

# The United Nations, Self-Determination and the Falkland Islands

Talk at a Public Meeting, by Professor Peter Willetts, Port Stanley, Friday 8 March 2013

I am ~~grateful to the Falklands Islands Government for formally accrediting me as an observer,~~ representing the South Atlantic Council, to witness the referendum on the future status of the Falklands. It is an historic event, whatever result is declared next week. While I am here on behalf of the South Atlantic Council, I am not speaking in their name. The Council does not adopt collective positions. It does not authorise anybody to make political arguments and political analysis in their name. The Council seeks to promote communication between Argentines, the British and the Falkland Islanders and to generate new ideas for discussion. I am speaking solely in my own name.

My aim this evening is to put the referendum into the context of the United Nations promoting the end of the European empires and self-government for all colonies. The UN has developed international legal norms on decolonisation. One of these norms is that no colony can be recognised as having achieved self-government unless the outcome is approved by an act of self-determination. The new status can be approved either by a general election or by a referendum.

I have no doubt that in international law the Falkland Islanders have the right to self-determination. The Argentine government is wrong to say that their sovereignty claim means the Falkland's electorate have lost their democratic rights. However, self-determination has a special meaning in the UN. It is not simply the right of any people to choose to live as they wish. Self-determination means making a choice from three options for self-government. For the UN, remaining a British Overseas Territory, under the current constitution, is not and cannot be an option. The change in status from being a Colony, to being a Dependent Territory, to being an Overseas Territory, has brought some political change down the road towards self-government, but it is not enough to satisfy the UN. It is possible that with further political change the Falkland Islands could be recognised by the UN as having achieved self-government, provided that a majority of the resident voters approved the new status in another referendum.

What I am saying will not be welcome to the Argentine government, to the British government or to most Falklands Islanders. The Argentine government will object to me saying that the people of the Falklands *do* have the right to self-determination. The British government will object to me saying that an Overseas Territory *is still* a colony. The Falklands voters will object to me saying the referendum will *not* be recognised at the UN as an act of self-determination.

First of all I will explain what is meant by self-determination in international law. Then, I will show what options are and are not available for the Falklands to be recognised as a self-governing territory. Finally, I will suggest some possibilities for the future.

## *The Origins of the Right to Self-Determination*

It is often suggested that the "right to self-determination" is written into the UN Charter. It is true that Article 1 of the Charter, defining the purposes of the UN, includes "respect for the principle of equal rights and self-determination of peoples". The same words are also used at the start of Chapter IX on "International Economic and Social Co-operation". BUT there is no mention of "self-determination" anywhere in the three chapters covering the UN's commitment to the political development of colonies. The UN Charter was negotiated and approved in 1945, when independence for all the British, French, Portuguese, Belgian, Dutch and other colonies seemed a dream for the distant future. Indeed, the Charter only referred to "the interests of the inhabitants" of colonies and an obligation "to develop self-government" taking "due account of the political aspirations of the peoples". There was no mention of independence nor self-determination for colonies.

The great change came when Africa made its impact on the UN. In 1945, there were only three independent African countries; in the 1950s, six more joined; and then in September 1960 sixteen more joined, with thirteen on the same day.<sup>1</sup> By October 1960, there were 25 African members of the UN. The Prime Minister and the leader of the Communist Party of the Soviet Union, Nikita Khrushchev, came to the UN General Assembly and seized the opportunity for anti-Western propaganda. It became a piece of dramatic theatre when he took off his shoe and banged his desk with it, to emphasise his arguments. Khrushchev proposed a declaration demanding the independence for all colonies within twelve months. The African and the Asians cleverly thanked Khrushchev for his initiative, but insisted on pushing for their own UN resolution. As a result, the Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted as General Assembly Resolution 1514 on 14 December 1960, with 89 votes in favour, none against and nine abstentions.<sup>2</sup> I have emphasised the African context for the Decolonisation Declaration, because I will argue this matters a great deal for the Falklands.

The Declaration simply stated seven general principles on decolonisation, but it generated a revolutionary change in the UN. To summarise, it asserted

- (1) alien subjugation was a denial of human rights,
- (2) "all peoples have the right to self-determination",
- (3) inadequate development must not be an excuse for delaying independence,
- (4) repression must stop,
- (5) immediate steps to transfer powers must be taken,
- (6) disruption of territorial integrity is unacceptable and
- (7) international law must be respected.

