

# **IS TIBET ENTITLED TO SELF DETERMINATION?**

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## IS TIBET ENTITLED TO SELF DETERMINATION?

The purpose of this article is to explore whether Tibet can be said to have a right to self-determination under international law.

The official position of the Chinese Government on this issue is that Tibet is an inalienable part of the People's Republic of China (just as France once claimed that Algeria was an inalienable part of Metropolitan France). Those who question this are regularly attacked in the official Chinese media as “splittists”,<sup>1</sup> and anti-China. If they are themselves Chinese and live in China they are liable to be imprisoned. Wei Jing Sheng and more recently Hu Jia are well-known Mainland Chinese dissidents imprisoned for calling for a new Chinese government attitude towards Tibet.

Questioners about Tibet from outside China are also habitually criticized by China for “interfering in China's internal affairs”. However to the Tibetans and most people in the world outside China who are familiar with Tibet's situation, it is an international problem crying out for a solution.

Most countries recognize China's sovereignty over Tibet. The one notable exception is the United Kingdom which traditionally recognizes “suzerainty” of China with autonomy for Tibet, a subtle evasion which happens to be fairly close to the actual situation of Tibet in relation to China during the last years of the Ching dynasty (1644-1911). The United States has officially recognized China's sovereignty over Tibet since 1966. Many states have glossed over or deliberately left undefined the question of whether their recognition is *de jure* or *de facto* i.e. recognizing China as having a legal title, or merely recognizing the fact that it is in reality ruling Tibet.

Notwithstanding these ambiguities, overwhelming state recognition for a given territorial status is itself usually powerful or even conclusive evidence of that status in international law.

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<sup>1</sup> For a typical statement see “Chinese Government opposes the collusion of Taiwan and Tibet splittists”, People's Daily On-line, 15 March 2001.

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The question therefore arises as to why Tibet should be different? To answer this it is necessary to consider the meaning of sovereignty and of self-determination in international law and the facts of China's involvement with Tibet.

### What is sovereignty?

Under the traditional theory of state sovereignty which underpinned international law for three hundred years, it was for the rulers of states to determine by agreement between themselves which territories they would rule over. This system, formalized by the Treaty of Westphalia in 1648, did not give any role to subjects in choosing their ruler. If sovereignty was not determined by conquest, it was decided by mutually agreed cession. No one consulted the inhabitants of the island of Minorca before it was ceded by Spain to Britain by the Treaty of Utrecht in 1713, or before it was ceded to Britain a second time, after capture by the French, by the Treaty of Paris in 1763, or before it was ceded back to Spain by the Treaty of Amiens in 1802. Minorca's experience was typical of many small European territories which happened to be coveted by more than one European power. Similar cession with complete disregard for the views of the inhabitants was also the fate of overseas colonial territories. Bombay became British in 1662 because it was ceded to England by Portugal as the dowry of Charles II's Portuguese bride, Catherine of Braganza.

Modern international law, although now applied at least to some extent by every country in the world, is largely a European invention.<sup>2</sup> This applies particularly to the doctrine of state sovereignty, under which China claims sovereignty over Tibet. It has been cogently argued<sup>3</sup> that by appropriating this European concept to claim sovereignty over Tibet, China is distorting a traditional historic relationship between the Ching dynasty emperors and the Dalai Lama of Tibet, which was that of a patron and a religious leader, and not that of a sovereign and a subject. If this is right, all China's claims to sovereignty based on the Ching-Dalai Lama relationship (and its more recent claims based on the earlier relationship between the Mongol (Yuan dynasty) emperors and Tibet) are misconceived. However I argue below that, misconceived or not, these claims are in any case irrelevant to whether Tibet now has a right to self determination.

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<sup>2</sup> Often attributed to the Dutch seventeenth century writer Grotius, although many international law concepts are older.

<sup>3</sup> See e.g. Dibyesh Anand, Tibet, China and the West, Empires of the Mind, "Open Democracy" 2 April 2008.

