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SELF-DETERMINATION AND THE QUESTION OF SOVEREIGNTY OVER FALKLAND ISLANDS/ MALVINAS

INTRODUCTION

The Falkland Islands/Malvinas are situated about 500 km East of the Southern shores of the Argentine Republic. The archipelago includes two main islands: East and West Falkland, and about 200 smaller islands; the total area is about 12 173 square kilometres. The living conditions are rather hard: the windy and cold weather and rocky terrain are not the most welcoming. The economy is based on fishing and sheep farming, but in 2001 reindeer were introduced as part of the farming effort. Tourism is also a source of economic growth, along with deposits of hydrocarbons discovered in the 1990s. The Islands' economy is self-sufficient, despite the cost of defence[1].

These small and unwelcoming islands are in the centre of a dispute between the United Kingdom of Great Britain and Northern Ireland and the Argentine Republic over the sovereignty over this territory that has been raging for about two centuries. In 1982, war broke out over this issue and to this day diplomatic efforts have failed to find an acceptable solution to the dispute. From time to time, the United Nations and the international community cast their focus to issues concerning this small territory, its society and the two States disputing over it incessantly. Sometimes there is hope of changing the *status quo*, but it usually fades quickly, even though all the participants are aware that the uncertainty in the territorial order is both dangerous and problematic. The aim of the article is to study the possibility of applying the people's to self-determination to the settlement of this dispute.

1. BRITISH-ARGENTINIAN DISPUTE

The treaty of Tordesillas 1494 granted the territory of the Falkland Islands/Malvinas (even though they had not yet been discovered) to Spain. However, during the beginning of the English conquests (Elizabethan Era), scholars supported the doctrine of using Roman civil law to the acquisition of territory, namely: *terra nullius* was to be acquired by effectively claiming it and by occupation. Many travellers are said to have landed on the islands, among them Sebald de Weert in 1598[2]. However, the first recorded landing

[1] The Falkland Islands/Malvinas Government website: http://www.falklands.gov.fk/self-sufficiency/the-economy/ [11.05.2016].

[2] The Falklands Project: http://thefalklandsproject.com/#Sebald-de-Weert [06.05.2016].

took place in 1690 by the English Captain Strong, who also named the islands 'Falkland'[3]. In 1763, the East Falkland Island become a haven for French refugees and Port Luis was built[4]. In 1767, French territorial claims to the islands were officially transferred to Spain[5]. In 1765, the British expedition established Port Egmont on Sounders Island and claimed formal possession of the Falkland Islands/Malvinas for the British Crown[6]. However, already in 1770 the territory was invaded and taken by the Spanish, and in 1771 an agreement was reached between England and Spain, granting the restoration of *quo status quo ante* 1770, and the former right to govern and erect settlements on the islands[7]. Although a British settlement already existed at that time, in 1774 British left the islands, despite continuing to claim sovereign rights. Spain incorporated the Islands into the viceroyalty of Buenos Aires in 1775[8].

The XIX century was a time of creating new postcolonial States in South America. In 1811, the Spanish left the islands due to a revolt in Buenos Aires. Argentina became independent from Spain in 1816 after a popular revolution[9]. Argentina's claim to the Falkland Islands/Malvinas was given practical effect in 1820, and in 1829 an Argentinian governor was appointed, despite protests from Britain[10]. In 1833, the British navy reclaimed the islands[11], and in 1843 an act of Parliament decided on the matter of government in the Falkland Island settlement[12]. In 1908 and again in 1917, British domination was confirmed by *Letters of Patent*[13]. It may be argued that in the early XX century, Argentina did not protest British claims to sovereignty, but reservations as to sovereignty were certainly made in the 1920s[14]. Nevertheless, a British and Falklands administration exists on this territory still today.

Pursuant to Article 73 (e) of the Charter of United Nations [the Charter], the United Kingdom of Great Britain and Northern Ireland [the UK] annually transmits information on the Falkland Islands/Malvinas as a Non-Self Governing Territory [NSGT] under its administration, which was confirmed for the first time by United Nations General Assembly [UNGA] resolution 66 (I). Since 1946, Argentina has expressed its reservation that it does not recognise British sovereignty over that territory (for the first time at the 25th meeting of Fourth Committee of the 1st Session of General Assembly).

The UK took steps in order to settle the dispute before the International Court of Justice [ICJ]. The Government of Argentina rejected the jurisdiction of the ICJ in the case of a territorial dispute, which led to the removal of the *Antarctica cases* from the list[15].

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[3] J.O. Laucirica, *Lessons from Failure: The Falklands/Malvinas Conflict*, "Seton Hall Journal of Diplomacy and International Relations" 2000, p. 80.

[4] The Falklands Project: http://thefalklandsproject.com/#New-Acadia [06.05.2016].

[5] P. Calvert, *Sovereignty and the Falklands Crisis*, "International Affairs" 1983, Vol. 59, No. 3, p. 406.

[6] D.W. Greig, *Sovereignty and the Falkland Islands/Malvinas Crisis*, "Australian Yearbook of International Law" 1983, p. 27.

