The Malvinas/Falkland Islands dispute

A fundamental disagreement

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Introduction

One thing is certain about the Malvinas/Falkland Islands: they are contested; and that is the only uncontroverted fact that every person familiar with the topic, regardless of citizenship or scholarly preferences, will concur.

In order to avoid troubled waters, it can be stated that the aforementioned disagreement involves two parties, namely the United Kingdom and Argentina. Including the inhabitants of the islands as a party in the debate would mean taking a stance in one of the most controversial aspects of the present work, which at this stage might be premature. Therefore, the bilateral approach will serve as a starting point, but it must be acknowledged that this understanding is merely temporary and will be opportunely put into question.

Another important matter that should be clarified earlier rather than later is that, any reference made in this work to the Malvinas/Falkland Islands discord, will be limited to the Isla Gran Malvina/West Falkland and the Isla Soledad/East Falkland. This restriction does not entail any implication in terms of the sovereignty arguments that also affect the other islands and territories situated in the South Atlantic Ocean[1]; the underlying reason is merely pragmatic: the self-determination argument offered by the United Kingdom is restricted to the Malvinas/Falkland Islands.

Basically, the divergence comprises two different controversies: the first one about sovereignty; the second one about self-determination. As if these were not enough, there is also disagreement in the way in which the two grounds of discordance

[1] Georgias del Sur/South Georgia and Sandwich del Sur/South Sandwich, along with their respective insular territories and maritime zones and Tierra de San Martín/Graham Land. See Provisional Clause I of the Constitution of the Argentine Nation.

interact. Are they independent or contingent on each other? Are they mutually exclusive? Is there any pre-eminence between them? If the latter were the case, then the superseding one should be solved in the first place. But if no precedence could be established, which order should be followed while addressing the topics?

Needless to say that these numerous concerns, apart from posing complex questions, are mingled in such a way that dealing improperly with one of them could lead to results of no avail.

This very aspect -the interplay between the sovereignty and the self-determination issues- will be tackled from a twofold perspective: a legal approach and a functional approach. In addition, it must be stated that the analysis will exceed the legal arguments offered by the parties involved. Instead, it will focus on the foundations, on the grounds over which a sincere negotiation should be built upon.

Despite the fact that the legal approach will put special emphasis on the stance adopted by an array of international organizations, this slant does not bring about the disregard of the parties´ arguments; it only entails an attempt to pursue some objectivity.

In the same vein, the functional approach will stress on the practical implications of dealing with the intricate situation described; and hopefully it will enable to formulate hypothetical outcomes according to the stances adopted towards the sovereignty - self-determination dichotomy.

Finally, based on the analytical context developed throughout the work, the current situation will be enquired into and the legal and practical consequences of the

ongoing unsettlement will be exposed. In this sense, the legal footing of the extant deadlock will be analysed and different proposals will be raised in order to break the inertia that has been eschewing any serious negotiation on the topic for too many years now.

1. Can the present state of affairs be qualified as a dispute?

a) Framing the case

Is it serious, in academic terms, to uphold that a situation, whose controverted facts might be traced as far as five centuries ago, still constitutes an ongoing dispute? What is the impact of the attitude adopted by the parties involved towards it? Does the international community have any role to play? Is the mere elapse of so many years, without any noteworthy progress, a fossilizing factor?

To be fair, it must be admitted that an absolute stalemate as the one that has characterized the Malvinas/Falkland Islands controversy for at least 37 years now might suggest that any argument in favor of the actual existence of a dispute is built on sand. But, is this assumption neutral? Is it legally well grounded? Does it, at least, constitute a means to achieve a fair solution?

A sound starting point to address some of the questions raised in the previous paragraphs would be to define what is a dispute according to International Law. Pursuant to the Permanent Court of International Justice -P.C.I.J.-, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[2] Building on this rather basic and broad definition, the International Court of Justice -I.C.J.- stated that "[w]hether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence";[3] a key element in the Malvinas/Falkland Islands case given the

[2] The Mavrommatis Palestine concessions, Collection of Judgments, Series A - N°2, Judgment of 30 August 1924. Page 11.

[3] Interpretation of peace treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950. Page 74.

disparate approach the parties involved have adopted towards the existence of the dispute itself.

On the other hand, it is also true that "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."[4] In this sense, the I.C.J. concluded that opposing views towards the interpretation and application of a treaty "reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor,"[5] showing that the disagreement between the parties involved only needs to reach a relatively low threshold in order to embody a dispute; a requisite easily met in the Malvinas/Falkland Islands affair.

So far, the perception of the parties could be enough to technically qualify a dissent among them as a dispute. But the opinion of an impartial body as the Secretariat of the United Nations, whose Secretary-General and staff "shall not seek or receive instructions from any government or from any other authority external to the Organization" and "shall refrain from any action which might reflect on their position as international officials responsible only to the Organization",[6] might provide a valuable resource as well. The mere statement included in the Editorial Directive issued by the

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[4] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962. Page 328.

[5] Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963. Page 27.

[6] Charter of the United Nations, Article 100.

Secretariat on 3 August 1999,[7] according to which "the name to be applied to the Territory of the Falkland Islands (Malvinas) in all United Nations documents is the following: (a) In English, ´Falkland Islands (Malvinas)´; (b) In Spanish, ´Islas Malvinas (Falkland Islands)´" speaks for itself.

More recently, the Commission on the Limits of the Continental Shelf approved the submission made by Argentina on 21 April 2009, explicitly referring in its Paragraphs 5, 11 and 19 to the underlying dispute between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland.[8]

To sum up, it would be barely arguable, if not impossible, to adopt the standpoint that the whole situation surrounding the Malvinas/Falkland Islands might be qualified as something else than an international dispute; but this is only the first of the many queries that need to be dealt with throughout this work.

b) What is the dispute about and who are the parties involved?

Whenever there is a dispute, the first logical step to be adopted is to determine the parties whose confronting arguments constitute the fundamental disagreement. But, although this is a well-reasoned beginning for most of the cases, there are some specific circumstances in which such an approach might undermine the analysis from its very inception, and therefore lead to equivocal -if not deceptive- results. The case concerning the Malvinas/Falkland Islands is one of these rare exceptions in which it is

[7] Editorial Directive prepared by the United Nations Secretariat on 3 August 1999. UN Document ST/CS/SER.A/42.

[8] See Summary of recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Argentina on 21 April 2009. Approved by the Subcommission on 21 August 2015 and by the Commission, with amendments, on 11 March 2016.

necessary to determine precisely what is at stake in order to be able to determine who are the parties involved in the discord.

In short, it can be said that the variance is so deep that the parties are stuck in an inherently distorted and stagnant dissension: both sides are showing a paramount deafness that only allows them to uphold their arguments, without even being able to controvert the other´s. The reasons that explain such a state of affairs will be dealt with throughout this work, but at this early instance, it is enough to point out that there are two parallel -though very much connected- discussions taking place.

On the one hand, Argentina contends that the first thing to be determined is whether International Law grants it a sovereign right over the territory of the Malvinas/Falkland Islands or not. This explains why its main arguments are built on classic International Law concepts such as sovereignty, acquisition of territory, succession of States, etc.

On the opposite side, the United Kingdom understands that the key factor to be resolved is the colonial situation that characterizes the islands as a consequence of their inclusion in the list of Non-Self-Governing Territories under the terms of Chapter XI of the Charter of the United Nations, suggesting that this controversy overrides the sovereignty one.

On that account, it becomes evident that there is not just one single dispute involving the Malvinas/Falkland Islands; several claims and counterclaims overlap. But how can this disagreement, which takes place in two different frameworks, be addressed? The basic answer that should be sought for is how do these two divergences

relate to each other, and this is the meta-discussion that I intend to tackle. These dissimilar approaches can be hardly defined as independent, as there is no possible way to take a standpoint in either of them without having a determining impact on the other. The decisive point is, therefore, to establish which of the two variables will be the principal one, acting independently; and which one will be subordinated, reacting in a dependent manner.

Basically, the Argentine position is built upon the understanding that the territorial dispute should prevail, that it is pointless to discuss the rights of the inhabitants of the islands as long as there is no decision regarding sovereignty. On the contrary, the United Kingdom insists that the right to self-determination to which the people living in the islands are entitled supersedes any territorial claim that might be pleaded by Argentina.

Does International Law provide a solution for this situation? Which rules should be taken into account in order to solve such a morass? Should the decision adopted in this regard make allowances for the possible consequences that it might entail?

Before moving on, there is an elemental aspect that permeates the entire dispute and that needs to be coped with; and that is who are the parties involved in it.

There are, at least, three actors that have clear interests at issue: the Argentine Republic, the United Kingdom of Great Britain and Northern Ireland and the inhabitants of the Malvinas/Falkland Islands. It is easy to perceive, so far, that these actors have contrasting views as to which are the foundations of the dispute; and it would be hard to determine *ab initio* who are the parties entitled to a saying in the meta-discussion.

Hopefully, by the end of this work there will be some more certainties regarding this aspect.

If the territorial dispute were to precede the self-determination one, then the consequence would be that any solution agreed upon should be adopted bilaterally between Argentina and the United Kingdom.[9] Conversely, if the self-determination or minority rights issue[10] were to prevail, then in both cases the inhabitants of the Malvinas/Falkland Islands would become a key player, having as a counterpart the United Kingdom -former case- or Argentina -latter case-.

The only inference that can be stated so far regarding the parties, and I believe it is as important as well-built, is that despite what the conclusion might be in terms of the meta-discussion, the dispute will always be bilateral. Allowing the inhabitants of the islands to have a voice in the dispute between Argentina and the United Kingdom concerning the sovereignty over the islands would be as disruptive to the negotiation as opposed to International Law. In a similar way, Argentina would have nothing to say if the case were dealt with as a quintessential and clearcut decolonization one, governed by Chapter XI of the Charter of the United Nations. Needless to say that the United Kingdom would have no *locus standi* in a situation involving minority rights within the Argentine sovereign territory.

To sum up, under the canons of International Law, the dispute regarding the Malvinas/Falkland Islands can never be understood as a trilateral one; a fact that brings significant clarity to any potential negotiation context.

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[9] This conclusion might be arrived to just in principle. Later on, it will become evident that this is only one among several possibilities.

[10] I am anticipating here a conclusion that I develop later in this work.

c) The basic arguments of the parties

Initially, the main contention between Argentina and the United Kingdom concerning the Malvinas/Falkland Islands was about discovery; and the disagreement on this point was twofold, as it comprised both legal and factual issues.

Regarding the legal aspect, the parties dissented on what constitutes a legally relevant discovery, that is to say, what distinguishes the mere discovery of land with no legal implications from the one that allows the discovering State to claim sovereignty over that territory. This is a purely jural argument, abstract, and should be solved in consonance with the doctrine of intertemporal law, according to which "[t]he same principle which subjets 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."[11] This is the reason why "[t]he rule that the effect of an act is to be determined by the law of the time when it was done, not of the law of the time when the claim is made, is elementary and important. It is merely an aspect of the rule against retroactive laws, and to that extent may be regarded as a general principle of law. It is especially important in international law because of the length of the life of states. It is particularly apt to questions of title".[12]

Besides, there is also disagreement in terms of how the events actually took place. A tentative sequence of the developments would include "Amerigo Vespucci in

[11] Island of Palmas case (Netherlands v. United States), Award delivered by Max Huber on 4 April 1928. Available at http://legal.un.org/riaa/cases/vol_II/829-871.pdf.

[12] Jennings, Robert Y.; The acquisition of territory in International Law, Manchester University Press, United Kingdom, 1963. Page 28.

1501, who was in the service of the King of Portugal; Esteban Gomez, who was a member of the Magellan expedition of 1519-1520 in the service of the King of Spain; Captain Pedro de Vera, who was in charge of one of the ships of the Garcia de Loayza expedition in 1525 also in the service of Spain; Alonso de Camargo in 1540 in the service of the Bishop of Plasencia; John Davis in 1592, a member and alleged deserter of Thomas Cavendish´s second expedition to the South Atlantic; and Richard Hawkins in 1594 in the service of Queen Elizabeth I of England. There is a general consensus, however, that the landfall struck by the Dutch navigator, Sebald de Weert at 50° 41' south latitude on January 24, 1600 on his return to Holland after a frustrated attempt to traverse the Magellan Strait was one of the islands of the group."[13]

The accuracy of the list and the legal implications of each of the events referred to there constituted the crux of the dispute for centuries; and depending on the conclusions to which I will arrive later, there is a chance that this might still be where the nub of the problem currently lies.

But, in order to avoid diverting away from my main aim, I must say that both the specific legal and factual controversies surrounding the discovery of the Malvinas/Falkland Islands are irrelevant for the purpose of this work: my main concern is the meta-discussion, the one deciding whether these legal and factual arguments should be considered at all.

The uncontroverted part of the narrative is that by the early 1830´s, the Argentine Republic was in possession of the Malvinas/Falkland Islands, and there was a

[13] Hope, Adrián F.J.; Sovereignty and decolonization of the Malvinas (Falkland) Islands, Boston College International and Comparative Law Review, vol. 6, issue 2, 1983. Pages 400-01.

settlement of Argentine citizens living there under the rule of authorities appointed by the Argentine Government.

Another uncontested set of facts is that "[i]n late December and early January [1831 and 1832, respectively], a U.S. Navy officer led an incursion against the Argentine settlement in the Falkland/Malvinas Islands and took the Argentine authorities away as prisoners. The following year, in January [1833], the British Navy ousted the new Argentine authorities from the Islands and claimed the archipelago for the British crown."[14]

It is at this point that the postures seem to become irreconcilable, and both the Argentine and the British interpretations of the facts -and the consequent rights arising from them- differ radically.

