

**The Forbidden
Land:
The Position
of Tibet In
International
Law**

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Introduction

Tibet is not a country. According to the Chinese Government Tibet is an autonomous region of China. As an autonomous region the Tibetans can establish a number of self-governing bodies, however under Section VI of the Republic's Constitution, these bodies would possess only a limited delegation of authority from the Central Government in Beijing. It is apparent from the Constitution that any suggestion of autonomy would not detract from the unity of the Chinese state. Article 4 states that "All the national autonomous areas are inalienable parts of the Peoples Republic of China"

Despite Tibet's 'inalienable' status, the Tibetan people have not embraced their apparent unity with the Central Government. For the past 45 years, Tibet has been home to a vigorous campaign of armed insurrection, this campaign has seen at least 50 major revolts against the Chinese, while in the past 25 years it has been claimed that at least one million Tibetans have lost their lives as a result of the Chinese occupation¹. International support for this campaign has centred upon the unofficial Government-in-exile, which formed around the Dalai Lama and his council.

The Central Government has claimed that the revolts in Tibet are of a purely domestic nature and as such they should not be subject to the scrutiny of international law². It is the intention of this essay to examine the international law status of Tibet, in particular this essay will outline the history of Sino-Tibetan relations leading up to and surrounding the signing of the 1950 "Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet".

¹ van Walt van Praag, Michael; *The Status of Tibet* (1987) at 157

² Article 2(7) of the United Nations Charter (1945)

An examination into the history of Sino-Tibetan relations will cover three aspects. Firstly, the origin of the Sino-Tibetan relationship will be discussed. Secondly, the reaction of the international community will be outlined, this will primarily consist of the response of the United Kingdom. Thirdly, the changes that have occurred to this relationship in the first half of the Twentieth century will be examined. This examination will confine itself to questions of sovereignty and territory, this essay will not deal with any of the issue relating to the Tibetans as a people e.g. questions of self-determination or human rights. It is hoped that a investigation into the relationship between China and Tibet will show that at the time of the Chinese invasion in 1950 Tibet was *de facto* an independent state.

The Origin of Sino-Tibetan Relations

1. Background

Tibet is located on the western border of China, and on the northern border of India. It is surrounded on all sides by some of the world's highest mountains, and with three of its four borders consisting of mountain ranges it is appropriately referred to as "the Forbidden Land" . Though Tibet may be isolated, it has developed a substantial population. The people of Tibet are thought to belong to the Mongoloid race due to the long and interrelated history they share, however the Tibetans believe they are the descendants of a union between a monkey, possessed by the Tibetan Guardian Spirit, the *Bodhisattva Avalokitesvara* or *Buddha*, and a mountain ogress. This story illustrates how, from the time they are born, the Tibetans accept the spiritual as been a part of their life. The importance that religion plays in the lives of the Tibetan people is the most striking aspect of their history. Tibetan history is intrinsically tied up with its religion, the spiritual and the terrestrial have become almost indistinguishable.

Buddhism was originally introduced into Tibet in approximately 700AD by an Order known as the Red-Capped Sect. Around the Fourteenth century when the Order adopted aspects that were considered unique to the Tibetan region, the order took on the name Yellow-Capped Sect so as to distinguish itself from the elder. There are two doctrinal aspects to the Sect which play a pivotal role in Tibetan history; firstly, the Sect's belief in the reincarnation of the *Buddha*, and secondly, the Sect's formation of regional monasteries.

The Yellow-Capped Sect believed that the guardian spirit of the Buddha was reincarnated in the form of a male child. This male child, once found, would be raised

to become the head of the Yellow-Capped Sect. The Dalai Lama, as a reincarnation of the Buddha, would become Tibet's supreme religious authority. This religious authority also possessed considerable temporal power; as spiritual leader the Dalai Lama controlled the Tibetan monasteries. The monasteries were more than just bases for the Yellow-Capped Sect; they also acted as a military, educational and spiritual centre for the surrounding areas. In effect the monasteries would act as a fort, school, church, library and granary for the local communities. The monasteries dominance over these terrestrial areas insured that the Sect, and the Dalai Lama, became a powerful influence in Tibetan life.

2. The Manchu Empire

The history of Sino-Tibetan relation effectively begins in 1720, when the Manchu Empire restored the Dalai Lama to power. The Dalai Lama had been driven from Tibet by Mongol invaders, these invaders were themselves defeated by the Manchu armies. Tibet was absorbed into the Empire through conquest, becoming the latest in a latest acquisition in the empire expansion. China had been absorbed by the Empire in the Sixteenth century. Though the Manchus had consolidated their position and hold in China, eventually assuming the title of Chinese Emperor, their position in Tibet was unclear.

It is difficult to define in terms familiar to international law the relationship that existed between the Tibetans and the Manchus. Their relationship was based on the phrase *Cho-yon*. This phrase has been described as a contraction of (i) *Cho-ne* which is translated as the "object worthy of religious offering"; and (ii) *Yon-daq*

which is translated as the "dispenser of offerings to a religious person or object"³. In this relationship the Dalai Lama assumed the position defined by the *Cho-ne*, he would be the Priest worthy of a religious offering. The Manchu Emperor would assume the role of *Yon-daq*, he would be the Patron dispensing offerings to the religious person. This relationship was purely a personal obligation between the Priest and the Patron.

A Central feature of the relationship is the duty of protection the Patron provides. The Patron is obliged to protect his Priest from those who might harm his teaching i.e. the Empire was obliged to protect the Dalai Lama and his followers. This protection must be provided when the Priest requests e.g. ostensibly the Dalai Lama was restored to power by an Emperor acting as Protector of the faith.

Commentators have tried to define this personal relationship in terms applicable to international law. Alexandrowicz-Alexander believes that the relationship is based on feudal law⁴. The Dalai Lama acted as vassal while the Emperor, as superior, was recognised as having control of all military, financial and political affairs. Alternately Richardson argues that the relationship cannot be defined in Western terms and as such should be viewed as *sui generis*⁵. Without questioning the validity of Alexandrowicz or Richardson's claims, it would appear hasty to define an international relationship on its initial premise as a personal obligation. Rather than attempting to define the *Cho-yon* relationship in international law nomenclature it is more important to ask whether this personal obligation between successive Dalai Lamas and Manchu Emperors evolved into a stronger political union.