[7] Ibidem, p. 29.

[8] M. Waibel, *Falkland Islands/Malvinas*, [in:] *Max Planck Encyclopedia of Public International Law*, para. 6.

[9] J.C. Brown, *A Brief History of Argentina,* 2nd edition, New York 2010, p. 89.

[10] M. Waibel, op.cit., p. 7.

[11] D.W. Greig, op.cit., p. 33.

[12] *Antarctica cases* (United Kingdom v. Argentina), British Application, ICJ 1955, p. 13.

[13] Ibidem, p. 17.

[14] Ibidem, pp. 25, 27.

[15] *Antarctica cases* (United Kingdom v. Argentina), Order of 16 March 1956, ICJ Reports 1956, p. 12.

Despite peaceful efforts put to finding a solution, war between the UK and Argentina broke out in 1982 when Argentinian forces attacked Port Stanley, the islands' capital, on 4 April[16]. In fact, the first confrontation on disputed waters took place as early as 1976[17]. The Argentinian forces surrendered on 17 June 1982[18].

In Resolution 2065 (XX), UNGA considered the question of the Falkland Islands/Malvinas. Two issues were raised: first, the need to settle the dispute between the UK and Argentina in accordance with principles of the Charter; and second, the principle of self-determination and the role of the Falkland Islanders. It is worth mentioning that the interests of the "population of the Falkland Islands/Malvinas" and UNGA Resolution 1514 (XV) – Declaration on granting independence to colonial countries and peoples – were raised in that resolution. Both problems were mentioned again in UNGA Resolution 3160 (XXVIII). UNGA Resolution 31/49 reaffirmed the recommendations presented before, and confirmed the solutions suggested in Report of the Special Committee on the Situation with regard to the Implementation of the Declaration of Granting Independence to Colonial Countries and Peoples [Special Committee on Decolonisation][19]. After the adoption of UNGA Resolution 2065 (XX), both States were close to reaching an agreement and transferring sovereignty over the islands to Argentina, but it was hindered by the disapproval of the Falkland Islanders, which significantly changed the UK's position in negotiations[20].

Two resolutions were issued by the United Nations Security Council [UNSC] in 1982: Resolution 502 and 505. Both called for the cessation of fire, the withdrawal of Argentinian forces and negotiations by diplomatic means. Two years later, UNGA Resolution 39/6 not only reminded both States of the need to end the dispute by peaceful solutions, but also reaffirmed the role of the interests of the Falkland Islanders in the dispute. The question of the Falkland Islands/Malvinas was also considered in UNGA Resolutions: 40/21, 41/40 and 42/19.

On 19 October 1989, Argentina and the UK agreed on the so-called 'Madrid-Formula', which was to be the ground for negotiations. It established a 'sovereignty umbrella' whereby the two governments agreed to put aside their respective sovereignty claims over the Falkland Islands, South Georgia and the South Sandwich Islands so that they could hold further talks on matters of mutual interest[21]. However, the latest changes in the status of the dispute took place after the discovery of the oil deposits, raising questions of sovereignty over the natural resources on the Falkland Islands/Malvinas waters[22].

The Special Committee on Decolonisation revisits the Falkland Island question annually. In its report from 2015, it was stated that the dispute must take into account

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[16] J.F. Gravelle, *An International Law Analysis of the Dispute between Argentina and Great Britain,* "Military Law Review" 1985, Vol. 107, pp. 5–6.

[17] Ibidem, p. 15.

[18] Ibidem, p. 19.

[19] A/31/23/Rev.1, pp. 172–173.

[20] S.G. Stransky, *Re-Examining the Falkland Islands/Malvinas War: the Necessity of Multi-Level Deterrence in Preventing Wars of Aggression*, "The Georgia Journal of International and Comparative Law" 2012, Vol. 40, p. 504.

[21] M. Waibel, *Falkland Islands/Malvinas*, [in:] *Max Planck Encyclopedia of Public International Law*, p. 16.

[22] A. Ruzza, *The Falkland Islands/Malvinas and the UK v. Argentina Oil Dispute: Which Legal Regime?*, "Goettingen Journal of International Law" 2001, No. 1, p. 82.

"the interests of the population of the islands in accordance with the provisions of the General Assembly resolutions"[23]. In addition, in the same document the Falkland Islands are called a "special and particular colonial situation"[24].

2. CLAIMS OF THE PARTIES TO THE DISPUTE

Between the postcolonial States in South America, which emerged after the liquidation of the Spanish empire in 1848, an agreement was reached that the binding principle for the delimitation of boarders would be the *uti possidetis* principle[25]. This principle had two major functions in postcolonial settlements in South America. First was the assurance that the status of *res nullius* open to an acquisition would cease to exist. Secondly, the title to any given locality was deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated.

However, the application of this principle to territories to which the Spanish title itself was disputable is rather doubtful: it has to be remembered that no question of international boundaries could ever have occurred to the minds of those who established administrative boundaries; *uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for other purposes. Moreover, as the ICJ noted in the Land, Island and Maritime Boundary Dispute case: "certain and stable frontiers are not the ones that find their way before international tribunals for decision. These latter frontiers are almost invariably the ones in respect of which *uti possidetis juris* speaks for once with an uncertain voice"[26].