It is not the UN Charter, but the Decolonisation Declaration, which established the right to self-determination. The Charter speaks of the "interests" of the inhabitants of non-self-governing territories. The Declaration speaks of the right of colonial peoples to "freely determine their political status". From this point onwards, the pressures for colonies to become independent greatly increased. The right to self-determination was re-asserted in December 1966, when it was included as the first article of two major international treaties – the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It was re-asserted again in October 1970, when the UN approved the Declaration on the Principles of International Law.<sup>3</sup> Due to its constant repetition, including in the Falklands Constitution, the right to self-determination is now regarded as part of customary international law, binding upon all states.

Several Latin American countries argued, during the debate on the Decolonisation Declaration, that emphasis on Africa must not obscure the need for decolonisation in Latin America. Argentina mentioned "one island sector of our territory under foreign control", but only Honduras referred to the Malvinas. Guatemala pushed its claim to the colony of British Honduras, describing Belize as unlawfully occupied national territory, but Mexico responded that it had rights to Belize. During the debate, Guatemala proposed an additional paragraph saying

"The principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory".<sup>4</sup>

<sup>1</sup> The original three were Egypt, Ethiopia and Liberia; those joining in 1955-58 were Libya, Morocco, Sudan, Tunisia, Ghana and Guinea. On 20 September 1960, Dahomey (now Benin), Cameroon, Central African Republic, Chad, Congo, Gabon, Ivory Coast (Côte d'Ivoire), Madagascar, Niger, Somalia, Togo, Upper Volta (Burkina Faso) and Congo Democratic Republic (Zaire) joined. A few days later, Mali, Senegal and Nigeria also joined.

<sup>2</sup> All the UN General Assembly resolutions quoted in this talk are available from links on the South Atlantic Council website at [www.staff.city.ac.uk/p.willetts/SAC/UN/UN-LIST.HTM](http://www.staff.city.ac.uk/p.willetts/SAC/UN/UN-LIST.HTM)

<sup>3</sup> UN General Assembly Resolution 2625 (XXV) of 24 October 1970, containing the "Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", available from .../UN-LIST.HTM (cited above).

<sup>4</sup> UN document A/L.325 in *General Assembly Fifteen Session Official Records, Annexes, Agenda Item 87*.

The Afro-Asian Group was determined to maximise support for the Declaration and so they appealed for the amendment to be withdrawn, arguing that the point was covered by the mention of “territorial integrity” in paragraph 6. Guatemala did reluctantly agree to withdraw. The Argentines rely on paragraph 6 when they claim that the people of the Falklands do not have the right to self-determination. It is worth quoting all of paragraph 6.

“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

This wording does not go as far as the amendment proposed by Guatemala. It forbids present and future actions to break up colonies and does not refer to the past. It certainly does not cover any “recovery of territory”, based on claims about nineteenth century history.

In 1960, the Africans were asserting the importance of maintaining the territorial integrity of colonies, because they had several specific fears about events in Africa. The independence of the Belgian Congo on 30 June 1960 was immediately followed by a break-down of law and order and by the secession of Katanga on 11 July 1960. The Congo crisis dominated African diplomacy and perceptions of decolonisation at the time the Declaration was passed. In addition, there was the possibility of France trying to separate part of the Sahara Desert from Algeria and the South African *apartheid* regime was creating autonomous tribal homelands. The African Group at the UN was appalled by the prospect of Africa countries being split into smaller units. The fears about South Africa found expression again in the Declaration on the Principles of International Law, when it was asserted that self-determination could not encourage

“any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states ... possessed of a government representing the whole people”.

The wording applies to the contemporary world and cannot be used to refer back to the status of colonies of the empires in the eighteenth and nineteenth centuries.

In 1961, a Special Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was established. This Committee still meets every year to consider the future of the remaining sixteen colonies, including the Falkland Islands. In June 2008, Argentina attended the Decolonisation Committee and obtained the addition of a new phrase to its standard resolution on eleven small island territories. For years, the Committee had affirmed “the inalienable rights of the peoples of the Territories to self-determination” and that “in the process of decolonisation, there is no alternative to the principle of self-determination”. Suddenly, on 11 June 2008, without any debate, and waiving the rule that no decision should be taken on a draft resolution until at least the day after written copies have been circulated, new words were added. The text became

“in the process of decolonisation, *and where there is no dispute over sovereignty*, there is no alternative to the principle of self-determination”.