³ *supra*, note 1 at 12-13

⁴ Alexandrowicz-Alexander, Charles Henry; *The Legal Position Of Tibet*, (1954) AJIL 265 at 267

⁵ Richardson footnote 28 ICJ

The *Cho-yon* relationship has being central to the arguments of both the Tibetans and the Chinese, it would appear therefore to possesses political qualities. by examining the Sino-Tibetan relationship from 1720, onwards it is hoped that this union, if found to exist, will be readily defined.

3. Manchu Influence in Tibet

The Mongol reign over Tibet had been known for its persecution and killing, the Tibetan people were therefore ready to accept the Manchus as the restorers of peace and order. By Decree of the Emperor the Dalai Lama was re-installed as spiritual leader, and given a limited temporal power. The Dalai Lama's temporal powers were restricted in that certain concessions were to be granted to the Emperor. while a Council of Ministers, consisting of three Tibetan members and one representative of the Yellow-Capped Sect, were installed to assist with Tibet's internal administration, the decisions of these members were to be supervised by representatives of the Emperor. These representatives consisted of two Residents, or *Ambans*, stationed in Lhasa, the Tibetan capital. The *Amban's* position was supported by a permanent garrison consisting of initially 3`000 soldiers. This initial concession provided a base from which the Manchus could strengthen their influence.

In 1728 15`000 Manchu troops were brought in to subdue a short civil war. After the fighting had been suppressed the Manchus reduced the influence of the Dalai Lama by exiling him from Lhasa. In his absence a pro-Chinese replacement governed, with the aid of the *Ambans* and their garrison, until 1750. The Manchu actions did not go unopposed. In 1751 the two *Ambans* were killed by Tibetan rebels, however his act of rebellion only led to a further increase in Manchu power. After the

rebels had been suppressed, the Council of Ministers was restructured so that half of its members would be appointed by the Manchus.

As the Manchu's increased their influence over Tibet's internal autonomy they also sought to control Tibet's external relations. The power of the Council was reduced, so that the responsibility for the countries defence and the maintenance of law and order was delegated to four generals who, though nominated by the Council, would hold their commissions from the Emperor. In tandem to these reforms the *Ambans* were reserved the right of drafting and forwarding all official correspondence to Peking, and the control of all post from Tibet into China. The *Ambans* in effect provided the only route for communication to leave Tibet.

The strengthening process culminated in a series of Decrees issued in 1791, the aftermath of a failed Gurkha invasion allowed the Manchus to use the rebuilding period to consolidate their influence. Manchu authority was increased through a number of measures. Firstly, the *Ambans* were no longer to be seen as merely advisors to the Council, from 1791 onwards they were to be considered the equal of the Dalai Lama. In some areas the *Ambans* were to act as the embodiment of the Emperor, e.g. the Dalai Lama was denied all access with the Manchu court and had to refer to the *Ambans* for all instructions. Secondly, the *Ambans* were to be consulted over all appointments to the Tibetan Administration. This power covered the appointment of all officials, regardless of the position to be filled. The only exceptions were appointments to the Council, in this area all appointment had to be approved by the Emperor. The reorganisation of the internal administration went hand in hand with the introduction of a new currency that would bear the Emperor's title.

Thirdly, the external authority of the *Ambans* was increased. Along with their existing power to have all external mail directed through them, they were to receive

all mail from outwith Tibet addressed to the Dalai Lama or the Council of Ministers. Frequently, this correspondence would be answered without the letters actually been delivered. The defence of the border became the sole responsibility of the *Ambans*. To support this duty the *Ambans* were empowered to raise and maintain a native force with to act along with the Manchu troops ordinarily stationed in Lhasa. This control of the Tibetan border extended to cover all aspects of foreign trade. Approved trade routes were open only to accredited traders during designated times.

Finally, the Emperor as the designated Patron for the Yellow-Capped Sect initiated a new procedure for appointments to the higher positions of the Order. Due to the propensity for reincarnations to appear in those factions that opposed the Emperor, all subsequent investitures would be subject to the Emperor's formal approval.

As the 1791 Decrees deal with Manchu influence on both Tibet's internal and external authority, they provide the perfect opportunity to review the questions over the *Cho-yon* bond. Alexandrowicz-Alexander has argued that the Sino-Tibetan relationship was based on a feudal law, in particular, he has argued that the relationship was one of suzerain-vassal. The Manchu Decrees throughout the nineteenth century would offer weight to this argument⁶. Under the terms of a suzerain relationship, the external affairs of the vassal state, Tibet, are administered by the suzerain state, China. Internally the vassal state would have a limited decree of self-governing authority but would hold certain obligations to the suzerain, e.g. a common obligation would be the payment of a tribute. The Decrees of 1751 and 1791 would appear to follow the terms of the suzerain relationship, therefore if the Decrees

⁶ *supra*, note 4

were implemented it is assumed that the Sino-Tibetan relationship was based on feudal law.

Ahmad believes that while these Decrees, on paper, were the high water-mark of Chinese influence inside Tibet there is serious question marks over there *de facto* implementation, Even when the Decrees were implemented their influence swiftly declined, e.g. upon the Dalai Lama death in 1808 his successor was chosen by the traditional manner rather than by approval of the Emperor⁷. This decline in Manchu influence continued throughout the Nineteenth Century with the reduction of the *Ambans* role in Tibetan politics to becoming little more than an ambassador. The only area where Manchu influence was left seemingly unchallenged was in their external control of Tibet's relations, nevertheless the extent of this control was undefined. This ambiguity surrounding Tibet external relations is evident throughout the various negotiations dealing with the British Trade Missions of the Nineteenth Century.

⁷ Ahmad, Zahiruddin, *China and Tibet 1708-1959: A Resume Of Facts* at 12

The British Trade Missions

1. The Cheefo Convention

In 1873, Britain, who sought to establish trade between India and Tibet, had to decide whether their negotiations should take place with Tibet or with China. Britain was aware that the relationship between the Tibetans and the Manchus were unclear, though it had been the Manchu's policy to control Tibet's external affairs there had been signs that this control was fading.