If the *uti possidetis* principle is not to be relied on, it will be necessary to turn to other claims made by the parties. Both of them, though in different aspects, claim that their rights stem from the right of acquisition of the land, and to some degree from practice of occupation – these grounds were recognised in the *Beagle Channel case* as valid titles to territory. In the case of Argentina, the acquisition goes back to the Spanish sovereignty over the Falkland Islands/Malvinas based on the cessation from 1767. There can be no doubt that the Spanish rights to this land existed in XVIII century, which was consented to by the UK in 1771 by declaration. However, the French title from 1767 was not the only one, and there are no grounds to establish Argentinian succession as to the British declaration, which was not by itself decisive on the matter of sovereignty.

Still, it should be borne in mind that, despite the existence of a treaty or other legal act, sovereignty over the land may still be claimed on the grounds of displaying authority over it, where two factors exists: "the intention and will to act as sovereign, and some actual exercise or display of such authority"[27] on the critical date. However, the rule of primacy of legal title over effectiveness significantly weakens this claim[28]. Furthermore, it cannot

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[23] *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 2015*, p. 36, A/70/23.

[24] Ibidem, p. 36.

[25] P. Calvert, *Sovereignty and the Falklands Crisis*, "International Affairs" 1983, Vol. 59, No. 3, p. 412.

[26] *Land, Island and Maritime Frontier Dispute* (Salvador/Honduras), "Judgment, ICJ" 1992, p. 41.

[27] *Legal Status of Eastern Greenland*, "Judgment, PCIJ Series A/B" 1933, pp. 45–46.

[28] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), "Judgment, ICJ" 2002, p. 68.

be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that territorial sovereignty continues to exist and did exist at the moment that must be considered as critical for the decision of the dispute. This demonstration means the actual display of State activities that belongs only to the territorial sovereign[29]. The modern principle of effectiveness supports that claim. As to sovereign authority over a territory, recognition by the international community also plays a crucial role: it can either condemn illegality or grant certainty[30].

The Argentinian claims to the territory are based on the French cessation to the Spanish Crown, to which new republic was to succeed. After that, during the period of 1810–1833, the Argentinian authority was displayed over the island and its waters. However, the issue was not then raised until 1920, when protests were made against British sovereignty. On the other hand, British claims are based on effective discovery, acquisition and occupation (presence) at least since 1833. There is no arbitration award or judgement in the case that would give any certainty on the subject.

On 21 April 2009, the Argentine Republic presented the Commission on the Limits of Continental Shelf [CLOS] with information on the limits of the continental shelf beyond 200 nautical miles[31]. With reference to that submission, the Permanent Mission of the United Kingdom of Great Britain stated that the UK "has no doubt about its sovereignty over the Falkland Islands/Malvinas" and, according to the principle of self-determination, no claims as to sovereignty over the Falkland Islands/Malvinas may be made until the Falkland Islanders decide to lose British sovereignty or become independent[32]. The same note raised the issue that the UK exercises control over the continental shelf of each of the Overseas Territories in accordance with the *Declaration* from 29 October 1986, which established the Falkland Islands/Malvinas Interim Conservation and Management Zone (FICZ) of 200 miles from the coastal baseline. Argentina presumed its sovereignty over the islands[33], which was also confirmed before CLOS at the twenty-fourth session (10 August –11 September 2009). In a written note from 8 August 2012, the Permanent Mission of the Argentine Republic confirmed its claims and rejected counter-claims made by Great Britain as to sovereignty over the Falkland Islands/Malvinas[34]. Referring to that note, the Permanent Mission of the United Kingdom of Great Britain confirmed its previous views on the matter[35].

The *Rules of Procedure* of CLOS remain clear in the matter of settling boundary disputes. Pursuant to rule 46 para. 2, the actions of the Commission must not prejudice any matters relating to a dispute between States[36]. The Commission on the Limits of the Continental Shelf held its fortieth session at the United Nations Headquarters from 1 February to 18 March 2016. It adopted the recommendation as to Argentina's submission, but pointed out that it has no jurisdiction over disputed territory, and consequently the CLOS decision does not influence sovereign rights over the Falkland

[29] *Island of Palmas*, "Arbitrary Award, UNRIAA" 1928, Vol. II, p. 839.
[30] R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. I, 9th edition, Oxford 2008, p. 710.
[31] CLCS.25.2009.LOS (Continental Shelf Notification) 1 May 2009.
[32] CLCS/84/09.
[33] CLCS/64, p. 74.
[34] CLCS/336/2012.
[35] CLCS/273/12.
[36] CLCS/40/Rev.1.

Islands/Malvinas[37]. According to Argentinian sources, the submission was mainly approved by CLOS and the new continental shelf delimitation will expand the Republic's influence over maritime areas up to 35%[38].

