

The Struggle for the Falklands*

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The Falkland Islands (or *Las Malvinas*, as Spanish speakers call them)¹ are a small archipelago in the South Atlantic, with a population of slightly more than 1,700.² Britain rules them and Argentina claims them. In the first week of April 1982, in a bloodless strike, Argentina seized the Falklands from the United Kingdom. Within two months, Britain had mounted a major assault and regained the islands. Civilian casualties were very low; about 960 combatants died.

In the United States, the media viewed Argentinian motives and capabilities with derision and encouraged the notion that the Falklands war was comic opera. Washington expressed strong sympathy for the United Kingdom and many U.S. officials used the opportunity to indulge in Churchillian rhetoric. Many factors, not all of them relevant, colored media coverage of the war and appraisal of its background in the United States. There was a general revulsion over Argentinian domestic human rights violations,³ though the United States has courted and embraced governments possessing worse human rights records. Some commentators accused Argentina of using a foreign adventure to divert attention from a disastrous domestic economic policy, although one has the impression that

* This comment reviews, in light of recent events, the analysis of the Falkland Islands' question by Julius Goebel in 1927. Professor Goebel's *The Struggle for the Falklands* was reissued in 1982 by Yale University Press.

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1. Where territorial rights are disputed, there is a latent politics in names. Just as one reveals one's position by using "the West Bank" or "Judea and Samaria," "Namibia" or "South West Africa," one is typed by whether one uses "Falklands" or "*Las Malvinas*" to designate the islands. U.N. documents designate them as "Falkland/*Malvinas*." Professor Goebel, despite his belief in the justice of the Argentinian case, referred to them as the Falkland Islands, presumably because that is their designation in English. I will follow Goebel's practice and refer to the islands as the Falklands because the term is used overwhelmingly by English-language media, is more commonly understood by English-speaking people, and is used by the current rulers and inhabitants.

2. Under the British, the Falkland Islands became "Falklands Ltd.," essentially a company town. The Falkland Islands Company, chartered in 1851, is "a privately owned monopoly enforced by the British Government." *The Falklands' Company*, NEWSWEEK, May 3, 1982, at 68. It owns roughly half the land, half the sheep, warehouses, and ships and in addition employs 80% of the non-government employees on the islands. It is the sole agent for vending of the islands' two million kilogram crop of wool—half of it sheared from the Company sheep. It has been reported that the overwhelming bulk of the profits has been exported to Britain, not reinvested locally. *Id.* The company provides housing to the employees, who earn about \$7000 a year. There are no unions. See Barnett, *Iron Britannia*, NEW LEFT REV., July-Aug. 1982, at 81. The British character of the population is assured by an Aliens' Ordinance, which prohibits non-British nationals from buying land without both a license from the governor and the approval of the Executive Council.

3. See Schumacher, *Argentina After the Falklands*, N.Y. Times, Dec. 26, 1982 (Magazine), at 12.

Mrs. Thatcher's choice of strategic responses was influenced by similar domestic factors. Other commentators emphasized that Argentina was governed by a military junta and the United Kingdom by an elected government, as if this demonstrated that the British had the better case.⁴ In most legal systems, title goes to the proper owner, not to the nicest person. If quality of government determined these sorts of issues, international title would oscillate with every coup and constitutional change, with opposing public order systems always drawing diametrically opposite conclusions.

This is neither the time nor the place to correct the record of recent events. No one has access to enough of the data to claim to know what happened.⁵ International incidents are so complex that even participants do not understand them as well as a scholar—with access to archives in many capitals—forty years after the event. However, the reissue by Yale University Press of Julius Goebel's *The Struggle for the Falkland Islands* (originally published by Yale and Oxford in 1927)⁶ is an appropriate occasion to reconsider the international legal issues.

In curious ways, Yale University Press's republication of the book is symptomatic of the United States's reaction to the war itself. The Press invited J.C.J. Metford, professor emeritus at the University of Bristol, to contribute both a foreword and an introduction. Metford is an expert on the Spanish language, but apparently not a lawyer. His foreword, written in May 1982, is openly partisan and gravely infected with war fever.⁷ For

4. In fact, discussion of Argentina in the United States is reminiscent of Edward Said's concept of "Orientalism." Commentators portray a complex and varied nation in the most shamelessly stereotyped fashion, seizing on improbable indicators as long as they show the subject in a sufficiently bizarre light. Introducing a scholarly collection of essays on Argentina in 1983, Frederick C. Turner observed with some asperity that the contributors

quite understandably . . . omit references to one of the ways in which tens of thousands of people are currently obtaining a view of Perón: through *Evita*, the malicious, one-sided, anti-Perónist musical that has been playing to packed houses in London and New York. As theater it is arresting; as history, it is false.

Turner, *The Cycle of Peronism*, in JUAN PERÓN AND THE RESHAPING OF ARGENTINA 3, 11 (1983). Certainly the *locus classicus* of "Argentinism" is the sweeping characterization of the sexual preferences of all Argentinian men by V.S. Naipaul. Naipaul, *The Return of Eva Perón*, in THE RETURN OF EVA PERÓN 155 (1980).

5. Quick, popular studies, such as THE SUNDAY TIMES OF LONDON INSIGHT TEAM, WAR IN THE FALKLANDS (1982), are unlikely to be complete. Imagine an "Insight" book on Pearl Harbor and compare it with G. PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR (1981). But for a more thorough analysis of the military aspects of the Falklands conflict, one which suggests that the conflict was closer than appreciated, see M. HASTINGS & S. JENKINS, THE BATTLE FOR THE FALKLANDS (1983).

6. J. GOEBEL, THE STRUGGLE FOR THE FALKLAND ISLANDS: A STUDY IN LEGAL AND DIPLOMATIC HISTORY (rev. ed. 1982).

7. Metford wrote:

That even responsible persons should be so emotional over such an issue; that a whole nation should be prepared to damage itself economically at a time when it could least afford it; that it could contemplate with equanimity the sacrifice of thousands of its men for some bleak, wind-swept islands suitable for penguins, sheep and those who can face a toilsome existence is diffi-

example, he speculated that Goebel's book must be taken as a manifestation of America Firstism, writing, "It was a period when isolationism in the U.S.A. was at its most vociferous, and nowhere more so than in the Law School of Yale University."⁸ "Presumably," Metford opined, "this was the subconscious motive for Dr. Goebel's researches, but it must be acknowledged that he approached the question of the sovereignty of the Falkland Islands with commendable scholarly integrity."⁹ In fact, it appears that the book was researched and substantially composed in 1915 and 1916 during Goebel's traveling scholarship in Europe.¹⁰ Moreover, Goebel was on the faculty at Columbia Law School and neither studied nor had appointments at Yale.¹¹ Furthermore, the book was published simultaneously by Oxford University Press, not known as a bastion of America Firstism. Finally, to conclude that scholarly criticism of British (and American) behavior in the nineteenth century amounts to twentieth-century isolationism and America Firstism is bizarre.

Speculations on Goebel's psychological motives must be left to Professor Metford. Goebel was "partisan" because his study of the historical record persuaded him that Britain had exploited the weakness and internal disruption of a young and weak state to seize the Falklands illegally. He concluded that the United States, under President Jackson, had abetted that seizure, but had never acknowledged its complicity nor made amends. The attribution to Goebel of America Firstism and isolationism is an oblique way of detracting from a singularly scholarly work without directly contesting its methods and conclusions. It is regrettable that Yale University Press, succumbing to faulty judgment or to war fever, should have chosen to introduce the Goebel book with two papers so inconsistent with Goebel's methods and findings and the spirit in which he executed the work.

I. GOEBEL'S METHODOLOGY

Goebel studied the legal and diplomatic history of the Falklands dispute, giving considerable attention to the relationship between international legal principles and the political interests of major European states during the discovery and colonization of the New World. Goebel believed that the Falklands struggle was paradigmatic of European imperial his-

cult to understand.

Metford, *Foreword* to J. GOEBEL, *supra* note 6, at vii. The reader may well wonder to which (if not both) of the contestants these words apply.

8. *Id.* at vii.

9. *Id.* at viii.

10. *Id.* at xxix.

11. WHO WAS WHO IN AMERICA 160 (1976).

tory in the eighteenth and nineteenth centuries. Hence, he reviewed the social and economic forces of the period that shaped the struggle and tried to relate them to normative formulations. The work examines in exhaustive detail the diplomatic correspondence, the politics and intrigues in the courts of the different European capitals, and the special complications arising from the domestic distribution of power in the British parliamentary system.

Goebel's deep commitment to the principles of the Peace of Utrecht, which he felt were fundamental to the public order of Europe, is a remarkable feature of his work.¹² Virtually alone among his contemporaries, Goebel insisted on the reality of this "public law of Europe" and denounced any defection from its norms with great moral indignation. Goebel often ignored the contradiction between the machinations and perfidy of all parties (sometimes explicitly revealed in their cameral deliberations) about which treaty and customary principles to use and the abiding constitutional principles of Utrecht. After the more than one hundred years and countless violations of Utrecht which he carefully detailed, Goebel insisted on appraising behavior in terms of treaty provisions that had become largely obsolete.

