The Falklands (Malvinas) Dispute: a critique of international law and the pacific settlement of disputes

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Abstract

This thesis brings a focusing lens on one of history's most intractable and protracted territorial disputes, that between the United Kingdom and Argentina over the non-self-governing territory known as the Falklands (Malvinas), an archipelago of 200 islands, some 480 miles north-east of Cape Horn, Argentina. For Argentina, the 'Malvinas are a constantly bleeding wound, flesh torn from the body that is Argentina'. To the United Kingdom, the territory represents one of the last vestiges of its once vast empire, having held effective control of the territory since 1833, other than for a short period in 1982 following an Argentine use of military force. The facts, history, law, and politics of this dispute all act in concert to create a picture that is so highly nebulous that a clear view as to which State should hold territorial sovereignty has yet to emerge, with there being legitimately argued positions in favour of both disputing States.

At the heart of this thesis is a critical analysis of the history, the legal arguments, and the methodologies of international lawyers in order to examine the effectiveness of international law as a dispute settlement mechanism. In doing so, this thesis ascertains whether international law has a role to play in resolving this most entrenched of international disputes. This re-evaluation of the value of international law, through a critical lens, argues that international law does have the potential to assist in the resolution of the dispute. However, this is only possible if political leaders are ready to grasp on to that opportunity, and to make use of diplomatic means of dispute settlement, at the critical moment when the dispute becomes ripe, at times of significant political change. It is in these moments that international law could prove to be the guiding hand that may assist with the normalisation of relations between Argentina and the UK.

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Abbreviations and Acronyms

Great Britain	GB
International Court of Justice	ICJ
Permanent Court of International Justice	PCIJ
United Kingdom	UK
United Nations	UN

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Chapter 1: Introduction

1.1: Background

There are few fields of study within international law and international relations that have generated as much attention, by both States and academics, as that of the acquisition and control of territory. That so much ink has been spilled on this subject is unsurprising given that the control of territory is of huge significance to the State as a political entity. Indeed, the control of territory is at the core of what it means to be a State,[1] and at the heart of this is the notion of territorial sovereignty.[2] As articulated by JudgeHuber, sitting as the sole arbitrator in the *Island of Palmas Arbitration*, territorial sovereignty 'involves the exclusive right to display the actives of the State'.[3] The key aspect to take from this is the notion of exclusivity, with Charles de Visscher articulating that:

> [t]he firm configuration of its territory furnishes the State with the recognized setting for the exercise of its sovereign power. The at least relative stability of this territory is a function of the exclusive authority that the State exercises in it and of the coexistence beyond its frontiers of political entities with similar prerogatives.[4]

Working with this definition it can be seen that territorial sovereignty has both a positive and a negative dimension; in one instance it provides sole authority

[1] Shaw M, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, p.61.
[2] For an analysis of the concept of state sovereignty, see Kelsen H, *Principles of International Law* (The Lawbook Exchange, New Jersey 2003), p.108ff.
[3] *Island of Palmas (Unites States of America v Netherlands)* (1928) Reports of International Arbitral Awards Vol II 829.
[4] de Visscher C, *Theory and Reality in Public International Law* (translated by Percy Ellwood Corbert) (Oxford University Press, Oxford 1957), p.197.

over a geographical area to a State, and, on the other, it has the effect of prohibiting the same State from exercising control over territory that falls outside of this geographical zone of control, without consent.[5] Therefore, for O'Connell the notion of territorial sovereignty, is the 'fundamental concept of international law',[6] with Shaw echoing this sentiment being of the perspective that the laws relating to territorial sovereignty enable the operation of the State as a sovereign entity.[7] This traditional notion of territorial sovereignty provides the State with the exclusive competency to utilise the territory, and its attendant resources, free from the interference of others. Consequently, it can come as no surprise that the history of international law and international relations is one that is permeated by instances of disputes between States over the control of territory.

Historically, disputes over the control of territory might have been resolved by the use of armed force, followed by conquest, or even debellatio (the complete subjugation of a hostile State).[8] Equally, negotiations between the disputing powers might have proven effective at stabilising relations, even going so far as to have resolved the dispute. However, since the birth of the UN Charter[9] conquest has no longer been a legitimate option for the resolution of territorial disputes. Reliance now falls firmly on the shoulders of judicial and quasi-

[5] Malanczuk P, Akehurst's *Modern Introduction to International Law* (7th Edn Routledge, GB 1997) p.75.
[6] O'Connel DP, *International Law: volume 1* (2nd Edn Stevens, GB 1970), p.403.
[7] Shaw M, 'The Heritage of States: The Principle of Uti Possidetis Juris Today' (1996) 67 British Yearbook of International Law 75, p.75.
[8] Korman S, *The Right of Conquest: the acquisition of territory by force in international law and practice* (Clarendon Press, Oxford 1996).
[9] Charter of the United Nations (adopted 24 October 1945), hereinafter referred to as the UN Charter, Evans M, *International Law Documents* (10th Edn Oxford University Press, GB 2011), p.9.

judicial bodies without automatic universal jurisdiction, and on diplomatic means of resolving the conflict of perspectives between the quarrelling States.

This thesis brings a focusing lens on one of these disputes, that between the United Kingdom (UK) and Argentina, over the non-self-governing territory[10] known as the Falklands (Malvinas).[11] The purpose of this thesis is to enhance the understanding of the interplay between law and politics in relation to the Falklands (Malvinas) dispute, with this being undertaken in order to determine whether there is a role for international law in resolving the dispute. For the sake of this thesis the Falklands (Malvinas), and the Falkland Dependencies are considered as independent territorial units.[12] The contested territory is comprised of an archipelago of 200 islands, some 650 kilometres north-east of Cape Horn, Argentina and 8000 kilometres from the UK metropole, the administering power..[13] The UK and Argentina have both long claimed

[10] UN Charter, *ibid*., Art.73(e); Transmission of Information under Article 73(e) of the Charter, GA Res 66 (14 December 1946), UN Doc. A/46/Add.1, p.125.

[11] The territory is known throughout this thesis as the Falklands (Malvinas). United Nations practice has been to utilise the name Falkland Islands (Malvinas).

[12] This should not be seen as an indication as to the author's perspective as to where territorial sovereignty should rest, but it is an acceptance of that notion that the factual and legal matrix of each territorial unit is distinct, and, therefore, to attempt to address both within the same thesis would be to the detriment of this work. This being said, the UK is of the perspective that the two are distinct territorial units, given that the claim to the title for each has unique historical roots, a position which Argentina contests,. Please see, Symmons CR, 'Who Owns the Falkland Island Dependencies in International Law? An analysis of certain recent British and Argentinian official statement' (1984) 33 International and Comparative Law Quarterly 726; Waldock H, 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25 British Yearbook of International Law 311; Letter dated 26 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (26 April 1982) UN Doc S/15002; Letter dated 21 June 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (21 June 1982) UN Doc S/15246; and Antarctica Cases (United Kingdom v Argentina; United Kingdom v Chile) (1955) ICJ Pleadings 8.

[13] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 9th Session, GAOR, UN Doc A/5800/Rev.1 (1964 -1965), at Chapter XXIII para. 1.

exclusive sovereign title to the territory at the heart of this dispute,[14] with the story of this dispute harking back to the European colonial age where the European powers were seeking to expand their overseas domains in an effort to obtain strategic and commercial advantages over their European adversaries. Over the centuries a wide plethora of States have, at some point, laid claim to the territory, with this now being reduce to two.

As of the 2012 census the local population was 2,840.[15] However, as a result of what the UK deems its obligation to provide external defence to its overseas territory,[16] this figure is substantially increased when one considers the number of military personnel based on the Islands; which is approximately 1,450.[17] The total landmass constitutes close to 12,000 square kilometres, with the capital, Stanley, being located on East Falkland, which, in combination with West Falkland, comprise the largest two islands of the archipelago.[18]

[14] For a comprehensive history of the dispute, up until the Twentieth Century please see Goebel J, *The Struggle for the Falkland Islands* (1982 reissue Yale University Press, GB 1982). Providing an insightful as to the British perspective, Freedman L, *The Official History of the Falklands Campaign: volume one and two* (Routledge, GB 2005). For a useful trove of material relating to the dispute, please see, Dolzer R, *The Territorial Status of the Falkland Islands (Malvinas): Past and Present* (Oceana Publications, USA 1993). For a concise overview please see Raimondo F, 'The Sovereignty Dispute Over the Falklands/Malvinas: What Role for the UN?' (2012) 59 (3) Netherlands International Law Review 399.

[15] Falkland Islands Census 2012: statistics and data tables (April 2013), p. 5.

[16] 'Delivering Security in a Changing World' Cm 6041-I, 'Overseas Territories: The Ministry of Defences Contribution' (2012) p. 5, 7. The delivery of this protection is often a source of tension between the two disputant States, with the most recent example being over the UK's determination to undertake missile firing activities in the region, to which Argentina claims contradict the principle of peaceful conflict resolution, <https://www.theguardian.com/world/2016/oct/14/argentina-protests-britain-military-exercises-falklands> last accessed 15/10/2016.

[17] HC Deb, 19 February 2007, c216W.

[18] Special Committee on the Situation with regard to the Implementation of the Declaration of Independence to Colonial Countries and Peoples: Falkland Islands (Malvinas), Working paper prepared by the Secretariat, UN Doc. A.AC.109/2012/12, p. 3.

To the British, and the Island's residents, the territory is known as the Falkland Islands. Within UK national law the Islands are deemed a British overseas territory, with the UK claiming long-lasting title to the territory through discovery and acquired by settlement, being treated as such in accordance with the British Settlement Acts 1887[19] and 1945.[20] Halsbury's Laws of England provides that a territory is acquired by the Crown, as a settlement, upon the settling of British subjects within a territory whereupon there was no prior population or form of 'civilised' government, as recognised by international law.[21] It must be noted that the language of both Acts is evidently representative of the UK's colonial history, but also of the recognised forms of territorial acquisition within international law in the nineteenth century. It is noteworthy that Lord Hope, acting within his capacity on the Judicial Committee of the Privy Council within *Christian v R*,[22] held that the status of settlement is a matter of law, and that once assigned by practice or judicial settlement could not be altered by the unearthing of contrary historical evidence;[23] a conclusion that would seem highly advantageous to the former colonial powers which was central to the creation of the legal regime of the acquisition of territory.

The territory is one of fourteen remnants of Britain's Empire labelled as a British overseas territory within Schedule 6 of the British Nationality Act 1981.[24]

[19] British Settlement Act 1887.
[20] British Settlement Act 1945.
[21] *Halsbury's Laws of England, vol. 13* (5th Edn Lexis Nexis, London 2009), para.801; see also British Settlement Act 1887, Introduction.
[22] *Christian v R* [2007] 2 AC (PC).
[23] *Ibid*., as per Lord Hope, para.47.
[24] British Nationality Act 1981.

Further to this, the Interpretation Act 1978 specifies that the Falklands (Malvinas) are a British possession, which refers to 'any part of Her Majesty's dominions outside the United Kingdom; and where parts of such dominions are under both a central and a local legislature'.[25] Consequently, the Falkland (Malvinas) are deemed, under domestic law, to be subject to British sovereign rule. This being said, the territory has its own distinct legal system, with large swathes of legislative authority being devolved to the Islands government.[26] However, this devolved legislation is often supplemented by legislation that has emanated from the UK.[27]

Being a distinct constitutional unit from the UK[28] the Falklands (Malvinas) has its own constitution,[29] which was negotiated between representatives of the UK government and the Falklands (Malvinas) legislature.[30] Chapter I provides a corpus of law relating to the protection of fundamental rights and freedoms of the individual. It should be noted that this is in addition to the provisions of the European Convention on Human Rights,[31] which extends to protect those within the Islands territory.[32] Chapter II establishes the Office of the Governor, acting as the Queens representative,[33] who is assisted by the Chief Executive with

[25] Interpretation Act 1978, Sch.1.
[26] The United Kingdom's Relationship with its Overseas Territories: paper presented to the Pacific regional seminar by the Foreign and Commonwealth Office (2008) PRS/2008/CRP.9.
[27] Interpretation and General Clauses Ordinance, s.83&84.
[28] Interpretation Act 1978 Sch.1. provides that the UK is comprised of Great Britain and Northern Ireland, thus excluding any overseas territory.
[29] Falkland Islands Constitution, Schedule to Falkland Islands Constitutional Order 2008, SI 2008/2846.
[30] Hendry I, *Dickson S, British Overseas Territories Law* (Hart Publishing, GB 2011), p.318.
[31] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
[32] UKTS No 71 (1953); Cmd 8969.
[33] Falkland Islands Constitution, *supra*, note 29, s.23.

primary responsibility over public services.[34] Section 56 (1) provides that executive power is vested in Her Majesty,[35] with Sections 56 (2) and 57 (1) stipulating that such is to be exercised by the Governor,[36] and the executive council, respectively. The Governor has responsibility – even so far as to be empowered to act against the wishes of the executive council – in issues that pertain to: external affairs;[37] internal security;[38] the administration of justice;[39] appointments to public service;[40] and defence[41]. However, Section 23 (4) necessitates that the Governor must consult with the relevant military commander, in relation to military matters.

