opinion on these allegations."

But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 26: "In areas that have mines, the mining activities can be carried out with the approval of the Government and technical guidance of the departments concerned. One has to go through [a] strict process for approval to run the mine and transport minerals."

³⁷³ Roos-Collins, *supra* n.164, at 9 (footnotes omitted): "The Chinese government is proceeding to develop and exploit Tibet's mineral resources with no demonstrable concern for the resulting cultural discomfort felt by Tibetans, and in violation of their right to self-determined development. As with timber, the minerals extracted generally do not remain in or enrich Tibet; rather, minerals are shipped out to other parts of China. The Chinese mining operations in Tibet are now extensive; mining and mineral extraction account for the largest share of economic activity in the industrial sectors of U-Tsang and Amdo (Tibet Autonomous Region and Qinghai, to the Chinese)."

See also Gyari, *supra* n.164, at 7: "Development in Tibet since 1980 has involved a large influx of Chinese settlers, the extraction of natural resources and enterprises which serve the interests of the Chinese in Tibet and in China proper. . . ."

"In the name of development China has built a network of roads to remote areas of Tibet. In many places where roads have been built, natural resources have flowed out and Chinese settlers have moved in. In Nyarong, Kham . . . roads were built to denude the surrounding forests with no benefits going to the local people."

³⁷⁴ See Roos-Collins, *supra* n.164, at 4: "[T]he Chinese government has been exploiting Tibet's natural resources with a pace and carelessness that is indeed more typical of the pillage of an enemy's stores than of the husbanding of one's own resources. . . . A better analogy may be the classic colonial relationship, with Tibet being milked for its raw materials, while the Chinese government points to a heavy flow of consumer goods and other subsidies into Tibet, which benefit primarily the colonialists (Chinese settlers). For example, Xinhua News reports that 'about 90% of Tibet's minerals, timber, animal by-products and medicinal herbs are transported through Golmu[d] to other parts of the country.' In other words, at least 90% of the raw materials produced in the Tibet Autonomous Region (U-Tsang) are shipped out to other parts of China."

See also Human Rights Advocates, *supra* n.157, at 15: "Significantly, these resources are exported to China or otherwise exploited for the benefit of Chinese rather than Tibetans. Similarly, the benefits of subsidized development projects in Tibet -- power stations and electricity, roads and airports, small-scale industry, and tourism -- inure primarily to the benefit of the Chinese government and Chinese settlers in Tibet."

[15-102] Moreover, environmental degradation and population transfer are intimately linked.³⁷⁵ The fragile Tibetan ecosystem is being overburdened by the number of settlers moving into Tibet.³⁷⁶ This is causing a cycle of erosion,³⁷⁷ a reduction of wildlife,³⁷⁸ and potentially

³⁷⁵ See, e.g., Roos-Collins, *supra* n.164, at 3: "The environmental impacts of the Chinese government's management of Tibet can be divided into two broad categories: those resulting from its removal of Tibet's natural resources for use elsewhere in China and those resulting from the enormous resource demands created by the Chinese settlers who have participated in the government's policy of population transfer to Tibet."

See also Gyari, *supra* n.164, at 7: "In the name of development China has built a network of roads to remote areas of Tibet. In many places where roads have been built, natural resources have flowed out and Chinese settlers have moved in."

See also International Committee of Lawyers for Tibet, *supra* n.28, at 1: "While appropriating and exporting so much of Tibet's [wealth in] resources, the PRC has been importing settlers and soldiers."

See also LAWASIA and Tibet Information Network, *supra* n.327, at 79-80: "Much of the influx has been associated with exploitation of Tibet's natural resources. . . . Reports from Sichuan say that thousands of Chinese workers from Chengdu and cities in Heilongjiang province are expected to staff large flax farms and factories that have been set up in Tibetan areas of western Sichuan."

³⁷⁶ Permanent Tribunal of Peoples, *supra* n.153, at 19: "The transfer into Tibet of non-Tibetan peoples, which has resulted in the rapid doubling of the population of Tibet, appears already to have reduced the capacity of a relatively fragile environment to meet the needs of human and other life forms."

See also Roos-Collins, *supra* n.164, at 12: "To understand the environmental impacts of doubling Tibet's population, it is important to keep in mind two points. First, the terrain is particularly fragile, due to its very high altitude, and its human carrying capacity is low. Second, Chinese settlers bring with them a lifestyle demanding a much higher level of consumer goods, electrical energy, and different foodstuffs than are consumed by Tibetans."

See also *id.* at 14: "The decline in arable land per capita in China is surely a large incentive behind population transfer into Tibet, but the fragile Tibetan lands cannot sustain the increased farming pressure being placed on them. This pressure has taken the form of requiring the farmers to grow new varieties of wheat instead of grain strains adapted by long usage to the high, dry climate, and requiring them to buy and use large amounts of fertilizer and pesticides, even though farmers complain that the chemicals are poisoning the land and crops."

³⁷⁷ Roos-Collins, *supra* n.164, at 13 (footnotes omitted): "[E]xpansion of farmland in a delicate environment has led to two basic problems: first, the marginal, often sloping lands now used for farming are prone to erosion. Second, the pastures expropriated for farming are often the former winter pastures of herders. Their loss means that the herd must be kept longer on the higher summer pastures, leading to overgrazing, which leads in turn to further soil erosion (due to reduced cover and weakened root structures), which leads to a permanent loss in the quality of the grass and thus the carrying capacity of the range."

³⁷⁸ Permanent Tribunal of Peoples, *supra* n.153, at 19: "It appears that wildlife, previously abundant, has been considerably reduced in number and variety, at least in certain parts of Tibet."

See also Roos-Collins, *supra* n.164, at 16 (footnote omitted): "A number of species have been pushed to near extinction by loss of habitat. The increased human activity resulting from the population transfer into Tibet and Chinese activities there all decrease available wild land."

See also Gyari, *supra* n.164, at 6: "Clear-cutting of Tibet's forests for the Chinese market also threatens Tibet's other residents, including the rare giant panda, golden monkey, and over 5000 plant species unique to the planet."

But see Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 26: "The region has issued regulations on protection of wild animals, set up an association for the protection of wild animals and established seven natural protection zones, such as the natural protection zone of Qomolangma and wild animal protection zones. All kinds of forests, plants and

permanent impairment of the fertility of the Tibetan land.³⁷⁹ The last of these is the most serious, and constitutes a gross violation of the Tibetans' right to preserve, as well as to exploit, their own natural resources.³⁸⁰

B. Assessing the Impacts of Alternative Resolutions of the Claims

[¶15-103: Summary of Part V.B)] This section discusses two important potential outcomes of the available resolutions of Tibet's and the People's Republic's claims: the problem of the parties' violence and the role of human rights.

[¶15-104] As discussed in ¶13-49 above, if a claimant group can show that the opposing State is an illegitimate government as respects that group, the question of balancing (that is, of assessing the impacts of alternative resolutions) need never even be reached, because the opposing State has no cognizable claim of territorial integrity. As discussed in ¶15-71 through 5-102 above, the People's Republic is an illegitimate government as respects the Tibetan people. Therefore, the question of balancing need not be reached.

[¶15-105] This paper addresses that question, however, for two reasons: First, the People's Republic has neither been forthcoming with specific evidence nor permitted independent investigation. Should it do so, the conclusions reached in this paper will require reexamination, which may render the question of balancing necessary to the resolution of the dispute. Second, one purpose of this paper is to demonstrate that actual disputes involving self-determination can be resolved by applying the proposed analytical framework; that demonstration requires completeness.

endangered wild animals are effectively protected."

³⁷⁹ Roos-Collins, *supra* n.164, at 16: "The land is being rendered incapable of sustaining as many people as it did prior to the Chinese occupation. By permanently reducing the land's fertility, the government is violating not only Tibetans' present rights, but their future rights to self-determined and sustainable development."

See also id. at 22: "The unsustainable pace of deforestation, so far beyond the regenerative capacity of the land, is designed to meet the short-term resource needs of China's millions, leaving the Tibetans bereft of their timber and forest ecosystems, now and for foreseeable generations to come. The farming and grazing lands are being driven to support more settlers and more food exports than those fragile, high-altitude lands can sustain. Wildlife and native plants are being decimated because the markets for them remain uncontrolled and because preservation of their habitats conflicts with the government's ambitions in areas capable of human settlement. When they are allowed to do so, even China's own resource experts are writing of the irrationality of such intense, short-term abuse of the land and of the desertification and permanently reduced fertility that are becoming widespread in the wake of the abuse. The situation constitutes a direct denial of the Tibetan people's right to determine the course of their development and the use of their resources. what is more, these rights will be impaired for generations because of the long-term effects of the current policies."

³⁸⁰ See id. at 22: "Finally, requiring Tibetans to change their practices and manage their land in a non-sustainable way violates their cultural and religious integrity. A people's right to cultural integrity must include the right to act upon a cultural preference for biodiversity and healthy ecosystems in that people's land."

1. The Possibility of Threats to the Peace: The Problem of the Parties' Violence

[¶15-106: Summary of Part V.B.1] The Tibetans argue that the People's Republic's ongoing denial of their claims, and the consequences of that denial, constitute a threat to the peace. The bulk of this argument concerns the human rights abuses alleged, which are discussed in ¶¶15-123 through 5-167 below. One additional point in the argument, however, is that because Tibet's independence is denied, the People's Republic and India are engaged in chronic border disputes which could be avoided by restoring Tibet to its traditional role as a buffer between the two largest Asian powers. This section discusses that argument and examines the level of violence employed by the Tibetans in their struggle.³⁸¹

a. The Denial of the Tibetan Claims Threatens the Peace

[¶15-107] Setting aside human-rights questions for the moment, the Tibetans claim is quite straightforward: The People's Republic maintains a large contingent of military forces on the Tibetan plateau,³⁸² as does India;³⁸³ if Tibet were independent, these military presences would

³⁸¹ This section is also the logical place to include a discussion of lesser alternatives (see ¶ 4-30, *supra*). In the case of Tibet, however, neither party has suggested that there are lesser alternatives available to the other which would serve to achieve the international objectives of vindicating the right to self-determination and averting threats to the peace. The People's Republic claims complete sovereignty over Tibet (see U.N. Docs. E/CN.4/1992/37 at 2, E/CN.4/1991/73 at 2, and E/CN.4/1990/68 at 2), and Tibet claims complete independence under its territorial integrity claim and at least complete internal autonomy under its self-determination claim.

This is not to suggest, however, that the parties should be able to limit the options available to the international community. Third parties and (*sua sponte*, if necessary) the quasi-adjudicative forum charged with resolving the claim should be entitled to raise whatever alternatives they may conceive, and the contending parties should be required to address those alternatives. Here, however, no such alternatives have been presented.

³⁸² See Tibet Information Network, *supra* n.156, at 21-22: "A secret Chinese military report has revealed that there are less than 50,000 troops stationed in the Tibet Autonomous Region. Details of the report were disclosed . . . in an article published by the South China Morning Post in Hong Kong today, 8th June.

"There are just over 40,000 Chinese troops in the region, according to the document."

Cf. Lord David Ennals, "Tibet: A New Colony," in Kelly, Bastian, and Aiello, *supra* n.61, at 65: "I saw in Tibet an enormous number of Chinese weapons and at least 300,000 soldiers."

Cf. also International Committee of Lawyers for Tibet, *supra* n.28, at 5: "In the Tibet Autonomous Region alone, [the People's Republic's] estimated troop strength exceeds 250,000."

Cf. also id. at 5 n. 14: "The South China Morning Post reported on March 8, 1989 that 170,000 soldiers were deployed 'within striking distance' of Lhasa when demonstrations took place in that city.

Cf. also LAWASIA and Tibet Information Network, *supra* n.327, at 77 (footnotes omitted): "The [People's Liberation Army], which suppressed Tibetan revolts in 1956-59 and 1968-69 and enforced martial law in Lhasa in 1989, remains a high profile force which is an essential guarantor of China's continuing control over Tibet. Estimates of the number of PLA troops stationed on the Tibetan Plateau vary from about 60,000 to half a million. whatever the exact figure, the numbers are substantial, and even casual observers notice the number of troops stationed in and around Lhasa and other Tibetan towns compared to cities elsewhere in the PRC. Some have described Lhasa as a 'garrison town'."

not be necessary, and China and India could redirect their limited resources toward improving the lives of their citizens.³⁸⁴

[¶15-108] That demilitarizing an international "hot spot" would tend to "maintain international peace and security"³⁸⁵ and conduce "friendly relations among nations"³⁸⁶ is self-evident. The People's Republic has offered no evidence in opposition to the claim that its denial of Tibetan self-determination and sovereignty is causing friction between the People's Republic and India, which friction threatens international peace and security. Nor has it offered any evidence suggesting that it and India do not maintain large armies in the Himalayan region. Therefore, the Tibetan claim that the People's Republic's conduct is threatening the peace must be taken as established.

³⁸³ See Tibet Information Network, supra n.156, at 22: "The [Chinese military] report claims that the Indians have six times as many combat-ready troops on the border as the Chinese. . . .

"The Indians, on the other hand, have 240,000 troops facing the Chinese, giving them a numerical advantage of 6.4:1, according to the Chinese generals [who prepared the report]. They say that the Indians have three armies, nine division, 24 brigades, 11 airborne units, 400 aircraft, [and] 90 tanks."

³⁸⁴ See Gyatso, supra n.172, at 289: "The establishing of a peace zone in Tibet would require withdrawal of Chinese troops and military installations from the country, which would enable India also to withdraw troops and military installations from the Himalayan regions bordering Tibet. . . . It was only when Chinese armies marched into Tibet, creating for the first time a common border [between India and China], that tensions arose between these two powers, ultimately leading to the 1962 war. . . . A restoration of good relations between the world's two most populous countries would be greatly facilitated if they were separated -- as they were throughout history -- by a large and friendly buffer region."

See also George Fernandes, "Tibet-India Solidarity," in Kelly, Bastian, and Aiello, supra n.61, at 72: "If Tibet should become a zone of peace and be free from Chinese troops and nuclear weapons, there would be no reason for India to maintain a large army on the Himalayan heights. This would immediately enable both India and China to reduce their military expenditure and use the money thus saved for economic development. When countries of Europe are reducing their troops and in the process their military expenditure, why should not India and China follow a similar course? A totally demilitarized Tibet and an India living in peace and friendship [with China] could trigger changes in South Asia that will end tensions in the region and pave the way for a better life for its people."

Cf. also LAWASIA and Tibet Information Network, supra n.327, at 77-78 (footnote omitted): "The Tibetan plateau is of continuing strategic importance to China. By constructing a road through Tibet parallel to the Indian and Nepalese borders, China has linked Kashgar, in the north-west of Xinjiang, with Sichuan province to the east of the TAR. China's commanding position looking down onto Indian territory from the TAR has enabled it to maintain pressure on its major Asian rival. It was from the south-east of the TAR (north of the Indian state of Arunachal Pradesh) that the PLA launched the highly successful 1962 offensive against India. The border with India in this region, as well as in the Aksai Chin region on the TAR-Xinjiang border, is still disputed. Access through Tibet has also enabled China to exert considerable political and economic influence on the tiny kingdom of Nepal. Over the years there have been reports that China has deployed nuclear weapons in the TAR, some of which may bring New Delhi into range."

Cf. also M.L. Sondhi, "The Return of Tibet to World Politics," in Kelly, Bastian, and Aiello, supra n.61, at 268: "An important development is India's increasing realization that its strategic interests cannot be served by the risks involved in the continued military occupation of Tibet by China. In the absence of confidence-building measures which would actively involve the Tibetans, India is not prepared to freeze the status quo, which the Chinese would like to do."

³⁸⁵ United Nations Charter, Art. 1(1).

³⁸⁶ Id., Art. 1(2).

b. The Tibetans' Violence and Nonviolence

[¶5-109] This section discusses the conduct of the Tibetans in terms of violent behavior. The three points made here are that the Tibetans have occasionally been violent, but most of that violence has been justified; that the Tibetans have generally been nonviolent; and that the possibility that the Tibetans may resort to violence is a relevant consideration insofar as that violence would be justified.