In 1841-2 and 1855-56 Tibet had been the recipient of a number of failed invasions attempts by its neighbours. In 1841-42, the Dogras of Khasmir invaded Western Tibet, in the aftermath of the conflict the "Agreement Between Tibet and Kashmir"⁸ was signed, a treaty in which Tibet appeared as a signatory. In 1856, after conflict with the Gorkhas of Nepal, Tibet again appeared as a signatory on the "Treaty Between Tibet and Nepal" and the "Treaty Between Nepal and Tibet". On both occasions Tibet had driven back the invading force without the aid of the Manchus, nevertheless the independence of the Tibet signature was questioned. The Agreement with Kashmir had also been signed by the Manchus despite playing no part in the conflict, while the bi-partite 1856 treaty was thought to have been heavily influenced by the perceived power of the *Ambans* in Lhasa.

The *Ambans* presence, with their appearance of control over Tibetan affairs, proved the critical factor in Britain decision to begin negotiations with the Manchus. On September 13th 1876 Britain and China signed an agreement commonly referred to as the Cheefo Convention, whereby the Manchus would arrange for a British party to be issued with passports to visit Tibet and conduct a trade mission. Richardson

⁸ The full text of this and all other treaties is available from the International Committee of Lawyers for Tibet website at <http://www.tibetictl.org/materials/treaties>

considers that this provision indicates the Manchus did not consider Tibet to be part of China⁹. In 1858 the Manchus and the British had concluded the "Treaty of Tien-Tsin" whereby British citizens had the right to enter the Empire with papers issued by a British Consul. Clearly if Tibet was part of the Manchu Empire the need for separate passports would be superfluous.

In its practical application the Convention failed to support any of the concessions it purported to grant. The Tibetan Authorities refusal to recognise the Passports led to the British Mission been forcibly prevented from entering the country. The relationship between the three states can be defined by the actions they took in response to the Convention practical failure. China was afraid that the continued Tibetan opposition to the Mission would expose the Empire's failure to control the Tibetan authorities. The Manchus therefore offered Britain an immediate settlement over the disputed Burma in exchange for the abandonment of the mission. The 1886 "Convention Relating To Burmah and Tibet" altered China's obligation under the Cheefo Convention. Article 4 stated that the Manchus would only:

"adopt measures... with a view to the promotion and development of trade... but if insuperable obstacles should be found to exist, the British Government will not press the matter unduly"

For the Tibetans the events surrounding the Cheefo Convention illustrated the control they possessed over Tibet's internal affairs. Nevertheless this internal control was not converted into a control of external relations. While it may be thought that the Tibetan resistance would have led the British to rethink their approach, the concessions granted by the Manchus in the 1886 Convention led them to continue negotiating with the Manchus.

⁹ Richardson, H. E.; *Red Star over Tibet*, Delhi (1959) 71

The Tibetan resistance had also brought back to British attention the dispute surrounding the border between Tibet and the British controlled Sikkim. In retaliation for the Mission being blocked the British had attacked the town of Lingtu situated in the disputed area, Lingtu was suspected of providing a base for Tibetan resistance. The British also secured the Chinese agreement to the 1890 "Convention Relating To Sikkim and Tibet" too finally settle the disputed boundary. In an unrelated Article the Convention attempted to secure for Britain a trade mart within Southern Tibet. This Article must also be read in tandem with the "Regulations Regarding Trade, Communication and Pasturage" which were appended to the main Convention in 1893.

Van Walt van Praag argues that the 1886 and 1890 Conventions help to define the nature of the relationship between the Manchus and Tibet. He argues that both the 1886 and 1890 Convention refer to Tibet as a separate political entity. He bases this argument on the fact that the treaties are headed "Relating to Burmah and Tibet" and "Relating to Sikkim and Tibet"¹⁰. This separation of Tibet, Sikkim and Burmah as distinct from the Chinese or British Empires leads him to conclude that Tibet could not be covered by Chinese sovereignty. This argument appears too simplistic, on van Walt van Praag basis the separation of "Sikkim" in the 1890 Convention would indicate that it was not an integral part of the British Empire, yet Article 2 states clearly that Sikkim is to be considered a protectorate of the British Empire, and that Britain would have "direct and exclusive control over the internal administration and foreign relations of that state". The separation of Sikkim in the title does not appear to affect the complete control the British Empire possessed over that territory. The

¹⁰ *supra*, note 1 at 129-130

separation of Tibet should likewise be seen having no effect on the relationship between the Manchus and the Tibetan.

The 1890 Convention though did continue to illustrate the lack of control China possessed over Tibetan affairs. In attempting to implement the 1890 Regulations the British were subject again to Tibetan resistance; boundary markers were destroyed almost as soon as they were erected while the proposed mart was rendered unsuitable for trade. Britain now suspected that the Chinese would be unable to meet any of the concessions they had granted.

2. The Lhasa Convention

Britain now thought that their objective would be better met through negotiation with the Tibetan themselves. Britain therefore attempted to communicate directly with the Tibetan Council of Ministers. These attempts were dismissed when, surprisingly, the Council said that the *Ambans* had not given them permission to speak to foreign Governments. This sudden desire to follow the 1791 Decrees was a diplomatic decision, the Decree provided the Council with an excuse to refuse negotiations while they attempted to ally themselves with Russia¹¹. Tibet's attempt to avoid negotiations led to Britain becoming increasingly frustrated. This frustration led the Viceroy of India, Lord Curzon, to declare both the Tibetans and the Manchus unfit for diplomatic negotiations. He believed that communication could only begin through direct contact with the Tibetan council, contact that could only take place after a

¹¹ Command Papers (Cd. 1920) No. 13

While this decision may have been successful in the short term, it has more recently provided China with apparent evidence of Tibet's acquiescence to Manchu rule. The diplomatic decision to play one state off against another has only served to reduce Tibet's claim of independence in the future.

military mission had been launched against Lhasa. This Mission, under the command of Colonel Younghusband, reached Lhasa in 1904.