According to the Argentine perspective, "the British physical occupation of the Malvinas or Falkland Islands in 1833 could not be considered a legal occupation because [...] the Islands were definitely subject at the time to Argentine sovereignty based on occupation and settlement both by Spain up until 1811 and by Argentina itself after 1820."[15] In addition, it is said that "[o]n the British side, on September 26th, 1765, Commander J. McBride received orders to build a fort ´in Port Egmont in the Falkland Island.´ [...] Contrary to the French occupation, and later to Argentina´s taking of

[14] Maish, Christian J.; The Falkland/Malvinas Islands Clash of 1831-32: U.S.and British Diplomacy in the South Atlantic, Diplomatic History, vol. 24, N° 2, Spring 2000. Page 185.

Although according to the Ruda Allegation (Alegato Ruda, 9 September 1964) -page 28- the American sloop USS Lexington destroyed the Argentine settlement and "perpetrated other predations" on 31 May 1831, while the British corvette Clio arrived to the islands and demanded the withdrawal of the Argentine detachment and the departure of the boat Sarandí on 3 January 1833; the discrepancy in certain dates does not alter the essence of the actions.

[15] Hope, Adrián F.J.; *op. cit.* Page 425.

possession in 1820, no public announcement was given of Britain´s settlement at Port Egmont. This point, and the absence of British protest, show that the British government maintained a clandestine occupation of a place in the Falklands/Malvinas, in the knowledge that its settlement was in violation of the treaties concluded with Spain, and that France had been the first to occupy the islands."[16]

There is one particularly interesting aspect in this whole situation: "the concept that acquisition of the Islands was effected by conquest has not been advanced by Great Britain. Furthermore, it should be observed that it is difficult to see how this argument could be put forward without actually conceding that the occupation of 1833 was an act of pure force."[17] This understanding is implicit in Lord Palmerston´s reply of 8 January 1834 to the Argentine protest against the 1833 incident, where it was stated in clear terms that the British rights were founded on the original discovery and the subsequent occupation of the islands.[18]

Despite the currency of the Argentine approach, in the sense that "[a]t the heart of the Argentine position is the claim that its *present-day* territorial integrity is at stake in the decolonization of the Falkland/Malvinas Islands, because the title claim by Britain

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[16] Kohen, Marcelo G. & Rodríguez, Facundo D.; The Malvinas/Falklands between history and law, 2017. Chapter 2. Available at http://www.malvinas-falklands.net/book/.

When referring to Port Egmont´s settlement, the Ruda Allegation affirms that the British "abandoned it voluntarily in 1774, and only returned 59 years later to violently expel the Argentine population." Translation of my own. See Ruda Allegation. Page 16.

[17] Hope, Adrián F.J.; *op. cit.* Page 425.

[18] See Ruda Allegation. Page 30. The same exact arguments were offered by the British consul and chargé d'affaires in Buenos Aires, Woodbine Parish, in his note dated 19 November 1829. Also see Maish, Christian J.; *op. cit.* Page 192.

is defective";[19] it must be highlighted that its arguments remained unaltered since the very beginning, a fact that some interpret as evidence of the consistency of its position.

Contrarily, the same cannot be said about the United Kingdom: "[s]ince the early twentieth century the British legal position has moved away from earlier assertions that the taking of the islands in 1833 was a ´mere reassertion of right´ arising from discovery and/or earlier occupation. In 1936, the British Foreign Secretary, Eden, decided that the British emphasis ought to shift from pre-1833 to post-1833 criteria."[20] And, on top of that, after the adoption of the Charter of the United Nations the arguments changed once again, as it will be evidenced later in this work.[21]

d) Some provisional inferences

Before concluding this first chapter, it might be useful to call attention to some of the most relevant points addressed, as the analysis in the forthcoming sections will be based upon them.

First of all, the fundamental disagreement both in fact and law between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland concerning the Malvinas/Falkland Islands allow me to conclude that there is an international dispute, regardless the perception of the parties on this aspect.

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[19] Trinidad, Jaime; Self-Determination in disputed colonial territories, Cambridge University Press, United Kingdom, 2018. Page 139.

[20] *Ibid.* Page 140.

[21] "It is a common feature of the cases reviewed above [one of which is the Malvinas/Falkland Islands dispute] that the respective Administering Powers at first opposed any claim contesting their sovereignty over a Non-Self-Governing Territory, and argued on the basis of the validity of the title they had to the territory in dispute. Afterwards, since the claimant states argued their cases on the basis of self-determination, the Administering Powers counter-attacked on the same grounds". See Rigo Sureda, Andrés; The evolution of the right of self-determination. A study of United Nations practice, Sijthoff, Netherlands, 1973. Page 81.

Moving along, a somehow more complex step would be to determine what the dispute is about; and here is where diverging perspectives start to play their role. As mentioned before, Argentina bases its argument on its sovereign right to the territory of the islands; while the United Kingdom abandoned that argument -which it initially embraced- to adopt a new one built on the right to self-determination of its inhabitants.

In order to be able to deal with this issue in an impartial way, the only course of action possible is to avoid focusing on the arguments of the parties, therefore seeking for a more objective source. For this purpose, I will have recourse to the United Nations General Assembly -U.N.G.A.-, not only because it is the broadest forum where international issues are debated, but also because the organization itself -of which it constitutes the most pluralistic organ- is founded upon all of the core values at stake.[22]

There are numerous references made by the U.N.G.A. to the Malvinas/Falklands dispute; and quoting just a couple of these will be more than enough to show what is the position of this principal organ of the United Nations. Through its Resolution 2065 (XX), the U.N.G.A. noted "the existence of a dispute between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the said [Malvinas/Falkland] Islands,"[23] making once again an explicit mention of the "dispute over sovereignty"[24] in its Resolution 31/49.

In addition to the U.N.G.A.´s understanding, the 1999 Editorial Directive issued by the United Nations Secretariat previously quoted leaves no space for doubts. In its

[22] See Charter of the United Nations, especially Chapter I for the purposes and principles of the organization, and Chapter IV for the composition, characteristics, functions, powers and procedures of the General Assembly.
[23] See the last paragraph of the considerations.
[24] See Paragraph 3.

Paragraph 4, it established that any reference to the Malvinas/Falkland Islands should be accompanied by a disclaimer adopted in 1997,[25] or by a footnote containing the following text: "A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland **concerning sovereignty** over the Falkland Islands (Malvinas)."[26]

Being able to establish that there is actually a dispute, and that the main controversy is about sovereignty, constitutes by itself a significant improvement. Which are the steps that should follow, according to International Law, will be the main concern of the next chapter.

[25] See Administrative Instruction issued by the United Nations Assistant Secretary-General for Public Information on 20 January 1997. UN Document ST/AI/189/Add.25/Rev.1.
[26] Emphasis added.

2. How should an international dispute be dealt with?

a) An overview

Among the purposes of the United Nations, the one whose aim is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" plays a paramount role. The sheer fact of its inclusion as the first paragraph of Article 1 of the Charter of the United Nations -a treaty regarded as the tenet of the current international system- leaves no space for controversies.

According to the terms of Article 33, Paragraph 1 of the aforementioned Charter, "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Though it would be hard to currently affirm that the dispute related to the sovereignty over the Malvinas/Falkland Islands might endanger the maintenance of international peace and security; one must never forget that this "smoldering and intermittently dormant dispute among neighboring states suddenly bursting into the flame of violent conflict"[27] was the cause -at least allegedly- that brought Argentina and the United Kingdom to war in 1982.[28] Should the international community wait until

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[27] Kratochwil, Friedrich, *et al*; Peace and disputed sovereignty. Reflections on conflict over territory, University Press of America, United States, 1985. Page vii.

[28] "The cases of Gibraltar, the Falkland Islands and the Western Sahara are exceptions in that they are still able to create considerable political tensions between states." See Hillebrink, Steven; The right to self-determination and post-colonial governance. The case of the Netherlands Antilles and Aruba, TMC Asser Press, Netherlands, 2008. Page 265.

peace and security are actually imperilled? Is it too naïve to think that unresolved disputes should be dealt with through peaceful means in order to prevent escalations?

Another important factor that cannot be disregarded is that the claim for the Malvinas/Falkland Islands is maybe the only conviction that brings together the whole Argentine political spectrum; therefore constituting one of the few -if not the single- State policy that has been continued since the nineteenth century. Can the international community afford to wait until this breeding ground is capitalized, as it has already happened, by unscrupulous demagogues?

Fully aware that, though well-intended, an answer to this conundrum faces the risk of being too optimistic and, in consequence, unrealistic; I will try to elucidate which should be the position of the parties to this dispute if deference is to be paid to International Law.

b) Is there an obligation to negotiate?

"Although there is no international ´government,´ there is an international ´society´; law includes the structure of that society, its institutions, forms, and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations."[29] As stated before, the pacific settlement of disputes pervades the whole international system -"society" in Henkin´s terms- and the strongest evidence in favor of this idea is not only the broad reference made to it in Chapter I -Purposes and

[29] Henkin, Louis; How nations behave. Law and Foreign Policy, Columbia University Press, United States, 1979. Page 14.

Principles- of the Charter of the United Nations, but the inclusion of an entire chapter specifically devoted to this topic.[30]

The current impasse in the situation is not illustrative of the history of the controversy. Indeed, the efforts made by both parties in order to put an end to the disagreement were several and diverse: "[i]nitiatives to resolve the dispute (or aspects of it) through third party adjudication have come to nothing. In 1884, Britain refused a request from Argentina that the dispute be submitted to arbitration. In 1947, Argentina rejected a proposal by Britain to submit the dispute over the Falkland Dependencies (but not the Falklands themselves) to the ICJ. In 1955 Britain made an application to the ICJ contesting Argentine and Chilean sovereignty over territory in the Arctic, which included South Georgia and the Sandwich Islands. The application was rejected by Argentina and Chile, neither being subject to compulsory jurisdiction. Argentina´s refusal was based *inter alia* on the argument that the British application said nothing about the ´fundamental sovereignty problem´. When hostilities broke out in 1982, the US raised the possibility of submitting the sovereignty dispute to the ICJ, but neither party showed an interest in pursuing this option."[31]

After the armed conflict took place in 1982, the negotiations between the parties have never been the same. Indeed, "[w]hereas the armed conflict was resolved in a little over two months, the diplomatic breach took a little under eight years to be

[30] See Chapter VI of the Charter.

[31] Trinidad, Jaime; *op. cit.* Page 141. Regarding the 1955 I.C.J. precedent, see Hope, Adrián F.J.; *op. cit.* Page 396. Also see paragraphs 2, 3, 24.2 and 35 -among others- of the Antarctica cases (United Kingdom v. Argentina; United Kingdom v. Chile), Orders of 16 March 1956, where no reference is made to the Malvinas/Falkland Islands, but only to its alleged dependencies.

repaired."[32] It was only in February 1990, after a series of negotiations held between Argentina and the United Kingdom that culminated in the Madrid Joint Statement, that full diplomatic relations were re-established.[33]

Even though the relaunching of the bilateral relations brought about many agreements between the parties, addressing particular areas regarding the Malvinas/Falkland Islands, the discussions have been ever since seriously restricted, as they have been invariably held under the "umbrella of sovereignty".[34]

In this regard, there was an explicit decision "to exclude the issue of sovereignty from the discussions by placing it under suspension in a manner similar to that used in the Antarctic Treaty. The following formula was agreed at the outset: 1. Nothing in the conduct or content of the present meeting or of any similar subsequent meeting shall be interpreted as (a) a change in the position of the United Kingdom with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas, (b) a change in the position of the Argentine Republic with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas, (c) recognition of or support for the position of the United Kingdom or the Argentine Republic with regard to sovereignty

[32] Evans, Malcolm; The restoration of diplomatic relations between Argentina and the United Kingdom, The International and Comparative Law Quarterly, vol. 40, N° 2, April 1991. Page 474.
[33] *Ibid.* Page 478.
[34] The underlying idea is that "*Ad hoc* arrangements -bilateral and certainly multilateral- may be concluded with the unrecognized State or government or in respect of territory claimed by virtue of an unrecognized title - without it being necessary (or permissible) to strain such conduct into implied recognition." See Lauterpacht, Hersch; Recognition in International Law, Cambridge University Press, United Kingdom, 1947.

or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas. 2. No act or activity carried out by the United Kingdom, the Argentine Republic or third parties as a consequence and in implementation of anything agreed to in the present meeting or in any similar subsequent meetings shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or the Argentine Republic regarding the sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas."[35] The mere adoption of such a clause -and its repetition throughout the years- is interpreted by many as an implicit acknowledgment that the controversy is about sovereignty; though this sheer fact does not advance the position of any of the parties regarding the merits of the dispute. From my point of view, the clause should be thought of simply as a means towards an end, as a political strategy intended to break a stagnant situation.

Considering the several agreements reached by the parties since 1990, the "umbrella of sovereignty" proved to be a successful formula. Nevertheless, it cannot be regarded as anything else than a transitory solution. The rationale underlying the whole idea is to build confidence amongst the parties; and the natural consequence of all this process is to be able to discuss in serious terms the main issue at stake: sovereignty. If almost three decades of confidence-building were not enough to bring the parties back to the negotiation table; is it serious to expect the parties to sustain these efforts?

[35] Evans, Malcom; *op. cit.* Pages 476-77.

Indeed, a legitimate question to be asked is who is taking advantage of the current *status quo*. Are both parties equally incentivized to negotiate?