[¶5-110] The Tibetans have occasionally been violent in their struggle against the People's Republic. They resisted the invasion and, as discussed in ¶5-53 above, they sometimes exceeded the bounds of justifiable conduct.³⁸⁷ Generally, however, there is no accusation made that their conduct was anything other than legitimate self-defense. Similarly, Tibetans waged a guerrilla war in Kham in 1956-1958, as also discussed in ¶5-53 above, and continued it until 1974, when international support evaporated.³⁸⁸ Again, however, this conduct appears to have been lawful self-defense. There is no indication in any of the evidence, nor has the claim even been made, that an independent Tibet would act aggressively towards any of its neighbors or any other nation.³⁸⁹

[¶5-111] The Fourteenth (present) Dalai Lama has consistently sought nonviolent solutions to the plight of his compatriots. Perhaps the best evidence of this is his having been awarded the Nobel Peace Prize in 1989, which he received because "in his struggle for the liberation of Tibet[. he] consistently has opposed the use of violence. He has instead advocated peaceful solutions based

³⁸⁷ See also Lodi Gyaltzen Gyari, "Prospects for Sino-Tibetan Dialogue," in Kelly, Bastian, and Aiello, supra n.61, at 311: "Naturally, we Tibetans have not always been blameless. There have been times in which we were a military power and exercised force."

³⁸⁸ See Tibet Information Network, supra at 14: "The Tibetans have not always pursued non-violent methods and fought a 20 year long guerilla war against the Chinese, much of the time with US support. It ended in 1974 when their bases were over-run by the Nepalese army."

The United States Central Intelligence Agency began supporting the Tibetan independence movement in 1951 (Avedon, supra n.250, at 36 and 47). By 1956, the Tibetan rebels, unified under the leadership of Gompo Tashi Angdrugtsang, were being trained by the CIA on the island of Guam (Id. at 47; Gyatso, supra n.214, at 121-122; Mullin and Wangyal, supra n.187, at 8). In 1960, the guerrillas and the CIA formed a base in Mustang (a vassal state appended to Nepal and bordering Tibet); the CIA supplied the rebels with arms and trained them secretly at Camp Hale, Colorado (Avedon, supra n.250, at 118-120; Gyatso, supra n.214, at 122).

In 1971, the United States withdrew its support of the Tibetans after Secretary of State Kissinger's secret trip to Beijing (Avedon, supra n.250, at 125). The Tibetans continued to operate out of Mustang, however, until 1974, when the Dalai Lama requested that they surrender (Id. at 127; Gyatso, supra n.214, at 193). Although the Nepalese government had promised otherwise, it jailed those Tibetan leaders who did surrender and ambushed and annihilated a group who did not (Avedon, supra n.250, at 128 and 131; Gyatso, supra n.214, at 193).

³⁸⁹ Indeed, such evidence as there is, though necessarily speculative, indicates that an independent Tibet would eschew such behavior: "In accordance with its traditions, Tibet renounces war as an instrument of offensive policy and force shall not be used against the liberty of other peoples and as a means of resolving international controversies and will hereby adhere to the principles of the Charter of the United Nations." Constitution of Tibet, Art. 6 (quoted in Hicks and Chogyam, supra n.214, at 182).

upon tolerance and mutual respect"³⁹⁰ Thus, the Tibetan Government-in-Exile has worked to advance the Tibetan cause through dialogue and negotiation in international fora, rather than by violence.³⁹¹

[15-112] The Tibetan Government-in-Exile's nonviolent position, however, is not universally shared among Tibetans. Particularly among Tibetan youth, there is a growing sentiment that Tibet's nonviolent campaign has been ignored by a world which is impressed only by displays of power. After the United Nations Commission on Human Rights voted against a resolution criticizing Chinese policies in Tibet on 4 March 1992, the Tibetan "Tiger Leopard Association" issued a statement pointedly addressing this issue:

We were expecting no miracle, but since we are a part of the world we were expecting justice. . . . The UN vote -- 27 to 15 in favour of the Chinese -- clearly indicates that the Tibet issue is [treated] differently from the liberation of Kuwait. But we are not asking for war, we are asking for justice. The highest world organisation fails to stand by its own decisions -- on whom can we depend?

* * *

We are not struggling just for our survival, culture, history and religion; the survival of Tibet will help maintain world peace, if that is what the world desires. . . .

The 14th Dalai Lama, Tenzin Gyatso, the 1989 Nobel Peace Prize winner, is our leader, and we are certain that under his leadership the truth will prevail. He never advocates hatred and revenge; otherwise we could have been as vicious to the Chinese as the Chinese are to the Tibetans. On humanitarian grounds we have resisted pursuing a destructive approach to the freeing of our country from China. The world does not see it that way. . . .

* * *

In some countries which suffer human rights violations the abuses have come from within. This is not the case in Tibet. In Tibet our survival is threatened by foreign occupiers. Human rights are totally non-existent in Tibet. . . .

We will continue to fight for our freedom. No power on this earth can stop us doing it. Further, the world should not be surprised or shocked if we resort to inhumane methods in the course of the struggle to regain our freedom. It may even turn Tibet and China into a pool of blood again. We know it is against our religion and beliefs, but what other option is open to us? . . . Our patience has been taken as a sign of weakness. The Chinese are bent on decimating our identity. The world does not seem in the least bothered, and sees our identity as of no major significance to world peace and humanity.

Our non-violent methods have been taken as a sign of weakness. We are determined to regain our freedom, and the recent UN vote clearly shows us that without blood-shed, sabotage and aggressive acts, we will not gain publicity, sympathy and support. . . . The world bodies are taking a keen interest in Yugoslavia, Burma, Palestine and Africa. Thousands of human lives have been lost in the struggle in these countries through acts of sabotage and violence. Hijacking and sabotage are tactics used by Palestinians, and still

³⁹⁰ Norwegian Nobel Committee, "Nobel Peace Prize Citation" (1989) in Nobel Peace Prize Award Ceremony Speeches, [Tibetan] (Office of Information and International Relations (Dharamsala 1989) at 2.

See also Gyari, supra n.164, at 12: "The Tibetans, led by His Holiness the Dalai Lama, have worked tirelessly to find a peaceful solution to end the Chinese occupation of Tibet."

³⁹¹ See Gyari, supra n.387, at 312: "Today we are grateful for any support in dialogue. We desire no support for armed combat."

world bodies support them. Now we feel that if these acts of aggression bring results, why should we not do the same? The world believes in these acts. Therefore, if no action is taken against the Chinese promptly by the UN, we will not hesitate to go ahead with modern destructive measures.³⁹²

[¶5-113] Thus, many young Tibetans have come to believe that they have no choice but to resort to violence because the international community has ignored Tibet's situation. The issue presented by this idea is the extent to which a claimant group's violent behavior detracts from its claim. As discussed in ¶¶ 4-25 through 4-26 above, the answer lies in the idea of justification. A claimant group's unjustified violence militates against a resolution in favor of that group because it indicates that the group is prone to violent behavior and tends to disregard international law. Justified violence, however, gives rise to neither of these inferences. Justified violence does not indicate a tendency to disregard international law, because, by definition, it is lawful. It also does not indicate a proclivity for violence, just as a lawful killing in self-defense does not indicate a propensity to commit murder.

[¶5-114] The Tibetans' violence, which has been quite limited when compared to other nationalist movements, is amply justified. A nation has "the inherent right of . . . self-defence,"³⁹³ which can lawfully be exercised "until the Security Council has taken measures necessary to maintain international peace and security."³⁹⁴ The Security Council has never taken any action with respect to Tibet. Therefore, the Tibetans are entitled to act on their own behalf in resisting the People's Republic's invasion and occupation of their homeland.³⁹⁵ Moreover, because the People's Republic has committed genocide against the Tibetans,³⁹⁶ they are entitled to exercise their "legal right of revolution; that is to say, that under the principle of self-determination the peoples of a territory must be allowed -- if necessary by forceful means -- to replace the government

³⁹² Tibet Information Network, supra n.156, at 14-15.

See also Tenley, supra n.171, at 46: "It is hardly surprising that people in Tibet are turning more and more toward forceful means. The repressions to which our people have been subjected are becoming more and more brutal and intolerable. . . . For too long we have indulged in the illusion that the suffering and injustice that have befallen our people would suffice to awaken genuine concern and international solidarity. Time presses, and we are no longer willing to wait; we will make use of all methods at our disposal. . . . We Tibetans wish to live in a free and independent Tibet, but the day approaches when we will have no future left to fight for -- only the desire for retaliation for the injustice that we have had to suffer, and for the future that has been denied to us."

See also Avedon, supra n.250, at 131 (quoting Tempa Tsering, a member of the Tibetan Youth Congress in 1977): "From the moment Yasir Arafat was invited to the UN and given a standing ovation, we had begun debating the use of terrorism It was clear the world had come to this: you kill and commit destruction and you are listened to. You appeal for justice for your people and you are ignored."

³⁹³ United Nations Charter, Art. 51.

³⁹⁴ Id.

³⁹⁵ Permanent Tribunal of Peoples, supra n.153, at 22: "The presence of the Chinese administration on Tibetan territory must be considered as foreign domination of the Tibetan people."

³⁹⁶ See ¶5-73, supra.

by one of their own choice."³⁹⁷

2. The Role of Human Rights

[¶5-115: Summary of Part V.B.2] This section examines the human-rights practices of Tibet (¶¶5-117 through 5-122) and the People's Republic of China (¶¶5-123 through 5-167). The former is based on the Tibetan Constitution of 1963 and subsequent developments in the Tibetan exile community; the latter, on the People's Republic's abundantly documented conduct.

[¶5-116] The assessment of the parties' likely future conduct regarding human rights is necessarily a prediction based on history. The most important consideration in such an assessment is the current practice of the parties.³⁹⁸ This is different from the assessment of governmental legitimacy: Whereas a government which renders itself illegitimate by its own conduct cannot regain its legitimacy simply by abandoning that conduct, a government which commits abuses that do not rise to such a level as to render that government illegitimate can redeem itself by remedying those abuses. Were it not so, there would not be a legitimate government on earth, because "[n]o nation-state in the world has eliminated all violations of all widely recognised human rights for all its citizens."³⁹⁹

a. Tibet

[¶5-117: Summary of Part V.B.2.a] This section examines the Tibetan attitude towards human rights, as exemplified in the Tibetan Constitution of 1963 (¶¶5-118 through 5-120), the constitutional reforms currently underway (¶5-121), and the conduct of the Tibetan Government-in-Exile (¶5-122).

[¶5-118] As mentioned in ¶ 4-31 above, one way for a claimant group to demonstrate its willingness to respect human rights is by adopting a tentative constitution in which international legal norms concerning human rights figure prominently. Tibet has done precisely that. Tibet "renounces war as an instrument of offensive policy and force shall not be used against the liberty of other peoples [or] as a means of resolving international controversies and [Tibet] will hereby adhere to the principles of the Charter of the United Nations."⁴⁰⁰

³⁹⁷ Higgins, *supra* n.86, at 211; *see also* Emerson, *supra* n.27, at 474: "a right of revolution, justified by an appeal to principles of higher law".

See also Universal Declaration of the Rights of Peoples (Algiers 1976), Art. 6 (*quoted in* Crawford, *supra* n.25, at 187): "Every people has the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime."

³⁹⁸ Any body charged with resolving the claim, however, should be cautious to discern behavioral changes which are undertaken solely to rebut a party's claims. Current practice is the most revealing evidence of likely future conduct, but only insofar as that practice is genuine; only genuine current practice demonstrates the motivations of the acting party.

³⁹⁹ Permanent Tribunal of Peoples, *supra* n. . . . at 16.

⁴⁰⁰ Constitution of Tibet, Art. 6; *see also* Charter of the Tibetans in Exile, Art. 7: "No offensive methods may be used to achieve the common goal of Tibet or for any other purposes."

Cf. United Nations Charter, Art. 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any

[15-119] Moreover, it is "the duty of the Government of Tibet to adhere strictly to the Universal Declaration of Human Rights,"⁴⁰¹ and the Tibetan Constitution includes numerous provisions which mirror those of basic instruments of international law. That Constitution guarantees the right to life⁴⁰² and prohibits slavery and forced labor,⁴⁰³ prohibits inhumane treatment⁴⁰⁴ and arbitrary detention,⁴⁰⁵ and guarantees equality before the law.⁴⁰⁶

the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

⁴⁰¹ Constitution of Tibet, Art. 3; see also Charter of the Tibetans in Exile, Art. 4: "It shall be the duty of the Tibetan Administration to adhere to the Universal Declaration of Human Rights"

⁴⁰² Constitution of Tibet, Art. 10: "Every person shall have the right to life, provided that deprivation of life shall not be deemed to contravene this Article when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence, (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or (c) in action lawfully taken for the purpose of quelling a riot or insurrection." See also Charter of the Tibetans in Exile, Art. 11(a).

Cf. UDHR, supra n.66, Art. 3: "Everyone has the right to life, liberty and security of person."

Cf. also ICCPR, supra n.25, Art. 6: "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. . . . 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

⁴⁰³ Constitution of Tibet, Art. 15: "(1) No one shall be held in slavery or be required to perform forced or compulsory labour. (2) For the purpose of this Article, the term 'forced or compulsory labour' shall not include (a) any work required to be done in the course of detention under the sentence of a court of law, (b) any service exacted in case of an emergency or calamity threatening the life or well-being of the community, (c) any service of a military character or (d) any work or service which forms part of the normal civic obligations of a nation."

Cf. UDHR, supra n.66, Art. 4: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

Cf. also ICCPR, supra n.25, Art. 8: "1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civic obligations."

⁴⁰⁴ Constitution of Tibet, Art. 14: "No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

Cf. UDHR, supra n.66, Art. 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Cf. also ICCPR, supra n.25, Art. 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Cf. also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

("Torture Treaty") *in toto*, esp. Art. 2: "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

⁴⁰⁵ Constitution of Tibet, Art. 11: "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice and to have adequate time and facilities for the preparation of his defence. (2) Every person who is arrested and detained in custody shall be produced before the nearest court having jurisdiction within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained beyond the said period without the authority of a magistrate. (3) Every person who has been arrested or detained in contravention of this provision of this Article shall have an enforceable right to compensation."

Cf. UDHR, *supra*, n.66, Art. 9: "No one shall be subjected to arbitrary arrest, detention or exile."

Cf. also ICCPR, *supra* n.25, Art. 9: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."

⁴⁰⁶ Constitution of Tibet, Art. 8: "All Tibetans shall be equal before the law and the enjoyment of rights and freedoms set forth in this Chapter shall be secured without discrimination on any ground such as sex, race, language, religion, social origin, property, birth or other status."

See also Charter of the Tibetans in Exile, Art. 9: "All Tibetans shall be equal before the law and [in] the enjoyment of all the rights and freedoms set forth in this Charter without discrimination on any ground such as birth, sex, race, language, lay or ordained, social origin, rich or poor or other status."

Cf. UDHR, *supra* n.66, Art. 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Cf. also ICCPR, *supra* n.25, Art. 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Cf. also ICESCR, *supra* n.25, Art. 2(1): "Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁴⁰⁷ Constitution of Tibet, Art. 17(2): "Every Tibetan shall have the right to freedom of thought, conscience and religion. The right includes freedom to openly believe, practice, worship and observe any religion either alone or in community with others."

See also Charter of the Tibetans in Exile, Art. 10: "All religious denominations are equal before the

expression, and peaceable assembly;⁴⁰⁸ choice of employment and association in unions;⁴⁰⁹ and

law. Every Tibetan shall have the right to freedom of thought, conscience and religion. The religious rights include[] the freedom to manifest one's belief and practice with matters relating to religious commitment, preaching and worship[, of] any religion either alone or in community with others."

Cf. UDHR, supra n.66, Art. 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Cf. also ICCPR, supra n.25, Art. 18(1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Cf. also Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra n.117, Art. 1(1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

⁴⁰⁸ Constitution of Tibet, Art. 18: "Subject to any law imposing reasonable restrictions in the interests of the security of the State, public order, health or morality, all citizens shall be entitled to: (a) freedom of speech and expression; (b) assemble peaceably and without arms[.]"

See also Charter of the Tibetans in Exile, Art. 11: "Subject to any law imposing reasonable restrictions in the interest of immediate and ultimate goals of the Tibetan people or public welfare, all Tibetans shall be entitled to: . . . (b) freedom of speech and expression; (c) freedom to assemble peacefully without arms[.]"

Cf. UDHR, supra n.66, Art. 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Cf. also id., Art. 20(1): "Everyone has the right to freedom of peaceful assembly and association."

Cf. also ICCPR, supra n.25, Art. 19: "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

Cf. also id., Art. 21: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

⁴⁰⁹ Constitution of Tibet, Art. 18: "Subject to any law imposing reasonable restrictions in the interests of the security of the State, public order, health or morality, all citizens shall be entitled to: . . . (c) form associations or unions; . . . (h) practise any profession or carry on any occupation, trade or business."