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### Self-determination

The Westphalia concept of state sovereignty came into conflict with nationalist aspirations for statehood in nineteenth century Europe. Polish nationalists did not like Poland being partitioned between the German and Russian Empires. Czechs did not like being part of the Austro-Hungarian Empire. Britain supported the cause of Greek independence against the Ottoman Empire, and the European powers generally supported the cause of independence of the Serbs, Romanians and Bulgarians.

At the Paris Peace Conference after World War I US President Woodrow Wilson pushed for the peace settlement to be based on the principle that “every territorial settlement in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states”. Despite this, the principle was only selectively applied, where it coincided with the interests of the major players at the conference. In other cases it was flagrantly ignored, most notably in the transfer of the former German Chinese treaty port of Tsingtao to Japan against the wishes of its inhabitants.

By the time the United Nations was set up after World War II, it was generally recognized that peoples were entitled to self-determination. Article 1.2 of the United Nations Charter states that the purposes of the United Nations include the development of friendly relations among nations based on respect for the principle of self-determination of peoples. It can therefore be said that all states which have become members of the United Nations by ratifying the United Nations Charter – including China – have accepted the principle of respect for the self-determination of peoples.

The United Nations Charter was followed by the Universal Declaration of Human Rights. The rights in the Universal Declaration were elaborated in two more detailed international covenants which, unlike the Declaration itself, are treaties intended to have legal force. Both Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights state that “All peoples have the right to self determination. By virtue of that right they may freely determine their political status”.

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The ICCPR has been ratified by 161<sup>4</sup> of 192 United Nations member countries. Five other countries, including China, have signed but not ratified. A nation which is a signatory of an international treaty, such as the ICCPR, is obliged under international law to “refrain from acts which would defeat the purpose and object of the treaty” (Vienna Convention on the Law of Treaties, Article 18, codifying earlier customary international law). The ICESCR was ratified by China in March 2001 and, as far as its application to the Mainland is concerned, without any reservation to Article 1.

China is therefore bound, both by its adherence to United Nations Charter, by its signature of the ICCPR and by being a state party to the ICESCR to respect the principle of self-determination of peoples.

### What does the right of peoples to self-determination actually mean?

There was no consensus about what the right to self-determination meant when it was included in the ICCPR and ICESCR. Western countries were generally reluctant to include it, but felt obliged to do so in response to the aspirations of recently independent countries to end European colonialism in those places where it still existed. Communist and Soviet influenced countries generally interpreted self-determination as meaning the right to choose a socialist form of government.

Since the ICCPR and ICESCR came into effect in 1976 there has been widespread concern that if the right to self-determination in Article 1 is applied literally this could lead to the break-up of many existing states. This applies particularly to Africa, whose national boundaries are mostly colonial era constructs, but also to numerous other states with ethnic minority populations who form a majority in particular regions.

The prevalent (though not universal) view which has emerged is that the right to self-determination for the purposes of ICCPR and ICESCR Article 1 applies only to the following: (1) entire populations living in independent states, (2) entire populations of territories yet to receive independence, and (3) territories under foreign military occupation.<sup>5</sup>

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<sup>4</sup> The most recent ratification is Samoa (February, 2008).

<sup>5</sup> See e.g. Antonio Cassese, “Self-determination of Peoples”, p. 59.

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This is a restrictive definition which excludes numerous groups who would in ordinary language be regarded as “peoples”. It excludes African tribes whose populations may be concentrated in one part of a state, or parts of more than one state. It therefore gives no encouragement to the destructive tendency to fragmentation of African states which was seen in the Biafran War in Nigeria and which has recently been evident in Kenya. More controversially it excludes some peoples with a long history of struggle for independence, such as the Kurds (spread across parts of Turkey, Iran, Iraq and Syria).

The issue of self-determination was considered in the context of colonial territories in the United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514(XV)) of 14 December 1960. Article 1 of this Declaration states that “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.” A further General Assembly resolution, the Declaration on Principles of International Law, Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, of 1970, again states that “alien subjugation, domination and exploitation are a violation of the principle” [of self-determination], as well as “a denial of fundamental human rights, and is contrary to the [United Nations] Charter”.