The Governors powers are more restricted when it comes to matters on any residual matter, with the position of Governor being supplemented by two additional branches of government: the Executive Council; and the Legislative Assembly. The Executive Council, itself, is comprised of three members of the elected Legislative Assembly.[42] These individuals are elected to the position on the Executive Council and sit for a period of twelve months, with the possibility of re-election.[43] The Legislative Assembly consists of eight elected members,[44] with the competence to make laws for the peace, order, and good government of

[34] *Ibid*., s.83.
[35] *Ibid*., s.56(1).
[36] *Ibid*., s.56(2).
[37] *Ibid*., s.67(2)(a).
[38] *Ibid*., s.67(2)(c).
[39] *Ibid*., s.67(2)(d).
[40] *Ibid*., s.67(2)(f) and s.84(3)&(4).
[41] *Ibid*., s.67(2)(c).
[42] *Ibid*., s.57(1).
[43] *Ibid*., s.58(2).
[44] *Ibid*., s.26(2).

the territory.[45] Critically, all laws must obtain the ascent of Her Majesty, or the Governor acting on Her behalf.[46] Critically, the power is reserved for Her Majesty to legislate in Council for the peace, order, and good government of the Islands.[47] As a result, it is apparent that whilst the Islanders have a degree of devolved autonomy, the position of Governor still maintains significant authority. This, in combination with Her Majesty's reserved authority, results in a form of devolution light, with the British State retaining *de jure* – if not *de facto* – full legal sovereignty. This being said, the UK considers its relationship with its overseas territories as a 'modern one based on partnership, shared values and the right of each Territory to determine if it wishes to retain the link to the United Kingdom'.[48]

Above all, and of most significance for this thesis, the British have long defended their sovereign claim over the territory:

> Be it known to all nations that the Falkland Islands … are the sole right and property of this Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith … In witness whereof this plaque is set up, and His Britannic Majesty's colour left flying as a mark of possession.[49]

Such confidence as to where legitimate sovereignty resides might lead a neutral, uniformed, observer to believe that this standing is indisputable. Reinforcing this

[45] *Ibid*., s.37.
[46] *Ibid*., Annex A 3(a)&(b).
[47] *Ibid*., para.11.
[48] The United Kingdom's Relationship with its Overseas Territories: paper presented to the Pacific regional seminar by the Foreign and Commonwealth Office (2008) PRS/2008/CRP.9.
[49] A plaque bearing such an inscription was left upon the Falkland Islands in 1771, following Britain's departure from the Islands. As printed in Freedman, *supra*, note 14, p.6.

assertion, the UK's government claims that title to the territory is derived from 'early settlement … continuous, effective and peaceful possession, occupation and administration of the Islands since 1833'.[50] Buttressing this territorial claim further, the UK relies upon the concept of self-determination,[51] stressing the right of the inhabitant population to this most indeterminate of international human rights. In this regard, 2013 bore witness to the population of the Falklands (Malvinas) determining, via referendum, that negotiation over the status of the territory, between the Government of the Falklands (Malvinas) and that of Argentina, should not occur;[52] tellingly, 99.9 percent of the electorate voted to maintain the status quo.[53] This being said, such a result was far from surprising, with the Argentinian ambassador to London, Castro, dismissing the referendum as a 'publicity stunt'.[54] . In addition to this, the Argentines, also, petitioned before the Special Committee on Decolonization, arguing that the vote as 'anecdotal … [as] the results were well known ahead of time'.[55] Despite the misgivings of the Argentine government international observers from seven nations: Canada; Mexico; Uruguay; Paraguay; Chile; the USA; and New Zealand held that the referendum was conducted 'in accordance with

[50] Further reinforcing the UK's position is the Fifth Report of the Foreign Affairs Committee of the House of Commons, 1983 -4, Vol 1 (HC 268 – I); Misc.1 (1985), Cmnd. 9447, at para.3.
[51] Freedman L, *supra*, at note 14, at pages 14 – 15; please see also, Falkland Islands Debate in the House of Commons, HC Deb 31 January 2012, vol 539, cols 191 – 215.
[52] Referendum on Political Status (Question) Order 2012, (31 December 2012) 23 (14) Falkland Islands Gazette: Supplement, p.2.
[53] For a full breakdown of the referendum please see, <http://www.falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/ > last accessed 14/01/2014.
[54] <http://www.bbc.co.uk/news/uk-politics-21894972> last accessed 12/01/2015.
[55] Special Committee on Decolonization 4th Meeting 14 June 2012, Special Committee on Decolonisation Considers 'Question of the Falkland Islands (Malvinas', Hears from Petitioners, Islands Assemblymen, Argentina's President, UN Doc. GA/COL/3238, as per the Argentinian Petitioner, Alejandro Jacob Betts.

international standards and local laws. The process was technically sound, with a systematic adherence to established voting procedures'.[56]

Contrary to the British position, to Argentina the territory is known as the las Malvinas. Argentina has long held a competing claim against the UK, being as resolute as to the justness of their claim as are the British. For example, the one-time Permanent Representative of Argentina to the United Nations (UN) indicated his belief that 'the dispute with the [UK] can be settled only by the restoration of the Islands to the national heritage of the Argentine Republic'.[57] The main thrust of the claim by Argentina is that upon obtaining independence from Spain, who Argentina has long suggested were the erstwhile legitimate colonial possessors of the territory, Argentina succeeded to the colonial State's title as a result of an application of the principle of *uti possidetis*.[58] Simply put, an application of the doctrine is said to crystallise the administrative borders of a territorial entity at the moment it secedes from its parent colonial power or State. In this instance, the administrative unit was the Spanish viceroyalty of the River Plate, which seceded from Spain's colonial territories in South America that the territory of Argentina and – as the argument goes – the Falklands (Malvinas) was constitutive of. This resulted in the territories former

[56] Referendum International Observation Mission: final report (March 23, 2013), p.1.
[57] Letter from the Permanent Representative of Argentina to the United Nations, dated March 25 1975. Reprinted in UN Doc. A/31/23 Rev.1.
[58] Shaw M, 'The Heritage of States: the principle of uti possidetis juris today' (1996) 67 (1) British Yearbook of International Law 75, see generally; Shucksmith-Wesley M, '*Uti Possidetis*: The Procrustean Bed of International Law?' 24 (2013-2014) Finnish Yearbook of International Law 227, see generally; for an account of the Argentinian perspective see the Report of Sub-Committee III on the Falkland Islands (Malvinas), UN Doc. A/AC.109/L.125/Add.3, para40, 43, and 52, referring to the principles of uti possidetis, the principle that American States do not recognise territorial acquisition by the use of force, and the principle of territorial integrity, respectively.

administrative borders now taking effect as the external borders of the newly emerged Argentine State. This would necessitate Argentina evidencing that Spain had title to the territory, as Spain could only transfer rights which she herself possessed,[59] *nemo dat quod non habet*. Despite Argentina giving the doctrine of *uti possidetis* centre stage it should not be forgotten that Argentina buttresses this position with reference to the doctrine of territorial contiguity, and suggests that the current population of the territory are an imported, and, therefore, a non-indigenous group, thereby countering the UK's claim to the population's right to self-determination.

The significance of the Falklands (Malvinas) to the Argentine people was reaffirmed in 1994 with the incorporation within the State Constitution that:

> "The Argentine Nation ratifies its legitimate and non-prescribing sovereignty over the Malvinas, Georgias del Sur and Sandwich del Sur Islands and over the corresponding maritime and insular zones, as they are an integral part of the National territory.
>
> The recovery of said territories and the full exercise of sovereignty, respectful of life of their inhabitants and according to the principles of international law, are a permanent and unrelinquishing goal of the Argentine people."[60]

[59] *Island of Palmas (Netherlands, USA)*, Reports of International Arbitral Awards, 4th April 1928, volume II 829, p.842.

[60] Constitution of the Argentine People, Temporary Provision, First paragraph, English Translation available at < http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf> last accessed 01/02/2015.

Further highlighting the significance of the place of the territorial dispute within the Argentine national psyche the 2nd April has been deemed a national holiday, Malvinas Day, held in order to commemorate the start of the Falklands (Malvinas) war in 1982.[61] In addition to the place of the Falklands (Malvinas) within national law successive Argentine governments have lobbied at the UN, insisting that Malvinas should be recorded as the "true name of the territory".[62] In response the UK has submitted a formal reservation against the use of the term Malvinas within UN official records.[63] It is the UK's assertion that the name Malvinas is nothing more than the Spanish translation of the UK's chosen name for the territory. In addition to this, the UK goes on the stress that that reference to whichever nomenclature has no implication with regard to the question of sovereignty.[64] Ironically, it is likely that there is a modicum of truth in the UK assertion, that the term Malvinas is a translation, but, critically, not from the English name – as is avowed by the UK. It is most likely that the name originates from the French le Malouines, the onetime French occupiers of the territory.[65]

At the international level the Islands are classified as a non-self-governing territory by the UN, having held this status since 1946, with the UN having seen

[61] Law 25.370, Declare a day April 2 'Veterans Day and Memorial of the Falklands War', No. 29551 (November 22, 2000); see also <http://en.mercopress.com/2011/03/29/cristina-kirchner-will-head-april-2-malvinas-veterans-day-in-rio-gallegos> last accessed 01/02/2015.
[62] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 9th Session, GAOR, UN Doc A/5800/Rev.1 (1964 – 1965), at Chapter XXIII prara. 31.
[63] *Ibid*., Chapter XXIII, para. 30.
[64] *Ibid*., Chapter XXIII, para. 30.
[65] Bougainville, 'Declaration on the occasion of the talking of possession of the Islands' (1764), in M Azpiri, *Historia Completa de las Islas Malvinas: vol.2* (1966), p. 10.

it as it being its role to ensure "the movement for independence in … Non–Self–Governing Territories", as was recognised in the preamble to General Assembly Resolution 1514. Most critically it identified that "the peoples of the world ardently desire the end of colonialism in all its manifestations".[66]

The designation of the Falklands (Malvinas) as a non-self-governing territory transpired as a result of an application by the UK[67] as required under Article 73(e) of the UN Charter to "transmit regularly to the Secretary-General" information pertaining to the "economic, social, and education conditions of territories for which they are respectively responsible" which have yet to attain a full measure of self-government. A list of factors that necessitates what must be taken into consideration when determining whether a territory should be given non-self-governing status are included within General Assembly Resolution 742.[68] The request for the transmission of the information to the UN Secretary General came about as a result of General Assembly Resolution 9 of 9th February 1946 on non-self-governing peoples. These requirements were reiterated and clarified within General Assembly Resolution 1541.[69] Amongst the criteria, and of most relevant here are: that the territory is geographically separate;[70] and that the territory is in a position of subordination to the

[66] Preamble, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), 14 December 1960, UN Doc. A/4684.
[67] Transmission of Information under Article 73(e) of the Charter, GA Res. 66 (14 December 1946), UN Doc, A/64/Add.1 p. 125.
[68] Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, GA Res. 742 (VIII) (27 November 1953), UN Doc. A/2630, pp. 21-22.
[69] Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter, GA Res. 1541 (15 December 1960), UN Doc. A/4684, p. 29.
[70] *Ibid*., Principle IV.

administering territory.[71] It is noteworthy that the Resolution stipulates that the obligation under Article 73(e) ceases only once a territory has progressed towards a "full measure of self-government".[72]

In regard to this, Principle VI of resolution 1541 does provide a list of modes within which it can be said that a non-self-governing territory has reached a full measure of self-governance. There are: the emergence as a sovereign independent State; the integration with another independent State; or the '[f]ree association with an independent State'.[73] Due to its relevance here, it is worth stating that Principle VII goes on to identify that any such '[f]ree association should be the result of a free and voluntary choice by the people of the territory concerned expressed through informed and democratic processes'.[74]

Considering this concept of 'full measure of self-government', and the free 'association with an independent State', it is not beyond the realms of a legal analysis to argue that the Falklands (Malvinas) residents have attained this; in regard to this it is worth noting the significance of the aforementioned referendum of 2013[75] where the residents of the Falklands (Malvinas) restated

[71] *Ibid*., Principle V.
[72] *Ibid*., Principle II, this raises questions as to whether the Falklands (Malvinas have yet attained this status, and whether it is feasible for the territory to attain this whilst retaining the status of a British Overseas Territory.
[73] General Assembly Resolution 1541, *supra*, note 69, Principle VI(b).
[74] *Ibid*.
[75] Referendum on Political Status (Question), Order 2012, (31 December 2012) 23(14) Falkland Islands Gazette: Supplement, p.2.

their desire to maintain links to the UK mainland.[76] Yet, this is an aspect of the dispute that still remains, largely, underdeveloped, with there being no notable work addressing this since Fawcett presented an argument on this to the House of Commons Foreign Affairs Committee in 1983.[77] Yet, it should be noted that the UK government has previously argued that the UK has fulfilled the relevant criteria within Resolution 1541, and, as a result, the UK has reiterated to the Special Committee on Decolonisation, albeit not directly, that it is of the view that its overseas territories should be removed from the list.[78] However, given the highly contentious nature of the dispute it is questionable as to whether such a proposition would be accepted by the Committee. Additionally, it is suggested that simply altering the status of the Islands would do little with regard to the dispute settlement process, other than to antagonise the situation further; therefore, this aspect of the legal analysis will remain largely untouched by this thesis.

On the issue of dispute settlement between the UK and Argentina the General Assembly, in Resolution 2065, urged Argentina and the UK to:

> "[P]roceed without delay with the *negotiations* … with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution … bearing in mind the provisions and objectives of the Charter of the

[76] For a full breakdown of the referendum please see <http://www/falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/> last accessed 15/01/2015.
[77] Fawcett J, House of Commons, Foreign Affairs Committee, Falkland Islands, Minutes of Evidence, 17th January 1983, p.546.
[78] The United Kingdom's Relationship with its Overseas Territories: paper presented to the Pacific regional seminar by the Foreign and Commonwealth Office (2008) PRS/2008/CRP.9.

> United Nations and of General Assembly Resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas)."[79]

The voting outcome for this was unequivocal, with ninety-four States to zero States voting in favour, and with fourteen abstaining. This position has regularly been further reiterated by the Special Committee on Decolonisation.[80] However, to date it would seem that there has been little positive movements towards resolution via negotiation, or via another method.

Despite this call, at its zenith the dispute over the Falklands (Malvinas) was to cost the lives of 907 individuals, when, in 1982, the Argentine military utilised military assets, thereby initiating an international armed conflict, in order to temporarily secure *de facto* control of the Falklands (Malvinas) from the British.[81] In response, the UK deployed a military force and was able to reinstate control over the territory, returning the situation to the *status quo ante bellum*. That the conflict occurred does not affect the question of sovereignty, but its significance cannot be ignored when it comes to addressing the issue of dispute resolution, with its shadow still looming over the whole dispute settlement process.

[79] GA Res. 2065, 16 December 1965, UN Doc. A/6014, p.57, authors own emphasis added; see also Special Committee Res. A/AC.109/2003/24.
[80] The Special Committee was established in order to oversee the implementation of General Assembly Resolution 1514, see GA Res 1654, 1962, UN Doc. A/1500. See, for example, with regard to the Falklands/Malvinas, Special Committee on Decolonisation 4th Meeting, 14 June 2012, UN Doc. GA/Col/3238.
[81] Hastings M; & Jenkins S, *The Battle for the Falklands* (Pan Books, GB 1997), pp.357&358.

Notwithstanding this reassertion of control over the territory, the dispute did not die with the surrender of Argentine forces at the territories capital, Port Stanley. The dispute as to which State's flag should be found fluttering over these Islands endures, with all parties showing a dogged determination as to the justness of their position. Tension between the two States has ebbed and flowed, with the coming into power of President Macri in 2015 appearing to show a more conciliatory atmosphere between the two States. However, there is, equally, evidence of underlying tensions, with a number of recent incidents showing an increase in these, as encapsulated by Argentina's claim to the territorial waters around the territory,[82] and by the friction over the extraction of oil in the territorial water off the coast of the Falklands (Malvinas).[83] Poignantly, contemporary disputes over the extraction of natural resources tied to historical territorial disputes are far from exclusive to the UK and Argentina. Therefore, it is submitted that discerning a mechanism through which to find resolution to this conflict could have constructive resonance throughout the world.

