

## TWENTY-FIRST CENTURY SELF-DETERMINATION: IMPLICATIONS OF THE KOSOVO STATUS SETTLEMENT FOR TIBET

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### I. INTRODUCTION

Over the last century, self-determination has played an ever-increasing role as a weapon in the armory of those espousing human rights, in particular group human rights. Although the concept can trace its roots back to the American Declaration of Independence of 1776 and the French Revolution of 1789,<sup>1</sup> self-determination has become enshrined in international law more recently, particularly in the aftermath of the Second World War through Article 1(2) of the 1945 Charter of the United Nations<sup>2</sup> and subsequently through the International Covenants of 1966.<sup>3</sup> In later years, the post-Cold-War era has seen a shift in the direction of self-determination and it may be seen as a general principle rather than a rule, albeit with a number of customary rules.<sup>4</sup> It is acknowledged that the right of self-determination (“the self-determination right”)

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1. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995).

2. One purpose of the United Nations is “[t]o 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.” U.N. Charter art. 1, para. 4. Self-determination reappears in Article 55, which commences: “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” *Id.* at art. 55. Both articles represent self-determination as an aim, an aspiration, rather than a right or an obligation necessarily creating a legal effect, although under Article 56 “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” *Id.* at art. 55.

3. International Covenant on Civil and Political Rights, *adopted* 16 December 1966, 999 UNTS 171, 6 I.L.M. 368 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *entered into force* 3 January 1976, 999 UNTS 3, 6 ILM 360 [hereinafter ICESCR]. In each of the two International Covenants, Article 1 commences: “All peoples have the right of self-determination.” *Id.* at art. 1.

4. *See* CASSESE, *supra* note 1, at 126-33. Self-determination is perceived as a general principle rather than a rule; thus a space opens up for ideas and evolution of the right.

may be “of fundamental importance for either the creation of . . . entities as States or their (continued) survival as States.”<sup>5</sup>

Secession is the ultimate potential result of self-determination, although not the only one, and may be defined as “the separation of part of the territory of a State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State.”<sup>6</sup> While secession is just one of the panoply of outcomes that may pertain under the concept of self-determination, it is the one with the most far-reaching consequences, although secession is not of itself a right of self-determination.<sup>7</sup> External self-determination through secession may be contrasted with internal self-determination, which may be seen as a protection of the right “of national or ethnic groups within the state to assert some degree of ‘autonomy’ over their affairs, without giving them the right to secede.”<sup>8</sup> Internal self-determination can therefore be understood as “forms of self-government and separateness within a state rather than separation (so-called ‘external’ self-determination) from the state.”<sup>9</sup>

In a proposal that has the potential to provide a new dimension to the self-determination right, on March 14, 2007, the UN mediator in Kosovo, Martti Ahtisaari, brought forward the Kosovo Status Settlement. That proposed settlement has been the subject of much debate and has proved divisive since its submission, even though the situation in Kosovo has been termed *sui generis*.<sup>10</sup> Its ability to act as an encouragement to other entities seeking self-determination around the world has been illustrated in August 2008 in Georgia during a dispute relating to the territories of South Ossetia and Abkhazia, but as yet little has been heard in terms of its capacity to impact what may be termed the Tibet Question.<sup>11</sup>

This paper focuses on that issue, the Tibet Question, one that has consumed the international community, in one form or another, for over half a century and, after briefly introducing it, moves on to discuss self-determination in the context of the contemporary philosophical debate between choice theorists and remedial right theorists. It then considers the evolving nature of the self-determination right, examining the law so far as secession is concerned and

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5. John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 94, 120 (Marcelo G. Kohen ed., 2006).

6. Christine Haverland, *Secession*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 354 (Rudolph Bernhardt ed., 2d ed. 2000); see also Li Ann Thio, *International Law and Secession in the Asia and Pacific Regions*, in SECESSION, *supra* note 5, at 297, 297.

7. See Georg Nolte, *Secession and External Intervention*, in SECESSION, *supra* note 5, at 65, 84.

8. PAUL GROARKE, DIVIDING THE STATE: LEGITIMACY, SECESSION AND THE DOCTRINE OF OPPRESSION 84 (2004); see CASSESE, *supra* note 1, 350-51.

9. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 1249 (2d ed. 2000).

10. See *infra* Part IV.C.

11. See *infra* Part II for an introduction of the Tibet Question.

analyzing the Kosovo Status Settlement. Finally, the paper evaluates the Tibet Question and the implications of the Kosovo Status Settlement for Tibet.

## II. THE TIBET QUESTION

The Tibet Question is one resonating particularly since 1950, when the People's Liberation Army of China entered Tibet in numbers and what may be termed a Tibetan polity and Tibetan de facto independence ceased,<sup>12</sup> as Tibet then fell under political control of China.<sup>13</sup> Thus, the Tibet Question is one that centers on territory and control. It has various facets: it is about what is, or should be, the political status of Tibet—whether it is a part of China or an independent state,<sup>14</sup> whether it should be an independent state, and if so, what the extent of that state should be. If not an independent state, issues of its status within China arise. For Barry Sautman, the Tibet Question is “one of the world's most intractable conflicts . . . [inter alia] a long-running ethnic dispute that has persisted into the post-Cold War era of rising nationalism . . . [and] a sovereignty dispute.”<sup>15</sup>

Consequently, it is a question at the heart of which is independence. Nevertheless, commentators also focus on human rights issues, and hence the issue can become one of nationalism or ethno-nationalist struggle for self-determination. Melvyn Goldstein specifically refers to it as “a conflict about nationalism—an emotion-laden debate over whether political units should directly parallel ethnic units.”<sup>16</sup> There are various ways of looking at the Tibet Question,

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12. See M.C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW* 140 (1987) (“On 7 October 1950, troops of the People's Liberation Army crossed into Tibet.”); see also MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913-1915: THE DEMISE OF THE LAMAIST STATE* 813 (1989) (“In the next few months, several thousand troops of the People's Liberation Army arrived in Lhasa; although the old system continued to exist in some form for another eight years, October 1951 marks the end of the de facto independent Lamaist State.”).

13. See, e.g., *The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet*, May 23, 1951, translated in VAN WALT VAN PRAAG, *supra* note 12, at 337-40.

14. TIBET INFORMATION NETWORK, *UNITY AND DISCORD. MUSIC AND POLITICS IN CONTEMPORARY TIBET* 8 (2004) (discussing whether Tibet is an “inalienable” part of China, as claimed by the Chinese authorities, or “a fully-fledged independent country, as the Tibetan government-in-exile claims”); see also Barry Sautman & June Teufel Dreyer, *Introduction: The Tibet Question in Contemporary Perspective*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 3, 5 (Barry Sautman & June Teufel Dreyer eds., 2006).

15. Barry Sautman, *The Tibet Issue in Post-Summit Sino-American Relations*, 72 *PAC. AFF.* 7, 11-12 (1999); see also Sautman & Dreyer, *supra* note 14, at 3.

16. MELVYN C. GOLDSTEIN, *THE SNOW LION AND THE DRAGON: CHINA, TIBET, AND THE DALAI LAMA* ix (1997).

some of which are more esoteric than others.<sup>17</sup> The legal questions spill over into the political and into the religious,<sup>18</sup> and the debate and the participants in the debate take on an elusive quality, the shape of the debate yielding to a variety of pressures. For China, the practical question, however, is one of territorial integrity, historical continuity as opposed to invasion, and one relating to interference by other states, and also human rights proponents, in internal affairs.<sup>19</sup>

As the Dalai Lama, the spiritual and political leader of the Tibetans, enters his later years,<sup>20</sup> a natural watershed approaches and a window of opportunity to achieve some form of reconciliation may become apparent to both China and Tibet. This may be given impetus, for example, by China's desire to bring Taiwan back to the motherland; any burgeoning dispute with Tibet is likely to be counter-productive in this regard. Conversely, the Dalai Lama's death potentially gives impetus to the Tibetan independence movement, if the Dalai Lama is seen as a moderate brake on that movement.<sup>21</sup> Increasing global terrorism in a fragile political international environment may impact this independence movement.

There are, therefore, reasons to suppose the time is ripe for a full consideration of the Sino-Tibetan relationship, and in so doing international law comes to the fore in the contexts of sovereignty, human rights and, in particular, self-determination.

### III. SELF-DETERMINATION: A QUALIFIED IDEAL

An underlying feature of the self-determination right is a determination of the conditions under which a right to external self-determination may be justified.<sup>22</sup> These conditions have changed over time, just as political theory and

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17. P. Christiaan Klieger, *Riding High on the Manchurian Dream: Three Paradigms in the Construction of the Tibetan Question*, in CONTEMPORARY TIBET, *supra* note 14, at 214, 227.

18. *Id.* at 224-27.

19. See Amy Mountcastle, *The Question of Tibet and the Politics of the "Real"*, in CONTEMPORARY TIBET, *supra* note 14, at 85, 86; GOLDSTEIN, *supra* note 16, at 130 (discussing "China's extreme sensitivity to outside intervention in its internal affairs").

20. The present Dalai Lama was born on July 6, 1935. The Official Website of the Dalai Lama, A Brief Biography, <http://www.dalailama.com/page.105.htm> (last visited Oct. 31, 2009).

21. JANE ARDLEY, THE TIBETAN INDEPENDENCE MOVEMENT: POLITICAL, RELIGIOUS AND GANDHIAN PERSPECTIVES 180 (2002) (commenting that the Dalai Lama's "stated goal of autonomy does not seem to correspond with the wishes of the majority of Tibetan people").

22. Margaret Moore, *Introduction: The Self-Determination Principle and the Ethics of Secession*, in NATIONAL SELF-DETERMINATION AND SECESSION 1, 1 (Margaret Moore ed., 1998) ("analy[zing] the various normative theories of secession, which elaborate the

views may change as contesting ideologies compete for dominance. The history of the right has evolved during the twentieth century through three distinct phases: first, subsequent to the First World War, with attendant population transfer and exchange;<sup>23</sup> second, following the Second World War, with the application of the theory to situations of colonial domination;<sup>24</sup> and third, in the post-Cold War era.<sup>25</sup>

In each stage, different conditions in which the right to self-determination may be justified can be identified. In the present century, the ongoing philosophical debate between the choice theorists and the remedial right theorists focuses on identification.<sup>26</sup> In this debate, it is possible to see how the collective right of self-determination has expanded and been circumscribed, where its dynamics have led it, and how it has been applied.

### **A. Choice Theorists**

Choice theorists expound the wider of the two concepts, potentially including within the ambit of the theory a large number of peoples entitled to self-determination. The right is essentially conditioned upon choice—the choice expressed by a majority through referendum or plebiscite for self-determination.<sup>27</sup> Daniel Philpott argues for this approach, which harmonizes with the approach of “John Stuart Mill and Woodrow Wilson, of the American Revolution and colonial independence movements: self-determination is a basic right, rooted in liberal democratic theory, available to any group the majority of whose members desire it.”<sup>28</sup> Philpott, while propounding this generally permissive approach, constricts the claims by providing that “[s]elf-determining groups are required to be at least as liberal and democratic as the state from which they are separating, to demonstrate a majority preference for self-determination, to protect minority rights, and to meet distributive justice requirements.”<sup>29</sup>

The nature of the group, “the peoples,” is at the core of any theory of self-determination, both as to whether particular “peoples” are perceived as being

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conditions in which a right to self-determination, including a right to secession, may be justified”).

23. See generally Treaty of Peace with Germany (Treaty of Versailles) part 1, June 28, 1919, 1919 U.S.T. LEXIS 7, 2 Bevans 43, available at <http://net.lib.byu.edu/~rdh7/wwi> (considering the context of the establishment of the League of Nations by the victorious Allied Powers following the conclusion of the First World War).