Because the Decolonisation Committee is a subsidiary body of the General Assembly, it has no decision-making powers. Its resolutions have no legal significance unless and until they are endorsed by the Assembly. As a result in October 2008, the British delegation proposed the deletion of the extra eight words. While the speakers, apart from the Latin Americans, Morocco and Indonesia, all supported the British, the vote was very close. In the Assembly’s Fourth Committee, with Argentina in the chair, 61 countries voted to delete the reference to sovereignty disputes, 40 voted to retain it, 47 abstained and 44 were absent. The necessary two-thirds majority was only just obtained. Nevertheless, this represents the second occasion on which the General Assembly explicitly refused to endorse Argentina’s position that self-determination does not apply to all colonial territories.

### *Past Examples of the Right to Self-Determination Clashing with Sovereignty Claims*

Argentina's claim is not unique. There have been several cases when neighbouring countries have claimed sovereignty over a colony, on the basis that the area was part of their territory before the colony had been created. There is not time to go into the details of all these cases, but I will give a quick summary.

- 1) The dispute between Britain and Spain over **Gibraltar** has many similarities to the dispute with Argentina over the Falkland Islands. The UN responded in a very similar manner to the two disputes, by urging negotiations. The differences are that Spain unambiguously had sovereignty over Gibraltar in the past and that Britain gained control over Gibraltar in agreement with Spain, under the Treaty of Utrecht in 1713. There are two important points to make about the UN's role. It has never suggested in any way what the outcome of the negotiations should be and it has never suggested that Gibraltarians have lost their right to self-determination.
- 2) Morocco objected to France granting independence to **Mauritania**, which it regarded as part of Greater Morocco. In December 1960, the Soviet Union cast a veto against Mauritania joining the UN. The Soviet Union dropped their support for Morocco's claim and the only effect was Mauritania joined the UN a year later, in October 1961.
- 3) In 1962, the UN "took note" of the agreement between Indonesia and the Netherlands for **West Irian** to be transferred to Indonesian control. The UN provided a transition administration for seven months. The agreement provided for an "act of self-determination", which took place in 1969. While the choice occurred after rather than before the transfer of authority and while there was not a proper referendum, the principle of self-determination was not challenged.
- 4) Morocco and Mauritania both claimed **Spanish Sahara**. In November 1975, they signed a tripartite agreement with Spain, for the colony to be divided between the two countries. In the face of sustained guerrilla warfare, Mauritania withdrew and gave up its claim in 1979. The UN has never recognised Moroccan sovereignty. Western Sahara remains on the UN list of dependent territories and is considered by the Decolonisation Committee each year.
- 5) In 1975, when the Portuguese dictatorship collapsed, the colony of **East Timor** declared its independence, but Indonesia invaded and incorporated the territory. The UN refused to recognise Indonesian sovereignty, continued to regard Portugal as the administering power and kept the territory on the agenda of the Decolonisation Committee. Eventually, a self-determination referendum was held in August 1999 and, after a difficult transition period involving violent reprisals by pro-Indonesian militias, East Timor joined the UN in September 2002.
- 6) **Belize** exercised self-determination and joined the UN in September 1981, despite Guatemala's claim based on Spanish colonial history.
- 7) After mainland China took the Chinese seat at the UN, they requested in March 1972 the removal of **Hong Kong** from the list of colonial territories. This was quietly agreed by the Decolonisation Committee and then by the General Assembly. Consequently, Britain stopped transmitting information about Hong Kong to the Committee. Here a sovereignty claim did block the right of the people of a colony to self-determination, but the end result was a form of autonomy for Hong Kong.

Among the seven sovereignty disputes, with the Falklands as an eighth case, three resulted in the disputed territory becoming an independent state, two resulted in integration with a neighbour and three are still contested. The really important point is that for five territories – Mauritania, West Irian, East Timor, Belize and Western Sahara – the right to self-determination has been explicitly upheld by the UN. For Gibraltar and the Falklands, it has never been denied. Only the people of Hong Kong were denied self-determination.

## *The Options for Self-Determination*

I have said the right to self-determination does not offer a free choice. The UN is absolutely committed to decolonisation and it does not recognise the right to remain a colony. The day after the Decolonisation Declaration was passed, another General Assembly resolution specified a set of principles for deciding when a territory has ceased to be a colony. Principle VI of Resolution 1541 says there are three ways in which a colony “can be said to have reached a full measure of self-government:

- (a) Emergence as a sovereign independent state;
- (b) Free association with an independent state; or
- (c) Integration with an independent state”.

The meanings of both independence and integration are obvious, but free association is not obvious. It was included on the assumption that the people of some small territories might wish to be independent, but have too few resources to be able to engage in normal international relations. It means full internal self-government, with another government being responsible for defence and foreign affairs. Two current examples are the Cook Islands and Niue, with each being associated with New Zealand.