These two United Nations General Assembly Resolutions have been extensively applied. The concept of alien domination has been treated by the UN as applicable to the Russian invasion of Afghanistan; the Vietnamese invasion of Cambodia; the occupation of Arab territories by Israel; of Estonia, Latvia and Lithuania by the former Soviet Union; of Grenada by the United States; of East Timor by Indonesia; and of Kuwait by Iraq.<sup>6</sup> It is strongly arguable that the rule that alien subjugation, domination and exploitation breaches a people’s right to self-determination now forms part of international customary law i.e. international law established not by treaties but by the customs of nations.

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<sup>6</sup> See list in Cassese, *op.cit.*, p. 94.

The history of China's relations with Tibet

China's present control over Tibet dates from 1950 when the People's Liberation Army invaded Tibet and defeated the Tibetan Army at Chamdo. China claims that Tibet was already part of China when it invaded.

This claim is based on a claim to sovereignty over Tibet by the Ching Imperial dynasty dating from the eighteenth century. More recently China has claimed that its rule over Tibet can be traced to the rule of Tibet by the Mongols – known in China as the Yuan dynasty.

There are at least three major historical difficulties with China's claim. First, as indicated above, it is doubtful whether the relationship between the Ching and the Yuan on the one hand, and Tibet on the other, was really one of sovereign and subject. The Kangxi Emperor occupied Tibet in 1720. After his death in 1722 this occupation continued under his successor the Yongzheng Emperor until 1728, and there were further Chinese invasions in 1750 and 1792. However after the end of the occupation in 1728, and after each of the later invasions, the Chinese armies withdrew and Tibet had virtually complete independence in practice.<sup>7</sup>

Secondly, it was never suggested under either dynasty that the relationship made Tibet a part of metropolitan China. If it was a political relationship at all, it was one of dependency which translated into modern language was a colonial relationship. It is therefore a basis for concluding that Tibet is a colony and so entitled to self-determination.

Thirdly, and most importantly, there was no relationship - either similar to that between Tibet and the Ching dynasty, or similar to the modern concept of sovereignty - between Tibet and the Chinese Republic which succeeded the Ching dynasty in 1911. In 1912 the Thirteenth Dalai Lama made a formal declaration of Tibetan independence. Although the Chinese Republic responded by laying claim to Tibet, it never exercised any control over it, save for certain far

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<sup>7</sup> There was a further invasion shortly before the end of the Ching dynasty, in 1910, by way of delayed reaction to the brief British invasion of Tibet in 1904. Unlike China's eighteenth century invasions, where in each case a faction in Tibet had encouraged Chinese intervention, the 1910 invasion was a full-frontal assault against united Tibetan opposition. After the 1910 Chinese occupation of Lhasa the Thirteenth Dalai Lama fled to British India, and fighting continued until the 1911 Revolution in China. In 1912 Chinese forces in Tibet surrendered and were repatriated through India with British assistance, and the Thirteenth Dalai Lama returned from exile.



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eastern regions, where there had always been an ill-defined borderland, which it invaded and occupied. Tibet was entirely independent of foreign control between 1911 and 1950.

Even if China's historical claim was much stronger than it is, this would not provide a justification for invasion of an independent country. Most countries were at one time under alien rule. In 1911 Ireland was under British rule as it had been for centuries, Finland was ruled by Russia, and Korea was ruled by Japan. The setting up of the United Nations was expressly intended to prevent the kind of aggressive wars, based on spurious or doubtful claims to historical rule or cultural identity, which had been the practice of both Nazi Germany and Imperial Japan.

China has frequently attempted to justify the invasion by the claim that Tibetan society was feudal and backward, and that China therefore brought liberation to the Tibetan peasantry from feudal domination.

Scholars agree that the pre-1950 Tibetan regime was feudal and backward.<sup>8</sup> One aspect of its backwardness was its failure to appoint ambassadors to other countries or to apply to join the United Nations until invasion by China was imminent. However this failure was not due to lack of independence but due to the absence, in Tibet's intensely traditional and isolated government, of a clear sense of the need for a modern state to maintain relations with other states.