24. See, e.g., James Crawford, *Some Conclusions*, in THE RIGHTS OF PEOPLES 159, 161 (James Crawford ed., 1988).

25. See *supra* note 4 and accompanying text.

26. See, e.g., NATIONAL SELF-DETERMINATION, *supra* note 22.

27. See Daniel Philpott, *Self-Determination in Practice*, in NATIONAL SELF-DETERMINATION, *supra* note 22, at 79.

28. *Id.* at 80.

29. *Id.*

entitled to pursue self-determination, and as to “*who* is the majority, *who* is the minority, and what is the relationship between them.”<sup>30</sup> As to the first part of this issue, the nature of “peoples” has been the subject of debate and uncertainty.<sup>31</sup> David Miller shows that a principle of nationality supplies a perspective on the issue of secession, and ultimately a self-determination theory, as an issue of secession, that “can avoid us having to condone a secessionist free-for-all without forcing us to defend existing state boundaries regardless.”<sup>32</sup> He defines a nation as “a group of people who recognize one another as belonging to the same community, who acknowledge special obligations to one another, and who aspire to political autonomy.”<sup>33</sup>

There are, however, problems with choice theory per se: its inevitable and logical result is fragmentation of states, leading to, among other problems, an ever-increasing number of states.<sup>34</sup>

In the context of Tibet, taking into account the dominant position of the People’s Republic of China (“China”), it is difficult to see how choice theory could rationally assist any resolution of the Tibet Question. A referendum to evidence choice would not be sanctioned by China, neither on a question of secession nor on one of internal self-determination—a concept that is seen as particularly relevant to choice theorists.<sup>35</sup>

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30. Moore, *supra* note 22, at 11.

31. See, e.g., Christian Tomuschat, *Secession and Self-Determination*, in SECESSION, *supra* note 5, at 23, 23-26 (discussing the concept of people and the attendant dilemma of legal construction).

32. David Miller, *Secession and the Principle of Nationality*, in NATIONAL SELF-DETERMINATION, *supra* note 22, at 62, 75. See Tomuschat, *supra* note 31, at 24 (referring to the potential secessionist free-for-all in a world where the majority of states are heterogeneous).

33. Miller, *supra* note 32, at 65.

34. If the choice theorist school of thought is to prevail, other inevitable outcomes would include an attendant increase in minorities, as any heterogeneous new state will contain its own minorities; potential increase in the movement of peoples as they seek escape from or entry to a state; and increased fluidity of political and legal identity. The Bangkok Governmental Declaration of 1993, which emanated from a regional meeting of Asian countries prior to the Second World Conference on Human Rights, by virtue of stressing territorial integrity and a state’s right to political independence, contemplated self-determination in a restrictive fashion, which “pre-empts groups within sovereign independent States from asserting self-determination as grounds for a legal claim to secession, allaying fears of State fragmentation.” Thio, *supra* note 6, at 310.

35. Philpott, *supra* note 27, at 86. See *infra* Part IV.C on the future status of Kosovo as to the possibility of secession without the consent of the predecessor state.

## **B. Remedial Right Theorists**

Remedial right theorists emphasize that the self-determination right is legitimate only if necessary to remedy a prior injustice.<sup>36</sup> Thus, a people exercising a simple choice by referendum or plebiscite will not, and should not, ground a collective right to self-determination; as Allen Buchanan argues, “recognition of a plebiscitary right to secede would threaten democracy.”<sup>37</sup> Consequently, the remedial right theorists impose a burden of proof on those seeking self-determination, a burden to prove they have a just cause:

[A] group has the right to secede (in the absence of any negotiations or constitutional provisions that establish a right) only as a remedy of last resort to escape serious injustices. On my version of the remedial right only position, injustices capable of generating a right to secede consist of persistent violations of human rights, including the right to participate in democratic governance, and the unjust taking of the territory in question, if that territory previously was a legitimate state or a portion of one (in which case secession is simply the taking back of what was unjustly taken).<sup>38</sup>

This view of remedial rights and self-determination potentially has considerable significance for the Tibetan situation.<sup>39</sup> Christian Tomuschat argues

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36. See Allen Buchanan, *Democracy and Secession*, in NATIONAL SELF-DETERMINATION, *supra* note 22, at 14.

37. *Id.* at 17.

38. *Id.* at 25; Thio, *supra* note 6, at 300 (“The international community is more likely to recognize the realities of secessionist attempts as a remedy where the government of the predecessor State committed gross human rights violations against the seceding unit.”). See Buchanan, *supra* note 36, at 15 (referring to a group having the right to secede); Moore, *supra* note 22, at 2 (the nature of a “group” having the right to benefit from the principle of self-determination can be distilled into two particular questions: first, as to who the people are; and secondly, as to the relevant territorial unit over which they should exercise self-determination. These questions are interrelated.). See *infra* Part V for a discussion of how the issues of “people” and “territorial unit” have particular relevance in the Tibetan context. Issues of whether a seceding unit can meet the criteria for statehood will also be of relevance. See Multilateral Rights and Duties of States (Montevideo Convention) art. 1, Dec. 26, 1933, 1933 U.S.T. LEXIS 69, 3 Bevens 145 (setting out the criteria for statehood). It is also of note that states may arise before all elements of those criteria are in place, and, in the instance of Bangladesh, “What brought about the recognition of the new entity by the international community was simply the principle of effectiveness.” Tomuschat, *supra* note 31, at 30.

39. See Tomuschat, *supra* note 31, at 35 (discussing “the idea that exceptional circumstances are capable of sustaining a claim for secession—circumstances which may roughly be summarized as a grave and massive violation of the human rights of a specific

that remedial secession “has broad support in the legal literature” and “should be acknowledged as part and parcel of positive law.”<sup>40</sup> He acknowledges that the empirical basis is thin, but points out that it is not entirely lacking: “the events leading up to the establishment of Bangladesh and the events giving rise to Kosovo as an autonomous entity under international administration can both be classified as coming within the purview of remedial secession.”<sup>41</sup> It should be noted, however, that Buchanan talks of secession as a last resort.<sup>42</sup> This is the correct view, for if issues can be dealt with in less conflictual ways the considerable disadvantages surrounding secession may be avoided. These disadvantages include: attendant increases in new minorities; the potentially increased movements of peoples seeking escape from or entry into a state; increased fluidity of political and legal identity; and, of course, potential armed conflict.<sup>43</sup> When considering the application of the remedial right theory, two specific issues arise: first, whether injustices capable of generating a right to secede exist; and secondly, whether the injustices can be resolved without resorting to the ultimate sanction of secession.

As far as the Tibet Question is concerned, it can be asked first whether there have been injustices capable of generating a right on behalf of Tibetans to secede. These injustices may consist of persistent human rights violations.<sup>44</sup> By amendment to Article 33 of the 1982 Constitution of the People’s Republic of China, “[t]he State respects and preserves human rights.”<sup>45</sup> Prior to this amendment, the Information Office of the State Council of the People’s Republic of China published a 1992 White Paper entitled “Tibet—Its Ownership and

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group in a discriminatory fashion”); *see also* LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 222 (1978).

40. Tomuschat, *supra* note 31, at 38, 42.

41. *Id.* at 42; *see infra* Parts IV.B and IV.C concerning ongoing developments with regard to Kosovo. *But see infra* note 79 for a contrary view of Bangladesh.

42. *See supra* note 38 and accompanying text.

43. *See supra* note 34 and accompanying text for the context of choice theory. *See also* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 497-98 (rev. ed. 1996) (Armed conflict arose out of the break-up of the former Yugoslavia, where the state ultimately broke up into constituent parts in a surge of violence and what came to be known as “ethnic cleansing”); Roel De Lange, *Paradoxes of European Citizenship*, in NATIONALISM, RACISM AND THE RULE OF LAW 97, 101 (Peter Fitzpatrick ed., 1995); *infra* Part IV.B. The creation of new states “disrupts the composition of international society and challenges the very foundations of its main actors.” Marcelo G. Kohen, *Introduction*, in SECESSION, *supra* note 5, at 1, 1. *But see* Thio, *supra* note 6, at 321 (“The violation of the right to internal self-determination, including the violation of minority and political participation rights, is a precursor to claims to external self-determination through secession.”).

44. *See infra* notes 48-50 and accompanying text.

45. XIAN FA art. 33, § 3 (2004) (P.R.C.), *available at* [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2826.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2826.htm).



Human Rights Situation,”<sup>46</sup> that included sections in Part Two entitled “The People Gain Personal Freedom,” “The People Enjoy Political Rights,” “Economic Development and Improvement of Living Standards,” and “Freedom of Religious Belief.”<sup>47</sup> In addition, China issues annual White Papers delineating progress in China’s human rights cause.

Nevertheless, an ongoing pattern of human rights abuse is evident in Tibet in the sphere of civil and political rights. Such abuses occur in respect of political and religious freedom, for example, also in regard to freedom of speech and assembly.<sup>48</sup> The oppression in Tibet has indeed been referred to as “something not far from genocide.”<sup>49</sup> There are recent instances of persecution by the state in Tibet in the religious and political context, and these include the case regarding the arrest, treatment, and sentence to death of Tenzin Delek Rinpoche, the violation of his rights, and the violation of rights and execution of Lobsang Dondrup on January 26, 2003.<sup>50</sup> Further, although the 1966 International Covenant on Economic, Social and Cultural Rights has been ratified by China, it has apparently not been complied with.<sup>51</sup>

Consequently, a case can be mounted that there are persistent violations of Tibetan human rights as to found injustices capable of generating a right for Tibet to secede from China, although this will be for Tibetans to demonstrate. Tibetans may further try to base such arguments on the “unjust taking of

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46. Tibet—Its Ownership and Human Rights Situation (Sept. 1992), *available at* <http://www.china.org.cn/e-white/tibet/index.htm>.

47. *Id.*

48. *See, e.g.*, Human Rights Watch, World Report 2001: China and Tibet: Human Rights Developments (2001), <http://www.hrw.org/wr2k1/asia/china.html>; HUMAN RIGHTS WATCH, WORLD REPORT 2006, at 246, 251 (2006).

49. JOHN GRAY, BLACK MASS: APOCALYPTIC RELIGION AND THE DEATH OF UTOPIA 169 (2007). For vivid accounts of incidents of oppression, see also JOHN F. AVEDON, IN EXILE FROM THE LAND OF SNOWS: THE DALAI LAMA AND TIBET SINCE THE CHINESE CONQUEST 92, 221-22, 230-32 (HarperPerennial, 1997) (1984).

50. *Trials of a Tibetan Monk: The Case of Tenzin Delek*, 16(1)(C) HUM. RTS. WATCH RPT. (Hum. Rts. Watch, New York, N.Y.), February 2004. For another example of the detainment and torture of a Tibetan monk, see FreeTibet.org, Phuntsok Wangdu: Urgent Campaign, July 22, 2005, <http://www.freetibet.org/campaigns/ucs-220705-phuntsok-wangdu>. Similar cases are also reported on the FreeTibet.org website.

51. *See* ICESCR, *supra* note 3 (The ICESCR was adopted on December 16, 1966 and entered into force January 3, 1976.). *See, e.g.*, TESERING SHAKYA, THE DRAGON IN THE LAND OF THE SNOWS: A HISTORY OF MODERN TIBET SINCE 1947, at 94, 333, 395, 404-05, 407, 438, 446-47 (1999) (discussing education, the study of the Tibetan language in schools, the use of the Tibetan language in business and administration, and attacks generally on Tibetan culture and identity); AVEDON, *supra* note 49, at 73, 269-71, 316; The Next Generation—The State of Education in Tibet Today, <http://www.tibet.com/Humanrights/EduToday/intro.html> (Sept. 12, 1997).

territory.”<sup>52</sup> However, the issue of whether Tibetan territory has been taken by China is highly contentious.<sup>53</sup> Moreover, Tibetan arguments in this respect have not found favor with the international community.<sup>54</sup> The most persuasive argument from the Tibetan perspective to establish a just cause and fall within the ambit of the remedial right theory is that of persistent violations of human rights.