[82] Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Argentina on 21 April 2009, 11 March 2016, <http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/2016_03_11_COM_SUMREC_ARG.pdf> last accessed 10/08/2017. Commission on the Limits of the Continental Shelf, 24th session, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 1 October 2009, CLCS/64, p.16; Commission on the Limits of the Continental Shelf, 30th session, Progress of work in the Commission on the Limits of the Continental shelf, 5 September 2012, CLCS/76; Commission on the Limits of the Continental Shelf, 40th session, Progress of work in the commission on the Limits of the Continental Shelf, 18 April 2016, CLCS/93, p.6; Commission on the Limits of the Continental Shelf, 43rd session, Progress of work in the Commission in the Limits of the Continental Shelf, 17 April 2017, CLCS/98, p.12.

[83] Available at < http://www.theguardian.com/world/2014/jan/12/argentina-falklands-oil-international-courts > last accessed 12/01/2014.

Returning to the Falklands (Malvinas) dispute, despite all of the above, it could be argued as to why effort should be expended in trying to settle the dispute, given for, as it stands, conditions are relatively stable. However, it must not be forgotten that this stability is the maintenance of a dispute for which the underlying problems have yet to be resolved, and have previously resulted in an armed conflict; indeed, as Smith wrote, the underlying fault lines that resulted in the 1982 conflict remain, and are 'as sharp and potentially disruptive as before the outbreak of hostilities'.[84] Given this, it would prove grievously negligent of us as international lawyers if we were to ignore this dispute that has already spilled far too much blood. Therefore, it is evident that a concerted effort must be undertaken in order to settle the dispute in a manner that enables positive peace to flourish within the South Atlantic; however, in attempting to resolve the dispute, it has to be recognised that it has been ongoing for over 200 years, with there being little sign of resolution, with the disputing States' positions currently being entrenched.[85]

Being conscious of this protracted and intractable nature, the initial chord that this strikes is that it is apparent that it will not be easy to generate the forward momentum required to bring the dispute to a resolution. The second issue that it raises, being as equally important for this thesis, is the question that the persistent nature of the dispute raises for the standing of international law; given that the dispute has been ongoing for such a protracted period of time does this

[84] Smith WS, 'Preface', in Smith WS (eds), *Toward Resolution? The Falklands/Malvinas Dispute* (Lynne Rienner Publishers, USA 1991,), p.vii.
[85] For an engaging overview of intractable disputes, please see Hassner RE, 'The Path to Intractability: time and the entrenchment of territorial disputes', (2006/2007) 31 (3) International Security 107.

speak to the effectiveness of international law, in general, and as a medium through which to attain the settlement of an international dispute? Is it evidence that in instances where there is a discernible power disparity between the disputing States international law is reduced to being little more than tokenistic terminology through which the parties to the dispute voice their perspectives? To answer these questions this thesis considers and examines international law's place within international dispute settlement, undertaking an engaged analysis of the role that international law has played in resolving, or indeed perpetuating, one of history's most protracted territorial disputes, the dispute over the contested Falklands (Malvinas).

It is acknowledged that the principal territorial dispute addressed within this thesis is far from the current 'vogue' within the public international law paradigm. Indeed, it is recognised, and it is unsurprising that, in a world that is seemingly increasingly strewn with violent non-international armed conflicts,[86] protracted interstate disputes – frequently shrouded in the mysticism of history – can often be found going unheeded. This is perhaps inevitable, for as Brownlie suggested, such conflicts often fail to grab the attention of the international lawyer due to the 'absence of any drama, an absence of casualties'.[87] Charlesworth echoed this perspective and developed the concept further, arguing that international law as a discipline has an obsessional psyche that

[86] For example, Syria, Security Council Resolution 2139 (2014), UN Doc. S/RES/2139 (2014) 22nd February 2014. In relation to the Ukraine, Security Council 7185th Meeting, UN Doc. S/PV.7185, 28th May 2014.
[87] Brownlie I, 'The Wang Tieya Lecture in Public International Law: the peaceful settlement of international disputes' (2009) 8 (2) Chinese Journal of International Law 267, p. 268.

fixates upon the contemporary crisis of the time before moving on to be consumed by the next international cataclysm. Critically, Charlesworth expanded upon this, contending that this crisis driven study actually 'impoverishes the discipline of international law'.[88] This issue is one of chronic concern and 'shackles international law to a static and unproductive rhetoric'.[89] Countering this position other legal scholars have argued that such crises focus international legal scholarship, as these incidents function as the 'basic epistemic unit of international law'.[90]

Accordingly, the focus that an international crisis would bring might enable a clarification of the penumbra of uncertainty[91] that may surround the legal regime relevant to the particular crisis. This thereby acts to bring added clarity to our understanding of international law. This indeed might be the case, but it is, as Charlesworth argued,, dangerous for international law to be consistently limited to playing a reactionary game. In this regard it would be remiss of the discipline of public international law to fixate solely upon the latest international dilemma. Tellingly, it is submitted there is weight to Charlesworth's proposition that this fixation upon the immediate is to the impoverishment of public international law as a composite whole.[92] Turning upon this impoverishment, it is contended that a dearth of sustained attention to the Falklands (Malvinas) territorial dispute is

[88] Charlesworth H, 'International Law: A Discipline of Crisis' (2002) 65 Modern Law Review 377, p.377.
[89] *Ibid*.
[90] Reisman M, 'International Incidents: introduction to a new genre in the study of international law in Reisman M; Willard A (eds), *International Incidents: the law that counts in world politics* (Princeton University Press, Princeton 1988), p.15.
[91] Hart HLA, *The Concept of Law* (3rd Edn OUP, 2012), p.12.
[92] Charlesworth, *supra* note 88, p.390.

highly problematic. This is not because, as is patently obvious, there is not an omnipresent causality leading from dispute to an armed conflict, but because it is unquestionable that for an armed conflict to arise the initial presence of a dispute is necessitated. And we cannot forget that, as international lawyers, one of the foundational aims of international law is the maintenance of international peace and security.[93]

International disputes are inevitable, for, as Merrills argued the existence of disputes is simply symptomatic of international relations.[94] Continuing on this theme Merrills pointed to the source of this inherent tension, that 'like individuals, [S]tates often want one thing in a situation where there is not enough of it to go around'.[95] Territory, and its attendant resources, is patently finite in quantity, hence why territorial disputes were traditionally the primary cause of armed conflict.[96] The Falklands (Malvinas) dispute would seem to fall very neatly within this prediction. Furthermore, looking beyond the confines of this thesis, the territorial debate over the Falklands (Malvinas) is far from an isolated phenomenon; it proves indicative of a particular breed of sovereignty dispute within international relations: that over an island territory separated from the central metropole. Examples of such disputes are those over the: Paracel Islands; Spatly Islands; Chagos Islands; Senkaku Islands; Isla de Aves (Bird Islands); Island of Redonda; Abu Musa and Tumb Islands; and the Kurile Islands. It is

[93] UN Charter, *supra*, note 9, Preamble.
[94] Merrills JG, *International Dispute Settlement* (5th Edn CUP, 2011), p.1.
[95] *Ibid*.
[96] Forsberg T, 'Explaining Territorial Disputes: from Power Politics to Normative Reasons' (1996) 33 (4) Journal of Peace Research 433, p.433.

recognised that the assessment of the Falklands (Malvinas) conflict cannot explain all of these island disputes monocausally,[97] with each dispute having specific contextual criteria that will demand a bespoke solution to be crafted. Yet, it is possible that the techniques employed in the analysis of the Falklands (Malvinas) dispute and the examination of the utility of international law in relation of intractable disputes could have a guiding effect in resolving them, and therefore be of a wider, global, appeal.

As has been made apparent, despite the rise of non-state armed conflicts – often territorial disputes within a given territory – territorial disputes are still of paramount importance, for, as Vasquez succinctly argued, 'if you want to avoid war, learn how to settle territorial disputes non-violently'.[98] Alas, despite this most obvious of claims there would appear to be no easily identifiable way within which to settle territorial disputes non-violently. Therefore, it is unsurprising that the United Nations (UN) has expended much energy in an attempt to better understand this riddle. For example, within the 'An Agenda for Peace'[99] document, a seminal post-Cold War review of peace and security, a concerted effort was made to emphasise the importance of conflict prevention, with the focus being upon the concept of preventive diplomacy. Within, it defined the role of preventative diplomacy as one that pursues and preserves peace, with the purpose being to avoid 'disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread

[97] Tagil S, *Studying Boundary Conflicts* (Lund Studies in International History, 1977).
[98] Vasquez J, *The War Puzzle* (CUP, 1993), p.307.
[99] Report of the Secretary-General, 'An Agenda for Peace: preventive diplomacy, peacemaking and peace-keeping' (1992) UN Doc. A/44/277-S/24111.

of the latter when they occur'.[100] More recently, the UN Secretary-General (SG) has stipulated that is it necessary to 're-energise' the preventive diplomatic machinery within the UN,[101] further emphasising that the focus upon the conflict prevention model is 'one of the smartest investments we can make'.[102] However, it is perhaps worth noting that this 2011 SG report follows the aforementioned crisis fixation, with it paying most attention to contemporary 'civil' wars,[103] or what it deems the 'internal crisis'.[104] Nevertheless, what these examples highlight is that there is a burgeoning body of sentiment and understand in regard to the necessity of a 'culture of prevention';[105] that a 'coherent and integrated approach to the prevention of armed conflicts and the settlement of disputes'[106] is necessitated. Concurrently, the normalisation of State relations – the establishment of a positive peace – will better enable the fulfilment of wider notions of security and economic development. It follows that the significance of interstate disputes, such as that over the Falklands (Malvinas), should not be understated or overlooked, if, as the Charter of the United Nations resolutely pronounced, we are to 'save succeeding generations from the scourge of war' and 'to promote social progress and better standards of life'.[107] Those within the Public International Law paradigm should recognise the role that they can play

[100] *Ibid*., at para.20.
[101] Report of the Secretary-General, 'Preventive Diplomacy: Delivering Results' (26 August 2011) UN Doc. S/2011/552, p.2.
[102] *Ibid*., p.24.
[103] *Ibid*., pp.5,14&15.
[104] *Ibid*., p.18.
[105] UNGA '2005 World Summit Outcome' UNGA Res 60/1 (24 October 2005) UN Doc. A/Res/60/1, at para.74.
[106] *Ibid*., para.75.
[107] UN Charter, *supra*, note 9, preamble.

in overcoming and resolving these – what are often deemed intractable – disputes.

In addition to academic literature providing guidance as to how to resolve the Falklands (Malvinas) dispute is to be resolved, States have a profound duty of their own to 'settle their disputes in accordance with international law'.[108] In this regard, the UN Charter prescribes that States 'shall settle their international disputes by peaceful means'.[109] Reinforcing the significance of the notion of the pacific settlement of disputes, the UN Charter continues, at Article 2 (4) to stipulate that States 'shall refrain in their international relations from the threat or use of force'.[110] However, despite these restrictions it remains a fact, as Kelsen noted, 'that in case of disputes between States there exists no authority accepted generally and obligatorily as competent to settle international conflicts, that is, to answer the question as to which of the parties to the conflict is right and which is wrong'.[111] Accordingly, as Kelsen continued, 'each State is authorized to decide for itself the question of whether the other State has violated, or is about to violate its right'.[112] This absence of a legal body with universal decision making authority is, arguably, what has been one of the key reasons as to why the dispute over the Falklands (Malvinas) has perpetuated for so long.

[108] Lauterpacht H, 'The Judicial Settlement of Disputes' in Lauterpacht E (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (CUP, GB 2004), Vol.5 p.72.
[109] UN Charter, *supra*, note 9, Art.2(3).
[110] *Ibid*., Art.2(4).
[111] Kelsen H, *Peace through Law* (Garland Library Edn, Garland Publishing 1973), p.13.
[112] *Ibid*., p.13.

1.2: The Significance of International Law to the Falklands (Malvinas) Dispute

To this point this chapter has crafted a picture of the dispute over the contested territory establishing why it is necessary to aim to bring it to resolution. In relation to this it was noted how one of international laws primary aims is to aid with the pacific resolution of disputes of an international character. Yet, as mentioned, the Falklands (Malvinas) dispute has been ongoing for over 200 years, and this strikes a chord of concern. It was identified that the protracted nature of the dispute proves representative of one of the key weaknesses of international law, for as Kelsen stated there is no entity of universal power that exist above the State, that has the capacity to determine the outcome of legal disputes, and to peacefully settle international conflicts.[113] Given this, this chapter progresses on from this point to assess the relevance of international law, generally, and specifically in relation to the pacific settlement of disputes. Notably, the question of international law's place in the dispute settlement process is returned to in the penultimate chapter of this thesis.

This core weakness within the international legal dispute system recorded by Kelsen would seem to be supportive of HLA Hart's perspective that international law still resembles that of a primitive legal system, whereby the system is comprised of a set of primary rules, without the required supporting secondary rule structure.[114] According to Hart, primary rules are those that denote how entities recognised by the purported legal system should behave,

[113] Kelsen, *supra*, note 111, p.13.
[114] Hart HLA, *The Concept of Law* (3rd Edn OUP, GB 2012) p.213; Kelsen H, General Theory of Law and State, (3rd reprinting The Law Book Exchange, USA 1999), p.338.

with secondary rules governing how the primary rules are to be created, adapted, and applied.[115] Typically, the primary rules – the rights and duties of States – under international law can be readily ascertained; however, there are exceptions, as with what is the scope of the 'right' of self-determination. The secondary rules of international law – those governing dispute resolution, for example[116] – however, are far less robust, especially those that are concerned with the implementation of international law, for, as was above mentioned, there is no adjudicatory body with automatic universal jurisdiction.

If this is indeed the case it is little surprise that Goldsmith and Posner came to the conclusion that it is a State's interests, and not international law, that *decisively* determine a State's compliance with the recognised primary rules.[117] This realist perspective builds on that of Morgenthau where he argued that it is necessary to 'detect and understand the forces that determine the political relations amongst nations [involved within a dispute], and to comprehend the ways in which those forces act upon each other and upon international political relations'.[118] Critically, much like Goldsmith and Posner, Morgenthau reduced these forces, and therefore State decision making and political activity, down to considerations of power. Yet, it must be noted that he utilised a rather narrow definition of politics stating that only decisions relating to power are those of a

[115] *Ibid*., p.79.
[116] Raustiala K; & Slaughter AM, 'International Law, International Relations and Compliance', in Carlnaes W; Risse T; & Simmons B (eds), *The Handbook of International Relations* (Sage Publishings, GB 2006), p.553
[117] Goldsmith J; & Posner E, *The Limits of International Law* (OUP, GB 2007).
[118] Morgenthau H, *Politics Among Nations: The Struggle for Power and Peace* (6th Edn, Kalyani Publishers 2012), p.18.

political nature – a self-serving and cyclical definition. This issue aside, these sceptics question the worth of international law, and, indeed, there is some value to these criticisms. For as Aron wrote the true test of a legal system is in how well it performs in a crisis,[119] and it would seem, as shown with the USA's invasion of Iraq in 2003 and with Russia's annexation of Crimea, that it is in these times of crisis that international law is at its weakest. It is quite easy to see the links between these sceptical positions, and the aforementioned discussion regarding the weakness in the secondary rule structure of international law, with the lack of enforcement structures to impose sanctions for non-compliance.