At the risk of stating the obvious, the fact that a country is backward cannot justify invading it. Backwardness was often advanced as a justification for nineteenth century colonialism, what Kipling called "The White Man's burden" when he encouraged the United States to colonise the supposedly backward Philippines. The fact that China relies on the "backwardness" argument<sup>9</sup> to support its occupation of Tibet is a further indication of a classic colonial occupation.<sup>10</sup>

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<sup>8</sup> See the catalogue of obscurantism, rigid traditionalism and wholesale rejection of modernity in Melvyn C. Goldstein "A modern history of Tibet, 1913-1951", University of California Press, 1989.

<sup>9</sup> For a very recent speech highlighting how China's rule has benefited Tibet's development, see Qiangba Puncog, chairman, Tibet Autonomous Region Council, Xinhua, 9 April 2008.

<sup>10</sup> According to Tsering Shakya ("Dragon in the Land of Snow, a history of Tibet since 1947") the colonial nature of China's occupation of Tibet was explicitly recognized in the 1980s by the former Secretary of the Chinese Communist Party, the late Hu Yao Bang.

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### China/Tibet relations since 1950

China invaded Tibet on 7 October 1950. On 7 November 1950 the Tibetan Government appealed for help to the United Nations but no assistance was forthcoming. Tibetan forces were easily overwhelmed by the much stronger Chinese forces, with the bulk of the Tibetan Army being surrounded and surrendering at Chamdo.

After the surrender the Chinese Government embarked on what would now be called a “charm offensive” in Tibet. Tibetans were given money by People’s Liberation Army representatives, and encouraged to accept Chinese occupation on the understanding that their traditional way of life would be unchanged and that Tibet would enjoy a high degree of autonomy.

In 1951 China and representatives of the Dalai Lama signed the “17 point agreement for the Peaceful Liberation of Tibet”. The drafting phraseology of this document shows that some one was looking at it when drafting Hong Kong’s Basic Law. It provides that “the Tibetan people have the right of exercising national regional autonomy under the unified leadership of the Central People’s Government” (Article 3); that “the Central People’s Government will not alter the existing political system in Tibet”(Article 4), and “will not alter the established status, functions and powers of the Dalai Lama”(Article 4).

These autonomy provisions were never observed. The Chinese Communist Party ruled Tibet, as it rules China, by way of a centralized party organization based on classic communist doctrine, whereby each organ of government is shadowed by an organ of the party. These party organs are accountable to the Chinese Communist Party and do not function in accordance with concepts of autonomy. In Tibet the new Chinese authorities insisted on taking all important decisions and interfered on an increasing scale with the daily life of Tibetans. In response to the harshness of Chinese rule, the Tibetans rose in revolt in 1958. The revolt was easily crushed by China, and in 1959 the Fourteenth Dalai Lama and some 80,000 other Tibetans fled into exile in India. The Chinese action in crushing the revolt was condemned by the United Nations General Assembly.

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The severity of Chinese repression in Tibet since that date is well-documented.<sup>11</sup> There is severe repression of Tibetan Buddhism, which in 1997 was labeled as a “foreign culture”. Virtually all classes in secondary and higher education in Tibet are taught in Chinese not Tibetan, resulting in a high drop-out rate among Tibetans. Urban development has generally benefited Chinese immigrants, large numbers of whom have moved to Tibet and who are now about 12% of the population in the Tibet Administrative Region. Tibetans are routinely detained for long periods without charge or sentenced to long prison sentences for peacefully advocating independence or maintaining links with the Dalai Lama. Torture and ill-treatment in detention is widespread. Freedom of expression is severely restricted. Peaceful political demonstrations are invariably broken up and their participants arrested. Tibetan culture is treated as inferior to Chinese culture, and most key posts in the government and the economy are held by Chinese. Those few Tibetans who are able to enter Chinese government service do so at the cost of alienation from their own people and culture. Tibet’s environment and natural resources are ruthlessly exploited in the interests of China. Overall the situation bears marked similarities in all these respects to the situation of Algeria under the French or of Uzbekistan and Kirgizstan under Soviet Russian rule.