3. SELF-DETERMINATION

3.1. THE RIGHT OF PEOPLES TO SELF-DETERMINATION

The right of peoples to self-determination was recognised during the Great War by Lenin and Wilson separately in theirs concepts of post-war peace[39]. During the inter-war period it was a principle of political nature, but with the possibility of being applied to territorial disputes, though only as a rule of internal law, after the decision of the State[40]. As a legal principle, it was recognised for the first time in the Charter, which stated in Article 1 para. 2: "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples […]", Chapter XI of the Charter – Declaration Regarding Non Self-Governing Territories adds the mission for administrating powers in Article 73 (b): "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 […]".

Later, UNGA Resolution 1514 (XV), in its Article 2, stated that: "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". In addition, it was pointed out in Article 5 that: "immediate 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 or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom". Further information as to the understanding of what NSGT is may be found in UNGA Resolution 1541 (XV): territory that is geographically separated and ethnically/or culturally different. The same resolution also clarifies what the full measures of self-government are: the emergence into a sovereign state, the free association of integration with an existing one.

In addition, the *International Covenant on Civil and Political Rights* [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights* [ICESCR] reaffirmed in Article 1 the right of all peoples to self-determination and explained its content further.

Crucial for the understanding of the principle is UNGA Resolution 2625 (XXV): "by virtue of the principle of equal rights and the self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without

[37] UN Press Realises: http://www.un.org/press/en/2016/sea2030.doc.htm [05.06.2016].

[38] Argentina, on a UN decision expands continental shelf area by 35% to 350 miles: http://en.mercopress.com/2016/03/27/argentina-on-a-un-decision-expands-continental-shelf-area-by-35-to-A350-miles [27.03.2016].

[39] A. Cassese, *Self-Determination of the Peoples. A Legal Re-apprisal*, Cambridge 1995, p. 16.

[40] *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, "League of Nations – Official Journal" 1920.

external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter". However, the actions undertaken by UNGA did not end in the 1970s. Resolutions titled: *The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights* were issued from 1970 to 1988, only to be replaced by the series *Universal Realization of the Right of Peoples to Self-Determination* still issued today.

The Committee on the Elimination of Racial Discrimination, in its recommendation regarding self-determination, drew the distinction between the internal and external ways of exercising this right. The latter is explained as follows: "the external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation"[41].

According to Robert Jennings and Arthur Watts, the right to self-determination has a role to play in the determination of sovereignty and territory, both in the case of acquisition and loss[42]. Malcolm N. Shaw noted that the principle of self-determination can provide criteria for the settlement of territorial disputes[43]. It is also commonly accepted that the right was introduced in order to enable peoples to conduct their own affairs and to remove barriers in those actions[44].

The right of peoples to self-determination has also been recognised by ICJ in several advisory opinions [AO] and cases. Firstly, in *Namibia AO,* where the Court recognised that this right belongs to all NSGT, and its goal is independence and expression of the will of the people, confirming that it become a rule of customary international law[45]. In addition, another opinion in *Western Sahara AO* concerns this right. In this opinion the Court stated that the ways of achieving the right and the decision as to what extent the people should take part in the decolonisation process lies in the competences of United Nations[46]. This conclusion was contested by Judge Dillard, who claimed that the will of the people will be the most important factor in exercising the right to self-determination[47]. Two later opinions in *Palestinian wall AO48* and *Kosovo AO49* were issued outside the colonial context.

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[41] *General Recommendation No. 21: Right to Self-Determination*, p. 4, CERD, UN Doc. A/51/18, 23 August 1996.

[42] R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. I, 9th edition, Oxford 2008, p. 715.

[43] M.N. Shaw, *International Law*, ed. 6, Cambridge 2008, p. 257.

[44] M. Saul, *The Normative Status of Self-Determination in International Law: a Formula for Uncertainty in the Scope and Content of the Right?*, "Human Rights Law Review" No. 4 2011, p. 619.

[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), "Advisory Opinion ICJ, Reports" 1971, p. 52.

[46] *Western Sahara*, "Advisory Opinion ICJ, Reports" 1975, p. 59.

[47] *Western Sahara*, "Advisory Opinion ICJ, Reports" 1975. *Separate Opinion of Judge Dillard*, p. 122.

[48] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "Advisory Opinion ICJ, Reports" 2004.

[49] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, "Advisory Opinion ICJ, Reports" 2010.

For further study will be presented *East Timor case* and *Western Sahara AO*, due to their nature: both were issued because of a territorial dispute. Here it will be useful to point out the separate opinion of Judge Vereshchten, who stated that, in the *East Timor case,* the ICJ should have consulted the people of East Timor, due to the fact that the dispute was over their territory. Consequently, as primarily interested in the judgement, they should have been consulted in accordance with rules put out in the principle of self-determination[50].

3.2. *WESTERN SAHARA* ADVISORY OPINION AND *THE EAST TIMOR CASE*

The *Western Sahara* advisory opinion is one of the most important issued in the era of decolonisation. When Spain, as Administrating Power, decided to put the question of self-determination of the people of Western Sahara to a referendum, two States – Morocco and Mauritania – manifested their territorial claims towards this territory. The main question laid before ICJ was whether or not either Morocco or Mauritania had any tie of sovereignty over the territory of Western Sahara before Spanish colonisation[51]. In its opinion, the Court confirmed that the territorial dispute had no implication on the exercise of the right of self-determination as envisaged in UNGA resolutions (including 3292 XXIX)[52].

