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# Self-determination and contested peoplehood in Gibraltar: separating the law from the rhetoric

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## ABSTRACT

'Self-determination' is a loaded and contested term and there is room for debate over what constitutes 'peoplehood' giving rise to a right to self-determination. In the past, British, as well as Spanish sources, characterised the Gibraltarians as an 'artificial' population. This was a cornerstone of Spain's irredentist claim. Recent scholarship in social and cultural history has yielded a better understanding of developments in Gibraltar since 1704. The argument that the Gibraltarians are an illegitimate population with no roots in the territory is difficult to sustain today. However, there are still questions around Gibraltar's legitimate aspirations under international law.

## KEYWORDS

Gibraltar; Spain; international law; self-determination; decolonisation; United Nations; International Court of Justice

## Introduction

Woodrow Wilson's Secretary of State, Robert Lansing, wrote in 1918 that the phrase 'self-determination' was 'loaded with dynamite' (Lansing, 1921, p. 97). His concern was that the principle of national self-determination that Wilson had evoked in loose idealistic terms was open to abuse:

When the President talks of 'self-determination' what does he have in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability. (Lansing, 1921, p. 97)

As the interwar politics of Europe unfolded, Lansing's scepticism proved well-founded, not least when the 'people's right to self-determination' was invoked as a basis for 'the union of all Germans to form the Greater Germany' ('Nazi Party 25-point Program', 1920).

The architects of the post-war international order, anxious that the principle of self-determination should not once again serve as a pretext for secessionism and expansionism, limited the scope of its practical application to colonial (or 'Non-Self-Governing') and Trust territories (UN Charter 1945, Chapters XI and XII). By 1960, the principle had evolved into a legal right of colonial peoples to decolonise in accordance with their freely expressed wishes, without external interference and with their erstwhile colonial boundaries intact (UNGA Res 1514(XV), 14 December 1960; *Chagos Advisory Opinion of the International Court of Justice*, 25 February 2019, paras. 150–152). The corollary of this right was that administering powers were under an obligation to take 'immediate steps . . . to transfer all

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powers to the peoples of [Trust and Non-Self-Governing] territories’, and ‘[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country’ was deemed ‘incompatible with the purposes and principles of the Charter of the United Nations’ (UNGA Res 1514(XV), 14 December 1960, paras.5, 6).

The ‘people’ with the right to self-determination was defined *territorially* rather than by reference to ethnic, linguistic or religious characteristics. In other words, the holder of the right to self-determination was the entire population of the colony in question. This was therefore a tamer formulation of self-determination than the one imagined by the likes of Lansing and Hitler. It nevertheless played a transformative role in the post-1945 international order, providing a normative basis for the political emancipation of the millions who were still living under colonial rule in the wake of the Second World War, while preserving the stability of existing international borders (however arbitrarily those borders may have been drawn).

Among the Non-Self-Governing-Territories that fell within this new normative framework were several small British territories which, for one reason or another, wished to preserve their links with the Administering Power, rather than accede to independence or some other change in their external status. Most of these territories excited little international attention, but two – Gibraltar and the Falkland Islands – became the focus of intense debate within UN committees from the 1960s onwards.

After the UN’s Special Committee on Decolonisation (or Committee of 24) was established in 1961, its proceedings frequently touched on the question of whether the right to self-determination of peoples could legitimately be invoked by (or on behalf of) the Gibraltarians and the Falkland Islanders, and whether such right should take precedence over the irredentist claims of Spain and Argentina.

In both cases, the character of the population as a ‘people’ with the right to determine the future of the territory has been called into question by the claimant state.