See also Charter of the Tibetans in Exile, Art. 11: "Subject to any law imposing reasonable restrictions in the interest of immediate and ultimate goals of the Tibetan people or public welfare, all Tibetans shall be entitled to: . . . (e) right to form and be a member of . . . unions . . . (g) practice any profession or carry out any trade or business or occupation . . ."

Cf. UDHR, supra n.66, Art. 23: "1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. . . . 4. Everyone has the right to form and to join trade unions for the protection of his interests."

Cf. also ICCPR, supra n.25, Art. 22(1): "Everyone shall have the right to freedom of association with

movement and change of residence.⁴¹⁰ It also guarantees numerous rights of criminal defendants,⁴¹¹ the right to participate in government through suffrage and by holding office,⁴¹²

others, including the right to form and join trade unions for the protection of his interests."

Cf. also ICESCR, supra n.25, Art. 6(1): "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

Cf. also id., Art. 7: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

Cf. also id., Art. 8(1): "The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade school of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

⁴¹⁰ Constitution of Tibet, Art. 18: "Subject to any law imposing reasonable restrictions in the interests of the security of the State, public order, health or morality, all citizens shall be entitled to: . . . (d) move freely throughout the territories of Tibet; (e) the right to a passport to travel outside those territories; (f) reside and settle in any part of Tibet[.]"

Cf. UDHR, supra n.66, Art. 13: "1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country."

Cf. also ICCPR, supra n.25, Art. 12(1)-(2): "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and to choose his residence. 2. Everyone shall be free to leave any country, including his own."

⁴¹¹ Constitution of Tibet, Art. 12: "(1) Every person shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of public morality, public order or national security where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (2) Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law. (3) Every person charged with a criminal offence shall have the free assistance of (a) a legal practitioner, when the interests of justice so require, if he has not sufficient means to pay and (b) an interpreter, if he cannot understand or speak the language used in court."

Id., Art. 13: "(1) No person shall be convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence more than once. (3) No person accused of

any offence shall be compelled to be a witness against himself."

See also Charter of the Tibetans in Exile, Art. 11: "Subject to any law imposing reasonable restrictions in the interest of immediate and ultimate goals of the Tibetan people or public welfare, all Tibetans shall be entitled to: . . . (d) right to obtain financial assistance, and to acquire an interpreter when charged and required to appear before a court of law should a person lack the necessary means[.]"

Cf. UDHR, *supra* n.66, Art. 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Cf. *id.*, Art. 11: "1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Cf. also ICCPR, *supra* n.25, Art. 14: "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. . . . 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. . . . 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Cf. also *id.*, Art. 15: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

⁴¹² Constitution of Tibet, Art. 20: "All Tibetans, men and women, who have attained the age of eighteen and above shall have the right to vote. The vote shall be personal, equal, free, and secret, and its exercise shall be deemed to be a civic obligation."

Id., Art. 22: "All Tibetans of either sex shall have the right to hold public offices, whether elective or otherwise, on conditions of equality in accordance with the requirements of law."

See also Charter of the Tibetans in Exile, Art. 12: "Unless disqualified by law, all Tibetans who have

and the right to hold property.⁴¹³ Perhaps most importantly, it guarantees the availability of an effective remedy for violations of the rights secured by it.⁴¹⁴

[¶5-121] The constitutional reforms currently underway with respect to the tentative constitution for a free Tibet and already partially implemented in Dharamsala by the Government-in-Exile represent the further democratic evolution of Tibet.⁴¹⁵ The Cabinet (Kashag) is now

attained the age of 18 and above shall have the right to vote and all Tibetans who have attained the age of 25 and above shall have the right to stand for nomination."

Cf. UDHR, supra n.66, Art. 21: "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Cf. also ICCPR, supra n.25, Art. 25: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country."

⁴¹³ Constitution of Tibet, Art. 19: "No person shall be deprived of his property save by authority of law and for public purpose on payment of just compensation." But see id., Art. 25(1): "All land shall belong to the State"

Cf. UDHR, supra n.66, Art. 17: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

⁴¹⁴ Constitution of Tibet, Art. 24: "Every citizen whose rights and freedoms as set forth in this Chapter are violated shall have the right to approach the Supreme Court, Regional Courts and such other courts as the National Assembly may by a law designate for the enforcement of those rights and freedoms enumerated in this Chapter and the court shall be entitled to pass such orders as are necessary to protect those rights."

See also Charter of the Tibetans in Exile, Art. 14: "Every Tibetan whose rights and freedoms as set forth in the aforesaid Articles are violated, except during an emergency situation, shall have the right to approach the Tibetan Supreme Justice Commission and all Tibetan Local Justice Commissions which are entitled to issue such orders as are necessary to protect those rights and duties."

Cf. UDHR, supra n.66, Art. 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."

Cf. also ICCPR, supra n.25, Art. 2(3): "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

⁴¹⁵ "Congressional Staff Trip Report on Tibetans in Exile," 138 Congressional Record 119 at S12732-S12737 (12 August 1992) ("Congressional Staff Report") at S12733: "Currently, the Dalai Lama remains the temporal and spiritual leader of the Tibetan nation. However, in 1991, the Dalai Lama called for the promulgation of new constitutions, one for the government-in-exile and one for the government of a free Tibet. The charter governing the exile community has been ratified by the Assembly [of People's Deputies] and the constitution for a free Tibet is currently being drafted in consultation with Tibetans in Tibet. Tibetans in exile and constitutional scholars in India and abroad. The Dalai Lama has proposed a charter

popularly elected,⁴¹⁶ whereas it was formerly appointed by the Dalai Lama;⁴¹⁷ the legislature now oversees the actions of the executive;⁴¹⁸ and an independent judiciary is emerging.

[¶15-122] The actual conduct of the Tibetan Government-in-Exile amply demonstrates that government's willingness to observe these constitutional guarantees in practice. From its beginnings in elections held among the refugees in 1960 (before the Tibetan Constitution had even been promulgated),⁴¹⁹ that government has outgrown its early practice of having legislators serve as executive officers and begun holding primary elections.⁴²⁰ An opposition party, the Tibetan Youth Congress, developed and holds a substantial share of governmental positions.⁴²¹ In short, "the Tibetans in exile have furnished proof that they are able to take their fates into their own hands. They are the best-organized exile nation in the world. They have combined their traditional values with modern education in such a way that they benefit from both. Politically, the exile government is a functioning democratic government."⁴²²

which substantially limits the authority of the Dalai Lama. The Kashag also is no longer appointed, but is elected by the Assembly of People's Deputies. The Kashag is not required to be elected from the membership of the Assembly of People's Deputies, and the present Kashag has five members.

"As part of the reforms, the Assembly of People's Deputies has taken a much larger role in the governance of the exile community, including the careful review of the government budget and oversight of the CTA [Central Tibetan Administration]. Most importantly, the Assembly elects the Cabinet, and, for the first time, the Kashag is fully accountable to the Assembly. . . . A general fear exists among many Tibetans that the Dalai Lama is laying the groundwork for the eventual and complete phase-out of the traditional, temporal role of the Dalai Lama.

"Finally, the democratic reforms will result in the establishment of a functioning, independent judiciary within the exile community. Earlier this year, the first Chief Justice was nominated by the Dalai Lama and confirmed by the Assembly of People's Deputies. The Chief Justice is mandated, by the draft constitution and the acting government-in-exile charter, to establish an independent judiciary. As a judiciary-in-exile in India, its scope of power is currently limited."

⁴¹⁶ Charter of the Tibetans in Exile, Art. 21.

⁴¹⁷ Constitution of Tibet, Art. 30(1).

⁴¹⁸ Charter of the Tibetans in Exile, Arts. 52 and 101.

⁴¹⁹ Avedon, supra n.250, at 107.

⁴²⁰ Id. at 107-108.

⁴²¹ Id. at 110; Gyatso, supra n.214, at 240.

⁴²² van Walt van Praag, supra n.183, at 63.

See also Gyari, supra n.164, at 11-12 (footnote omitted): "The Tibetan Government in exile is currently making efforts to democratize while in exile and incorporate what they have learned living in democracies around the world into a new system for an independent Tibet. The Dalai Lama has called for any decisions that are made concerning the future of Tibet to be decided by the Tibetan people. Furthermore he has said that a new government in Tibet should incorporate Tibetans who have lived under Chinese control and who have suffered for their political and religious beliefs, Tibetan officials working in the Chinese bureaucracy, and those Tibetans who have made a contribution in exile over the last 43 years."

b. The People's Republic of China

[¶5-123: Summary of Part V.B.2.b] This section examines the claims made by the Tibetans of human-rights abuses committed by the People's Republic of China. After a discussion of various legal issues raised by the parties (¶¶5-124 through 5-134), this section turns to an extensive analysis of the evidence concerning the claims (¶¶5-135 through 5-167).

(I) The Claims

[¶5-124] The Tibetans claim that the People's Republic engages in arbitrary arrest and detention, torture, and murder, thereby violating numerous provisions of international law; that these abuses are directed at suppressing protected fundamental freedoms, and therefore violate numerous other provisions of international law; and that because the underlying purpose of this activity is to undermine the Tibetans' claim of self-determination, these abuses recall into question the legitimacy of the People's Republic as the government over the Tibetans. Adduced in favor of the third claim are also allegations that the People's Republic has implemented a policy of forced abortions and sterilizations of Tibetans.

[¶5-125] The People's Republic denies the factual assertions made; argues that because it has not ratified various international instruments, it is not bound to respect their provisions; asserts that matters of human rights lie within its domestic jurisdiction and are not appropriately raised in an international adjudicative forum; and claims that if the hierarchy of human rights is correctly viewed, its performance has been admirable.

(A) Legal Issues Raised by the Tibetans

[¶5-126] The first legal issue raised by the Tibetans is not disputed. It is beyond cavil that the acts of arbitrary arrest and detention, torture, and murder, if they have occurred as alleged, violate an array of international legal provisions. These provisions have been noted above. The second legal issue raised by the Tibetans also is not disputed. Acts which are themselves contraventions of international law and which are carried out in order to violate freedoms which are protected by international law plainly violate those provisions whose guarantees they are intended to breach, as well as those which render the acts unlawful. The provisions of international law which protect the freedoms relevant here have also been noted above.

[¶5-127] The third legal argument raised by the Tibetans is correct. As discussed in ¶¶ 3-44 through 3-47 above, the legitimacy of a government depends upon its originating in and continuing as an authentic manifestation of the governed people's exercise of self-determination. As discussed in ¶¶ 4-10 through 4-11 above, although human rights abuses are generally matters relating to the assessment of outcomes likely to arise from alternative resolutions of self-determination claims, a challenge to a government's legitimacy can be based on any pattern of human rights abuses calculated to undermine a group's claim of self-determination. The Tibetans claim that the People's Republic's conduct constitutes such a pattern. If this claim is borne out by the evidence, the People's Republic is an illegitimate government over the people of Tibet.

(B) Legal Issues Raised by the People's Republic of China

[¶5-128] The first legal argument made by the People's Republic is erroneous. It is true that the People's Republic has ratified neither the International Covenant on Economic, Social and Cultural Rights nor the International Covenant on Civil and Political Rights; but it has joined the

Cultural Rights nor the International Covenant on Civil and Political Rights; but it has joined the United Nations, thereby binding itself to the provisions of the Universal Declaration of Human Rights, G.A. Res. 217A (III) of 10 December 1948; and it has acceded to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴²³ Thus, this argument can have no application to rights guaranteed or conduct prohibited by the latter instruments.

[15-129] In addition, the People's Republic acceded on 29 December 1981 to the International Convention on the Elimination of All Forms of Racial Discrimination,⁴²⁴ which requires it "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation[.]"⁴²⁵ Article Five of that treaty specifies numerous rights that may not be infringed on racial grounds, notably for present purposes, the right to security of person and protection from bodily harm,⁴²⁶ the right to freedom of opinion and expression,⁴²⁷ and the right to freedom of peaceful assembly and association.⁴²⁸ Therefore, the People's Republic is bound not to violate those rights in racially discriminatory ways. The Tibetans claim that the People's Republic's human-rights abuses are racially motivated.

[15-130] More importantly, however, at least the fundamental rights accorded by the International Covenants have become customary international law, and are therefore binding on the People's Republic even without its ratification of those instruments.⁴²⁹

⁴²³ Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1989 (United Nations, New York 1990).

See also Permanent Tribunal of Peoples, supra n.153, at 17: "The Chinese government adhered on October 4, 1988, to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment [or Punishment]. Thus, the Chinese government violates international obligations it has assumed by failing effectively to stop torture and mistreatment and to prevent and sanction those responsible."

The People's Republic, when it acceded to the Convention, declared that it did not consider the Committee Against Torture competent to conduct investigations or make reports pursuant to Article 20, and that it would not be bound by Article 30(1), which provides for arbitration and reference of disputes to the International Court of Justice. (Human Rights: A Compilation of International Instruments (United Nations, New York 1988) at 231.)

⁴²⁴ Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1989 (United Nations, New York 1990).

⁴²⁵ Art. 1(1)(a).

⁴²⁶ Art. 5(b).

⁴²⁷ Art. 5(d)(viii).

⁴²⁸ Art. 5(d)(ix).

⁴²⁹ See Permanent Tribunal of Peoples, supra n.153, at 17-18: "The Chinese government has tried to argue that, in any event, it is not violating the rules of international law inasmuch as it has not ratified the relevant international conventions, and notably the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights.

"The Permanent People's Tribunal understands that international rules bind only the states that have ratified them. However, the international treaties on human rights include, among others, principles and rules

[¶15-131] The second legal argument made by the People's Republic⁴³⁰ is also erroneous. As pointed out in footnote 85 above, an investigation by the United Nations into a situation within a state does not constitute an intervention into that state's domestic jurisdiction. Therefore, if the Sino-Tibetan dispute is investigated under the auspices of the United Nations, that investigation infringes no cognizable interest of the People's Republic. Moreover, as discussed in ¶¶ 3-60 through 3-62 above, intervention into a nation's domestic jurisdiction is justified by that nation's violations of human rights. Therefore, even if the Sino-Tibetan dispute is investigated and adjudicated by a body other than the United Nations, any intervention into the People's Republic's

tending to assure the physical and moral integrity, and the dignity and freedom of opinion of human beings, which are principles accepted by all humanity following historic struggles of the peoples of the world.

"The fundamental human rights principles must today be deemed rules of customary international law whose application is demanded by all humanity. That is why the Tribunal deems that the Chinese government, in violating the fundamental rights of the Tibetans, violates its obligations under international law."

Customary law binds all nations except those which have persistently objected to the development of the customary norm. North Sea Continental Shelf Cases, 1969 I.C.J. 3, 41-44 (1969); Restatement of Foreign Relations Law (American Law Institute 1987) § 102 Comment d.

To become customary international law, a norm must be generally, but not necessarily universally, recognized. Restatement § 102 Comment b. If the norm is recognized, it need not be adhered to in order to become customary law. Filartiga v. Pena-Irala, United States Court of Appeals, 630 F.2d 876, 884 n. 15 (2d Cir. 1980): "The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."

Treaties and the actions (especially Resolutions and Declarations) of international organizations are authoritative sources of customary international law. Filartiga, 630 F.2d at 881-884; Coliver and Newman, Using International Human Rights Law to Influence United States Foreign Population Policy: Resort to Courts or Congress?, 20 N.Y.U. J. Int'l L. & Politics 53, 64-65 (1987).

⁴³⁰ Amnesty International, supra n.159, at 15: "On 1 November 1991, the State Council of the PRC issued a 40,000-word document entitled Human Rights in China for the stated purpose of 'helping the international community to understand the human rights situation as it is in China.' . . .

"The document argues that human rights is an issue which 'falls by and large within the sovereignty of each country' and that a country's human rights situation should not be judged in disregard of its history and social, economic and cultural conditions."

See also "National Seminar Condemns 'Human Rights Diplomacy,'" BBC Summary of World Broadcasts 5 November 1992 (from Renmin Ribao 18 October 1992 at 3): "[T]o get to the heart of the matter, human rights constitute a problem which falls in the domain of a country's sovereignty, because the subject of international law is a sovereign country, and the UN is not a supra-national organization."

See also Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 7: "For a long time, certain international forces have supported and connived with a small number of Tibetan separatists in their activities aimed at separating Tibet from China. They cook up rumours, invent stories and wantonly attack and vilify the Chinese Government. The resolution on so-called 'Situation in Tibet' [Sub-Commission Resolution 1991/10] is part of their long-planned conspiracy aimed at splitting China and constitutes an interference in China's internal affairs by using the human rights issue. the resolution goes against the principles of respecting State sovereignty and non-interference in the Charter of the United Nations and international law. Therefore it is entirely illegal and null and void, and absolutely unacceptable to the Chinese Government."

