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## Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute

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# Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute

Alejandro Schwed

## **Abstract**

This Note will trace the development and present status of the right to self-determination under international law and its applicability to the decolonization of the Falkland Islands. No attempt will be made to determine whether Argentina's claim to sovereignty over the Islands is valid. The focus will be, rather, on whether the right of self-determination as set out by the United Nations can be limited and superseded by competing territorial claims.

# TERRITORIAL CLAIMS AS A LIMITATION TO THE RIGHT OF SELF-DETERMINATION IN THE CONTEXT OF THE FALKLAND ISLANDS DISPUTE

## INTRODUCTION

The importance of resolving competing claims of nations to territories in the process of decolonization<sup>1</sup> was highlighted by the recent armed conflict between Argentina and the United Kingdom in the South Atlantic.<sup>2</sup> At stake in the Anglo-Argentine controversy are the Falkland Islands,<sup>3</sup> located 772 kilometers north-east of Argentina's southern coast.<sup>4</sup> The Falklands are classified by the United Nations as a non-self-governing territory,<sup>5</sup> a term used to describe a particular type of colony.<sup>6</sup> The process by which the territory should be decolonized has become the subject of much debate and controversy.

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1. See *The Right to Self-Determination: Implementation of United Nations Resolutions*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (study prepared by H. Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) (an analysis of actions taken by the United Nations with respect to a large number of non-self-governing territories); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION* (1973) (an analysis of territorial disputes involving, among others, British Cameroons, British Togoland, Cyprus, Gibraltar, Palestine, Ruanda-Urundi, and West Irian); Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331 (1976) (an analysis of territorial disputes involving Belize, Djibouti, the Falkland Islands, Gibraltar, Portuguese Timor, and Western Sahara).

2. Argentina invaded the Falkland Islands (Malvinas) on April 2, 1982. N.Y. Times, Apr. 3, 1982, at 1, col. 5. Argentina surrendered 74 days later, on June 14, 1982. N.Y. Times, June 15, 1982, at 1, col. 1.

3. The United Kingdom refers to the Islands by the name "Falklands," and alleges that the word "Malvinas," by which the Islands are also known, is simply the Spanish translation. 19 U.N. GAOR C.4 Annex 8 (pt. 1) (Agenda Item 21) para. 30, U.N. Doc. A/5800/Rev. 1 (1965). Argentina, however, considers "Malvinas" the true name of the territory. *Id.* para. 31. Throughout this Note the Islands will be referred to as the Falklands. This does not imply agreement with either view.

4. Falkland Islands (Malvinas) Working Paper Prepared by the Secretariat, U.N. Doc. A/AC.109/712, at 2 (1982). The Falklands are actually a group of 200 islands, containing a total land mass of 11,691 square kilometers. *Id.* According to a census taken in 1980, their total population numbers 1,813. *Id.*

5. The Islands were listed as such in an early resolution, pursuant to a submission by the United Kingdom. G.A. Res. 66, U.N. Doc. A/64/Add.1, at 124-26 (1946). In the immediate post-war period, the General Assembly actively sought to organize and obtain information on these territories. See, e.g., G.A. Res. 142, U.N. Doc. A/519, at 48 (1947).

6. See G.A. Res. 742, 8 U.N. GAOR Supp. (No. 17) at 21, U.N. Doc. A/2630 (1953). This resolution lists factors which should be taken into account when determining whether a territory is non-self-governing. *Id.* at 22. Several years later a resolution summarized these characteristics:

Colonial relationships are not permitted under contemporary international law,<sup>7</sup> and the United Nations has repeatedly urged Argentina and the United Kingdom to negotiate a solution to the Falkland situation.<sup>8</sup> The United Kingdom is charged with administering the Islands until they are decolonized.<sup>9</sup> Argentina, however, asserts that historic ties to the Islands place them within its sovereign territory.<sup>10</sup>

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[T]erritories . . . known to be of the colonial type. . . . [T]erritories whose peoples have not yet attained a full measure of self-government.

. . . .  
*Prima facie* . . . a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

. . . .  
 . . . [A]dditional elements may be . . . of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination they support the presumption that [the territory is non-self-governing].

G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960).

7. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), states:

*Considering* the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

*[r]ecognizing* that the peoples of the world ardently desire the end of colonialism in all its manifestations,

. . . .  
*[s]olemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

[a]nd to this end . . .

. . . .  
*[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions . . . in order to enable them to enjoy complete independence and freedom.*

*Id.* at 66-67. For a discussion on how the provisions of resolution 1514 became part of international law, see *infra* notes 49-58 and accompanying text.

8. See G.A. Res. 37/9, U.N. Doc. A/RES/37/9, at 1 (1982); G.A. Res. 31/49, 31 U.N. GAOR Supp. (No. 39) at 122, U.N. Doc. A/31/39 (1976); G.A. Res. 3160, 28 U.N. GAOR Supp. (No. 30) at 108, U.N. Doc. A/9030 (1973); G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1965).

9. See G.A. Res. 66, *supra* note 5. The duties of administering states were initially set out in the Charter of the United Nations. U.N. CHARTER art. 73. See also *infra* notes 31-32 and accompanying text (an analysis of the obligations toward non-self-governing territories, as contained in the Charter).

10. 37 U.N. GAOR (14th plen. mtg.) at 106-07, U.N. Doc. A/37/PV.14 (prov. ed. 1982). Argentina argues that when it gained its independence from Spain in 1816 it succeeded to Spain's rights over the former colonial territory. Therefore, the United Kingdom's acquisition of the Islands by force in 1833 violated Argentina's sovereignty, and Argentina has never accepted the legality of the United Kingdom's occupation. *Id.* For a detailed explanation of the Argentine legal claim, made by a Venezuelan delegate, as well as an analysis of the

Much of the disagreement preventing an accord<sup>11</sup> centers on the interpretation of United Nations resolutions.<sup>12</sup> The United Kingdom claims that the Falklands population has a right under international law to determine the future status of the Islands regardless of any territorial claims which may exist.<sup>13</sup> The United Kingdom, therefore, refuses to consider Argentina's sovereign claims.<sup>14</sup> Argentina contends that the United Nations resolutions permit territorial claims to prevail under certain circumstances, and insists that this issue must be resolved first.<sup>15</sup> It is certain that a peaceful resolution will not be possible without a careful analysis of the United Nations' position regarding the scope of the right to self-determination.<sup>16</sup>

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doctrine of *uti possidetis*, by which nations gaining independence automatically inherit the colonial boundaries, see 28 U.N. GAOR C.4 (2074th mtg.) at 293-98, U.N. Doc. A/C.4/SR.2074 (1973).

11. Argentina claimed, as early as 1973, that negotiations were at a standstill, and placed the blame upon the United Kingdom. See 28 U.N. GAOR, *supra* note 10, para. 73. In July of 1981 Argentina repeated its claim that "no substantial progress has been made since negotiations were undertaken pursuant to resolution 2065 . . ." U.N. Doc. A/36/412, at 1 (1981).

12. See *infra* notes 13-15.

13. U.N. Doc. S/15,007, at 1-2 (1982) (letter dated April 28, 1982 from the Permanent Representative of the United Kingdom to the United Nations).

Self-determination is usually referred to these days . . . not as a principle, but rather as an "inalienable right": in other words, it is a right which cannot be taken away. This right derives principally from the Charter and the Covenants on Human Rights. . . .

. . . .  
The Falkland Islanders are a people. . . . They are a permanent population. . . . The United Kingdom cannot accept that the right of self-determination as enshrined in the Charter and the Human Rights Covenants is subject to a special exception in the case of the Falkland Islands. . . .

. . . .  
Whilst no doubt much time and energy could be spent in reviewing the history of the Falkland Islands between the first settlement in 1764 and 1833, and whilst the United Kingdom is confident about the strength of its legal case over that period, these factors cannot be allowed to override the right of self-determination.

*Id.* at 1-2.

14. See U.N. Doc. A/AC.109/712, at 2 (1982).

15. See 31 U.N. GAOR (85th plen. mtg.) paras. 51, 53, U.N. Doc. A/31/PV.85 (1976). In February 1981, during a round of talks held in New York City, the Argentine delegation rejected a proposal by the United Kingdom that there be a "freeze" on further discussions of sovereignty for a determined period of time. Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/AC.109/670, at 6 (1981).

16. Argentina has implied that one reason for its invasion of the Falklands was the lack of progress in the negotiations. See *supra* note 11 and accompanying text. In a statement made shortly before the invasion, Argentina said:

This Note will trace the development and present status of the right to self-determination under international law and its applicability to the decolonization of the Falkland Islands. No attempt will be made to determine whether Argentina's claim to sovereignty over the Islands is valid.<sup>17</sup> The focus will be, rather, on whether the right of self-determination as set out by the United Nations can be limited and superseded by competing territorial claims.

### I. LEGAL EVOLUTION OF THE RIGHT TO SELF-DETERMINATION

The concept of a right to self-determination has existed for centuries,<sup>18</sup> but until recently it has had little legal significance.<sup>19</sup> Before the United Nations clearly defined and applied the right,<sup>20</sup> it was regarded as simply "the right of nations to sovereign indepen-

The new system [of negotiations] is an effective measure to arrive at a prompt solution.

....