Goebel's refusal to accept contemporary practices was linked to several deeper jurisprudential problems. He demonstrated cogently that a transnational political process served the common interests of the elites of Europe. To an extent, this process shaped behavior as an independent variable. But for all his review of politics, Goebel did not incorporate power as a factor in the lawmaking process. He was simply unwilling to accept the revisory effect of naked power on law and instead assumed a distinction between legal matters, which did not change, and political matters, which were subject to change. Hence, he grappled with English challenges to the law, in which Britain's lawyers, not surprisingly, presented British special interests as new legal formulations (e.g., freedom of the seas), not as a continuation of the process or as new law making, but as violations of the law. In Goebel's theory, any legal change in an unorganized system became legal perfidy. Further, Goebel refined a focus so sharply detailed that it rendered the viewer incapable of distinguishing negotiating positions and ruses from agreements.

12. Consider one portion of his appraisal of part of the Peace of Utrecht:

It may be argued in the light of Lexington's candid advice to his ministers that the regime introduced by the treaties was a purely formal cloak for a projected destruction of the Spanish colonial legal order. This was, in fact, the case, but the perseverance of the existing legal system had many implications that were of international importance.

J. GOEBEL, *supra* note 6, at 168.

In the nineteenth century, the British government based part of its claim for the Falklands on discovery. Although for more than a century Spain had insisted (and to an extent England had deferred) that it enjoyed title to all the undiscovered lands of the New World by virtue of papal grant, Spain could also emphasize discovery as a basis for acquisition or consolidation of title. Spanish claims, however, were undermined by the Reformation and the disintegration of the idea of the universal authority of the Holy See, as well as by England's increasing insistence that title could be acquired only by peaceful occupation.

The controversy over who discovered the islands may never be resolved. Navigation, plotting, and cartography were crude. Some of the early charts of the oceans of the New World include islands later discovered not to exist. Although Goebel concluded that, on all the evidence, Amerigo Vespucci was probably the first to discover the islands,¹³ the entire question of discovery was already historical rather than legal. Goebel—like almost all international lawyers today—argued that the basis for international title was not discovery but peaceful occupation.¹⁴ This demonstration was one of his book's most valuable contributions.¹⁵ Ironically, his conclusions validated certain British claims that he criticized.

Goebel's conclusion that occupation was the only basis of international title was accurate only in part then, and is quite inadequate now.¹⁶ As is demonstrated by two cases almost contemporaneous with the original publication of Goebel's work, the *Island of Palmas* and *Clipperton Islands*,¹⁷ contemporary disputes turned less on the fact of occupation and more on the adequacy of the manifestation of sovereignty in a particular territory. Title over inaccessible islands has been recognized when based upon scarcely more than discovery and "symbolic acquisition" because the contextually appropriate level of occupation was deemed to be very, very low.

Putting these doctrinal distinctions aside, Goebel did establish that Britain's case was weak at the outset. If discovery alone were adequate to acquire title, the British were not the discoverers. If discovery alone were inadequate to acquire title, the British, as we will see, were not the first occupiers.

13. *Id.* at 3-4.

14. *See id.* at 47-119.

15. *Id.* at xxix.

16. *See* 1 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 498-510 (2d ed. 1945); J. MOORE, *Memorandum on Uti Possidetis, Costa Rica-Panama Arbitration, 1911*, in 3 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 328 (1944).

17. *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (1928); *Sovereignty over Clipperton Island (Fr. v. Mex.)*, 26 AM. J. INT'L L. 390 (1932).

II. THE HISTORICAL PERSPECTIVE: THE ENGLISH AND SPANISH STRUGGLE OVER THE FALKLANDS IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

The most detailed part of Goebel's book is his analysis of the struggle between England and Spain in the seventeenth and eighteenth centuries. This conflict must be reviewed in some detail, for it is indispensable to understanding what happened and how Goebel appraised it.

The conflict over the Falkland Islands was part of a larger struggle for economic control of the western hemisphere. The Spanish had built their colonial empire by scattering settlements widely and then claiming control over the intervening territory on the principle of contiguity. Spain also sought to restrict trading privileges with the colonies to Spanish subjects and domiciliaries. Such a system could be effective only as long as Spain was a major maritime power, and by the eighteenth century it was not. As a result, it sought to close the seas through a legal device—papal edict. English maritime power, by contrast, was increasing, and because England then had no colonies, it perforce looked to trade relationships with Spanish settlements in the New World. Spain naturally resisted. Goebel writes:

[T]he whole resources of English politics and trade were concentrated on the object of striking a breach in South America which would give her not only the political but the economic control of the western hemisphere. The attempt on the Falklands occurred in the final stages of the struggle, and here the whole defensory apparatus of law which Spain had built up was put to the test.¹⁸

The Treaty of Münster (1648) legitimated the Spanish and Dutch colonial systems and absolutely prohibited colonials from trading with outsiders.¹⁹ But the treaty implicitly acknowledged that where others had not established effective settlements, new occupation could confer title. To preempt such claims, the Spanish evolved another principle in Münster and prohibited navigation not only in coastal waters off its colonies, but on the high seas as well. England recognized these principles in the Second Treaty of Madrid (1670).²⁰

There followed a period that contemporaries described as loathsome in its violence. English privateers preyed on the Spanish colonies and on the ships plying the Spanish main. England could benefit from these activities while disavowing them, for none were overtly official. One English expe-

18. J. GOEBEL, *supra* note 6, at 124.

19. Treaty of Münster, Jan. 30, 1648, Spain-Netherlands, 1 Parry's T.S. 1.

20. A GENERAL COLLECTION OF TREATYS 162 (1732); J. GOEBEL, *supra* note 6, at 129.

dition landed on the Falklands,²¹ but Goebel believed this was devoid of legal consequences.²² Additionally, the Spanish monarchy's leasing of the governmental monopoly on the slave trade resulted in a number of foreign companies' bringing more ships to the South Atlantic.

Matters were finally settled in the Peace of Utrecht of 1713.²³ Its instruments set out a regime central to European imperial and colonial policies. In Goebel's view, *Utrecht* is fundamental to the status of the Falkland Islands in international law.

The 1713 Treaty of Utrecht confirmed the principles of *Utrecht* and reestablished the system that had prevailed before the War of the Spanish Succession, except that the slave trade was henceforth to be in British hands.²⁴ England, for its part, guaranteed the old order, including its territorial arrangements.

It is no simple matter to identify and follow European imperial politics or international law during the eighteenth century. England, Spain, and France were fighting, negotiating, and agreeing, while all were pursuing duplicitous paths, strewn with assurances of good faith and protests of indignation over the lack of it in the other parties. Spain, in concert with France, was playing for time so that it could reestablish its naval power and meet what it felt to be the inevitable conflict with Britain in the South Atlantic and the Pacific. Forces in Parliament, responsive to the growing trade demands of Britain and intoxicated with the thought of empire, pressed for acquiring the Falklands as a base to expand British influence. Elements in the Foreign Office, however, realized that no treaty sanctioned British aspirations and, moreover, saw insufficient value in the Falklands to warrant war. Parliament finally prevailed.

The Seven Years' War was ultimately settled by the Treaty of Paris, which largely stripped France of her colonial empire while creating certain common interests between the Bourbon Houses of France and Spain. Choiseul, the French Foreign Minister, sought to rebuild the colonial system by concentrating on islands. To this end, he allowed a young officer, Bougainville, to undertake an expedition to the Falklands at Bougainville's own expense, assisted by his relatives at St. Malo. (It is from this

21. J. GOEBEL, *supra* note 6, at 136.

22. Goebel wrote:

It was of no conceivable legal consequence, for it involved neither a mere formal taking possession of the islands, nor an occupation. Inasmuch as the voyage was undertaken with the intention of violating the treaty between England and Spain and the Spanish rules of trade, and was so treated by the Spaniards, it can scarcely be said that as against Spain any acts of Captain Strong had the effect either of establishing or perfecting any claim of the English to the Islands.

Id. at 137.

23. *Id.* at 164-67.

24. *Id.* at 171.

group that the French "*Les Malouines*" and the Spanish "*Malvinas*" come.)

Bougainville established a colony on East Falkland in 1764.²⁵ Upon learning of it, the Spanish government insisted that the colony be surrendered. Subsequently, Spain installed a Spanish governor under the authority of the Captain-General of Buenos Aires. Meanwhile, the British mounted an expedition to the Falklands to secure a base for future operations. Un-aware of the French settlement, the British circled the islands in 1765, took comprehensive surveys of the coast and sailed past Berkeley Sound, the location of the French colony.

This expedition became an important basis for British claims to the islands; hence Goebel recounts in detail what was actually accomplished. At Port Egmont (now called Byron Sound), Captain Byron recorded, "Of this harbor and all the neighboring islands, I took possession for his Majesty, King George, the Third, of Great Britain, by the name of Falkland's Islands."²⁶ The surgeon of the ship also "surrounded a piece of ground near the watering place with a fence of turf and planted it with many esculent vegetables as a garden, for the benefit of those who might hereafter come to this place."²⁷ Goebel commented sarcastically, "This act of benevolence is mentioned here because it was later used as proof of possession!"²⁸ Indeed, the following year, the Secretary of State, Conway, described the garden as a settlement when addressing the Lords of Admiralty. By this time, of course, the British knew of the French colony.²⁹

In a note to the Duke of Grafton, Lord Egmont acknowledged that securing the island was important for a variety of imperial programs in the South Atlantic and the Pacific.³⁰ He rejected Spanish claims to the Falklands based on proximity, the papal grant, or treaty. Furthermore, France's presence confirmed that Spain did not have good title. As for the awkward prior presence of the French, Egmont insisted that England had discovered the islands before France had seen them.