See also Office of Tibet, supra n.247, at 6: "In the case of Tibet, China has characterized expressions of concern over human rights abuses as 'interference' in its 'internal affairs.' Tibetans do not accept this characterization, for we do not accept that China has sovereignty over Tibet, but rather view its regime as one of illegal occupation."

domestic jurisdiction is justified by the nature of the claims.

[¶5-132] The third legal argument made by the People's Republic is also erroneous. The People's Republic argues that "the right to subsistence and the right to development are the first and foremost human rights" ⁴³¹ Although it is true that "the hungry cannot talk about freedom, and the chanting of 'democracy' cannot give the people their rights of subsistence and development," ⁴³² the People's Republic misstates the applicable law. First, the right of self-determination is the right to subsistence and development, but it is the right to free economic, social and cultural development. ⁴³³ Thus, the goals of subsistence and development cannot be set up as if in opposition to the right of self-determination, because they are constituent elements of that right.

[¶5-133] Second, self-determination is a prerequisite to the enjoyment of human rights. ⁴³⁴ Therefore, other human rights, even those as fundamental as subsistence and development, cannot take precedence over the right of self-determination. Indeed, the People's Republic's governance of Tibet abundantly demonstrates that unless a governed people is allowed to exercise its right of self-determination, its government can effectuate some of the governed people's human rights only by suppressing others.

[¶5-134] Third, many of the human rights alleged to have been violated by the People's Republic are non-derogable rights. ⁴³⁵ Thus, even in case of a "public emergency which threatens

⁴³¹ BBC Summary of World Broadcasts, 5 November 1992 (quoting "National Seminar Condemns 'Human Rights Diplomacy'," in Renmin Ribao 18 October 1992).

⁴³² Id.

⁴³³ See e.g., ICCPR and ICESCR, supra n.25, common Art. 1(1); Declaration on Independence, supra n.25, ¶ 1.

⁴³⁴ G.A.Res. 637 A (VII); accord Charter of the United Nations, Art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among states based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms"; 10 U.N. GAOR, Annexes, Agenda Item No. 28(11), 14 U.N. Doc. /2829 (1955): "prerequisite to the enjoyment of all the rights and freedoms of the individual"; Cristescu, supra n.31, at ¶ 256: "The universal realization of the right of peoples to self-determination is of great importance for the effective guarantee and observance of human rights"; H. Gros Espiell, supra n.28, at ¶ 59: "Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings."

⁴³⁵ See ICCPR, supra n.25, Art. 4: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

"2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

Articles 6, 7, 8, 11, 15, 16, and 18 guarantee, respectively, the right to life, the freedom from torture, the freedom from slavery, the freedom from imprisonment for failure to fulfill a contractual obligation, freedom

the life of the nation,"⁴³⁶ people may not be extrajudicially executed, tortured, or denied the equal protection of the laws. These are among the allegations made, so the People's Republic's legal contention is incorrect.

(II) Evidence Concerning the Claims

[¶15-135: Summary of Part V.B.2.b.(II)]

This section examines the evidence concerning the Tibetans' allegations of arbitrary arrest (¶¶15-137 through 5-141), torture (¶¶15-142 through 5-148), extrajudicial execution (¶¶15-149 through 5-155), and forced abortion and sterilization (¶¶15-156 through 5-161). This section then revisits the legitimacy, in light of these claims, of the People's Republic as the government over the Tibetans (¶¶15-162 through 5-168).

[¶15-136] This section concludes that the Tibetans have made a prima facie showing of their claims with respect to arbitrary arrest and detention, torture, and extrajudicial execution, and that the People's Republic has failed to rebut these claims; that the policies of arbitrary arrest and detention, torture, and extrajudicial execution are calculated to undermine the Tibetans' claim of self-determination; that even if the policy of forced abortion and sterilization, standing alone, is not so calculated, the combination of that policy with the policy of population transfer is so calculated; and that although the evidence is inconclusive on whether the People's Republic has undertaken any of the policies here discussed with genocidal intent, at least the policy of torture violates a norm of jus cogens, thereby making the People's Republic an illegitimate government over the Tibetan people.

(A) Arbitrary Arrest and Detention

[¶15-137] The People's Republic of China takes people into custody without charge under a regime known as "shelter and investigation"⁴³⁷ and detains them without trial under a regime known as "re-education through labor."⁴³⁸ This is the essence of arbitrary detention -- arrest

from punishment under ex post facto laws, and the right to equality before the law.

⁴³⁶ Id., Art. 4(1).

⁴³⁷ Amnesty International, supra n.159, at 18: "Many of those detained in mass arrest operations appear to have been kept in custody under regulations on 'shelter and investigation', a form of detention imposed by the police to detain suspects without charge or trial."

⁴³⁸ Id. at 34: "The detainees under detention orders are not tried, they do not have the right to be assisted by a lawyer or to present a defence before the Committee [for the Management of Re-education through Labour]."

Id. at 18: "Detainees who are not tried receive terms of administrative detention known as re-education through labour', without charge or trial, after being taken into custody for 'shelter and investigation'."

Id. at 31: "An article in the official China Legal News in 1985 described 're-education through labour' as an administratively determined punishment imposed for acts falling 'between crime and error', that is neither minor public order offenses nor crimes listed in the criminal law."

Id. at 33: "'Re-education through labour' is defined in Article 2 of the Decision [of the State Council of the People's Republic of China on the Question of Re-education Through Labour, promulgated 3 August 1957] as 'a measure of a coercive nature for carrying out the education and reform of persons receiving it. It is also a method of arranging for their getting employment.' The Decision avoids the use of the terms 'arrest', 'offender', and 'confinement' for those detained under its provision. In the official terminology, they are 'summoned' by the police and not 'arrested', they 'receive' 're-education through labour' instead of being

without charge and detention without trial.⁴³⁹

[¶15-138] The People's Republic bases these arrests and detentions, in many cases, on conduct which is nothing more than peaceful expression of political views.⁴⁴⁰ The most common cause for arrest, as has been reported by the Special Rapporteur on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,⁴⁴¹ is having participated in demonstrations protesting the People's Republic's occupation of Tibet

'confined' or 'sentenced' and, unlike convicted criminal offenders, at the end of their term of 're-education' they are not 'released' but simply 'dismissed'."

⁴³⁹ See ICCPR, Art. 9 (quoted in n. 405, *supra*).

⁴⁴⁰ See Amnesty International, *supra* n.159, at 18: "Hundreds of Tibetans have been detained in the past five years for periods ranging from a few months to three years for taking part in peaceful political activities or because they were suspected of otherwise supporting Tibetan independence. . . . "After martial law was lifted in May 1990, arrests continued: those detained included participants in demonstrations, people accused of possessing illegal literature, people who wanted to travel to Nepal or who had returned from trips abroad and people accused of gathering information about political detainees."

See also United States House of Representatives, Congressional Human Rights Caucus, Letter to Premier Li Peng Zongli (14 August 1992) ("Human Rights Caucus") at 2: "We consider all of these monks and nuns to be prisoners of conscience -- people who have been imprisoned solely for peacefully expressing their views. We therefore call for the immediate and unconditional release of these peaceful protestors."

See also International League for Human Rights, Submission Pursuant to Resolution 1991/10 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at 2: "Between three to [sic, and] four thousand Tibetan nationalists are believed to have been detained since September 1987. Most Tibetan political prisoners are imprisoned because of their advocacy of Tibetan independence from China or for proclaiming allegiance to the Dalai Lama. The majority of those arrested whose charges have been published by the Chinese government have been detained for non-violent activity in support of Tibetan independence, such as 'splittist' activities, 'disseminating counter-revolutionary propaganda,' or participating in 'underground reactionary organizations.'"

See also LAWASIA and Tibet Information Network, *supra* n.327, at 39 (footnote omitted): "Counter-revolution is defined in the PRC Chinese Criminal Law as acts 'committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system'. In practice this usually means expressing opposition to the rule of the Communist Party or to the prevailing Marxist-Leninist-Mao Zedong state philosophy. The specific offences include:

- organising or leading a counter-revolutionary group (article 98);
- 'through counter-revolutionary slogans, leaflets or other means, propagandising for and inciting the overthrow of the political power of the dictatorship of the proletariat and the socialist system', or 'inciting the masses to resist or sabotage the implementation of the state's laws or decrees' (article 102);
- colluding with foreign states to harm the sovereignty or territorial integrity of 'the motherland' (article 91);
- organising or using 'feudal superstition or superstitious sects and secret societies to carry on counter-revolutionary activities' (article 99).

"The death penalty may be imposed for all counter-revolutionary offences except counter-revolutionary propagandising (article 102) or organising or leading a counter-revolutionary group (article 98)."

⁴⁴¹ U.N. Doc. E/CN.4/1990/46 at 10-11 ¶ 35.

and demanding independence.⁴⁴² People have also been arrested on suspicion of having participated in such demonstrations.⁴⁴³

[15-139] Other causes of detention include shouting slogans favoring Tibetan independence,⁴⁴⁴ hanging posters advocating the same or criticizing Chinese policies,⁴⁴⁵ criticizing Chinese policies

⁴⁴² See Tibet Information Network, *supra* n.156, at 9: "The Tibetan Government in Exile reported last week that 8 monks were still in custody in the Eastern Tibetan town of Ngapa after a protest march on 1st May staged by monks from Kirti Gonpa, the largest monastery in Tibet, housing over 1,500 monks."

See also *id.* at 5: "There are 25 women, aged between 18 and 45, held for political offences at Drapchi, situated 3 km north of Lhasa and officially known as Tibet Autonomous Region Prison No 1. They are the only women political prisoners to have received court sentences; at least 50 other women political activists are held without charge or in administrative detention centres."

"The sentences of the women range from three years to nine years, with an average of 5.5 years, almost all imposed for taking part in tiny pro-independence demonstrations since 1987, each involving less than a dozen women."

See also International Association of Educators for World Peace, U.N. Doc. E/CN.4/Sub.2/1989/NGO/11 at 2: "The causes of detention are: having participated in demonstrations"

See also LAWASIA and Tibet Information Network, *supra* n.327, at 21: "With two exceptions, every demonstration in Lhasa over the last three years has been broken up by Chinese security forces. The participants have been arrested, often with considerable violence. On six days, 1st October 1987, 5th March 1988, 10th December 1988 and 5th-7th March 1989, security forces fired directly into demonstrating crowds, killing and wounding Tibetans."

⁴⁴³ International Association of Educators for World Peace, *supra* n.442, at 2: "The causes of detention are: having participated in demonstrations; being suspected of having participated although not having done so"

⁴⁴⁴ Particularly noteworthy is the case of Jigme Zangpo, described in Tibet Information Network, *supra* n.156, at 11: "The prisoner, a 63-year old primary school teacher named Jigme Zangpo, spent fifteen years in prison from 1960 for not punishing a child who had written an anti-Mao slogan on the wall of the school toilet."

* * *

"The prisoner has had his current 19 year sentence increased to 27 years because he shouted out a sentence calling for support of the Dalai Lama while three Swiss diplomats were inspecting conditions in the prison last year."

* * *

". . . In 1984 he is believed to have received a 15 year sentence for shouting slogans criticising the Chinese leader Deng Xiaoping a year earlier. In 1987 or soon after he received an additional sentence of four years for shouting pro-independence slogans inside the prison."

"By the time he staged his 1991 protest he had been in prison for so long that a leading human rights organisation in the west had closed their files on his case, assuming that he had [] either died or been released several years earlier."

⁴⁴⁵ See *id.* at 12: "The appeal, [issued by the Tibetan Government-in-Exile and] dated 28th April 1992, names the three farmers . . . who were arrested in March for putting up posters supporting Tibetan 'separatists'."

See also *id.* at 8-9: "At least 69 arrests have taken place this year in county towns, small villages and remote Tibetan monasteries where monks and laypeople have put up pro-independence posters, according to unofficial sources in Lhasa."

See also Amnesty International, *supra* n.159, at 28 (quoting Radio Lhasa): "Deliberately planning to form counter-revolutionary organisations, putting up posters, spreading rumours and collecting information,

in any other fashion,⁴⁴⁶ speaking to anyone (especially foreigners) about independence,⁴⁴⁷ possessing illegal literature⁴⁴⁸ or the Tibetan flag,⁴⁴⁹ gathering or disseminating information

they frenziedly conducted criminal activities to split the motherland"

See also International Fellowship of Reconciliation, supra n.327, at 3 ¶ 12: "People have been arrested for writing political posters"

See also LAWASIA and Tibet Information Network, supra n.327, at 42: "Thousands of posters and leaflets calling for a free Tibet and criticising Chinese policies are being hand written or reproduced on woodblocks, and distributed in many Tibetan areas of the PRC. Tibetans arrested for such activities are now almost always sentenced to prison or labour camp."

⁴⁴⁶ See Human Rights Advocates, supra n.157, at 7: "Yulu Dawa Tsering was arrested in late 1987 for discussing Tibetan independence and criticizing Chinese policies; his sentence is ten years in prison."

⁴⁴⁷ See Asia Watch, supra n.156, at ¶ 5: "Others have been arrested for trying to speak to foreigners about independence. Palden Gyatso, 57, is currently serving an eight-year term for passing a written appeal for independence to a group of 13 foreign journalists visiting Lhasa in 1983. He was sentenced in April 1984."

See also Human Rights Advocates, supra n.157, at 7: "Yulu Dawa Tsering was arrested in late 1987 for discussing Tibetan independence and criticizing Chinese policies; his sentence is ten years in prison."

See also International Association of Educators for World Peace, supra n.442, at 2 ¶ 3: "The causes of detention include . . . speaking to foreigners. For example, the Rev. Yulu Dawa Tsering, lecturer in philosophy at Tibet University, was arrested for statements made in private conversation at home with a foreign guest."

See also LAWASIA and Tibet Information Network, supra n.327, at 44: "Recently, sources in Lhasa report the arrest of some Tibetans who have been caught talking to foreign tourists about the independence issue."

⁴⁴⁸ See Amnesty International, supra n.159, at 27-29: "At a mass sentencing rally held on 30 November 1989, the Lhasa Intermediate People's Court publicly announced prison sentences pronounced against the 10 monks. The sentences ranged from 5 to 19 years' imprisonment; the monks had been charged with 'counter-revolutionary' crimes related to their advocacy of Tibetan independence.

* * *

"Among the 'reactionary literature' that the Group was accused of printing, was a complete Tibetan translation of the Universal Declaration of Human Rights. The other documents they published included reports on recent dissident activity in Tibet and on Tibetans shot and killed by policy at a pro-independence demonstration, reports about support Tibetan pro-independence activists are receiving from abroad and a detailed summary of a statement on human rights violations in China made in the USA House of Representatives in April 1989."

See also id. at 18: "After martial law was lifted in May 1990, arrests continued: those detained included . . . people accused of possessing illegal literature"

See also Human Rights Advocates, supra n.157, at 7: "In Spring of 1989 Tseten Norgye was arrested in Lhasa after police searched his house and found a mimeograph machine allegedly used to print literature advocating independence. He was sentenced to four years' imprisonment."

See also International Association of Educators for World Peace, supra n.442, at 2 ¶ 3: "The causes of detention are: . . . possessing . . . information considered to be critical of Chinese rule in Tibet or in favour of political nationalism"

See also LAWASIA and Tibet Information Network, supra n.327, at 43 (footnotes omitted): "Because much of the unrest in Tibet is blamed on infiltration by 'agents' of the Dalai Lama, the authorities have made a concerted effort to proscribe and intercept almost any audio, visual or written material being brought into Tibet, particularly if it is written by, or refers to, the Dalai Lama. One list of names seized by border customs officials between 1986 and 1989 includes the Dalai Lama's autobiography, 'My Land and My People', a book of 'Sayings of the Dalai Lama' and a study called 'The Meaning of the Flag of Tibetan Independence'."

regarding human rights abuses in Tibet,⁴⁵⁰ and writing letters to the United Nations.⁴⁵¹ [¶5-140] That these practices violate international law, including the Universal Declaration of Human Rights, by which the People's Republic would be bound even were the Declaration not customary international law, is beyond dispute:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴⁵²

⁴⁴⁹ Tibet Information Network, *supra* n.156, at 9: "In Qinghai province Tibetan activists are reported to have climbed a local Government building and replaced the Chinese flag with the illegal Tibetan national flag. The incident . . . took place in December last year in the county town of Rekong, called Tongren by the Chinese, 300 kilometres north of Ngapa."