The case of East Timor is inevitably different from the case of the Falkland Islands/Malvinas for three main reasons. First, in addition to the administrating powers – Portugal and Australia – there was also third party to the dispute – Indonesia. Second, the Australian position was not concerned with sovereignty over East Timor, the dispute, which was referred to ICJ in 1991, was concerned with the agreement between Indonesia and Australia regarding the exploration and exploitation of natural resources on the continental shelf in the area of the Timor Gap[53]. The sovereignty dispute existed between Portugal and Indonesia since its invasion in 1975. Third, the UNSC Resolution 384 from 1975 stated *expressis verbis* that the East Timorese people have the right to exercise the right to self-determination, which was also confirmed in UNSC Resolution 389 from 1976.

The proceedings ended in 1995 by an ICJ judgement that ruled on the lack of jurisdiction in the case due to an absence of a party to the dispute – Indonesia, because only by deciding on the lawfulness of Indonesian actions could the Court decide on the Portuguese claims[54]. Significantly, the judgement for the Falkland Islands/Malvinas case makes reference to the principle of self-determination: "[…] the Territory of East Timor remains a non-self-governing territory and its people have the right to self-determination. In addition, the General Assembly, which reserves the right to determine the territories that are regarded as non-self-governing for the purposes of applying

[50] *East Timor* (Portugal v. Australia), "Judgment, ICJ Reports" 1995. *Separate Opinion of Judge Vereshchten*, p. 135.
[51] *Western Sahara*, "Advisory Opinion ICJ, Reports" 1975, p. 1.
[52] Ibidem, p. 161.
[53] *Application East Timor* (Portugal v. Australia), "Judgment, ICJ Reports" 1991, p. 2.
[54] *East Timo*r (Portugal v. Australia), "Judgment, ICJ Reports" 1995, p. 35.

Chapter XI of the Charter, has treated East Timor as such a territory"[55]. In the Court's view, there was a link between the status of NSGT and the right to self-determination.

3.3. THE PEOPLE?

The Falkland Islands/Malvinas have not been listed as NSGT since 1946[56]. The regime of NSGT is established in the Charter of United Nations (Charter) in Chapter XI, as well as in UNGA Resolution 1514 (XV) refers to them in the preamble: "considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories", and further in Article 5 "immediate 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 or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom". In addition, the practice in decolonisation confirmed that the people of NSGT bear the right to self-determination[57].

The Falkland Islands total population in 2012 was 2931 inhabitants[58]. Data from 2012 shows the ethnic composition of Falkland Islands/Malvinas population, according to the inhabitants' declarations, as: Falkland Islander 57%, British 24.6%, St. Helenian 9.8%, Chilean 5.3%, other 3.4%[59]. But who are the Falkland Islanders? Generally, the Falkland Islanders are people who have lived on the Islands for 200 years, which means nine generations[60]. As the place of birth, 47% of the overall population were born in the Falkland Islands/Malvinas, with 28% born in the UK, 10% on St. Helena, 6% in Chile and 8% born elsewhere (among them 1.3 % of total population in Argentina)[61]. The Islanders' dominant language is English, with 76% of population also speaking Spanish[62].

Pursuant to *The Falkland Islands/Malvinas Constitution Order 2008*[63], the Legislative Assembly, which consists of elected members, is the representation of the people of the Falkland Islands (Article 26) and is an independent institution (Article 42 para. 2). The Governor is the executive organ, appointed by the Queen of the United Kingdom (Article 23). The executive authority of the Falkland Islands/Malvinas is vested in the Queen of the United Kingdom (Article 56), there is also the Executive Council elected by the Legislative Assembly (Article 57) which must be consulted by the Governor (Article 66). The Supreme Court (Article 86) and the juridical system exists independently for the Falkland Islands/Malvinas.

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[55] Ibidem, p. 31.

[56] Non Self-Governing Territories: http://www.un.org/en/decolonization/nonselfgovterritories.shtml [11.05.2016].

[57] S. Oeter, *Self-Determination*, [in:] *The Charter of the United Nations: A Commentary*, Vol. I, Ed. B. Simma, D.-E. Khan, wyd. 3, Oxford 2012, p. 325.

[58] Falkland Islands/Malvinas Census 2012, Statistics and Data Tables, 2013, p. 5, www.falklands.gov.fk/assets/79-13P.pdf [29.05.2016].

[59] Ibidem, p. 13.

[60] Falkland Island Government: http://www.falklands.gov.fk/our-people/ [11.05.2016].

[61] Falkland Islands/Malvinas Census 2012, Statistics and Data Tables, 2013, p. 15, www.falklands.gov.fk/assets/79-13P.pdf [29.05.2016].

[62] Ibidem, p. 21.

[63] 2008 No. 2846.