However, if this does not come about, if there is no response from the British side, *Argentina reserves the right to put an end to the operation of such a mechanism and freely choose the procedure it deems fit in accordance with its interests.*

U.N. Doc. A/AC.109/712, at 4 (1982) (emphasis added).

In response to a question regarding the above statement, Richard Luce, Minister of State at the Foreign and Commonwealth Office and head of the United Kingdom's negotiating team, answered: "I can tell the hon. Gentleman that, without any shadow of a doubt, there will be no contemplation of any transfer of sovereignty without consulting the wishes of the islanders . . ." 19 PARL. DEB., H.C. (6th ser.) 264 (1982). Less than a month later, Argentina invaded the Islands. See *supra* note 2.

17. For an insightful analysis of the history of the Falkland Islands starting with their discovery until the early 1900's, see J. GOEBEL, *THE STRUGGLE FOR THE FALKLAND ISLANDS* (2d ed. 1971).

18. See generally H. JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS 19-58* (1967); U. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW 3-43* (1972). There seems to be little agreement among historians as to how the phrase and the concept originated. Toynbee traces its origin to the Greek idea of city-states. See generally A. TOYNBEE, *HELLENISM* (1959). Others refer to the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, which granted the people the right to decide their own destiny through democratic means. See, e.g., R. ARON, *PEACE AND WAR 81-82* (1966). Winston Churchill credits the invention of the phrase to Johann Fichte. 4 W. CHURCHILL, *THE WORLD CRISIS 208* (1929). Umozurike attributes some of the modern principles of the right to the American President Woodrow Wilson. U. UMOZURIKE, *supra*, at 13.

19. See Eagleton, *Self-Determination in the United Nations*, 47 AM. J. INT'L L. 88, 92 (1953). Self-determination did not acquire a degree of legal enforceability until the United Nations became actively involved. *Id.*

20. See *infra* notes 30-50 and accompanying text.

dence."<sup>21</sup> More recently, as the old colonial empires have been dismantled,<sup>22</sup> the right has acquired a new importance.<sup>23</sup>

The United Nations defines self-determination as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>24</sup> By this broad definition alone, the right to self-determination could apply to a multitude of situations, including the Falklands. When and how the right to self-determination is to be exercised, however, is intricately related to its evolution.<sup>25</sup>

The right to self-determination for colonial territories is now a principle of international law.<sup>26</sup> Numerous resolutions of the United Nations,<sup>27</sup> as well as its Charter,<sup>28</sup> have established that the right is applicable to colonized territories.<sup>29</sup>

The Charter of the United Nations mentions the right to self-determination in two articles.<sup>30</sup> However, the Charter's language is

21. U. UMOZURIKE, *supra* note 18, at 3.

22. See H. BOKOR-SZEGÓ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 46-47 (1978). The disintegration of the old colonial empires and the emergence of a complex interacting world community has led directly to changes in international law. The right to self-determination is an integral part of these changes. *Id.*

23. See *infra* notes 30-50 and accompanying text.

24. G.A. Res. 1514, *supra* note 7, para. 2.

25. See *infra* note 34 and accompanying text.

26. J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 98 (1979). "The principle of self-determination as a general principle of international law . . . commands substantial academic support. In the absence of any compelling considerations of principle there would be little justification for rejecting it as a part of the substantive law." *Id.* (footnote omitted).

27. See *infra* notes 35-58 and accompanying text.

28. See *infra* notes 30-32 and accompanying text.

29. The numerous resolutions passed by the General Assembly on the right to self-determination have usually been addressed to non-self-governing territories. See, e.g., G.A. Res. 1514, *supra* note 7, at 66-67. Article 73 of the Charter, which is sometimes viewed as establishing self-determination as a principle of international law, see *infra* notes 30-32 and accompanying text, is part of a chapter entitled "Declaration Regarding Non-Self-Governing Territories." U.N. CHARTER ch. XI.

30. U.N. CHARTER arts. 1, 55. Article 1 states that 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." *Id.* art. 1, para. 2. Article 55 continues:

With 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, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedom for all.

not strong enough to establish the right for colonized territories.<sup>31</sup> Some commentators have argued that the Charter was intended to impose only a moral obligation upon administering states, an obligation which fell within their internal jurisdiction.<sup>32</sup> The lack of consensus regarding the scope of this right makes it improbable that provisions of the Charter are sufficient to establish the right of self-determination as a principle of international law.

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*Id.* art. 55. Article 56 states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56.

31. The legal obligations of administering states towards their non-self-governing territories are treated within article 73. U.N. CHARTER art. 73. Although the right to self-determination is not expressly mentioned, some writers suggest that there is an implicit acceptance of the right as applicable to colonized territories. See *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981) (a study prepared by A. Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities); U. UMOZURIKE, *supra* note 18, at 52-53.

The first source of law recognized by the International Court of Justice comprises "[i]nternational conventions establishing rules expressly recognized by the contesting states." I.C.J. STAT. art. 38(1)(a). Among these "international conventions" are treaties, which includes the Charter. See R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 1 (1963). As co-signatories of the Charter, the member-states are obligated to recognize and carry out their obligations contained therein. See U.N. CHARTER art. 4, para. 1. Since the vast majority of the countries in the world are members of the United Nations, the Charter should be recognized as a source of international law under article 38 of the Statute of the Court. See KOPELMANAS, *L'ORGANISATION DES NATIONS UNIES* 199-200 (1947), cited in Cionanu, *Impact of the Characteristics of the Charter Upon Its Interpretation*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW AND PRACTICE* 9 (1975). Therefore, if the Charter clearly sets out a right of self-determination for colonial peoples, this would place it within international law. However, a literal reading of article 73 does not appear to support this view. There are no explicit references to self-determination, and implicit ones seem to refer to an internal, not external, right. See U.N. CHARTER art. 73. Thus, arguments have been made that the only obligation of administering states under the Charter is to ensure that the people of these territories establish self-government, not necessarily accompanied by a change in their territory's status. See H. BOKOR-SZEGÓ, *supra* note 22, at 52. External self-determination is at issue in the Falklands. See generally G.A. Res. 1541, *supra* note 6, at 29 (options under external self-determination).

32. See generally J. CRAWFORD, *supra* note 26, at 368-69. Paragraph (e) of article 73 appears to be the only section which implies a legal obligation. However, this section simply places an obligation upon administering states to supply information on their territories to the General Assembly. Bokor-Szegó believes that this was the result of a compromise between pro and anti colonial forces during the drafting of the Charter. H. BOKOR-SZEGÓ, *supra* note 22, at 52. Article 76 of the Charter, which clearly sets forth independence as a goal for trust territories, satisfied the anticolonial forces, while article 73, which applies to non-self-governing territories, satisfied the pro-colonial ones. *Id.*



Although the General Assembly lacks the power to legislate norms,<sup>33</sup> legal scholars agree that its resolutions can become customary international law.<sup>34</sup> The first resolutions to apply self-deter-

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33. See generally J. CASTAÑEDA, *LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS* 11 (1969); R. HIGGINS, *supra* note 31, at 1. D. NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 35 (1970). There is a general consensus that resolutions of the General Assembly were never meant to be international law by virtue of their mere passage. *Id.* The wording of the Charter never grants the General Assembly legislative powers; instead it consistently limits it to an exhortatory capacity. See U.N. CHARTER arts. 10-17.

Articles 10-17 list the powers of the General Assembly. Throughout these articles the words "may recommend" consistently refer to the body's authority. *Id.* On the other hand, when listing the powers of the Security Council, which does have the power to bind members by some of its decisions, the wording changes to: "Members . . . agree to accept and carry out the decisions of the Security Council . . ." *Id.* art. 25. During the actual drafting of the Charter at Dumbarton Oaks, a proposal that the General Assembly be "authorized to enact rules of international law which should become binding upon members" was overwhelmingly rejected by a vote of 26-1. Doc. 507, II/2/22, 9 U.N.C.I.O. Docs. 70 (1945).

34. See generally H. BOKOR-SZEGÓ, *supra* note 22, at 33-40; J. CASTAÑEDA, *supra* note 33, at 105-06; R. HIGGINS, *supra* note 31, at 5; THE DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES, *INTERNATIONAL DISPUTES* 5 (1972); U. UMOZURIKE, *supra* note 18, at 189-90; Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445, 457-59 (1981). Customary international law is one of the four sources of international law accepted by the International Court of Justice. I.C.J. STAT. art. 38(1)(b). In order for principles to evolve through custom they must fulfill certain requirements. Among these is a "clear and continuous habit of performing certain actions [by the states] in the conviction that they are obligatory under international law." R. HIGGINS, *supra* note 31, at 1-2. Law created through state practice must satisfy two prerequisites: (1) the practice must adequately define the norm created; and (2) a sufficient number of states must accept, even if implicitly, the legality of the rule. Joyner, *supra*, at 458.

Although traditionally a lengthy process, the evolution of customary norms has been greatly accelerated in the second half of this century. H. BOKOR-SZEGÓ, *supra* note 22, at 40. This is due, in part, to the increased interaction among states through such organs as the United Nations. *Id.* at 40-41. The expansion in the number of independent states has transformed the world from a largely homogeneous one dominated by large colonial powers, principally from Western Europe, into a complex multitude of states. See Joyner, *supra*, at 445-46. Therefore, part of the body of law created by the Western powers is antiquated, and should not be applied to the younger nations. *Id.* There is now a greater receptivity to the creation of new norms within international law. K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 167 (1964). The moment a principle becomes customary law, however, cannot be ascertained precisely. See R. HIGGINS, *supra* note 31, at 6-7. It is an evolution which parallels the growth of the international community.