In 1766, a second British expedition established a settlement at Port Egmont.³¹ It took this expedition almost a year to find the French settlement. The British officials insisted that the French leave and then themselves sailed for England.³² There followed a period of intense negotiation between Britain, on the one side, and France and Spain, on the other, in

25. *Id.* at 226.

26. *Id.* at 232.

27. *Id.* at 233.

28. *Id.*

29. *Id.* at 234.

30. *Id.* at 236.

31. *Id.* at 238.

32. *Id.* at 239-40.

which it became increasingly clear that Britain intended to establish a colony on the Falklands and to treat them as an exclusive area.

For Goebel, "[T]he British were on the Falklands without the least color of right and . . . their act in making settlement was one of pure aggression, involving not merely a denial of the validity of a previous settlement by another power, but likewise the repudiation of a solemn treaty engagement which had subsisted for over a half-century."³³ Goebel reasoned that Article 8 of the Treaty of Utrecht clearly resolved the issue.³⁴ Even setting aside the Treaty, the British were forced to rely, first, on discovery, itself a very weak ground, and, second, on occupation, in which the French had preceded them and then ceded whatever rights they may have had to the Spanish, acknowledging the superior Spanish claim.

In 1770, in an eerie anticipation of the events of 1982, Spain, acting alone, successfully forced the British settlement to remove itself from the Falklands, apparently without loss of life.³⁵ Evictions in international politics, however, are rarely terminal events. Spain, imprudently, was unprepared for the war which its action was likely to precipitate and decided to sue for a diplomatic settlement. Under the Spanish proposal, England would be entitled to reconstitute its colony without prejudice to Spanish rights prior to joint removal. The proposal was not implausible, and might have been accepted by the Foreign Office but for the untimely arrival of the ship carrying the evicted Falklands settlers. Popular clamor, fanned by the Parliamentary opposition that saw an opportunity to regain the government, made it impossible for the Foreign Office to proceed toward a balanced diplomatic settlement.

Goebel demonstrated that French and, to a lesser extent, Spanish diplomats, were also boxed in by domestic political pressures. The French king made it clear to his Spanish cousin that he would not stand by Spain in the event of war over the Falklands. This contingent suspension of the alliance enormously strengthened England's hand, for Spain alone could not effectively conduct a war against England.

Throughout this period, French and Spanish diplomats in London negotiated with the British. Goebel recounted (in his own italics) that Lord

33. *Id.* at 270.

34. *Id.* at 165.

The text of Article 8 reads:

That there be a free use of navigation and commerce between the subjects of each kingdom, as it was heretofore in time of peace and before the declaration of this late war, in the reign of Charles II of glorious memory, Catholic King of Spain, according to the treaties of friendship, confederation and commerce which were formerly made between both nations according to ancient customs, letters patent, cedulae and other particular acts; and also according to the treaty or treaties of commerce which are now and will forthwith be made at Madrid.

Id. at 166.

35. *Id.* at 275-77.

North told Francés, the Spanish envoy: “[I]f Francés would promise that this conversation would not be made public he would say in confidence that they did not desire to keep the island, that it was worth nothing to them and if Spain would give the satisfaction demanded they would certainly evacuate.”³⁶ According to Goebel, this “secret promise” was a critical factor in the Spanish decision to conclude a diplomatic settlement.

On January 22, 1771, Masserano, the Spanish ambassador, and Lord Rochford signed reciprocal declarations. The Spanish statement disavowed the removal of the British colony and gave immediate orders that it be restored. But the Declaration added that the decision to restore “cannot nor ought in any wise to affect the question of the prior right of sovereignty of the Malouine Islands, otherwise called Falkland’s Islands.”³⁷ The British response acknowledged the Spanish declaration and accepted it as “satisfaction for the injury done to the Crown of Great Britain.”³⁸

On exchanging the documents, Masserano stated that Spain had acted in reliance on promises of the Ministry to evacuate the island and port. Lord Rochford temporized, saying he could make no categorical reply but would act within a week or ten days, during which he hoped the hostility of the opposition party would be overcome. He did state, however, that Britain would never make war for the Falklands, for she had no interest in them.³⁹

Although contemporary readers may find these remarks ambiguous, Goebel believed they constituted an additional compact that was to be confirmed in an ambiguous exchange the following evening between Masserano and George III.⁴⁰ Goebel further argued that the agreement confirmed Spanish rights to the Falklands. He wrote:

[T]he Spanish declaration was a mere act of satisfaction. . . . It was an act by which the physical *status quo* previously obtaining was restored. The question of right, however, was not affected by the act of the Spanish king, for . . . the English demand had been sharpened down to satisfaction to the injury to the crown which the attack of Bucareli had involved, a claim which, as we have seen, was based not on any violation of territorial sovereignty but upon the fact that a royal force had been attacked.⁴¹

36. *Id.* at 308 (italics in original). Lord Rochford, according to Goebel, told Francés the same thing. *Id.* at 310; *see id.* at 314–15. Weymouth, it should be noted, took a harder line and indeed played for war. He resigned a month later.

37. *Id.* at 359.

38. *Id.* at 360.

39. *Id.*

40. *Id.* at 361.

41. *Id.* at 362.

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Goebel also argued that the British tacitly waived their rights to the islands in light of Spain's express reservation. Although he acknowledged that British assurances to evacuate the islands were not given officially, Goebel claimed that they should have legal effect as they were the inducement for the Spanish action.

Goebel's textual analysis appears unassailable, but his incorporation of understandings (some expressed in early phases of negotiation) as a component of the written document is open to question. A major trend in international interpretation, often assumed to have substantial policy basis, insists on the primacy of the text and tends to exclude extratextual items.⁴² In fact, Goebel himself expressed some uncertainty on this point.⁴³ If the admission acquired legal validity only by implementation, as Goebel argued, then it would appear that the statement itself, in whatever form, was insufficient to establish rights in favor of Spain. Yet the interpretation of the understanding in other European capitals provides some support for Goebel. The agreement was widely viewed as a Spanish triumph and an indication of British pusillanimity.⁴⁴

In England, a furious debate ensued in Commons and the House of Lords. Chatham, leader of the opposition, requested an opinion of Lord Camden, then the Lord Chancellor but formerly the Lord Chief Justice of the Court of Common Pleas. According to Goebel, Camden's opinion became the conventional English judgment. Camden replied:

The right of sovereignty becomes absolute *jure coronae* from the moment the restitution takes place. Nor does it seem to me the King's title is abridged or limited; inasmuch as the reservation neither denies the right on one side nor asserts it on the other. The question remains as it stood before the hostility; the King of Spain declaring only that he ought not to be precluded from his former claim by this act of possessory restitution.⁴⁵

Goebel criticized the opinion for being inconsistent with international law, which does not depend in a domestic law view of sovereignty in title disputes. And of course, Goebel believed the opinion was flawed because it failed to take account of the secret promise that purportedly induced Spain to make the agreement.⁴⁶ Whatever the understandings, the Government's

42. See Vienna Convention on the Law of Treaties, Article 31, U.N. Doc. A/Conf. 39/27, at 16 (1969). But cf. McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992 (1967).

43. J. GOEBEL, *supra* note 6, at 363.

44. *Id.* at 364.

45. *Id.* at 370.

46. *Id.*

position was sustained in both Houses, although contemporaneous reports concluded that the opposition was not placated.⁴⁷

The Foreign Office suggested to Spain that it implement the agreement by allowing a British ship with a small garrison to repossess the British property at Port Egmont. In 1771, a British squadron reached Port Egmont and amicably exchanged possession of the garrison with the small Spanish forces there.⁴⁸

In 1774, the British abandoned the garrison upon the urgings of the Foreign Office. The British ambassador in Madrid was instructed to portray the British evacuation as an economy measure, not as an abjuration of right or a recognition of Spanish claims.⁴⁹ In fact, the British left an inscription on the blockhouse which declared continued English sovereignty.⁵⁰ Sometime after 1777, the Spanish destroyed the remaining buildings at Port Egmont to ensure that no colony would be established again.⁵¹

Goebel believed that Britain's abandonment in 1774 effectively "disposed of any shadow of right [to the Falklands] which the British may have had."⁵² He accepted the British contention that the evacuation of the Falklands was not accompanied by the requisite *animus derelinquendi*; thus British rights were not terminated because of abandonment or dereliction in the international legal sense. Rather, Britain's only claim to the islands arose from adverse possession, which was extinguished upon the British abandonment.⁵³

Spain, by contrast, could rely on rights arising from the Treaty of Utrecht. Goebel thought that these rights were confirmed in Article 9 of the Anglo-Spanish Nootka Sound Convention of 1790:⁵⁴

It is further agreed with respect to the eastern and western coasts of South America and the islands adjacent, that the respective subjects shall not form in the future any establishment on the parts of the

47. *Id.* at 375.

48. *Id.* at 407-08.

49. *Id.* at 408-09.

50. That inscription was:

Be it known to all nations that the Falkland Islands, with this fort, the storehouses, wharfs, harbors, bays, and creeks thereunto belonging are the sole right and property of His Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith, etc. In witness whereof this plate is set up, and his Britannic Majesty's colors left flying as a mark of possession by S.W. Clayton, commanding officer at Falkland Islands, A.D. 1774.

Id. at 410.

51. *Id.* at 423-24.

52. *Id.* at 425.

53. *Id.*

54. Nootka Sound is an inlet on the western shore of Vancouver Island where British and Spanish expeditions had arrived independently. Both governments deemed a treaty necessary to establish reciprocal terms of access and rights in the area. *Id.* at 427-28.