There is a question as to whether or not the Falkland Islanders constitutes "people" for the purposes of self-determination. Unfortunately, no binding definition of this term was ever created, nevertheless some attempts were made. One of them, by the African Commission on Human and Peoples' Rights, which suggested, that: "peoples are, for the purpose of these guidelines, any groups or communities of people that have an identifiable interest in common, whether this is from the sharing an ethnic, linguistic or other factor"[64]. Another was made at the UNESCO meeting of experts: "a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; or (g) common economic life; the group as a whole must have the will to be identified as a people, or the consciousness of being a people, allowing the groups or some members of such to grow, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly; the group must have institutions or other means"[65]. An important strand in international legal scholarship argues that "'people' in this understanding is not simply a group of persons, or an 'ethnic group', but rather the constituent people of a certain territorial entity formed by history"[66]. The inhabitants of the Falkland Islands/Malvinas (especially the ethnic majority – the Falkland Islanders) meet most of the conditions presented above.

4. THE FALKLAND ISLANDS/MALVINAS CASE

4.1. APPLICABILITY

Whether an entity constitutes a people is undoubtedly crucial in the present case. If the Falkland Islanders are one, their will should be taken into consideration in territorial disputes as highly important. If not, the two States: the UK and Argentina, are free to carry out their negotiations and there are no other factors that influence their decisions, despite binding international law. Both the UK and Argentina agree that the Falkland Islands/Malvinas must be decolonised, but they differ as to the ways of achieving that goal. Without a doubt, the people's right to self-determination constitutes one of the most important principles in the decolonisation process. Therefore, the problem of the application of this right to the Falkland Islands/Malvinas case is crucial.

Some authors claim that the Falkland Islanders are not a people in the decolonisation context, because they are the descendants of colonialists. This statement must be considered in the context of the indiscrimination clause of UNGA Resolution 1514 (XV), namely: "without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom". The principle of prohibiting discrimination is also included in Article 2 of ICCPR. This principle will be seen as affirmation that

[64] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on *Human and Peoples' Rights*, "African Commission on Human and Peoples' Rights" 2010, p. 8.

[65] *UNESCO Meeting of Experts on further study of the concept of the rights of the people*, Paris 1989, pp. 7–8.

[66] S. Oeter, *Self-Determination*, [in:] *The Charter of the United Nations: A Commentary*, Vol. I, Ed. B. Simma, D.-E. Khan, wyd. 3, Oxford 2012, p. 326.

exceptions to applicability of this right must be extraordinary. Furthermore, the rule of legal reasoning: *ubi lex non distinguit, nec nos distinguere debemus* leaves some doubts as to the possibility of refusing the right to self-determination in the situation when *prima facie* we are dealing with a people, specially in the colonial context.

Nevertheless, as stated above, UNGA Resolution 1541 (XV) set out conditions that must be met in order to apply the NSGT regime: the territory must be geographically separated and the people must be ethnically/or culturally different. The first condition is met undoubtedly. As to the second, the answer may be found in the declaration of the inhabitants, of which a majority (57%) claim to be Falkland Islanders (which clearly shows some degree of a sense of distinctiveness).

The strongest point made by scholars refusing the population of Falkland Island the right to self-determination is that, as practice shows, UNGA and its organs has a right to designate which NSGT has the right to self-determination. In the case of seventeen remaining NSGT, UNGA made such a recommendation for all of them except two: the Falkland Islands/Malvinas and Gibraltar[67]. However, the weight of this argument is uncertain. The last *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on Granting Independence to Colonial Countries and Peoples* addressing the issue of the Falkland Islands/Malvinas stated that Resolution 1514 (XV) apply to that case and it also reaffirms: "the need for the parties to take due account of the interests of the population of the islands"[68]. The reference itself is evidence of the fact that an UNGA subsidiary body concerned with decolonisation considers the Falkland Island population as able to exercise the right to self-determination. The lack of further recommendations would only indicate lack of the will of United Nations to take part in the dispute between Great Britain and Argentina.

In Argentina's view, there is a distinction between a colonised indigenous people with the right to self-determination and communities of colonialists and their descendants without one[69]. This view, as necessary leading to discrimination, has already been contested above. However, it would also be useful to find some examples of practice applied to this kind of situation. Very similar is the history of the Cayman Islands, which was also uninhabited before the European colonisation in XVII century. Later it was inhibited by Europeans and Africans. In 2010, the Caymanians constituted 56.3% of the population, while in 1979 it was 80.7%. The Cayman Islands are one of the British Overseas Territories and also NSGT. The latest UNGA Resolution 70/102, concerning the Cayman Islands among other things, reaffirms the right of NSGT to self-determination, and stated that it: "also reaffirms that, in the process of decolonization, there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognized under the relevant human rights conventions". Consequently, it seems that, in the practice of the United Nations, the composition of the population does not affect the existence of the right to self-determination.

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[67] F. Raimondo, *Does the Population of the Falkland Islands (Malvinas) Really Have the Right to Self-Determination?* (9 April 2015), p. 8. Available at SSRN: http://ssrn.com/abstract=2594199 or http://dx.doi.org/10.2139/ssrn.2594199.