This article will trace the contours of the debate concerning Gibraltarian peoplehood. The first part will examine the types of arguments that Spain has advanced to contest the status of the Gibraltarians as a ‘people’ with the right to self-determination. These arguments are notable for their focus on the (sometimes poorly understood) sociological characteristics of the Gibraltarian population. The second part of the paper aims to show that the Spanish arguments on self-determination and peoplehood are (a) out of step with the modern definitions of these concepts under international law; and (b) an apparent attempt to shift the debate away from arguments regarding title to territory, which do not afford a realistic basis for the recovery of Spanish sovereignty over Gibraltar.

## The rhetoric of contested peoplehood

In an interview with the Daily Mail dated 30 April 1959, General Franco described the Gibraltarian population in the following terms:

The ‘Llanitos’ are almost entirely Spanish, though they take advantage of their British citizenship, and the rest, Jews and aliens, who can live as well under one flag as under another. The true population of Gibraltar is situated legally at San Roque, and effectively, with its 60,000 inhabitants, at La Línea de la Concepción on the actual frontier. (Red Book 1965, p. 289)

The characterisation of the Llanitos (as the Gibraltarians are colloquially known) as an assortment of opportunistic Spaniards and other rootless individuals, while typical of the Franco regime, was not original or unique. As the Gibraltar author MG Sanchez has shown, similar derogatory, racially charged language has long been a feature of representations of the Gibraltarians in 19<sup>th</sup> and 20<sup>th</sup> century *British* writing (Sanchez, 2007, 58 et seq). As Sanchez notes, a 1966 essay by the renowned British novelist Anthony Burgess in the *Manchester Guardian* was even included in the Spanish Ministry of External Affairs' *New Spanish Red Book on Gibraltar* of 1968, because it contained a description of the Gibraltarians that resonated with the official Spanish view:

They speak English, but only on a denotatory (sic) level which is wholly inadequate for commerce and local legislation. They know nothing of English literature and have not themselves produced either a poet or a novelist. Their primary language is Andalusian Spanish, but not even in this they have asserted a cultural identity. Their songs, dances and cuisine are Spanish . . . (cited in Sanchez, 2007, p. 58)

These are the types of tropes that the Spanish government sought to advance in UN debates in the 1960s, as the question of Gibraltar's post-colonial status loomed large in Anglo-Spanish relations. In Spain's first intervention before the Committee of 24, the Spanish Representative, Ambassador de Piniés, left no stone unturned in seeking to persuade the Committee that the Gibraltarians were not a genuine 'people' with the right to determine the future of the territory. It is worth quoting from his statement at length:

In 1961 the population was 24,502, of whom only 17,785 were considered by the British Administration as residents of Gibraltar; 4,809 British subjects, members of the armed forces and of the colonial Administration and their families, and the remainder were Spanish, including a few other aliens.

The means of livelihood of the population are only those which can be derived from economic traffic of an illicit nature, at the cost of the Spanish economy. This traffic has attracted to Gibraltar a population of the most heterogeneous type who have replaced the original inhabitants who were expelled when the city was occupied.

Leaving aside the British civil and military officials, the present inhabitants of Gibraltar are a mixed population.

I do not use this term in any derogatory sense. Spain has never practised racial discrimination. In describing the population as a mixed one, I want to say that it has no link whatsoever with the parcel of Spanish soil whose future is to be discussed by this Committee. (Red Book 1965, pp. 323-4)

The statement contains assertions that would become staple elements of Spain's official position towards the Gibraltarians at the UN: the seemingly contradictory emphasis on the population's 'Spanishness', 'heterogeneity' and 'mixed' nature; the concern with highlighting the supposedly illicit nature of the population's economic activities; the reference to the displacement of the 'original' inhabitants (it is notable that originality is a quality attributed to the Spaniards who were expelled by the British after 1704 but not, apparently, to the earlier Moorish inhabitants who were expelled from Gibraltar by Castilian forces two centuries earlier); and, fundamentally, the population's *rootlessness* – its lack of links with the 'soil'. The aim of such portrayals is clear: to delegitimise the

presence of the Gibraltarians in Gibraltar, and thereby to cast doubt on their status as a 'people' with the right to determine the political future of the territory.