The "Convention Between Great Britain and Thibet", commonly referred to as the Lhasa Convention, was concluded between the British and Tibetan Governments only; there is no reference either directly or indirectly to the Manchus alleged right to negotiate on Tibet's behalf, nor is the Manchu seal attached to the document. The lack of reference would suggest that the Convention was signed independently of their control, however the absence of a signature does not suggest that the Manchus were not involved in the negotiations surrounding the Convention conclusion. Li states that the *Ambans* assisted the British mission in their negotiations¹². To be involved though is not the same as having authority. The International Commission of Jurists argue that as the stated purpose of the British Mission was to negotiate with the Tibetans, the assistance of the *Ambans* does not detract from this purpose¹³. Additionally, the involvement of the *Ambans* was dependant on the negotiations taking place in Lhasa. A month prior to the arrival of the mission the *Ambans* had been prevented from leaving the city, if the negotiations had taken place outside of Lhasa it is likely the *Ambans* would not have been involved.

The Lhasa Convention bound Tibet to observe the terms of the 1890 Convention and the 1893 Trade Regulations. Accordingly the majority of the Articles of the Lhasa Convention concern the setting up of trade, however Article 9 is the exception as it deals with Tibet's relationship with other states. Article 9 required Tibet to secure the consent of the British Government before it concluded a number of

¹² Li, Tieh-Tseng ; *The Legal Position of Tibet*, 1956 AJIL 394 at 396

¹³ International Commission of Jurists; *The Question of Tibet and the Rule of Law*, (1959)

specified agreements¹⁴. This prior consent obligation has important implications for the Sino-Tibetan relationship. The International Commission of Jurists argue that China should be included under the term "foreign power". Due to the ambiguity surrounding the Manchus position in relation to Tibet the Commission believe that from Article 9 absolute and unambiguous nature it is clear that China was not to be excluded from it's provisions. This argument appears dependant on the Manchus lack of involvement in the negotiating process. While there are questionmarks over the extent of their involvement, it is clear that the Ambans were consulted by members of the British Mission, it would seem absurd that they would co-operate in any way with an Agreement that was intended to rob them of any claim they may have had to Tibet. Nevertheless from the nature of Article 9 it is apparent that the Sino-Tibetan relationship must have been altered.

Alexandrowicz-Alexander, who argues that the Sino-Tibetan relationship is based on suzerainty, believes Article 9 reduces this suzerain link to little more than a nominal right¹⁵. However for this reduction to occur the suzerain relationship would have to exist. Alexandrowicz-Alexander refers to the 1907 "Convention Between Great Britain and Russia Relating To Persia, Afghanistan and Thibet" as confirmation

¹⁴ Article 9 states:

"The Government of Tibet engages that without the previous consent of the British Government-

(a) no portion of Tibetan territory shall be ceded, sold, leased, mortgaged or otherwise given to any foreign power;

(b) no such power shall be permitted to intervene in Tibetan affairs;

(c) no representative or agents of any foreign power shall be admitted to Tibet;

(d) no concession for railways, roads, telegraphs, mining or other rights shall be granted, similar or equivalent concessions shall be granted to the British Government;

(e) no Tibetan revenues, whether in kind or in cash, shall be pledged or assigned to any foreign power, or to the subject of any foreign power."

¹⁵ *supra*, note 4 at 256

of the suzerain relationship existence. The first sentence of the Convention states "The Governments of Great Britain and Russia recognising the suzerain rights of China in Thibet..." However, as discussed, the relationship between Tibet and China was based on the *Cho-yon* bond. If the relationship was based on the suzerain relationship it should be evident from examining the events surrounding the nineteenth century trade missions. As suzerain any treaties concluded by China would be applicable in Tibet, yet this was shown not to be the case during the negotiation surrounding the Cheefo Convention. The "Treaty of Tien-Tsin" had already dealt with issue of British travel in China's territory. As suzerain the "Treaty of Tien-Tsin" should have applied to Tibet, on this basis the Cheefo Convention provisions concerning the issuing of passports to British subjects should have been superfluous. The Cheefo Convention therefore shows that China did not view itself as suzerain. Li, who supports Chinese sovereignty, denies that China was ever suzerain. He argues that suzerainty is essentially a Western concept¹⁶. The phrase was used was inserted into the 1907 Anglo-Russian Convention without the Manchus being consulted. With Tibet and China absent from the Convention, neither Britain nor Russia had the authority to affect China or Tibets' sovereign rights¹⁷.

While an examination of the facts would conclude that the relationship had not evolved into a suzerainty it is possible to misconstrue it as such, China's proclaimed control of Tibet's external relations would appear to support Alexandrowicz-Alexander argument. For this reason his argument should not be dismissed, regardless of the existence of the suzerain relationship prior to 1904, Alexandrowicz-Alexander

¹⁶ *supra*, note 12 at 394

¹⁷ *supra*, note 1 at 39

argument supports the proposal that Article 9 excluded suzerainty as the basis for any future Sino-Tibetan relations.

3. The Adhesion Agreement and The Anglo-Russian Treaty

The Lhasa Convention left China adrift from Tibet. Britain's negotiations had made a mockery of the Manchus declared right to control Tibet's external relations. China was looking for an opportunity to reassert herself, luckily the Manchus did not have long to wait before Tibet's status was discussed again. Britain had received adverse international criticism of its mission to Lhasa, it sought to remedy this situation by seeking China's acceptance of the 1904 Convention.

The 1906 "Convention Between Great Britain and China Respecting Thibet", more commonly referred to as the Adhesion Agreement, failed to resolve the questions surrounding Tibet's status. The Adhesion Agreement transferred the responsibilities of Article 9 so that China, rather than Britain, would be responsible for Tibet's integrity. The Agreement effectively removed any of the gains Tibet had achieved through the Lhasa Convention, any claim Tibet may have made to control its external affairs were seriously weakened. The extent of control China would possess is left unstated. However while there is no direct mention of a suzerain relationship the agreement implies that one could exist. Britain's acquiescence in the transfer of Article 9 was effectively recognising China's authority to conduct Tibet's external relations.

China's position was further strengthened by the 1907 "Convention Between Great Britain and Russia Relating to Persia, Afghanistan and Tibet". Though China

This view is supported by the statements of the Russian Foreign Minister who states that "the two contracting parties have no sovereign right to use at their will over [this] region."

was not a signatory the effect of the Convention had important ramifications; firstly, as discussed, it recognised Chinese so-called suzerainty, while secondly the signatories pledged from interfering in Tibet's internal administration. With Britain and Russias' withdrawal, China was left with unrivalled authority over Tibet. China was now free to pursue its objectives in Tibet without the threat of third-party interference. Accordingly China began by seeking to remove or take over the obligations Tibet had undertaken in the Lhasa Convention.