It is certainly true that "states are not obliged to resolve their differences at all, and this applies in the case of serious legal conflicts as well as peripheral political disagreements."[36] In addition, the I.C.J. has stated that "[i]n international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate."[37]

"From 1965, the United Nations had regarded British control of the Falkland Islands as an example of colonialism and noted the existence of the sovereignty dispute between Britain and Argentina. The two States were invited to negotiate";[38] but the results were at best meager.

Through its Resolution 2065 (XX), the U.N.G.A. invited the parties "to proceed without delay with the negotiations recommended by the Special Committee".[39] By 1973, the U.N.G.A. could only express its concern "at the fact that eight years have elapsed since the adoption of resolution 2065 (XX) without any substantial progress having been made in the negotiations," as well as "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

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[36] Shaw, Malcolm N.; International Law, Cambridge University Press, United Kingdom, 2014. Page 733.
[37] Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile), Judgment of 1 October 2018. Paragraph 91.
[38] Evans, Malcom; *op. cit.* Page 474.
[39] See Paragraph 1.

well-being of the population of the islands".[40] Even more years would go by, and the U.N.G.A. would keep on insisting on its request to the parties "to expedite the negotiations concerning the dispute over sovereignty".[41]

"This call was repeated in substantially identical terms in 1983 and 1984. In all these Resolutions, the question of sovereignty appeared as the central issue upon which the solution to the dispute hung. In addition, they all referred back to Resolution 2065 with its reference to decolonisation. A marked change took place in 1985 with the adoption of Resolution 40/21, which did not refer to any previous Resolutions but requested the governments ´to initiate negotiations with a view to finding the means to resolve peacefully and definitively the pending problems between both countries, including all aspects on the future of the Falkland Islands (Malvinas), in accordance with the Charter of the United Nations´."[42] As a consequence, many started arguing that "[a]fter the war, the General Assembly resolutions continued to call for negotiations but were less supportive of Argentina and were marked by a high number of abstentions";[43] understanding that the avoidance of any reference to "sovereignty" somehow undermined the Argentine position. If this were true, it should also be taken into account that in its Resolution 40/21, the U.N.G.A. did not allude to "self-determination" -neither to "decolonization"-; a fact that should be interpreted, following the same rationale, as eroding the British claim. It is apparent that, regardless the years and

[40] See preliminary part of U.N.G.A. Resolution 3160 (XXVIII).
[41] U.N.G.A. Resolution 31/49. Paragraph 3.
[42] Evans, Malcom; *op. cit.* Page 475.
[43] Trinidad, Jaime; *op. cit.* Page 145.

despite the war, the international community never stopped inviting the parties to negotiate.[44]

"While resolutions of the General Assembly may not be legally binding *per se*, it is widely contended that they play an important role in shaping international law, especially when they are adopted with the support of an overwhelming majority of States. At least, it is fair to argue, as Higgins does, that the resolutions of the General Assembly as a whole provide ´a rich source of evidence about the development of customary international law´."[45] It would be difficult to argue that the call consistently made by the U.N.G.A. for over half a century now is binding by itself on the parties, as well as it might be troublesome to prove the existence of a bilateral rule of customary law compelling Argentina and the United Kingdom to negotiate, limiting their freedom "to resort to negotiations or put an end to them".[46] Nevertheless, it is beyond doubt that the consistent position adopted by the international community throughout so many years, as reflected in the several U.N.G.A. Resolutions adopted, has not only political implications, but also legal ones.

In addition to the global system, represented mainly by the U.N.G.A., the claim has also been part of the hemispheric debate. For example, the General Assembly of the Organization of American States has reaffirmed "the need for the Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume, as soon as possible, negotiations on the sovereignty dispute, in order to find a

[44] As previously shown, during the 1990´s the United Nations resumed its clear and explicit reference to the dispute over the Malvinas/Falkland Islands as one about sovereignty.
[45] Trinidad, Jaime; *op. cit.* Page 9.
[46] Obligation to negotiate access to the Pacific Ocean. Paragraph 86.

peaceful solution to this protracted controversy" while welcoming "the will of the Argentine Government to continue exploring all possible avenues towards a peaceful settlement of the dispute and its constructive approach towards the inhabitants of the Malvinas Islands."[47]

In an even more specific regional level, the Presidents of the States Parties of MERCOSUR -plus their Bolivian and Chilean[48] counterparts- have adopted in 1996 the Potrero de Funes Declaration, through which they stressed on the "hemispheric interest" in the "protracted dispute over the sovereignty";[49] a claim that has been reiterated every year since then.

Still, I am convinced that the denial of the very dispute itself and the absolute reluctance to negotiate undermine the strength of the British arguments. How long can this immutable position be tolerated? What is the impact of such an attitude on the rest of the international community, when it becomes evident that one member can demand others to comply with standards that it is not willing to respect itself?

c) What should be expected from a negotiating process?

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[47] See the declaration on "the question of the Malvinas Islands", adopted at the Second Plenary Session of the General Assembly of the Organization of American States, held on 4 June 2018. AG/DEC. 96 (XLVIII-O/18).

[48] The adhesion of Chile to this declaration is of particular relevance given the stance it adopted during the 1982 war. This fact reflects the level of maturity achieved in the last decades, in which the shared interests of the region have superseded the bilateral rivalries of the countries comprising it.

[49] "Los Presidentes de los Estados Partes del MERCOSUR y los Presidentes de la República de Bolivia y de la República de Chile, reafirman su **respaldo a los legítimos derechos de la República Argentina en la disputa de soberanía referida a la cuestión de las Islas Malvinas**. Asimismo, recuerdan el interés hemisférico en que la prolongada disputa de soberanía entre la República Argentina y el Reino Unido de Gran Bretaña e Irlanda del Norte sobre dichos territorios, alcance una pronta solución de conformidad con las resoluciones de las Naciones Unidas y de la Organización de los Estados Americanos. Hecha, el 25 de junio de 1996 en la localidad de Potrero de los Funes, Provincia de San Luis, República Argentina." Emphasis added.

To start with, it must be made clear that a negotiation by itself has no impact on any of the parties´ position. In other words, accepting to negotiate a dispute does not prejudge on the legitimacy nor the legality of the conflicting arguments. In a best case scenario, it might bring the dispute to an end, but this desired outcome is the consequence of a settlement agreed upon, and it does not embody the predominance of one single argument over the rest.

Though decidedly in favor of a negotiated solution, I have to be commonsensical in what should be expected from such a process; and the first reality check is provided by the decades-long deadlock unilaterally imposed by the United Kingdom. Still, this posture is not the most daunting one, as it is essentially political and not legal. That mere fact, alone, is the main takeaway of this section; and I would consider myself satisfied if this point is advanced coherently.

The most challenging -if not disencouraging- aspect of a prospective negotiation process has a legal basis, and it constitutes an inescapable limitation: the obligation to negotiate does not amount to an obligation to reach an agreement.[50] This disconnection between the means and the ends, between the process and its result -irrespective of its fairness-, is inherent to International Law; and therefore, though particularly dislikable when it leads to negotiations exclusively held *pour la galerie*, this reality must be accepted for the sake of legality and consistency.

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[50] See the Case concerning pulp mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010. Paragraph 150. Here, the International Court of Justice reproduces the idea put forward by the Permanent Court of International Justice in the Railway Traffic between Lithuania and Poland, Collection of Judgments, Series A/B, N° - 42, Advisory Opinion of 15 October 1931. Page 116; where the latter stated that an engagement "is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements."

Despite the fact that, under International Law, States are required to pursue their negotiations in good faith[51] "with a view to arriving at an agreement, and not merely to go through a formal process",[52] and are even urged to "conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;"[53] the truth is that the whole obligation is focused on the means, and not on the results.

In this regard, "the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short;"[54] but still, at some time the process must at least begin.

After almost forty years of a complete lack of negotiations, the biggest challenge faced by the parties is "to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other [...], and having regard to the interests of other States [...]. It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law."[55]

Considering that the legal requirements to start negotiations are negligible, that the plea made by the international community has proved to be as clear as inefficient,

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[51] Obligation to negotiate access to the Pacific Ocean. Paragraph 86.

[52] North Sea continental shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969. Paragraph 85. In the same sense, see Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011. Paragraph 132.

[53] *Ibid.*

[54] The Mavrommatis Palestine concessions. Page 13.

[55] Fisheries jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits judgment of 25 July 1974. Paragraph 78.

and that embarking upon such a process entails no risks for the United Kingdom; the British aversion can only delegitimize its position. “At times, when a nation seeks to justify its action by asserting that international law is or ought to be something else, the justification in effect admits violation, especially when the nation cannot reasonably expect that its ´proposed norm´ would be acceptable. Sometimes, indeed, it might be quite unhappy if its action became a general norm.”[56]

In the following chapters I will deal with the main purpose of my work: trying to set the foundations on which a negotiation between Argentina and the United Kingdom, regarding the sovereignty over the Malvinas/Falkland Islands, should be started.

[56] Henkin, Louis; *op. cit.* [1978]. Page 43.

3. The Malvinas/Falkland Islands dispute from a territorial perspective

a) General remarks

There is an aspect of the dispute that calls the attention of every international lawyer dealing with it; and that is why, when taking the islands by force in 1833, the United Kingdom did not state they were just annexing through violent means part of the territory of another sovereign State, which at that time was not outlawed as it is today. "At the time, and since then, British spokesmen have often asserted that the status of the islands actually did not change because of the *Clio´s* actions. Britain was merely reasserting its already well-established claim. The islands´ history prior to 1833, and much British policy after 1833, tend to discount this as a serious position."[57]

"The British reluctance to rely on conquest as a basis of title has been noted by various commentators. Although Foreign Office records reveal a self-conscious concern that reliance on the 1833 seizure might show the British ´as international bandits,´ the most likely reason Britain has never invoked conquest is that such a claim would rest on dubious legal foundations."[58] In this sense, the arguments not to adduce conquest in plain terms can be either political or legal; or even both at the same time. Regardless of the set of considerations that prevailed at that time, which up to a certain point is irrelevant to solve the dispute today, my analysis focuses exclusively on the legal arguments. If the 1833 seizure of the Malvinas/Falkland Islands is considered to be legal, then Argentina does not have many solid grounds on which to sustain its claim to sovereignty, notwithstanding who had a better title to the territory back then. Arriving

[57] Gustafson, Lowell S.; The sovereignty dispute over the Falkland (Malvinas) Islands, Oxford University Press, United States, 1988. Page 26.
[58] Trinidad, Jaime; *op. cit.* Page 140.

to the opposite conclusion -that is, the illegality of the British takeover by force- will not necessarily shift the balance in favor of the Argentine claim: it will only allow me to continue developing the arguments offered in the dispute, though it must be admitted that it somehow erodes the base of the British position.

In terms of International Law, there are two salient features that must be taken into account in order to understand the situation, and these are: the existence of a specific treaty provision, agreed upon in the late eighteenth century, which prohibited the British from settling in South America; and the inexistence of a state of war between Argentina and the United Kingdom by the time the British took forcible possession of the Malvinas/Falkland Islands.

Before going deeper into each of these, it must be stated that far from being mutually exclusive, both the specific and the more general arguments should be interpreted in a complementary way.

A last observation that should also be paid attention to is that "[e]xtensive research, backed by a great amount of case law, has tried to disentangle the legal problems involved in the recognition and non-recognition of new States and new governments. Scant attention, however, has been given hitherto to the legal aspects of the non-recognition of territorial transfers";[59] making the arguments even more complex and the entire discussion more controversial.

[59] Langer, Robert; Seizure of territory, Princeton University Press, United States, 1947. Page 95.

b) The Treaty of San Lorenzo (Saint Lawrence)/Nootka Sound

"Spain and Great Britain signed the Treaty of Saint Lawrence (also known as the Nootka Sound Convention) on 25 October 1790. By the terms of this treaty, Spain recognized Great Britain's right to navigate, land, and settle in the regions of the Pacific Coast of North America not already occupied by Spanish settlers and its right to continue fishing in the seas near the Spanish possessions in South America. The establishment of any permanent settlement by Great Britain in the Falkland/Malvinas Islands was implicitly prohibited by Article 6 of the treaty: ´It is further agreed, with respect to the Eastern and Western Coasts of South America, and to the Islands adjacent, that no Settlement shall be formed hereafter, by the respective Subjects, in [the regions] ... South of those ... same Coasts, and of the Islands adjacent, which are already occupied by Spain.´ Since Spain had a settlement in the Falkland/Malvinas Islands at the time of this convention, while Great Britain did not, Spain and Argentina have claimed that this treaty represented a *de jure* recognition on the part of Great Britain of the Spanish right of sovereignty over these Islands."[60]

Though a fast reading of the above quoted Article 6 might allow to conclude that Port Egmont -founded in 1765- is not affected by the fact that "no Settlement shall be formed **hereafter**",[61] it is important to remember that by 1774 the British had abandoned the site; and that "the abandonment of Port Egmont was an abandonment

[60] Maish, Christian J.; *op. cit.* Page 189.
[61] Emphasis added. In addition, see Ruda Allegation. Page 23; which refers to this provision as Article 7 of the Treaty of San Lorenzo.

in law as well as in fact".[62] In other words, regarding the islands, by 1790 Great Britain "had nothing to do with them since 1774".[63]

Another relevant provision of the Treaty of San Lorenzo that evidences the prohibition of British interference in South America is Article 4, according to which "His Britannic majesty engages to take the most effectual measure to prevent the navigation and fishery of his subjects, in the Pacific Ocean or in the South-Seas, from being made a pretext for illicit trade with the Spanish settlements; and, with this view, it is moreover expressly stipulated, that British subjects shall not navigate or carry on their fishery, in the said seas, within the space of ten sea-leagues from any part of the coasts already occupied by Spain."[64]

The text of these articles support the view that from 1790 onwards, Great Britain had the legal obligation not to settle in the Malvinas/Falkland Islands; and such an understanding might explain why the 1833 takeover was never qualified as a conquest by the British authorities. Accordingly, "this guarantee of the *status quo* in the Nootka Sound Convention, with its reiteration of the principle of *uti possidetis*, had a significant bearing upon the legal status of the Falklands at that time. The British had now in a solemn treaty recognized the *status quo*; the *de facto* occupation of the whole Falkland group was admitted by them to be an occupation in the legal sense. This seems to be the fair interpretation to put upon the treaty."[65]

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[62] Goebel, Julius (Jr.); The struggle for the Falkland Islands. A study in legal and diplomatic history, Yale University Press, United States, 1927. Page 425.
[63] Baty, Thomas; Abuse of terms: "recognition": "war", American Journal of International Law, vol. 30, issue 3, 1936. Pages 386-87.
[64] See the text quoted in Kohen, Marcelo G. & Rodríguez, Facundo D.; *op. cit.* Chapter 1.
[65] Goebel, Julius (Jr.); *op. cit.* Pages 430-31.