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coast situated to the south of the parts of the same coast and of the islands adjacent already occupied by Spain; it being understood that the said respective subjects shall retain the liberty of landing on the coasts and islands so situated for objects connected with their fishing and of erecting thereon huts and other temporary structures serving only those objects.⁵⁵

Moreover, since Article 4 prohibited the British from navigating or fishing within the distance of ten maritime leagues "from any part of the coast already occupied by Spain," Goebel reasons that the treaty "*by inference forbade any landing at the Falklands as they were a place already occupied by Spain.*"⁵⁶

By the time of the Treaty, Spain had constituted Buenos Aires, including the Falklands, as a Vice-Royalty. By 1820, however, the Vice-Royalty had broken away from Spain and the new government of the United Provinces or Argentina, as it was later called, was secure enough to establish its control over the Falklands.⁵⁷ The Argentinians appointed a governor three years later and established a colony in 1826.⁵⁸

In 1829, the new governor of the Falklands, Louis Vernet, tried to protect his fishing monopoly by excluding foreign fishing vessels from waters surrounding the Falklands. In July, 1831, he seized three American ships, after warning one of them, and brought them into port.⁵⁹ The United States consul in Buenos Aires protested the arrest of the vessels in a series of increasingly rancorous exchanges. By coincidence, the warship *U.S.S. Lexington* sailed into the Buenos Aires harbor at that moment. The U.S. consul presented his version of the facts to the captain of the *Lexington*, who stated that he considered it his duty to go to the Falklands and protect American citizens. The *Lexington* arrived at Puerto Soledad at the end of December 1831; its crew arrested nearly all the inhabitants, seized all the weapons, sacked the houses, and seized some seal skins. They took seven Argentinians in irons to Montevideo and released them to the Argentinian government only on assurances that they had acted under governmental authority.⁶⁰ Goebel reported that the *Lexington's* commander did not record any of these transactions in his logbook.⁶¹ There seems to be no substantial controversy over the basic facts of the interven-

55. *Id.* at 428.

56. *Id.* at 431 (italics in original).

57. *Id.* at 434; see L. DESTEFANI, *THE MALVINAS, THE SOUTH GEORGIAS AND THE SOUTH SANDWICH ISLANDS: THE CONFLICT WITH BRITAIN 77-79* (1982) (United Provinces formally occupied islands in 1820).

58. J. GOEBEL, *supra* note 6, at 434-36.

59. *Id.* at 438.

60. *Id.* at 439-44.

61. *Id.* at 444.

tion, although President Jackson transformed them substantially in his Annual Message to Congress.⁶²

In the negotiations that followed, the United States envoy to Buenos Aires disclaimed any responsibility for the actions of the *Lexington*, and demanded restitution of the property taken by Vernet as well as reparation and indemnities for the direct and consequential injuries.⁶³ It became apparent that further negotiations would be fruitless, and the American envoy prepared to leave Buenos Aires. Just before he embarked, he had a conversation with his British counterpart, which, Goebel speculated, contained indiscreet admissions that may have encouraged the British to re-enter the islands, on the assumption that the United States would neither object nor invoke the Monroe Doctrine.⁶⁴

Indeed, within three months, two British warships arrived at the Falklands with orders to expel the Argentinian garrison.⁶⁵ In response to Argentinian protests, Lord Palmerston replied that Britain had unequivocally asserted and maintained sovereignty over the island in discussions with Spain in 1770 and 1771. Palmerston contended that the 1771 agreement had confirmed Britain's rights to the Falklands and, thus, Argentina could not claim title to the islands based on a right derived from Spain.

The United States government asked a Spanish historian to investigate the ownership of the Falklands, and to determine whether the British had abjured their rights to the Falklands in a secret treaty. The historian answered that the Falklands had been part of the Vice-Royalty of Buenos Aires, but that he had not seen evidence of a secret agreement abjuring British rights. On the basis of this ambiguous report, the United States inexplicably decided not to apply the Monroe Doctrine when the British re-entered the Falklands. The United States argued then and later that jurisdiction over the Falklands was contested. Therefore, the controversy between the United States and Argentina could not be resolved until that prior issue was settled.⁶⁶ By tacitly acceding to the British claim, the United States was able to avoid any responsibility for the *Lexington's* detour. From 1833 on, Great Britain remained in control of the Falklands.

62. *Id.* at 445-47. A salvage action in the Circuit Court of Connecticut for the seal skins taken by the *Lexington* failed because the Court found that the islands were under the authority of the government of Buenos Aires: "Captain Duncan could have no right, without express directions from his government, to enter into the territorial jurisdiction of a country at peace with the United States, and forcibly seize upon the property found there and claimed by citizens of the United States." *Davison v. Seal-Skins*, 7 F. Cas. 192, 196 (C.C.D. Conn. 1835) (No. 3661).

63. J. GOEBEL, *supra* note 6, at 450. Goebel's judgment of the instructions on which the United States representatives operated was harsh: "deliberately misrepresenting, not only in its statement of fact, but also in its delineation of the legal aspects of the matter." *Id.* at 449.

64. *Id.* at 454.

65. *Id.* at 455.

66. *Id.* at 461-62.

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Like many other smaller states confronting a superpower bent on having its way, Argentina could do nothing but record continuous and vain protests.

After Theodore Roosevelt's Panama caper, he asked Philander Knox, his Attorney General, about a good legal argument. Knox reportedly replied, "Oh, Mr. President, do not let so great an achievement suffer from any taint of legality."⁶⁷ Palmerston also practiced a bold and ruthless power politics, but he cultivated a taste for legal fig leaves. Indeed, 1833 marks a substantial change in the British legal argument claiming title to the Falklands.⁶⁸

For Goebel, Britain's reliance on the Declaration of 1771 was as untenable as its predecessors. The Declaration of 1771 did no more than restore the *status quo ante* under which British claims were, to say the least, slender:

For Aberdeen to assert that the declaration of 1771 fixed the rights of the parties gave the lie to the very provisions of the instrument itself, for it confessedly was only an act of satisfaction which left the question of right untouched. . . . But even if . . . the declaration were regarded as fixing the rights of the parties, . . . then the British were given a right only to Port Egmont and the Spanish claim to Soledad was impliedly recognized. Every reason which would support the argument of Lord Aberdeen supports as well the claim of Spain to the eastern island.⁶⁹

Goebel concluded his account with Britain's occupation of the islands in 1833. Hermann Weber, a German scholar who published a short monograph on the Falklands in 1977, pursued the legal analysis beyond that time.⁷⁰ Weber, who apparently saw enduring effective control as the foundation of international title, doubted that Argentina's occupation of the Falklands in 1820 gave it more than inchoate title to the archipelago, for Spain never demonstrated an intention to abandon the island. Argentina's establishment of *de facto* authority gave it some claim to the islands, but Weber argued that, after 1833, Britain could rightfully assert title based on what international law euphemistically calls long-term adverse possession. Less convincingly, Weber rejected Argentina's claim of contiguity

67. W. LA FEER, *THE PANAMA CANAL: THE CRISIS IN HISTORICAL PERSPECTIVE* 34 (1978).

68. J. GOEBEL, *supra* note 6, at 456-59.

69. *Id.* at 466.

70. H. WEBER, "FALKLAND ISLANDS" ODER "MALVINAS"? DER STATUS DER FALKLANDINSELN IM STREIT ZWISCHEN GROSSBRITANNIEN UND ARGENTINIEN: EIN VOLKERRECHTLICHE FALLSTUDIE (1977).

and doubted the viability of that doctrine in international law.⁷¹ He dismissed the Latin American *uti possidetis* doctrine as unhelpful.

In my view, Goebel's analysis of the situation through 1833 is largely correct. He demonstrated that British seizure of the islands was based either on a misapprehension of the record or on strategic objectives that were inconsistent with the legal rights of first Spain and then Argentina. After 1833, however, it appears that Britain successfully consolidated title.

Goebel sustains his case even if he cannot win all of his arguments. His construction of the negotiations leading to the Declaration of 1771, for example, does seem to overstate the case for a secret understanding. Unquestionably some British diplomats did express Britain's willingness to abandon the Falklands once Spain had satisfied British demands for honor and compensation, and also assured the Spanish of a lack of interest in the Falklands. But many ideas are exchanged in the course of negotiation. One of the purposes of formal agreements is to enable parties to explore different possibilities in the early stages of negotiation without binding themselves.

Moreover, the Spanish and French diplomats may have pretended to believe there was a secret agreement even when they knew that the exchange of ideas had not amounted to that. They then could report that the unsatisfactory textual agreement was *actually* supplemented by a secret one which won the critical concessions. Thus, they could avoid war while assuaging the anger of their principals to whom the agreement, on its face, would have been objectionable. The English may well have appreciated the negotiators' dilemma. Hence their nods and winks, to which Goebel attributes such portentous meaning, could have conveyed something entirely different from what he imagined.⁷²

Most problematic for Goebel's argument, there is no hint in the Declaration of such an understanding. To be sure, scholars must bear in mind that records are careful artifacts and not faithful recordations. Indeed, government archives may practice selective destruction of embarrassing or inconvenient documents. But the absence of *any* reference to a secret agreement in the archives in Paris and Madrid undermines Goebel's case.