4. The Trade Regulations

Article 6 of the Lhasa Convention had pledged the Tibetans to compensate Britain for the cost of the Mission. China's new-found freedom resulted in this compensation being paid by the Manchus. Britain though was reluctant to accept this payment, they thought that this gesture would undermine the Tibetan authorities. A compromise was reached whereby the compensations would be paid by the Manchus however it would be delivered by the Tibetans. However, after the first payment had been made through the Tibetan Council, all subsequent payments were delivered directly. Significantly the Tibetan authorities offered no objection to this arrangement.

Article 3 of the Lhasa Convention had promised discussions on updating the 1890 Trade Regulations. Article 3 implied that this discussion would take place exclusively between Tibet and Britain¹⁸. Despite this suggestion Britain accepted China's offer to re-negotiate on condition that a representative of the Tibetan authorities was in attendance. However to attend and to participate are entirely

¹⁸ Article 3 of the Lhasa Convention states:

separate concepts, by the time the Treaty was signed the Tibetan representative appears as a mere subordinate of the Manchus.

The 1908 “Agreement Between Great Britain China and Thibet Amending Trade Regulations of 1893” outlines a large degree of Manchu authority over Tibet. Internally, Britain recognised China right to control the administration and maintenance of the Trade Marts throughout the country. Externally Britain recognised that China rather than Tibet would be responsible for fulfilling the terms of the Lhasa Convention and the trade regulations attached. Yet even though a large measure of Manchu control is outlined, the extent of the control is left unclear e.g. it has been argued that the 1908 Convention supports the claims of Tibet rather than China. The International Commission of Jurist believe that the Agreement illustrates that the Manchus did not view Tibet as a province of China. The Agreement contains several references to the Tibetan people as distinct from the Manchu subjects, this separation indicates that Tibet was not a province of China¹⁹, for if Tibet were a province of China the Tibetan people would be Manchu subjects. China’s action in the aftermath of this Agreement appear to support the Commission's argument, as the Manchus spent the next 3 years attempting to forcibly assimilate Tibet.

“The question of the amendment of the Regulations of 1893 are reserved for separate discussion, and the Thibetan Government undertakes to appoint fully authorised delegates to negotiate with the British Government as to the details of the amendments required”

¹⁹ *supra*, note 13 at 82-83

Tibetan Independence

1. The Fall of The Manchu Empire

The 1906 Trade Agreement and the 1907 Anglo-Russian Convention gave China unopposed control over Tibet. With this freedom China sought to actively incorporate Tibet as a Chinese province. Between 1908 and 1911 the Manchus increased their military presence within Tibet, a succession of campaigns were launched against the Monasteries and Clans that were thought to oppose China's plan. This clampdown resulted in the establishment of an exclusively Manchu administration, with the Commander of the Manchu Army assuming control of the Government. These measures were not opposed by the Tibetan council as they hoped to secure peace through negotiation.

China's expansion was curtailed in the Autumn of 1911, after the fall of the Manchu Dynasty. The resulting struggle for power consumed China's attention, with attention focused on Beijing the troops stationed in Tibet failed to receive pay or supplies. This lack of support, with the desertion and low morale that followed, allowed the Tibetans to easily expel all Chinese personnel from the country. In spite of their now complete lack of control the new Chinese Republic declared, on 21st April 1912, that Tibet would thereafter be viewed as a province of China. To restore Chinese rule an armed expedition was launched to re-subjugate it. Accordingly 1913 saw not only the start of the China invasion, but also the concurrent declaration of independence by the Tibetan authorities.

2. An Independent Tibet?

A number of commentators have referred to Tibet's declaration of independence in 1913, while they agree on the year, they differ over the basis for this declaration. The International Commission of Jurists mentions the Declaration without reference to a specific document or incident²⁰. This reference without evidence is echoed by a number of authors²¹. This situation led Rubin to argue that no Declaration had ever been issued²². Such a direct statement could not go unchallenged for long, McCabe argues that there is clear evidence that Tibet had Declared its independence²³. In 1913 Tibet and Mongolia concluded The "Treaty of Friendship and Alliance". In the preamble both Tibet and Mongolia declare themselves to be independent states free from Manchu authority, while in Articles 1 and 2 each country recognised the others independence. This declaration and recognition would be a persuasive response to Rubin's argument were it not for doubts surrounding the Treaties validity²⁴. The Treaty was concluded by a Russian national, on behalf of the Tibetan Government, after he had received an ambiguous document purporting to delegate authority from the Dalai Lama. After the existence of the Treaty was brought to the Tibetan Government's attention, the Dalai Lama denied delegating any authority to the Russian. Accordingly neither Government considered the treaty to be in force.

²⁰ *supra*, note 13 at 84

Later in the Report at p89 the ICJ state that "It does not appear before 1942 that Tibet actively and formally asserted herself to be independent of... the China polity". It would appear that the ICJ doubt there own assertion.

²¹ Ahmad, *supra* note 7 at 18, Sharma Suyu P., *The India-China Border Dispute: An Indian Perspective*, AJIL (1965) 16 at 21

²² Rubin, Alfred P., *A Matter of Fact*, AJIL (1996) 586

²³ McCabe David A., *Tibet's Declaration of Independence*, AJIL (1966) 369 at 370.

McCabe also refers to several Foreign Office files which mention that a Declaration has been given. This rebuttal of Rubin's argument shares a similar characteristic to the International Commission of Jurists: a complete failure to produce a declaration of independence. The evidence of a secondary sources should not presume the existence of a primary document.

This ambiguity over the existence of a physical document was resolved when Shakbapa produced evidence of a physical document²⁵. The document Shakbapa refers to was a Proclamation issued by the Dalai Lama in February 1913. The Proclamation began by stating that the military actions of China between 1908 and 1911 had ended the Priest-Patron relationship, as that relationship "...had not been based on the subordination of one by the other." This reference to the *Cho-yon* relationship must also be seen in light of an earlier Declaration by the Dalai Lama. Shortly after his exile to India in 1910 the Dalai Lama had stated that the *Cho-yon* relationship had come to an end.