"The prohibition is crystal clear, as is the fact that at the moment the Treaty was signed, Spain was in sole possession of the Falklands/Malvinas. By that time, Spain had already appointed the 13th Governor of the Malvinas."[66] To put it in even more clear terms, with the Treaty of San Lorenzo "[t]he Spanish right to the Falklands became absolute at this moment, if, indeed, it had not been so before."[67]

c) The bilateral relation between the parties by 1833

As paradoxical as it might sound, the United Kingdom was the first European power to recognize Argentina as a country. In 1825, both parties had celebrated the Friendship, Commerce and Navigation Agreement between the United Provinces of Río de la Plata and His Britannic Majesty, and by the time the violent incidents of 1833 took place, this treaty was unquestionably in force.

It is clear that in the first half of the nineteenth century, conquest was a legitimate way of acquiring territory; but this does not mean that any use of force leading to the effective control of a portion of territory under another State´s sovereignty gave legal title to that land.

It must be highlighted that the 1833 military attack on the Malvinas/Falkland Islands was never considered a war -neither by Argentina nor by the United Kingdom-, it did not bring to an end the 1825 treaty, and it did not even produce the severance of the diplomatic relations between the parties involved. On top of that, there was no peace agreement after the 1833 *fait de force*, an incident that has remained unsettled ever since.

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[66] Kohen, Marcelo G. & Rodríguez, Facundo D.; *op. cit.* Chapter 1.
[67] Goebel, Julius (Jr.); *op. cit.*Page 466.

"At the moment of the usurpation, not only were the parties not at war, but they had concluded a treaty of peace and friendship. [...] [A] simple act of force did not in itself imply belligerency between the parties. It was necessary for the States involved to consider themselves at war. There was no state of belligerence between Argentina and Great Britain when commander Onslow expelled Argentine agents from the Falklands/Malvinas in 1833. Nor did this fact imply the outbreak of a war between the two countries. The concept of conquest does not therefore apply to the case of the Falklands/Malvinas."[68] Support for this standpoint is widespread. "The prevailing view is that the acquisition of title by conquest -while possible as a matter of international law in 1833- would have required ´as a first essential condition´ the existence of a state of war between the parties (Argentina and Britain were formally at peace in 1833)."[69]

On this point, the opinion of pre-1945 scholars might be of particular help. Early in the twentieth century, it was widely accepted that "[c]onquest is the taking of possession of enemy territory through military force **in time of war**. [...] Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexed the territory."[70]

Specifically related to the instant case, it was said that "[i]t cannot be imagined that such raids as those on the Falkland Islands or on Corinto, in the peaceable possession of a friendly State, can be seriously quoted as authority for anything [...] [a]nd it was shown that the pretensions to exercise violence against the will of the

[68] Kohen, Marcelo G. & Rodríguez, Facundo D.; *op. cit.* Chapter 4.
[69] Trinidad, Jaime; *op. cit.* Page 140.
[70] Oppenheim, Lassa F.L.; International Law, a treatise, Longmans, Green and Co., United Kingdom, 1912. Vol. I, pages 302-03. Emphasis added.

territorial sovereign without breaking the peace had in the past, with one or two exceptions [one of which is the Malvinas/Falkland Islands case], been futile or insignificant up to the very end of the nineteenth century."[71]

But the mere annexation of part of another State´s territory by force does not allow to conclude that a conquest has taken place;[72] the aftermath of the war is of paramount importance as well. "When an act of force results in physical occupation of only a part of the territory of a state, as Cohen Jonathan has pointed out specifically in connection with the Malvinas, such occupation could not have the effect of transferring sovereignty to the acting state except by a treaty of peace or of cession, even if such treaty was imposed by force."[73] To make it clear, "a treaty of cession might, at least in the traditional law, be imposed by force of arms, and we know of course that the treaty of cession is as a matter of history the normal way in which the victor would, at the peace, impose his will in respect of territorial changes upon the vanquished."[74] But, still, there must always be a treaty agreed upon the contending parties.

Departing from widely accepted principles as the ones previously outlined might not only undermine the effectiveness of the legal system, but also lead to flagrant injustices. In this sense, "to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot

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[71] Baty, Thomas; *op. cit.* [1936]. Page 390.
[72] "[T]he hostile occupant of territory neither is, nor ever was, its lawful sovereign." See Baty, Thomas; The canons of International Law, John Murray, United Kingdom, 1930. Page 469.
[73] Hope, Adrián F.J.; *op. cit.* Pages 426-27.
[74] Jennings, Robert Y.; *op. cit.* Page 19.

form an exception to that imperative alternative."[75] Furthering this idea, Lord Palmerston -one of the key actors involved in the whole situation- stated that "[t]here cannot be a principle more dangerous to the maintenance of peace, or more fatal to the independence of the weaker Powers, than that it should be lawful for a stronger Power, whenever it has a demand upon a feebler neighbour, to seize hold of part of its territory by force of arms, instead of seeking redress in the usual way of negotiation."[76]

Despite the fact that it seems clear that in 1833, the legal system made a distinction between the annexation of territory in the context of a war and during peacetime; there are some scholars who, a century and a half later, kept on disregarding this fact. In this sense, it was said in the 1980´s that "[t]aking the Falkland Islands by force in 1833 was not contrary to any rule of international law recognized at the time."[77]

Arguing in favor of a customary rule dealing with the non-recognition of illegally acquired territories, a divergence between Europe and Latin America must be pointed out. In this regard, it was said that "[w]hile in the Old World the idea developed rather slowly that territorial changes should not only politically, but also legally, be a matter of concern for third States, similar ideas occupied the minds of the Latin-American world since the early days of Latin-American independence, and led to endeavors to establish a doctrine, or even a law, of what was termed ´the legal validity of conquest.´"[78] This connection between the legality in the acquisition of the territory and its recognition by

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[75] Lauterpacht, Hersch; *op. cit.* Page 421.
[76] Letters of Queen Victoria (1862 to 1898), I, 146 (8 Jan. 1864). Quoted in Baty, Thomas; *op. cit.* [1936]. Page 398.
[77] Fawcett, James; The geography of the Falkland Islands, The Geographical Journal, vol. 149, N° 1, March 1983. Page 10.
[78] Langer, Robert; *op. cit.* Page 34.

third parties constitutes clear-cut evidence that, in the early nineteenth century, the right to acquire territory by force was far from being unrestricted.

d) The legal status of the Malvinas/Falkland Islands territory after 1833

As paradoxical as it may sound, both the Argentine and the British stances rely heavily upon one same term, though this term involves two different concepts depending on which argument is fostered.

This multivocal term at issue is "occupation"; and to make it clear from start, it must be said that in International Law, it has two very different meanings.

The first definition, which is the oldest, relates to a form of acquisition of territory. In this regard, "[o]ccupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State."[79] This was, basically, the fundamental idea underlying the original argument offered by the British.

But, there is a key element in this concept, and its importance for the case under study cannot be stressed enough. For a territory to be subject to the law of occupation, the territory in question had to be unclaimed, that is to say, it had to be *terra nullius*. "The expression ´terra nullius´ was a legal term of art employed in connection with ´occupation´ as one of the accepted legal methods of acquiring sovereignty over territory. ´Occupation´ being legally an **original means of peaceably acquiring sovereignty over territory** otherwise than by cession or succession, it was a cardinal condition of a valid ´occupation´ that the territory should be terra nullius -a territory

[79] Oppenheim, Lassa F.L.; *op. cit.* Vol I, page 291.

belonging to no-one- at the time of the act alleged to constitute the ´occupation´ (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, pp. 44 f. and 63 f.)."[80]

This concept was further clarified through subsequent precedents adopted by the I.C.J. For example, it stated that during the nineteenth century, "the State practice [...] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius."[81] Applying this criterion, what could be said of a territory that had been under colonial administration for several years, and which had even been the object of treaties among the most important States at that time?[82]

Though it is beyond doubt that the islands were taken by force from Argentina, not from Spain, in 1833, it is also true that Argentina claimed to be the successor of Spain in regard to the territory at stake. On this issue, the I.C.J. has also adopted a relevant decision, in which it had to deal with the independence of former Spanish colonies in Latin America. To solve the problem, it affirmed that "none of the islands were terra nullius; sovereignty over the islands could not therefore be acquired by occupation of territory. The matter was one of the succession of the newly-independent States", and in consequence had recourse to the principle of *uti possidetis juris*, which had to be applied in accordance with the time of the independence of the former

[80] Western Sahara, Advisory Opinion of 16 October 1975. Paragraph 79. Emphasis added.
[81] *Ibid.* Paragraph 80.
[82] By referring to the treaty law related to the Malvinas/Falkland Islands, I do not intend to limit to those celebrated between Spain and Great Britain after 1833. Far from that, special attention should be paid to the 1766 agreement that involved France and Spain, through which the Spanish sovereignty was explicitly recognized and the first colony ever settled on the islands -Port Louis, which was established by Louis Antoine de Bougainville in 1764-, was transferred from French to Spanish authority.

colony.[83] In the Argentine case, that year would be 1816. In other words, "[t]he right of the Argentine nation to stand in the place of Spain with reference to the sovereignty over the Falklands was established by the successful revolution, and by the assertion and maintenance of sovereignty over the Falklands as against Spain. When Great Britain seized the islands in the year 1833 the legal consequences were the same as if the islands had never passed out of the hands of the Spanish crown."[84]

In relation to the second definition, it is closely related to the law of armed conflicts, and this is true to such an extent that it is usually referred to as "military occupation".

Even before World War I, it was widely acknowledged that during the last couple of centuries "the distinction between mere temporary military occupation of territory, on the one hand, and, on the other, real acquisition of territory through conquest and subjugation, became more and more apparent".[85]

Indeed, it was the Supreme Court of the United States that determined in 1828 that "[t]he usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."[86]

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[83] Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment of 11 September 1992. Paragraph 333. Regarding the application of the principle of *uti possidetis* to the succession of States, see also Paragraph 45. Another interesting precedent by the I.C.J. is the Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019; where the I.C.J. also made reference to the pre-independence status of the island of Mauritius and its uninterrupted administration in order to determine the current status of the Chagos Archipelago. See Paragraph 170.

[84] Goebel, Julius (Jr.); *op. cit.* Page 468.

[85] Oppenheim, Lassa F.L.; *op. cit.* Vol II, page 205.

[86] American Insurance Company v. Canter, 26 U.S. 1, 511 (1828).

In terms of treaty law, it was only in 1907 that the Regulations concerning the Laws and Customs of War on Land annexed to the Convention (IV) respecting the Laws and Customs of War[87] defined the concept of occupation. Indeed, its Article 42 determined that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

But why should a treaty provision apply to a situation that took place more than eighty years before its entry into force? That would certainly go against the rationale underlying the doctrine of intertemporal law. To answer this question, treaty law must give way to customary law. Indeed, it is in the third paragraph of the Preamble to the 1907 Hague (IV) Convention that the signatories highlight how important it is "to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible".

The codifying nature of the Hague Conventions is not enough by itself to argue that the law of occupation was part of customary international law when the British took by force the Malvinas/Falkland Islands in 1833. Nevertheless, the discussions surrounding this idea can be traced back to the sixteenth and seventeenth century, where it can be found in the writings of Francisco de Vitoria and Hugo Grotius. Nevertheless, the most compelling evidence is the decision adopted in 1828 by the

[87] Better known as the 1907 Hague (IV) Convention.

Supreme Court of the United States and cited above, which basically refers to occupation as a "usage of the world".

Later in time, treaty law would continue to develop the concept, as indicated in common Article 2 of the Geneva Conventions of 1949, where it was set that occupation can take place even if it meets with no armed resistance.[88] Furthermore, while interpreting this provision, the International Committee of the Red Cross stated that **"**[e]ven if the Geneva Conventions do not contain any definition of occupation, the 1907 Hague Regulations and their preparatory work, academic literature, military manuals and judicial decisions demonstrate the pre-eminence accorded to three elements in the occupation equation, namely the unconsented-to presence of foreign forces, the foreign forces' ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory. All together, these elements constitute the so-called 'effective control test' used to determine whether a situation qualifies as an occupation for the purposes of humanitarian law."[89] Even though the Geneva Convention (IV) of 1949, relative to the Protection of Civilian Persons in Time of War, devotes the whole Section III of its Part III to the topic, the best definition available today is based on customary law and the 1907 broad terms.[90]

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[88] See specifically the third paragraph.

[89] International Committee of the Red Cross; Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2016. Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518. Paragraph 303.

[90] According to the I.C.J., the Hague Regulations annexed to the Fourth Hague Convention of 1907 both reflect the customary law existing at that time, and the customary law that developed after their entry into force. See Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion of 9 July 2004. Paragraph 85.