The United Nations' creation of customary international law, as evidenced by resolutions and their application, is often criticized. See, e.g., J. HOVER, *BLOC POLITICS IN THE UNITED NATIONS* (1960). Writers claim that the United Nations is so politically motivated that states do not necessarily believe in the legality of the principle voted upon. *Id.* Although there is some truth to these assertions, this is not always the case, especially in the area of self-determination. First, it is important to remember that in the evolution of customary norms it is not necessary for the states to believe that a resolution of the United Nations is itself legally

mination to non-self-governing territories appeared in 1952,<sup>35</sup> but only urged administering states to promote self-determination within the territories.<sup>36</sup> In 1960, the General Assembly finally placed a legal obligation upon the administering states to enforce the right.<sup>37</sup> Resolution 1514<sup>38</sup> declared colonialism to be illegal, and

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enforceable, but that the motivating principle is. J. CASTAÑEDA, *supra* note 33, at 168, 171. Consequently, when the General Assembly passes a resolution ordering an administering state to grant self-determination to a non-self-governing territory, it is not necessary for the Assembly to believe that the state is under a legal obligation. It is necessary, however, that the General Assembly believe that self-determination is a legal principle. Some writers also believe that there is no distinction between political and legal motivations when a state casts a vote in the General Assembly.

Perhaps the purest analytical conception of "law" is that in which an impartial judge objectively applies a pre-established rule to decide a controversy. And perhaps the purest analytical concept of "politics" is that in which the stronger influence or interest regulates the social distribution of values. In the real world, however, judges cannot avoid exercising at least some political discretion in the decision of cases. And in any stable political system, the political process is also subject to normative constraints.

M. KAPLAN & N. KATZENBACH, *POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 3 (1961). Likewise, "[t]he essential nature of relations between states, in which there is no sharp division between legal and political obligations, has expressed itself within the United Nations." C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 113 (1965). It can also be said that a principle which is consistently applied by the member states over time meets the required degree of belief in its legality.

Some writers still fail to recognize self-determination as a norm in international law. See generally J. CRAWFORD, *supra* note 26, at 95 n.72; Suzuki, *Self-Determination and World Public Order*, 16 VA. J. INT'L L. 779 (1976). Most writers, however, accept it. "[T]here is almost complete unanimity that self-determination applies to colonial peoples . . ." U. UMOZURIKE, *supra* note 18, at 190. See also J. CRAWFORD, *supra* note 26. The International Court of Justice has also recognized the legality of the right of self-determination. See *Western Sahara*, 1975 I.C.J. 12, 31-36 (Advisory Opinion of Oct. 16).

35. See G.A. Res. 637 A, 8 U.N. GAOR Supp. (No. 17) at 26, U.N. Doc. A/2630 (1953); G.A. Res. 545, 6 U.N. GAOR Supp. (No. 20) at 36, U.N. Doc. A/2119 (1952). The resolutions prior to 1952 only requested information from the administering states regarding the progress made by the non-self-governing territories toward internal self-government, as provided for in the Charter. U.N. CHARTER art. 73, para. e. See *infra* note 49. It appears that their legal obligation focused more on providing information than ensuring that meaningful progress was achieved in the area of self-determination. See, e.g., G.A. Res. 327, U.N. Doc. A/1251, at 41 (1949).

36. G.A. Res. 637 A, *supra* note 35, provides in part:

The States Members of the United Nations responsible for the administration of Non-Self-Governing . . . Territories shall take practical steps, pending the realization of the right of self-determination and in preparation thereof, to ensure the direct participation of the indigenous populations in the legislative and executive organs of government of those Territories, and to prepare them for complete self-government or independence.

*Id.*

37. G.A. Res. 1514, *supra* note 7.

38. *Id.*

urged that control over the administered territories be transferred to their inhabitants.<sup>39</sup> The burden was placed upon the administering states to ensure that the right to self-determination was enforced.<sup>40</sup> The resolution passed by a vote of eighty-nine to zero, with nine countries abstaining.<sup>41</sup>

Resolution 1514 was followed closely by resolution 1541,<sup>42</sup> which set out the three instances in which a non-self-governing territory reaches 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."<sup>43</sup> The resolution stressed that each form of decolonization could only become effective if accomplished through "free consultation" with the non-self-governing territory.<sup>44</sup>

The importance of these two resolutions in establishing a right of self-determination for non-self-governing territories cannot be overemphasized.<sup>45</sup> These resolutions state that self-determination is an enforceable present right.<sup>46</sup> They therefore nullify previous ar-

39. *Id.* at 66-67.

40. *Id.*

41. See 15 U.N. GAOR (947th plen. mtg.) para. 34, U.N. Doc. A/PV.947 (1960). The abstaining countries were Australia, Belgium, the Dominican Republic, France, Portugal, South Africa, Spain, the United Kingdom and the United States. *Id.* At the time, most of these countries represented the major colonial powers.

42. G.A. Res. 1541, *supra* note 6.

43. *Id.* principle VI. Portugal and South Africa were the only states to vote against the resolution. 15 U.N. GAOR (948th plen. mtg.) para. 88, U.N. Doc. A/PV.948 (1960).

44. G.A. Res. 1541, *supra* note 6, at principle VII.

45. The importance of resolution 1514, *supra* note 7, is not only its language, *see infra* notes 46-50 and accompanying text, but also the fact that it is a declaration. Declarations require a two-thirds majority to pass, U.N. CHARTER art. 18, para. 2, and are ultimately more compelling. A committee of the United Nations stated that:

[I]n view of the greater solemnity and significance of a "declaration", it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.

[A] "declaration" is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.

U.N. Doc. E/CN.4/L.610, at 1-2 (1962).

46. G.A. Res. 1514, *supra* note 7, for example, states: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence. . . . Immediate steps shall be taken, in . . . Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories, without any conditions or reservations . . ." *Id.* at 67.

guments of the administering states used to prevent colonial territories from asserting the right.<sup>47</sup> An administering state can no longer point to a population's lack of political sophistication as a reason for denying them a plebiscite, as was formerly possible under the ambiguous wording of the Charter.<sup>48</sup>

Resolution 1514 is the culmination of efforts by the United Nations to bring the rights of the people of non-self-governing territories wholly within its jurisdiction.<sup>49</sup> Non-self-governing territories now have international legal personalities distinct from those of the administering states. Administering states are estopped from claiming that the implementation of the right falls within their domestic jurisdiction.<sup>50</sup>

47. See generally R. HIGGINS, *supra* note 31, at 91-92. During the early stages of the evolution of the right there was an apparent conflict between self-determination and article 2(7) of the Charter. Article 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ." U.N. CHARTER art. 2, para. 7. Under the theory that the Charter mandated only development of internal self-government in colonized territories, see *infra* note 48 and accompanying text, states claimed non-self-governing territories were part of their metropolitan jurisdiction, and therefore their international status was not the concern of the United Nations. See R. HIGGINS, *supra* note 31, at 90-92; Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 701 (1976).

48. The Charter only encouraged the development of self-determination.

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation . . .

. . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.

U.N. CHARTER art. 73.

49. An early resolution of the General Assembly spoke of the "voluntary transmission of information" in conformity with article 73 of the Charter. G.A. Res. 144, U.N. Doc. A/519, at 56 (1947). Two years later, a resolution recommended that information on geography, history, people, and human rights should cease to be voluntary. G.A. Res. 327, *supra* note 35. Another resolution, in the same year, established a committee charged with overseeing the transmission of information. G.A. Res. 332, U.N. Doc. A/1251, at 42-43 (1949). In 1951, resolution 551 set forth a revised standard form. G.A. Res. 551, 6 U.N. GAOR Supp. (No. 20) at 40-55, U.N. Doc. A/2119 (1951). It required administering states to provide additional information regarding non-self-governing territories. The 14-page form was extremely detailed. It appears to have been an attempt by the General Assembly to ensure that it would be aware of all aspects of life within such territories. *Id.* Thus, for all practical purposes, transmission of information was no longer voluntary.

50. See *supra* note 47 and accompanying text.

Since 1960, the General Assembly passed several resolutions on decolonization, each recognizing the principle of self-determination as a legal right enforceable by non-self-governing territories.<sup>51</sup> Of the nine countries which originally abstained in the vote on resolution 1514 in 1960,<sup>52</sup> only South Africa remains opposed to applying the right.<sup>53</sup> The evolution of customary international law, however, requires only a consensus, not unanimity.<sup>54</sup> Otherwise, the opposition of just one nation would be sufficient to prevent international law from developing.<sup>55</sup>

Resolutions supporting self-determination and decolonization are meaningless unless member states show by their conduct that they regard self-determination as a legally enforceable right.<sup>56</sup> In

51. There are literally hundreds of resolutions regarding self-determination. For an excellent discussion of a large number of them and their application, see *The Right of Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, *supra* note 31.

52. *See supra* note 41.

53. South Africa refuses to grant self-determination to the territory of Namibia, despite repeated pleas by the General Assembly. *See, e.g.*, G.A. Res. 2145, 21 U.N. GAOR Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966).