Having noted that this is the overriding issue for Tibetans so far as the remedial right theory is concerned, this paper will now turn to consider the dynamism of the self-determination theory and whether this has the potential to unlock the Tibet Question to assist ethnic Tibetans. It is helpful to conclude this section, however, by emphasizing that the remedial right theory echoes the burgeoning global concern with the concept of human rights.<sup>55</sup>

#### IV. THE DYNAMIC RIGHT TO SELF-DETERMINATION: A NEW PROGRESSION

According to traditional theory, “the function or disappearance of a State is a pure fact, a political matter, remaining outside the realm of law (which does not create States but presupposes their existence as *de facto* sovereign entities).”<sup>56</sup>

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52. The Lithuanian, Estonian, Latvian, and Baltic claims for independence in the early 1990s were based on claims of forcible and illegal annexation by the Soviet Union in 1940; their claims “were not articulated as an exercise of the right to self-determination or as a secession, but rather as a reassertion of the independence and *de jure* continuity of these States which had been sovereign from 1918 to 1940.” Photini Pazartzis, *Secession and International Law: the European Dimension*, in SECESSION, *supra* note 5, at 355, 363. It is nevertheless the case that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.” G.A. Res. 2625 (XXV), U.N. GAOR, 25<sup>th</sup> Sess., Item 85, U.N. Doc. A/8082 (Oct. 24, 1970), available at, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625> (XXV)&Lang=E&Area=RESOLUTION. See also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 688 (2d ed. 2006) (“It is well established that belligerent occupation does not affect the continuity of the State.”).

53. China contends Tibet is historically a part of China. See *supra* note 14.

54. The response of the international community with regard to the predicament of Tibet has been limited. No United Nations General Assembly resolution succeeded until 1959 and only three in all have to date been passed. G.A. Res. 1353 (XIV), U.N. Doc. A/RES/1353(XIV) (1959); G.A. Res. 1723 (XVI), U.N. Doc. A/RES/1723(XVI) (1961); G.A. Res. 2079 (XX), U.N. Doc. A/RES/2079(XX) (1965). No UN resolution on Tibet has been passed since the People’s Republic of China replaced Taiwan as the representative of China at the United Nations in 1971. G.A. Res. 2758 (XXVI), U.N. Doc. S/10378 (1971).

55. See *infra* note 100 and accompanying text. See also *supra* note 38 and accompanying text regarding the nature of the remedial right theory.

56. Antonello Tancredi, *A Normative “Due Process” in the Creation of States Through Secession*, in SECESSION, *supra* note 5, at 171, 171-72. See *infra* Part IV.C regarding creation of states and state building from the outside, especially with reference to

However, this norm has been abrogated within the framework of self-determination emanating from decolonization, and the question is now how far this exception has expanded in the post-Cold War period, when few colonized territories remain under the control of the metropolitan state.<sup>57</sup> An attempt to answer this question “may be based on the practice of the last decade, a period which hosted a large number of processes of State creation.”<sup>58</sup> The remedial right theory is pertinent in this context. As a preliminary to issues of dynamism, however, when considering the conditions in which a right to self-determination may be justified, it always has to be borne in mind that in international law there is no right to unilateral secession.<sup>59</sup> Secession, subject to exceptions referred to in section IV.A below, is not a right of self-determination.

### **A. Secession**

Secession as a concept is in opposition to ideas of territorial integrity and state sovereignty. It is these latter ideas that dominate the international political arena, and by extension, international law. The Charter of the United Nations emphasizes the inviolability of territorial integrity and the political independence of the state,<sup>60</sup> as, for example, do UNGA Resolution 1514 (XV) of December 14, 1960,<sup>61</sup> and UNGA Resolution 2625 (XXV) of October 24, 1970,<sup>62</sup> and an entity is only able to separate itself from its parent state in limited circumstances for separation by an entity from the state in itself violates territorial integrity and the political independence of the state.<sup>63</sup>

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Kosovo. If, however, a state comes into existence or ceases to exist, this de facto situation should be based on principles of international law. *See, e.g.*, Arbitration Commission of the Conference for Peace in Yugoslavia Op. No. 1, para. 1(c), 31 I.L.M. 1494, 1497 (1992) [hereinafter Badinter Commission].

57. *See* Nolte, *supra* note 7, at 89.

58. *See* Tancredi, *supra* note 56, at 184.

59. *See* Nolte, *supra* note 7, at 95. Antonello Tancredi concludes, “international law, as it now stands, recogni[z]es neither a general nor a remedial right to secede in oppressive contexts,” although a state formed in breach of “due process . . . is not inexistent from a factual or a legal point of view.” Tancredi, *supra* note 56, at 188, 205. However, “[t]he right to self-determination of subaltern nations is really a right to secession from the control of dominant powers,” echoing back to the views of Lenin who affirmed a right to national self-determination, which was “really the right to secession for all.” MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 106, 432 n.7 (2001).

60. U.N. Charter art. 2, para. 4; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177 (July 9, 2004).

61. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

62. *See supra* note 52 and accompanying text.

63. *See* discussion of exceptions *infra* pp. 558-60.

It is clear that, subject to certain exceptions, unilateral secession is not recognized in international law, and “[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>64</sup> State practice resists any claim to a right to secession “leading to statehood against the will of the present sovereign.”<sup>65</sup> Thus, the primacy of territorial integrity is acknowledged. There remain, however, exceptions to the inviolability of territorial integrity, and these become evident in the historical context of self-determination.

A principal exception relates to the recovery of land lost to enemy action, and “existing states which have been invaded or which are otherwise clearly controlled by foreign powers have a right of self-determination, i.e., the right to overthrow the invaders and re-establish independence.”<sup>66</sup> This exception has particular application in the colonial context, but is said not to apply to a minority within a subsisting state.<sup>67</sup> So far as such minorities are concerned, “constant state practice and the weight of authority require the conclusion that such a right does not exist.”<sup>68</sup> If an independent state is unlawfully invaded and annexed, international law protects that state so that it “may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness.”<sup>69</sup>

As far as Tibet is concerned, this particular exception would only have relevance if it can be established that Tibet was an existing state prior to 1950.<sup>70</sup>

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64. G.A. Res. 1514 (XV), *supra* note 61, at ¶ 6.

65. Christopher Warbrick, *States and Recognition in International Law*, in INTERNATIONAL LAW 217, 227 (2d ed. 2006). Consequently there is no right in international law to unilateral secession “where the central government represented ‘the people as a whole on the basis of equity and without discrimination.’” *Id.* (referring to *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 154 (Can.), where the actual wording is “the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination”).

66. HANNUM, *supra* note 43, at 48; *see also supra* Part III.B.

67. HANNUM, *supra* note 43, at 48-49.

68. *Id.* at 49. *See also* CRAWFORD, *supra* note 52, at 415. The application of the principle of *uti possidetis* applies – an extension of the principle that you keep what you now possess. *See* PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW, 162-63 (7th ed. 1997). In this context it is important to recall the emphasis given by China to the integrity of the state, in particular of the Chinese state, and by Article 52 of the 1982 Chinese Constitution. “It is the duty of the citizens of the People’s Republic of China to safeguard the unity of the country and the unity of all its nationalities.” XIAN FA art. 52, § 2 (1982) (P.R.C.). Also note that, although republics were able to secede from the Soviet Union, federal units were not given the opportunity to establish statehood, for example Chechnya. Warbrick, *supra* note 65, at 227. However, by way of potential contrast, *see infra* Part IV.C regarding Kosovo.

69. CRAWFORD, *supra* note 52, at 63.

70. The exception does not apply to a minority within a subsisting state. *See supra* note 67 and accompanying text.

Arguments can be put forward that Tibet was *de facto* independent at that time, but *de jure* sovereignty had not been established.<sup>71</sup> This has essentially resulted in Tibet not being recognized as a state, and it is this lack of recognition that has proved critical and determinative as the international community has for all intents and purposes taken the side of China, recognizing Tibet as a territory within that state.<sup>72</sup>

States in the post-World War II era have shown “extreme reluctance . . . to recognize or accept unilateral secession outside the colonial context.”<sup>73</sup> However, a second exception is apparent in that “[a] government may become partially illegitimate if effective participation by minority or indigenous groups or their members has been rendered impossible by either deliberate discrimination or a political situation which permanently excludes such groups.”<sup>74</sup> Similarly, a government may lose legitimacy if it practices human-rights abuses and the “common denominator is the violation of fundamental rights by the state.”<sup>75</sup> The United Nations Charter, in its Purposes and Principles, refers to promoting and encouraging respect for human rights,<sup>76</sup> and, due to the increasing profile and significance of human rights, if a state fails to respect the human rights of its peoples or minorities it may “forfeit the protection it enjoys by virtue of international law.”<sup>77</sup> This may lead to intervention by the international community, and while such government practices may not legitimate a right to secession, they may legitimate a basic right to resistance and self-help on the part of the community discriminated against, and such right may lead to a recognized secession.<sup>78</sup> Other than the instance of Bangladesh it is arguable that, in the

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71. See VAN WALT VAN PRAAG, *supra* note 12, at 134-136; see also Charles Henry Alexandrowicz-Alexander, *The Legal Position of Tibet*, 48 AM. J. INT'L L. 265, 270 (1954) (asserting that after the revolution of 1911, Tibet was “in her initial stage of independence”); INTERNATIONAL COMMISSION OF JURISTS, *THE QUESTION OF TIBET AND THE RULE OF LAW* 85 (1959); Goldstein, *supra* note 12, at 815 (“Tibet unquestionably controlled its own internal and external affairs during the period from 1913 to 1951 and repeatedly attempted to secure recognition and validation of its *de facto* autonomy/independence.”). As to the lack of *de jure* sovereignty, see, e.g., CRAWFORD, *supra* note 52, at 325; GOLDSTEIN, *supra* note 16, at 34.

72. Strictly speaking, of course, recognition is not a criterion of statehood.

73. CRAWFORD, *supra* note 52, at 415.

74. HANNUM, *supra* note 43, at 470-71.

75. *Id.* at 471. See also *infra* Part IV.C.

76. U.N. Charter, art. 1, para. 3.

77. Tomuschat, *supra* note 31, at 41.

78. See BUCHHEIT, *supra* note 39, at 223 (“In the end, one is left with the thought that remedial secession . . . merely affirms a basic right of revolution by oppressed peoples; and that has long been thought to be one of those ‘inalienable’ rights which the international community could neither bestow nor revoke.”). This contention receives strong support, by implication, from the penultimate paragraph of the U.N. General Assembly Resolution 2625 (XXV), which has the heading, “The principle of equal rights and self-determination of peoples”:

decades following 1945, of the newly emergent states outside the colonial context, none achieved independence through unilateral secession.<sup>79</sup> Yet, the dynamism of the self-determination theory may be evidenced by more recent events where the international community has intervened, particularly in Kosovo.

### **B. Kosovo and Intervention by the International Community**

States within the international community, and bodies within the United Nations, have recently shown an increasing appetite for intervention against the territorial integrity of Member States.<sup>80</sup> Territorial integrity diminishes in importance for those looking on and then intervening. One area stands out as of special importance in this respect: the Balkans generally, Kosovo in particular.

Prior to the break-up of the former Yugoslavia, Kosovo was a self-administering province of Serbia under the 1974 Yugoslav Constitution.<sup>81</sup> Self-

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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.

G.A. Res. 2625 (XXV), *supra* note 52.