The constant evolution of the concept is not only provided by the innovations in the legal realm; the ever-changing reality has an impact as well. In this sense, "[i]n the nineteenth century, occupations were quickly resolved by peace agreements. Nowadays, occupations usually tend to be quite protracted. In the nineteenth century, occupations were perceived as a possible burden on the occupant [...]. Nowadays, many occupants find the occupation rather useful."[91]

Coming back to the Malvinas/Falkland Islands dispute, it could be helpful to determine whether the ´effective control´ test was part of customary law in 1833. If this were the case, then it should be inquired if the situation resulting from the violent takeover of the Malvinas/Falkland Islands complied with all the requirements of such test. Finally, even assuming that in 1833 the set of circumstances amounted to an occupation,[92] it could be argued that after almost two centuries that is no longer the case.

Regarding this last aspect, it must be noticed that according to a classic point of view, "[o]ccupation comes to an end when an occupant withdraws from a territory or is driven out of it."[93] From a more contemporary perspective, it can be said that **"**the

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A further interesting aspect related to International Humanitarian Law is that Article 1.4 of the 1977 Additional Protocol (I) to the 1949 Geneva Conventions, when referring to wars of national liberation, included a distinction between "colonial domination" and "alien occupation", allegedly at the instigation of certain Latin American States. See Cassese, Antonio; Self-determination of peoples. A legal reappraisal, Cambridge University Press, Great Britain, 1995. Pages 92-93. In this sense, an armed conflict opposing alien occupation would automatically be considered an international armed conflict, regardless the relation between the Occupying Power and the population under its rule.

[91] Benvenisti, Eyal; The international law of occupation, Princeton University Press, United States, 2004. Page 215.

[92] It is worth being mentioned that Cassese, when referring to the Malvinas/Falkland Islands, does not hesitate to assert that the events developing in 1833 led to the military occupation of the islands by the British. See Cassese, Antonio; *op. cit.* Page 86.

[93] Oppenheim, Lassa F.L.; *op. cit.* Vol II, page 210.

effective control test applies equally for establishing the beginning and the end of an occupation. In fact, the criteria for establishing the end of occupation are generally the same as those used to determine its beginning, but in reverse."[94]

In addition to the inherent complexities in determining when an occupation comes to an end, political reasons might come into play and make things even more complicated. "If the occupant is entitled to adopt a policy of ´wait and see,´ and hold on to the occupied territory until it is fully satisfied by the ousted government´s terms for settlement, then the burden of stalemate in the settlement process rests solely with the ousted government. Such an allocation of the burden of stalemate is not conducive to political solutions; rather, it encourages the ousted government to seek military responses. This situation ought to be altered. The law of occupation ought not to condone an occupant who holds out in bad faith, using its control of the occupied territory as leverage. Indeed, such a position is no different from outright annexation."[95]

To recapitulate, it is impossible to determine the current status of the Malvinas/Falkland Islands territory if the 1833 incident is not analyzed beforehand. And, moreover, as the legality of such event is affected by the status of the territory prior to 1833, it is fundamental to examine this aspect as well.

[94] International Committee of the Red Cross; *op. cit.* Paragraph 306.
[95] Benvenisti, Eyal; *op. cit.* Pages 215-16.

4. A matter of peoples and self-determination?

a) To be or not to be, that is the question

Even though the controversy surrounding which of the parties to the dispute has a better legal title to the territory of the Malvinas/Falkland Islands is of paramount importance, it must be acknowledged that this is only one part of the discussion. The second part, which is centered in the current population of the islands, has been the cornerstone of the British argument for half a century now.

From the British perspective, the whole Malvinas/Falkland Islands decolonization process should be ruled in accordance with Chapter XI -"Declaration regarding Non-Self-Governing Territories"- of the Charter of the United Nations and the International Law developed under its aegis.

On the other side, the Argentine position is that the inhabitants of the Malvinas/Falkland Islands do not evince the legal requirements needed to be under the protection of Chapter XI, and therefore the principles contained in that body of law are not applicable to their case.

A lot has been written on this issue, a lot has been discussed too -both in terms of facts and of Law-, but still no consensus has been ever reached to. Nevertheless, one thing is certain: when Argentina affirms that the inhabitants of the islands are not a people, when they are characterized as an implanted population, or when they are simply regarded as nostalgic imperialist puppets; such assertions resonate more as political statements than as legal arguments. It is absolutely valid to argue whether or not the population of the Malvinas/Falkland Islands is entitled to the rights enshrined in

Chapter XI, but insisting on a labelling that is interpreted by many as contemptuous, can end up being politically counterproductive.

From the Argentine perspective, the peculiar nature of the Malvinas/Falkland Islands case is given by the fact that "when Great Britain forcefully occupied the Malvinas in 1833, the population which then inhabited the Islands, rather than being allowed to remain under the ´subjugation,´ ´domination´ or ´exploitation´ of the European power as had been the case with most other colonial experiences, was simply displaced, shipped back to Buenos Aires and no longer allowed to return there. After this step had been accomplished, Britain undertook to transfer and implant its own population on the Island to carry out the colonial project, which from then onwards was developed without any Argentine participation whatsoever."[96] Furthermore, in order to highlight the uniqueness of the case, it is also said that "unlike ordinary cases of colonialism, that is, the oppression of an entire people by a European power, the Falklands/Malvinas case concerns the eviction of a newly born independent State from an insular, scarcely populated portion of its territory lacking any original population, by the most powerful colonial nation of the time."[97]

In this sense, the Argentine position puts into question the classification of the Malvinas/Falkland Islands population as a "people" entitled to the right to self-determination. "It is difficult to arrive at a precise definition of the term ´people´, because the identification of a people to whom the principle would apply may present very complex problems. The various possibilities of interpretation and the consequent

[96] Hope, Adrián F.J.; *op. cit.* Page 439.
[97] Kohen, Marcelo G. & Rodríguez, Facundo D.; *op. cit.* Chapter 6.

uncertainties could in many cases turn the right of peoples to self-determination into a weapon for use against the territorial integrity and political unity of States. Indeed, peoples might be used, against their real interests, to support aggressive or subversive designs for the benefit of foreign interest."[98]

This reasoning is the one impregnating the conclusion that "the population inhabiting the territory proposed to be decolonized is imported, implanted and non-indigenous";[99] which is a necessary step if it is to be sustained that "the islanders are a ´settler´ population who displaced the ´legitimate´ Argentine inhabitants, and thus do not have a ´legitimate relationship´ with the territory.[100] Argentina also relies on the fact that the islanders are of British origin and not ´under alien subjugation, domination and exploitation´. In some respects, Argentina appears to treat the applicability of self-determination as an issue that can be ruled out *a priori* on the basis of the composition of the population, rather than an issue that is necessarily linked with the validity of Argentina´s underlying territorial claim."[101]

"The principle of self-determination would not support Britain´s title to the Falklands if the islanders were not a self entitled to exercise the right because they were imported by a colonial power. The principle would support Argentina´s claim to title if

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[98] Cristescu, Aureliu; The right to self-determination. Historical and current development on the basis of United Nations instruments, United Nations, United States, 1981. UN Document E/CN.4/Sub.2/404/Rev.1. Paragraph 275.

[99] Hope, Adrián F.J.; *op. cit.* Page 444.

[100] The population of the Malvinas/Falkland Islands, alongside with the one inhabiting Gibraltar, has been referred to as "´plantations´ of the colonial administration". See Blay, Samuel K. N.; Self-determination versus territorial integrity in decolonization, New York University Journal of International Law and Politic, vol. 18, issue 2, Winter 1986. Page 464.

[101] Trinidad, Jaime; *op. cit.* Page 138.

the self was the nation whose territory was defined by its former colonial boundaries." [102]

In the following sections, I will try to elucidate which set of international rules should be applied to the inhabitants of the Malvinas/Falkland Islands and, successively, its effects on the broader dispute.

b) The self-determination of peoples

The Charter of the United Nations alludes to the "self-determination of peoples" in only two occasions, and it would be hard to qualify these references as something more than just peripheral. While Article 1.2 of the Charter seeks "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;" Article 55 deals with the promotion of "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 absolute lack of a definition, added to the lax provisions included in Articles 1 and 55 of the Charter, hardly help to narrow the concept. "Before the moral and political imperative of decolonization, however, the vague ´principle´ of self-determination soon evolved into the ´right´ to self-determination. This evolution culminated in the adoption by the UN General Assembly in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples".[103]

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[102] Gustafson, Lowell S.; *op. cit.* Page 55.

[103] Hannum, Hurst; Autonomy, sovereignty and self-determination. The accommodation of conflicting rights (revised edition), University of Pennsylvania Press, United States, 1996. Pages 33-34.

Through its Resolution 1514 (XV) -the abovementioned declaration-, the U.N.G.A. expressed its conviction ""that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,"[104] and in consequence "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."[105]

Nowadays, the legal validity of the declaration is beyond doubt, and it would be unthinkable to question its binding nature, especially after the I.C.J. affirmed that "although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination. Certain States justified their abstention on the basis of the time required for the implementation of such a right."[106]

Another important step that the international community made towards defining the concept and scope of the right to self-determination of peoples was the adoption of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. According to its common Article 1, **"**[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development";[107] and "[t]he

[104] See Preamble.
[105] See Paragraph 2.
[106] Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Paragraph 152.
[107] See Paragraph 1.

States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[108]

Moreover, mention must be made of the Resolution 2625 (XXV), known as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. In its Annex, the U.N.G.A. asserted that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without 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", consolidating even more the right to self-determination of peoples.

An aspect of supreme importance in the dispute over the Malvinas/Falkland Islands is the way in which the United Kingdom managed to funnel the self-determination issue by including it under the framework provided by Chapter XI of the Charter of the United Nations. In this sense, Article 73 provides that those "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 promote to the

[108] See Paragraph 3.

utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories".

Chapter XI provided a prolific realm within which the principle of self-determination of peoples had a significant evolution; and this was despite the fact that "[t]he Declaration [the first paragraph of Article 73 of the Charter of the United Nations] does not refer to ´independence´ (in contrast with Chapter XII, ´International trusteeship system´) or ´self-determination´. The colonial powers of 1945 probably intended Chapter XI to be no more than a code of good conduct".[109]

Just one day after the adoption of Resolution 1514 (XV), the General Assembly issued its Resolution 1541 (XV), containing the Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter. Once again, the intimate relation between self-determination of peoples and Non-Self-Governing territories became apparent.

According to Principle VI, "[a] Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State"; while Principle VIII sets that "[i]ntegration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without

[109] Hillebrink, Steven; *op. cit.* Pages 4-5.

any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government." In connection with this point, "[t]he clear preference for independence as the normal result of exercise of the right to self-determination is evidenced by detailed requirements for the free and informed consent of the peoples concerned if either free association or integration is chosen",[110] which means that additional requirements are not only substantive but also procedural.

As previously stated, Resolution 2625 (XXV) provided that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development," broadening the choices available to peoples exercising their right to self-determination and allowing to conclude that "[t]he options are slightly, if significantly, expanded in the Declaration on Friendly Relations".[111]

c) The particular case of the Malvinas/Falkland Islands in the United Nations

According to the I.C.J., "[t]he General Assembly has played a crucial role in the work of the United Nations on decolonization, in particular, since the adoption of resolution 1514 (XV). It has overseen the implementation of the obligations of Member States in this regard, such as they are laid down in Chapter XI of the Charter and as they arise from the practice which has developed within the Organization."[112]

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[110] Hannum, Hurst; *op. cit.* Pages 39-40.
[111] *Ibid.* Page 41.
[112] Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Paragraph 163.

But is this really the case with the Malvinas/Falkland Islands? Did the United Nations actually do enough to prevent the 1982 war? Even worse, are the United Nations doing enough in order to prevent another violent incident in the South Atlantic?

Just to put the years preceding the war into context, it is worth mentioning that as early as 1965, through its Resolution 2065 (XX) on the Question of the Falkland Islands (Malvinas), the U.N.G.A. invited "the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to proceed without delay with the negotiations recommended by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas)".[113]

Through its Resolution 3160 (XXVIII), the same Main Body of the United Nations showed itself "[g]ravely concerned at the fact that eight years have elapsed since the adoption of resolution 2065 (XX) without any substantial progress having been made in the negotiations,"[114] and in consequence urged "the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland, therefore, to proceed without delay with the negotiations, in accordance with the provisions of the relevant resolutions of the General Assembly, in order to put an end to the colonial situation".[115]

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[113] See Paragraph 1.
[114] See fourth paragraph of the Preamble.
[115] See Paragraph 3.

Only three years later, with the adoption of Resolution 31/49, the General Assembly would express "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"[116] and request "the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to expedite the negotiations concerning the dispute over sovereignty, as requested in General Assembly resolutions 2065 (XX) and 3160 (XXVIII)".[117]

After seventeen years of fruitless urges by the U.N.G.A. to negotiate, the war broke out.

Interestingly enough, the year 2010 marked the fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples; and in consequence Resolution 65/119 -Third International Decade for the Eradication of Colonialism- was adopted. Even though the U.N.G.A. called "upon the administering Powers to cooperate fully with the Special Committee to develop a constructive programme of work on a case-by-case basis for the Non-Self-Governing Territories to facilitate the implementation of the mandate of the Special Committee and the relevant resolutions of the United Nations on decolonization, including resolutions on specific Territories;"[118] the decade is almost coming to an end and no progress can be identified in the Malvinas/Falkland Islands dispute. Does Argentina have any reason to feel

[116] See Paragraph 2. This phrase was a reproduction of the last paragraph of the Preamble of Resolution 3160 (XXVIII).
[117] See Paragraph 3.
[118] See Paragraph 3.

enthusiastic about this kind of grandiloquent assertions? Is there any reasonable ground for it not to grieve?