*The General Assembly,*

[r]eaffirming the inalienable right of the people of South West Africa [Namibia] to freedom and independence in accordance with the Charter of the United Nations . . . [and] resolution 1514 . . .

. . . .

[r]eaffirms that . . . the people of South West Africa have the inalienable right to self-determination . . .

. . . .

[d]ecides that the Mandate . . . to be exercised . . . by . . . South Africa is therefore terminated, that South Africa has no other right to administer the Territory . . . .

*Id.* The vote on the resolution was lopsided: 114-to-2, with 3 abstentions. Voting against it were South Africa and Portugal, while France, the United Kingdom and Malawi abstained. 21 U.N. GAOR (1454th. plen. mtg.) para. 244, U.N. Doc. A/PV.1454 (1966).

South Africa's opposition has led to a reaffirmation of the right of self-determination. The International Court of Justice, in an advisory opinion, held by a vote of 13-to-2 that the continued presence of South Africa in Namibia was illegal. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 58 (Advisory Opinion of June 21). In the text of the opinion, the Court states: "[T]he . . . development of international law in regard to non-self-governing territories . . . made the principle of self-determination applicable to all of them. . . . A further important stage in this development was [resolution 1514] . . . which embraces all peoples and territories which 'have not yet attained independence.'" *Id.* at 31.

54. *See U. UMOZURIKE, supra* note 18, at 189.

55. *Id.*

56. This is needed in order to fulfill the requirement of *opinio juris* in the development of customary international law. *See supra* note 34.

international law, the validity of norms is linked to their observance, especially when tracing the evolution of customary international law through the United Nations.<sup>57</sup> The creation of at least seventy newly independent states, all former colonies,<sup>58</sup> demonstrates that most nations have honored the resolutions on self-determination.

## II. TERRITORIAL LIMITATIONS TO THE RIGHT OF SELF-DETERMINATION

### A. Interpretations by Argentina and the United Kingdom

Disagreement over whether self-determination is a legal right has not delayed the decolonization<sup>59</sup> of the few remaining non-self-governing territories.<sup>60</sup> Argentina and the United Kingdom recognize that the General Assembly's resolutions have created a right to self-determination enforceable with respect to non-self-governing territories.<sup>61</sup> They agree that colonialism is unacceptable, including the situation in the Falkland Islands.<sup>62</sup>

The United Kingdom's refusal to negotiate the Falklanders' participation in the decolonization process<sup>63</sup> stems from differing

57. J. CASTAÑEDA, *supra* note 33, at 15; *see also infra* note 110.

58. For a list of these territories, as well as an explanation of their path to independence, see *The Right to Self-Determination: Implementation of United Nations Resolutions*, *supra* note 1, at 46-63. All of these states have gained independence since the drafting of the Charter in 1945. *See id.*

59. *See generally id.* at 47-63.

60. For a history of 38 possible non-self-governing territories which have not yet been decolonized, *see id.* at 47.

61. *See* 37 U.N. GAOR (51st plen. mtg.) at 16, 56-57, U.N. Doc. A/37/PV.51 (prov. ed. 1982). "[T]he right of self-determination, as we have repeatedly stated, is one of the essential rights in the area of decolonization. Its position and the role it generally plays in this process is particularly relevant." *Id.* at 16 (Argentina). "The purposes and principles of the Charter are clear. I am thinking especially of the principle of self-determination. It applies to the Falklanders as to other peoples. . . . The reason is that the Falkland Islands is a territory covered by Article 73 of the Charter." *Id.* at 56-57 (United Kingdom).

62. *Id.* at 7-10 (Argentina). "[T]his Assembly has labeled colonialism in all its manifestations as a crime against mankind and has laid down the legal obligation for all Members of the international community to co-operate in bringing it to an end." *Id.* For the United Kingdom's version of the responsibilities of administering states, *see id.* at 56-60.

63. "[T]he United Kingdom could not agree to participate in discussions of sovereignty over the Falkland Islands." 19 U.N. GAOR Annex 8 (pt. 1), *supra* note 3, at 436 (United Kingdom). "Any solution to the problem must recognize not only the right of the Falkland Islanders to self-determination but should provide for them to express their wishes in that regard." 28 U.N. GAOR C.4, *supra* note 10, para. 88 (United Kingdom).

interpretations of the various resolutions which established the right to self-determination. Argentina believes that the right of a territory's inhabitants to self-determination can be superseded by other principles of international law set forth by the General Assembly. Argentina argues that "[the] principle [of self-determination] . . . is applicable in most cases, but it is one, and only one of the principles which should be taken into account and applied in the area of decolonization. . . . [I]t should . . . be brought into line with other principles, *such as the principle of territorial integrity . . .*"<sup>64</sup> In Argentina's view, reversion to a claimant state rather than self-determination may be the appropriate solution where historical and geographic ties antedate the colonial relationship.<sup>65</sup>

Another factor that should be considered, according to Argentina, is the legitimacy of the population's presence on the territory.<sup>66</sup> "The fundamental principle of self-determination must not be utilized in order to convert illegal possession into full sovereignty [assuming that the Falklands would vote to continue their ties with the United Kingdom] under a mantle of protection to be provided by the United Nations."<sup>67</sup> Argentina claims that in the Falklands, the colonial entity is the territory itself, not its population.<sup>68</sup>

The United Kingdom's interpretation of the decolonization process focuses on the rights of its inhabitants. While not conceding Argentina's sovereignty claim over the Islands,<sup>69</sup> the United Kingdom asserts that the Falklanders have an absolute right of self-determination under international law, a right which is sufficient to void even a legitimate territorial claim:<sup>70</sup> "He [Argentina's Foreign Affairs Minister in 1982, Mr. Aguirre Lanari] stressed legalisms: I shall stress natural law and fundamental rights. He stressed

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64. 31 U.N. GAOR, *supra* note 15, para. 51 (Argentina) (emphasis added).

65. *Id.*

66. 19 U.N. GAOR Annex 8 (pt. 1), *supra* note 3, para. 29.

67. *Id.*

68. See U.N. Doc. A/37/353, at 1 (1982) (letter dated July 23, 1982 from the Permanent Mission of Argentina to the United Nations). Argentina considers the Falklanders the beneficiaries, not the victims, of their colonial relationship with the United Kingdom. 28 U.N. GAOR C.4, *supra* note 10, at 302. They are thus even less entitled to define the question of sovereignty.

69. See 28 U.N. GAOR C.4, *supra* note 10, at 301.

70. See 37 U.N. GAOR, *supra* note 61, at 43-45 (United Kingdom); Review and Implementation of the Concluding Document of the Twelfth Special Session of the General Assembly, U.N. Doc. A/37/389, at 2 (1982) (letter dated August 13, 1982 from the Permanent Mission of the United Kingdom to the United Nations).

sovereignty over land; I stress the rights of people . . . . A small people is at stake . . . but that principle [self-determination], which applies to them, is universal.”<sup>71</sup> The United Kingdom’s refusal to permit any change in the status of the Islands without the Islander’s explicit approval stems from this absolute version of the right to self-determination.<sup>72</sup>

### B. Support for Argentina’s and the United Kingdom’s Views

Argentina’s position is based on paragraph 6 of resolution 1514.<sup>73</sup> The paragraph states: “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.”<sup>74</sup> Argentina claims that paragraph 6 reflects a belief of the General Assembly that the right to self-determination in non-self-governing territories is subject to the sovereign territorial rights of claimant states.<sup>75</sup> The United Kingdom, however, points to the verb tense used in the paragraph and alleges that it applies only to future threats to territorial integrity and not to past incursions.<sup>76</sup> Under this view, the purpose of this paragraph is to ensure that resolution 1514 is not invoked by minorities within an independent country in an attempt to legitimize a secessionist movement.<sup>77</sup>

The United Kingdom supports its position by citing article 73 of the Charter, as well as numerous resolutions.<sup>78</sup> Resolution 1514, for example, states in its preamble:

71. See 37 U.N. GAOR, *supra* note 61, at 43-45 (United Kingdom).

72. 31 U.N. GAOR C.4 (11th mtg.) para. 10, U.N. Doc. A/C.4/31/SR.11 (1976). “The United Kingdom . . . [is] committed to the principle of self-determination for all Non-Self-Governing Territories, and it follow[s] that the freely expressed wishes of the inhabitants must be a prime consideration for it in considering the future of the Falklands.” *Id.*

73. See 31 U.N. GAOR, *supra* note 15, para. 53.

74. G.A. Res. 1514, *supra* note 7, at 67.

75. See 31 U.N. GAOR, *supra* note 15, para. 53. “I might only remind you that resolution 1514 (XV) establishes quite clearly, in paragraph 6, that in certain circumstances—including, without any doubt, those deriving from acts of territorial usurpation against a country—the applicable principle is territorial integrity and not self-determination.” *Id.*

76. See 19 U.N. GAOR C.4 Annex 8 (pt. 1), *supra* note 3, para. 109.

77. See generally M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 44 (1982); Franck & Hoffman, *supra* note 1, at 370.