71. See D. SCHENK, *KONTIGUITAT ALS ERWERBSTITEL IM VOLKERRECHT* (1978).

72. Goebel's assumption overlooks the subtle dynamics that occur between negotiators (or lawyers in general) which are not always compatible with their instructions. These interactions help reach agreement, but they are tricky. Consider, for example, the so-called technique of "non-contradiction" which is now used by American negotiators when they are unable to win from the other side some explicit concession viewed as critical to agreement, but are still anxious to secure agreement on other matters. The United States negotiator declares his government's position and then construes the other party's silence as agreement. "One trouble with the diplomatic device of non-contradiction," writes Strobe Talbott, "is that an understanding arrived at by the silence of one party is easily undone; all the other party has to do is break silence." Talbott, *Scrambling and Spying in SALT II*, INT'L SECURITY, Fall 1979, at 3, 18.

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Goebel is correct, however, in his textual^{4[nk]} analysis of the Declaration of 1771. The Declaration simply refers to the *status quo ante* of Utrecht. In contrast, his analysis of the Treaty of Utrecht and the Nootka Sound Convention are merely expositions of their language. Goebel overstates his claim that the continuing “constitutive” character of the Peace of Utrecht established Spain’s sovereignty over the Falklands. When the British invaded, Spain had title over the islands by prior treaty law and under the shared expectations of the parties.

A possible obstacle to Argentina’s title is that even though Spain may have originally owned the islands, Argentina, as a former colony, could not claim them. Weber devotes more attention to this issue, but concludes that Argentina did not succeed to the islands. I disagree. Upon acquiring independence, a former colony ordinarily inherits all the territory of that colony. This principle, enshrined in Latin America and, a century later, in Africa,⁷³ would certainly appear to apply to the Falklands. Spain treated the islands as part of the Vice-Royalty of Buenos Aires, and did not occupy them. Moreover, the short time that elapsed before Argentina took control of the islands does not seem to warrant the conclusion that Argentina was derelict, thereby transforming the territory into a *res nullius*. International law has traditionally tolerated temporary lapses in the control of central authorities over peripheral territories caused by internal disruptions.

The case for British title is far weaker. Goebel’s documentary study of British policy indicates that the Palmerston government, as usual, pursued larger strategic objectives and used international law to support its claim when it served British purposes. The government’s statements about the Falklands were quite inconsistent with prior communications and the facts of the case.⁷⁴

After 1833, however, despite Argentinian protests, Britain seems to have consolidated title on the basis of adverse possession and effective occupation. As a means of stopping consolidation of title, protest has the most uncertain consequences in international law. If anything, early twentieth-century arbitral awards, some rendered shortly after Goebel’s book appeared, confirm British title to the Falklands. For example, in the *Is-*

73. Cairo Resolution of 1964, Organization of African Unity, OAU Doc. AHG/Res. 17(1). *But see* A. MCEWEN, INTERNATIONAL BOUNDARIES OF EAST AFRICA 27–31 (1971).

74. United States behavior from the *Lexington* incident and at least through the Cleveland administration was equally incongruent with the law and facts. United States motives, however, are less apparent. Jackson certainly practiced a high-handed and sometimes brutal foreign policy. U.S.-Spanish conflicts (which Goebel scarcely touches) may have made Washington loathe to concede strong Spanish title anywhere in the Americas. In general, U.S. relations with Latin America were hardly a paragon of good neighborliness.

land of Palmas,⁷⁶ Max Huber concluded that the then-prevailing norms were decisive in determining title. In *Clipperton Island*, the tribunal held that a very low degree of occupation would be sufficient to consolidate title for generally inaccessible islands.⁷⁶ A decade later, the Permanent Court of International Justice affirmed that doctrine with regard to rugged hinterland in the *Eastern Greenland* case.⁷⁷ In the *Temple of Preáh Vihear*, its successor, the International Court of Justice, held that in order to promote stability, even gross errors and asymmetries in negotiating skill would be ignored in title inquiries.⁷⁸

During a 1976 senatorial campaign, S.I. Hayakawa commented on United States rights to the Panama Canal, in an apothegm which captures much of the practice of territorial acquisition in the nineteenth century: "We stole it fair and square . . ." ⁷⁹ So too, the Falklands: Stolen or not, the islands became British according to the prevailing international law. Great Britain entered the twentieth century with a firm, if not proud, title. But that was hardly the end of the political or legal struggle.⁸⁰

III. CONTEMPORARY INTERNATIONAL NORMS: SELF-DETERMINATION AND DECOLONIZATION

The chronology of the Falklands must be suspended to consider the intervention of two radical legal norms. The first, self-determination, has now been enshrined as a fundamental postulate of contemporary law and politics by the United Nations⁸¹ and the International Court.⁸² It refers, most broadly, to the demands by individuals to form a political community to further their interests. The "right" of self-determination in international law refers to the policies and procedures of the world community which are meant to encourage and realize those demands. Since human beings are constantly forming new identifications in the ongoing process which Max Weber called "consociation," self-determination is a potentially disruptive doctrine: It contains the potential for challenging the legitimacy of existing systems.

75. *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (1928).

76. *Sovereignty over Clipperton Island (Fr. v. Mex.)*, 26 AM. J. INT'L L. 390 (1932).

77. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J., ser. A/B, No. 53, at 46 (Judgment of Apr. 5).

78. *Concerning the Temple of Preáh Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 4 (Judgment of June 15).

79. *N.Y. Times*, Aug. 22, 1977, at 5, col. 1.

80. Research after the Falklands War indicated that elements in the Foreign Office had long had doubts about the soundness of the British claim to the Falklands. See *Insight*, Sunday Times, June 20, 1982; *Falkland Islands: The Origins of a War*, *ECONOMIST*, June 19, 1982, at 31.

81. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66-67, U.N. Doc. A/4684 (1960).

82. *Advisory Opinion, Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16 (*Advisory Opinion of June 21, 1971*) [hereinafter cited as "Namibia Case"].

The second radical legal norm, decolonization, is often conflated with self-determination. Decolonization has sought to eliminate European and Japanese domination over substantial parts of the world, and to transfer political power to indigenous elites. It is thus manifestly retrospective in its intent and effect. Compared to the relatively limitless character of self-determination, decolonization is finite in several senses. First, it addresses only those political arrangements that are deemed "colonial." Obviously, this is a very selective characterization; human history has been marked by the movement of peoples with a small margin of superiority in organization or in warfare (or both) to areas where the inhabitants were subordinated, expelled or exterminated.⁸³ Decolonization is also more limited prospectively. Claims for self-determination may continue indefinitely; but when the current category of colonizers has been extinguished, the process of decolonization will end. Indeed, there are only a few patches on the globe which have yet to be decolonized.⁸⁴

There is a tendency to view self-determination and decolonization as synonymous. In many cases, self-determination claims and decolonization claims have been perfectly congruent. For example, Egypt's demand for self-government can be characterized as both a claim for self-determination and a claim for decolonization. In other cases, as in India, contending groups within the country will concur on decolonization but

83. There is no small irony, scrupulously ignored, in the claims of some colonized peoples against their colonizers. The Creoles of South America, for example, hardly occupied a vacuum. Many of them built upon the shards of indigenous cultures and civilizations which they systematically destroyed. Those indigenous civilizations themselves were often reared upon earlier social constellations which they suppressed.

84. Decolonization won a degree of verbal support from the victors in the First World War. See N. BENTWICH, *THE MANDATES SYSTEM* (1930); R. CHOWDHURI, *INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS, A COMPARATIVE STUDY* (1955); Gross, *United Nations Trusteeship and League of Nations Mandate System*, 4 *INDIA Q.* 224 (1948); see also Namibia Case, *supra* note 82, at 16; G. COCKRAM, *SOUTH WEST AFRICAN MANDATE* (1976). The Mandate system, however, was only selectively used as a technique for dismantling the empires of the losers. However cynical may have been the motives of some of the people who designed and used the Mandate system, a process of decolonization was initiated. Its normative development culminated in 1960, in the General Assembly Resolution 1514(XV), the "Declaration on the Granting of Independence to Colonial Countries and Peoples," which is widely accepted as expressing a fundamental postulate of contemporary international law and politics. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). The Declaration affirmed two principles which are not necessarily congruent. The first was the right of all peoples to self-determination. The second, which appears as operative paragraph 6 in the Declaration, states that, "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." In the equally authoritative Declaration of Principles on International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8082 (1970), the principle of self-determination is accorded equal prominence with the commitment "to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned . . ." In interpreting the Declaration, the International Court in the 1971 Namibia case characterized it as embracing "all peoples and territories." Namibia Case, *supra* note 82, at 31. Indeed, the Declaration of 1960 does proclaim as its objective "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."

seek incompatible self-determination goals. In some cases, such as Algeria or Northern Ireland, many citizens of the colonizing power, or indigenes who identify with it, will have been implanted in the colonial territory. If the colonists or their offspring do not identify with the indigenous population, their insistence on self-determination will conflict with the demand of other inhabitants, whether resident or expelled, for decolonization. Those identifying with the metropolitan will insist on self-determination and continued association with the metropolitan country. Exiles, or a state claiming to have been expelled, will demand decolonization and reinstatement. This is the situation in Gibraltar, perhaps in Western Sahara, and, if self-determination is even relevant to it, in the Falkland Islands.⁸⁵

The conflation of contrasting images and the extraordinary sense of righteousness that both self-determination and decolonization generate make cases like the Falklands qualitatively different from mundane territorial disputes. Britain expelled the Argentinian inhabitants of the Falklands and barred those who wished to settle there after the English seizure of the islands. In the interim, an entirely British population took root and became the only indigenous Falkland Islanders. Nonetheless, the Argen-

85. The potential lack of congruence between the doctrines of self-determination and decolonization can lead to difficult intellectual and emotional issues. The problem can be illuminated by a hypothetical. In 1967, the Six Day War ended with Israel controlling the Golan Heights, Syrian territory to which the Israeli government had previously made no claims. The Israeli government began a program of Jewish settlement and investments in the area, Stone, *Behind the Ceasefire Lines: Israel's Administration in Gaza and the West Bank*, in 2 *THE ARAB-ISRAELI CONFLICT* 390, 401 (J. Moore ed. 1974), formally annexing it in 1981. Syria has insisted that the Golan Heights are Syrian territory and that Israel is no more than a belligerent occupant. Meanwhile, the Jewish population of the Golan Heights continues to increase; in fact, many of its Jewish inhabitants were born there.