A creative -though by no means new- solution to deal with these situations was proposed more than half a century ago. "Under Article 10 the General Assembly may very well discuss the fact that a Member has not fulfilled its obligations under Chapter XI and make recommendations in this respect. The General Assembly -together with the Security Council- may even apply the sanction provided for in Article 6 in case a Member violates its obligations under Articles 73 and 74."[119]

According to Article 73 of the Charter of the United Nations, States "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" accept "to further international peace and security".[120] The irresponsible attitude of blatantly disregarding the calls of the U.N.G.A. for more than half a century is beyond doubt far from furthering international peace and security. I can hardly think of more conclusive evidence than the fact that, this same disregard for International Law, has already caused a war.

Argentina has complained when the Malvinas/Falkland Islands were included in the system created under Chapter XI of the Charter of the United Nations.[121] The real reason for this position is based on its claim to sovereignty and not because it does not

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[119] Kelsen, Hans; The law of the United Nations. A critical analysis of its fundamental problems, Frederick A. Praeger Inc., United States, 1950. Page 552 -footnote 1-.

[120] See Section c.

[121] See General Assembly Resolution 66 (I) -Transmission of information under Article 73e of the Charter-. According to its Paragraph 3, "The General Assembly also notes that the following Governments have declared their intention of transmitting information: [...] the United Kingdom on [...] Falkland Islands." Attention must also be paid to its Footnote 2: "[i]n regard to the Falkland Islands the delegation of Argentina, at the twenty-fifth meeting of the Committee, made a reservation to the effect that the Argentine Government did not recognize British sovereignty in the Falkland Islands. The delegation of the United Kingdom made a parallel reservation, not recognizing Argentine sovereignty in these islands."

regard the situation as a -particular- case of decolonization. “The objections [to the classification of avowedly colonial areas as Non-Self-Governing territories] of China regarding Hong Kong and Macao, of Spain regarding Gibraltar, of Argentina concerning the Falklands (Malvinas), and of Guatemala with respect to Belize were designed to abort any future claims by the inhabitants of those territories either to separate ´selfhood´, or alternatively, to the exercise of the more usual rather than the ´classic alternative´ form of self-determination. In any event, the independence option, as well as the option of joining with the administering rather than the contiguous State, would be effectively barred.”[122]

It cannot be stressed enough that “[n]one of the more than 40 resolutions passed by the General Assembly and the Decolonization Committee of the United Nations has recognized the existence of a separate people on the territory of the Falklands/Malvinas, and these resolutions have therefore taken other paths regarding the manner in which to proceed to the decolonization of the islands. The position of the United Nations as to how to put an end to the colonial situation is negotiation between Argentina and the United Kingdom to solve the dispute over sovereignty, taking into account the interests of the population of the islands.”[123] In other words, “the ´indigenous´ credentials of the populations of Gibraltar and the Falklands are apparently eyed with some suspicion - a factor which (along with considerations of territorial extent and size of population) goes far towards explaining the Assembly´s preference for the

[122] Pomerance, Michla; Self-determination in law and practice. The New Doctrine in the United Nations, Martinus Nijhoff Publishers, Netherlands, 1982. Page 27.
[123] Kohen, Marcelo G. & Rodríguez, Facundo D.; *op. cit.* Chapter 6.

territorial claims of Spain and Argentina, respectively, over the right of the inhabitants concerned to separate self-determination."[124]

"It is often the case that self-determination is part of the armoury of rhetoric in what is essentially a dispute about territorial title. Both the case of Gibraltar and that of the Falklands illustrate the point. Title to Gibraltar is disputed between the United Kingdom and Spain. Title to the Falklands-Malvinas is disputed between the United Kingdom and Argentina. From the perspective of the United Kingdom, self-determination has a pertinent role to play. These are dependent territories, whose peoples have been given the opportunity to decide if they would like to remain in the status quo or not. From the British point of view, it is important that the wishes of the peoples of the territories be heard and heeded. But from the point of view of the Argentinians and the Spanish, that is an irrelevance. If the territory concerned belongs to Argentina, or to Spain, then the inhabitants have no right of self-determination - any more than would Spanish or Argentinian nationals happening to live in the United Kingdom."[125]

Leaving behind abstract theory for a moment and analyzing some actual events could be illustrative to better understand certain aspects dealt with in the present chapter.

During March 2013, 1672 residents had the chance to vote in a referendum held in the Malvinas/Falkland Islands.[126] The question that had to be answered was: "Do you

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[124] Pomerance, Michla; *op. cit.* Page 21.
[125] Higgins, Rosalyn; Problems and processes. International Law and how we use it, Clarendon Press - Oxford University Press, United States, 1994. Page 127.
[126] "Sending their message". Article available at https://www.economist.com/node/21573293/all-comments?page=6.

wish the Falkland Islands to retain their current political status as an Overseas Territory of the United Kingdom?"[127] The legal relevance of the whole ballot was put into question for several reasons, which I will try to point out in the following paragraphs.

Those who believe the referendum was legally admissible emphasize the legitimacy provided by "the international observation team made up of political and civil society leaders and technical experts **from all over Latin America**. Observers from as far as New Zealand joined Mexico, Uruguay, Chile, Canada, and the U.S. for the vote";[128] and even some British media published that the team of observers was comprised of official observers sent by several countries.[129]

What most articles published outside Latin America do not make clear is that no single government of the region sent authorities on their behalf to act as observers in the referendum; and that none of the individuals who went there can be considered to be legally representing their respective States. Indeed, the only Latin American politician who acted as an observer was Jaime Trobo, a legislator from Uruguay, who did so despite the opposition of the government of his own country.[130]

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[127] "Falklands referendum: voters choose to remain UK territory". Article available at https://www.bbc.com/news/uk-21750909.

[128] "A Historic Vote in the Falkland/Malvinas Islands". Article available at https://www.americasquarterly.org/historic-vote-falkland-malvinas-islands. This article was posted by one of the members of the observation team -indeed its president-, who seems to have acted in his capacity as "consultant based in Mexico City and former Mexico Country Director for the International Republican Institute (IRI), a Washington DC-based not-for-profit democracy promotion organization."

[129] "En Malvinas/Falklands los isleños deciden su futuro". Available at https://www.bbc.com/mundo/noticias/2013/03/130307_malvinas_falklands_referendo_posicion_islenos . The article, published in Spanish, states: "varias naciones han enviado observadores oficiales al referéndum".

[130] "´Es un error no venir a Malvinas´, alegó el diputado uruguayo acusado de ´traidor´". Article available at https://www.infobae.com/2013/03/12/700626-es-un-error-no-venir-malvinas-alego-el-diputado-uruguayo-acusado-traidor/.

Unfortunately, the international media seemed more active in promoting a disinformation campaign than fostering a legal discussion.

"The official count showed 99.8 percent of islanders voted in favor of remaining a British Overseas Territory [...]. Only three ´no´ votes were cast."[131] Is it too far fetched to suspect that such an overwhelming outcome might be lopsided? These kind of monolithic results somehow explain the reason why "[s]erious questions have been raised regarding the legitimacy of British settler populations in Gibraltar and the Falkland (Malvinas) Islands".[132] "Preconceived notions of who the ´real´ population of a territory is; of the significance to be given to movements of population, in the recent and more remote past; and above all, of *whose* rights should prevail over whose - ineluctably influence the stand taken on the illusorily neutral issue of the conditions for holding a ´fair´ referendum."[133]

Needless to say that, despite the referendum, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by consensus, later that same year, a resolution[134] calling the Governments of Argentina and the United Kingdom to resume negotiations over the Malvinas/Falkland Islands dispute.[135]

When trying to shape an opinion over the referendum in the Malvinas/Falkland Islands, it might be useful to keep in mind that "[w]here peoples exercised a right of

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[131] "Falkland Islands vote 99.8% to stay British". Article available at https://www.france24.com/en/20130312-falklands-vote-overwhelmingly-remain-british.
[132] Hannum, Hurst; *op. cit.* Page 39.
[133] Pomerance, Michla; *op. cit.* Page 29.
[134] See UN Document A/AC.109/2013/L.7.
[135] See https://www.un.org/press/en/2013/gacol3257.doc.htm.

choice to stay in a relationship with a particular State, that has often been greeted with a certain scepticism if the State concerned was the colonial power; or with outright hostility if there is a debate as to whether the power allowing the exercise of ´self-determination´ of the population is indeed the title holder to the territory. Gibraltar, the Falklands and Western Sahara are all examples of tension between self-determination and title to territory."[136]

[136] Higgins, Rosalyn; Self-determination and secession, in *Secession and International Law. Conflict avoidance*, Dahlitz, Julie (ed.); United Nations, United States, 2003. Page 25.

5. A clash of principles

a) There is no space for absolutism

By now, it should be clear enough that there is one situation, the dispute over the Malvinas/Falkland Islands, where two confronting views coalesce. These opposed interpretations of one same problem, in addition, seem to be founded on mutually exclusive arguments; meaning that the prevalence of any of them over the other prevents the consideration of the latter in absolute terms.

But, can such determinant stances constitute the starting point for bilateral negotiations? Can the British adherence to the right to self-determination be inflexible enough to trample any territorial claim? And, on the other side, is there any possible way to interpret the right to territorial integrity in order to overshadow the right to self-determination?

To provide an answer to these questions, a sound first step is to keep in mind that regardless how passionately an argument might be construed, "rights [...] are, however, not absolute, but are susceptible of, and indeed demand compromise, whenever they come into practical conflict with one another, as experiences proves that they constantly do."[137]

Ridiculous as it might appear, "[i]t is [...] not a work of supererogation to discuss the theoretical problem raised by the claim that self-determination is an absolute right, for this is the form in which it was normally put forward."[138] To put it in clear terms, "[t]he evolving norms on self-determination contained -undeniably and consistently- an

[137] Cobban, Alfred; The nation state and national self-determination, Thomas Y. Crowell Co., United States, 1970. Page 106.
[138] *Ibid*. Page 105.

anxious refrain whereby self-determination is to be harnessed to, and not the enemy of, territorial integrity. Both General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Peoples and General Assembly Resolution 2625 (XXV), the Declaration of Principles on Friendly Relations -each of which emphasizes self-determination- caution against anything being interpreted to violate territorial integrity."[139]

From a normative perspective, Resolution 1514 (XV) set in Paragraph 6 that "[a]ny 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"; while in Paragraph 7 it added that "[a]ll States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

These provisions are explicit enough to reject any absolute interpretation of the right to self-determination. Indeed, Paragraph 6 has been referred to as a "fundamental principle, without which one almost never (at least in UN forums) finds a reference to self-determination";[140] and the I.C.J. itself has regarded it as a means "to prevent any dismemberment of non-self-governing territories".[141] Just to add some political insights to the otherwise strictly legal argument, some argue that "[i]t is apparent, both from the

[139] Higgins, Rosalyn; *op. cit.* [1994]. Page 121.
[140] Hannum, Hurst; *op. cit.* Page 34.
[141] Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Paragraph 153.

text of this provision [paragraph 6 of Resolution 1514(XX)] and from the preparatory work, that developing countries, with the full support of socialist States and without any opposition from Western countries, believed that colonial boundaries should not be modified, lest this would trigger the disruption of many colonial countries, as well as serious disorder as a result of the carving up of old States into new."[142]

For its part, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations -General Assembly Resolution 2625 (XXV)- emphasized once again "that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter," and reiterated that "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[143]

At this point of the evolution of International Law, "the principle of self-determination cannot be regarded as authorizing dismemberment or amputation of sovereign States exercising their sovereignty by virtue of the principle of self-determination of peoples."[144] In the fewest possible words, "[t]he new law of self-determination has not resulted in the invalidation of these legal bases of title [over the territory] *ipso facto*."[145]

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[142] Cassese, Antonio; *op. cit.* Pages 72-73.
[143] Regarding the customary nature of both the right to self-determination as enshrined in the Declaration, and the consequent limitation imposed by national unity and territorial integrity, see Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Paragraph 155.
[144] Cristescu, Aureliu; *op. cit.* Paragraph 279.
[145] Cassese, Antonio; *op. cit.* Page 186.

The right to territorial integrity, which provides for the Principles contained in Paragraphs 1[146], 4[147] and 7[148] of Article 2 of the Charter of the United Nations, has also been defined through the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. As stated there, "sovereign equality includes the following Elements: [...] (d) The territorial integrity and political independence of the State are inviolable;" and later on it is provided that "[i]t is the duty of all States to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of another country. Such behaviour is incompatible with the purposes and principles of the Charter, as is pointed out in the Declaration on the Granting of Independence to Colonial Countries and Peoples."[149]

But is this enough to conclude that territorial integrity, understood as "the material expression of State sovereignty and jurisdiction (land, water, subsoil, airspace, population),"[150] is an absolute right? Such an assertion would be logically unsustainable. If this were the case, how could the right to self-determination exist today? It should always be remembered that "[e]ven within their own territory, states have long been

[146] "The Organization is based on the principle of the sovereign equality of all its Members."
[147] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[148] "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."
[149] Cristescu, Aureliu; *op. cit.* Paragraph 172.
[150] Butler, William E.; Territorial integrity and secession: the dialectics of international order, in *Secession and International Law. Conflict avoidance*, Dahlitz, Julie (ed.); United Nations, United States, 2003. Page 111.

limited by international law in a manner which makes any argument in favor of ´absolute´ sovereignty difficult to maintain."[151]

This delicate balance between two rights, neither of which is absolute, shows clearly that "the colonial self-determination rule is the product of a synthesis of the principles of territorial integrity and self-determination [which is supposed to reconcile] a conservative concern for preserving international order on the one hand, and a progressive concern for promoting a measure of international justice on the other."[152]

b) If not self-determination, what rights do the inhabitants of the Malvinas/Falkland Islands have?