78. See 37 U.N. GAOR (53d plen. mtg.) at 107, U.N. Doc. A/37/PV.53 (prov. ed. 1982); 37 U.N. SCOR (2366th mtg.) at 71-72, U.N. Doc. S/PV.2366 (prov. ed. 1982). For a discussion of article 73, see *supra* note 31 and accompanying text.



*Recognizing* the passionate yearning for freedom in all dependant peoples and the decisive role of such peoples in the attainment of their independence,

[a]ware of the increasing conflicts resulting from the denial of . . . freedom of such peoples, . . .

. . . .

[a]ffirming that peoples may, for their own ends, freely dispose of their natural wealth, . . .

. . . .

[c]onvinced that all peoples have an inalienable right to complete freedom, . . .

. . . .

[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations; [a]nd to this end [d]eclares that:

. . . .

. . . All peoples have the right to self-determination.<sup>79</sup>

Resolution 2625, specifically mentioned by the United Kingdom as supportive of its position,<sup>80</sup> adds: “[Member states have an obligation to] . . . bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.”<sup>81</sup>

The United Kingdom states that the language of these two important resolutions prohibits exceptions to the right of self-determination by inhabitants of non-self-governing territories.<sup>82</sup> United Nations resolutions consistently refer to self-determination as a right which all peoples possess, and indicate that it is the only process by which colonialism can be terminated.<sup>83</sup> This very consistency lends some support to the United Kingdom’s claim that the right of self-determination is intended to be an absolute right for the populations of non-self-governing territories.

### C. Interpretation and Application of the Resolutions

#### 1. The International Court of Justice

The International Court of Justice addressed the issue of territorial limitations on self-determination in the *Western Sahara* advi-

79. G.A. Res. 1514, *supra* note 7, at 66-67.

80. 37 U.N. SCOR, *supra* note 78, at 72.

81. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8028 (1970).

82. See 37 U.N. GAOR, *supra* note 78; 37 U.N. SCOR, *supra* note 78, at 72.

83. See, e.g., *supra* notes 24-29, 38-44 and accompanying text.

sory opinion.<sup>84</sup> Several Justices of the Court recognized the existence of territorial limitations in dicta.<sup>85</sup> Justice Singh wrote in a separate opinion that situations could arise in which prior legal ties between a territory and a claimant state would bring into effect paragraph 6 of resolution 1514, and force reintegration of the territory.<sup>86</sup> In another separate opinion, Justice Petrán recognized that “[where] the territory belonged, at the time of its colonization, to a State which still exists today . . . [the claim would be] on the basis of [the State’s] territorial integrity.”<sup>87</sup> Justice Petrán also stated that “in certain specific cases one must equally take into account the principle of the national unity and integrity of States . . . .”<sup>88</sup>

At no point in the opinion did the Court recognize an absolute right to self-determination for the population of Western Sahara, a non-self-governing territory.<sup>89</sup> Instead, the Court engaged in an extensive exploration of Morocco’s, Mauritania’s, and Spain’s historical ties to the territory.<sup>90</sup> Although this analysis had been requested by the General Assembly,<sup>91</sup> the issue would have been moot under international law had the Court recognized the Saharans’ absolute right to self-determination. The Court decided that the historical ties between Western Sahara and Morocco and Mauritania were not sufficient to apply any territorial limitations,<sup>92</sup> but the Court implied that in other appropriate cases historical ties might require territorial reintegration.<sup>93</sup>

84. 1975 I.C.J. 12 (Advisory Opinion of Oct. 16).

85. The request for the advisory opinion, as formulated by the General Assembly, G.A. Res. 3292, 29 U.N. GAOR Supp. (No. 31) at 103, 104, U.N. Doc. A/9631 (1975), asks the Court two specific questions: “I. Was Western Sahara . . . at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?” If the answer to the first question is in the negative, “II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?” *Id.* at 104. The Court acknowledged in its opinion that it did not feel constrained by the specific request:

Extensive arguments and divergent views have been presented to the Court as to how, and in what form, the principles of decolonization apply in this instance, in the light of the various General Assembly resolutions on decolonization in general . . . . This matter is not directly the subject of the questions put to the Court, but it is raised as a basis for an objection to the Court’s replying to that request.

Western Sahara, 1975 I.C.J. at 30.

86. Western Sahara, 1975 I.C.J. at 79-80.

87. *Id.* at 110.

88. *Id.*

89. See generally *id.* at 31-37.

90. *Id.* at 40-68.

91. See G.A. Res. 3292, *supra* note 85.

92. Western Sahara, 1975 I.C.J. at 69.

93. Specifically, the Tribunal concludes that “the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of

The *Western Sahara* opinion, however, is not as definitive a statement on territorial limitations as Argentina professes it to be.<sup>94</sup> The limitations were set out only in dicta, and the Court failed to provide guidelines for determining when sufficient ties might exist.<sup>95</sup> Justice Petró stated:

It seems however that questions of this kind are not yet considered ripe for submission to the Court. The reason is doubtless the fact that the wide variety of geographical and other data which must be taken into account in questions of decolonization have not yet allowed of the establishment of a sufficiently developed body of rules and practice to cover all the situations which may give rise to problems.<sup>96</sup>

Using this reasoning, the United Kingdom could argue that territorial limitations to the right of self-determination are not developed sufficiently under customary international law to be enforced.<sup>97</sup>

## 2. The Drafters' Intent

Evidence of drafters' intent regarding resolution 1514 does not clearly favor either side. The speeches in the General Assembly emphasized the right of self-determination, not its limitations.<sup>98</sup> However, many delegates seemed to fear that the right to self-determination could be used as an excuse for secession.<sup>99</sup>

Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory." *Id.* at 68 (footnote omitted).

94. See 31 U.N. GAOR, *supra* note 15, at 1295-96.

95. See generally *Western Sahara*, 1975 I.C.J. at 31-37.

96. *Id.* at 110.

97. A rule cannot become customary international law unless it is clearly defined. See Joyner, *supra* note 34, at 458.

98. The debates surrounding the passage of resolution 1514 in the General Assembly lasted 16 days. 15 U.N. GAOR (925th-39th, 944th-47th plen. mtgs.) at 981-1200, 1231-84, U.N. Docs. A/PV.925 to A/PV.939, A/PV.944 to A/PV.947 (1960). Most of the countries represented in the Assembly received an opportunity to be heard on the matter. With the exception of minor remarks, the only nations which engaged in an analysis of paragraph 6 were Honduras, Guatemala, Indonesia, the Netherlands and Morocco. See *infra* note 100.

99. Although it is not apparent from the speeches, Franck and Hoffman wrote in 1976: [M]ost states voting for Resolution 1514's paragraph 6 probably did so in the belief that they were creating a sort of "grandfather clause": setting out the right of self-determination for all colonies but not extending it to parts of decolonized states and seeking to ensure that the act of self-determination occur within the established boundaries of colonies rather than within sub-regions.

Franck & Hoffman, *supra* note 1, at 370.

References to paragraph 6 tended to support Argentina's interpretation.<sup>100</sup> The delegate from Guatemala sought to introduce an amendment during the drafting stages of the resolution which would have insured that the right to self-determination would not be used to impair the right of a state to recover territory.<sup>101</sup> He decided to withdraw the amendment<sup>102</sup> after being told by several countries,<sup>103</sup> notably Indonesia,<sup>104</sup> that paragraph 6 already applied to situations in which recovery of territory was involved. This was followed only by the vocal disagreement of the Netherlands, which although not in accord with Indonesia's interpretation of the paragraph, offered no alternative explanation.<sup>105</sup> The Soviet Union, an original sponsor of resolution 1514, opposed Guatemala's amendment, and urged that decolonization follow a case by case approach.<sup>106</sup> Argentina points to these speeches as evidence of the drafters' intent concerning paragraph 6.<sup>107</sup> Yet, only a small minority of the General Assembly participated in these discussions.<sup>108</sup> Furthermore, most of the countries which did participate were embroiled in territorial disputes of their own.<sup>109</sup>

### 3. Application of the Resolutions

The final interpreter of United Nations resolutions is the Organization itself.<sup>110</sup> The manner in which it applies these resolutions

100. See generally 15 U.N. GAOR (936th, 945th-947th mtgs.) at 1147, 1152-53, 1258, 1267, 1269, 1271, 1275-77, 1284, U.N. Docs. A/PV.936, A/PV.945 to A/PV.947 (1960) (speeches by Indonesia, Honduras, the Netherlands, Guatemala and Morocco).

101. 15 U.N. GAOR Annex 2 (Agenda Item 87) at 7, U.N. Doc. A/L.325 (1960).

102. 15 U.N. GAOR, *supra* note 100, at 1276-77 (Guatemala).

103. *Id.* at 1147, 1152-53, 1158, 1267, 1269, 1271.

104. *Id.* at 1271.

105. *Id.* at 1276.

106. *Id.* at 1258.

107. E. Ros, LAS CONCLUSIONES Y RECOMENDACIONES DEL COMITÉ ESPECIAL DE LAS NACIONES UNIDAS PARA LA APLICACIÓN DE LA RESOLUCIÓN 1514 (XV) EN EL CASO DE LAS ISLAS MALVINAS 18 (1965).