[68] *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 2015*, pp. 34–35, A/70/23.

[69] D.W. Greig, *Sovereignty and the Falkland Islands/Malvinas Crisis*, "Australian Yearbook of International Law" 1983, p. 55.

The last argument is based on the conflict of norms invoked by some authors also in a general context: the conflict between the protection of the territorial integrity of the States versus self-determination. Firstly, the claim of territorial integrity may only be invoked in opposition to claims of another State. This was confirmed in the ICJ advisory opinion in the case of Kosovo, where the Court stated *expressis verbis* that a unilateral declaration of independence is in accordance with international law[70]. Secondly, it is hard to find a legal norm pursuant to which entities that are not States can be bound by the norms of international law directed to States. Thirdly, the limitation clause from UNGA Resolution 1514 states that: "any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". In this clause, there are two requirements that need to be met in order to establish whether or not the right to self-determination will be limited. Due to the regime provided by the resolution, as Blay states, the principle of self-determination almost categorically pre-empts the principle of territorial integrity[71]. In the case at hand, to establish that there is a national unity between the Falkland Islands/Malvinas and Argentina is nearly impossible. Moreover, it is doubtful to claim that the protection of territorial integrity could be applied, due to ongoing dispute over whether the Falkland Islands/Malvinas are part of Argentinian territory.

Currently, as to the dispute between the UK and Argentina, it is highly unlikely to reach any solution by negotiations[72]. Relations between the UK and Argentina are today one of the worst since 1982: while UK stands firmly on the ground that it is executing the will of the Falkland Islanders and protects their right to self-determination, Argentina claims sovereign right over the territory[73]. In a message to the Islanders, broadcast on 18 December 2015, the Prime Minister of the United Kingdom, David Cameron reaffirmed the support of his Government for the Islanders' right to self-determination[74]. It is the position of the Government of the United Kingdom that the Falkland Islanders should be able to attend all international meetings affecting their interests in their own right. They also take part in Commonwealth forums and are a member of the United Kingdom Overseas Territories Association and the South Atlantic Territories Cooperation Forum. The United Kingdom maintains its position that it supports the Islanders in developing their own economy and future, including their decision to exploit their natural resources[75].

Argentina reaffirms the bilateral nature of the question of the Falkland Islands/Malvinas, and consequently rejects any attempt to enable the international participation of the Islanders on their own[76]. In addition, the Argentine Republic government reaffirms

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[70] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, "Advisory Opinion ICJ, Reports" 2010, p. 122.

[71] S. Blay, *Self-determination versus Territorial Integrity in Decolonisation*, „New York Journal of International Law and Politics" No. 18 issue 2, 1985–1986, p. 443.

[72] P.J. Beck, *The Falkland Islands/Malvinas as an International Problem*, Abington–New York 1988, p. 161.

[73] K. Dodds, *Stormy Waters: Britain, Falkland Islands and UK-Argentinian relations*, "International Affairs" 2012, No. 4, p. 699.

[74] *Falkland Islands/Malvinas (Malvinas), Working Paper*, A/AC.109/2016/6, pp. 39–40.

[75] Ibidem, p. 38.

[76] Ibidem, pp. 31–32.

the inalienable sovereignty rights of the Argentine Republic over the Falkland Islands/Malvinas, South Georgia Islands and South Sandwich Islands and the surrounding maritime areas[77]. The Minister for Foreign Affairs and Worship of Argentina, Héctor Marcos Timerman made a statement on 25 June 2015. He stated that General Assembly Resolution 2065 (XX) recognised that the question of the Falkland Islands/Malvinas was a case of colonialism. He further stated that the British claim that the principle of self-determination applied to the population that it had implanted in the Falkland Islands/Malvinas was diametrically opposed to the purpose that the international community had in view when it recognised the right to self-determination[78].

4.2. EXCISING THE RIGHT

Indifferent to the problem of the possibility of applying the right of people to self-determination to the Falkland Islands/Malvinas, its inhabitants and Great Britain took some steps in order to take the will and interests of the population of this territory into consideration.

In 1968, it seemed possible to achieve a settlement to the dispute by granting Argentina sovereignty over the territory and resettling the Falkland Islanders for some kind of compensation, because it was obvious that the inhabitants would not consent to a change of sovereignty over the islands[79]. Still, it did not happen at that time. In 1980, as a culmination of a decade of talks with Argentina, Britain again consulted the Islanders on the question of the basis upon which future co-operation with Argentina could be negotiated. The Islanders rejected the idea of surrendering sovereignty to Argentina in exchange for a lease-back of the administration of the islands[80].

On 11 March 2013, the Falklands Islanders took part in a vote, by which they confirmed their desire to remain the Overseas Territory of Great Britain[81]. The 2013 referendum, in which 98.3 per cent of the electorate voted in favour of remaining an overseas territory of the United Kingdom, sent a clear message that the people of the islands did not want to enter into dialogue on the question of sovereignty[82].