Moving from general remarks applicable to a wide array of cases to considerations more specific to the dispute under analysis, it is important to consider that "[s]elf-determination, however, also has a bearing on the legal status of some ´special´ territories. These territories are unique in that they exhibit two features. First, they do not fall neatly into the category of colonial territories, either because it was not as a result of colonial conquest that they were subjected to the sovereignty of the State currently wielding authority over them [...] or because for historical reasons they are not inhabited by an indigenous population but exclusively by settlers (for example, the Falklands/Malvinas). The second feature is that these territories, although they cannot be regarded as ´colonial´ in the classical sense, are nevertheless situated far away from the State holding the sovereign rights and have consequently been regarded by this

[151] Hannum, Hurst; *op. cit.* Page 19.
[152] Trinidad, Jaime; *op. cit.* Page 21.

State itself as different from its territory proper, so much so that they have been included, in the UN, in the list of ´non-self-governing territories´."[153]

Even though it might sound as a mere terminological digression, the use of certain specific words in the documents adopted under the auspices of the United Nations on the Malvinas/Falkland Islands dispute have relevant underpinnings in terms of rights recognized to the population of the islands.

As mentioned before, Article 73 of the Charter of the United Nations deals with Non-Self-Governing territories, and according to its text "the interests of the inhabitants of these territories are paramount". Nevertheless, Resolution 1514 (XV), far from clarifying the situation, made reference to the "freely expressed will and desire"[154] of peoples in a move that was interpreted as an expansion of their rights and their involvement in the decolonization process.

Still, starting with Resolution 2065 (XX), every time the General Assembly called for the parties to the dispute to negotiate, it explicitly mentioned that such negotiations should proceed bearing in mind the "interests of the population of the Falkland Islands (Malvinas)",[155] and not its "wishes". The choice of words, undoubtedly, reflects the unwillingness of the U.N.G.A. to treat the population plainly as a people under colonial rule. Nevertheless, this reluctance does not mean that the inhabitants of the islands have no rights as a group; or that self-determination -though in a broader sense- has no role to play in the dispute.

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[153] Cassese, Antonio; *op. cit.* Page 187.
[154] See Paragraph 5.
[155] See Paragraph 1 of Resolution 2065 (XX).

In theoretical terms, "it is possible to distinguish between ´external´ self-determination - the act by which a people determines its future international status and liberates itself from ´alien´ rule; ´internal´ self-determination - the selection of the desired system of government; and the substantive nature -democratic, socialist, or other- of the régime selected."[156] Though this classification of the different aspects comprising the right to self-determination has been seriously questioned,[157] there is no need to enter into this discussion; as the legal characterization of the inhabitants of the Malvinas/Falkland Islands would prevent them from being entitled to the right to self-determination both in its external and internal manifestations.

When referring to the difficult task of deciding "whether or not an entity constitutes a people fit to enjoy and exercise the right of self-determination", it was asserted that "[a] people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights."[158] At this point, it becomes evident that the way the Argentine Government characterizes the population living in the Malvinas/Falkland Islands is not just inflamed rhetoric; and that the reluctance to allude to it as a people is not tantamount to suppressing their identity. To the extent that they are "a numerically smaller, non-dominant group distinguished by shared ethnic, racial, religious, or linguistic attributes"[159] they constitute a minority, and therefore -intrinsically- protected

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[156] Pomerance, Michla; op. cit. Page 37.
[157] "The terms ´external´ and ´internal´ not only are inadequate to deal with the complexities of the challenges posed by self-determination movements, they can also cause considerable confusion." See Halperin, Morton H., *et al*; Self-determination in the new world order, Carnegie Endowment for International Peace, United States, 1992. Page 48.
[158] Cristescu, Aureliu; *op. cit.* Paragraph 279.
[159] Hannum, Hurst; *op. cit.* Page 50.

under International Law. But, I must insist, "[i]t is Peoples as such which are entitled to the right to self-determination. Under contemporary international law minorities do not have this right."[160]

If self-determination is not the exclusive legal framework available to protect the inhabitants of the Malvinas/Falkland Islands, then the set of rules applicable to them should be defined. In this sense, "majoritarian rule within the nation State, while in principle necessary and desirable, will have to be tempered to reflect the fact that some groups feel very special ties of language, culture or religion, and will want to make sure that aspirations of the majority within the nation State do not prevent the coexistence of these special values. Hence the concept of minority rights."[161]

It is apparent that, regarding the population of the islands as a minority relies on the assumption that the Argentine claim to sovereignty is valid. If this were not the case, the characterization of the population as a people subject to colonial domination or a minority within the British State would up to a certain point be irrelevant: it is only a matter to be defined among the United Kingdom and the population of the Malvinas/Falkland Islands.

"Our understanding of any one of the concepts of self-determination, minorities and secession depends upon us also understanding the other two";[162] so having devoted a considerable part of this work to explain the first of the concepts, I will focus on the second one.

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[160] Gros Espiell, Héctor; The right to self-determination. Implementation of United Nations resolutions, United Nations, United States, 1980. UN Document E/CN.4/Sub.2/405/Rev.1. Paragraph 56.
[161] Higgins, Rosalyn; *op. cit.* [2003]. Page 22.
[162] *Ibid.* Page 21.

In the period between the two World Wars, the redefinition of the European borders -not only in political terms, but also in religious, racial and cultural lines- gave rise to an incipient body of law aimed at the protection of minorities; though it must be said that the different situations were approached eminently on an *ad hoc* basis. Considering that the Second World War culminated with the refoundation of the international world order on new principles, it is logical that for many years the issues related to minorities were not a priority. "After World War II, the protection of minorities receded as both a political concern and a legal right. There is no mention of minority rights in the U.N. Charter (1945) or the Universal Declaration of Human Rights (1948)";[163] and certainly there was no authoritative definition of the concept. It would take almost two decades to achieve a certain degree of positivization through the International Covenant on Civil and Political Rights, according to whose Article 27 "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Nevertheless, it is true that "[t]he Covenant [on Civil and Political Rights] addresses only minimal, although traditional, minority rights, that is, cultural, religious, and linguistic rights. In addition, rights are granted to ´persons belonging to such minorities´ rather than to minorities groups themselves."[164]

So far, legal arguments were developed in favor and against the claim of the inhabitants regarding their right to self-determination. But, alongside, there are always

[163] Halperin, Morton H., *et al*; *op. cit.* Page 56.
[164] Hannum, Hurst; *op. cit.* Pages 59-60.

powerful political reasons that also come into play in this kind of situations. For example, "it is the desire to dominate over others that the legal right to self-determination seeks to overcome and prevent."[165] Aware that "the moralization of geostrategic rivalries is often a partisan effort that factions favoring confrontation employ to discredit alternative policies of accommodation",[166] it might be hard to label the British rule over the population of the Malvinas/Falkland Islands as oppressive. To the contrary, according to some viewpoints, "[t]he inhabitants are, in effect, beneficiaries of colonial rule."[167]

But the struggle against oppression and domination is not an exclusive banner of the right to self-determination. When minorities are oppressed, the concept of secession moves to the forefront. And, it might be useful to keep it in mind, secession constitutes the last element of the triad described above.

As there is no treaty nor customary law ruling the right of secession exercised by minorities, the best source available is scholarship. In this sense "it is implausible to say that the need to preserve a culture, even when other means fail, justifies overturning the state´s territorial claim and transferring title, as it were, to the secessionists. Any such principle would be unacceptable for at least two reasons. First, it treats valid territorial claims too lightly, according them too little substance. Second, because the notion of a culture and hence of a cultural group is so expansive and vague, the principle is a recipe for intolerably excessive international instability and this is subject to the

[165] Coleman, Andrew K.; Resolving claims to Self-Determination. Is there a role for the International Court of Justice?, United Kingdom, 2013. Page 84.
[166] Roth, Brad R.; Sovereign Equality and moral disagreement, Oxford University Press, United States, 2011. Page 16.
[167] Blay, Samuel K. N.; *op. cit.* Page 464.

same objection that was raised against the ´people´s right of self-determination´, or normative nationalist principle [...]. Therefore, the principle that the need to preserve a culture can overturn a state´s valid claim to territory ought to be rejected."[168] According to this theory, the recognition of Argentine sovereignty over the islands would forestall any claim to secession that the minority inhabiting them could raise.

It is worth mentioning that the author proposes another rule in case "the state from which secession is attempted does not have a valid claim to the seceding territory. Of course, more than this is needed if the argument is to be fully convincing: the area in question must not be subject to a valid territorial claim by any third party either. For it is obviously not enough for the secessionists to establish that the state has no valid claim to the territory. To make a strong case that their need to preserve their culture entitles them to the territory, they must also show that no other group or state has a valid claim to it".[169] This second hypothetical case cedes once again to the Argentine claim to sovereignty.

Before finishing the instant chapter, the Argentine attitude towards the inhabitants of the Malvinas/Falkland Islands deserves to be addressed.

The 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" expressed by the U.N.G.A. through its Resolutions 3160 (XXVIII) and 31/49 was already referred to, but still it is important to insist on this point.

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[168] Buchanan, Allen; Secession. The morality of political divorce from Fort Sumter to Lithuania and Quebec, Westview Press, United States, 1991. Page 60.
[169] *Ibid.* Pages 60-61.

What most of the people dealing with the dispute ignore is that, in 1994, when the last Amendment to the Argentine Constitution took place, several provisional clauses were included. It is no coincidence that the first one deals with the dispute under analysis in the following terms: "The Argentine Nation ratifies its legitimate and imprescriptible sovereignty over the Malvinas, Georgias del Sur and Sandwich del Sur islands and their respective maritime and insular spaces, as an integral part of its national territory. The recovery of such territories and the full exercise of sovereignty, **respecting the lifestyle of its inhabitants and complying with the principles of International Law**, constitute a permanent and unrenounceable aim of the Argentine people."[170] The message is firm and unambiguous, and has a twofold impact on the issue. On the one hand, it makes clear that the Argentine Republic will never give up its sovereignty over the Malvinas/Falkland Islands. On the other, it makes explicit reference to the respect owed to the inhabitants of the islands and to the principles of International Law.

Is there any way in which the population of the Malvinas/Falkland Islands can provide legal grounds to justify stripping part of the territory of a country, even though the sovereignty over this territory is disputed? According to International Law, there is no room for hesitations: as long as the territorial claim remains unresolved, the answer can only be categorically negative.

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[170] Translation of my own. Emphasis added.

"La Nación Argentina ratifica su legítima e imprescriptible soberanía sobre las islas Malvinas, Georgias del Sur y Sandwich del Sur y los espacios marítimos e insulares correspondientes, por ser parte integrante del territorio nacional.

La recuperación de dichos territorios y el ejercicio pleno de la soberanía, respetando el modo de vida de sus habitantes, y conforme a los principios del derecho internacional, constituyen un objetivo permanente e irrenunciable del pueblo argentino."

Conclusion

a) The order of the factors does alter the product

The arguments of the parties have already been dealt with and the inherent inconsistencies pervading the dispute over the Malvinas/Falkland Islands have been exposed. There is only one last question that needs to be addressed, and it is far from being trivial: is there any space for International Law? Does it make any sense, after almost two centuries, to keep on fighting for a cause that is perceived as just? Is the perception of justice static, or can it mutate? From a legal perspective, it is beyond doubt that legality varies over time, and conducts that were permitted in the past are now prohibited.[171] But legality and justice are not always coupled.

Focusing on the legality aspect and convinced that the dispute exists at the present time, it can be argued that a twenty-first century conflict cannot be solved applying nineteenth century rules. A clear answer to this purported dilemma was provided more than 90 years ago, when the Island of Palmas case was decided. Nevertheless, instead of relying exclusively on the broad principle set in that instance -to which I personally adhere-, it might be interesting to seek for a particular solution that takes into account all the matters at stake.

The key to solve the problem is to find the interrelation between the two arguments: one arose in the nineteenth century, the other came into existence in the second half of the twentieth century; one is based on the territory, the other centers on the rights of a group of persons in relation to that same territory. In other words:

[171] The opposite might also be true, though this trend is certainly less common.

self-determination was not even dreamt of in the early nineteenth century and the law ruling the acquisition of territory today differs radically from the one in force two hundred years ago.

If there is one moment of supreme relevance for the legal dispute, that is the 1833 incident. Having identified the turning point, it should be analyzed who had a better title to the islands prior to that date; whether the events taking place in 1833 were legal or not; and who holds a better title ever since.

	Dispute	**1832/1833 title**	**1833 incident**	**Post 1833 title**	
1	Sovereignty	Argentine	Legal	British / Islanders	
2			Illegal	Argentine	**Argentine official position**
3		British	Irrelevant	British / Islanders	British former official position
4	Population	Irrelevant	Irrelevant	Islanders	**British current official position**
5		Argentine	Legal	British / Islanders	
6			Illegal	Occupation?	**Real debate**
7		British	Irrelevant	British / Islanders	

If sovereignty was to be considered the principle that should prevail in the dispute, then self-determination would anyway have to be discussed[172] due to the inclusion of the Malvinas/Falkland Islands in the list of Non-Self-Governing Territories during the second half of the twentieth century. The only case in which self-determination would have no relevance whatsoever would be in the situation 2,

[172] To be absolutely clear about it, discussing a topic does not prejudge on the correctness of any argument offered by any of the parties.

where sovereignty would act as an absolute principle, overriding any claim to self-determination.