108. See generally *supra* note 100.

109. In 1960, Guatemala was pursuing its claim to Belize from the United Kingdom, 15 U.N. GAOR (874th plen. mtg.) para. 218, U.N. Doc. A/PV.874 (1960); Morocco claimed Mauritania, Ifni, and parts of Western Sahara from France and Spain, 15 U.N. GAOR C.4 (1005 mtg.) at 17, U.N. Doc. A/C.4/SR.1005 (1960); Indonesia claimed West Irian from the Netherlands. 15 U.N. GAOR, *supra* note 43, at 1271.

110. See generally J. CASTAÑEDA, *supra* note 33, at 15.

Contrary to what occurs within the state, in the international order there is no organ whose specific function is to determine the constitutionality of the authorities

to specific situations, and its subsequent resolutions on the same subject are indicative of the resolutions' true scope. The United Nations' treatment of the territories of Gibraltar and Ifni provide guidance in this area.<sup>111</sup>

#### a. Gibraltar

In its resolutions concerning the Rock of Gibraltar, the General Assembly recognizes territorial limitations to the right of self-determination in non-self-governing territories. Gibraltar is a territory administered by the United Kingdom.<sup>112</sup> Until recently, sovereignty over the Rock was governed by the Treaty of Utrecht, signed in 1713.<sup>113</sup> The terms of the treaty provide that Gibraltar was to be supervised by the United Kingdom and to revert automatically to Spain before any change in its status could take place.<sup>114</sup> This aspect of the treaty is questionable today since any treaty imposing colonial relationships would be superseded by recent developments in international law.<sup>115</sup> Even so, the treaty serves as

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that apply legal norms. . . . [E]ach international organ (not subordinate to another) determines the constitutionality of its own acts. This factor, plus the extreme vagueness with which the powers of a political organ such as the Assembly are enunciated, easily explain why the very practice of the organ becomes, with the passage of time, the decisive factor in determining the legal scope of its own functions.

*Id.* A resolution which has become binding, such as resolution 1514, may assume characteristics similar to those of a treaty. Treaties should be interpreted by the parties which are bound by them. See I.C.J. STAT. 38(1)(a); R. HIGGINS, *supra* note 31, at 1.

111. See *infra* notes 113-44 and accompanying text. Territorial sovereignty as a possible limitation to a non-self-governing territory's right to self-determination has been debated in the context of many territorial claims. The importance of the treatment of Ifni and Gibraltar lies in the direct acceptance by the General Assembly of such limitations. *Id.*

112. See G.A. Res. 66, *supra* note 5. Gibraltar has been listed as a non-self-governing territory in subsequent resolutions of the General Assembly. See, e.g., G.A. Res. 2353, 22 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6716 (1967); G.A. Res. 2231, 21 U.N. GAOR Supp. (No. 16) at 74, U.N. Doc. A/6316 (1966).

113. Treaty of Utrecht, July 13, 1713, Great Britain-Spain, 1 British & Foreign State Papers 613, 28 Parry's T.S. 295.

114. The Treaty states that:

[I]n case it shall hereafter seem meet to the Crown of *Great Britain* to grant, sell, or by any means to alienate therefrom the Propriety of the said Town of *Gibraltar*, it is hereby agreed and concluded, that the Preference of having the same shall always be given to the Crown of *Spain* before any others.

*Id.* art. X.

115. See generally Western Sahara, 1975 I.C.J. at 168. A supervening change in existing law can affect the validity of title to land. "The Court thus judged that the original title ceases to be valid if there are new facts to be considered on the basis of new law." *Id.* Other

evidence that Gibraltar is part of Spain's sovereign territory, occupied by the United Kingdom.<sup>116</sup>

Spain claims that the inhabitants of the Rock are not the true population of the territory and cannot unilaterally determine the international status of Gibraltar.<sup>117</sup> Spain views Gibraltar as a territory which falls under the paragraph 6 exception to resolution 1514.<sup>118</sup> The population is of mixed nationality, having arrived on the Rock after the treaty was signed.<sup>119</sup> The only way to decolonize Gibraltar, according to Spain, would be to reintegrate Gibraltar with Spain itself.<sup>120</sup>

The United Kingdom's arguments for self-determination in Gibraltar are the same as those relied upon in the Falklands dispute. The United Kingdom claims that the people of Gibraltar are the inhabitants of a non-self-governing territory<sup>121</sup> who enjoy all the benefits of resolutions 1514 and 1541. Therefore the population has a right to determine its future status regardless of competing territorial claims.<sup>122</sup>

The General Assembly has been monitoring the dispute for several years. Numerous resolutions have requested the two parties to negotiate a settlement but have not expressly mentioned any rights of the local population to participate in the discussions.<sup>123</sup> Many member states have criticized the United Kingdom's refusal

cases support this position. *E.g.*, *Island of Palmas (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 829, 845 (1928).

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects [sic] the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

*Id.*

116. *See infra* note 145.

117. *See* 22 U.N. GAOR C.4 (1743rd mtg.) para. 41, U.N. Doc. A/C.4/SR.1743 (1967).

118. 37 U.N. GAOR (9th plen. mtg.) at 88, U.N. Doc. A/37/PV.9 (prov. ed. 1982).

119. Franck & Hoffman, *supra* note 1, at 376. The population consists mostly of Maltese, Italians, Jews, and other Mediterranean peoples. *Id.*

120. 22 U.N. GAOR C.4, *supra* note 117, para. 9.

121. *See generally* 22 U.N. GAOR C.4 (1741st mtg.) para. 33, U.N. Doc. A/C.4/SR.1741 (1967).

122. *Id.*

123. *See generally* G.A. Res. 2353, *supra* note 112; G.A. Res. 2231, *supra* note 112; G.A. Dec. 31/406, 31 U.N. GAOR Supp. (No. 39) at 199, 200, U.N. Doc. A/31/39 (1976).

to transfer sovereignty over the territory to Spain<sup>124</sup> without the approval of the local population.<sup>125</sup>

Spain,<sup>126</sup> as well as many legal writers,<sup>127</sup> interprets the General Assembly's resolutions as supportive of its territorial claims. Resolution 2353,<sup>128</sup> for example, states the General Assembly's belief that rights over Gibraltar should be resolved without the participation of the local population.<sup>129</sup> The resolution followed a plebiscite in which the population of Gibraltar was given a choice between continuing its present ties with the United Kingdom or reverting to Spain.<sup>130</sup> The people of Gibraltar voted overwhelmingly in favor of maintaining their present status.<sup>131</sup> The resolution, passed by a vote of seventy-three to nineteen, with twenty-seven abstentions,<sup>132</sup> declared: "[T]he holding of the referendum of 10 September 1967 by the Administering power [was] a contravention of the provisions of [the] General Assembly."<sup>133</sup> The resolution again requested the parties to reach a negotiated settlement.<sup>134</sup>

124. In 1969, the United Kingdom and Gibraltar agreed to a new constitution. The United Kingdom was not to transfer Gibraltar to another state unless the inhabitants, through a plebiscite, approved. See 24 U.N. GAOR Supp. (No. 23) at 53, U.N. Doc. A/7623/Rev.1 (1974).

125. See 22 U.N. GAOR C.4, *supra* note 117, paras. 85-97, 99 (speeches by the representatives of Ecuador, Honduras, and Mauritania).

126. *Id.* paras. 5, 8.

127. See A. RICO SUREDA, *supra* note 1, at 185; Franck & Hoffman, *supra* note 1, at 374.

128. G.A. Res. 2353, *supra* note 112.

129. *Id.*

130. Judith Hart, the United Kingdom's Minister of State for Commonwealth Relations, commented on the plebiscite to be held in Gibraltar: "If the majority of the people of Gibraltar vote in favour of the second alternative [continued ties with the United Kingdom], . . . we will regard this choice as constituting, in the circumstances of Gibraltar, a free and voluntary relationship of the people of Gibraltar with Britain." 748 PARL. DEB., H.C. (5th ser.) 567 (1967). It is curious that independence was not an option given to the people of Gibraltar. The United Kingdom claims that this was due to provisions of the Treaty of Utrecht, *supra* note 113, which did not allow a change of status without reversion to Spain. 22 U.N. GAOR C.4, *supra* note 117, para. 78. However, any legitimate attempt to allow for the exercise of self-determination by the people of Gibraltar, including the use of a plebiscite, depends on the non-applicability of the relevant sections of the treaty, since those sections exclude any participation by the local population in the sovereignty of Gibraltar. Treaty of Utrecht, *supra* note 113. Thus, it appears that the United Kingdom is simultaneously following the treaty and disregarding it.

131. See U.N. Doc. A/6876, at 2-3 (1967) (letter dated October 25, 1967 from the Permanent Representative of the United Kingdom to the United Nations). The United Kingdom reported to the General Assembly that of 12,757 eligible voters, 12,138 voted to maintain their present ties, while only 44 favored reversion to Spain. *Id.*

132. 22 U.N. GAOR (1641st plen. mtg.) at 13, U.N. Doc. A/PV.1641 (1967).