Let us assume that 30 years hence, the United Nations, with the agreement of Israel, calls for self-determination of the Golan Heights. By then we may assume that the Jewish component of the population will have increased substantially and will far outnumber the Syrian indigenes. Will the termination of Israeli occupation by a plebiscite, in which the now numerical majority of Jewish settlers vote for incorporation in Israel, adequately discharge the international norms of self-determination and decolonization? Will the precedent of yielding to the numerical majority of inhabitants without regard to how and when they entered the territory enhance international order? Is Syria likely to accept the plebiscite in these circumstances? Even if the principle of self-determination is deemed to prevail in this hypothetical, it is easy to comprehend the fury of Syria and the general unwillingness of communities fresh from the colonial experience to accept this application of the doctrine.

Prior to the Israeli evacuation of the last segment of the Sinai in the final stages of the Egyptian-Israeli peace treaty, many of the Sinai's Israeli inhabitants protested vigorously. Under contemporary standards, even if these residents comprised a numerical majority of the sparsely inhabited Sinai, the doctrine of self-determination would not permit them to stay in their homes and determine which of the two competing states, Israel or Egypt, would exercise sovereignty. Egyptian title to the area prevails; the Israeli settlements could not be the basis for an Israeli claim for self-determination. In the Sinai case, of course, Israelis held the territory only by virtue of belligerent occupation. Under international law, the belligerent occupant is prohibited from transferring its own population into the area. Geneva Convention Relating to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49(6), 6 U.S.T. 3516, T.I.A.S. No. 3365. Yet the same situation prevails in the Golan Heights. One can understand why, after a generation or two, Israelis, born and bred in Golan, will believe as devoutly in their right of "self-determination" as a way of solving the issue of territorial title as the Syrians will believe in the right and propriety of decolonization.

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tinians continued to cherish the territory, to celebrate their title in history and myth, to protest the British seizure, and to demand decolonization. Human expectations, like international law, have no explicit statute of limitations. Hence the two states, drawing on the fundamental complementarity of self-determination and decolonization, lay claim to the same island in the name of international law.

In 1982, Mrs. Thatcher, like her predecessors, and to an extent, Mr. Reagan, presented self-determination as the critical issue affecting British policy and insisted that no change in status would take place without the approval of the inhabitants. This played well in the United States, but is less persuasive when examined carefully, since the preeminence of self-determination over decolonization in a case like the Falklands is far from clear.

In 1975, the International Court, in response to a request by the General Assembly, rendered an opinion regarding the status of Western Sahara.⁸⁶ Spain, which allegedly had seized the territory in 1884 from Morocco, was about to vacate. The question was whether Morocco should be reinstated based on the principle of decolonization and the fact that it claimed that the territory had been taken from it, or whether the population of Western Sahara, such as it was, should be entitled to a right of self-determination. Some, perhaps a majority, of Saharois had indicated that they did not wish to be associated with the Kingdom of Morocco. In construing the question before dealing with the details, the Court said:

In short, the decolonization process to be accelerated which is envisaged by the General Assembly in this provision is one which will respect the right of the population of Western Sahara to determine their [sic] future political status by their [sic] own freely expressed will. This right is not affected by the present request for an advisory opinion, nor by resolution 3292 (XXIX); on the contrary, it is expressly reaffirmed in that resolution. The right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court.⁸⁷

On its face, this is an authoritative holding of the primacy of self-determination over decolonization. But the opinion, taken as a whole, tends to undermine the generality of that conclusion. The Court found that the people of Western Sahara had been a politically organized community prior to 1884 and that they had not been subjected by or incorporated into the Sherifian state of Morocco. As a result, the narrow holding

86. Western Sahara (U.N. request for an advisory opinion), 1975 I.C.J. 4. (Advisory opinion of Oct. 16).

87. *Id.* at ¶ 70.

of the case does not address the issue of decolonization for Morocco. Morocco had not, in the Court's version of the facts, been expelled by Spain, nor had any of the rights that it claimed there ever been usurped. Self-determination and decolonization were congruent. Thus the opinion might apply to fact situations like those in the Ogaden, but *Western Sahara's* general statements about self-determination and decolonization do not address actual situations of conflict between claims to self-determine and claims to decolonize. Here they provide scant assistance to the Falklands controversy. Moreover, the Court's narrower holding may have been rejected by an international political process which has supported Morocco's retention of the territory despite the advisory opinion.

In 1982, self-determination was presented as a single, self-evident option in which the local inhabitants were entitled to a veto right. Self-determination is, and must be, a more complex *international* process, for it involves choosing that option which most nearly approximates *all* the valid interests involved. Many other states, groups, and individuals must be taken into account if different options for self-determination are likely to have significant deprivatory effects on them. The wishes of the inhabitants should be granted as much deference as possible, but they are not accorded a veto over competing considerations. The interests of other peoples and groups must also be considered.

All this, of course, presupposes that self-determination, as a practical political doctrine, applies to situations like the Falklands—that self-determination is available for any group, no matter how small and no matter how lacking in viability the community may be. Self-determination cannot be a pact to produce communities so small and so poor in resources that they cannot provide security and other minimum values for human dignity. If the issue is still in doubt, the notion of a state with a rapidly dwindling population of 1700 residents should stimulate urgent reconsideration. The British government would not hesitate to remove as many people through eminent domain proceedings to clear an area for a military base or to lay a road or a rail line. Its sincerity must be doubted when it refuses even to consider more moderate options in a distant community like the Falklands.

IV. RECENT HISTORY OF THE FALKLANDS

In 1946, Britain registered the Falkland Islands with the United Nations as a non-self-governing territory.⁸⁸ In 1965, the General Assembly recommended that the issues between Argentina and the United Kingdom

88. See Trusteeship Council Incorporating the United Nations' Findings Under Chapter XI of the Charter, [1946-47] 2 U.N.Y.B. 569, 571.

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be negotiated.⁸⁹ Negotiations began in 1966. During these talks, four unofficial members of the Falkland Islands Executive Council sent an appeal to Parliament and to the *Times* of London warning that the Government was negotiating with Argentina with a view toward transferring sovereignty.⁹⁰ The Government was questioned sharply in both the House of Lords and Commons. Lord Chalfont, Minister of State for Foreign Affairs, implied that such a transfer was under consideration, but that Her Majesty's government was not oblivious to the wishes of the Islanders.⁹¹ In Commons, Secretary of State for Foreign and Commonwealth Affairs Stewart said:

In what event or in what time could the transfer of sovereignty be considered? To that my answer would be, first, only as part of an agreement which would secure a permanently satisfactory relationship between the islands and Argentina . . . in which, if there were a transfer of sovereignty there would be the fullest safeguards for the special rights of the islanders, for the fact of their dissent, their language and so on. . . . [S]econdly, only if it were clear to us, the Government in the United Kingdom, that the islanders themselves regarded such an agreement as satisfactory and in their interests.⁹²

The ambiguity of his remarks is captured in the subtle interstitial threats. After this debate, confidential talks between the two governments continued.

In 1969, the unofficial members of the Islands' Executive Committee came to London and sought to mobilize "their good friends in Parliament to redouble their efforts to ensure that sovereignty of the islands does not pass to the Argentines"⁹³ Lord Chalfont, on a visit to the Islands in November, assured the inhabitants, "there will be no sovereignty change against your wishes," but told them that they must recognize the significance of the Falklands question in Argentinian politics and appreciate that Britain had to take account of those considerations.⁹⁴

On his return to London, Chalfont was attacked by the Conservative opposition in the House of Lords. Under pressure from the opposition he stated that "no transfer of sovereignty can be made against the wishes of the Falkland Islanders."⁹⁵ Before the House of Commons, Secretary of State for Foreign and Commonwealth Affairs Stewart reiterated Lord

89. G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1965).

90. Keesing's Contemporary Archives 22,730 (June 1-8, 1968).

91. 290 PARL. DEB., H.L. (5th ser.) 206-12 (1968).

92. 761 PARL. DEB., H.C. (5th ser.) 1464 (1968).

93. Keesing's Contemporary Archives 23,292 (Apr. 12-19, 1969).

94. *Id.*

95. 298 PARL. DEB., H.L. (5th ser.) 25 (1968).