If the revocation of the *Cho-yon* relationship by the Dalai Lama is not sufficient proof of the bonds extinction, the events after the fall of the Manchu Empire also signified the end of this relationship. As the relationship had been based on a personal obligation by the Manchu Emperor and the Dalai Lama the fall of the Empire was the end of the obligation. It is clear that the new Republic succeeded to the treaties and Agreements concluded by the Manchu Emperor. A purely personal obligation is not covered by the law covering State succession²⁶. Either through revocation by the Dalai Lama, or through the extinguishing of the obligation it is

²⁴ *supra*, note 13 at 87

²⁵ Shakabpa, Tsepon W. D., *Tibet: A Political History*, Yale University Press (1967) p246-248

evident that the beginning of the Chinese Republic, and the attempted subjugation of Tibet that followed, signified the end of the *Cho-yon* relationship, for how was the Patron protecting his Priest by attacking his land and monasteries?

After discussing the *Cho-yon* bond, the 1913 Declaration refers to Tibet independence in a roundabout manner. The Dalai Lama talks of Tibet as a "small religious and independent nation". He concludes by stating that "To safeguard and maintain the independence of our country, one and all should voluntarily work hard" Rubin, in a later article, argued that the mention of an "independent nation" the Declaration dealt with the revocation of the *Cho-yon* bond exclusively, it had no effect on China's sovereign rights over Tibet²⁷. Rubin argument presumes that the Sino-Tibetan relationship was based on a stronger union than that provided by the *Cho-yon* bond. In the absence of a stronger tie the end of the *Cho-yon* relationship signified the end of Sino-Tibetan relations. The existence of a stronger union was the subject of international discussions at the 1914 Simla Conference.

3. The Simla Conference

Britain, in the hope of securing peace and stability on the border of India, sought to settle the status of Tibet through negotiation. The Tibetan and Chinese authorities were invited to send representatives to a tri-partite conference which met at Simla from October 13th 1913. After considerable discussion a draft Convention was initialled by the representatives of all three Governments, however the Chinese representative declined to formally sign the completed Convention. In the Chinese

²⁶ Lauterpacht (editor), *Oppenheim's International Law: A Treatise (vol. 1) Peace*, 8th Ed., Longmans (1955) at 159.

Governments absence the Convention was signed on July 3rd 1914 by the representatives of Tibet and Britain. Both Governments declared that China would be barred from claiming any privileges arising from the document for as long as their signature was withheld.

The document was a compromise between the opposing positions advocated by the Chinese and Tibetan representatives. The Tibetans had declared, in their opening speech to the Conference, that "It is decided that Thibet is an independent state and that the precious Protector, the Dalai Lama, is the ruler of Thibet, in all temporal as well as spiritual affairs."²⁸ China responded by stating that Tibet was to form "an integral part of the territory of the republic of China" and if this was agreed "China would engage not to convert Tibet into a province"²⁹ As a compromise Britain proposed the division of Tibet into two zones. "Inner Tibet", which covered the eastern and north-eastern regions of Tibet, would be subject to China's right to "Establish such a measure of control... as will safeguard their historic position there". Article 2 of the Convention would also explicitly recognise that "Tibet is under the suzerainty of China". "Outer Tibet" which covered the Central and Western Regions would be subject to the full autonomy of the Tibetan Government. China would promise to respect this autonomy by abstaining "from interference in its administration (including the selection and the installation of the Dalai Lama)"

The lack of a Chinese signature does not exclude conclusions been drawn from the conference. The formal recognition of the Tibetan delegation into the conference, where they would participate in the negotiation and conclusion of an international

²⁷ Rubin Alfred P., *The Position of Tibet In International Law*, 35 *The China Quarterly* (1968) 110 at 121-122, footnote 64

²⁸ Quoted in *Tibet's Declaration Of independance*, *supra* note 23 at 371

agreement, could imply that Britain and China recognised Tibet's independent treaty making power³⁰. This recognition is dependent though on the intention of both Britain and China as recognition is not implied where the non-recognised state is admitted to an international conference when there is no intent to recognise that state. From the Chinese negotiators opening words to the conference it is clear that China had no intention of recognising Tibet. Nevertheless the conclusion of a bi-lateral treaty with the non-recognised state does imply recognition by the other party to that treaty, therefore when Britain concluded a bi-lateral treaty with Tibet in China's absence they were impliedly recognising Tibet.

It should be evident that the status of Tibet would have changed if the Convention had been signed and ratified by the Chinese as Tibet would have recognised China's suzerainty and control. China's refusal to sign the agreement effectively granted Tibet its independence, as their refusal led to a recognition of Tibetan independence and an end to Sino-Tibetan relations. By refusing to agree to a suzerainty over Tibet China had no fall back position. The Sino-Tibetan relationship had been built on the original *Cho-yon* bond which, as discussed, had been revoked by the Dalai Lama. If China possessed a claim based upon a stronger connection, this connection should be apparent from the history of the relationship throughout the nineteenth and twentieth century. Yet, as shown, China's control over Tibet had not been reflected in their *de facto* relations.

4. Tibetan survival

Until 1950 Tibet successfully maintained its independence from China. During the First World War Tibet reoccupied all the land it had lost during the Chinese

²⁹ Quoted in *The Status of Tibet*, *supra* note 1 at 55

³⁰ Oppenheim, *supra* note 26 at p146-147

offences in 1910. This action led to a truce whereby a border between China and Tibet was fixed at the Yangtze river. Though the Agreement was never ratified by the Chinese its terms were observed.

At the end of the First World War, Tibet began to show all the requirements for statehood; fixed population and territory, and effective Government with the capacity to enter into relations with other states³¹. Due to Tibet's geographic condition, it is hard to dispute the requirements attached to showing a permanent population or a fixed territory. The Tibetan Government exercised all of the powers and duties expected of it, they ran an extensive civil service with control over taxation, currency and communications, they also maintained a small army. The Government was founded on the traditional Tibetan rules of law, rather than one imported from China. Finally the Tibetan Government controlled its borders through the creation of an Office for Foreign Affairs which dealt with passport and trade.