79. Even in the case of Bangladesh,

[t]he indications are that the United Nations did not treat the emergence of Bangladesh as a case of self-determination despite good grounds for doing so, but rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances. The violence and repression engaged in by the Pakistan military made reunification unthinkable, and in effect legitimi[z]ed the creation of the new State.

CRAWFORD, *supra* note 52, at 415-16. Others, though, believe the establishment of Bangladesh does come within the principle of self-determination. *See, e.g., supra* note 41 and accompanying text.

80. *See* ROGER PLUNK, THE WANDERING PEACEMAKER 119 (2000) (“What is ‘international,’ and the concern of the international community, and what is ‘domestic,’ and the sole concern of a nation, are evolving concepts.”).

81. CONSTITUTION OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA (1974), *reprinted in part in* SNEŽANA TRIFUNOVSKA, YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 224-33 (1994). The Socialist Federal Republic of Yugoslavia was a federal state comprising five Socialist Republics and also two “Socialist Autonomous

rule “was curtailed in 1989 leading to local unrest,”<sup>82</sup> and was further curtailed the following year by a new republican constitution proclaimed by Serbia on September 28, 1990.<sup>83</sup> The goal of the Kosovars was “independence from Serbia under international (presumably UN) protection,”<sup>84</sup> and, in response to the 1989 curtailment of autonomy, the Kosovo provincial assembly issued a Declaration of Independence on July 2, 1990, which made reference to the sovereign right, including the right to self-determination, of the Kosovar people.<sup>85</sup> Kosovo attempted to secede from Serbia, if not from Yugoslavia, and a plebiscite was held in September 1991 on Kosovo’s sovereignty and independence.<sup>86</sup> Following secession from Yugoslavia by Croatia and Slovenia the next month, Kosovo declared independence and sought international recognition.<sup>87</sup> Only one state, Albania, recognized Kosovo’s independence.<sup>88</sup> It is noteworthy that the European Community was not prepared to grant recognition of autonomous provinces, only of Yugoslavia’s former republics.<sup>89</sup>

The Kosovo Liberation Army formed and started to attack federal security forces of the rump Yugoslavia in 1998.<sup>90</sup> Following continued and spreading violence on both sides, United Nations (“UN”) Security Council Resolution 1160 (1998) expressed “its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.”<sup>91</sup> At subsequent talks in early 1999 at Rambouillet, the Federal Republic of Yugoslavia (“FRY”) “rejected provisions for NATO peacekeeping and eventually withdrew from the talks.”<sup>92</sup> There followed a NATO bombing campaign, commencing on March 24, 1999, subsequent to which the NATO-led KFOR (“Kosovo Force”) was deployed under UN Security Council

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Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia.” *Id.* at art. 1; *see also id.* at art. 2.

82. CRAWFORD, *supra* note 52, at 557; *see also* PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 196-97* (2002).

83. By Article 6 of that constitution, Kosovo, renamed “the Autonomous Province of Kosovo and Metohija, was stated to have a ‘form of territorial autonomy.’” RADAN, *supra* note 82, at 197.

84. MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR 181* (1992).

85. RADAN, *supra* note 82, at 198.

86. *Id.* at 198-99.

87. *Id.* at 199.

88. *Id.* at 200.

89. *Id.* at 204-05 (referring to Badinter Commission, Opinion No. 3, *supra* note 56, at 1488, 1497-99, and confirming the applicability of the principle of *uti possidetis* in the context of whether the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent people of Yugoslavia, had a right to self-determination).

90. RADAN, *supra* note 82, at 200.

91. S.C. Res. 1160, ¶ 5, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

92. CRAWFORD, *supra* note 52, at 557; *see also infra* note 103 and accompanying text.

Resolution 1244 (1999)<sup>93</sup> and FRY forces withdrew from Kosovo.<sup>94</sup> Resolution 1244 (1999) confirmed the territorial integrity of the FRY, yet brought about what was effectively a partitioning of Kosovo from the FRY under the protection of the United Nations by virtue of the deployment of KFOR.<sup>95</sup>

Thus, both NATO and the United Nations, as a mandating authority, have shown willingness to intervene in the affairs of a sovereign state, despite references in Security Council resolutions to commitment to the sovereignty and territorial integrity of the states in the region, including the FRY.<sup>96</sup> Yet it was concern for humanitarian matters that prevailed in the United Nations, and UN Security Council Resolution 1244 (1999).<sup>97</sup> In its preamble, the Resolution underlined a determination “to resolve the grave humanitarian situation in Kosovo,” referring also to a “humanitarian tragedy.” UN Security Council Resolution 1160 (1998), referred to in Security Council Resolution 1244 (1999), emphasized “that the way to defeat violence and terrorism in Kosovo is for the authorities in Belgrade to offer the Kosovar Albanian community a genuine political process.”<sup>98</sup> This concern coincides with the approach of the Badinter

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93. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

94. See RADAN, *supra* note 82, at 200-01; CRAWFORD, *supra* note 52, at 558.

95. RADAN, *supra* note 82, at 201. S.C. Res. 1244, *supra* note 93, ¶ 3 (demanding that the FRY put an “end to . . . violence and repression in Kosovo,” and to conduct a phased withdrawal of its military, police, and paramilitary forces from Kosovo).

96. See, e.g., S.C. Res. 1244, *supra* note 93.

97. See *id.*

98. S.C. Res. 1160, *supra* note 91, ¶ 3. It is also of note that two international tribunals, the ICTY and the ICTR, have in recent years been established to deal with grave violations of human rights. The ICTY was set up in 1993, and still sits some sixteen years later, establishing facts and bringing to accountability those involved in war crimes within the scope of its remit. The ICTR was established in 1994 “for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994.” See International Criminal Tribunal for Rwanda, General Information, <http://www.icttr.org/default.htm> (last visited Nov. 2, 2009). These tribunals strengthen the force of human rights law, and evidence increased forces against national sovereignty, although the tribunals themselves do not put at risk the territorial integrity of the state. Nevertheless, forces evinced by the evolution of human rights covenants and conventions check and control national sovereignty: as William Twining puts it, “either internally or externally . . . municipal law can no longer be treated in isolation . . . the twin doctrines of national sovereignty and non-interference in the internal affairs of independent states [are] being steadily challenged, most prominently, but not exclusively, by international humanitarian and human rights law.” WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 51 (2000). There is an increasing influence of human rights law evident in international discourse. Humanitarian intervention has been criticized on the basis that it is “deeply corrosive” of the rule of non-intervention in the internal affairs of states. Mary Kaldor, *American Power: From “Compellance” to Cosmopolitanism?*, in AMERICAN POWER IN THE 21ST CENTURY 181, 204 (David Held & Mathias Koenig-Archibugi eds.,



Commission that, in its Opinion No. 2, stated that “Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights,” and the Commission considered that “international law as it currently stands does not spell out all the implications of the right to self-determination.”<sup>99</sup>

In consequence, in 2003 Michael Ignatieff felt able to comment that although

Kosovo’s future is held in the balance so that appearances of the international state order can be maintained . . . Kosovo does set a precedent. It establishes the principle that states can lose sovereignty over a portion of their territory if they so oppress the majority population there that they rise in revolt and *successfully* enlist international support for their rebellion.<sup>100</sup>

The legitimacy of the United Nation’s action in Kosovo has been questioned,<sup>101</sup> yet the fact of the matter is that it shows a will on the part of the international community to proactively intervene in the internal affairs of a nation state, both in Security Council resolutions and on the ground.<sup>102</sup> It is also instructive that this intervention followed violence by an ethnic “liberation army,” in this instance the Kosovo Liberation Army.

### **C. The Future Status of Kosovo**

The final outcome for Kosovo is not yet certain, but recent developments are significant for the concepts of sovereignty and self-determination. The process with reference to the future status of Kosovo was launched in accordance with Security Council Resolution 1244 (1999), which mandated the international presence to promote substantial autonomy in Kosovo, taking into account the Interim Agreement for Peace and Self-Government in Kosovo (the so-called Rambouillet Accords).<sup>103</sup> Martti Ahtisaari was appointed by the Secretary-

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2004) (citing Hedley Bull, *Conclusion, in* INTERVENTION IN WORLD POLITICS 181, 183 (Hedley Bull ed., 1984)).

99. Batinger Commission, Opinion No. 2, *supra* note 56, paras. 3 and 1 respectively.

100. MICHAEL IGNATIEFF, *EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO AND AFGHANISTAN* 69-70 (2003).

101. *See* CRAWFORD, *supra* note 52, at 560.

102. The partitioning of Kosovo from Serbia (successor state to the FRY) is also *ipso facto* in defiance of the principle of *uti possidetis* in that it partitions a state (Serbia) that has itself been formed through the self-determination of the constituent parts of the Socialist Federal Republic of Yugoslavia.

103. S.C. Res. 1244, *supra* note 93, ¶ 11(a), (e). The Interim Agreement for Peace and Self-Government in Kosovo provided a framework and detail for peace and self-

General of the United Nations as Special Envoy for the future status of Kosovo in October 2005, an appointment supported by the UN Security Council the following month.<sup>104</sup> In addition, ten Guiding Principles were issued by the Contact Group for a settlement of the status of Kosovo,<sup>105</sup> which included provisions, *inter alia*, that:

[t]he settlement of the Kosovo issue should be fully compatible with international standards of human rights, democracy and international law;<sup>106</sup> . . . [t]he settlement should ensure multi-ethnicity that is sustainable in Kosovo . . . [t]he settlement of Kosovo's status should include specific safeguards for the protection of the cultural and religious heritage in Kosovo . . . [and] [f]or some time Kosovo will continue to need an international civilian and military presence to exercise appropriate supervision of compliance of the provisions of the Status settlement, to ensure security and, in particular,

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government in Kosovo, including detailed provisions for a constitution, policing and security, elections, humanitarian assistance, reconstruction, and economic development. Interim Agreement for Peace and Self-Government in Kosovo, U.N. Doc. S/1999/648 (Feb. 23, 1999). Yugoslavia refused to sign the Agreement. *See RADAN, supra* note 82, at 200.

104. *See, e.g.*, Press Release, Secretary-General, Secretary-General Appoints Former President Martti Ahtisaari of Finland as Special Envoy for Future Status Process for Kosovo, U.N. Doc. SG/A/955 (Nov. 15, 2005).

105. The Contact Group, comprising France, Germany, Italy, the Russian Federation, United Kingdom, and United States, was created in 1998 and was involved in the resolution of the question of Kosovo's status as an advisory group and a link between Kosovo and the UN Security Council. *See, e.g.*, Security Council, Letter Dated 9 July 1998 from the Acting Permanent Representative of Germany to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1998/657, (July 16, 1998). The UN gave its approval to the work of the Contact Group. *See, e.g.*, S.C. Res. 1160, *supra* note 91; S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

106. It is suggested that compatibility is a matter that will fail to be determined by the international community in the forum of the United Nations, and issues of customary international law and *opinio juris* become relevant. The substance of customary rules is located "primarily in the actual practice and *opinio juris* of states." *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1985 I.C.J. 13, ¶ 29 (June 3, 1985); *see also* *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶ 64. It may be "that an *opinio juris* expressed in a resolution of the General Assembly will be itself sufficient, or may stimulate a practice which will eventually be consolidated into customary international law." BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD 71-75 (1991). This could legitimize the proposals for the Kosovo Status Settlement.

protection for minorities as well as to monitor and support the authorities in the continued implementation of standards.<sup>107</sup>

Ultimately, and following the failure of negotiations, on March 14, 2007, the Comprehensive Proposal (“the Proposal”) for the Kosovo Status Settlement (“the Settlement”), prepared by the Special Envoy, was handed over to the Secretary-General of the United Nations, together with the Report of the Special Envoy on Kosovo’s Future Status.<sup>108</sup>

The Report of Martti Ahtisaari on Kosovo’s future status is unequivocal. It states, “I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.”<sup>109</sup> The Special Envoy refers to the systematic discrimination against the Albanian majority in Kosovo, the response of the Kosovo Albanians in the form of armed resistance, and the subsequent “reinforced and brutal repression” by Belgrade during the 1990s.<sup>110</sup> Martti Ahtisaari states,

A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of

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107. United Nations Office of the Special Envoy for Kosovo, Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, U.N. Doc. S/2005/709 (Nov. 10, 2005) [hereinafter Guiding Principles].