In reply, the Gibraltarian Chief Minister, Sir Joshua Hassan, pushed back against the Spanish Representative's caricature of the Gibraltarians, observing that it was wrong at the level of factual description, and arguing that the legitimacy of the population was not in doubt:

No community can exist for over 250 years without creating its own individuality, its character, its personality. Gibraltar has achieved its own culture in the widest sense of that word. It has drawn for this culture from many sources, but naturally the two main sources have been Britain, for political, and Spain, for geographical reasons, and Italy where the bulk of the civilian population originated. We are not afraid to say that we have drawn something from Spain. It is precisely because our culture is eclectic that it has become individual, and it is precisely because it is individual that we do not desire to allow Gibraltar to be swallowed up by Spain, Britain or anybody else. (Red Book 1965, p. 360)

As a result of Gibraltarian voices being heard at the UN, and an increasingly assertive approach by the UK when it came to promoting the rights of the Gibraltarians, it became more widely known over the course of the 1960s that the Gibraltarians were of 'mixed Mediterranean origin', mostly the descendants of Genoese and Maltese immigrants who had settled in the territory during the eighteenth and nineteenth centuries (Sugg Memorandum 1968). Although there were many cross-border marriages, and Spanish was the *lingua franca* on the Rock, it was difficult for Spain to maintain its insistence on the *Spanishness* of the Gibraltarians when denying the population's status as a distinctive 'people'.

The emphasis in Spanish interventions at the UN therefore shifted subtly onto the supposedly 'artificial' character of the population. For instance, in a 1964 petition before the Committee of 24, Camilo Barcia Trelles opined, 'in [his] capacity as a professor of international law', that 'the population which has occupied the Rock from the time of the British occupation, could be defined as a "prefabricated" population which was put there at the desire of the London Government; in other words, that the main characteristics of this Gibraltar population, as may be seen from the history I have given you, is its notorious, artificial character' (Red Book 1965, p. 414).

Spanish contributions to debates at the UN during the 1960s were replete with adjectives like 'artificial', 'prefabricated' and 'alien' to describe the Gibraltarians (Trinidad, 2018, p. 206). In 1966 the Spanish Minister of Foreign Affairs went so far as to describe the population as an 'unnatural human assemblage', whose economy, which he said was 'based on smuggling', 'has not hitherto given rise to a national and human community in any natural or political sense' (*Gibraltar - Talks with Spain 1966*, Cmnd 3131, 77).

This type of language proved persuasive within the UN General Assembly. When the draft of resolution 2353 (XXII) was debated in the Fourth Committee in 1967, the Sudanese Representative referred to the Gibraltarians as 'aliens imported by a colonial regime' (UN Doc A/C4/SR1754 (1967) 553, para 19), and the Ecuadorean Representative insisted that self-determination only applies when the people have 'deep roots in the Territory's soil', which in his view did 'not appear to be the case in Gibraltar' (UN Doc A/C4/SR1746 (1967) 467, para 40). Resolution 2353 (XXII) was the most pro-Spanish of all the General Assembly resolutions on Gibraltar, and the rapporteur of the UN Fourth Committee at the same session, M.S. Esfaniary, commented in an interview that the Assembly's approach was influenced by the fact that the Gibraltarians 'have been

beneficiaries of colonialism rather than victims of it' and have 'completely changed the cultural and social makings of the society of Gibraltar to serve their own peculiar needs' (cited in Umzurike 1972, p. 87, fn92).

A common feature of such views is that they are rarely, if ever, based on direct contact with Gibraltar or the Gibraltarians; they simply accept the official Spanish characterisation of the Gibraltarian population at face value. Gibraltarian petitioners at the UN have repeatedly invited the Committee of 24 and Fourth Committee to visit Gibraltar, but they have never received a response (for a recent example see 'Picardo addresses UN C24', 12 June 2013).