⁴⁵⁰ See Human Rights Advocates, *supra* n.157, at 9-10: "There is also evidence of retaliation against Tibetan human rights monitors. In September 1989, Tibetan Ngodup was sentenced to 11 years' imprisonment and four years' deprivation of political rights for collecting what appears to be basic human rights data. More recently, Tibetan doctor Jampa Ngodrup was sentenced to 13 years in prison for collecting the names of persons arrested or injured during two independence demonstrations in Lhasa in 1988. Because this information was allegedly gathered for dissemination outside Tibet, the doctor was charged with 'stealing or secretly gathering or providing intelligence for an enemy.'"

See also *id.* at 10: "The PRC regulates the flow of information in and out of Tibet by . . . treating certain information-gathering as 'espionage'; criminalizing political dissent and the expression of independence sentiments; and suppressing peaceful demonstrations with excessive, sometimes lethal, force."

See also LAWASIA and Tibet Information Network, *supra* n.327, at 44 (footnotes omitted): "Tibetans . . . who collect information about conditions in Tibet and try to forward it to the Tibetan Government-in-Exile or western human rights groups, are particularly at risk. Ngodup . . . a 37 year old member of the CPPCC, was sentenced on 12th Sept[em]ber to 11 years imprisonment plus 4 years deprivation of political rights for collecting what appears to have been basic human rights data. He was accused of obtaining from a Sera monk a list of casualties during the March 1989 demonstrations and of collecting information about the 'so-called thought trends of the people'. Because he allegedly sent this information to the Tibetan Government-in-Exile, Ngodup was convicted of working as a 'spy sent by the Dalai lama clique'."

See also Asia Watch, *supra* n.156, at ¶ 4: "Several Tibetans are serving prison sentences for trying to pass human rights information on to foreigners. One of them, Jampa Ngodrup, 45, a doctor . . . in Lhasa, was detained on October 20, 1989 and formally arrested on August 13, 1990. He was accused of having, at the end of 1988, arranged for a colleague to collect a list of all those arrested during the March 5, 1988 in Lhasa. He then allegedly passed the list to a Tibetan woman whom the trial documents describe as a 'foreign resident.' The woman, in turn, gave Jampa Ngodrup a list of those injured and arrested in the December 10, 1988 protests, which he copied. He was accused of being a foreign agent and sentenced on December 24, 1990 to thirteen years in prison."

See also Amnesty International, *supra* n.159, at 24-25 (brackets in original): "The following are excerpts of the Lhasa Municipal Intermediate Court verdict on the case of Jampa Ngodrup: '. . . In the opinion of this court, defendant Jampa Ngodrup, harbouring counter-revolutionary intent, compiled a list of people detained in the disturbances and passed them on to others, thus undermining the law and violating the [laws of] secrecy.'"

⁴⁵¹ International Fellowship for Reconciliation, *supra* n.327, at 3 ¶ 12: "People have been arrested for . . . writing letters addressed to the United Nations."

⁴⁵² UDHR, *supra* n.66, Art. 19.

Cf. ICCPR, *supra* n.25, Art. 19: "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive

[¶15-141] The People's Republic flatly denies engaging in arbitrary arrest and political imprisonment,⁴⁵³ but the overwhelming weight of the evidence is to the contrary.⁴⁵⁴ The

and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

⁴⁵³ See, e.g., Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 25-26.

⁴⁵⁴ Besides the authorities already cited, see Amnesty International, *supra* n.159, at 15-16: "On 1 November 1991, the State Council of the PRC issued a 40,000-word document entitled Human Rights in China for the stated purpose of 'helping the international community to understand the human rights situation as it is in China.' . . .

* * *

". . . It states that the judiciary is independent and describes in detail the procedures provided by Chinese law for the criminal process, from arrest to trial, but it does not make any comment on the practical implementation of the law. It neither mentions the numerous human rights violations resulting from abuses of the law or malpractice by officials, nor acknowledges that human rights violations result from the use of legislation aimed at curbing dissent or political opposition. . . .

". . . It says: 'ideas alone, in the absence of action which violates the criminal law, do not constitute a crime; nobody will be sentenced to punishment merely because he holds dissenting political views. So-called political prisoners do not exist in China.' It further argues that 'counter-revolutionary crimes' are crimes which endanger state security and which are punishable under the Chinese criminal law. Such kinds of criminal acts endangering public security, it says, are punishable 'in any country'.

"Whereas the document asserts that people in China are not sentenced to punishment merely for holding dissenting views, Amnesty International has documented many cases of prisoners of conscience, in Tibet and elsewhere, sentenced to long terms of imprisonment where their only 'action which violated the criminal law' was to peacefully express their views, either in public or in private among groups of friends. In the latter case, they were invariably convicted of 'organising a counter-revolutionary [p] group', whereas those expressing dissenting views in public were usually charged with 'carrying out counter-revolutionary propaganda or incitement'."

See also Tibet Information Network, *supra* n.156, at 19: "Harry Wu, who spent 19 years in Chinese labour camps, and published a major study of the prison system in May this year, described the White Paper as 'a lie'."

See also Bernard Levin, "Selling Out Hong Kong," The Times (London 5 November 1992): "I must turn to a document [the 1992 White Paper] so vile and dishonest that it is difficult to believe that it was written by a human being, rather than the mad scientist of fiction.

"It is a paper drawn up in China's 'Information Office', and the suffocating ritualised clichés, the barefaced lying, the prose made of cheap cardboard, the monstrous inversion of the truth, the entire absence of anything that can be called real [--] these qualities run through every sentence of the 22 crammed pages."

See also International Committee of Lawyers for Tibet, *supra* n.28, at 7 (footnote omitted): "It is estimated that one in every ten Tibetans has been imprisoned at some time, and that at the close of the 1970's, at least, there were 100,000 still interred in labor camps."

See also Gyari, *supra* n.164, at 6 (footnotes omitted): "Asia Watch and the Tibet Information Network have confirmed, by name, over 360 Tibetan political prisoners who languish in prisons, detention centers, and labor reform camps in Tibet. There are probably 3 to 4 times more than that whose names are not confirmed. A recent fact finding trip by the International Campaign for Tibet documented thirteen of these facilities on the Tibetan plateau, including all four of the main detention facilities in the Lhasa valley."

See also LAWASIA and Tibet Information Network, *supra* n.327, at 31 (footnote omitted): "The rule of law in Tibet is subordinate to the higher political goal of defeating the perceived 'conspiracy' to 'split the motherland'. Everyone involved in the administration of justice in Tibet has been mobilised to 'go after the criminal elements to make them run like rats'. Legislative provisions protecting due process are therefore only observed to the extent that the political struggle is not hindered."

People's Republic refuses to allow independent investigation of the allegations. The Tibetans having established a prima facie case that the People's Republic engages in systematic arbitrary arrest and detention in order to suppress the expression of political views, and the People's Republic having failed to rebut that claim, the Tibetans' claim must be taken as established.

(B) Torture

[15-142] Reports of torture of Tibetans by the People's Republic date back to the 1950 invasion, and they persist to this day. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on the Question of the Human Rights of All Persons Subjected to Detention or Imprisonment, has repeatedly noted violations by the People's Republic in Tibet of the right to be free from torture.⁴⁵⁵ The Special Rapporteur has also repeatedly made specific inquiries of the People's Republic concerning named persons and incidents. The People's Republic's responses have not addressed the named persons or incidents, but have been couched in platitudes.

[15-143] On 10 June 1988, for example, the Special Rapporteur requested information from the People's Republic concerning eleven named arrestees reportedly tortured in October 1987, one named arrestee reportedly tortured in December 1987, and 23 named of a total of 840 arrestees reportedly tortured in March 1988.⁴⁵⁶ The People's Republic's Response of 21 July 1988 did not mention any of the individuals named in the Special Rapporteur's inquiries. Instead, it proclaimed that the "riots in Lhasa"⁴⁵⁷ were "organized by a few separatists at home in collusion with those abroad."⁴⁵⁸ It also claimed that only 200 persons had been arrested, and that those had been given "humanitarian treatment and there had been no maltreatment or torture."⁴⁵⁹

[15-144] Similarly, on 3 November 1988, the Special Rapporteur sought information regarding 10 named individuals reported to have been tortured after arrest. It was reported that one had died from torture, that two were blinded and had their spines broken, and that two were kept standing for fourteen days and then hung in the air for two days and two nights.⁴⁶⁰ The People's Republic's response again did not mention any of the individuals named in the Special Rapporteur's inquiry. Instead, it claimed that the People's Republic had "verified that all those detained had been treated strictly in accordance with the law, and no cases of torture and ill-treatment had been found."⁴⁶¹ The People's Republic also asserted that only 200 persons had been arrested in September 1988, and claimed, oddly, that this is what its previous reply had said.⁴⁶² Its previous

⁴⁵⁵ U.N. Docs. E/CN.4/1991/17, E/CN.4/1990/17, and E/CN.4/1989/15.

⁴⁵⁶ U.N. Doc. E/CN.4/1989/15 at 6 ¶ 25.

⁴⁵⁷ Id. at 7 ¶ 28.

⁴⁵⁸ Id.

⁴⁵⁹ Id.

⁴⁶⁰ Id. at 7 ¶ 26.

⁴⁶¹ Id. at 7 ¶ 29.

⁴⁶² Id.

reply was dated before September 1988,⁴⁶³ and it putatively described events that had occurred months earlier.

[15-145] In 1990, the Committee Against Torture reviewed the People's Republic's first periodic report, found it inadequate, and required supplementation, particularly on conditions of detention.⁴⁶⁴ The People's Republic, however, claims that it, "with the earnest and responsible attitude, has given timely, comprehensive and detailed replies and clarifications to different kinds of inquiries and accusations transferred to us through the United Nations Centre for Human Rights, Special Rapporteurs as well as the Working Group on Communications."⁴⁶⁵

[15-146] The kinds of torture reported are as varied as the reports are manifold. The International Association of Educators for World Peace collected seventy-seven first-hand reports from Tibetans who had been imprisoned in Tibet between September 1987 and November 1988, and summarized them as follows:

They were routinely beaten at the time of detention, during interrogation sessions and at other times, with wooden clubs (sometimes with protruding nails), iron bars, pistol butts, tin mugs, ropes, chairs, leather straps and other objects.^[466]

⁴⁶³ Id. at 7 ¶ 28.

⁴⁶⁴ Katrina K. Morris and Andrew M. Scoble, "Tibet and the United Nations," in Kelly, Bastian, and Aiello, supra n.61, at 182.

⁴⁶⁵ Reply of the Permanent Representative of China to the United Nations Office at Geneva, U.N. Doc. E/CN.4/1992/37 at 5.

But see LAWASIA and Tibet Information Network, supra n.327, at 47 (footnote omitted): "The flow of first hand accounts of mistreatment in prison has been as consistent after China's ratification of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . as before."

⁴⁶⁶ Cf. Amnesty International, supra n.159, at 38-39: "In the evening of 5 March 1989 . . . several saw a Tibetan man being severely beaten and taken into custody by People's Armed Police or Public Security officers. . . . An eyewitness reported: 'The soldiers came, they grabbed a well-dressed man, who was about 45 or 50, out of an alley. He did not look like he was part of the demonstration but it is possible he was involved. He was pulled by about eight soldiers to right in front of our windows and thrown to the ground. Then several of them started kicking him in the head from which much blood flowed. About 40 soldiers from the People's Armed Police stood around him and watched as two soldiers picked him up and one soldier took a two-foot long metal pipe and, swinging it like a baseball bat, smashed his left knee.'"

Cf. also id. at 40: "Tsechok, a monk interviewed outside the country in 1990, said he had been detained for his participation in the March 1989 demonstrations. He alleged: 'I was beaten at the time of my arrest. They first tried to tie me up with ropes from behind. I had to sit on the floor and they pressed into my back with their knees.'"

Cf. also id. at 40-41: "A 14 year-old Tibetan boy interviewed outside the country in October 1989, described his detention as follows: '. . . I got a very bad beating with clubs and rifle butts from the Chinese police.'"

Cf. also id. at 41 (brackets in original): "A 23 year-old Buddhist nun from Shungsep nunnery, interviewed in February 1991, alleged: '. . . During the demonstration we were all arrested. The Chinese security violently beat us up. After being handcuffed and manacled we were taken to Gatsu [detention centre] We were subjected to severe beating'"

Cf. also id. at 42: "Methods of torture reported by former detainees include . . . beatings inflicted with

Most prisoners also report being tortured with electric batons (also referred to as cattle prods). . . . In most cases, the batons were applied to the soles of the prisoner's feet, to the stomach, chest, neck, mouth and even the eyes. Women prisoners, particularly young nuns, have been stripped naked and had the electric batons forced into their vagina[s].^[467]

truncheons or rifle butts"

Cf. also id.: "Sonam Dolkar, 24, from Lhasa, was interviewed in Kathmandu, Nepal, on 16 September 1991. . . . She showed her interviewer a large scar on her chest, which she indicated was caused by the boot of a guard who kicked her."

Cf. also id. at 43 (brackets and second ellipsis in original): "Rinzen Kunsang, 27, from Nyemo District, a Buddhist nun from Shungsep monastery near Lhasa, was interviewed in 1988. . . . She said that, after a few days in detention: ' . . . Beatings occurred at every interrogation session. I had to put my head down towards the ground and raise my chuba [Tibetan robe] like this, with the under-trousers showing, then they beat me with a stick They hit so hard and so many times that the sticks frequently broke. During the beatings I often fainted."

Cf. also Amnesty International, People's Republic of China: Amnesty International's Concerns in Tibet (London December 1991) at 5: "The methods of torture most commonly reported include beatings"

Cf. also id. at 7: "In another case, a teenage girl from Lhasa whose name is being withheld to protect her and her family, was detained for over four months in 1989 for taking part in a demonstration in which groups of teenagers used slings to throw stones at members of the military police force in Lhasa. . . . She was reportedly kicked on the head and the body by four or five armed police officials She could not remember subsequent events for a few days but about three days after her first beating, she found that her left leg had become lame."

Cf. also International Committee of Lawyers for Tibet, supra n.28, at 10 (footnote omitted): "Prisoners have reported being stripped naked and beaten with a wide variety of objects, including rifle butts, electric cattle prods, and wooden clubs or paddles with nails driven through them."

Cf. also International League for Human Rights, supra n.440, at 8: "Frequently reported forms of torture and other mistreatment include severe beatings"

⁴⁶⁷ Cf. Amnesty International, supra n.159, at 40: "Tsechok, a monk interviewed outside the country in 1990, said he had been detained for his participation in the March 1989 demonstrations. He alleged: ' . . . Then I was beaten all over my body with a cattle prod approximately a metre long."

Cf. also id. at 40 (brackets and second ellipsis in original): "A 23 year-old Buddhist nun from Shungsep nunnery, interviewed in February 1991, alleged: ' . . . During the demonstration we were all arrested. The Chinese security violently beat us up. After being handcuffed and manacled we were taken to Gatsu [detention centre] We . . . were raped with electric cattle prods."

Cf. also id. at 42: "Methods of torture reported by former detainees include electric shocks inflicted with electric police batons similar to cattle prods and with electrical wire connected to generators"

Cf. also id. at 42: "Sonam Dolkar, 24, from Lhasa, was interviewed in Kathmandu, Nepal, on 16 September 1991. . . . She said her interrogators attached live electric wires to parts of her body, causing convulsions strong enough to render her unconscious. She also alleged that she received electrical shocks from an electric police baton applied to her body. She indicated that the baton had been introduced into her vagina."

Cf. also Amnesty International, supra n.466, at 5: "The methods of torture most commonly reported include . . . shocks with electric batons on the genitals, the soles of the feet or in the mouth"

Cf. also id. at 7: "In another case, a teenage girl from Lhasa whose name is being withheld to protect her and her family, was detained for over four months in 1989 for taking part in a demonstration in which groups of teenagers used slings to throw stones at members of the military police force in Lhasa. . . . She . . . reportedly . . . received electric shocks inflicted with an electric baton while [she was] lying on the floor. She could not remember subsequent events for a few days but about three days after her first beating, she found that her left leg had become lame."

* * *

Sometimes the prisoner is hung from his arms tied behind his back: the "airplane", very common all over China during the cultural revolution. Several detainees report dislocated shoulders from this practice.^[468]

Cf. also International Committee of Lawyers for Tibet, supra n.28, at 10-11 (footnote omitted): "Many prisoners have reported that electric batons were forced into their mouths."

Cf. also id. at 12 (footnotes omitted): "In a case reported by Amnesty International, two nuns in Gutsa prison had first rubber balls, then electric batons forced into their vaginas. Numerous cases have been reported in which electric batons were placed in women's private parts and in their mouths."