108. See United Nations Office of the Special Envoy for Kosovo, Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, U.N. Doc. S/2007/168 (Mar. 26, 2007) [hereinafter UNOSEK Report]; Addendum, Comprehensive Proposal for the Kosovo Status Settlement, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007). In his letter, the Secretary-General stated that he fully supported both the recommendation of Martti Ahtisaari in his Report and the Comprehensive Proposal. The terms of reference acted upon by the Special Envoy were that the process “should culminate in a political settlement that determines the future status of Kosovo,” and his mandate explicitly provided that he “determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground.” UNOSEK Report, *supra* note 108, ¶¶ 1, 3. It was for the UN Security Council to consider the Report and Comprehensive Proposal. See *supra* note 106 regarding legitimation of the proposals.

109. UNOSEK Report, *supra* note 108, ¶ 5. In the same paragraph, Martti Ahtisaari comments that his Comprehensive Proposal for the Kosovo Status Settlement “provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence.” *Id.*

110. *Id.* ¶ 6.

Serbia—however notional such autonomy may be—is simply not tenable.<sup>111</sup>

He also concludes that the “international administration of Kosovo cannot continue,”<sup>112</sup> so that “[i]ndependence is the only option for a politically stable and economically viable Kosovo.”<sup>113</sup>

The Settlement provides that “Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law.”<sup>114</sup> The exercise of public authority “shall be based upon the equality of all citizens and respect the highest level of internationally recognized human rights and fundamental freedoms.”<sup>115</sup> A Constitution is to be adopted to enshrine such principles and to promote “the peaceful and prosperous existence of all [Kosovo’s] inhabitants.”<sup>116</sup> The general principles stipulated in the Settlement include clear elements of sovereignty. Examples include: “Kosovo shall have the right to negotiate and conclude international agreements and the right to seek membership in international organizations;”<sup>117</sup> “Kosovo shall take all necessary measures towards ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;”<sup>118</sup> and “[t]he Constitution shall provide that the rights and freedoms set forth in [the main] international instruments and agreements [on fundamental human rights and freedoms] shall be directly applicable in Kosovo.”<sup>119</sup>

In essence, the Proposal will create a state of Kosovo, by virtue of supervised statehood wherein “[t]he international community shall supervise, monitor and have all necessary powers to ensure effective and efficient

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111. *Id.* ¶ 7. Such comments may also have resonance with regard to, for instance, Chechnya within the borders of Russia. Russia would argue that they also have resonance with reference, for example, to South Ossetia within Georgia.

112. *Id.* ¶ 8.

113. *Id.* ¶ 10.

114. Comprehensive Proposal for the Kosovo Status Settlement, *supra* note 108, at art. 1.1. This reference to democracy is despite the fact that all states have the right to choose their own political system. The UN Charter imposes no duty so far as democracy is concerned. *See* U.N. Charter art. 2, para. 4; U.N. Charter art. 4, para 1. *See also* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 264-69 (2005) (regarding the rejection of a proposed requirement of the UN that states should have democratic institutions). Questions of democracy, therefore, are within the domestic jurisdiction of a state.

115. Comprehensive Proposal for the Kosovo Status Settlement, *supra* note 108, at art. 1, para. 2.

116. *Id.* at art. 1, para. 3; *see also id.* at annex 1, art. 1.

117. *Id.* at art. 1, para. 5.

118. *Id.* at art. 2, para. 1.

119. *Id.* at annex 1, art. 2, para. 1.

implementation of this Settlement.”<sup>120</sup> The Proposal, if acted upon, is a significant development in the role of self-determination, to the detriment of sovereignty and territorial integrity of the state. If the Proposal is followed through, it would instance a situation whereby a state has been constructed by other states that was not in the past a republic, but simply an autonomous unit within a state.<sup>121</sup> It would also suggest the legality of this procedure. The Guiding Principles issued by the Contact Group incorporated the reference that the settlement of the Kosovo issue should be fully compatible with international law.<sup>122</sup>

There is no certainty that the proposals of Martti Ahtisaari will achieve the support of the United Nations and be acted upon. For instance, Serbia’s foreign minister responded to the draft proposals by asserting that Belgrade should insist on its right to keep Kosovo.<sup>123</sup> Neither Russia, an ally of the former Yugoslav state of Serbia, nor China support Kosovar independence.<sup>124</sup> The principal point, however, is that the Proposal has been made and a trend has potentially emerged even though the Special Envoy indicates in his Report that the solution for Kosovo “does not create a precedent for other unresolved conflicts.”<sup>125</sup> The Proposal speaks of a dynamic to the legal theory of self-determination that is continuing, an extension of the conditions in which the right to self-determination may be justified, and a considerable attack on the supposed illegality of unilateral secession.

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120. Comprehensive Proposal for the Kosovo Status Settlement, *supra* note 108, at art. 1, para. 11.

121. This moves beyond, for example, the recognition of Bosnia, a republic within the Socialist Federal Republic of Yugoslavia, at a time when “clearly [it] was not one” and further “had never been a State at all, at least in recent times.” Warbrick, *supra* note 65, at 246. That recognition in itself was beyond what might have been expected. *Id.* at 268. The present momentum regarding Kosovo demonstrates the potential construction of a juridical state out of a unit within a subsisting state.

122. Guiding Principles, *supra* note 107; *see also supra* note 106; *cf.* Warbrick, *supra* note 65, at 246 (expressing skepticism as to this possibility). The legitimacy of any settlement needs to be premised on customary rules of international law, as any treaty entered into regarding the settlement would not prevail over obligations of the UN Charter. U.N. Charter, art. 103. Such obligations include the right to respect for territorial integrity. *See* U.N. Charter, art. 2, para. 4; *see also* SIMPSON, *supra* note 114, at 87.

123. *Serbia insists on right to keep Kosovo*, PEOPLE’S DAILY ONLINE, Feb. 5, 2007, [http://english.peopledaily.com.cn/200702/05/eng20070205\\_347664.html](http://english.peopledaily.com.cn/200702/05/eng20070205_347664.html).

124. *See, e.g.*, U.N. SCOR, 63rd Sess., 5917th mtg. at 17-18, U.N. Doc. S/PV.5917 (June 20, 2008) (remarks by Chinese Ambassador La Yifan).

125. UNOSEK Report, *supra* note 108, ¶ 15. Kosovo is seen as a *sui generis* case creating no wider precedent. *See, e.g.*, UN SCOR, 63rd Sess., 5839th mtg. at 12-14, U.N. Doc. S/PV.5839 (Feb. 18, 2005) (statement of Sir John Sawers, Permanent Representative of the United Kingdom to the United Nations). If the principle of self-determination is to be indivisible, then if circumstances equivalent to Kosovo pertain elsewhere, the Kosovo precedent should be followed. *See infra* Part VI, especially note 202 and accompanying text. For questions on state practice and *opinio juris*, *see supra* note 106.

It may be that the norm of non-intervention in foreign states appears to be weakening,<sup>126</sup> and this recent intervention by the international community demonstrates that the apparent illegality of unilateral secession is not the absolute prohibition on unilateral external self-determination it appears to be. This is evident from the situation in Kosovo: the intervention of the United Nations in UN Security Council Resolution 1160 (1998);<sup>127</sup> the NATO bombardment;<sup>128</sup> the deployment of KFOR under UN Security Council Resolution 1244 (1999);<sup>129</sup> and the Proposal of UN mediator Martti Ahtisaari—despite the fact that the ultimate outcome for Kosovo is uncertain. These interventions are indicative of a willingness to tolerate or even encourage unilateral secession,<sup>130</sup> despite the Special Envoy writing in his Report that the solution for Kosovo does not create a precedent.<sup>131</sup> The UN Security Council resolutions relating to Kosovo confirmed the territorial integrity of the FRY,<sup>132</sup> and yet this appears to no longer be the case, at least so far as the Special Envoy and Secretary-General of the United Nations are concerned.<sup>133</sup>

Nevertheless, against the background of a perceived general bar against unilateral secession, in 1996 Hurst Hannum wrote, “the notion that there is an

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126. See Warbrick, *supra* note 65, at 238 (discussing changes in non-intervention norms as to electoral issues).

127. See *supra* note 91.

128. The NATO bombing campaign was launched without authorization of the UN Security Council. See RADAN, *supra* note 82, at 201. It may thus be characterized as unlawful. See U.N. Charter art. 2, para. 4.

129. See *supra* note 93.

130. As to the value of the interventions in Kosovo as a potential new trend, see *infra* Part V.

131. See UNOSEK Report, *supra* note 108, ¶ 15; see also *supra* note 125 and accompanying text. See *supra* note 106 regarding *opinio juris* and state practice.

132. E.g., S.C. Res. 1244, *supra* note 93. By extension, latterly, the territorial integrity of Serbia was also confirmed.

133. See *supra* note 108. The Secretary-General has given his full support to Martti Ahtisaari's proposals. The proposals also have state support. The British Government, for instance, welcomed the final settlement proposals, which then Foreign Secretary Margaret Beckett said would give Kosovo “clarity over its future,” going on to say: “We look forward to working with our partners in the UN Security Council, on the basis of the UN Special Envoy's settlement proposals, to bring the status process through to completion.” *UN Envoy recommends Kosovo independence*, GUARDIAN.CO.UK, March 26, 2007, <http://www.guardian.co.uk/world/2007/mar/26/balkans>. A draft resolution on Kosovo was presented to the UN Security Council on 17 July 2007, but agreement could not be secured. See, e.g., *Kosovo*, UPDATE REPORT NO. 3 (Security Council Report, New York, NY), July 19, 2007, available at [http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3006603/k.64C6/Update\\_Report\\_No3brKosovobr19\\_July\\_2007.htm](http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3006603/k.64C6/Update_Report_No3brKosovobr19_July_2007.htm). As a result of the failure to implement the Status Settlement, Kosovo's parliament declared independence from Serbia on February 17, 2008. *Kosovo's MPs Proclaim Independence*, BBC NEWS, Feb. 17, 2008, <http://news.bbc.co.uk/2/hi/europe/7249034.stm>. See *infra* note 168 as to the question of recognition of such independence.

internationally recognized right of secession would seem to have advanced only marginally, if at all, in recent years.”<sup>134</sup> Subject to the Kosovo outcome, this comment is still relevant, despite suggestions of choice theorists and remedial right theorists to the contrary. Even so, the political will to intervene or not to intervene is of evident importance. The right of self-determination is dynamic, evidenced particularly in Kosovo, yet international support for the unit potentially seceding is a prerequisite, as pertinently made plain by Michael Ignatieff,<sup>135</sup> and this paper now turns to an evaluation of the Tibet Question in the context of self-determination.

## V. THE TIBET QUESTION AND ISSUES OF SUPERVISED STATEHOOD

Resolution of the Tibet Question is in both Tibetan and Chinese interests. Both sides have much to risk if the impasse continues. For instance, a violent outcome, potentially involving revolution and repression, could destroy Tibet and its culture, but could also leave China as a pariah in the international community. It is clear from what has been written above that the concept of self-determination evolves; and, particularly in the absence of a conclusion based on satisfactory Tibetan autonomy, the doctrine of external self-determination merits further examination in seeking a prospective solution to the Tibetan problem.