As Spain began its transition towards democracy, it significantly toned down its dehumanising rhetoric when seeking to portray the Gibraltarians as a non-people. However, its emphasis on the 'artificial' character of the population of Gibraltar remained a cornerstone of its irredentist claim. It is moreover important to note that the 'artificiality' argument has always been more than merely a rhetorical device deployed in political forums like the UN General Assembly; it is a *legal* argument designed to deprive the Gibraltarians of the benefits of peoplehood under international law. When counsel for Spain argued before the International Court of Justice in the *Western Sahara* advisory proceedings in 1975 that the population of Gibraltar was 'artificial' and not indigenous to the territory, his claim was that the Gibraltarians, unlike the Sahrawis, lacked the status of a 'people' entitled to self-determination under international law (International Court of Justice, 1975, p. 68).

The second part of this paper will evaluate the validity of that claim, and scrutinise the broader Spanish legal strategy that underpins it.

## **Separating the rhetoric from the law**

In the paragraphs that follow, I will argue that the Spanish arguments about the supposed character of the Gibraltarian population are (a) out of step with the territorial definition of a people under contemporary international law; and (b) an attempt to shift the debate away from the crux of the dispute: the question of where territorial sovereignty lies.

### ***Self-determination and the territorial criterion for peoplehood***

In the introduction I highlighted the centrality of the territorial criterion when defining a 'people' with the right to self-determination under international law, and I identified its underlying rationale. The drafters of the UN Charter did not wish to establish any difference between 'peoples' and 'inhabitants' of territories based on indigenesness or any other ground (Trinidad, 2018, p. 209); ethnic conceptions of peoplehood had, after all, helped to create the very conditions that led to the outbreak of war in Europe.

The closest the UN came to laying down a sociological criterion for peoplehood was in resolution 1541 (XV) of the General Assembly, adopted the day after its more famous sibling, resolution 1514 (XV), in 1960. Resolution 1541 defines a Non-Self-Governing Territory for the purposes of Chapter XI of the Charter as 'a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it' (UNGA Res 1541(XV), 15 December 1960, Principle IV). It can be deduced from the 'and/or' that cultural distinctiveness from the Administering Power is

considered sufficient, of itself, for an overseas territory to earn the designation ‘non-self-governing’, even in the absence of ethnic distinctiveness. In any event, it is not in dispute that Gibraltar is distinct ethnically *and* culturally from the UK, even though its culture is influenced in important ways by its connection with the UK.

There is a presumption that the entire population of a Non-Self-Governing Territory is a ‘people’ with the right to self-determination. As the International Court of Justice said in its 1971 *Namibia* Advisory Opinion, ‘the ... development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them’ (International Court of Justice, 1971, p. 31).

However, the International Court of Justice (1975) alluded to exceptions in its 1975 *Western Sahara* Advisory Opinion:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances. (*Western Sahara* Advisory Opinion, 1975, para 59)

While Spain argues that Gibraltar is such a territory with a population that does not constitute a ‘people’ entitled to self-determination, it is far from clear that Gibraltar was one of the territories to which the Court was obliquely referring (and the fact that those territories are not identified by name in the Opinion suggests that the Members of the Court could not agree on a definitive list). Moreover, the General Assembly has never made a pronouncement to the effect that it did not consider the Gibraltarians a ‘people’, even while insisting that the future of Gibraltar should be decided through bilateral negotiations rather than through the wishes of the population (see UNGA 2231(XXI), 20 December 1966; UNGA Res 2353(XXII), 19 December 1967; UNGA Res 2429(XXIII), 18 December 1968).