The problem with this highly sceptical position is that it fixates on external observations of primary rule compliance; for the 'realist' the significant factor is not whether a rule exists, but whether there has been an observable compliance with that rule. Therefore, as Koskenniemi highlighted, the internalised components of law, 'the feeling with many statesmen and diplomats that rules exist and are binding upon them and their States'[120] is disregarded as irrelevant. This is echoed by White where he argued that whilst these realist arguments are effective at identifying some of the weaknesses within international law, they are ignorant of the value that the international community has placed on a number of key concepts at the heart of the international legal system, such as peace, stability, and humanity. The rules and principles of international law embody these values, and it is these that impact on the decision-making process.

[119] Aron R, *Peace and War: a theory of International Relations* (Reprint Transaction Publishers, USA 2003), p.705.
[120] Koskenniemi M, *From Apology to Utopia: the structure of international legal argument, reissue with new epilogue* (CUP, GB 2007), p.200

Developing this further White continued to argue that despite international law apparently being plagued by a weaknesses in its secondary rule structure, markedly so when compared to most domestic legal systems, it is this unobservable characteristic of international law, its ability to affect even the most powerful of States, that gives it significant potential to facilitate the settlement of international legal disputes.[121] Indeed, as Brownlie advocated, one of the central tenets of public international law is that it 'provides the principles and modalities governing the peaceful settlement of disputes between States'.[122]

However, despite it being concluded that international law is of significance in foreign affairs, this thesis accepts that that the secondary rule structure of international law is, relatively speaking, weak. Therefore, in order to not fall into the trap of being an unreflecting pragmatist, applying law without considering the significance of State interest in relation to compliance, it is acknowledged that international law is more than a system of universally applicable rules. As a result, throughout this thesis international law is not seen as merely an identifiable framework of rules within which the Falklands (Malvinas) dispute will find resolution, but, as Higgins suggested, it is an *ongoing process*[123] through which settlement can ultimately be grafted from. It allows progress to be made towards settlement whilst still remaining sufficiently flexible (or, as Morgenthau argued, this lack of concreteness makes it possible for governments

[121] White ND, *The Cuban Embargo under International Law: el bloqueo* (Routledge, GB 2015), p.2.
[122] Brownlie I, 'The Wang Tieya Lecture in Public International Law: the peaceful settlement of international disputes' (2009) 8 (2) Chinese Journal of International Law 267, p.267.
[123] Higgins R, *Problems and Process: international law and how we use it* (Oxford, Clarendon press 1994).

to interpret legal provisions in a manner that best suits their own agenda)[124] to provide the disputing States with a degree of political freedom. Accepting that this political freedom exists, as Koskenniemi argued, in highly politicised disputes, as is the case in the Falklands (Malvinas) dispute, it is typically the case that this would result in politics taking a more prominent role in the form, or lack of, that international law takes.[125] In other words, if the disputing parties have the political freedom to determine how they believe international law should be interpreted, it is of little surprise that disputing States are capable of crafting polar arguments, thereby, as in this instance, entrenching the dispute. However, this role can be reversed in moments of political change, where the dispute is said to be ripe, and it is in these instances that international law can help shape politics. Therefore, accepting this notion of international law as a process, it is the assertion within this thesis that Public International Law is the 'handmaiden' that can assist the UK and Argentina towards resolution. It can act to guide and frame of the dispute until the critical moment arises whereby resolution of the dispute is possible. It is possible to reinforce this by looking at the nature of international law and international legal disputes in light of theories of legal indeterminacy.

It has already been shown that international law and politics are intimately intertwined. Consequently, the legal analysis undertaken within this thesis is itself imbedded – and tangentially linked – within wider debates as to the nature

[124] Morgenthau, *supra*, note 118, p.281.
[125] Koskenniemi M, 'The Place of Law in Collective Security' (1996) 17 Michigan Journal of International Law 455.

and effectiveness of international law, in particular those that focus upon its posited indeterminacy.[126] It is to the indeterminacy of international law to which this thesis now turns, where the role of international politics and international relations is examined in relation to this. Crawford identified two forms of indeterminacy as being of particular relevance within international law,[127] the first being that of linguistic indeterminacy, as espoused by Hart.

Hart postulated that the process of legal decision making involved problems of the core and problems of the penumbra.[128] In regard to the former Hart suggested that the application of the law was clear; whereas for the latter, he argued that 'words are neither obviously applicable nor obviously ruled out'.[129] He developed this notion further, stipulating that logic is silent as to how to classify the particulars, and that the degree of uncertainty enabled – indeed necessitated – the penumbral concepts to be permeated by wider societal principles and concerns, such as the political. Stressing the distinction between the two Hart determined that the core, where the 'legal rules whose meaning has been settled',[130] are to not to be contaminated by these extra-legal forces.

Two points can be served against Hart that prove relevant to international law. The first is that this understanding would seem to indicate that once the core is

[126] *Ibid*., see generally.
[127] Crawford J, *Chance, Order, Change: the course of international law* (AIL-Pocket, France 2014), p.149
[128] Hart, *supra*, note 91, p.123.
[129] Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) Harvard Law Review 593, p.607.
[130] *Ibid*., p.614.

set it cannot be influenced or changed by political factors; clearly even concrete legal provisions are not permanently static in definition, thereby showing that even rules where the core is firmly understood are shaped by external factors. The second, which again focuses on this issue of political contamination, is that it presupposes a clear separation between the core and the penumbra, and, therefore, where the point is at which the legal analyst should not allow the legal rule to be soiled by the political. If we cannot disentangle the core clearly from the penumbra, how is it possible to clearly note when politics should not be a persuading factor? One option would be to try and limit the influence of external factors, but, as indicated above, Hart himself noted that the penumbral concepts should be influenced by the political; indeed, it is necessary, for if we are to gain greater understanding of the penumbra it must be feasible for it to be influenced by the political.

Therefore, it would seem unworkable to relegate political factors to irrelevance. However, perhaps we do not need to actively consider this when undertaking legal interpretation as it is arguable that politics naturally becomes decreasingly significant the clearer the core of understanding. For example, consider if a State's foreign minister was to argue a position that was far removed from the understanding of a norm with a strong core of understanding it is incredibly unlikely that this argument would prove persuasive, and it would have a negligible, if not non-existent, effect on the core of understanding. Therefore, it would seem to be the case that a political position or argument would become increasing untenable the further away it would seem to be from a more concrete legal norm. But, this does not negate the relevance or capacity of a particularly

persuasive political position from influencing the core of understanding. The ultimate outcome of this is that the role of politics cannot be disregarded out of hand for even the most concrete of norms.

Accepting this, and also noting that international law is influenced for more significantly by politics than is the case in most domestic legal systems, this raises two critical issues for international law. Both highlight as to why international law suffers from a higher degree of indeterminacy than is typically the case within domestic legal systems. The chief issue here is that the primary subjects of the legal system are also the principle source of the law.[131] International law is created through a State's external political actions, for example via: the creation of treaties; and through an interpretation of the combined activity of States[132] with the creation of customary international law.[133] In a legal system where entities with competing political interests are the source of the legal provisions it is all but inevitable that the core of certainty of legal provisions will be less well developed than in legal regimes where there is one single sovereign source of legal authority; with regard to treaties, for example, this might entail the utilisation of indeterminate words which will facilitate agreement.[134] In addition to this, the penumbral mass of legal issues is arguably greater within the international legal system than within the domestic as a result of, *inter alia*: linguistic differences; variations in legal cultures; and

[131] Statute of the International Court of Justice (1945), Art.38, Evans M, *International Law Documents* (10th Edn OUP, GB 2011), p.30.
[132] *North Sea Continental Shelf Cases*, Judgment, ICJ Reports 1969 3.
[133] Statute of the ICJ, *supra*, note 131, Art.38(1)(b).
[134] Stern B, 'Interpretation in International Trade Law' in Fitzmaurice M' Elias O; & Merkouris P, Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on (Martinuss Nijhoff Publishers, The Netherlands 2010), p.113.

with the lack of a court with universal compulsory jurisdiction. These cumulative factors expand the penumbral cases, restrict the scope of the core, and, therefore, give rise to an elevated level of interpretative discretion.

The second influencing factor, as recognised within Article 31 of the Vienna Convention on the Law of Treaties,[135] is that continued State practice is established as one of the primary forms of assistance to legal interpretation of treaties. Therefore, the interpretation of these legal provisions, with large penumbras of uncertainty, is, most prominently, executed by these same political actors that have created these uncertain legal provisions. Therefore, this continued political influence perpetuates the existence of this penumbra, and thereby limits the likelihood of there being a crystallisation of understanding at the core of the legal provision. Consequently, it is understandable that Hart questioned whether the international legal system had the requisite characteristics of law,[136] and inquired as to whether international law could ever 'be meaningful and truthfully said to give rise to obligations?'[137]

The consequences of this analysis for this thesis is that this further reinforces the significance of the political within international law and international legal dispute settlement. Yet, despite this it does highlight how these political factors are still framed within the general, albeit often uncertain, structure of

[135] Vienna Convention on the Law of Treaties, 23 May 1969, Article 31(3)(2)(b), (1969) 8 International Legal Materials 679.
[136] Hart, *supra*, note 91.
[137] *Ibid*., p.217.

international legal provisions. Therefore, this thesis, at Chapter 5, undertakes an analysis as to how, and when, subsequent practice might act in order to reduce the penumbra of uncertainty of a legal rule, thereby creating clearer legal obligations through which State behaviour can be more effectively constrained, and how it might aid with the resolution of the Falklands (Malvinas) dispute.

The second form of indeterminacy acknowledged by Crawford is substantive indeterminacy,[138] as advocated by Koskenniemi within his text of *From Apology to Utopia.*[139] Within the text Koskenniemi built on the work of Gordon and his assessment of the history of critical legal studies where he was argued that law is 'indeterminate at its core … [t]his indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory'.[140] Koskenniemi suggested that even if linguistic and semantic indeterminacies are removed from the international legal system it would still remain inherently indeterminate.[141] This results from the intrinsic dearth of capacity in providing coherent justification for the *objectivity* of international law. Koskenniemi maintained that such stems from international legal scholars, in attempting to justify the objectivity of international law as being separate from international politics, having relied upon two competing requirements: concreteness and normativity.[142]

[138] Crawford, *supra*, note 127, p.157.
[139] Koskenniemi, *supra*, note 120.
[140] Gordon RW, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, p.114
[141] Koskenniemi, *supra*, note 120, p.62
[142] *Ibid*., p.7.

The *concreteness* strand stipulates that international law should not be based upon subjective and contested political assertions and values, but be founded upon state behaviour that is actual and verifiable;[143] crafting a tangible link between law and how it appears to be socially conceived, rather than viewing law as a naturally occurring phenomenon.[144] The *normativity* aspect of international law relates to the capacity of international law to be opposable to State policy,[145] and therefore applicable against the subjective will of the state.[146] However, Koskenniemi argued that these positions are in contradiction with one another. And his central argument was as follows:

> [I]t is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements cancel each other. An argument about concreteness is an argument about the closeness of a rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.[147]

Therefore, for Koskenniemi, it follows that international law is irredeemably indeterminate as a result of it being founded upon the opposing, mutually exclusive, concepts of apology and utopia. Koskenniemi appeared to take this theory as to the indeterminacy of international law to the extreme. For him there

[143] *Ibid*.
[144] *Ibid*., p.58.
[145] *Ibid*., p.58
[146] *Ibid*., p.8.
[147] Koskenniemi M, *The Politics of International Law* (Hart, GB 2011), p.39.

is no centre, 'no pragmatic meeting-point existing independently of arguments that seek to make a position seem "central" or "pragmatic"'.[148] Indeed, for Koskenniemi it is possible to 'defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards'.[149] Koskenniemi linked this with the lack of a coherent corpus of jurisprudence within international law as a result of the lack of a court with universal jurisdiction.[150] Consequently, Koskenniemi came to the conclusion that 'all that is left for international law is argument'.[151]

In suggesting this, it appears that Koskenniemi is providing those that dispense and practice with international law a free hand to determine the content of such; being in a position to apply it in an arbitrary fashion to any particular factual matrix.[152] It is suggested that this is a highly negative and restricted view of international law, with Koskenniemi seemingly suggesting that international law is forever destined to be a heterogenic penumbral mass; playing into the hands of the realist critique.[153]

[148] Koskenniemi, *supra*, note 120, p.597.
[149] *Ibid*., p.591.
[150] *Ibid*., p.591.
[151] *Ibid*., p.591.
[152] *Ibid*., p.569.
[153] Purvis N, 'Critical Legal Studies in Public International Law2 32 (1) (1991) Harvard International Law Journal 81.

In addition to this, a further problem with Koskenniemi's argument is that it fails to sufficiently address the so called easy cases. Easy cases, as indicated by Soininen, are 'technical legal decisions, not legal conflicts, which are usually present in legal decision making';[154] in this sense they are legal problems where the legal answer can be clearly identified. Illustrating this it is possible to ask the legal question as to how many members comprise the UN Security Council. The legal answer as indicated by Article 23 of the UN Charter is fifteen.[155] In this regard, it seems impossible to come to a different legal answer. Examples of such easy cases quickly identify how problematic Koskenniemi's suggestion is that international law is so radically indeterminate as to enable any position to be justified through impeccable legal argument

Therefore, it is clear that there are instances where international legal language is not consistently so indeterminate as to enable the justification of any legal argument. In the above example to suggest a legal answer other than fifteen would be an unsustainable position to adopt. Evidently, an argument can be made to support any legal position, but, taking the above example, arguing that there are thirteen members of the Security Council would fail to be persuasive. In this regard, Crawford suggested that this form of easy case example identifies how there is a distinction between arguing and justifying a legal position, as '[i]nternational legal language is not so open-ended or mutable as to justify just anything: there comes a point at which a particular argument or interpretation

[154] Soininen N, 'Easy Cases and Objective Interpretation' in Husa J & Hoecke MV, *Objectivity in Law and Legal Reasoning* (Hart, GB 2013), p.136.
[155] UN Charter, *supra*, note 9, Art.23.

becomes untenable'.[156] Therefore, as Scobbie argued, there will be instances where no degree of impeccable legal argument can act to justify a given position.[157] Consequently, it proves difficult to accept Koskenniemi's extreme form of indeterminacy, despite it providing an illuminating insight into how legal arguments are questions of political choice.