Despite its new-found independence, Tibet was careful in how it dealt with China. Regardless of the control the Government exerted, the Council and the Dalai Lama were always mindful of the power the Chinese possessed. In 1930, two missions were sent by the Chinese to discuss the re-establishment of Sino-Tibetan relations, the Dalai Lama replied that China would have to respect Tibet's autonomy. A mission remained at Lhasa throughout the 1930 and 40s. Their presence, like the presence of the *Ambans* before them, insured that doubts would remain over the independence of the Tibetan authorities e.g. In 1940 the Chinese claimed that they had played a large part in the selection and appointment of the Dalai Lama, upon his predecessor's death.

³¹ Convention on Rights and Duties of States (1934) Art(1)

However this story was allegedly a fabrication as they had been present only as observers³².

This continued suspicion was partially laid to rest during the Second World War. In 1942-43 the Allies sought to use Tibet as a alternate military supply route to China. At first the Tibetan Council refused as they wished to maintain their neutrality. Britain believed that the Tibetans reluctance stemmed from their distrust of China's motives in supporting the proposed route, they suggested that China should issue a declaration respecting Tibet's autonomy so that Tibetans fears would be alleviated. The Chinese refused to issue the declaration on the basis that Britain appeared to use the words 'autonomy' and 'independence' almost interchangeably³³. Nonetheless a compromise was reached whereby the supply route would be open for all non-military supplies provided they were escorted by only a token escort, no large Chinese or British force would be allowed to travel through Tibet. Additionally the proposed route would be altered so as to bypass Lhasa.

The negotiations surrounding the proposed supply route illustrate the strength possessed by the Tibetan authorities in its relations with other states. This strength is shown in a number of ways; firstly, the fact that China was at war with Japan was of no consequence to the Tibetan Council. Tibetan maintained its neutrality throughout the war contrary to any suggestion of Chinese suzerainty. Secondly, Tibet successfully maintained its independence despite the pressure exerted upon it by China and Britain.

³² *supra*, note 13 at 88

³³ American Official Quoted in *The Question Of Tibet and The Ruel Of Law supra* note 14 at 91

Chinese Invasion

1. The Seventeen Point Agreement

On the 7th October 1950 40,000 Chinese troops entered Tibet in breach of the customary rules of state sovereignty and territorial integrity. Within a fortnight they had overrun the Eastern territory and captured the provincial capital of Chamdo. The Chinese justified their movement of troops as a strengthening of China's western border, China's western border being the Western Border of Tibet. The fighting between the Tibetan soldiers and Chinese troops was justified as a removal of rebellious elements. The Tibetans realised they were heavily outnumbered and that to continue resisting would be futile. On the 11th November the Dalai Lama appealed to the United Nations for aid. El Salvador, with the backing of India and the United States, asked the General Assembly to consider this appeal. despite this support the Steering Committee of the Assembly decided that discussion should postponed, they thought that Tibet autonomy could be safeguarded through peaceful negotiations with the Chinese Government.

The United Nations decision left the Tibetans with no choice but to begin discussions with the Chinese. On the 23rd May 1951 the "Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet" was signed. The agreement contained 17 articles governing the future course of Sino-Tibetan relations, taken together these articles effectively absorbed Tibet into Chinese territory.

The validity of the Seventeen Point Agreement has been questioned by commentators, their criticism has taken three forms. The first argument deals with the authority of the Tibetan representatives to conclude the Agreement. The Tibetan seal,

attached to the document, was alleged to be a Chinese forgery and therefore incapable of having any binding legal effect, however this argument would be moot if there was Tibetan collusion in the process. The original seal was reported to be diplomatically "lost" by the Tibetan negotiators so as to avoid the appearance of genuine acquiescence to the Agreements terms³⁴. If this account is true it shows that the negotiators knew the seals were not genuine, and the principle of *estoppel* should apply to hinder any subsequent claim.

The second criticism has centred on whether the Tibetan signature on the Agreement was obtained voluntarily. The Dalai Lama in 1959 stated that "The Agreement which followed the invasion of Tibet was... thrust upon its people and Government by threat of arms... consent of the Government was secured under duress and at the point of bayonet"³⁵ The lack of voluntary consent could raise question marks over the validity of the treaty. Oppenheim states that a valid agreement can only be created through the free and mutual consent of the contracting parties³⁶. Accordingly coercion to sign could invalidate the Treaty.

The nature of the coercion is important when determining the validity of the Agreement. The International Commission of Jurists argue that physical or mental coercion would invalidate the treaty only if it was directed against the states representatives not the state itself³⁷. Though it was clear that China was prepared to continue to use force against Tibet, it is questionable whether any physical coercion was directed against the negotiators. Van Walt van Praag alleges that the negotiators

³⁴ *supra*, note 27 at 123

³⁵ Dalai Lama Statement at Moosoirie June 20th 1959 quoted in The Question of Tibet and the rule of Law *supra* note 13 at 95-96

³⁶ *supra*, note 26 at 891

³⁷ *supra*, note 13 at p96

were threatened with physical violence and were treated as prisoners throughout the discussions, however Rubin believes that these allegations are without foundation and difficult to believe. It is difficult to find any evidence to back up these allegation; it may be significant that van Walt van Praag offers no supporting evidence, or, it may be significant that Rubin phrases his opinion in the form of a personal remark, again without the support of any evidence. This lack of corroborating evidence hinders any argument based on physical coercion.

Coercion does not have to be physical, it can also take the form of mental pressure. The Dalai Lama stated "My representatives were compelled to sign the agreement under the threat of further military operations against Tibet by invading armies leading to the utter ravage and ruin of the country"³⁸ Clearly the Tibetan negotiators were subject to mental pressure due to the continued presence of the Chinese troops in Tibet. This mental coercion would render the treaty invalid or the treaty could be repudiated on this ground.

The third criticism is concerned with the obligations imposed by the 17 Point Agreement. This criticism has focused on the interpretation of Point 4, which states "The Central Government was not to alter the existing political system in Tibet. The Central Authorities also will not alter the established status, functions and powers of the Dalai Lama" The Dalai Lama was thought of as the spiritual and temporal ruler of Tibet. This position had been reinforced as recently as 17th November 1950 when the Foreign Minister stated "Tibet is united as one man behind the Dalai Lama"³⁹. It should be apparent that the position occupied by the Dalai Lama would not be a part

³⁸ Dalai Lama statement at Moosorie June 20th 1959 quoted in *The Question of Tibet and the rule of Law supra* note 13 at 95-96

of China's future plans; the Chinese believed that Tibetan autonomy in cultural, educational and religious areas would satisfy Point 4, the Tibetans thought of autonomy as nothing less than a complete control over local Government.