Applying this to the Falklands, self-determination means choosing to be independent *or* to integrate with Argentina *or* to integrate with Britain *or* to have full self-government in association with any country that agrees to offer support with external relations.

The Falklands has changed a great deal since the 1960s. Its economy has grown and diversified, helped by the income from fishing licences. Government services have expanded. People have increased in their confidence. The political system has developed with the current Legislative Assembly having more authority and more autonomy from London than the previous Legislative Council. All this has had a significant social-political effect with the emergence of a new identity, related to but different from being British. I was struck by the words of Mike Summers at the UN in June last year. He said

“We are a successful country. I intentionally use the word country, because Falkland Islanders have a distinct and clear identity, and consider the islands to be our country, our home”.<sup>5</sup>

It might be attractive to many Islanders to argue that being an Overseas Territory is the equivalent of free association with Britain.

It is absolutely clear that remaining an Overseas Territory cannot match the option of independence nor the option of integration with another country. It is equally clear that the being an Overseas Territory is only a step down the road towards “free association”. Resolution 1541 says an “associated territory should have the right to determine its internal constitution without outside interference”, but the Falklands is still subject to the ultimate control of London.

Resolution 1541 is just as important to the Falklands as is the Decolonisation Declaration. It specifies that the Falklands must remain on the agenda of the Decolonisation Committee until one of the three options has been chosen and implemented. It also specifies that no option will be valid, unless it is freely chosen by the people of the Falklands. ***This means that even if some future British government were to agree to hand the Falklands over to Argentina the Falkland Islanders would still have the right to say yes or no to the integration option.*** The very fact of being on the agenda of the Decolonisation Committee each year is the strongest possible evidence that the Falkland Islanders do have the right to self-determination.

---

<sup>5</sup> The full text of Mike Summers speech on 14 June 2012 is available from .../UN-LIST.HTM (cited above).

In 1970, the situation changed a little by the UN opening up of the theoretical possibility of a so-called "fourth option". The Declaration on the Principles of International Law re-affirmed the right of self-determination and re-affirmed the three options from Resolution 1541. But it added new wording. I will quote the paragraph in full:

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

The idea of "any other political status" has never been expanded and it is unclear what it could mean. Presumably, it could cover the use of other existing models, such as the Isle of Man, the Aland Islands, Andorra or Liechtenstein, or some variation of free association, as options for self-determination.

### *The Referendum and the Future of the Falklands*

After the current referendum, whether the result is a Yes majority or a No majority, the Falkland Islands will remain a British Overseas Territory. Neither result will change the international law of self-determination. Neither result will change the nature of the political debate at the UN. The most important impact is that holding the referendum is a powerful assertion of the right of self-determination by the Falkland Islanders and this will be noticed at the UN. Nevertheless, the referendum is not itself an act of self-determination.

A British Overseas Territory is still a colony. The Falklands Constitution can only be changed in London. There is no prime minister. The Chief Executive is a British civil servant. There is no normal governmental structure. The Executive Council consists of only three elected members, with up to five non-elected officials in attendance (the Governor, the Chief Executive, the Director of Finance, the Commander British Forces and the Attorney-General). The Governor can overrule the Legislative Assembly. Last, but not least, The self-government of an Overseas Territory can be suspended, as we saw in the Turks and Caicos Islands in August 2009. I am sure there will be changes in the future and the Islands will move further down the road towards full, autonomous self-government. I would expect the next steps to be some increase in the size of the Legislative Assembly and for the Chief Executive to be elected by the members of the Assembly.

What will be the situation in the more distant future? The dispute with Argentina cannot be resolved in the near future, but the current Kirchner government will not remain. In the medium-term, an Argentine government that paid more respect to human rights, including the Islanders' right to self-determination is not impossible. Can full decolonisation be achieved? Yes, I believe some creative variation on free association is possible. For example, might you be interested in a new set of sovereignty arrangements in free association with Canada? This would keep the Falklands in the Commonwealth, but also provide a link to the Americas. It would be recognised by the UN, provided that the Falkland Islanders endorsed it in an act of self-determination by another referendum.

To summarise: the people of the Falklands do have the right to self-determination. At the UN, this only means the right to independence or to integration or free association with another independent country. It does not include the right to remain an Overseas Territory, without further change in the constitutional relationship with Britain. The forthcoming referendum is not the end of the road. It is another major step down the continuing road of political change towards decolonisation and full self-government.