Therefore, this thesis rejects the notion that international law is radically indeterminate, as Koskenniemi would argue; however, it does accept that international law is moderately indeterminate as a result of the consequences of linguistic indeterminacy. To say that international law is moderately indeterminate is not to suggest that international law is devoid of efficacy. In this regard it must be mentioned that the nature of international law, with it lacking a judicial system with compulsory jurisdiction, means that questions of legitimacy are distinct from those that are directed at domestic systems where law is seen as being legitimate only in instances where a judge's actions are constrained by a determinate legal provision.[158] Legitimacy here is understood in its classical philosophical sense, in that the decision provides a *prima facie* moral obligation that individuals, and other legal persons, must obey.[159] Inversely, this thesis takes a position that the relative indeterminacy of international law can in fact be utilised as an asset; providing such with transformative potential; with it being essential for conciliation and its utility in

[156] Crawford, *supra*, note 127, p.172.
[157] Scobbie I, 'Towards the Elimination of International Law: some radical scepticism about Sceptical Radicalism' 61 (1990) British Yearbook of International Law 364, p.351.
[158] Fiss, OM 'Objectivity and Interpretation' 34 (1982) Stanford Law Review 739, p.749.
[159] Raz J, *The Morality of Freedom* (OUP, GB 1986), pp.100-101.

dispute settlement. In this regard, it is worth noting the words of Franck where he maintained that a determinate rule is less elastic,[160] that 'some degree of indeterminacy is inevitable in any body of rules … [and] may even have its uses in promoting agreement and achieving flexibility'.[161] It is this flexibility that emanates from the moderate indeterminacy of international law that enables international law to function as a handmaiden guiding international legal argument. This is particularly poignant given the significance of politics,[162] the importance of the notion of the sovereign equality of States,[163] and the prominence of compromise as the primary method of international concord. Accordingly, this thesis embraces the argument that international law is moderately indeterminate.

1.3: Methodology

This analysis of international law has already started to build a picture as to the methodological approach that this thesis deploys, in the analyses of the value of international law. Within, it showed that there is an omnipresent connection between international law and politics. This permeates the existence of international law from its very inception, with international politics being of significance in the birth of an international legal provision, whilst also remaining of relevance throughout its life when it finds interpretation and application. Accepting this analysis this has significant repercussions for the methodological approach that this thesis takes.

[160] Franck T, *The Power of Legitimacy among Nations* (OUP, GB 1990), p.54.
[161] *Ibid*., p.53.
[162] Crawford, *supra*, note 127, p.148.
[163] UN Charter, *supra*, note 9, Art.2(1).

However, before addressing the methodology that was determined upon for undertaking the legal analysis within thesis, it first proves necessary to indicate as to why this approach was chosen. In order to achieve this it is essential that a discussion is undertaken with regard to the most commonly utilise methodological approach when addressing the dispute over the Falklands (Malvinas), and as to why this methodology was rejected. Much of the pre-existing academic scholarship addressing the legal aspects of the Falklands (Malvinas) dispute have primarily followed a doctrinal, a systematic exposition of the rules governing a particular legal category,[177] Legal Positivist methodology.[178]

In making this claim it must initially be noted that this is not to suggest that all Legal Positivists are homogeneous. For example, the work of the Classical Legal Positivists Bentham and Austin is certainly distinct from that of Kelsen. For example, much of Bentham's work focused on the command theory of law, defining law as being an 'assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed'.[179] Kelsen on the other hand focused on the hierarchical normative structure of a

[177] Hutchinson T; & Duncan N, 'Defining and Describing What We Do: doctrinal legal reasoning' (2012) 17 (1) Deakin Law Review 83, p.101.
[178] Hope AFJ, 'Sovereignty and Decolonization of the Malvinas (Falkland) Islands (1983) 6 Boston College International and Comparative Law Review 391; Schwed A, 'Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute' (1982) 6 Fordham International Law Journal 433; Metford JCJ, 'Falklands or Malvinas?' (July 1968) 44 (3) International Affairs 463;
[179] Bentham J, *Of Laws in General: his collected works* (Athlone Press, London 1970), ch.1 para.1.

legal system, arguing that the 'legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms'.[180] However, for the sake of this thesis it is enough to focus on the propositions that these jurists are united by. In this regard, common amongst all Legal Positivists, as Gardner identified, is the proposition that '[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits'.[181] Therefore, generally speaking, Legal Positivism, including Classical Legal Positivism, is a methodological approach that perceives the law as being describable, being supported by effective sanctions, and which is objective in that it exists independent of moral and ethical factors.[182]

Looking at this concept deeper it proves insightful to address the work of Kelsen, as an example of a Classical Legal Positivist, who wrote that law is comprised of an 'internally coherent system of rules, principles and basic axioms',[183] that are free from the influence of foreign elements.[184] Therefore, a legal provision is either a valid legal provision in that it has been created through a valid process, or it is not valid law; for Kelsen law should be examined through a 'structural analysis … free of ethical or political judgments of value'.[185] In this sense, politics is seen as an external process which is essential for the creation of the

[180] Kelsen H, Pure Theory of Law (University of California Press, USA 1967), p.221-222.
[181] Gardner J, 'Legal Positivism: 5 ½ myths' 46 (2001) The American Journal of Jurisprudence 199, p.199.
[182] Penner JE, *McCoubrey & White's Textbook on Jurisprudence* (4th Edn OUP, GB 2002), p.52.
[183] Salter M; & Mason J, *Writing Law Dissertations: an introduction and guide to the conduct of legal research* (Pearson Education Ltd, GB 2007), p56.
[184] Kelsen H, 'The Pure Theory of Law' (1934) 50 Law Quarterly Review 474, pp.477&478.
[185] *Ibid*., p.498.

law, but it should not be allowed to pollute our application of the law once it has come into being;[186] extra-legal considerations are deemed to be irrelevant to the legal analysis.[187]

It should be noted that this is not to say that Classical Legal Positivism sees all legal provisions as being normatively concrete, for it is recognised that all legal rules, being constructed of written language, contain a certain degree of indeterminacy, meaning that they must be interpreted.[188] However,, with regard to international law, Kelsen was of a mind that to the Positivist international laws are the rules to which States have agreed, through treaties, custom, or via other forms of consent,[189] and are, in this sense, objectively determinable. The clearest example of this form of legal reasoning within judicial jurisprudence can be found expressed in the *Lotus* judgment of the Permanent Court of International Justice:

> The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[190]

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[186] *Ibid*., p.478.
[187] Weil P, 'Towards Relative Normativity in International Law?' (1982) 77 American Journal of International Law 413, pp.414-418.
[188] Fastenrath U, 'Relative Normativity in International Law' (1993) 4 (3) European Journal of International Law 305, p.308.
[189] Kelsen H, *Principles of International Law* (The Law Book Exchange, New Jersey 2003) p.438-439.
[190] *The Case of the SS Lotus*, Judgment of the Permanent Court of International Justice, 7 September 1927, Series A No 10, p.18.

Therefore, in this regard it is commonly recognised that it is the role of the international lawyer to interpret the 'authentic will of the States concerned',[191] and to apply these appropriately. In instances of competing, often contradictory, legal claims the claims that the disputing parties have generated are analysed following an application of rules such as the *lex posterior, lex specialis,* or *lex superior* rules.[192] Through an application of these rules, and others, it is determined which legal rule is applicable, with this indicating what the outcome should be. It should be noted that the notion of there being a requirement for effective sanctions, as is perceived as being essential for domestic Positivists, is not being addressed, for, as Hart wrote, it is particularly apparent that there is a dearth of a 'score keeper' within international law[193]

Drawing this together, it can be summarised that the Classical Positivist Legal methodology perceives the international legal regime as being one comprised of a degree of objective order, with definable legal rules. Critically, these primarily centre upon the purported foundational core of Legal Positivism, that international law is objectively determinable and that is can exist independent from the political factors that created it.

[191] Simma B, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a positivist view' (1999) 93 (2) American Journal of International Law 302, p.304.
[192] Fastenrath U, 'Relative Normativity in International Law' (1993) 4 (3) European Journal of International Law 305, p.308.
[193] Hart, *supra* note 91, p. 144.

Yet, the above analysis of international law has already shown the weaknesses of this argumentative position. The analyses of linguistic and substantive indeterminacy, undertaken above, both prove highly damaging to the Classical Positivist methodology, and its claim to objectivity. In brief, the linguistic analysis showed the significance of politics in interpreting legal rules, with substantive indeterminacy, despite being rejected due to it failing to adequately explain easy cases, helping to explain the problems attached to justifying the objectivity of international law. For instance, Koskenniemi argued that legal rules are created by politics, and the 'separation of the creation and ascertainment of legal rules cannot be consistently maintained',[194] thereby resulting in law having an omnipresent nexus with politics. However, in order to provide a fully reasoned rejection of the Classical Positivist methodology, before looking specifically at the weaknesses of the Classical Legal Positivist approach in relation to the Falklands (Malvinas) dispute, it proves helpful to build on the above comments, examining some of the other key criticisms that have been levied against the Classical Positivist approach. But, before coming to this it should be noted that it is not the role of this thesis to craft a new critique of Classical Positivism, as it is enough to merely restate and evaluate those which predate this study.

Adding further to this attack on Classical Legal Positivism, Morgenthau was of an opinion that the 'most disastrous error of Positivism [was] to misunderstand completely the implicit reference to the sociological context which every legal

[194] Koskennimei, *supra*, at note 120, at page 23.

rule contains'.[195] In this regard, Morgenthau was rejecting the notion that international law was objectively observable. This criticism was not just levied at the Classical Legal Positivists only by Morgenthau, and other realists, but it has been advocated by scholars from other theoretical approaches. For example, Weiler and Paulus were of a mind that it is not the role of the lawyer to come to an objective determination of the law; Weiler perceived this as a myth that could not survive sufficient scrutiny, and that this argument is irredeemable in that it is impossible for the lawyer to objectively determine on a legal rule and to then apply it. Critically, in this regard Weiler felt that the claims of the Positivist were fundamentally impossible, as the work of the legal scholar is *goal and policy oriented*.[196] In this sense he was arguing that it is the lawyer's role to present a socially and politically guided legal argument.

Nevertheless, despite the robustness of these critiques, it must be recalled that not all scholars are comfortable with this move away from objectivity. For example, Robbins took a very stark view of the existence of the nexus between law and politics, suggesting that it is 'the chaos of independent sovereignties which is the ultimate condition of international conflict'[197] with the 'anarchic political organization of the world [being] the root disease of our civilization'.[198] This position might have some merit, but it is argued that this highly pessimistic view would seem to be, somewhat, an overstatement, given that, as has already

[195] Morgenthau H, 'Positivism, Functionalism, and International Law' (1940) 34 (2) American Journal of International Law 260, p.270
[196] Weiler JHH; & Paulus AL, 'The Structure of Change in International Law' (1997) 8 European Journal of International Law 545, p.551.
[197] Robbins L, *The Economic Causes of War* (London, J. Cape 1939), p.104.
[198] *Ibid*., p.99.

been discussed, international law is not devoid of restrictive nature. Furthermore, Robbins failed to provide an effective alternative model to the sovereign State oriented international legal system, which might have acted as an insightful counterpoint to this argument.

Despite these criticisms, it very quickly becomes evident that the majority of the literature addressing the Falklands (Malvinas) dispute has followed a Classical legal Positivist approach. Looking at the literate from the authors of this collected body, it is apparent that they have strived to undertake, what is held to be, an objective analysis, in order to make sense of the competing legal claims over the territory. The typical analytical examination of the dispute appears to address, *inter alia*, a recurrent number of themes, for example: *uti possidetis*; the laws relating to discovery; and self-determination. In this sense, academics addressing the dispute have attempted to formulate an objectively hierarchical structure of the applicability of the competing legal claims, in order to form some semblance of legal order and supremacy. These legal analysts would utilise doctrines of international law, such as the critical date and intertemporal law,[199] in order to ascertain which law is the *lex posteria*. Histories and legal timelines are draw in an attempt to assist with determining which of the principles discussed above – such as *uti possidetis*, discovery, and self-determination – should be applied to determine the successful party. Such a methodological approach aims to 'fit in these novelties in the legal system in such a way that the

[199] Elias TO, 'The Doctrine of Intertemporal Law' (1980) 74 (2) The American Journal of International Law 285, see generally.

integrity and coherence of the legal system is preserved'.[200] What is fundamentally critically is that this approach relies on the ability to be able to objectively determine, define, and apply a legal regime to a particular factual matrix; in this instance a highly complex legal regime, coupled with a nebulous factual matrix, to which Chapter Two will turn. The above criticisms have already identified the impossibility of achieving this.

In addition, and most damningly – albeit not a criticism of the Positivist approach in of itself, but an observation that relates to the difficulty of applying the methodology – much of the Positivist literature to have emerged from scholars addressing the Falklands (Malvinas) dispute has proven highly susceptible to the influences of politics. The years following the Falklands (Malvinas) conflict proved a hot-bed of, what can only be called, apologist academic literature. At the apogee of this mountain of literature is the work of Pinto. Published in 1983, Pinto suggested that the intent of the Argentine Republic, in its 'recovery' of the Islands, was to initiate a process of negotiation. Pinto went on to stress that as negotiations were deemed necessary by successive UN General Assembly Resolutions[201] this resulted in its fulfilment being of paramount legal importance. This interpretation of international law clearly gave preference to the Argentine State's subjective perspective, positioning the legal provision that supported Argentina's activity in a position of superiority to other

[200] Westerman P, 'Open or Autonomous: the debate on the legal methodology as a reflection of the debate on law' (October 30 2009), at page 3, available at SSRN: < http://ssrn.com/abstract=1609575 >. Last accessed 20/05/2017.
[201] Pinto M, 'Argentina's Rights to the Falkland/Malvinas Islands' (1983) 18 Texas International Law Journal 1.

recognised international legal provisions, such as Article 2 (4) of the United Nations Charter,[202] and customary law prohibiting the use of force.[203] The first criticism that can be labelled at Pinto is that this is a poorly constructed piece of academic literature, evidently not fulfilling Koskenniemi's analysis that 'it is possible to defend any course of action … by professionally impeccable legal argument'.[204] The second is that Pinto was simply utilising international law as an instrument of political purpose, with it being submitted that legal argument manufactured upon this form of approach to international law opens the legal advocate up to being accused of employing the law as an apology for State behaviour. In other words, as Koskenniemi revealed, this form of legal interpretation results in 'a law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description';[205] far removed from the objective determination which the Legal Positivist would be claiming to undertake.