Cf. also International League for Human Rights, supra n.440, at 8: "Frequently reported forms of torture and other mistreatment include . . . application of electric shocks."

Cf. also id. (footnote omitted): "Accounts by nuns of their experience in prison, particularly in Gutsa, where treatment appears to be especially harsh, indicate that nuns have frequently . . . had electric batons inserted in their vaginas and/or rectums."

Cf. also LAWASIA and Tibet Information Network, supra n.327, at 50-51 (footnotes omitted): "Written and oral accounts by nuns of their experiences in prison, particularly in Gutsa, are strikingly consistent and indicate that nuns have been singled out for special treatment. Tortures apparently reserved for nuns include the use of dogs to bite prisoners; lighted cigarettes being applied to the torso and face, and the use of electric batons in the genitals."

"One 21 year old nun from Shungseb nunnery, who was imprisoned in 1988, recalled:

Upon my arrival at Gutsa prison I was stripped of all my clothes . . . even my socks were taken off. They Made me lie down on the ground and beat me with electric truncheons. They inserted the electric truncheons in my vagina, rectum and mouth.

"Another nun, arrested during a small demonstration on 17th April 1988, recounted:

11 people came up to me with two dogs . . . They beat me with belts and electric sticks and ropes and rifles continuously for one minute. Blood and white mucus came out of my mouth. I was conscious. At this moment two people grabbed me to try to make me get up but I could not get up, so they kicked me and stamped all over me from head to toe. Another two or three men touched my body all over with about 11 burning cigarettes, continuously for two hours. The Chinese used their belts so much that the metal buckles came off. They broke a chair over me. Then they had to stop for a rest because they were so tired. After that dogs bit me on the feet. Blood came out and my clothes were ripped."

Cf. also Office of Tibet, supra n.247, at 3: "Methods [of torture] include electric shocks applied to all parts of the body but especially the most sensitive (such as sexual organs, or the mouth) . . ."

⁴⁶⁸ Cf. Tibet Information Network, supra n.156, at 10 (first ellipsis in original): "A Tibetan prisoner says that he was hung from the ceiling of his cell for over a month after taking part in a prison protest last year, according to a personal statement by the prisoner, received in London last week.

"His statement conflicts with a 'White Paper' released by the Chinese Government on Tuesday, 11th August. The White Paper, 'Criminal Reform in China', describes Chinese prisons as 'a new type of socialist prison, where the prisoners are regarded as human beings . . . and where they receive fully humane treatment'.

"The prisoner, a Tibetan monk in his mid-thirties, was one of a number of political prisoners who took part in a brief protest in one of Lhasa's prisons in 1991. The protest, which was peaceful, was in support of Tibetan independence.

"After the demonstration those of us who took part were put in solitary confinement," said the prisoner.

"Then they chained my thumbs together and hung me up by my hands from the roof," he said, "I was kept there without my feet touching the floor for one month and ten days."

* * *

"It has not been possible to verify the account, or to establish whether the suspension was intermittent or continuous over the 40 day period."

* * *

"There were frequent reports in 1988 and 1989 that Tibetan prisoners were being subjected to aerial

A number of prisoners have been made to stand or lie on ice in cold water for extended periods of time;^[469] others have been forced to inhale the smoke from burning garbage or forced to eat human excrement.

Some report burning cigarettes^['] being applied to the prisoner's body^[470] or boiling water^[s] being poured over the body or in the mouth.^[471]

suspension, known in Tibet as the 'flying airplane', but this is the first detailed account which shows that it was still taking place in 1991, a year after Beijing began to allow foreign officials to inspect Tibetan prisons."

Cf. also Amnesty International, supra n.159, at 40 (brackets and second ellipsis in original): "Tsechok, a monk interviewed outside the country in 1990, said he had been detained for his participation in the March 1989 demonstrations. He alleged: '... [That evening] I was tied up to the ceiling until the next morning: they attached another rope to the one I was already tied up with and then they hung me up. After a few hours hanging like this, my shoulders were dislocated... the next morning they took me down. At that time I could not move anymore, I could not bring my arms back in front of me, they would stay in the back.'"

Cf. also Asia Watch, supra n.156, at ¶ 11: "Torture immediately following arrest appears to be common. One nun, Ngawang Tsepek, who completed a two-year sentence on September 2, 1991, reported that she and eight other nuns arrested for violating martial law regulations for chanting pro-independence slogans at a September 1989 festival at the Norbulingka (Summer Palace) in Lhasa were tortured after their arrest. She said they were driven to Gutsa detention center, stripped naked, then suspended from trees in the 'airplane position' with their arms behind their backs, then beaten or given electric shocks on the inside of their mouths with electric cattle prods. She said she was suspended in this way for three hours."

Cf. also International Committee of Lawyers for Tibet, supra n.28, at 11 (footnote omitted): "Hanging of prisoners by the thumbs, ankles, or wrists, with arms tied behind backs and suspended from trees or prison bars is common. . . . Chinese authorities have recently admitted a new 'airplane torture' whereby prisoners are stripped naked and forced to lie spread-eagled over a ditch, supporting themselves with their hands and feet on either side of the ditch."

Cf. also International League for Human Rights, supra n.440, at 8: "Other forms of torture or mistreatment include hanging prisoners by their wrists, ankles or thumbs for periods of hours or even days"

Cf. also Office of Tibet, supra 247, at 3: "Methods [of torture] include . . . hanging upside down or in the so-called 'aeroplane' position over burning chili peppers; hanging by the thumbs and other body parts"

⁴⁶⁹ Cf. Amnesty International, supra n.466, at 7: "Tsering Dhundrup, a 26 year-old woodcarver, was reportedly first detained in December 1988 for making woodblocks inscribed with slogans in favour of Tibetan independence. He was held in Utridu Detention Centre in Lhasa, where he was reportedly made to stand barefoot in cold weather on an outdoor concrete platform while guards poured water on his feet. When he was allowed to move his feet, some skin remained stuck on the ground."

Cf. also International Committee of Lawyers for Tibet, supra n.28, at 11-12 (footnote omitted): "Many former prisoners have testified that they were either doused with ice water or held down in tubs of cold water when temperatures in Lhasa, especially during the winter months, were extremely low. (The average temperature in Lhasa during winter is approximately 28 degrees Fahrenheit.)"

⁴⁷⁰ Cf. Amnesty International, supra n.159, at 42: "methods of torture reported by former detainees include . . . cigarette burns"

Cf. also International League for Human Rights, supra n.440, at 8: "Other forms of torture or mistreatment include . . . applying lighted cigarettes to prisoners"

⁴⁷¹ Cf. International Committee of Lawyers for Tibet, supra n.28, at 12 (footnote omitted): "Chinese guards also reportedly torture prisoners by pouring boiling water into their mouths."

Other forms of torture such as setting hungry dogs on naked female prisoners^[472] and various forms of sexual abuse^[473] are also reported. Some prisoners state that they were given injections which caused partial paralysis.⁴⁷⁴

[¶15-147] As noted, the People's Republic denies the allegations made against it. The People's

⁴⁷² Cf. International Committee of Lawyers for Tibet, *supra* n.28, at 12: "Women in particular have been subjected to a form of torture which consists of interspersed beatings or other abuse with attacks by guard dogs trained to bite on command and tear away large chunks of the victim's flesh."

Cf. *also* International League for Human Rights, *supra* n.440, at 7: "Other forms of torture or mistreatment include . . . setting trained guard dogs to attack prisoners."

Cf. *also* Office of Tibet, *supra* n.247, at 3: "Methods [of torture] include . . . enclosure in a cell with savage dogs tearing at one's flesh"

⁴⁷³ Cf. Human Rights Caucus, *supra* n.440, at 2: "More shocking are reports that some young Tibetan women who have been promised education and employment opportunities by Chinese officials have been denied these opportunities and have been forced to stay within the confines of their 'employers' complex where they have been subjected repeatedly to rape."

Cf. *also* International Committee of Lawyers for Tibet, *supra* n.28, at 12 (footnote omitted): "Several released prisoners interviewed have said that Tibetan nuns and laywomen are treated most harshly in prison. There have been many reports and allegations of sexual abuse and harassment in Lhasa-area prisons."

⁴⁷⁴ U.N. Doc. E/CN.4/Sub.2/1989/NGO/11 at 3 ¶¶ 8-12.

Cf. International Committee of Lawyers for Tibet, *supra* n.28, at 13-14 (footnotes omitted): "There are reports that prison authorities have administered to Tibetan prisoners injections which interfere with the functioning of the brain. While medical observers have not been able to separate the adverse effects of these reported injections from those of torture or electric shock, it appears that they produce dysfunction in speaking, pronouncing words, answering questions, and recognizing friends. It is said that prisoners have been given many such injections prior to their release. Indeed, many Tibetans believe that Lobsang Wangchuk, the renowned Tibetan prisoner of conscience, was injected prior to his release from Sangyip prison in Lhasa, and that he died two days later as a result."

Cf. *also* International League for Human Rights, *supra* n.440, at 8 (footnote omitted): "There have also been several reports of involuntary extraction of blood from prisoners in Lhasa in November or December 1990. This practice reportedly has produced long-term illness. In February 1991, several individuals reportedly were still suffering from chronic shaking and required long-term hospitalization after their release from prison, apparently as a result of the involuntary extraction of blood."

Other methods of torture reported involve incarceration in very small cells or being chained to one position in a cell. See Amnesty International, *supra* n.159, at 38 ("A former detainee in Sitru detention centre in late 1988 said that a punishment cell he had been held in was so small that one could only sit cross-legged in it but not stretch in any direction, stand up or lie down to sleep.") and 40 ("In the cell there was a cement pillar. In the cell I was kept on an iron chair with my hands chained to the chair. My legs were chained to this cement pillar. I stayed in this cell 8 days. When the guards were giving us food they did not take off our chains so we had to bend down and try to eat the best way we could.")

Cf. *generally* LAWASIA and Tibet Information Network, *supra* n.327, at 47-48 (footnotes omitted): "First hand accounts from released prisoners describe the use of electric batons . . . applied to the torso and sometimes in the mouth, soles of the feet and genitals; the use of lighted cigarettes to inflict burns; the use of dogs to bite detainees; and the use of manacles and chains to restrain prisoners for long periods. They also describe the practice of making people stand outside for several days at a time, sometimes on blocks of ice, and of making prisoners kneel on the point of triangular pieces of wood. . . . officials have devised new forms of punishment, such as prisoners being 'stripped naked and forced to lie spread-eagled over a ditch, supporting themselves on their hands and feet on either side of the ditch'."

Republic, however, has refused to allow any investigation of the allegations.⁴⁷⁵ Moreover, most of those arrested are detained incommunicado,⁴⁷⁶ a practice whose abolition, the Special Rapporteur has observed, "would greatly reduce the number of reported cases of torture."⁴⁷⁷ [¶5-148] Because the Tibetans have adduced ample evidence as prima facie support of their claims and the People's Republic has failed to rebut that evidence, the Tibetans' claims must be taken as established: The People's Republic has employed torture systematically against Tibetan detainees⁴⁷⁸ as part of a calculated policy⁴⁷⁹ aimed at squelching the Tibetan demand for independence.⁴⁸⁰

(C) Extrajudicial Execution

[¶5-149] The Tibetans claim that the People's Republic has murdered many Tibetans. They allege that some of these deaths have resulted from torture, that others have resulted from the

⁴⁷⁵ See Amnesty International, supra n.159, at 37: "The authorities of the PRC have never permitted Amnesty International to undertake research in Tibet or in any other parts of China."

See also Asia Watch, supra n.156, at ¶ 7: "The most telling evidence of poor conditions in prisons came on March 31, when two prisoners in Drapchi tried to hand visiting U.S. Ambassador James Lilley a petition about mistreatment and torture of prisoners. Prison officials grabbed the petition out of Lilley's hand and refused to give it back."

⁴⁷⁶ U.N. Docs. E/CN.4/1990/NGO/69 at 3 ¶ 12, E/CN.4/1990/SR.26/Add.2 at 7 ¶ 23, and E/CN.4/Sub.2/1989/NGO/11 at 2 ¶ 6.

⁴⁷⁷ U.N. Doc. E/CN.4/1989/15 at 50 ¶ 239.

⁴⁷⁸ Permanent Tribunal of Peoples, supra n.153, at 17: "The Tribunal is convinced of the gravity and extent of torture and mistreatment practised by public order forces and authorities against Tibetans, including women and children."

Amnesty International (May 1992) at 2: "Torture and ill-treatment of political detainees have been systematically used against detainees in Tibet, particularly in periods of heightened tension such as during the period when martial law was in force in Lhasa from March 1989 to May 1990 . . . Children and young women are among those who have been tortured and ill-treated."

Id. at 38: "Torture and ill-treatment appear to occur at all stages of the detention and imprisonment process. Peaceful demonstrators have been severely beaten by PSB and PAP officials while being taken into custody. Torture and ill-treatment of political detainees during interrogation appears to be practised systematically and is aimed at extracting confessions from them."

⁴⁷⁹ Human Rights Advocates, supra n.157, at 8: "Reports of torture have become so widespread as to indicate a deliberate state-endorsed policy in violation of article 5 of the Universal Declaration of Human Rights and the PRC's binding obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

⁴⁸⁰ Amnesty International, supra n.159, at 38: "Most torture victims in Tibet whose cases are known to Amnesty International are pro-independence demonstrators and other political activists, but relatives of activists, including children, have also reportedly been tortured. Their torturers are Public Security Bureau (PSB) or People's Armed Police (PAP) officers who are both responsible for the detention and interrogation of detainees, as well as Procuracy officials."

Id. at 41: "In [some] cases, Tibetans detained after pro-independence demonstrations have been beaten and tortured in police stations and detention centres, then released without charge, indicating that the torture was used simply to intimidate the victims and other potential dissidents from participating in further political activities."

denial of medical treatment, and that some persons have been summarily or otherwise extrajudicially executed. This last claim includes persons executed at public meetings or during demonstrations, persons secretly executed while detained, persons found dead under suspicious circumstances, and persons killed by the indiscriminate use of lethal force in crowd-control activities. The People's Republic denies these claims.

[¶5-150] The state of the evidence has been succinctly summarized by the Permanent Tribunal of Peoples: "All sources agree that the Chinese policy in Tibet has led to repression of various types including extra-judicial executions and imprisonment of persons because of political, cultural or religious activities, notably upon those activities, which promote the political independence of Tibet."⁴⁸¹ Only the People's Republic disagrees.⁴⁸²

[¶5-150] The Special Rapporteur on Summary or Arbitrary Executions has noted reported violations of the right to life⁴⁸³ repeatedly in recent years.⁴⁸⁴ The Working Group on Enforced or Involuntary Disappearances has done the same.⁴⁸⁵ In 1990, the Special Rapporteur on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief named three persons reportedly killed during or after a peaceful demonstration in Lhasa on 5 March 1989.⁴⁸⁶

[¶5-152] There have been numerous reports that persons tortured while in detention have died as a result of that treatment or of being denied medical treatment after having been tortured.⁴⁸⁷

⁴⁸¹ Permanent Tribunal of Peoples, *supra* n.153, at 17.

⁴⁸² See, e.g., U.N. Doc. E/CN.4/1988/NGO/58 at 2.

⁴⁸³ See UDHR, *supra* n.66, Art. 3: "Everyone has the right to life, liberty, and security of person."

See also ICCPR, *supra* n.25, Art. 6(1): "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

⁴⁸⁴ U.N. Docs. E/CN.4/1991/36, E/CN.4/1990/22, and E/CN.4/1989/22.

⁴⁸⁵ U.N. Docs. E/CN.4/1991/20, E/CN.4/1990/13, and E/CN.4/1989/18.

⁴⁸⁶ U.N. Doc. E/CN.4/1990/46 at 11-12 ¶ 37.

⁴⁸⁷ See Amnesty International, *supra* n.159, at 2: "Cases of death in custody as well as deaths of former detainees within days of their release, allegedly as a result of ill-treatment in detention have been reported."

See also *id.* at 37: "Cases of death in custody of political prisoners in suspicious circumstances and reports of deficient medical care for prisoners and of the use of incommunicado detention for long periods suggest that conditions of detention are conducive to torture and ill-treatment."

See also Human Rights Advocates, *supra* n.157, at 8: "Some detainees have been permanently maimed, and others have died, as a result of torture. Recent examples include those of Yeshi and Tenpa Choephel, who died in 1989, apparently from mistreatment while in custody, and 20-year-old Lhakpa Tsering, who is reported to have been beaten to death after being imprisoned for putting up pro-independence posters."