It is difficult to fit notions of sovereignty and self-determination into the context of the Sino-Tibetan relationship, and it has been argued persuasively that the West has framed the debate on the Tibet Question:

There is *no neutral historical “truth”* that can resolve whether Tibet was always an independent nation or an integral part of China. What is more important is to recognize historical developments that have contributed to the framing of the question in absolutist terms of sovereignty or independence, something that was alien to both the Chinese and the Tibetans before the twentieth century.<sup>136</sup>

As a result, Dibyesh Anand suggests that sovereignty and self-determination provide the wrong framing for the Tibet Question, and believes that the debate should move beyond conventional international politics, where *realpolitik* is

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134. HANNUM, *supra* note 43, at 499.

135. *See supra* note 100 and accompanying text.

136. Dibyesh Anand, *The Tibet Question and the West: Issues of Sovereignty, Identity, and Representation*, in CONTEMPORARY TIBET, *supra* note 14, at 285, 287 [hereinafter Anand, *Tibet Question*]; *see also* Dibyesh Anand, *Western Colonial Representations of the Other: The Case of Exotica Tibet*, 29 NEW POL. SCI. 23, 41 (2007) [hereinafter Anand, *Exotica Tibet*].

emphasized, in order to solve the Tibet issue.<sup>137</sup> It is questionable whether this is necessary, and it is undesirable that this be the case: the issue needs to be resolved within the present international system and can be. It is in this respect that the concept of supervised statehood emanating from the UN mediator in Kosovo comes to the fore, prospectively supplying persuasive momentum.

Supervised statehood as a concept brings an added dimension into international law, having the potential to expand the ambit of the external self-determination principle. It emphasizes the global reach of the international community, and adds to the growing pressures of international human rights on sovereignty. Thus, the mapping of international law itself evolves, commensurate with the idea that “[t]he globalisation of the principle of sovereignty and the aggressive legitimization of state power by reference to morality and human rights leaves no-one and nothing untouched.”<sup>138</sup> Indeed, Costas Douzinas was moved to comment, “[h]uman rights have become the *raison d’être* of the state system as its main constituents are challenged by economic, social and cultural trends.”<sup>139</sup>

The proposals of Martti Ahtisaari, by concluding that independence supervised initially by the international community is the only viable option for Kosovo,<sup>140</sup> indicate that the international order has taken on a new dimension, and as a result, nation states are not necessarily defined by their physical territorial boundaries. Other factors may be relevant, and one of these may be ethnicity, or ethnographic boundaries. Kosovars did not think of themselves as Yugoslavs, and particularly not as Serbs.<sup>141</sup> A sense of community becomes significant, along with a shared language and a shared culture.

Michael van Walt van Praag has previously promulgated a solution to the Tibet Question in the form of a free association between Tibet and China, suggesting that this is an arrangement that could be satisfactory to Tibetans, at the same time safeguarding the primary interests of China.<sup>142</sup> The initial problem is

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137. Anand, *Tibet Question*, *supra* note 136, at 287, 297.

138. COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 374 (2000).

139. *Id.* Hence China’s intent to justify its human rights policies in the publication of annual White Papers in defense of the state’s position on the subject.

140. *See* UNOSEK Report, *supra* note 108.

141. Thus the attempt to secede from Serbia, if not from Yugoslavia, in 1990. *See supra* Part IV.B.

142. VAN WALT VAN PRAAG, *supra* note 12, at 201; *see also* G.A. Res. 1541 (XV), Principle VII, at 29-30, U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960) (referring to principles that should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter). It should be borne in mind that van Walt van Praag, a practitioner of law, is a proponent of the argument that Tibet was an independent state at the time of the 1950 Chinese invasion. *Id.* at 141. However, his proposal is not one directly and immediately pursuing a claim for historical sovereignty, rather it is the solution of a free association, with Tibet as the associate state, having the right, for example, to be a member of international organizations, including the UN, and thus:



evident in the first of the features of free association listed by van Walt van Praag: “the relationship must be a *consensual* one between two sovereign States.”<sup>143</sup> The issue of statehood and territorial integrity arises—the centerpiece of the Tibet Question.

The concept of free association now finds an echo in the supervised statehood mooted with reference to Kosovo. It is in the Comprehensive Proposal for the Kosovo Status Settlement that the solution to the Tibet Question may find expression. Although the ultimate outcome of this proposal is by no means certain, what can be said is that the very proposal and its mandate for supervised statehood potentially open the door for independence—focusing on the central issue of the Tibet Question.<sup>144</sup> The Settlement may give impetus to the Tibetan independence movement currently restrained by the Dalai Lama.<sup>145</sup>

The Settlement is a new and important development in the doctrine of self-determination, prospectively a new interpretation of the international order. Kosovo can be distinguished, for example, from states created following the break-up of the Soviet Union and also from the states created from the other constituent parts of Yugoslavia. It has enjoyed the status of an autonomous province, not a republic. Under the 1974 Constitution, Kosovo was a constituent part of the Socialist Republic of Serbia and was recognized as such.<sup>146</sup> In that, it bears similarities to the Tibet Autonomous Region, by definition an autonomous area, under the Chinese Constitution.

While China is “a unitary multi-national state,”<sup>147</sup> and therefore distinguishable from the former Soviet Union and the former Yugoslavia, this distinction loses potency by virtue of the fact that both Kosovo and Tibet (in the form of the Tibet Autonomous Region) are in essence autonomous regions. The Constitution of Serbia, of September 28, 1990, in its Preamble states that “[a]ccording to the new Constitution of Serbia, only one State does exist, as

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Tibet would thereby resume the exercise of its sovereignty, but China would assume the desired degree of responsibility for Tibet’s foreign relations and defense . . . the more satisfactory solution of the Sino-Tibetan question in the long run, however, would be . . . the reemergence of Tibet as a sovereign State in law and fact.

*Id.* at 202.

143. *Id.* at 201 (emphasis added).

144. See Edward Lazar, *Afterword*, in *TIBET: THE ISSUE IS INDEPENDENCE* 84 (Edward Lazar ed., 1994) (as to “the central issue of Tibetan independence”). State opposition to Ahtisaari’s proposals is inevitable, for example from Serbia, Russia and also the PRC. See *supra* Part IV.C.

145. See *supra* note 21 and accompanying text.

146. See CONSTITUTION OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA, *reprinted in part in* TRIFUNOVSKA, *supra* note 81, at 534-65.

147. XIAN FA, pmb. (1982) (P.R.C.).

everywhere in the world, in the territory of the single State of Serbia.”<sup>148</sup> Thus, the Republic of Serbia, at the time when it was a part of the Socialist Federal Republic of Yugoslavia, stressed its territorial integrity, as does China. The Preamble goes on to refer to the units of territorial autonomy, formerly known as autonomous provinces, which are without state functions.<sup>149</sup> By Article 6, the Republic of Serbia included the Autonomous Province of Kosovo and Metohija, which is expressed to have a form of territorial autonomy.<sup>150</sup>

The Constitution of the Federal Republic of Yugoslavia,<sup>151</sup> comprising Serbia and Montenegro, promulgated on April 27, 1992, in turn refers to the FRY “as a sovereign federal state,”<sup>152</sup> and in Article 3 refers to the territory of the FRY as a single entity.<sup>153</sup> No specific mention is made of Kosovo, an integral part of Serbia and (at that time) a unit within the FRY.<sup>154</sup> China operates under a system of democratic centralism,<sup>155</sup> practicing regional autonomy on the basis that “[a]ll the national autonomous areas are inalienable parts of the People’s Republic of China.”<sup>156</sup> Here one state exists, China, and an autonomous area within that state is the Tibet Autonomous Region (“TAR”).<sup>157</sup> Both Kosovo and Tibet, therefore, had autonomous status within the parent state; neither had the status of a republic. Just as the territorial integrity of the FRY (later Serbia) was not protected, the argument follows that the territorial integrity of the PRC with regard to Tibet may be open to question.

If Martti Ahtisaari’s proposals comply with international law, and it was a prerequisite of the Settlement that they should,<sup>158</sup> then it would appear that secession by an autonomous region is potentially legitimate. This would provide a basis for prospectively legitimizing secession from China by Tibet, and is potentially of profound significance in the context of the Tibet Question. The particular significance is for the TAR, and the people of the TAR, rather than for

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148. USTAV REPUBLIKE SRBIJE [CONSTITUTION] pmb. (1990) (Serb.). *See also* RADAN, *supra* note 82, at 197.

149. USTAV REPUBLIKE SRBIJE pmb.

150. *Id.* at art. 6.

151. CONSTITUTION OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA (1974), *reprinted in part in* TRIFUNOVSKA, *supra* note 81, at 534-65.

152. *Id.* at art. 1. Montenegro declared independence from Serbia and seceded consensually following a referendum on May 21, 2006, and was admitted to the United Nations on 28 June 2006. *See, e.g., Timeline: Montenegro*, BBC NEWS, Apr. 1, 2009, [http://news.bbc.co.uk/1/hi/world/europe/country\\_profiles/5075632.stm](http://news.bbc.co.uk/1/hi/world/europe/country_profiles/5075632.stm); Press Release United Nations Member States, U.N. Doc. ORG/1469, July 3, 2006.

153. CONSTITUTION OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA art. 3, *reprinted in part in* TRIFUNOVSKA, *supra* note 81, at 534.

154. *See id.*; USTAV REPUBLIKE SRBIJE; RADAN, *supra* note 82.

155. XIAN FA art. 3 (1982) (P.R.C.).

156. *Id.* at art. 4.

157. *See id.*; VAN WALT VAN PRAAG, *supra* note 12, at 156.

158. *See* Guiding Principles, *supra* note 107; *see also supra* note 106.

ethnographic Tibet as a whole.<sup>159</sup> It is secession for an autonomous region as territorially defined that is potentially legitimized, rather than for a people, an ethnic group. The Settlement has extended the meaning of “people” to those based in an autonomous region, and so, in the case of Tibet, to the TAR. Consequently, the Settlement has implications for “people” in the Tibetan context: it is the people within the specific unit of the TAR to which the Settlement has relevance. Yet, for Tibetans, including the Dalai Lama, it is ethnographic Tibet that constitutes Tibet; the Dalai Lama is quoted as saying “Tibet was and is in fact different from China—racially, culturally, linguistically, geographically and historically. No knowledgeable person would for a moment think that Tibetans are Chinese.”<sup>160</sup>

In the context of Kosovo, human rights are emphasized by the Contact Group.<sup>161</sup> Thus, credence appears to be given to the remedial right theory of self-determination. There is now a case for Tibet to seek to build on the trend emanating from the Comprehensive Proposal for the Kosovo Status Settlement, within the confines of international law, and consider the pursuit of external self-determination through supervised statehood based on the remedial right theory, particularly in the event of continued failure of Tibetans to achieve substantial and substantive autonomy.<sup>162</sup>

## VI. A KOSOVAN FOCUS FOR TIBET

Concepts such as sovereignty are overriding principles of international law, forming a body of *jus cogens*,<sup>163</sup> from which no derogation is permitted,<sup>164</sup> reflecting the importance of an entity being able to establish statehood. Sovereignty as a construct has been developed from its Western roots in the Treaty of Westphalia of 1648.<sup>165</sup> It is in this Western concept that the Tibet

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159. Ethnographic Tibet today spreads over a number of provinces of China. The TAR includes the Tibetan province of Ü-Tsang and its western extensions, while the Tibetan provinces of Amdo and Kham are largely incorporated within Qinghai, Gansu, Sichuan and Yunnan. The ethnic boundaries of Tibet have not been congruous at all times with its political boundaries. See A. TOM GRUNFELD, *THE MAKING OF MODERN TIBET* 245 (1996).