The above analysis is not to say that the Legal Positivist method naturally results in an apologist determination, but that, in highly politicised disputes, combined with the adversarial nature of the doctrinal method, which is typically employed by the legal scholar, it can be utilised in order to further a particular political orientation – just as the practitioner within an adversarial legal system formulates an argument to best fit the demands of the client. It is the argument of this thesis that in many instances, the proclaimed objectivity of the Positivist

[202] UN Charter, *supra*, note 9, Art.2(4).
[203] Skubiszewski AK, 'The Use of Force by States' in Sorensen M (ed), Manual of Public International Law (Macmillan, London 1968), p.745
[204] Koskenniemi, *supra*, note 119, p.591.
[205] *Ibid*., p.17.

approach can be utilised as a mask to hide the underlying political considerations of the legal argument.

There is one final criticism of the proceeding literature that must be address that has already, very lightly, been touched upon. It must be recalled that the Legal Positivist approach will often pit one legal provision against the other. This doctrinal approach is highly adversarial, and it is submitted that this approach ultimately acts to preserve the adversarial and competitive nature of the dispute, rather than to extinguish it. Fundamentally, building on this, it is postulated that the current field of legal scholarship has proven of little value when it comes to resolving the dispute. Given the adversarial construction of this research, far from assisting in resolving the dispute, it is argued that this literature has, conversely, aided in sustaining the antagonism between the disputing parties, fuelling the fire of resentment. Indeed, the argumentative positions articulated by the disputing parties within the UN, and other international forums, tend to mirror those set forth and discussed within academic literature.[206] Therefore, simply undertaking a further classical doctrinal analysis would most likely repeat the work of earlier academics, and prove fruitless. Therefore, it proved essential that a methodological was utilised that is distinct from that which has just been discussed.

[206] For example, UN General Assembly, 37 GNAOR (14th Plenary Meeting) UN Doc. A/37/PV.14; Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Falkland Islands (Malvinas) working paper, UN Doc. A/AC.109/2012/12.

In this regard, given the disputes perennial nature, and that successive Positivist analyses have yet to hit upon any progressive elements through which the dispute might build resolution on, it was determined that a different approach was necessitated to resolve the dispute. To achieve this, this thesis undertakes a hybrid deconstructive/constructive legal analysis of the territorial dispute between Argentina and the UK, over the of the Falklands (Malvinas). Therefore, it follows that the legal arguments are not to be pitted against one-another, employing the classically utilised doctrinal methodology; conversely, this thesis addresses the competing State legal arguments following a deconstructive model.

The form of deconstruction utilised within the thesis differs from that which can find its roots within philosophy; however, the origins are still worthy of exploration as, despite the distinction between the philosophical and the legal approaches, they are related, and the roots of the roots of the philosophical method do provide an effect in understanding as to the rationale behind the adoption of the analytical technique. For Derrida, the 'God-Father' of the philosophical branch of deconstruction, 'deconstruction is … not simply positive, not simply conservative, not simply a way of repeating the given institution';[207] it is a technique that goes beyond the observational. Caputo elucidates this further stipulating that 'everything in deconstruction is turned toward opening, exposure, expansion, and complexification [sic], toward

[207] Caputo JD (ed), *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham University Press, USA 1997), p.5.

releasing unheard-of, undreamt-of possibilities'.[208] Derrida argues, with some force, that all those concepts that are constructs of human thought are open to a process of dismantling, destabilisation, and subversion.[209] However such a deconstructive methodology would provide a purely critical – arguably negative – treatment of the legal equation at play. Remarking upon this, Hoy and McCarthy suggested that what can be deconstructed by the 'same token it could also be reconstructed, reconfirmed, renewed. Derrida never develops this side of things'.[210] Therefore, as indicated, the deconstructivist approach espoused by Derrida will not be followed as it was never the intention of this thesis to utilise a process of deconstruction in order to destroy the legal concepts. Rather, this thesis applies the deconstructive methodology of the critical school of legal thought in order to undertake a productive deconstruction. In this regard, this thesis undertakes a deconstruction of the legal arguments in order to crack open the axioms, principles, and rights that underpin the competing State arguments. Much as a hadron collider enables the physicists to detect the particles from which matter is formed the deconstructivist approach followed within this thesis will enable an analysis of the plurality of international law – implementing an approach mirroring that championed by Koskenniemi within his seminal text *From Apology to Utopia.*[211]

[208] *Ibid*., p.31.
[209] Derrida J, translated by Weber S, *Limited Inc* (Northwestern University Press, USA 1988), p.136.
[210] Hoy DC; & McCarthy T, *Critical Theory* (Blackwell Publishers, 1994), p.36.
[211] Koskenniemi, *supra*, note 120.

For Koskenniemi, this approach 'attempts to reach further, to a description of the controlling legal *langue,* the *conditions of what can acceptably be said within*, or what it is possible to think or believe in it'.[212] Koskenniemi continued to suggest that such a deconstruction will 'not attempt to make new interpretations about the law but to explain how the making of interpretations is possible'.[213] In order to overcome the abstract nature of a theoretical analysis, this form of deconstruction remains grounded within the political and social context of the discussion, to which an analysis of this chapter will shortly turn. From this position of deconstruction it is hoped to locate interconnecting strands between what appear to be, *prima facie*, competing legal arguments. Consequently, this thesis looks at the underlying problems within the international legal regime that have resulted in the disputes perpetuation. For example, in Chapter 4 it is questioned as to what the hierarchical relationship is between a doctrine of international law, *uti possidetis*, and a peremptory norm, self-determination, ultimately determining upon an underlying factor that would seem to determine this relationship, and, also, perpetuate the non-resolution of the dispute.

However, as noted, when constructing this thesis it was understood that undertaking such a purely critical methodology would provide only a fraction of the necessitated answer; it fails to fulfil the critical aspect of dispute resolution: the settling of the dispute. Therefore, the weaknesses inherent within Derrida's methodology, highlighted by Hoy and McCarthy, are equally present within the

[212] *Ibid*., p.11, author's original emphasis.
[213] *Ibid*.

work of Koskenniemi; that undertaking a deconstruction, alone, is a purely negative process. As a consequence, being aware of this inherent negativity, this thesis builds upon the deconstruction, deploying an additional methodological layer: a constructivist technique. The employment of this approach enables the positive utilisation of the fragments of the deconstruction, piecing them together in order to ascertain whether the critical technique can be utilised to aid and proactively inform the dispute resolution process.

One final note on methodology, accepting the influence of politics on legal interpretation, as Pendelton argued '[l]egal writing inevitably reflects the writer's jurisprudential assumptions and beliefs';[214] therefore it is perhaps unavoidable that one's nationality and political perspective might have an influence upon any conclusions drawn. Therefore, a degree of caution must be taken to not allow political bias to permeate the legal analysis undertaken. Perhaps it could be argued that in accepting the significance of politics in international law, this is, in effect, opening the door to allow the entry of bias into the analysis. However, it should be noted that there is a clear distinction to be had between accepting that politics has a role to play in international law and that of letting one's analysis be guided by political bias. Furthermore, it is submitted that the methodological approach undertaken within this thesis, in avoiding the adversarial, should mitigate in some way for much of the problem of political bias.

[214] Pendeleton M, 'Non-Empirical Discovery in Legal Scholarship', in McConville M; & Chui WH (eds), *Research Methods for Law* (Edinburgh University Press, GB 2007), p.161.

Representative of this indeterminacy is that both Argentina and the UK frame their argument's utilising international law.[215] Critically, both States'' arguments have compelling components, and cannot be easily rejected. For the Realist this is indicative of the purely external nature of international law; an instrument that can empower a State; that the State is able to ignore, or utilise, on a whim.[216] In rejecting the Realist argument it is first accepted that the posited inherent indeterminacy of international law results in international relations, often, having the outward visage that resembles that theorised by the Realist cohort. However, it is held that the Falkland Islands dispute is a contextual situation that is revealing of the weaknesses within the Realist argument, that suggests that policy has primacy over the law; indeed, adopting Koskenniemi's thesis, when a party 'engaging in the formalism of the legal argument inevitably makes public the normative basis and objectives of one's actions and assumes the actor's communal accountability for what it is that one is justifying. It is the antithesis of a culture of secrecy, hegemony, dogmatism, and unaccountability'.[217] Koskenniemi developed this notion further suggesting that law enables the opening up of conceptions and practices, and, as a result, increases accountability, thus functioning as the 'gentle civilizer' of international politics.[218] As a result, it is hypothesised that the formulation of

[215] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/AC.109/2012/12, p.10&11.
[216] Slaughter AM, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503, p.503.
[217] Koskenniemi, *supra*, note 125, p.490.
[218] Koskenniemi M, *The Gentle Civilizer of Nations: the rise and fall of international law 1870-1960* (CUP, GB 2008), p.516.

legal argument, by the opposing States, opens the debate up to scrutiny, acting, as White suggests, not as a set of universal rules,[219] but as a normative framework that facilitates the forward momentum of dispute settlement.[220] Consequently, strands of congruent thinking imbedded within these – often *prima facie* polar – interpretations of international law might be located, and be utilised in order to progress the dispute a step towards peaceful resolution.

1.4: Thesis Overview

In order to provide greater clarity as to the form that this thesis takes, this thesis now turns to provide a skeleton of the argument upon which it is based. The first half of this thesis draws a critical picture of the nature of the Falklands (Malvinas) dispute. In shaping this narrative, it highlights the factual and legal uncertainties that reside at the core of the Falklands (Malvinas) dispute, and how these contribute towards the intractable nature of the dispute. The latter half progresses to utilise the conclusions drawn in the former, layering on top of this an analysis of international dispute settlement mechanisms, and the value of international law to the processes of settling the Falklands (Malvinas) dispute.

To effectively demonstrate this, in Chapters 2 and 3 this thesis continues to build on the overview given within this chapter to clearly show how the factual matrix of the Falklands (Malvinas) dispute is highly uncertain. Considerable attention was spent looking at the relationship between the State arguments and the key

[219] This is despite suggestions that an explicit international rule of law exists; see for example, UNGA Res. 68/116 (2013).
[220] White, *supra*, note 121, p.4.

relevant historical aspects of the dispute. Amongst those issues addressed are: the legal efficacy of the Papal Bull Inter Caetera of 1493;[221] as is the question of first discovery;[222] and the significance of the British withdrawal in 1774.[223]

The critical approach to this history is undertaken in a fashion that moves beyond creating a chronology of events. The value that is attained from executing this is twofold. Firstly, it starts to move the analysis of the dispute beyond the adversarial, bilateral, approach that is most frequently undertaken when addressing the dispute. This is not to say that literature approaching the dispute from this bilateral angle is irrelevant; indeed, texts such as Goebel's[224] still prove highly insightful, not only in shaping the story of the history, but that we have these studies provides material from with which to conduct a critique.

The second advantage to be gained from executing this is that it starts to create a picture as to the manner within which the dispute might find resolution. Critically, with much of the history being clouded in uncertainty it provides the foundations from which it is possible to start questioning the feasibility of drawing an objective history. Significantly, an adjudicative body, such as the ICJ, will deem it necessary to create this, as shown in the *Minquiers and Ecrehos*

[221] Pope Alexander VI, 'Bull *Inter Caetra*' (1493), English translation found at <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> last accessed 20/08/2015.
[222] Goebel J, *The Struggle for the Falkland Islands* (1982 reissue Yale University Press, GB 1982), p.7.
[223] Hyde CC, *International Law: chiefly as interpreted by the United States* (Little, Brown, and Company, Boston 1922), p.197.
[224] Goebel, *supra*, note 195, p.466.

case.[225] A judgment to which this thesis returns when it looks more closely at the methodological tools that an international tribunal, such as the ICJ is likely to utilise in relation to disputes with its roots deeply imbedded in history.

The fourth chapter undertakes a critical appraisal of the contemporary legal arguments at the heart of the dispute. However, as mentioned within the examination above, these legal arguments are not pitted against each other. Indeed, what occurs is that this chapter highlights the complex nature of the relationship between the competing legal arguments, with there being a focus on the indeterminate nature of self-determination and *uti possidetis*, with both States utilising this indeterminacy to take, what would appear to be, polar opposite positions. The usual assessment of the Falklands (Malvinas) dispute would seem to try and determine which of these positions is the 'correct' approach, and it is here that the standard dispute settlement approach falls flat. This thesis avoids this, by not suggesting which State has the strongest argument, but the deconstruction of these legal norms highlights how their indeterminacy has contributed to the intractable nature of the dispute, and that the subjective bias of the legal interpreter proves key in determining how the norms are perceived.

Developing on that argued within Chapter 3 and Chapter 4, Chapter 5 takes the fragments of the deconstruction of the factual matrix, and of the legal doctrines

[225] *The Minquiers and Ecrehos Case (France/United Kingdom)*, Judgment, ICJ Reports 1953 47.

of self-determination and *uti possidetis*, and assesses the different modes of dispute settlement in light of this. This final substantive chapter draws together the key notions that run throughout the core of this thesis, culminating in the argument that international law does have the capacity to contribute towards the resolution of the protracted, apparently intractable, Falklands (Malvinas) dispute. As has been indicated, international law and politics are undoubtedly closely connected, with this having consequences for the determinacy of many of the rules of international law. Yet, this indeterminacy can also be labelled as flexibility, and it should be noted that this flexibility is not without limit, as shown above. In a legal system comprised of 'equal' sovereign States, with weak secondary rules such as with the dearth of a body of universal legal authority to implement sanctions for non-compliance, this flexibility is key. In a highly politicised, intractable disputes, forced agreement based on an indeterminate legal regime, and a nebulous factual matrix is very unlikely to prove the peaceful solution to the dispute that is sought.

In the alternative, it is international laws role to play that of a gentle guiding hand through to the point that the dispute ripens, when there is a change in the political climate. It is here, facilitated through diplomatic modes of dispute settlement, that the flexibility of the indeterminate international legal regime comes to the fore, where legal norms can be interpreted in novel manners which can aid in the pacific resolution of the dispute. Evidently, this is not dispute resolution in the strict sense as a domestic lawyer might recognise, but it shows how international law can frame a dispute, and function to provide the guiding hand required when the political climate is ripe for settlement.

Chapter 2: Historico-Legal Methodology

2.1: Why Undertake a Historical Analysis?