See also International Committee of Lawyers for Tibet, *supra* n.28, at 12-13 (footnote omitted): "There are various reports of death resulting from torture in prison. Among them is the case of Yeshe, a 25-year-old painter, who was released from prison badly bruised with severe genital damage. He was unable to control his bladder and unable to walk. Yeshe died a couple [of] weeks after his release."

See also International League for Human Rights, *supra* n.440, at 9: "Lhakpa Tsering, who was detained with five other Tibetan students in November 1989 for allegedly forming a 'counter-revolutionary

It has also been widely reported that the People's Republic's security forces fire indiscriminately into crowds of peaceful demonstrators, causing numerous deaths, and that the security forces deliberately provoke demonstrators in order to create an excuse for the killings.⁴⁸⁸

[¶15-153] Thus, eyewitness reports collected by the International Fellowship of Reconciliation indicate that on 1 October 1987, the security forces fired directly into crowds participating in a peaceful pro-independence demonstration.⁴⁸⁹ Similarly, Amnesty International has reported that on 10 December 1988, one Gyalpo, who was leading a peaceful demonstration, was summarily executed in the street.⁴⁹⁰ Amnesty International has also reported that at least sixty persons were killed by security forces during demonstrations in March 1989;⁴⁹¹ Pax Christi International, however, puts the figure at two-hundred fifty-six.⁴⁹²

[¶15-154] There have also been reports that prisoners have been executed while detained and

organization,' displaying 'reactionary' posters and having called for Tibetan independence, reportedly died as a result of repeated beatings in Drapchi prison on 15 December 1990. The 20-year-old victim reportedly had suffered [p] ill-treatment, including repeated beatings, before his death, and had been denied medical assistance on three occasions. Chinese officials have stated that Lhakpa Tsering died as a result of 'acute appendicitis and . . . peritonitis,' but have not explained why physicians who saw the victim before his death did not operate on him. The conditions Lhakpa Tsering was said to have been afflicted by were operable, and should not have caused death in light of the fact that the victim was seen by physicians and was within reach of a hospital where necessary surgery could have been performed."

⁴⁸⁸ See Human Rights Advocates, *supra* n.157, at 8: "On at least six days since 1987, security forces have fired directly into crowds, killing and wounding Tibetans. . . . During the 1988 demonstration planned to mark International Human Rights Day and the fortieth anniversary of the adoption of the Universal Declaration of Human Rights, security forces opened fire without warning, killing two Tibetans and wounding several more. On 5 March 1989, police shot peaceful demonstrators, and on several occasions in the ensuing violence which spanned three days, they fired automatic weapons indiscriminately into crowds. . . . These events indicate that security forces adopted a strategy of provoking demonstrators, allowing the protests to escalate, and then firing indiscriminately into the crowds of Tibetans."

⁴⁸⁹ U.N. Doc. E/CN.4/1988/NGO/58 at 2.

⁴⁹⁰ Amnesty International, *supra* n.159, at 45: "On the basis of the available information, Amnesty International has concluded that the 10 December 1988 demonstration was peaceful. There was no indication that protesters advocated violence or attempted to use violence. The killing of Gyalpo, who was leading the demonstration, appears to have been an extra-judicial execution: a deliberate killing by government forces acting outside the limit of the law."

See also Human Rights Advocates, *supra* n.157, at 9: "Some Tibetans have been summarily executed in the course of peaceful protests. . . . There have been well-documented reports of politically motivated judicial executions of Tibetans."

⁴⁹¹ Amnesty International, *supra* 159, at 46: "According to unofficial sources, at least 60 civilians were reportedly killed and hundreds were injured by police and military forces firing indiscriminately at demonstrators and unarmed civilians during demonstrations and riots which took place in Lhasa from 5 to 7 March 1989."

⁴⁹² U.N. Doc. E/CN.4/Sub.2/1989/SR.16 at 2 ¶ 4.

that persons have been executed at public meetings.⁴⁹³ Leaders of the independence movement in Tibet have also been found dead under suspicious circumstances.⁴⁹⁴

[¶15-155] Thus, it appears that, although the People's Republic seems to have abandoned its prior practice of mass killings,⁴⁹⁵ extra-judicial executions continue. Therefore, the Tibetans have made a prima facie showing in support of this claim as well. The People's Republic having failed to rebut the claim, it must be taken as established.

(D) Forced Abortions and Sterilizations

[¶15-156] The Tibetans claim that the People's Republic has imposed on the Tibetans and on the Chinese a regime of forced and coerced abortions and sterilizations. They further claim that the government provides incentives for women to undergo abortions and for men and women to undergo sterilizations, and that sterilizations of women are sometimes performed without the women's knowledge. The People's Republic concedes that it has a policy of population control, which includes encouragement of abortion and sterilization, as well as compulsory sterilization in some circumstances, but denies that it engages in forced abortions or sterilizations (except sterilizations claimed to be justified on other grounds).

⁴⁹³ See Office of Tibet, supra n.247, at 12: "Tibetans have also been executed in public meetings for alleged crimes ranging from 'counterrevolutionary activities' to 'murder.' These persons have had no opportunity to defend themselves in a fair trial against charges brought against them. . . . Moreover, it is believed that Tibetans have in recent years been summarily executed in police stations, prisons or military barracks. In many cases, it is believed that relatives of executed political prisoners are charged for the cost of the bullets used."

⁴⁹⁴ See, e.g., Tibet Information Network, supra n.156, at 2: "Champa Tenzin, a 49 year old monk at the Jokhang Temple, died on 22nd February in circumstances which police have said was a suicide. Unofficial Tibetan sources say that foul play was involved.

"Champa Tenzin became famous in the west as well as in Tibet when he ran through flames to release prisoners trapped inside a burning police station during a pro-independence protest in Lhasa on 1st October 1987.

* * *

"The monk was found lying in his bed, half-covered with a quilt, with blood 'all over,' said the sources. One end of the rope around his neck was tied to a leg of the bed, but the bed had not been disturbed or up-ended, say the sources, who asked not to be named.

"The account rules out hanging and suggests self-strangulation, a form of death which medical experts in London today confirmed is extremely rare if not impossible.

"Strangulation does not lead to extensive bleeding, said one of the doctors, who described the unofficial account, if correct, as 'indicating very suspicious circumstances.'"

⁴⁹⁵ The war in Kham in 1956-1958 has already been described in ¶15-53 through 5-54 above. Two additional examples will suffice. In 1957, the population of the Golok region of Kham was 120,000. By 1962, it had been reduced to 6,000. 21,000 Tibetans died in combat against the People's Liberation Army, 20,000 more were executed, another 20,000 died of starvation, and 53,000 were deported en masse in 1962 and disappeared. (Mullin and Wangyal, supra n.187, at 21.) During 17 days of 1966, when the cultural revolution was in full swing, the People's Republic executed 69,000 Tibetans in and around Lhasa, more than the Nazis killed during their entire occupation of France. (Id.) A s demonstrated by the first example, not all of the deaths are deliberate killings, but they all result from consequences of the invasion and occupation. Thus, between 1949 and 1980, at least 23,419 Tibetans died working either on the Gansu railway or in the Qinghai borax mines. (Id.)

[¶15-157] It has been widely reported that Tibetan women have been forced to undergo abortions.⁴⁹⁶ Abortions also occur by coercion,⁴⁹⁷ and, as the People's Republic has admitted, in response to governmental incentives.⁴⁹⁸ There have also been reports of infanticide, which is difficult to distinguish from extremely late or artificially induced abortion.⁴⁹⁹ Similarly,

⁴⁹⁶ See International League for Human Rights, supra n.400, at 9-10 (footnote omitted): "Some Tibetan exiles allege that from 1987 to 1989, Tibetan women in several villages in Amdo were compelled by force to undergo . . . abortion by mobile birth control units. According to these sources, local police in some villages used physical force to bring recalcitrant women in for the procedure. This practice reportedly was used against Tibetan women who already had two children."

See also id. at 10: "A number of the abortions reportedly take place in the third trimester, including terminations of pregnancies in the eighth and ninth months, indicating that the women undergoing these abortions did not do so voluntarily."

See also LAWASIA and Tibet Information Network, supra n.327, at 92: "Several observers have claimed that Tibetan women are being physically forced to undergo abortions"

See also Minority Rights Group, U.N. Doc. E/CN.4/1990/NGO/9 at 4 ¶ 16: "There are more and more allegations of Tibetan women[s] being . . . forced to submit to abortion"

See also Bernard Levin, "Selling Out Hong Kong," The Times (London 5 November 1992) (all but first ellipsis in original): "For some time now, the Chinese barbarians have been waging war against unborn children: in their drive to subjugate Tibet they must control child-bearing, and the best way to control the bearing of a child is to abort the birth forcibly I have pages and pages of eye-witness accounts of this culling; one will suffice among many."

"... a team came to the village[s] of Woja Chue, Nyenchu and Hor... women must report... or face 'grave consequences' and that to resist was to violate the constitution. They say those who did resist were rounded up by the police and taken by force... pregnant women crying as they waited for their turn in the abortion tent, listening to the screams of those who went before them and watching the growing pile of babies build up outside the tent..."

See also Blake Kerr, "Tibetans Under the Knife," in Kelly, Bastian, and Aiello, supra n.61, at 98; "Paying for Abortions," The Wall Street Journal (New York 9 April 1984).

⁴⁹⁷ See International League for Human Rights, supra n.440, at 10: "For many Tibetan women, abortions violate deeply held religious convictions and are an affront to cultural values emphasizing the importance of childbearing. Many are nonetheless induced to undergo abortions by the threat of harsh sanctions and pressure from representatives of the Work Units and Birth Control Offices which may rise to the level of harassment or coercion. The severity of the coercive measures reportedly adopted by Chinese authorities to implement national family planning policy prevent women from exercising free and informed consent to abortion procedures."

See also Minority Rights Group, U.N. Doc. E/CN.4/1990/NGO/9 at 4 ¶ 16: "There are more and more allegations of Tibetan women[s] being pressured . . . to submit to abortion"

⁴⁹⁸ See Tibet Information Network, supra n.156, at 24 (brackets in original): "The regulations give lists of holidays, described as rewards or incentives, for women who have abortions; they get 20 days off work on full pay for an abortion, and 23 days off 'for those who both adopt the remedy method and have a contraceptive ring [IUD] inserted'. . . for a mid-term abortion (from 4 to 6 months into pregnancy) they get 50 days holiday."

⁴⁹⁹ See also LAWASIA and Tibet Information Network, supra n.327, at 92 (footnote omitted): "[S]ome published accounts report cases of infanticide."

See also Minority Rights Group, U.N. Doc. E/CN.4/1990/NGO/9 at 4 ¶ 16: "There are more and more allegations . . . of infanticide in State hospitals."

See also Kerr, supra n.496, at 105: "[Chinese law allows doctors] to inject women nine months pregnant to induce abortion and to give lethal injections to infants while they are still in the birth canal."

Cf. International League for Human Rights, supra n.440, at 10: "A number of the abortions reportedly

sterilizations occur by force,⁵⁰⁰ by coercion,⁵⁰¹ and in response to governmental incentives.⁵⁰² It has also been reported that women have been sterilized without being so informed when they have entered hospitals for other treatment.⁵⁰³

[¶5-158] The People's Republic concedes that its family planning policy includes sterilizations,⁵⁰⁴ but denies the abuses alleged. Documents generated by the People's Republic,

take place in the third trimester, including terminations of pregnancies in the eighth and ninth months, indicating that the women undergoing these abortions did not do so voluntarily."

⁵⁰⁰ See International League for Human Rights, supra n.440, at 9-10: "Some Tibetan exiles allege that from 1987 to 1989, Tibetan women in several villages in Amdo were compelled by force to undergo sterilization . . . abortion by mobile birth control units. According to these sources, local police in some villages used physical force to bring recalcitrant women in for the procedure. This practice reportedly was used against Tibetan women who already had two children."

See also Tibet Information Network, supra n.156, at 24: "Refugee accounts suggest that sterilisation and sometimes the [use] of physical force have been prevalent in rural areas of Eastern Tibet for some years: 'In the village where I was working, we sterilized 163 people out of a population of 4,953 in just one week in June 1986', recalled the Tibetan abortion team worker who worked in the area."

See also LAWASIA and Tibet Information Network, supra n.327, at 92 (footnote omitted): "Several observers have claimed that Tibetan women are being physically forced to undergo . . . sterilisations . . ."

See also Minority Rights Group, U.N. Doc. E/CN.4/1990/NGO/9 at 4 ¶ 16: "There are more and more allegations of Tibetan women[']s] being . . . forced to submit to . . . sterilization . . ."

See also Bernard Levin, "Selling Out Hong Kong," The Times (London 5 November 1992): "For some time now, the Chinese barbarians have been waging war against unborn children: in their drive to subjugate Tibet they must control child-bearing, and the best way to control the bearing of a child is to . . . sterilise the mother."

See also Kerr, supra n.496, at 98; "Paying for Abortions," The Wall Street Journal (New York 9 April 1984).

⁵⁰¹ See Minority Rights Group, U.N. Doc. E/CN.4/1990/NGO/9 at 4 ¶ 16: "There are more and more allegations of Tibetan women[']s] being pressured . . . to submit to . . . sterilization . . ."

⁵⁰² See Tibet Information Network, supra n.156, at 24: "For a sterilisation they get 30 days holiday; for a mid-term abortion (from 4 to 6 months into pregnancy) they get 50 days holiday.

"If they have an abortion followed by sterilisation the women are entitled to 65 days holiday plus a free gift of 5 kilos of first class sticky rice and 1 kilo of butter."

⁵⁰³ See International League for Human Rights, supra n.440, at 9: "[R]ecently obtained testimony of female Tibetan exiles suggests that doctors in Chinese hospitals at times sterilize women who have come to give birth or to undergo abortions without informing them of the nature of the procedure."

See also LAWASIA and Tibet Information Network, supra n.327, at 92: "The reports allege that doctors deceive women into believing they are to undergo a totally different operation, or deliberately misinform them, saying that the foetus is deformed or already dead in the womb, and then perform an abortion and/or sterilisation."

⁵⁰⁴ See Tibet Information Network, supra n.156, at 26 (brackets in original): "May 20: Gansu Radio announces that over 180,000 oviduct ligation and vasoligation operations [male and female sterilisations] had been performed in Gansu Province by April 22, 'accounting for more than 30% of this year's quota'."

however, strongly imply that force is used.⁵⁰⁵ Forced or coerced abortions and sterilizations violate the Convention on the Elimination of All Forms of Discrimination Against Women, Art. 16(e), which guarantees women's right "to decide freely the number of children they will have,"⁵⁰⁶ and to which the People's Republic acceded in 1980.⁵⁰⁷ Therefore, such actions breach the People's Republic's obligations under international law.

[¶5-159] The current state of the evidence does not permit a firm conclusion as to whether the People's Republic's family planning policies are applied especially strictly to Tibetans.⁵⁰⁸ The People's Republic claimed in 1985 that its then-current family planning policy did not apply to Tibetans or other non-Chinese, but it has recently admitted that assertion was false.⁵⁰⁹ The 1992 regulations make the same claim,⁵¹⁰ and some of their stated provisions support that claim.⁵¹¹ Because the falsity of the previous claim is established, however, and because the People's Republic refuses to allow outside investigation, the People's Republic's evidence is mere assertion.

[¶5-160] Moreover, the People's Republic's justification of its family planning policy is explicitly discriminatory:

In the "Decision on How to Strengthen the Work of Birth Control", issued by the

⁵⁰⁵ See *id.* at 26: "May 21: TAR Congress says family planning must focus on rural areas, but should encourage voluntary participation."

See also *id.* at 25: "'[B]irths are forbidden to people who have serious hereditary diseased proved by medical evidence', say the TAR Regulations."

See also *id.* at 23: "The 1985 document includes special rules to cover birth permits for 'those who cannot undergo surgical operations', an otherwise unexplained remark which implies that surgical birth control methods were in use.

"The 1992 regulations are more severe, and imply a use of force."

⁵⁰⁶ International League for Human Rights, *supra* n.440, at 10 (footnote omitted).

⁵⁰⁷ *Id.* at 15 n. 47.

⁵⁰⁸ See Permanent Tribunal of Peoples, *supra* n.156, at 17: "On the materials provided, it has not been established that the measures and methods of abortion and sterilization used in Tibet [are] discriminatory"

⁵⁰⁹ Tibet Information Network, *supra* n.156, at 22: "[Official Chinese] documents show that birth control was already in force in the Tibet Autonomous Region (TAR) in 1985, when Beijing was claiming that there was no birth control for non-Chinese subjects. That year Beijing announced that 'the minority [ie, non-Chinese] groups in Tibet . . . are exempt from family planning'.