Chalfont's statement.⁹⁶ Dr. Costa Mendez, the Argentinian negotiator, stated at the same time that his government could not accept Britain's insistence on "subordinating recognition of Argentine sovereignty to the desires of the inhabitants."⁹⁷

In 1969, the General Assembly noted with satisfaction the reports of progress in the negotiations between Argentina and Great Britain and urged the parties to reach, as soon as possible, "a definitive solution of the dispute."⁹⁸ In December 1971, both governments issued a joint statement establishing new patterns of cooperation between the Falklands and Argentina. This agreement, which may have had the germ of a definitive solution, was the high point of the negotiations.⁹⁹ After that, relations between Britain and Argentina deteriorated through 1977.¹⁰⁰

Negotiations, however, continued. Finally, in 1979, perhaps because of progress in secret talks, the two countries announced that they were re-summing relations at the ambassadorial level, which had been suspended since 1975.¹⁰¹ In late 1980, Nicholas Ridley, the Minister of State of the Foreign and Commonwealth Office, visited the Falklands and presented the Legislative Council with three major options: a twenty-five-year freeze on the dispute; a lease-back arrangement in which sovereignty would be surrendered to Argentina and the islands leased back to Britain; and, finally, a joint Argentinian-British administration. In January 1981, the Legislative Council indicated a preference for freezing the dispute. Argentina rejected that option and offered to make the Falklands its "most pampered region" and to respect the Falklanders' democratic traditions if sovereignty were relinquished.¹⁰² Relations worsened in 1982, when Argentina insisted on monthly, rather than the existing annual, meetings on the Falklands. On February 26th, the Argentinians entered the talks with explicit and more rigid guidelines issued by their government: fur-

96. 775 PARL. DEB., H.C. (5th ser.) 425 (1968).

97. Keesing's Contemporary Archives 23,294 (Apr. 12-19, 1969).

98. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Item 23), 24 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/7630 (1969).

99. Keesing's Contemporary Archives 24,968 (Dec. 4-11, 1971).

100. In 1975, the Labor Government dispatched a mission at the request of the Islanders to conduct an economic survey and make recommendations for development. This prompted a diplomatic protest from Argentina, which saw in the move a retrenchment of Britain in the Falklands. *Id.* at 28,405 (June 24, 1977). When the report was issued the following year, it noted the economic stagnation and population loss on the island, and stated that cooperation with Argentina was necessary for development. *Id.* The report prompted fears on all sides. The islanders feared that a transfer was under consideration. Argentina viewed the report as a unilateral change in the situation, in violation of the 1971 agreement, and itself introduced changes which were violations. *Id.* In December 1976, the United Nations General Assembly called on both sides to refrain from actions which would imply unilateral modifications and urged them to expedite the negotiations over sovereignty. G.A. Res. 31/49, 31 U.N. GAOR Supp. (No. 39) at 122, U.N. Doc. A/31/39 (1976); see Communications from Argentina and United Kingdom, [1976] 30 U.N.Y.B. 323-24.

101. Keesing's Contemporary Archives 30,319 (June 27, 1980).

102. *Id.* at 31,525 (June 11, 1982).

ther discussions must presuppose Argentinian sovereignty.¹⁰³ Two days after the talks ended, on March 1, 1982, the Argentinian Foreign Ministry issued a statement in Buenos Aires, warning that if there were no speedy negotiated settlement, Argentina would end the negotiations and "seek other means."¹⁰⁴ On April 2, 1982, Argentina invaded the islands.¹⁰⁵

V. THE DOCTRINE OF SELF-HELP

One of the most difficult features of this phase of the Falkland dispute is the unilateral character of the Argentinian government's action. Whatever the equities, Argentina seized the islands, and expelled the British garrison by force of arms. The implications of such self-help are sobering. After all, what state does not have some grievance which has not been acted on or not acted on quickly enough to satisfy it? Many governments and individuals who supported or sympathized with the Argentinian position scrupulously reserved judgment on its unilateral action. Some ultimately condemned the entire operation on this ground. One scholar has gone so far as to assert that the British response was first and foremost based on this principle.¹⁰⁶

Like so many other questions here, the issue of the lawfulness of unilateral action in international law in general, and in the Falklands case in particular, is extremely complicated. The United Nations Charter is characteristically unhelpful, for its lack of textual clarity is matched only by the incongruence between the text's image of the organization and the realities of contemporary international politics. The pertinent provisions of the Charter were premised on a short-lived consensus in 1945 which was to be the basis for a collective security system. The Security Council, comprising the five major states of the world, would ensure compliance with internationally guaranteed rights. If a state failed to comply, the Security Council, under the Charter, was empowered to secure an appropriate remedy.¹⁰⁷ If such a scheme worked, the need for self-help, so charac-

103. *Id.* at 31,526.

104. *Id.*

105. On April 3, the Security Council, in Resolution 502, avoided characterizing Argentinian actions as an act of aggression, presumably because this would imply that Britain had full title to the islands. Rather, it characterized the situation as a "breach of the peace," and demanded an immediate cessation of hostilities and immediate withdrawal of all Argentinian forces. It also called on the governments of Argentina and the United Kingdom to seek a diplomatic solution.

106. Frank, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109 (1983). On the question of a unilateral resort to force in the Falklands case, see also the interesting exchange between Professor Emilio J. Cardenas in 77 AM. J. INT'L L. 606 (1983) and Professor John Norton Moore, *id.* at 610. See also Moore, *The International System Snarls in Falklands War*, 76 AM. J. INT'L L. 830 (1982); Hassan, *The Sovereignty Dispute over the Falkland Islands*, 23 VA. J. INT'L L. 53 (1982).

107. U.N. CHARTER art. 39. See generally L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER

teristic of political and legal systems with inadequate or inefficient centralized authority,¹⁰⁸ would wither away. In anticipation of that development, the Charter prohibited unilateral action in Article 2(4). However, it did confirm, for all members, a general right of self-defense, presumably subject to the limitations of the Charter and the dynamic potential of the United Nations.¹⁰⁹

As is well known, the consensus and optimism upon which the United Nations was founded in 1945 were brief. Conflicts persisted. The United Nations' Charter mechanisms often proved ineffective. As a result, a curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics. While the general Charter prohibition against unilateral action continued, and appropriate organs of the United Nations frequently condemned such action, nothing was done beyond verbal condemnation. In many cases, the party subject to the condemnation, and hence in violation of international law, was permitted to continue to benefit from the fruits of its illegal action.¹¹⁰

The resort to unilateral action for self-determination and decolonization is not uncommon.¹¹¹ It is clear that in these cases, a very complex message is being conveyed. This message does not say that all self-help is unlawful, nor, as Ivan Karamazov put it, that everything is permitted. A highly articulated code regarding the lawfulness of particular actions is determined by reference to many features: the precipitating events, the stakes

OF THE UNITED NATIONS 293-302 (3d ed. 1969); R. RUSSELL, A HISTORY OF THE U.N. CHARTER 464-65, 670-87 (1958).

108. See M. BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY (1968); Reisman, *Sanctions and Enforcement*, in INTERNATIONAL LAW ESSAYS 381 (M. McDougal & W. Reisman eds. 1981).

109. U.N. CHARTER art. 51. Even if the system had worked as planned, it favored permanent members of the Security Council, for the permanent members had a veto power. *Id.* art. 27, para. 3. Thus, in a conflict like that over the Falklands, the United Kingdom might obtain relief from the Security Council; Argentina could not.

110. See Reisman & Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INT'L L. 737 (1982).

The new pattern became apparent as early as 1949, with the sanction of the International Court of Justice. Ironically, it was the United Kingdom that initiated the claim of a right of self-help when it asserted legal rights that could not otherwise be vindicated. In the Corfu Channel case, *see* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9), the United Kingdom sued Albania for allegedly placing mines in straits which the United Kingdom averred were an international waterway. At one stage, the United Kingdom, without international authority, swept the straits, took the mines, and sought to submit them to the International Court as evidence of the Albanian delict. Albania objected that the United Kingdom had no right to enter its territory to seize the mines; hence, they should not be admitted as evidence. The Court condemned the United Kingdom for violating Albanian sovereignty by seizing the mines, but admitted the mines as evidence, and thereby confirmed the United Kingdom's case. Thus, the court conveyed the message that some unilateral assertions of international rights might be condemned in the most trivial fashion, but the perpetrators would nonetheless be permitted to benefit from their actions.

111. See [1969] 23 U.N.Y.B. 124-28 (discussing, *inter alia*, Rhodesian war for independence); *Dutch Sign Pact Giving Indonesia New Guinea Rule*, N.Y. Times, Aug. 16, 1962, at 1, col. 7 (Dutch give Indonesia rule over New Guinea); *see also* *The Situation in Cyprus*, [1964] 18 U.N.Y.B. 150.

and consequences of inaction for the different actors, the alternatives for peaceful resolution, and the extent to which those alternatives were explored. In addition, factors such as the level of violence employed, the likelihood of the proliferation of conflict, and general compliance with the laws of war appear to have been taken into consideration as well.¹¹² A special exception appears to be made for self-determination and decolonization.

The tension between the formally prescribed legal processes of international law and the less predictable variables of international politics has extended the ambit of self-help even further. The superpowers have often ignored condemnations by the United Nations and persisted in self-help. On occasion, smaller states politically sheltered by a superpower have done the same. For all of these reasons, the international attitudes toward lawful unilateral action are much more complex than the editorial writers equipped with a copy of the U.N. Charter lead one to believe.