160. DAWA NORBU, *CHINA’S TIBET POLICY* 313 (2001).

161. See Guiding Principles, *supra* note 107.

162. See Thio, *supra* note 6; see also *infra* Part VI, especially note 190 and accompanying text.

163. CRAWFORD, *supra* note 52, at 99 (defining *jus cogens* as “peremptory norms of general international law”).

164. See Vienna Convention on the Law of Treaties art. 53, 23 May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

165. CRAWFORD, *supra* note 52, at 10

The effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy

Question has been formulated. The international community as a whole has not recognized that Tibet meets the criteria for statehood, the criteria being those specified in Article 1 of the Montevideo Convention on Rights and Duties of States.<sup>166</sup> The importance of recognition to statehood, although not a criterion for statehood, should be emphasized,<sup>167</sup> and becomes clear when examining the situation of Kosovo. Following its Unilateral Declaration of Independence on February 17, 2008, Kosovo has, for example, failed to achieve UN membership. Kosovo has so far been recognized by only sixty-two countries.<sup>168</sup>

Tibetans, by virtue of their lack of participation in the larger community during the first half of the twentieth century, by their failure to participate in international organizations such as the League of Nations, and by their failure to modernize, have been unable to mount a convincing case to establish that Tibet was an independent state at the time of the 1950 Chinese occupation.<sup>169</sup> Other states do not recognize Tibet as a state. International law is itself largely a construct of, and dominated by, Western states that engage in, and are involved in the *realpolitik* of international relations. Tibet has fallen outside the scheme of things.<sup>170</sup> As a result, China has been able to maintain its occupation and assert that Tibet was historically part of its territory, relying on other states not to interfere in its domestic affairs on a basis of territorial integrity.<sup>171</sup> This is buttressed by the political power of China, a dominant force and Permanent Member of the United Nations Security Council.<sup>172</sup> Thus, for example, the United States recognizes the TAR as an integral part of China.<sup>173</sup>

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it recognized or established) at the expense of the Empire, and ultimately at the expense of the notion of the *civitas gentium maxima*—the universal community of mankind transcending the authority of States.

166. Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

167. See generally Badinter Commission, Opinion No. 8, *supra* note 56, at 1523 (“[W]hile recognition of a state by other states has only declarative value, such recognition, along with membership of international organizations, bears witness to these states’ conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law.”).

168. In 2009, the Dominican Republic recognized Kosovo. New Kosova Report, Dominican Republic recognizes Kosovo, July 11, 2009, <http://www.newkosovareport.com/200907111864/Politics/Dominican-Republic-recognizes-Kosovo.html>.

169. Tibetan sovereignty *de jure* has not been recognized. See *supra* note 71 and accompanying text.

170. See *supra* note 165 (regarding international law as a Western construct); see also Anand, *Tibet Question*, *supra* note 136, at 285-88.

171. See, e.g., U.N. Charter art. 2, para. 4 (referring to the territorial integrity and political independence of states).

172. U.N. Charter art. 23, para. 1.

173. KERRY DUMBAUGH, CONGRESSIONAL RESEARCH SERVICE, CHINA-US RELATIONS: CURRENT ISSUES AND IMPLICATIONS FOR U.S. POLICY 21 (2006), available at

The issue of sovereignty is at the heart of the Tibet Question, but the primacy of the concept of sovereignty is itself under pressure. Neil Walker refers to a “new multi-dimensional configuration . . . in which state and non-state politics relate;”<sup>174</sup> in effect a constitutional pluralism with “multiple levels of constitutional discourse and authority.”<sup>175</sup> Walker argues that sovereignty is a centralized and orderly framework through which other “values and virtues may flourish.”<sup>176</sup> While sovereignty may be subject to various pressures, it remains a core concept that cannot be sidelined, to the extent that “the entire U.N. conceptual structure is predicated on the recognition and legitimation of the sovereignty of individual states.”<sup>177</sup> The pressures, though, come from a variety of sources. Examples of these sources include: an expanding principle of self-determination that since its inception has undergone profound changes; the evolution of human rights covenants and conventions in an era of globalization;<sup>178</sup> a combination of sub-state nationalism and supranationalism; and potentially from the communicative power of the Internet.<sup>179</sup> The Chinese government sees the last as a threat, and the State seeks to exert control over the content of the Web available to its citizens.<sup>180</sup> The threat to sovereignty from a rising tide of sub-state nationalism and supranationalism is evident in Europe in the guise of the European Union and developments towards subsidiarity. It takes form as a potential alternative concept to sovereignty, a contrasting principle,<sup>181</sup> but as yet is in its infancy and restricted to a European dimension. There is, nevertheless, by virtue of the threat to sovereignty, a weakening of exclusive territoriality.<sup>182</sup>

All these pressures provide checks and controls to external sovereignty. Human rights abuses in Tibet, from a practical point of view, have had little

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<http://fpc.state.gov/documents/organization/61492.pdf>; Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 107 (2002).

174. Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 3, 5 (Neil Walker ed., 2003).

175. *Id.* at 4.

176. *Id.* at 31.

177. HARDT & NEGRI, *supra* note 59, at 4-5.

178. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990) (stating that globalization may be seen as an “intensification of worldwide social relations”).

179. *See generally* TAI ZIXUE, *THE INTERNET IN CHINA: CYBERSPACE AND CIVIL SOCIETY* (2006).

180. *See, e.g.*, Dan Sabbagh, *No Tibet or Tiananmen on Google’s Chinese site*, TIMES ONLINE, Jan. 25, 2006, available at <http://business.timesonline.co.uk/tol/business/markets/china/article719192>.

181. *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 38, 68, 78 (2003).

182. This in turn may lead to a new order having the potential to transcend sovereignty. For the weakening of the sovereign state in the EU, *see* NEAL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* ch. 8 (1999).

impact in the wider world, despite UN resolutions referring to the fundamental rights of the Tibetan people.<sup>183</sup> The human rights factor does, however, supply a platform for debate: “the expanding human rights agenda, with its growing visibility at the global level, has opened up the social and political space that enables people to challenge the domestic status quo and to challenge the state.”<sup>184</sup> The idea of human rights gives Tibetans a public presence and leverage within international debate, yet in and of itself it has the potential to cloud the Tibetan debate,<sup>185</sup> particularly the potential to antagonize representatives of China.

As to the doctrine of self-determination, to date it has proved a false friend to Tibet.<sup>186</sup> Nevertheless, the incorporation of self-determination principles into international law has impinged on the law of sovereignty, contesting that norm and effectively engaging in state building from the outside.<sup>187</sup> Its acceptance as a legal principle has been entrenched, particularly as a principle of *erga omnes*<sup>188</sup> character and it arguably forms part of the body of *jus cogens*, with both legal and political implications.

As stated in section I above, two aspects to self-determination exist. Internal self-determination in the form of autonomy is less threatening to the integrity of the state than is external self-determination, with its deducible extreme of secession from an existing state, and is of relevance to the factual situation of Tibet within China.<sup>189</sup> However, in the context of Tibet, a distinction is evident

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183. G.A. Res. 1353 (XIV), (Oct. 21, 1959); G.A. Res. 1723 (XVI), (Dec. 20, 1961); G.A. Res. 2079 (XX) (Dec. 18, 1965). See also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities Res. 1991/10, U.N. Doc. E/CN.4/Sub.2/1991/L.19 (Aug. 23, 1991).

184. Mountcastle, *supra* note 19, at 93.

185. *Id.* at 92, 87.

186. RICHARD FALK, ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS 30 (1995) (referring to Tibet having experienced “the demoralizing burdens of thwarted self-determination and the criminal cruelties of persisting Chinese occupation,” in contrast to Yugoslavia, “experiencing the full nihilistic brunt of self-determination,” both instances comprising “opposed tragedies”).

187. See, e.g., *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶ 29 (June 30) (referencing self-determination as a principle of international law); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 177 (July 9); Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT’L L. 59, 59-88, 64 (2005) (“The right of peoples to self-determination is undoubtedly a part of *jus cogens*.”). The view of the Court in *East Timor* supports a proposition that self-determination has achieved the status of *jus cogens*, derogation from which is prohibited. See also *supra* note 121 and accompanying text regarding state building from the outside.

188. Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211, 211-39 (1997) (defining *Erga omnes* rules as “rules which, if violated, give rise to a general right of standing – amongst all States subject to those rules – to make claims”).

189. See *supra* notes 8, 9, and accompanying text.

between the regional autonomy deriving from Marxist principles that the TAR enjoys, and liberal principles of autonomy on which the Dalai Lama bases his proposal for genuine autonomy.<sup>190</sup> This distinction also highlights that, in debating the Tibet Question, two different Tibets emerge: the TAR, viz political Tibet, and ethnographic Tibet—which includes Tibetan provinces of Kham and Amdo, now incorporated within Qinghai, Gansu, Sichuan, and Yunnan. The TAR has been treated differently by China. The 1951 Agreement on Measures for the Peaceful Liberation of Tibet, for instance, related specifically to political rather than ethnographic Tibet, and it is political Tibet that has the status of an autonomous region, the TAR.<sup>191</sup> While prior to 1950 there is a strong argument that the Dalai Lama's writ ran in political Tibet, it is less clear that Tibetan government, or indeed any government, held sway and dominated the part of Tibet that may be termed Inner Tibet.<sup>192</sup>

While the Dalai Lama has moved toward a position seeking enhanced autonomy,<sup>193</sup> not only for the TAR but also for the remainder of ethnographic Tibet, such moves have failed to produce a result. This may fuel a secessionist struggle.<sup>194</sup> Indeed, China has shown extreme reluctance to engage in any negotiation on the Tibet Question, and will not negotiate unless and until the Dalai Lama publicly commits that Tibet is an inalienable part of China.<sup>195</sup> The Tibet Question has not been resolved through autonomy, and if it cannot be, issues of sovereignty and external self-determination potentially return to the fore. Secession has been analyzed above, as it is in opposition to concepts of territorial integrity and sovereignty.<sup>196</sup> As a result of the apparent inviolability of such concepts, it appears that, subject to exceptions, unilateral secession is not recognized in international law.<sup>197</sup> However, recent developments in the Kosovan context indicate a momentum to the contrary, a momentum that has the potential

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190. Baogang He, *The Dalai Lama's Autonomy Proposal: A One-Sided Wish?*, in CONTEMPORARY TIBET, *supra* note 14, at 67, 73. See also The Dalai Lama, Address to the Members of the European Parliament: Strasbourg Proposal 1988 (June 15, 1988), available at <http://www.dalailama.com/page.96.htm> [hereinafter the Strasbourg Proposal].

191. See *supra* note 157 and accompanying text.

192. Inner Tibet would be considered those areas of ethnographic Tibet falling outside what is now the TAR. See *supra* note 159 for the distinction between the areas. Such areas enjoyed significant independence and freedom of action both from Lhasa and Beijing. They were remote from the centers of power, but in any event were not regarded by China as falling under the government of Lhasa. See NORBU, *supra* note 160, at 189, 215-16.

193. See the Strasbourg Proposal, *supra* note 190.

194. See Thio, *supra* note 6, at 312 (noting that in the Tibetan context, ethnic and religious conflicts may fuel secessionist struggles by groups possessing distinct identities, particularly if those groups are unable to attain the autonomy they seek otherwise).

195. Baogang, *supra* note 190, at 71, 80.

196. See *supra* Part IV.A.

197. See Georges Abi-Saab, *Conclusion, in SECESSION*, *supra* note 5, at 470, 474 (detailing that unilateral success is certainly not recognized outside the context of self-determination).

to establish an exception to the prohibition of unilateral secession, and new support for secessionist entities; in short, a new dimension to the right of self-determination, providing fresh incentives for China to negotiate with the Tibetans and potential new leverage for Tibetans in those negotiations.