### The case for self-determination

No one disputes that the Tibetans are a distinct people with their own language and culture, who form a large majority of the population of Tibet. They do not control their own destiny. Tibet is controlled by the Chinese Government by means of military occupation for the benefit of the Chinese state. Tibet is a country under foreign military occupation, and its people are subject to “alien subjugation, domination and exploitation” within the meaning of the UN Resolutions on Colonial Peoples and on Friendly Relations.

The severity of the repression the Tibetans have undergone at China’s hands, combined with the threadbare nature of China’s territorial claim to Tibet, mean that if the universal right of peoples to self-determination has any meaning it must extend to Tibet.

Tibet’s status has been given renewed topicality by the recent independence of Kosovo. Kosovo was an autonomous region of Serbia dating from when Serbia was a state within Federal

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<sup>11</sup> See e.g. the 1997 International Commission of Jurists Report “Tibet and Human Rights”.

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Yugoslavia. About 90% of its population is ethnically Albanian, and so distinct from the Serbs who form the remaining 10% and the large majority of the population of Serbia as a whole. Kosovo had enjoyed some real autonomy in Yugoslavia but in the 1990s this was progressively reduced. In 1996 guerilla warfare broke out as Albanians rose in revolt against Serbian rule. In 1999 as a result of a NATO air campaign against Serbia, the Serbian Army withdrew from Kosovo and a United Nations administration was set up. Following a recommendation from the United Nations Special Representative, Martti Ahtisaari, a plan was devised for Kosovo's independence, which was bitterly opposed by Serbia. Kosovo nevertheless declared independence on 17 February 2008. This has so far been recognized by 43 countries, including all of the Group of Seven industrialized countries. It has not been recognized by countries such as Russia, China and Spain which face their own separatist issues (although it has been recognized by Turkey).

The recognition of Kosovo would seem to extend the right of self-determination beyond the traditional colonial or foreign occupation situation. Kosovo was never a colony, and the Serbian Army had withdrawn long before the independence issue was determined. The only coherent legal basis for recognizing the exercise of self-determination by the Kosovo people in the form of an independent state is that, prior to that independence, while under Serbian rule, the Kosovar Albanians were subject to "alien subjugation, domination and exploitation".

The Kosovars and the Serbs were historic enemies. Who was exploiting whom varied at different times in history. However a convincing case can be made that in the later years of Slobodan Milosovic's rule in Serbia, the Kosovars were being persecuted by the Serbian authorities, and were indeed in that sense subject to subjugation, domination and exploitation by people, who although long part of the same country, were culturally different and could in that sense arguably be described as alien.

If Kosovo has a right to self-determination, the right of Tibet is infinitely stronger. The catalogue of gross oppression, the second class citizen status of Tibetans under Chinese rule, and the identity of Tibet as a country are all much clearer than in Kosovo's case.

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### Self-determination, autonomy and independence

Self-determination need not mean independence. In many situations, autonomy within a larger nation state offers the best of both worlds, combining the benefits of being part of a large state in terms of defence, foreign relations and economic opportunity, with preservation of local laws, customs and culture from outside interference. Hong Kong is a good example.<sup>12</sup>

The Dalai Lama has repeatedly said that he favours autonomy for Tibet within China, provided that it is meaningful autonomy. Such is his authority with the Tibetan people that they would probably support autonomy in any referendum in which he expressed support for it.

However unless there is a change in Chinese government thinking, real autonomy does not appear to be on offer. This is shown by the continuing aggressive denunciation and misrepresentation of the Dalai Lama by Chinese official spokespersons.

Unless real autonomy is offered, self-determination in Tibet is bound to mean independence. China may hold down the Tibetans by force for a long time, but, as the example of Ukraine and Russia shows, even hundreds of years of repression is unlikely to extinguish the longing for self-determination among what are, incontrovertibly, a people.

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<sup>12</sup> The extent of Hong Kong's autonomy highlights the present lack of autonomy in the so-called "Tibet Autonomous Region". Hong Kong has its own currency, control over its own natural resources, its own education system, its own legal system, its own immigration control system, and its own elected parliament, albeit only partly democratic. Tibet presently has none of these things.

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