There are a small number of situations where the inhabitants of a Non-Self-Governing Territory could not reasonably be described as a genuine ‘people’. One example is the Portuguese fort of São João Baptista de Ajudá in Benin, designated as a Non-Self-Governing Territory in 1960, whose entire human population at the time it was overrun in 1961 consisted of two colonial administrators (Trinidad, 2018, p. 186). That situation was nevertheless different, in kind as well as in degree, to the situation in Gibraltar, whose diverse civilian population of 30,000 has roots in the territory going back to the early 18<sup>th</sup> century. The presence of the Gibraltarian population on the territory may be traced back to historic acts of violence, dispossession and colonial planning, but it would not be alone among the populations of the world in this respect.

Some authors nevertheless consider that the ‘implanted’ nature of the Gibraltarian population – that is to say, the fact that it is comprised of the descendants of people who arrived in the territory with the approval, and sometimes at the invitation of, the colonial power – disqualifies it from peoplehood and self-determination (see for example, Blay, 1985–1986). In response to such views, Suzanne Lalonde argues persuasively that the notion that a population is illegitimate because it has been ‘imported’ into a territory by the colonial power ‘has little merit when the “imported” inhabitants have inhabited the

territory for centuries. Historical claims vindicated on such an interpretation of the self-determination principle would have a serious destabilizing effect' (Lalonde, 2002, p. 164).

The rationale and importance of a *territorial*, as opposed to a sociological, definition of a 'people' with the right to self-determination is deftly summed up by Dame Rosalyn Higgins, former President of the International Court of Justice:

Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political change within them. That the right of self-determination operates within generally accepted political units is an essential premise, for several reasons – first, without this qualification, all is in flux, and there is no constant factor at all; second, to withdraw this proviso would encourage impermissible use of force across state boundaries, an outcome which the United Nations can hardly encourage; and third, by and large the emergent states seem content so far to accept the colonial boundaries imposed on them. (Higgins, 1963, p. 104)

It follows logically from this view, as Higgins has written elsewhere, that '[u]ntil it is determined where sovereignty lies, it is impossible to determine whether the inhabitants have the right to self-determination' (Higgins, 1991, p. 174).

In the case of Gibraltar, the implications are clear: Spanish arguments aimed at undermining the sociological legitimacy of the population are an unhelpful distraction from the central question of territorial sovereignty.

### ***Avoiding the question of territorial sovereignty***

If Spain were able to prove that Gibraltar is legally part of Spain, it would follow automatically that the Gibraltarians could not be considered a 'people' with the right to determine the external political status of the territory. The obvious forum for Spain to assert such a right to territorial sovereignty is not a political body like the UN General Assembly, but an international court or tribunal.

In 1966 the UK presented Spain with a formal proposal to resolve all aspects of the sovereignty dispute at the International Court of Justice. The Spanish government rejected the proposal, arguing at the UN that 'the problem of Gibraltar is essentially a political one' and that '[t]he British proposal to submit the dispute to the International Court of Justice, therefore, interferes with the recommendation made by the United Nations to Great Britain and Spain to solve their differences over Gibraltar by means of bilateral talks' (Red Book 1965, pp. 553–4).

It seems likely that Spain's reluctance to engage in an adjudicative process, and its description of the 'problem' of Gibraltar as 'political' rather than legal, is due to the fact that it realises its sovereignty claim over Gibraltar is weak. In particular, it is difficult for Spain to circumvent the strong language used in paragraph 1 of Article X of the Treaty of Utrecht 1713, pursuant to which Gibraltar is ceded to the British Crown 'absolutely', 'forever', and 'without any exception or impediment whatsoever'. Spain may be able to construct arguments to chip away at the edges of British sovereignty; for instance, it argues that the UK has never properly acquired sovereignty over the isthmus connecting Gibraltar to the Spanish mainland (where Gibraltar's airport is situated), and that the waters around Gibraltar remain Spanish because they were not explicitly ceded in



Utrecht (for an analysis of the latter argument, see Trinidad, 2016). However, the core of the British position on territorial sovereignty is unassailable.