March 1955 saw the formation of the "Preparatory Committee" to further the integration of Tibet into China. The Committee's stated task was to assist in the observance of Tibetan autonomy in accordance with the Chinese Constitution and the 1951 Agreement. The Chinese have claimed that the criticisms of the 1951 Agreement are superfluous, as the Dalai Lama had acquiesced to the changes during his time on the Preparatory Committee. The Dalai Lama hoped that the Committee would have acted as a conduit for compromise between the Chinese and the Tibetans, however in practical terms the Committee had little influence on Chinese policy. Subordinate agencies, dominated by Chinese personal, controlled the majority of Governmental power; e.g. the agencies controlled appointments to the legislative and judicial administrations, in addition they governed all aspects of trade and the economy, cultural affairs and education. Even in the areas not covered by the Agencies the Committee was subject to Chinese interference as all of their decisions had to be approved by the Central Government.

The Dalai Lama's co-operation has to be viewed in light of the Chinese presence within Tibet. With 150'000 Chinese troops stationed in the country the threat of violence, both at a personal and a general level, was always present. In these circumstances the Dalai Lama's conduct throughout the 1950s cannot be viewed as voluntary. After the Dalai Lama fled Tibet in 1959 he was able to speak freely without

³⁹ Quote from Tibet Government-in-Exile Paper Proving Truth From Facts at <http://tibet.com/whitepaper/white2.html>

a threat of violence, he immediately repudiated the 1951 Agreement as the Chinese had not fulfilled their obligations⁴⁰.

2. Use of Force

The repudiation of the Seventeen point Agreement leaves one final question: what effect did the Chinese use of force in 1950 have on the Sino-Tibetan relationship? China was party to the 1928 “General Treaty for the Renunciation of War”, more commonly known as the Kellogg-Briand pact. Article 1 of the Pact pledged states not to use war as a solution to international controversies or as an instrument of national policy in their international relations. However the Pact did not ban warfare outright, the act only applied to relations between states who were party to it, accordingly as Tibet was not a party to the treaty China invasion would not be contrary to Article 1.

Article 2(4) of the UN Charter states that “All members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state”. Although China did not become a member of the United Nations until 1972 Article 2(4) was generally considered to form part of the customary international law. Van Walt van Praag argues that China adherence to the Kellogg-Briand pact and to other international obligations with a similar nature illustrates China adherence to the customary restriction on the use of a force⁴¹. In 1949 the International Court of Justice in the Corfu Channel Case stated that the use of force between states had no place in international law and that “Between independent

⁴⁰ *supra*, note 13 at 99

⁴¹ *supra*, note 1 at 150

states, respect for territorial sovereignty is an essential foundation of international relations”⁴²

It is therefore arguable that the actions of China in 1950 were a breach of the international customary law prohibiting the use of force between states.

⁴² The Corfu Channel Case, ICJ Report 1949 at 35

Conclusion

In 1791 the Manchus issued a series of Decrees covering Tibet's internal and external structure. One effect of the Decrees was to transfer control of Tibet's foreign relations, trade and defence into Manchu administration. This transfer in control led Tibet to become isolated from the rest of the world. Due to its geographic position Tibet had always been a difficult country to enter, yet the Manchus increased the bureaucratic difficulties in gaining admission. The Manchus thought that by hindering foreign visitors, especially those from Britain and Russia, their influence over Tibet would be easier to maintain. By removing contact with possible allies the Manchus hoped the Tibetans would increasingly turn towards China for guidance. The success of the 1791 Decrees were questionable, as discussed earlier, the nineteenth century saw a decline in China's influence over Tibet, nevertheless the "Forbidden Land" policy played a decisive role in forming the opinions of Tibetan citizens. Throughout the nineteenth century the few visitors who managed to enter Tibet were met with suspicion if not hostility. It was even thought that by eating sweets or using soap imported from India the Tibetans would be putting their faith at risk⁴³.

The end of the twentieth century sees an unparalleled increase in global travel and communication. Modern technology has rendered Tibet almost as accessible as any Package Destination. Yet, in this climate, China has attempted to reinvent its "Forbidden Land" policy. China claims that Tibet's problems are of domestic nature, that the Tibetan resistance does not justify international scrutiny. In effect the Chinese are hoping that without international assistance Tibet will be left with no choice but to acquiesce to Chinese rule. As this essay has attempted to show the Sino-Tibetan

⁴³ *supra*, note 25 at 173-174

relationship is an international problem requiring solutions. However, while this essay has highlighted the Tibetan claims for independence, it may appear paradoxical to say that the solution is not necessarily based on Tibetan independence. The history of Sino-Tibetan relations is ambiguous. The Tibetans have exhibited signs of independence, especially after the First World War, however there also been conflicting evidence of Chinese authority. Firstly, Tibetan authorities were not averse to relying on China to resolve problems e.g. the Tibetans refusal to negotiate with Britain in 1904 out of an alleged respect for the 1791 Decrees⁴⁴. Secondly, the influence of the *Ambans* has always effected the Tibetan claims, e.g. it was the presence of the *Ambans* in Lhasa that led Britain to open negotiations with China in 1876. Thirdly, the alleged acceptance or acquiescence of the 17 Point Agreement by the Tibetan Government.

The Simla conference illustrates that Tibet has been prepared to accept solutions short of full independence. Under the terms of the proposed Agreement Tibet was ready to accept Chinese suzerainty in return for local autonomy. This type of solution is also the approach favoured by the Dalai Lama, he stated as recently as January of 1999 that “I’m fully committed tot he middle way approach [of seeking autonomy for Tibet]... as an antidote to separation”⁴⁵ Nevertheless China refusal to enter discussions only serves to polarise the issue. While China hides behind Art 2(7) the suspicion will remain that while Tibet may not be a country, perhaps it should become one.

⁴⁴ Discussed above at p15

⁴⁵ Interview with the Dalai Lama in *Time Magazine*, 25 January 1999

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