Since the publication of the monograph by Isaac Areco, *Titulos de la Republica Argentina a la Soberania y Possession de las Islas Malvinas*, published in 1885[1] there have been numerous attempts to survey and resolve the conflict over the disputed Falklands (Malvinas) archipelago. What is noteworthy about the vast majority of these studies is that they are firmly based within the parameters of history. It is possible to empathise and understand as to why the analyst seeking to address the sovereignty dispute over the Falklands (Malvinas) would seek to wrap their evaluation within the tapestry of history. For, fundamentally, as Carty suggested, appreciating history enables the analyst to understand the context of what is being assessed.[2] In a similar tone, Thorne, a professor of history, suggested that "a society lacking an awareness of the past is as deprived as those who remain strangers to the world of imaginative literature".[3] In this instance, history is the story that shaped the Falklands (Malvinas) dispute, therefore it can be readily seen as to why there is a presumption that history will form the basis of the disputes resolution. There seems to be an assumption that the sovereignty dispute's resolution resides within this history. Therefore, the central question with which this, and the next chapter, addresses is to what degree is this true;

[1] Aerco I.P., *Titulos de la Republica Argentina a la Soberania y Posesion de las Ilsas Malvinas* (Libreria de Mayo, Beunos Aires 1885).
[2] Carty A, 'Visions of the Past of International Society: law, history or politics? (2006) 69 (4) Modern Law Review 644, p.654.
[3] Thorne C, 'International Relations and the Promptings of History' (1983) 9 (2) Review of International Studies 123, p.123.

can history positively aid with the resolution of the legal dispute over the contested territory?

The First Chapter began the analysis of the Falklands (Malvinas) dispute by looking at the methodological approaches available to the international lawyer when undertaking an analysis of international legal disputes. The scrutiny paid to these methodologies questioned the relevance of international law in relation to a protracted bilateral territorial dispute, and it was acknowledged that international law might not be the sole guiding principle of State behaviour, with politics appearing to shape and manipulate the law in a highly politicised dispute.[4] In accepting this, it was argued that international law is not, as classical Legal Positivists would suggest, objectively determinable. Further to this, this thesis takes a view that the relatively high level of indeterminacy in international law, which can often result in disagreement, is the very same characteristic that enables international law to facilitate the coming together of States, enabling these States to reach conformity and agreement; essential characteristics for the resolution of a bilateral territorial dispute in a system comprised of, according to the UN Charter,[5] equal sovereign entities. Therefore, as noted, the main thrust of this thesis is that international law is of significance within State relations, and the settlement of international disputes. Accepting this, it is the role of this thesis to identify the role that international law might have in resolving the intractable dispute over the Falklands (Malvinas) archipelago. This, therefore,

[4] Koskenniemi M, 'The Place of Law in Collective Security', (1996) 17 Michigan Journal of International Law 455.
[5] Charter of the United Nations (adopted 24 October 1945), Art.2(1), Evans M, *International Law Documents* (10th Edn Oxford University Press, GB 2011), p.9.

brings us to the first element that needs to be addressed, the history of the Falklands (Malvinas) dispute.

Accepting that history has a role to play this Chapter follows from that undertaken in the First Chapter by carrying out a critical appraisal of the methodological approaches available to the international lawyer when dealing with legal disputes that are steeped in history. Therefore, given that this historical account is not about the provision of facts on which a legal framework is laid. This chapter deliver a theoretical explanation as to the place that this thesis positions history in relation to international legal dispute settlement. The key point that it makes is that it takes a leap away from the traditional use of history in a legal investigation, whereby the legal analyst claims to craft an objective chronology of the dispute, upon which they then apply an objectively determined legal provision.

This analysis first considers the methodologies of historians, such as Skinner and Cohen. The various approaches are contrasted with how lawyers address historical information, in order to determine whether international lawyers can learn anything from those that specialise in the discipline. What is notable is that synergies can be drawn between the methodological theories of many historians – that argue that there is a close nexus between the past and the present, scholars of the field of Hermeneutics, and of that of the American Legal Realism,

specifically that of the Fact Sceptic movement.[6] For the American Fact Sceptic the determination of an objective understanding of the facts is unknowable. Seeing value in this understanding, building on what was discussed in the first chapter where it was concluded that it is impossible to objectively define a legal provision, this chapter turns to an examination of this theoretical movement. It is noted that it has much to give, as it highlights the significance of the bias of a legal observer when it comes to addressing a factual matrix in relation to legal analysis. Nevertheless, it is concluded that to fully buy into Fact Scepticism would be to suggest that all facts, and all legal rules, are of irrelevance. Therefore, ultimately, this theoretical approach is not fully bought into, as it is recognised that, despite a factual matrix not being objective, it is acknowledged that some facts are clearer than others. Consequently, it is at this point in the analysis that it is suggested that it might aid with our interpretation and understanding of the structure of factual matrices if we were to perceive them in a similar manner to that which Hart perceived the linguistic indeterminacy of laws; accordingly, some facts will have strong cores of certainty, whilst others will be surrounded by a cloud of uncertainty. This correlation is hardly surprising if one considers the connection between facts and law. Accordingly, this chapter creates an understanding behind the rationale for the inclusion of a historical analysis, whilst starting to construct a picture as to why it would be unsuitable for the Falklands (Malvinas) dispute to be heard before a legally binding tribunal.

[6] Frank J, *Law and the Modern Mind* (Reprint with a new introduction Transaction Publishers, USA 2009).

2.2: The Distinction between Facts and Law

The analysis of the history of the Falklands (Malvinas) dispute is, inevitably, going to contain a mixture of factual, and legal matters. For the sake of clarity, and to streamline this analysis, this thesis accepts the general legal proposition that there are questions of fact, and that there are also questions of law, for as Jerome Michael argued, there is an 'intrinsic and essential difference between law and fact, between propositions about matters of fact and statements about matters of law'.[7]

Yet, it is accepted that this distinction is one of convenience, rather than one that goes unquestioned by legal philosophers. Indeed, when it comes to addressing the uncertainties of fact, and the uncertainties of law, similar conclusions are ultimately drawn. Looking briefly at the philosophical arguments between facts and law, as Twining elaborated, despite issues of law and questions of fact being distinct they are also interconnected.[8] Going further, Isaacs suggested that the two concepts are actually mutable and interchangeable, stating that 'it is by no means clear what is law and what is fact … what is today a question of fact may be a question of law tomorrow'.[9] Drawing further attention to this lack of distinction, albeit not suggesting that laws are facts but something quite opposite, Koskenniemi, in *From Apology to Utopia*, drew the reader's attention to the musings of what he called the Idealists; for the Idealists, the world is

[7] Michael J, *The Elements of Legal Controversy* (Brooklyn 1948). See, also, Isaacs N, 'Law and the Facts' (1922) 2 Columbia Law Review 1; Salmond J, *Jurisprudence: or the theory of the Law* (6th Edn Stevens & Haynes, London 1920), p.16; Twining W, 'Taking Facts Seriously' (1984) 34 Journal of Legal Education 22.
[8] Twining, *ibid*., p.27.
[9] Isaacs N, 'The Law and the Facts' (1922) 2 Columbia Law Review 1, p.3.

purely about thought; '[w]hat appear to us as physical, biological, historical or other facts are only surface appearances, or aspects, of the more general ideas on which they are dependent'.[10]

For some law is comprised of facts. With regard to laws as being facts it should be noted that agreement is found with the position of Greenberg who noted that laws are merely a certain category of fact in that they are observable phenomena. Indeed, Greenberg was of a mind that non-normative descriptive facts are 'among the determinants of the content of the law'.[11] Yet, Greenberg also added an additional element stating that legal provisions are comprised of value facts, as well as descriptive facts.[12] A value fact being a normative, or evaluative proposition. However, Greenberg labels facts as being true propositions, with it being the position of this thesis that it is problematic to label a fact as being 'true'.

This thesis approaches facts and law through the traditional legal approach, [13]

separating questions of fact and questions of law, for it enables a clearer picture to be crafted throughout the analysis. However, it should be noted that the author of this thesis is of a perspective that the distinction between facts and law is a false one, but, for the sake of this thesis it is not necessary to delve any deeper

[10] Koskenniemi M, *From Apology to Utopia: the structure of international legal argument, reissue with new epilogue* (CUP, GB 2007), p.516.
[11] Greenberg M, 'How Facts Make Law' (2004) 10 Legal Theory 157, p.157.
[12] *Ibid*., p.167.
[13] Isaacs, *supra*, note 9; Isaacs N, 'Judicial Review of Administrative Findings' (1921) 30 (8) The Yale Law Journal 781.

down this philosophical rabbit hole. It is merely enough to note that they are related, and, as will be shown, both laws and facts suffer from problems of interpretation, particularly when there is a high degree of uncertainty with regard to each.

2.3: The Method of Historico-Legal Analysis

As with the study of law there would seem to be as much debate as to the 'correct' way to investigate the discipline of history. One such approach, the Cambridge School,[14] is to suggest that everything must be placed within the context of its own time; the scholar should demarcate the contemporary from the historical, and this will result in a present-day context, in this instance the politics surrounding the dispute over the Falklands (Malvinas), being prevented from manipulating and distorting our understanding of the past. This position should be maintained even if that dispute is omnipresent throughout the period of history that is being addressed, given that that the distortion of history is an ongoing process.[15] This methodological approach of Skinner, a key player within the Cambridge school, would seem to come from a school of thought that the past, and the present, can be cleanly dissected from one another.

[14] Major R, 'The Cambridge School and Leo Struass: texts and context of American Political Science' (2005) 58 (3) Political Research Quarterly 477, see generally; see, also, Wootton D, 'Quentin Skinner on Himself: the hard look back' (14 March 2003) Times Literary Supplement 8.

[15] Skinner Q, 'Meaning and Understanding in History of Ideas' (1969) 8 History and Theory 3; see also, Skinner Q, 'Interpretation and the Understanding of Speech Acts', in Skinner Q, *Visions of Politics: volume 1, regarding method* (CUP, GB 2002), p.103.

Given what has already been written in this thesis it will hardly surprise that this thesis argues against the feasibility of this form of historical interpretation, but it should be noted that this approach is not without support in the field of law. For example, there seems to by a degree of synergy between that argued by Skinner, and that of the legal doctrine of Originalism, or Textualism, as once espoused by Justice Scalia of the United States Supreme Court, a methodological approach with which the Constitution of United States, and other statutes, are interpreted.[16] It was argued that the content of a legal text should be given its original meaning,[17] thereby avoiding the reading of the legal provision as a living instrument, in that the content of the legal provision evolves over time, unlike as has been deemed the case with the European Convention on Human Rights.[18] In this regard, in *Myers v United States*,[19] the Chief Justice of the Supreme Court of the United States sought to determine the meaning of the Constitution of 1789 by 'examining various evidence, including not only … the text of the Constitution and its overall structure', along with other evidential elements that were of contemporary relevance at the time of the drafting of the Constitution.[20] Yet, even Scalia was wise to the idea that judges have a tendency to 'think that the law is what they would like it to be', and that this will 'cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values'.[21] In this regard, Scalia was

[16] Scalia A, *A Matter of Interpretation: Federal courts and the law* (Princeton University Press, USA 1998), p.p.7.
[17] *Ibid*., p.8.
[18] *Tyrer v UK* (1978), Series A no.26; see, also, Lestas G, 'The Truth in Autonomous Concepts: how to interpret the ECHR' (2004) 15 European Journal of International Law 279, p.299.
[19] *Myers v United States*, 272 US 52 (1926).
[20] Scalia A, 'Originalism: the lesser evil' <https://www.law.uc.edu/sites/default/files/Scalia%201988%20Taft%20Lecture.pdf> last accessed 10/09/2017.
[21] *Ibid*.

warning that the personal bias of the interpreter of the past could prove deleterious to the aims of Originalism.

Given that one the staunchest proponents of the approach has conceded this, it is unsurprising to find that many other legal scholars come from a very different methodological perspective. By way of an example, Anne Orford was of a mind that the dissection of the past from the present would seem alien to those coming from a common law legal heritage, where emphasis is placed upon the extraction of meaning from previous case law, this being a reflection of the past. In this sense the past is infused with the contextual matrix of the present; the preceding case is observed through a lens where synergies are sought between the present and the past, in order to ascertain whether it can act as binding precedent, or whether the previous case can be distinguished from the factual matrix which occurred in the (close to) present.[22] In highlighting this Orford drew attention to the notion that the application of law requires the lawyer to examine a legal issue outside of that historical period within which it originated, in order to assist with the contemporary legal application. In this sense, there is a clear merging of the historical, and the contemporary.

As noted, historical methodology is as diverse as that relating to legal analysis. Therefore, it can prove illuminating to return to this discipline to shine an additional critical light on the Cambridge School and Originalism. In this regard,

[22] Orford A, 'On International Legal Method' (2013) 1 (1) London Review of International Law 166, p.172.

the historian Cohen wrote about there being a dynamic interaction between the past and the present, through which the 'past is continually being reshaped, either consciously, or unconsciously, in accordance with the diverse and shifting preoccupations of people in the present';[23] the preoccupation of the people in the present being an embodiment of the contemporary. It is notable that this approach seems to draw heavily from the discipline of Hermeneutics, originally a branch of theology, that now permeates many other disciplines that have a focus on the interpretation of documents, as with history,[24] and, indeed, there is a branch of Hermeneutics dedicated to interpretation in law,[25] *Hermeneutica Juris*.[26]

Without wanting to refine the theoretical field down too far, Hermeneutics, as a discipline, can be defined as an approach to the interpretation of documents, such as recorded historical texts.[27] Amongst the leading scholars in the field of Hermeneutics was the German scholar Gadamer. Gadamer wrote of a hermeneutical circle, within which there is a fusion of present and historical horizons.[28] In this regard, Hermeneutics would suggest that there is an integral relationship between the past and the present, for as Greenawalt wrote, a 'central

[23] Cohen PA, *History in three Keys: the Boxers as event, experience and myth* (Columbia University Press, USA 1997), p.XII.
[24] Skinner Q, 'Hermeneutics and the Role of History' (Autumn 1975) 7 (1) New Literary History 209.
[25] Greenawalt K, *Legal Interpretation* (Oxford University Press, GB 2010), pp.2-3.
[26] Hoy DC, 'Interpreting the Law: hermeneutical and poststructuralist perspectives' (1985) 58 Southern California Law Review 136, please see generally.
[27] Grondin J, *Introduction to Philosophical Hermeneutics* (Yale University Press, USA 1994), p.2.
[28] Gadamer HG, *Truth and Method* (2nd revised edition Crossroad Publishing, New York 1989), p.306

aspect of modern theories is that interpreters do not come at a text as a blank slate: they begin with a viewpoint or pre-understanding'.[29]

This is worth contemplating further for a moment. The pre-understanding of the interpreter will influence how the text is initially interpreted, and, as Greenawalt wrote, it is most unlikely that this initial pre-understanding will disappear. Nevertheless, Gadamer suggested that during the interpretation process there is a dialogue between the interpreter and the text.[30] This is, obviously, not a dialogue in the normal sense, but, as Gadamer continued, it involves a process of questions being put to the text by the interpreter, with the text then providing an answer.[31] Looking at the work of Taylor helps clarify this concept, whereby it was suggested that this conversation results in the interpreter listening to the text, which, in turn, might redefine what the interpreter is 'aiming at'.[32] Another way of seeing this is that Hermeneutics sees the present as, initially influencing how the past is interpreted, but then the past influences the present, and so on in an ongoing feedback-loop of influence.