* * *

"In its White Paper on Tibet issued last month the Chinese Government acknowledged . . . that the two-child policy has been in force in towns in the TAR since 1984."

⁵¹⁰ *Id.*: "The 1992 Regulations, which appear to be confidential, indicate that Tibetans are treated more leniently than Chinese."

⁵¹¹ *Id.* at 24: "The TAR regulations state that sterilisation is compulsory for Chinese and also possibly Tibetan couples who have had two unauthorised children and for unregistered women who are pregnant, unless they agree to return to their registered home."

Central Committee of the Communist Party on 12th May 1991, eugenics is cited as the third of three primary policy objectives in China: "We have made birth control, control of the population growth and the improvement of the quality of population our long-term basic state policies", said Central Committee Document No. 9 (1991). The document applied the question of population quality not to the Chinese but to justify the decision to impose birth control amongst the minorities:

"In order to raise the economic and cultural standard and national quality in the minority areas, birth control must also be implemented among minorities; the detailed demand and method to be decided upon by each local autonomous region or province."⁵¹²

[¶5-161] As noted in ¶5-130 above, the People's Republic has acceded to the International Convention on the Elimination of All Forms of Racial Discrimination. Therefore, its racially-motivated family planning policy breaches obligations it has expressly assumed under international law. Furthermore, as noted in footnote 250 above, racial discrimination violates numerous other provisions of international law which bind the People's Republic. Therefore, the People's Republic's racially-motivated family planning policy breaches those international legal obligations as well.

(E) Legitimacy Revisited: Jus Cogens and Undermining the Claim of Self-Determination

[¶5-162] The Tibetans claim that the People's Republic's policies of arbitrary arrest and detention, torture, extrajudicial execution, and forced and coerced abortion and sterilization render the People's Republic an illegitimate government over the Tibetan people. One argument in support of this claim is that the policies are undertaken with the intent to undermine the Tibetans' claim of self-determination; that they therefore violate the Tibetans' right of self-determination; and that such violation renders the current government of Tibet illegitimate. The other argument in support of the claim is that the policies violate norms of jus cogens, thereby rendering the government illegitimate.

[¶5-163] It is clear from the evidence that the policies of arbitrary arrest and detention, torture, and extrajudicial execution are directed specifically at those who advocate Tibetan self-

⁵¹² Tibet Information Network, supra n.156, at 25.

See also China Population News (22 December 1989) (quoted in Bohana, supra n.299, at 88-89: "[S]ome of our comrades do not understand that to justify lenient policies (for the minorities) is untenable [H]uman reproduction comprises not only quantitative but qualitative changes in the population. In the minority areas the cultural quality of the population is quite backward, the quality is stagnant [T]here must not be a reason for relaxing family planning."

See also Peking Economic Research Journal (quoted in id. at 88): "[Tibetans] lack the capacity to absorb advanced technology and are highly imbued with a character of laziness."

See also Tibet Information Network, supra n.156, at 26: "March 31: Tibet Daily said that a family planning programme had been launched since the beginning of the year. It said 'the excessive growth of population has relatively slowed down the growth of economic development in our region. Resources in terms of per capita amounts are on the decline. The planned control of population growth to ease population pressures and [to] improve the quality of the population has become a new problem that needs urgently to be solved."

determination.⁵¹³ Most of the pseudo-crimes for which people are arbitrarily arrested and detained are explicitly calls for Tibet to exercise its self-determination.⁵¹⁴ Others are attempts to bring to light the conduct of the People's Republic in Tibet, evidence which tends to bolster the Tibetan claim of self-determination.⁵¹⁵ Those detained for political offense are held in conditions inferior to those accorded non-political prisoners.⁵¹⁶ Torture is most commonly inflicted upon those who call for Tibetan self-determination,⁵¹⁷ as are extra-judicial executions and other

⁵¹³ See International Committee of Lawyers for Tibet, supra n.355, at 2: "There are reliable reports that Tibetans have been arbitrarily detained, tortured in custody, and executed for peaceful protest against the PRC's continued occupation of Tibet."

⁵¹⁴ See Amnesty International, supra n.159, at 18 ("peaceful political activities," possessing illegal literature), 27 (possessing illegal literature), and 28 (hanging posters); Asia Watch, supra n.156, at ¶ 5 (speaking to foreigners about independence); Human Rights Advocates, supra n.157, at 7 (discussing independence and criticizing Chinese policies, possessing illegal literature); Human Rights Caucus, supra n.440, at 2 ("peacefully expressing their views"); International Association of Educators for World Peace, supra n.442, at 2 (demonstrations, suspicion of participation in demonstrations, speaking to foreigners, possessing illegal literature); International Fellowship of Reconciliation, supra n.327, at 3 ¶ 12 (hanging posters); International League for Human Rights, supra n.440, at 2 ("non-violent activity"); Tibet Information Network at 5 (demonstrations), 8-9 (hanging posters), 9 (demonstrations, displaying Tibetan flag), 11 (shouting slogans), and 12 (hanging posters).

⁵¹⁵ See Amnesty International, supra n.159, at 24-25 (passing human rights information to foreigners); Asia Watch, supra n.156, at ¶ 4 (same); Human Rights Advocates at 9-10 (same); International Fellowship of Reconciliation, supra n.327, at 3 ¶ 12 (writing letters to United Nations).

⁵¹⁶ See Tibetan Information Network, supra n.156 (Text of a Statement given by a Tibetan in Lhasa), at 16: "There are two types of prisoners -- the first is a political one and for them no visits or food are allowed. The other kind, common criminals, have better accommodation, food and visits. When foreign dignitaries and visitors come only those criminals with better living conditions are shown and the political ones were completely hidden."

⁵¹⁷ See Amnesty International, supra n.159, at 38: "Most torture victims in Tibet whose cases are known to Amnesty International are pro-independence demonstrators and other political activists . . ."

See also id., at 40: "'Once I was singing Tibetan independence songs in the cell and I got beaten for that. They beat me for about an hour with cattle prods and also kicked me from the back. I was bleeding from the nose and mouth because my face had been kicked onto the concrete floor.'"

See also id., at 41: "In [some] cases, Tibetans detained after pro-independence demonstrations have been beaten and tortured in police stations and detention centres, then released without charge, indicating that the torture was used simply to intimidate the victims and other potential dissidents from participating in further political activities."

See also Amnesty International, supra n.466, at 7: "In another case, a teenage girl from Lhasa whose name is being withheld to protect her and her family, was detained for over four months in 1989 for taking part in a demonstration in which groups of teenagers used slings to throw stones at members of the military police force in Lhasa. . . . She was reportedly kicked on the head and the body by four or five armed police officials and received electric shocks inflicted with an electric baton while lying on the floor. She could not remember subsequent events for a few days but about three days after her first beating, she found that her left leg had become lame."

See also id.: "Tsering Dhundrup, a 26 year-old woodcarver, was reportedly first detained in December 1988 for making woodblocks inscribed with slogans in favour of Tibetan independence. He was held in Utridu Detention Centre in Lhasa, where he was reportedly made to stand barefoot in cold weather on an outdoor concrete platform while guards poured water on his feet. When he was allowed to move his feet,

killings.⁵¹⁸

[¶15-164] It is equally clear that this conduct violates the Tibetan right of self-determination: No people can exercise that right when prevented even from discussing its exercise.

[¶15-165] It is not so clear that the policy of forced abortions and sterilizations is calculated to

some skin remained stuck on the ground."

See also Asia Watch, supra n.156, at ¶ 10: "Medical treatment for prisoners can be deliberately denied. In December 1991, Tibetan sources reported that Sonam Wangdu, a thirty-six-year-old prisoner arrested for involvement in the killing of a policeman during the demonstrations in Lhasa on March 5, 1988, was near death, without medical treatment, in Drapchi prison."

See also id. at ¶ 11: "Torture immediately following arrest appears to be common. One nun, Ngawang Tsepak, who completed a two-year sentence on September 2, 1991, reported that she and eight other nuns arrested for violating martial law regulations for chanting pro-independence slogans at a September 1989 festival at the Norbulingka (Summer Palace) in Lhasa were tortured after their arrest. She said they were driven to Gutsa detention center, stripped naked, then suspended from trees in the 'airplane position' with their arms behind their backs, then beaten or given electric shocks on the inside of their mouths with electric cattle prods. She said she was suspended in this way for three hours."

⁵¹⁸ See Amnesty International, supra n.159, at 45: "On the basis of the available information, Amnesty International has concluded that the 10 December 1988 demonstration was peaceful. There was no indication that protesters advocated violence or attempted to use violence. The killing of Gyalpo, who was leading the demonstration, appears to have been an extra-judicial execution: a deliberate killing by government forces acting outside the limit of the law."

See also id. at 46: "According to unofficial sources, at least 60 civilians were reportedly killed and hundreds were injured by police and military forces firing indiscriminately at demonstrators and unarmed civilians during demonstrations and riots which took place in Lhasa from 5 to 7 March 1989."

See also Human Rights Advocates, supra n.157, at 8: "Some detainees have been permanently maimed, and others have died, as a result of torture. Recent examples include those of Yeshi and Tenpa Choephel, who died in 1989, apparently from mistreatment while in custody, and 20-year-old Lhakpa Tsering, who is reported to have been beaten to death after being imprisoned for putting up pro-independence posters."

See also id.: "On at least six days since 1987, security forces have fired directly into crowds, killing and wounding Tibetans. . . . During the 1988 demonstration planned to mark International Human Rights Day and the fortieth anniversary of the adoption of the Universal Declaration of Human Rights, security forces opened fire without warning, killing two Tibetans and wounding several more. On 5 March 1989, police shot peaceful demonstrators, and on several occasions in the ensuing violence which spanned three days, they fired automatic weapons indiscriminately into crowds. . . . These events indicate that security forces adopted a strategy of provoking demonstrators, allowing the protests to escalate, and then firing indiscriminately into the crowds of Tibetans."

See also id. at 9: "Some Tibetans have been summarily executed in the course of peaceful protests. . . . There have been well-documented reports of politically motivated judicial executions of Tibetans."

See also International League for Human Rights, supra n.440, at 9: "Lhakpa Tsering, who was detained with five other Tibetan students in November 1989 for allegedly forming a 'counter-revolutionary organization,' displaying 'reactionary' posters and having called for Tibetan independence, reportedly died as a result of repeated beatings in Drapchi prison on 15 December 1990. The 20-year-old victim reportedly had suffered [p] ill-treatment, including repeated beatings, before his death, and had been denied medical assistance on three occasion. Chinese officials have stated that Lhakpa Tsering died as a result of 'acute appendicitis and . . . peritonitis,' but have not explained why physicians who saw the victim before his death did not operate on him. The conditions Lhakpa Tsering was said to have been afflicted by were operable, and should not have caused death in light of the fact that the victim was seen by physicians and was within reach of a hospital where necessary surgery could have been performed."

undermine the Tibetans' claim of self-determination, because it is not clear whether that policy is racially biased in application (though it is plainly racially motivated).⁵¹⁹ Coupled with the policy of population transfer discussed in ¶¶5-91 through 5-96 above, however, the family planning policy does manifest an intent to undermine the Tibetans' claim of self-determination by reducing the Tibetans to a minority in their own homeland and diluting their territorial connection to that land. Even if the family planning policy is applied even-handedly to Tibetans and Chinese in Tibet, a zero-growth policy in Tibet coupled with a program of moving Chinese into Tibet must necessarily conduce a constant increase in the ratio of Chinese to Tibetans in Tibet.

[¶5-166] If any or all of the policies of torture, extra-judicial execution, and forced abortion and sterilization are undertaken "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"⁵²⁰ they are plainly genocidal.⁵²¹ The present evidence, however, does not support the inference of such intent. Although it is clear that the People's Republic intends to deprive the Tibetans' of their right of self-determination, there is insufficient evidence to conclude that even if the Tibetans' give up that right, the People's Republic intends to destroy their national or religious identity.⁵²² There is considerable evidence that the People's Republic intends to destroy the Tibetans' linguistic identity, but this policy is not implemented by genocidal acts.

[¶5-167] Even if the policies of torture, extrajudicial execution, and forced abortion and sterilization are not genocidal, they may nonetheless violate norms of jus cogens. If so, any government which engages in such conduct is illegitimate, as discussed in ¶¶1 above. The right to life is widely regarded as a norm of jus cogens,⁵²³ although exceptions to it are also

⁵¹⁹ See Permanent Tribunal of Peoples, supra n.153, at 17: "On the materials provided, it has not been established that the measures and methods of abortion and sterilization used in Tibet [are] discriminatory"

⁵²⁰ Genocide Convention, supra n.106, Art. II.

⁵²¹ Id.: "In the present Convention, genocide means any of the following acts . . . : (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; . . . (d) Imposing measures intended to prevent births within the group[.]"

⁵²² Even the family planning policy may not be genocidal, because "it has not been established that the measures and methods of abortion and sterilization used in Tibet . . . [are] carried out to destroy a part of the Tibetan population." (Permanent Tribunal of Peoples, supra n.153, at 17.) Although, when coupled with the population transfer policy, the family planning policy clearly bespeaks an intent to undermine the Tibetans' claim of self-determination, even these together are not necessarily genocidal: The Tibetans can be outnumbered and diluted in Tibet without being destroyed.

⁵²³ Restatement of Foreign Relations Law (American Law Institute 1987) § 702 Comment n. See also Parker and Neylon, supra n.108, at 431 (brackets and ellipsis in original; footnotes omitted): "The right to life, called the most fundamental human right, is a jus cogens rule. The right to life is positioned prominently in virtually every major international human rights instrument. As one scholar states, '[T]he right to life . . . is one of the rights universally recognized as forming part of jus cogens and entailing, on the part of States, obligations erga omnes toward the international community as a whole.'"

recognized,⁵²⁴ which militates against its character as "a peremptory norm . . . from which no derogation is permitted"⁵²⁵ The prohibition of torture, on the other hand, is widely recognized as a norm of ius cogens without exception.⁵²⁶ Policies of forced abortion and sterilization in the context of ius cogens have not been addressed.

[¶5-168] Thus, at least the People's Republic's policy of torture violates ius cogens, thereby rendering the People's Republic an illegitimate government. Moreover, whether the policy of torture is aimed particularly at the Tibetan people or is applied universally to peoples governed by the People's Republic is immaterial to the People's Republic's illegitimacy as the government over the Tibetan people. If the policy of torture is applied to all nationals of the People's Republic, that government is illegitimate as respects all those people.

C. Balancing the Likely Outcomes of Alternative Resolutions in the Light of International Values

[¶5-169] Tibet has a compelling case for self-determination; it lies at one extreme of the spectrum of cases.⁵²⁷ The Tibetans have a strong sense of self-identity, manifested perhaps most enduringly in their Government-in-Exile. They have a long history of political and cultural unity -- indeed, of independent statehood -- in connection with the territory of the Tibetan Plateau. They seek to exercise their right of self-determination against a government which has committed genocide against them and which, at least by its policy of torture, continues to do so; which deliberately suppresses their language and culture, especially their religion; which is engaged in a program of population transfer and environmental degradation with respect to the Tibetan territory; and which has committed, and continues to commit, innumerable abuses of human rights upon Tibetans.

[¶5-170] There is, in short, little to dispute. The Government of the People's Republic of China is illegitimate as respects the Tibetan people, so it has no cognizable claim of territorial integrity over the Tibetan Plateau. Even if it had such a claim, the Tibetan claim of territorial integrity, grounded in centuries of independent statehood brought to an end by an unlawful invasion and ongoing occupation, is better supported. Even if the Tibetans had no cognizable claim of territorial integrity, resolving their self-determination claim in their favor would accord with international values by diminishing the threat to the peace currently posed and greatly improving the human-rights condition of the Tibetans. The Tibetans are entitled to exercise their right of self-determination, and they should be permitted to do so.

⁵²⁴ Parker and Neylon, supra n.108, at 431-432 (footnotes omitted): "In spite of its ius cogens character, there are exceptions to the right to life. For example, states have the right to maintain armies and to order soldiers into combat. Incidental civilian casualties are not necessarily violations, though casualties resulting from violations of the rules of war do violate the right to life. Additionally, national constitutions and international instruments allow the death penalty."

⁵²⁵ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (in force 1980), Art. 53.

⁵²⁶ Restatement § 702 Comment n.

See also Parker and Neylon, supra n.108, at 437-438 (footnotes omitted): "Torture is widely recognized as contravening ius cogens. All major human rights agreements and instruments contain a prohibition against torture. In the relevant treaties, the prohibition is non-derogable."

⁵²⁷ See ¶ 4-37, supra.

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