133. G.A. Res. 2353, *supra* note 112.

134. *Id.* "Invites the Governments of Spain and the United Kingdom . . . to resume without delay the negotiations . . . with a view to putting an end to the colonial situation in

There should be little doubt that the General Assembly believes that despite Gibraltar's status as a non-self-governing territory, its population is not entitled to self-determination.

b. Ifni

The decolonization of Ifni is further evidence that the General Assembly accepts limitations to the right of self-determination in non-self-governing territories. The territory of Ifni, located on Morocco's western coast, was the subject of a dispute between Spain and Morocco.<sup>135</sup> Morocco claimed Ifni was a part of its territory occupied illegally by Spain.<sup>136</sup> Spain, in turn, considered Ifni a non-self-governing territory which should remain under its control until the population, which was nomadic, could vote intelligently in a plebiscite.<sup>137</sup> Resolution 2229<sup>138</sup> refers to both Ifni and Western Sahara, and limits the Ifnians' right to self-determination.<sup>139</sup> The resolution requested Spain to transfer Ifni to Morocco bearing in mind "the aspirations of the indigenous population."<sup>140</sup> The resolution considered this procedure to be in furtherance of the decolonization of the territory.<sup>141</sup> Because the dispute between the two countries over Western Sahara arose at approximately the same time, the General Assembly often treated the cases together.<sup>142</sup> The General Assembly invited Spain to hold a referendum in Western Sahara "with a view to enabling the population of the Territory to exercise freely its right to self-determination."<sup>143</sup> The difference between the two paragraphs within the same resolution indicates that in certain situations, such as Ifni, the General Assembly limits the right of self-determination. The resolution also allows for the transfer of such territory without recourse to resolution 1541.<sup>144</sup>

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Gibraltar and to safeguarding the interests of the population upon the termination of that situation." *Id.*

135. See G.A. Res. 2354, 22 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6716 (1967); G.A. Res. 2229, 21 U.N. GAOR Supp. (No. 16) at 72, U.N. Doc. A/6316 (1966).

136. See 21 U.N. GAOR (1441st plen. mtg.) para. 289, U.N. Doc. A/PV.1441 (1966).

137. See 18 U.N. GAOR Annex I (Agenda Item 23, addendum) at 280-82, U.N. Doc. A/5446/Rev.1 (1963).

138. G.A. Res. 2229, *supra* note 135.

139. *Id.* at 73.

140. *Id.*

141. *Id.*

142. See *supra* note 135.

143. G.A. Res. 2229, *supra* note 135.

144. G.A. Res. 1541, *supra* note 6, at 30. According to resolution 1541, [i]ntegration should have come about in the following circumstances: (a) The



#### 4. Application of the Resolutions to the Falklands Case

A comparison of the General Assembly's resolutions on the Falklands with those covering Gibraltar strongly suggests that the Assembly views self-determination as a limited right. In Gibraltar, substantial evidence indicates that the Rock is part of Spain's sovereign territory.<sup>145</sup> The issue is therefore well defined: self-determination on the one hand, territorial integrity on the other. In the Falklands, however, the historical claims set forth by Argentina are not as clear, and they are actively disputed by the United Kingdom.<sup>146</sup> The General Assembly's willingness to preempt the right of self-determination in the Falklands therefore becomes highly significant.

Resolution 2065,<sup>147</sup> the first General Assembly resolution on the decolonization of the Falkland Islands, resembles resolution 2231<sup>148</sup> on Gibraltar. Resolution 2065, like resolution 2231, notes the existence of a dispute and urges both countries to negotiate, bearing in mind the provisions of resolution 1514.<sup>149</sup> The resolution urges the two parties to consider "the interests of the population of the Falkland Islands."<sup>150</sup> The resolution regarding Gibraltar recom-

integrating territory should have attained an advanced stage of self-government with free political institutions, so that its people would have the capacity to make a responsible choice through informed and democratic processes; (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes . . . .

*Id.* Ifni was transferred to Morocco in 1969 without the participation of the local population. The International Court of Justice later accepted this unilateral transfer as the valid decolonization of the territory. See *Western Sahara*, 1975 I.C.J. at 35.

145. The Treaty of Utrecht, *supra* note 113, which is the basis for the United Kingdom's possession of Gibraltar, provides: "[T]he Catholick King wills, and takes it to be understood, that the abovementioned Property [Gibraltar] be yielded to *Great Britain, without any Territorial Jurisdiction.*" *Id.* art. X, translated in 1 A. TOYNBEE, *MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967*, at 223-24 (1967) (emphasis added). The statement is even stronger in light of Spain's right of reversion, also contained in article X. *Id.*

146. See U.N. Doc. A/S-12/31, at 2-5 (1982) (letter dated June 30, 1982 from the Permanent Representative of the United Kingdom to the United Nations).

147. G.A. Res. 2065, *supra* note 8.

148. G.A. Res. 2231, *supra* note 112.

149. G.A. Res. 2065, *supra* note 8.

150. *Id.* The exact meaning of the word "interests" is subject to debate. Both the United Kingdom and Argentina, as well as several legal writers, claim it does not include a right to self-determination. See 31 U.N. GAOR C.4 (21st mtg.) para. 45, U.N. Doc. A/C.4/31/SR.21 (1976) (the United Kingdom feels that it is not bound by the resolution and expresses misgivings about its fairness to the Falklanders); U.N. Doc. A/9287, at 2 (1973) (Argentina distinguishes between "wishes" and "interests" and concludes that the latter do not include

mends "taking into account the interests of the people of the Territory."<sup>151</sup>

Resolution 3160<sup>152</sup> went beyond resolution 2065 by indicating that "the way to put an end to this colonial situation is the peaceful solution to the conflict of sovereignty between the Governments of Argentina and the United Kingdom."<sup>153</sup> Furthermore, the only rights of the inhabitants mentioned in the resolution are those specifically granted previously by resolution 2065.<sup>154</sup> Although resolution 3160 expresses no opinion on either party's version of their historical-territorial claims to the Islands, it does emphasize that this aspect of the dispute must be resolved before the rights of the Falklanders can be addressed.<sup>155</sup>

Recognition of the Argentine position becomes more explicit with every resolution. Resolution 31/49<sup>156</sup> repeats statements found in prior resolutions and for the first time implies support for Argentina's historical claims.<sup>157</sup> Resolution 37/9,<sup>158</sup> adopted after the

self-determination); Franck & Hoffman, *supra* note 1, at 381 (resolution 2065 does not include a provision for self-determination).

151. G.A. Res. 2231, *supra* note 112.

152. G.A. Res. 3160, *supra* note 8.

153. *Id.* at 109.

154. *Id.* at 108-09. The resolution was approved by a vote of 116-to-0, with 14 abstentions, including that of the United Kingdom. 28 U.N. GAOR (2202d plen. mtg.) at 23, U.N. Doc. A/PV.2202 (1973).

155. The resolution requests the two parties to commence immediate negotiations and to find a peaceful solution to the Falkland problem. G.A. Res 3160, *supra* note 8, at 108-09. The significance of the wording can be better understood by contrasting it with resolution 2229, *supra* note 135, which ordered Spain to grant the right of self-determination to the people of Western Sahara. *Id.*

156. G.A. Res. 31/49, *supra* note 8, at 122.

157. *Id.* The resolution bears "in mind the paragraphs related to this question contained in the Political Declaration adopted by the Conference of Ministers for Foreign Affairs of Non-Aligned Countries, . . . and in the Political Declaration adopted by the Fifth Conference of Heads of State or Government of Non-Aligned Countries." *Id.* Both paragraphs openly support Argentina's territorial claim. See U.N. Doc. A/37/553, at 4, 17-18 (1982). The resolution goes on to state that the General Assembly "[e]xpresses its gratitude for the continuous efforts made by the Government of Argentina, in accordance with the relevant decisions of the General Assembly, to facilitate the process of decolonization and to promote the well-being of the population of the islands." G.A. Res. 31/49, *supra* note 8, at 122. This section refers to Argentina's efforts in providing certain educational and other facilities to the Falklands. Although this would not have been possible without the United Kingdom's cooperation, there is no mention of this in the resolution. See generally 28 U.N. GAOR C.4, *supra* note 10, at 301. The resolution passed by a vote of 102-1, with 32 abstentions. The United Kingdom cast the sole negative vote. 31 U.N. GAOR, *supra* note 15, para. 77.

158. G.A. Res. 37/9, *supra* note 8.

armed conflict,<sup>159</sup> once again urges both countries to negotiate, but makes no reference to participation by the Falklanders.<sup>160</sup> Speeches in the General Assembly indicated widespread agreement that the issue of territorial claims must be resolved before the question of self-determination.<sup>161</sup>

It should be clear from the resolutions of the General Assembly on Gibraltar, Ifni and the Falklands, as well as the *Western Sahara* opinion of the International Court of Justice, that both bodies consistently view paragraph 6 of resolution 1514 as establishing such territorial limitations to the right of self-determination. The General Assembly's interpretation of the right to self-determination is especially important because that Organ, through its resolutions, incorporated the right into international law.<sup>162</sup> Therefore, in certain limited situations, the people of non-self-governing territories will not be able to determine their future status. Their right to vote can be precluded by competing territorial claims.

#### D. Factors in the Application of Territorial Limitations

Limiting the right of self-determination has been criticized by commentators who envision a "redrawing [of] colonial boundaries,"<sup>163</sup> or, worst yet, "chaos, insecurity and war."<sup>164</sup> Uganda's claims to parts of Kenya and the Sudan in the 1970's are examples of what writers feel could lead to these outcomes.<sup>165</sup> The development of territorial limitations within the context of the right of self-determination, however, indicates that it applies in such limited circumstances that these fears need not be realized.