Even a preliminary appraisal of the lawfulness of Argentina's unilateral action must take account of a number of factors. First, the Argentinian view was not based on wild or fantastic legal interpretations. It is a cogent, if not a conclusive legal case, substantially supported by most Latin American states¹¹³ and consistent with a good deal of international practice regarding decolonization. Virtually the entire Argentinian nation believed profoundly in the rightness of its actions. In addition, Argentina had apparently exhausted the possibilities of negotiation. It seems clear that Argentina had concluded that the back-benchers of the Conservative Party and defenders of the erstwhile British Empire would continually block the groups in the British Foreign Office which were sympathetic to Buenos Aires's claim. As a result, a negotiated settlement would not be accepted, no matter how reasonable the proposal or how accommodating Argentina. At the same time, it would not have been unreasonable for Buenos Aires to conclude that time was actually running against Argentina. The viability of a claim for decolonization required that it be pressed while international support for the doctrine was still strong. Each year that passed would weaken its own claim and strengthen the claim for adverse possession by the United Kingdom. Moreover, the Falklands archipelago was Britain's claim to a share of Antarctica.¹¹⁴ As exploitation of

112. See W. REISMAN, *NULLITY AND REVISION* ch. 18 (1971).

113. See Rubin, *The Falklands (Malvinas), International Law, and the OAS*, 76 AM. J. INT'L L. 594 (1982); Question of the Falkland Islands (Malvinas), U.N. Doc. A/37/L.3 (1982) (draft resolution submitted by Latin American states); Falklands-Malvinas, UN Chronicle, July 1982, at 3. *But cf.* Argentina No Tiene Derecho Alguno en las Malvinas, *El Mercurio*, Apr. 18, 1982, at 6 (interview with former Chilean diplomat); N.Y. Times, Apr. 16, 1982, at A11, col. 1 (Caribbean states did not support Argentina).

114. British Antarctic Territory Order-in-Council 1962, No. 400; see also F. AUBURN,

that continent became more practicable, the British could be expected to be increasingly loathe to surrender whatever claim they had to the Falklands. Moreover, changes in the law of the sea have transformed what had been an island of limited resource and geo-strategic value into a basis for claims on the continental shelf and for an economic zone that substantially increases the islands' value.¹¹⁵

Nor would the operational aspects have appeared hopeless. It would not have been unreasonable for Buenos Aires to assume that a quick and bloodless strike might cut the Gordian knot and press Britain to a negotiated settlement it might not otherwise feel obliged to seek. And finally, there was the expectation of external constraints such as those working in favor of Egypt when Nasser seized the Suez Canal. When Iceland expelled British fishermen from waters near her, NATO allies restrained Britain from forceful action. One wonders if some U.S. officials, with or without authority, somehow led Buenos Aires to expect United States sympathy, if not more.

A judgment on the lawfulness of the Argentinian action and of British reaction is premature. As with so much of this imbroglio, much remains to be revealed. The history of duplicity and deceit which Goebel so meticulously records should make one wary of hasty judgment. Although subsequent events indicate that it was a mistake of judgment, perhaps rendered so by inconstant allies or the fortunes of war, it seems unjustified to conclude that the Argentinian action was precipitous or stupid. The point to emphasize is that Argentina's claim was not without a basis in contemporary international law, yet the formal legal system provided no remedy. In such a system, for better or worse, self-help, survives as a doctrine to which states may resort when international processes do not avail.

VI. THE INFLUENCE OF DOMESTIC POLITICS

Like many other ostensibly "international" problems, the Falklands dispute is complicated, both in Argentina and Britain, by domestic politics. Some Argentinian intellectuals bemoan the issue, feeling that the islands are unimportant to the country and have served only to deflect attention from more pressing political and economic problems. It is a familiar refrain, heard in Spain about Gibraltar, in Egypt about the Sinai, and in Somalia about the Ogaden. The fact that it is heeded nowhere indicates that it fails to grasp the depth and passion of these issues. The Falklands

ANTARCTIC LAW AND POLITICS 55 (1982). For the Argentines, disputes with Britain over the Falklands and over the Antarctic "are frequently viewed in principle as one and the same." Hayton, *The "American" Antarctic*, 50 AM. J. INT'L L. 583, 588 (1956).

115. See United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF. 62/122.

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continue to be a general part of the Argentinian identity and national myth. Like the lost lands of Peru in the War of the Pacific, and like the array of *terrae irredentae* in the Middle East and elsewhere, time has not soothed the anger about the loss; nor is it likely to in the future. Virtually every Argentinian politician and student of Argentinian politics appreciates that this is an issue which can be ignored only at the peril of having the opposition seize it.

The issue is as complicated and as baffling in Britain. Since 1771, elements in the Foreign Office have viewed the Falklands as unimportant, certainly not worth a war. But other forces, some imperial, some concerned with securing trade or geo-strategic advantage, have always been willing to agitate for it. Once the battle lines were drawn, the question became a parliamentary issue, and it was almost impossible for any government to propose withdrawing from territory inhabited by kinsmen. Moreover, the Falklands are an important part of the British claims to Antarctica, a region whose economic and geo-strategic benefits seem increasingly accessible. That makes withdrawal from the islands appear more costly in *lucrum cessans* and *damnum emergens*.

In parliamentary systems, cross-pressures such as these generally produce inaction. The more difficult problems in contemporary democracies are no longer addressed as matters which must be "solved," but rather as matters which are to be "managed" and then passed on to successors. "Conflict resolution" has yielded to "conflict management." For Britain, and to an extent the United States, the Falklands issue was simply easier to manage and pass on than it was to solve. As a result, it festered too long.

Temporizing politics may have seemed appropriate in London, but international politics introduced its own inexorable pressure. The United Kingdom had to inscribe the islands as a non-self-governing territory with the United Nations. Under the Charter, the United Kingdom had to terminate that status in one of the three authorized ways: by granting independence, by establishing an association with the United Kingdom or with another state, or by incorporating the territories into the United Kingdom.¹¹⁶ Any one of these options would have required both the substantial support of the islanders themselves and the approbation of the United Nations. After 1960, the cooperation of the United Nations could not be counted on to support any option that excluded Argentina.

The United Kingdom Foreign Office was less than enthusiastic about incorporation or association, for they promised to impose substantial security and welfare obligations on the United Kingdom for a distant and

116. Keesing's Contemporary Archives 23,777 (Jan. 17-24, 1974).

strategically unimportant area, and for a very small number of people. Since Argentina would certainly continue to protest and agitate against any such putative resolution, there would be an additional indefinite military expense. Similarly, independence for the 1,700 people on the islands with little in the way of natural resources was not feasible and, moreover, would have been destabilizing given intense Argentinian feelings about its title. The islanders themselves did not wish to be associated with Argentina, though this was a geographically more reasonable, economical, and feasible connection. Moreover, an accommodation with Argentina, even if it vouchsafed the rights of the Islanders, was likely to be opposed by them and by pressure groups in Parliament.

Caught in these crosscurrents, the Foreign Office adopted a classic minimax strategy and did nothing. This strategy may have worked domestically, but it could not satisfy the international legal requirement that viewed the non-self-governing status as a pathology needing speedy correction. Nor could it satisfy Argentina or the Latin American countries in sympathy with it. In retrospect, it is difficult to see how anyone could have thought that the status quo could be maintained indefinitely. An explosion was inevitable. The tragedy, underlined by the loss of nearly a thousand young lives, is even more bitter because, as in other parts of the world, the war was avoidable had there been statesmanship and courage rather than pusillanimity and "management."

VII. TOWARD A SOLUTION

Britain won the war of 1982, but there is little reason to believe that the struggle for the Falklands is over. One cannot expect changes in Argentinian objectives. Political rhetoric notwithstanding, it is doubtful that the British can enlarge or even maintain the colony on the Falklands for long. The economics of the venture are prohibitive. There was some discussion in London of inviting the United States to bear part of the burden in return for transforming the Falklands into a NATO base. To the present, the United States has wisely demurred. The unpopularity of some bases is outweighed by their strategic or tactical importance. But this "base" is unnecessary. Moreover, if the proposal were adopted, it could have catastrophic consequences for Latin American relations.

In comparable straits in 1774, Britain nailed a plaque on the blockhouse and simply withdrew. Were it to do the same now—abruptly or incrementally—and Argentina were to resume control, the controversy might wane, without formal resolution. But if the Falklands Affair teaches us anything, it is the value of clarity in international consensus. The optimum solution might be an arrangement resembling the Aaland

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Islands settlement.¹¹⁷ This settlement resolved the dispute between Sweden and Finland over potentially strategic islands at the mouth of the Gulf of Bothnia with a Swedish-speaking population. The Aalands remained Finnish, but they became an autonomous region with language and administrative guarantees for the Swedish population. Under the circumstances, Aalanders have the best of all possible worlds. Falklanders could, too. Argentina appeared amenable.

Short of that, another possible solution would involve a transfer of sovereignty to Argentina, coupled with a long-term lease-back to the United Kingdom. This possibility, too, apparently was acceptable to Argentina and had some support in the Foreign Office at different points in the last half-century.¹¹⁸ It was rejected, however, by the Islanders, who apparently were irresponsibly encouraged by some to believe that the twentieth century was similar to the nineteenth and that they could expect much more.¹¹⁹

As the passions inflamed by this useless war cool, the lease-back proposal can still be revived. It has three distinct advantages. It would at last solve the question of sovereignty, it would guarantee the status and wishes of the island's population, and it would harness social forces already at work on the islands to terminate the issue and the conflict endogamously and non-violently. As the depletion of the British population proceeds, the end of the lease and the end of the British hold on the islands could coincide, concluding at last the struggle for the Falklands.

117. See J. BARROS, *THE AALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS* (1968).

118. See *supra* note 80.

119. Barnett, *Iron Britannia*, *NEW LEFT REV.*, July-Aug. 1982, at 13-15.

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