At the 6th meeting of the Special Committee on Decolonisation in 2015, statements of the people of the Falkland Islands/Malvinas were heard. The representatives of the Legislative Assembly spoke in favour of remaining a British Overseas Territory, with autonomous institutions as the realisation of the right to self-determination. On the other hand, some of the inhabitants supported Argentinian claims to natural resources in the maritime area, and as to Argentinian sovereign rights[83].

At a meeting of the Joint Ministerial Council in December 2015, a *Comminiqué* was issued, affirming the observance of exercising the right of the people to self-

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[77] Ibidem, p. 46.

[78] Ibidem, p. 54.

[79] J.C.J. Metford, *Falklands or Malvinas?*, "International Affairs" 1968, Vol. 44, No. 3, p. 481.

[80] D.W. Greig, *Sovereignty and the Falkland Islands/Malvinas Crisis*, "Australian Yearbook of International Law" 1983, p. 47.

[81] B. Henderson, *Falkland Islanders defend right to remain British as Argentina renews claim*, http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/10133367/Falkland-Islanders-defend-right-to-remain-British-as-Argentina-renews-claim.html [20.06.2013].

[82] *Falkland Islands/Malvinas (Malvinas), Working Paper*, A/AC.109/2016/6, p. 60.

[83] UN Press Realises: http://www.un.org/press/en/2015/gacol3283.doc.htm [09.05.2016].

determination. The same document confirmed that: "we agreed that the fundamental structure of our constitutional relationships was the right one – powers were devolved to the elected governments of the Territories to the maximum extent possible, consistent with the UK retaining those powers necessary to discharge its sovereign responsibilities – while agreeing the need to review the effectiveness of constitutional arrangements over time".

5. SOVEREIGNTY DISPUTE OR SOVEREIGNTY QUESTION? SUMMARY

As Judge Dillard put it in his separate opinion to *Western Sahara AO*: "it is for the people to determine the destiny of the territory, and not for the territory the destiny of the people"[84]. If we agreed with this statement, we would need to presume that the principle of the self-determination of the people is the guiding rule for a settlement of any territorial dispute. It was summarised by Richard Falk in this way: "the idea of self-determination recognizes that the legitimacy of *any* political arrangement depends on the will of the people subject to its authority and is closely associated with ideas of democracy and fundamental human rights"[85].

For the time being, the dispute over the Falkland Islands/Malvinas is seen as dispute between Argentina and the United Kingdom over territory, but in truth it should be seen as a dispute concerning sovereignty over not only territory, but also the people residing there, and they should not be recognised as an object, but as a subject of the dispute. The will in the process of self-determination should be expressed freely by all inhabitants of that territory. However, the options available to the islanders should not be limited to an association with this or that State, the Falkland Islanders must also be able to choose independence, or to take part in determining their political status in any other way in the future. In this way, and only this way, the conditions stemming from the principles of democracy, the people's participation and the observance of human rights will be met. And these principles are fundamental for contemporary international law.

UNGA Resolution 637 A (VII) states that the people's right to self-determination is exercised in plebiscite or by other democratic methods, preferably under the auspices of the United Nations. The role of the United Nations is also confirmed in relation to the settlement of international disputes. Article 35 para. 1 of the Charter states: "any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly". In the light of these norms, the peaceful settlement of the dispute at hand under the auspices of the United Nations must be taken into consideration.

Pursuant to Articles 36 and 65 of the statute of the International Court of Justice, the case could also be decided by the ICJ either in the form of a Judgement or an Advisory Opinion, which will depend on the nature of the applicant and the stage of the dispute. In both cases, the question or the application concerning the right to self-determination

[84] *Western Sahara,* Advisory Opinion ICJ, Reports 1975. *Separate Opinion of Judge Dillard*, p. 122.

[85] R. Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, [in:] W. Danspeckgruber (Ed.), *The Self-Determination of the Peoples. Community, Nation and State in an Independent World*, London 2002, p. 65.

needs to be directed to the Court to decide on that matter (a lesson learned from *Kosovo AO86*). There was no judgement concerned with the exercise of the right to self-determination so far, however some conclusions as to this right stem from advisory opinions. One of them is that, in the decolonisation process, the competences as to the application of the right to self-determination lies with the United Nations[87]. Second is the fact that this right can be applied to the case at hand, as was argued above. Third, as shown, among others, from the *North See Continental Shelf case*, the Court can issue advice as to the peaceful settlement of the dispute and principles that should be applied[88].

To summarise, despite the way of settling a dispute between two States itself, in the end, it comes to the plebiscite recommended and implemented under the auspices of the UN in order to establish the status of the Falkland Islands/Malvinas. The UK has already asked the population of Falkland Islands/Malvinas for their opinions on the matter, although Argentina opposed these actions. Will the situation change? It is likely that, if the plebiscite was a UN initiative, then the position of Argentina would change. This may be the case, mostly because only that way neither of the States will win a dispute that has been going on for over two centuries, and neither will regard the solution as a failure. Implementing the principle of self-determination of the people is either way the fairest solution for the people of the Falkland Islands/Malvinas.

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[86] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo…*, pp. 82–83.

[87] *Western Sahara…*, p. 59.

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