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159. *Id.* at 2; see also *supra* note 2.

160. G.A. Res. 37/9, *supra* note 8. The resolution does request negotiations in accordance with prior resolutions. It also includes the question of the Falklands in its 38th session, to be held during 1983. *Id.*

161. See, e.g., 37 U.N. GAOR (52d plen. mtg.) at 12-15, 18-22, 28-30, 31-42, 48-55, 61-63, U.N. Doc. A/37/PV.52 (prov. ed. 1982) (speeches by the representatives of Mexico, Cuba, Costa Rica, Nicaragua, Ecuador, Suriname, German Democratic Republic); 37 U.N. GAOR (53d plen. mtg.) at 3-5, 11-16, 21-22, 26-27, 42-45, 47-50, 61-70, 73-75, 77, 96, 101-02, U.N. Doc. A/37/PV.53 (prov. ed. 1982) (speeches by the representatives of Hungary, Brazil, Colombia, Yugoslavia, Uruguay, Soviet Union, Venezuela, Dominican Republic, Haiti, Poland, Viet-Nam, Albania, Zaire, Bolivia).

162. See *supra* notes 34, 37-46.

163. J. CRAWFORD, *supra* note 26, at 383.

164. Franck & Hoffman, *supra* note 1, at 351.

165. See *id.*

The right of self-determination, as developed by the United Nations, has been applied exclusively to the decolonization of non-self-governing territories.<sup>166</sup> Therefore, any territorial claims based on limitations of the right can only be asserted against these territories. This is an important restriction since there are only a few such territories remaining.<sup>167</sup> Territorial claims asserted against independent states must find some other justification in international law.

A territorial claim will not supersede a non-self-governing territory's right of self-determination unless it meets certain requirements.<sup>168</sup> The International Court of Justice has expressly recognized the validity of territorial claims when the population of the territory is not "a 'people' entitled to self-determination," or when "a consultation was totally unnecessary, in view of special circumstances."<sup>169</sup> The Court has not stated what it considers to be those special circumstances. In finding that Morocco and Mauritania lacked sufficient ties to supersede the Saharans' right of self-determination,<sup>170</sup> however, the Court implied a requirement that the claimant state must have existed at the time of colonization of the territory.<sup>171</sup> It must also have asserted valid sovereignty over that territory at that time.<sup>172</sup>

166. See *supra* note 29 and accompanying text. The right to self-determination has become a part of international law through resolution 1514 and its companion resolutions, which were limited to colonial territories. *Id.* See also *Western Sahara*, 1975 I.C.J. at 32.

167. A special rapporteur listed 27 non-self-governing territories in 1980. See *The Right to Self-Determination: Implementation of United Nations Resolutions*, *supra* note 1, at 48-57.

168. A requirement in accordance with general practice is that a claimant state must not have peacefully and voluntarily surrendered its rights. See J. CRAWFORD, *supra* note 26, at 383.

169. *Western Sahara*, 1975 I.C.J. at 33.

170. *Id.* at 68.

171. *Cf. id.* at 63, 68. The Court concluded that although legal ties existed between Western Sahara and what it referred to as the Mauritanian "entity" (not an independent nation), the entity "did not have the character of a personality or corporate entity distinct from the several emirates and tribes which composed it." *Id.* at 63. Thus, the ties were not sovereign ties which could affect the right to self-determination. *Id.* at 68.

172. *Id.* at 68. Justice Singh stated this in a separate opinion:  
 Those legal ties which the Court found to exist at the time of Spanish colonization . . . were not of such a character as to justify today the reintegration . . . of the territory without consulting the people. The main reason for this conclusion is simply that, at the time of Spanish colonization, there was no evidence of the existence of one single State comprising the territory of Western Sahara and Morocco, or Western Sahara and Mauritania, which would . . . attract the provisions of paragraph 6 of resolution 1514 (XV) . . . .  
*Id.* at 79-80.

The General Assembly appears to agree with the Court's requirements. In the case of Guatemala's claim over Belize,<sup>173</sup> for example, the General Assembly refuted that country's arguments and granted the Belizeans the right of self-determination.<sup>174</sup> Guatemala based its arguments primarily on territorial claims inherited from Spain.<sup>175</sup> At the time of Guatemala's independence from Spain, however, Belize was already a colony of the United Kingdom.<sup>176</sup> Guatemala never existed as a state at the time of the colonization of the territory. Argentina, by comparison, was an independent nation in 1833 when the United Kingdom claimed the Falklands.<sup>177</sup> Spain likewise was an independent nation at the time of the signing of the Treaty of Utrecht.<sup>178</sup>

### CONCLUSION

The resolutions of the General Assembly, by fulfilling the requirements of customary international law,<sup>179</sup> have created a right

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173. Belize, formerly British Honduras, is located in Central America between Guatemala and the Caribbean Sea. Kunz, *Guatemala v. Great Britain: In Re Belize*, 40 AM. J. INT'L L. 383 (1946). The United Kingdom has been involved in a dispute over the territory since the 1600's, first with Spain, then later with Spain's successor to the claim, Guatemala. *Id.* at 383-85.

174. G.A. Res. 3432, 30 U.N. GAOR Supp. (No. 34) at 114, U.N. Doc. A/10,034 (1975), reaffirmed "the inalienable right of the people of Belize to self-determination and independence." *Id.* at 115.

On September 25, 1981, Belize was admitted as a member state to the United Nations. G.A. Res. 36/3, 36 U.N. GAOR Supp. (No. 51) at 12, U.N. Doc. A/36/51 (1981). Admission to the United Nations has been referred to as "unchallengeable evidence that a territory ceased to be non-self-governing." See J. CRAWFORD, *supra* note 26, at 368.

175. See generally 30 U.N. GAOR C.4 (2162nd mtg.) at 158, U.N. Doc. A/C.4/SR.2162 (1975). The United Kingdom bases its claim on a continuous and peaceful display of territorial sovereignty for over 350 years. *Id.* at 156. Guatemala alleges that the United Kingdom's occupation during the Spanish colonization was illegal. *Id.* at 158-60.

176. See generally Kunz, *supra* note 173, at 388. The basic difference between the dispute over Belize and the dispute over the Falklands appears to be that Guatemala accepts that the United Kingdom occupied the territory almost continuously since the 1600's, including the time when Guatemala obtained its independence. 30 U.N. GAOR C.4, *supra* note 175, at 158-59. Another difference is a treaty, signed in 1859, wherein Guatemala recognized the United Kingdom's sovereignty over the territory. Wyke-Aycinema Treaty, Apr. 30, 1859, Great Britain-Guatemala, 49 British & Foreign State Papers 7, 16 Martens Nouveau Recueil 366. However, Guatemala claims the treaty is void. See generally Kunz, *supra* note 173, at 388. The United Kingdom does not use the treaty as a basis for its arguments. *Id.* at 387.

177. See J. GOEBEL, *supra* note 17, at 433.

178. 20 ENCYCLOPAEDIA BRITANNICA Spain 11,098-113 (1969).

179. See *supra* note 34 and accompanying text.

of self-determination which applies to the peoples of non-self-governing territories.<sup>180</sup> The Falkland Islands, being such a territory, appear to fall within the ambit of the right.<sup>181</sup> Argentina argues that the right is not applicable where the territory is subject to a prior historical claim placing it within the sovereign territory of the claimant country.<sup>182</sup>

The General Assembly and the International Court of Justice, recognize limitations to the right. The Court's *Western Sahara* opinion, and its interpretation of paragraph 6 of resolution 1514 are definitive,<sup>183</sup> as are the General Assembly's resolutions regarding Gibraltar, Ifni, and the Falklands themselves.<sup>184</sup> The United Nations, as creator of the right, has also directed when and how it should be applied.<sup>185</sup> Because decolonization is now mandatory under international law,<sup>186</sup> territories subject to valid prior sovereign claims must revert to the claimant state without the participation of the inhabitants of the territory. Their rights, however, must be safeguarded.

Before this reversion can take place, several historical requirements must be fulfilled. The claimant state must have existed as an independent nation continuously since the colonization of the territory.<sup>187</sup> It must have exerted valid sovereign ties over the territory at the time.<sup>188</sup> And it must have never peacefully renounced its claim.<sup>189</sup>

The conflict over the Falkland Islands cannot be resolved until a careful analysis determines the validity of Argentina's territorial claims, an analysis similar to the one conducted by the International Court of Justice in the *Western Sahara* case. Only then can one decide whether the Falklanders have a right to a binding plebiscite. For this to happen, the United Kingdom must be willing to negotiate sovereignty over the Islands without the participation

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180. See *supra* notes 27-58 and accompanying text.

181. See *supra* notes 76-83 and accompanying text.

182. See *supra* notes 73-75 and accompanying text.

183. See *supra* notes 84-93 and accompanying text.

184. See *supra* notes 79-87, 157-62 and accompanying text.

185. See *supra* notes 34, 37-51, 166-67 and accompanying text.

186. See *supra* notes 34, 37-48 and accompanying text.

187. See *supra* notes 171, 176-78 and accompanying text.

188. See *supra* notes 172, 175-76 and accompanying text.

189. See *supra* note 168.

of the Falklanders. Its insistence of an absolute right of self-determination is a misinterpretation of the law regarding decolonization, a misinterpretation which has proven to be extremely costly.

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