On the contrary, if the center of the dispute were to be the population of the islands,[173] still the title to the territory before 1833 should be discussed; as it affects the composition of the "self". The only scenario in which even raising the territorial issue would make no difference at all would be in case 4, which is built on the assumption that self-determination is an absolute right and is subject to no limitations.

Considering that neither of the principles are absolute, the main takeaway of the chart is that both territory and population must be discussed in order to reach not only a legal solution, but also a fair one. And, as an additional inference, it can be said that the territorial controversy should precede the debate surrounding the population; and such conclusion is dictated by pure logic. The nature of the population cannot affect, *per se*, the nineteenth century title to the territory. In opposition, the nineteenth century title to the territory can affect, by itself, the nature of the population. Therefore, in order to fully understand which legal body protects the inhabitants of the Malvinas/Falkland Islands in the present, it must first be determined who had -and has- a better title to the territory.

Far from being original, this conclusion has been embraced by several scholars: "The General Assembly has not accepted the supremacy of self-determination in the two disputed cases of Gibraltar and the Falkland Islands."[174] Going even further, it was stated that "The approach of the General Assembly seems to involve treating the

[173] I chose the term "population" and not "self-determination" for the sake of clarity, as I believe minority rights should be also included in the category.
[174] Blay, Samuel K. N.; *op. cit.* Page 463.

resolution of the territorial dispute as a necessary first step in the decolonization process. This is arguably evidence of a collective judgement that the Argentine territorial claim appears sufficiently credible -more so than, say, the Moroccan claim to Western Sahara- to warrant resolution prior to modalities of decolonization being decided."[175] Rephrasing the same idea, it was said that "Argentina, the Committee of 24, and the General Assembly stressed that the principle of self-determination should not be applied at the expense of decolonization even though self-determination had come to be almost equated with decolonization."[176]

To put it in even more clear terms: "the territorial issue *does* come first. Until it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have a right of self-determination."[177] "Territorial integrity is integral to the process of identifying self-determination units. In this sense, it could be said that territory determines the destiny of the people at a fundamental level";[178] and not that "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people."[179]

b) A story without an end

"The 135-year-old dispute over the Falklands could hardly have seemed anything other than rather innocuous by the early 1960s. Argentina could be expected to continue making regular protests about the British presence in the Malvinas. Argentines had registered official protests in 1833, 1841, 1849, 1884, 1888, 1908, 1927, 1933, 1946,

[175] Trinidad, Jaime; *op. cit.* Page 154.
[176] Gustafson, Lowell S.; *op. cit.* Page 55.
[177] Higgins, Rosalyn; *op. cit.* [1994]. Page 127.
[178] Trinidad, Jaime; *op. cit.* Page 71.
[179] Western Sahara, Advisory Opinion of 16 October 1975. Separate opinion by Judge Dillard. Page 122.

and yearly thereafter in the United Nations."[180] A century and a half without any progress inevitably led to a war. Almost forty years after the armed conflict has come to an end, what should be expected from an absolute absence of dialogue? "Because there exists little trust between the parties, there will be little incentive to trust a third party decision that in turn relies upon the opponent´s compliance for its implementation. Because negotiating avenues of resolution appear blocked, armed force that creates objective ´facts´ such as de facto change in control or infringement of territorial sovereignty are more readily tried."[181]

By the end of 2017, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples included all the Resolutions and Decisions concerning specific issues tackled by the Special Committee during that year in a list.[182] From all the territories listed there -which total 17-, 16 had relevant Resolutions/Decisions adopted during 2017, and the only one that did not were the Malvinas/Falkland Islands, as the most recent resolution dealing with them was adopted in 2004.[183] Through its Resolution 58/316, the U.N.G.A. decided that the "Question of the Falkland Islands (Malvinas) [...] shall remain on the agenda for consideration upon notification by a Member State;"[184] and since then, no traceable innovations have taken place.

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[180] Gustafson, Lowell S.; *op. cit.* Page 56.
[181] Kratochwil, Friedrich, *et al*; *op. cit.* Page 120. The underlining corresponds to the original text.
[182] Note issued by the Secretary General of the United Nations on 19 December 2017. UN Document A/AC.109/2018/L.1. Specifically, see Section III.A.1.
[183] See U.N.G.A. Resolution 58/316.
[184] See Section D.4.(b) of the Annex to the Note issued by the Secretary General of the United Nations on 19 December 2017. UN Document A/AC.109/2018/L.1.

The dispute[185] has reached a stalemate, and the prospects of any solution in the near future are not encouraging. Meanwhile, at the very minimum, the temporary legal status of the territory should be determined until a final solution is arrived at.

Once again, in order to find out the law applicable today, it must first be determined who had a better title to the territory in the nineteenth century. And, obviously, if there was a minimum consensus among the parties to figure this out, then the whole situation would be solved. But, for the sake of argument, I will try to inquire into the legal consequences of both hypothetical scenarios.

If, either before 1833 or through the violent action taking place that year, the United Kingdom has acquired a valid title to the territory, then today´s *de facto* situation would reflect the legal framework. In this sense, Argentina would have nothing to claim, and the title over the territory would be held by the British or by the inhabitants of the islands.

But if, on the other hand, Argentina was the sovereign in 1832, and the 1833 attack constituted a violation of International Law, then the territory of the islands would be under occupation, regardless the almost two hundred years elapsed.

According to well-established customary law, "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."[186] In other words, in the hypothetical case presented, the

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[185] By now, it should be clear enough that, considering the "disagreement, both on the law and on the facts", the existence of a dispute between the United Kingdom and Argentina is undeniable. See Case concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995. Paragraph 22.

[186] Articles on the responsibility of States for internationally wrongful acts, adopted by the U.N.G.A. through its Resolution 56/83. Article 14, paragraph 2.

United Kingdom would be, currently, committing an international wrongful act. As a consequence, it would be "under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[187]

In a case that resembles the one under analysis in many aspects, the I.C.J. found that the United Kingdom had conducted the decolonization process of Mauritius in a manner inconsistent with the right of peoples to self-determination, and therefore "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State [...]. It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius."[188] In consequence, it concluded that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination"[189] and that "**all Member States must co-operate with the United Nations** to complete the decolonization of Mauritius."[190]

So, if it were determined that the occupation of the Malvinas/Falkland Islands since 1833 constitutes and internationally wrongful act, then "[t]he territorial integrity principle may give the claimant a remedial right to restore pre-colonial territorial

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[187] *Ibid.* Article 30.
[188] Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Paragraph 177.
[189] *Ibid.* Paragraph 178.
[190] *Ibid.* Paragraph 182. Emphasis added.

boundaries, or, a right of retrocession."[191] But as soon as this possible outcome is put into consideration, two serious concerns arise: time and population.

Is it even reasonable to think of reverting to its legitimate sovereign a territory that has been under foreign administration for almost two centuries? Time, by itself, can only consolidate the Occupying Power´s position if the *fait accompli* theory is to prevail, securing the ascendancy of force over law. In this regard, it must be remembered that "[i]nternational law, being a weak law, is fully exposed to the impact of the phenomenon to which jurists have referred as the ´law-creating influence of facts´. But unless law is to become a convenient code for malefactors, it must steer a middle course between the law-creating influence of facts and the principle, which is the essence of law, that its validity is impervious to individual acts of lawlessness."[192]

In terms of population, the arguments become more practical than theoretical; and examples are not abundant. Nevertheless, there is a paradigmatic case of withdrawal from an occupied territory, and even though that occupation was not as prolonged as the one in the Malvinas/Falkland Islands, the politics and history behind it made it even more complex. This landmark in the history of occupation was the Israeli

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[191] Blay, Samuel K. N.; *op. cit.* Page 444.

Another interesting analogy can be drawn with the decolonization process in Western Sahara. As stated by Judge Singh, "[t]hose legal ties which the Court found to exist at the time of Spanish colonization between Western Sahara and Morocco or Mauritania were not of such a character as to justify today the **reintegration or retrocession 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 have been dismembered by the colonizer and thus justify reunion on decolonization at the present time. Accordingly, the facts and circumstances of this case would not attract the provisions of paragraph 6 of resolution 1514 (XV) which holds disruption of national unity or territorial integrity of a country as incompatible with the Charter of the United Nations and thus points to reintegration of territory." Western Sahara, Advisory Opinion of 16 October 1975. Declaration by Judge Singh. Page 80. Emphasis added. It can be inferred, *a contrario sensu*, that if Argentina´s title to the islands was recognized, then reintegration of the territory should follow.

[192] Lauterpacht, Hersch; *op. cit.* [1947]. Page 427.

withdrawal form the occupied territories of Gaza, though many scholars still argue that the disengagement plan did not put an end to the Israeli occupation.

Nevertheless, the point is that after decades of occupation, after thousands of deaths, after widespread condemnation by the international community, after endless rounds of negotiations involving the most powerful nations of the twentieth century, in 2005 the Government of Israel decided to change its recalcitrant policy. "At the time of the withdrawal, only 8.500 Israeli settlers lived in Gaza, among a population of 1.375 million Palestinians, but they required about 3.000 soldiers, a substantial monetary cost and potential source of risk."[193]

Coming back to the Malvinas/Falkland Islands dispute, it might be interesting to wonder which might be the risks -if any- of an eventual retrocession for each of the actors involved. How would a retrocession affect the Argentine and British legal interests? Will it impact on the legal interests of the population of the islands at all? Or is it that the legal arguments offered are only a façade that seeks to hide other kind of interests?

From a political perspective, the current situation constitutes a serious drawback of the democratic principle. Approximately 2.500 individuals[194] are allowed to outweigh the will of almost 45.000.000 persons who have expressed their willingness to respect the formers´ interests. Are there any grounds for such an alleged fear of oppression?

[193] Cohen, Raphael S., *et al*; From Cast Lead to Protective Edge. Lessons from Israel´s wars in Gaza, RAND Corporation, United States, 2017. Page 20.
[194] Falkland Islands (Malvinas) 2017 basic facts. Available at https://www.un.org/en/decolonization/pdf/Falkland-Islands(Malvinas)2017.pdf.

Currently, there are between 8.000 and 10.000 British residents in Argentina.[195] Was there ever any hostility against them?

Another astounding fact related to numbers is that the military casualties during the 1982 war were between 800 and 1.000 on the Argentine side and 250 on the British. [196] This means that an amount of people roughly equivalent to half of the population of the islands perished in less than three months. If the more than 500 Argentine veterans that committed suicide after the end of the war[197] are also taken into account, it becomes clear that this whole situation is inconsistent not only in legal and political terms, but also from a humanitarian perspective.

Since 1982, the United Kingdom has adopted an intransigent stance reflected in the absolute denial to negotiate the sovereignty of the Malvinas/Falkland Islands; but this was not the case in the years preceding the war. Did the armed conflict somehow change the legal position of the parties? As far as my understanding goes, the sovereignty issue has not been altered by the 1982 war in any way; and this assertion is strictly legal and far from any kind of apologist jingoism.

Almost a decade after the end of the armed conflict, some of the participants in the negotiations that took place during the 1982 crisis expressed their views on the

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[195] Accurate and updated official data is not available.

[196] Freedman, Lawrence D.; Reconsiderations: The War of the Falkland Islands, Foreign Affairs, vol. 61, N° 1, Fall 1982. Available at https://www.foreignaffairs.com/articles/argentina/1982-09-01/reconsiderations-war-falkland-islands-1982.

According to Argentine estimations, military casualties were 649 -Argentine- and 255 -British-, while civilian casualties -inhabitants of the islands- amounted to 3. See "La última guerra cuerpo a cuerpo". Article available at https://www.clarin.com/sociedad/ultima-guerra-cuerpo-cuerpo_0_BJHPziphg.html.

[197] See "Alarma la serie de suicidios de ex combatientes de Malvinas". Article available at http://www.eldiariodelfindelmundo.com/noticias/2018/12/07/79975-alarma-la-serie-de-suicidios-de-ex-combatientes-de-malvinas.

topic. According to Ambassador Jeane Kirkpatrick´s words, she still thought, in 1990, that "there should have been a peaceful settlement to this conflict even in retrospect";[198] while Sir Anthony Parsons stated, in 1991, that it seemed to him "there was an opportunity for the preemptive diplomacy in which the UN so conspicuously failed over the years."[199]

Today, the South Atlantic does not seem to be a possible scenario for an armed conflict in the near future, and I hope that remains the case indefinitely. But, is such a wish realistic? How long can International Law be openly disregarded with the international community´s complicity? "Law is not necessarily disintegrated by impotence; but it is destroyed by unqualified submission to the lawlessness of force."[200]

If both parties really believe that their positions are respectively upheld by International Law, then there is no reason to justify the negative to negotiate. Keeping in mind that "the law which states have so painstakingly wrought to govern their relations is too precious a heritage to be suborned to cover the imperialistic designs of any nation",[201] and that perpetuating the *status quo* will only push the disfavored party to seek extra legal remedies; sitting down to negotiate the sovereignty over the Malvinas/Falkland Islands is more than just a solution provided by International Law, it is the most convenient course of action for the United Kingdom, Argentina and -primarily- the population of the islands.

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[198] Interview to Ambassador Jeane Kirkpatrick, 13 November 1990. Transcript available at http://dag.un.org/bitstream/handle/11176/89730/Kirkpatrick13Nov90TRANS.pdf. Pages 21/22.
[199] Interview to Sir Anthony Parsons, 19 April 1991. Transcript available at http://dag.un.org/bitstream/handle/11176/89711/Parsons19Apr91TRANS.pdf. Page 42.
[200] Lauterpacht, Hersch; *op. cit.* [1947]. Page 435.
[201] Goebel, Julius (Jr.); *op. cit.* Page 468.

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