Against this backdrop, emotive Spanish arguments about the inherent unworthiness of the Gibraltarians as putative holders of the right to self-determination fulfil a dual role. Firstly, they serve as a smokescreen, deployed to occlude the underlying weaknesses of the Spanish position on territorial sovereignty. Secondly, they are part of a concerted attempt, from the 1960s onwards, to open up a new front in the dispute over Gibraltar within the UN General Assembly, where a growing number of newly independent states, whose peoples had lived through the horrors of colonial rule, could be relied upon to support positions contrary to British interests.

With the exception of a few years during the 1960s, the Spanish policy has not enjoyed significant success at the UN; it is now over fifty years since Spain last obtained a General Assembly resolution on Gibraltar favourable to its interests. However, in hindsight it was astute of Spain to avoid a showdown at the International Court of Justice. By nudging the political debate away from territorial sovereignty, and towards a human narrative that portrays the Gibraltarians as beneficiaries – indeed, instruments – of British colonialism, Spain has been able to maintain significant (though not decisive) multilateral support for its irredentist claim within the UN.

## Conclusion

Much more is known today about the Gibraltarians than was known in the 1960s, when the Spanish arguments for contesting Gibraltarian peoplehood were taking shape in the Committees of the UN General Assembly. Several fine works of social and cultural history have since documented the evolution of Gibraltarian society under British rule (see for example, Constantine 2009; Howes, 1991; Stockey & Grocott, 2012). The argument that the Gibraltarians are an illegitimate population with no roots in the territory is difficult to sustain today, and it has steadily faded from official Spanish discourse.

While formally the Spanish position has not changed, the language that officials employ when discussing the Gibraltarians has been toned down significantly. Spanish diplomats continue to refer to the ‘settlers imposed by an occupying Power to the detriment of the original inhabitants’ (UN Committee of 24, Working Paper on Gibraltar, UN Doc A/AC/109/2013/15, 15 March 2013, para 39), and they continue to rely on the 1960s UN General Assembly resolutions on Gibraltar, ‘which make no reference to the supposed right to self-determination of the people of Gibraltar’ (UN Committee of 24, Working Paper on Gibraltar, UN Doc A/AC/109/2019/8, 21 March 2019, para 59). However, they no longer invoke the type of dehumanising rhetoric that had been a feature of the Franco government’s advocacy in favour of those 1960s resolutions. Indeed, when addressing the challenges posed by Gibraltar’s exit from the European Union, Spain’s current socialist government has evinced concern for the protection of ‘the rights of all workers’, on both sides of the border (*ibid*, para 60).

There are further reasons to believe that Spanish policy may be shifting behind the scenes. For instance, a former legal advisor to the Spanish government, Luis Pérez-Prat, acknowledged in 2013 that the Gibraltarians have inhabited the territory for longer than the USA has existed, and admitted that the Spanish government realises privately that it will not be able to recover Gibraltar against the wishes of the population (*Europa Sur*, 3 May 2013).

A small sign of these shifting attitudes is a recent change in the standard wording of the Consensus Decision that the UK and Spain agree annually at the UN. The Consensus Decision used to refer to the need to ‘bear in mind the interests’ of the Gibraltarians, but more recent iterations of the Decision require the parties to ‘listen[...] to the interests and aspirations of Gibraltar that are legitimate under international law’ (see GA Decision 68/523, 11 December 2013, and subsequent Decisions).

Of course, the new formula begs the question: to what may the Gibraltarians legitimately aspire under international law? The answer, returning to the analysis of Rosalyn Higgins, depends on where sovereignty lies. Assuming it lies with the UK, the Gibraltarians may legitimately aspire to determine the external political status of Gibraltar in accordance with the right to self-determination of peoples. That aspiration may be defeated if Spain is somehow able to show – notwithstanding the unequivocal cession in the Treaty of Utrecht – that it is the rightful territorial sovereign in Gibraltar. However, the right to self-determination cannot be displaced by arguments based on the purported sociological characteristics of the Gibraltarian population.

## Disclosure statement

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