The exception of supervised statehood has yet to reach fruition in Kosovo, yet it is the fact that Martti Ahtisaari has felt able to make the Proposal in compliance with the norms of international law that is important and demonstrates the evolving boundaries of the principle of self-determination and also the dynamism and momentum of the principle.<sup>198</sup> It represents state building from the outside,<sup>199</sup> and consequently, an attack on the supposed illegality of unilateral secession and on concepts of sovereignty and territorial integrity, even though it is stated that the Settlement should not create a precedent in relation to other unresolved conflicts.<sup>200</sup>

The Proposal also represents an opportunity for Tibetans to ensure that the international community becomes fully aware of the Tibet Question. Just as China has taken advantage of the Western doctrine of sovereignty, the way is potentially now open for Tibet to take advantage of self-determination through a legitimated claim for supervised statehood.<sup>201</sup> “The right of self-determination is indivisible,”<sup>202</sup> and thus, if the Kosovan example is applicable to Tibet, Tibet should find support in the international community for a claim to similar independence; it is this indivisibility that should provide greater leverage for Tibetans with China in pursuing their claims for greater autonomy based on the Dalai Lama’s liberal principles. It is also of relevance that “[l]aws not only represent reality, but also create it.”<sup>203</sup> Law has the potential to create the reality of an independent Kosovo and, consequently, Tibet.

A weakening of the non-intervention norm in State internal affairs is apparent and, at minimum, the autonomous region of Tibet should prospectively benefit from the proposal of supervised statehood for the autonomous province of

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198. See *supra* Part IV.C.

199. See *supra* note 121 and accompanying text.

200. See UNOSEK Report, *supra* note 108, ¶ 15. This statement may have been inserted in the Special Envoy’s Report because to date there has been no state practice backed up by *opinio juris* to warrant the solution being a precedent. However, this is not to say the potential for a precedent does not exist, despite the fact that Kosovo has not as yet succeeded in gaining acceptance of its bid for independence.

201. The question arises as to which peoples have the right to external self-determination, and to date Tibet has not been seen as a right-holder. Kosovo, too, as a province rather than a republic, has not previously been seen as a right-holder. China rigidly interprets the doctrine of sovereignty, emphasizing territorial integrity and non-interference in the domestic affairs of a state, which are perceived as purely internal matters for the state.

202. Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo?*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 203, 213 (2001).

203. TWINING, *supra* note 98, at 238.



Kosovo, which has been administered by the United Nations since Resolution 1244 (1999).<sup>204</sup> There are additional factors that are relevant. First, the potential importance of the remedial right theory promulgated in respect of self-determination should not be overlooked, particularly in conjunction with the advent of the apparent exception to the bar against unilateral secession. The Contact Group, in its ten Guiding Principles, emphasized the importance of human rights.<sup>205</sup> If pursuing an agenda premised on the Kosovo Status Settlement, it will be for Tibetans to show a systematic discrimination and grave violations of human rights, thus bringing about equivalence of their situation with that of the Kosovars.<sup>206</sup> It should be noted that, while Tibetans allege human rights abuses,<sup>207</sup> China rebuts such views.<sup>208</sup>

A second pertinent factor relates to the people entitled to self-determination. Generally, resolution of the issue of “peoples” entitled to the benefit of the principle of self-determination is in a state of flux. The nature of “peoples” has been undefined in international instruments.<sup>209</sup> Like the Kosovars, Tibetans are “a group of people living in a cohesive territory and they are closely connected by a common history, language, religion, culture and mentality. These are characteristics that distinguish one people from another.”<sup>210</sup> As a result, as a people, Tibetans have the right to self-determination, certainly so far as internal self-determination is concerned. However, if the analogy with Kosovo is to be taken by Tibet and secession pursued, it is the autonomous unit that is clearly relevant, and any claim along the lines of the Kosovo Status Settlement should focus on the TAR rather than in ethnographic Tibet. The Kosovan example gives focus and definition to “peoples” that is required in the Tibetan context.

The status of the self-determination right is dependent upon recognizing the collective in question, and the recognition given to an expanded definition of “peoples” to include the Kosovar Albanians should help to confer similar status on Tibetans. This focus given by the Kosovo example entails Tibetans limiting what they have sought to date, and excluding areas falling outside the TAR. The collective having the right to self-determination through supervised statehood would be the population in the autonomous region.<sup>211</sup> Tibetans need to concentrate on this problem because much support for the independence movement comes from Khampas and Amdowas, who regard themselves as

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204. See S.C. Res. 1244, *supra* note 93.

205. See *supra* notes 105, 107 and accompanying text.

206. Seidel, *supra* note 202, at 209; *see id.* at 210 (“The right of an oppressed people or minority to demand secession . . . is the sanction against a State’s policy of ignorance and permanent and serious violations of human rights imposed on [a] people or minority.”)

207. See *supra* notes 48-51 above and accompanying text.

208. See *supra* notes 45-47 above and accompanying text.

209. See, e.g., ICCPR, *supra* note 3; ICESCR, *supra* note 3.

210. Seidel, *supra* note 202, at 205.

211. See *supra* note 159 and accompanying text regarding the population of the TAR as opposed to ethnographic Tibet.

Tibetans and are committed to the independence struggle, even though the areas of Kham and Amdo fall outside the autonomous region.<sup>212</sup>

A third factor of significance is that unilateral secession, where it has arguably succeeded, may be seen as largely a product of violent revolution as, for instance, in Kosovo. Such violence, and also terrorism, play a part in a changing world order.<sup>213</sup> Consequently, if all political weapons, including those relating to revolution, are to be available to Tibetans, it seems necessary to decouple politics from religion.<sup>214</sup> At the same time, it is important not to distance religion too far from politics in the Tibetan context, because such support as Tibet has found over recent decades is based largely on support for the Dalai Lama and for the Buddhist religion.<sup>215</sup> In Buddhism, violence is antithetical, and if Tibetans are to pursue a claim beyond one of internal self-determination then civil disobedience in the form of violent resistance may prove to be an essential precursor. State opposition to supervised statehood as expounded by Martti Ahtisaari is only to be expected, both in Kosovo and when otherwise propounded.<sup>216</sup>

Nevertheless, there are compelling reasons why China should consider a political solution to the Tibet Question and a reappraisal of the Sino-Tibetan relationship. First, there are external pressures in respect to human rights, and China produces White Papers defending the State's position to the outside world,<sup>217</sup> evidencing that China is conscious of the potential impact of expanding human rights covenants, conventions, laws, and custom. Second, there are political realities regarding easing/improving relations with Taiwan, and whether Taiwan may be persuaded to return to the motherland.<sup>218</sup> Third, there is increasing

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212. Cf. ARDLEY, *supra* note 21, at 45; NORBU, *supra* note 160, at 203-06.

213. Such violence may be seen also in respect of the situation in South Ossetia in August 2008.

214. See ARDLEY, *supra* note 21, at 178-81. See also Seidel, *supra* note 202, at 213 (arguing that “[o]nly a change in the *status quo*—the secession of Kosovo desired by the Kosovo Albanians—could ensure peace”).

215. See, e.g., ARDLEY, *supra* note 21, at 178 (stating that if Tibetans give political legitimacy to future violence against China, “[t]hat might risk the moral support which the Tibetan cause currently enjoys”).

216. Parent state opposition to such self-determination is inevitable, and has been evidenced in respect of the separation of Bangladesh from Pakistan and East Timor from Indonesia. The role of violence in independence movements generally, and the attendant implications for international law, is an interesting and increasingly important topic, but beyond the scope of this paper. It is noteworthy too that China relies on the principle of non-intervention in the affairs of states—both so far as China is concerned and so far as other states are concerned—hence its refusal to recognize Kosovo.

217. See *supra* Part III.B.

218. See, e.g., Li Peng, *Accomplishing the Great Task of the Reunification of the Motherland Is the Common Wish of All Chinese People*, 35 CHINESE LAW & GOV'T 18 (2002).

democratization in China (and globally).<sup>219</sup> Fourth, there are advantages to China, both in the area of economical and political benefits in full participation in the international community, and also in an improved and constructive relationship with the United States.<sup>220</sup> Fifth, the peaceful resolution of the Tibet Question, a resolution that may not only pay political dividends but also achieve security of the State and provide economic dividends.<sup>221</sup> This last reason, combined with the fact that a violent repression of a Tibetan revolution is a realistic alternative to a peaceful resolution, is likely to lead to China becoming a pariah of the international community.<sup>222</sup>

In this sense, *realpolitik* is obviously relevant. It has an impact on legal doctrines in the context of a Kosovan solution for Tibet based on supervised statehood, and provides a window of opportunity for a peaceful resolution of the Tibet Question. Equally, it impacts from the Tibetan perspective, for no state to date has supported or recognized Tibetan independence; furthermore, it may be argued, for instance, that the United States is not likely to change its stance in the current global economic circumstances and the Obama Administration may prove to be less interventionist than the previous Bush Administration. Thus, an important issue is whether Tibet can now successfully enlist the international community's support, as Kosovo was able to do. Without that support, the potential precedent of Kosovo will fail to avail the Tibetans despite the tacit indivisibility of the self-determination concept.

As the present Dalai Lama has entered his eighth decade, there is an urgency to resolve the Tibet Question, and it is necessary to ensure that new impetus is given to that resolution. This can be achieved by a refocus of the question into the ongoing discourse on self-determination, to take advantage of its widening momentum into the concept of supervised statehood broadened within the remedial right theory.<sup>223</sup> Such a refocus prospectively provides an opportunity for the self-determination doctrine to stem the physical movement of peoples from

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219. This paper does not purport to consider in any depth issues of democratization. There is considerable literature on the question, and in respect of democratization in China. *See, e.g.*, CHINA'S CHANGING POLITICAL LANDSCAPE: PROSPECTS FOR DEMOCRACY (Cheng Li ed., 2008); BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD (2004); BAOGANG HE, THE DEMOCRATIZATION OF CHINA (1996).

220. *See, e.g.*, GILLEY, *supra* note 219, at 144-47.

221. Economic dividends may be obtained as a result of reduction in the subsidies paid in regard to the TAR; Tibet has been chronically dependent on Chinese subsidy. SHAKYA, *supra* note 51, at 392.

222. ARDLEY, *supra* note 21, at 180 (suggesting that violent repression is more likely subsequent to the death of the present Dalai Lama, who exerts a moderating influence and whose goal of autonomy does not seem congruent with the wishes of the majority of Tibetans). *See supra* note 78 regarding the issue of revolution.

223. It is in this concept of supervised statehood that an interstice opens up in the norm of sovereignty, which allows additional space for wider interpretation of self-determination.

Tibet,<sup>224</sup> and also to establish the political and legal identity of Tibetans. It will create pressure on the international community to achieve a consistency in its approach to the principle of self-determination, and to achieve this before the Tibetans resort to violence, in turn premising potentially catastrophic violence against the Tibetans.<sup>225</sup> It is this pressure giving an equivalence to the Tibetan and Kosovar situations that can persuade the two sides to negotiate a more liberal autonomous regime, if not throughout ethnographic Tibet, within the TAR, and ensure that secession remains a last resort.



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224. See, e.g., Fran Yeoman, *Factfile: Tibet's Fight for Independence*, TIMES ONLINE, Mar. 11, 2008, available at <http://www.timesonline.co.uk/tol/news/world/asia/article3529905.ece> (stating that up to 3,000 Tibetans continue to leave Tibet clandestinely each year for India and Nepal).

225. In this context, the outbreaks of violence in both Bangladesh and Kosovo prior to the breakaway of these units from the respective parent state are instructive.