Evidently there are positive attributes on either side of this methodological debate. Even when looking at Originalism, with its evident problems, it has to be admitted that its search for a form of legal interpretation based on contextual evidence that quietens the bias of the legal interpreter is an admirable aspiration.

[29] Greenawalt, *supra*, note 25, p.151.
[30] Gadamer, *supra*, note 28, p.306.
[31] *Ibid*.
[32] Taylor C, 'Understanding the Other: a Gadamerian view on conceptual schemes' in Malpas J; Arsnwald U; & Kertscher J (eds), *Gadamer's Century* (MIT Press, Cambridge Massachusetts. 2002), pp.279-281.

For Scalia, the interpreter's critical mind can assist to mitigate against these negative attributes, but, it is arguable that the bias of the interpreter might influence the manner within which the past is interpreted, without the interpreter being consciously aware of its influence. In addition, this reliance on a 'critical' mind is far from persuasive, if we are to suggest this approach over that of others, such as Cohen.

Indeed, all too often in strongly partisan disputes one's own political bias, and the intention for undertaking the study, as indicated by those that follow the school of Hermeneutics suggested, can prove the determinative factor for the author when selecting which aspects of history are pertinent, and how the history and law of the time should be interpreted. Indeed, as Beck articulated, despite an objective study of history being the ideal, '*in reality history is often exploited for functional reasons*'.[33] This suggests that the historical analyst is intentionally taking advantage of history for their own functional agenda. Beck, continuing down this train of thought, further suggested that facts are often distorted to fulfil this functional requirement, with authors displaying a form of localised and selective amnesia, with regard to counterfactual evidence.[34] Beck doesn't go as far as to suggest the construction of untruths, but other authors have taken forwarded this perspective, with the South American academic Escude, writing in relation to a multitude of South American territorial disputes, writing that States will go so far as to fabricate lies in order to justify a particular territorial

[33] Beck P.J. 'History and Policy-Makers in Argentina and Britain', in Hill C and Beshoff P (eds), Two Worlds of International Relations (Routledge, GB 1994), p.166, original emphasis.
[34] *Ibid*., p.166.

claim.[35] Echoing this extreme, Hobsbawm went as far as to suggest that there are instances where there is an employment of a history that never actually existed, with this occurring through the manipulation and engineering of facts.[36] For instance, in relation to the Falklands (Malvinas) dispute, Dr Ruda, representing the Argentine State, suggested that the population of the British colony has been periodically renewed, by the British State, via a constant turnover of the population;[37] an argumentative position with little data to support.

What is notable when looking at this analysis is that a number of common aspects shine through the cloud of the discussion. Foremost is that the bias of the interpreter has a role to play in interpretation. Even Scalia, a strong advocate of Originalism, conceded that it is difficult to interpret the historical without the bias of the legal interpreter proving significant. Secondly, intrinsically linked to the first point is that concepts evolve over time, and that today's understanding of notions differs from that of the past. What this wide range of perspectives indicates is that history is malleable, and, critically, it is doubtful whether a truly objective history can ever be crafted.

[35] Escude C, 'Argentine Territorial Nationalism' (1988) 20(1) Journal of Latin American Studies 139, p.151.
[36] Hobsbawm E. 'Inventing Traditions' in Hobsbawm E. and Ranger T. (eds) The Invention of Tradition (21st Printing Cambridge University Press, GB 2013), pp.13&14.
[37] Ruda JM, 9 September 1964, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, in 19 UN GAOR Annex 8 (Agenda Item 21, addendum item part 1), UN Doc. A/5800/Rev.1.

2.4: Fact Scepticism

One particular legal school of thought finds synergy with the above conclusion: the American Legal Realist movement of the early to mid-twentieth century.[38] The movement can be broken down into two distinct theoretical streams: the Rule Sceptics;[39] and the Fact Sceptics[40] – which are the focus here. In their analysis of the functioning of the American legal system the rule sceptics theorised that the significance of established formal rules should be downplayed and that other extra-legal factors were of prominence in the judicial decision-making process,[41] that 'rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings'.[42] Distinct, yet related, from this group were the Fact Sceptics, for which Frank was central. Frank held similar beliefs to that of the Rule Sceptics, but supplemented this position by advocating the impossibility of objectively determining upon the facts of a situation,[43] and that the application of the law cannot be 'hermetically sealed' from any erroneously deployed factual matrix.[44]

[38] Penner JE, *McCoubrey & White's Textbook on Jurisprudence* (4th Edn Oxford University Press, GB 2008), p.54
[39] Douglas WO, 'Stare Decisis' (June 1949) 49 (6) Columbia Law Review 735, see generally; Llewellyn KN, *The Common Law Tradition* (Little Brown & Co, Boston Massachusetts 1960) pp.75-92.
[40] Frank J, *Law and the Modern Mind* (Reprint with a new introduction Transaction Publishers, USA 2009); Frank J, *Courts on Trial: myth and reality in American Justice* (2nd printing The Cornwall Press Inc, USA 1950).
[41] Llewellyn KN, 'Some Realism about Realism – responding to Dean Pound' (1930-1931) 44 Harvard Law Review 1222, see generally, and p.1236.
[42] Llewellyn KN, *The Bramble Bush: on our law and its study* (Oceana Publications, New York 1951), p.9.
[43] McCoubrey H; & White ND, Textbook on Jurisprudence (3rd Edn Blackstone Press, GB 1993), p.203.
[44] Frank, *supra*, note 40, pp.xvi &xvii.

Frank identified two main factors as being intrinsic to the elusiveness of fact attainment. The first of these being human fallibility in the recording and recall of facts:

> The trial judge or jury, endeavouring (as an historian) to learn those past events, must rely, usually, on the oral testimony of witnesses who say they observed those events. The several witnesses usually tell conflicting stories. This must mean that at least some of the witnesses are either lying or (a) were honestly mistaken in observing the past facts or (b) are honestly mistaken in recollecting their observations or (c) are honestly mistaken in narrating their recollections at the trail … [T]he trail court (judge or jury) must select some part of the conflicting testimony to be treated as reliably reporting the past facts.[45]

Despite Frank focusing upon the trial process, this notion is readily transferable to any factual analysis of history with legal application, with the discovery of the Falklands (Malvinas) providing a prime example – with multiple States claiming to have achieved this feat, as will be shown in the next Chapter. The final sentence of the above quotation leads coherently into the second of Frank's factors, where he highlighted the importance of judicial prejudice – it is suggested that, in the context of the Falklands (Malvinas), the academic is undertaking a quasi-judicial function – when determining upon what facts are pertinent, and how these facts should be interpreted.[46] Again Frank's model related specifically to the trial process, with facts being but a few months to a few years old. Linking Frank's argument to Cohen's historical methodology, one can clearly see a synergy between the two, with Cohen arguing that that a

[45] Frank J, 'A Conflict with Oblivion: some observations on the founders of legal pragmatism' (1954) 9 Rutgers Law Review 425, pp.447–448.
[46] Frank, *supra*, note 40, pp.xii&xiii.

writer will normally be engaged in an *intended* act of communication;[47] as a result, the intention behind the production of the work would be determinative.

In instances of historical disputes, both strands of this scepticism would be multiplied. Within the first strand: first-hand accounts could be lost; historical modes of recording could be inaccurate; and secondary sources could have widely different interpretations, given that these are themselves interpretations of facts – or perhaps of other secondary sources – and are thus undermined by the same two factors that Frank identified. With regard to the second strand, it is arguable that intervening events – those that take place between the historical time in question and the date of the analysis – could, perhaps, further affect the prejudice of the individual undertaking the assessment. Consequently, adopting Frank's stream of argument the progression of time can prove a determinative factor as to which of the historical facts could be deemed pertinent, and, concurringly, the manner within they could be deciphered. Consequently, it is argued that the prejudice strand of Frank's argument takes on increasing significance with the passage of time.

2.5: Fact Scepticism and Hartian Indeterminacy

As indicated, the Fact Sceptics would argue against the feasibility of obtaining an objective truth; as Traynor wrote, another American Fact Sceptic, it is an undeniable truth (the irony of a sceptic claiming to have determined on a truth

[47] Cohen, *supra*, note 22, p.XII.

is not lost on this author) that 'facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past to life'.[48] Accepting this position as being correct, that an objective truth cannot be obtained, the question that should then be posed is as to what are the consequences of this for the undertaking of a legal analysis, and for the dispute settlement process that might find application in resolving the Falklands (Malvinas) dispute.

Were the analysis of the Fact Sceptics to be seen as accurate in their totality, this would have significant implication for the resolution of the Falklands (Malvinas) dispute. Following the logic of the Fact Sceptics, a factual matrix would be interpreted by an analyst dependent on their own subject bias, and would be, therefore, highly unpredictable.[49] Given the reality of legal analysis, that, to some extent, there will be an assessment of history, it will prove impossible to remove the past from the equation.[50] Therefore, following the Fact Sceptic approach, this will result in the outcome of any legal analysis of the Falklands (Malvinas) dispute being the result of personal bias. This is a pretty extreme deduction to make. It would seem that the only conclusion to draw from this is that if personal bias is to not be significant the analysis of facts should be removed. However, to remove history in the totality would be to remove any context from the legal analysis. To remove all context from the analysis would be to ignore the purpose of this legal analysis: that is to attempt to aid,

[48] Traynor R.J. 'Fact Skepticism and the Judicial Process' (1958) 106 (5) University of Pennsylvania Law Review 635, p.636.
[49] Frank, *supra*, note 40, pp.xii-xiii
[50] Brownlie I. *Principles of Public International Law* (7th Edn OUP, GB 2008), p.124.

progressively, with the dispute resolution process between Argentina and the UK over the contested territory of the Falkland Islands. Consequently, this thesis arrives at a destination where it is recognised that facts have a role to play in a legal analysis; yet, it is, at the same time, recognised that the lack of objectivity of the factual matrix of the dispute proves a significant hurdle to the pacific resolution of the dispute.

Critically, one of Fact Scepticisms ideological forefathers, Stephen, was somewhat less intransient when it came to the utilisation of facts. He accepted that factual matrices would often prove deficient, agreeing that an objective truth was out of reach, but he rejected that facts, as a whole, should, therefore, be dismissed. He instead suggested that the legal analyst should approach a factual matrix assessing the *prudence* of following any conclusion that would likely result from its utilisation.[51] However, the labelling of a fact as being prudent to apply does not seem to overcome the problem of subjectivity. Yet, the key point to take from this ongoing analysis is that one factual matrix may be more certain than another; or, to put it another way, more determinate. Therefore, Stephen's perspective does usefully plant the idea that facts do not need to be objective in order for them to be of utility in the legal process. Finding resonance with this position Traynor warned against a fixation on fact scepticism, suggesting that lawyers should not shy away from undertaking a legal analysis that is based on probabilities, and not objective facts.[52] Indeed, this approach to Fact Scepticism

[51] Stephen JF, 'On the Uncertainty of Judicial Fact-Finding: excerpted from his introduction to the Indian Evidence Act – Calcutta 1872 (1963) 38 New York University Law Review 1035, p.1043.
[52] Traynore RJ, 'Fact Skepticism and the Judicial Process' (1958) 106(5) University of Pennsylvania Law Review 635, p.636.

finds resonance with Hart's perspective of Rule Scepticism, where he argued the sceptic is a 'disappointed absolutist', and that they have come to the conclusion that:

> rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attainable by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.[53]

Hart suggests that the Rule Sceptic is of a mind that because an objective rule, or law, is not attainable this vitiates for the existence of rules. Looking at the approach of Fact Sceptics, they approach facts from a similar absolutist perspective.

Developing on this critique of the Sceptics, this creates a picture where the facts aren't presented as an objective truth, yet it is accepted that some facts are more certain than others; it is here that the analogy can be drawn between how we should deal with facts and how Hart suggests we should perceive laws. In some instances there may be facts that have larger cores of certainty when compared to other more easily contested facts. For instance, there is a large degree of factual certainty surrounding the position of the cruiser *Belgrano*, when it was targeted and sunk by the Royal Navy during the 1982 armed conflict; but, inverse to this, there is a great deal of uncertainty as to the purpose and intention

[53] Hart HLA, *The Concept of Law* (3rd Edn OUP, 2012), p.139.

of the vessel at the time it was targeted. This uncertainty has resulted in both parties arguing alternative positions, with the British State indicating that the vessel was a threat, and with the government in Buenos Aries arguing the counter position.[54] In this instance, the Argentine position is that the *Belgrano* was clearly outside of the 200 mile Total Exclusion Zone,[55] that the UK had established,[56] within which '[a]ny ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by the British forces'.[57] The Argentina government has long contested that the ship was outside of this zone, and that, critically, it was sailing away from it. The British government's perspective does not contest the position of the *Belgrano*, but it does dispute the vessel's intent, for as written by Margaret Thatcher, the *Belgrano* was manoeuvring as one claw of a 'classic pincer movement against the [British] Task Force', and it was 'clear to me what must be done to protect our forces'.[58]Given the nebulous nature of this fact, both positions are perfectly valid and predictable interpretations of the indeterminate situation.

[54] Middlebrook M, *Task Force: the Falklands war, 1982* (Revised Edn Penguin Books, GB 1987) p. 146.
[55] Sivakumaran S, 'Exclusion Zones in the Law of Armed Conflict at Sea: evolution in law and practice' (2016) 92 International Law Studies 153, see generally, and pp.176-181for an analysis specific to the Falklands (Malvinas) armed conflict.
[56] Schumacher E, 'Argentina Confirms Loss of its Cruiser', (May 4th, 1982) New York Times. See also, Moro R, 'Thirty Years on: an Argentine view <http://belgranoinquiry.com/may-2nd-2012-mr-moro-replies> last accessed 19/09/2017.
[57] Letter dated 28 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Island to the United Nations addressed to the President of the Security Council (28 April 1982) UN Doc S/15006.
[58] Thatcher M, *The Downing Street Years* (Harper Press, UK 2012), p.214.

In relation to the determinacy of facts it is argued that modern forms of data storage, communication, record keeping, and the invaluable reporting mechanisms and forum that have emanated from the creation of the United Nations all aid to increase the certainty of facts that have emanated in the past century. This is not to say that they are objectively accurate, but it is to suggest that there will be a greater core of certainty with regard to these facts. By way of evidence the particular factual matrix of the twentieth century, and beyond, of the Falklands (Malvinas) territorial dispute, as is later shown, is mostly agreed upon by Argentina and the UK. However, does not suggest that there is complete conformity of perspective, with the sinking of the *Belgrano* proving, once again, illuminating.

Consequently, looking back at the two key strands that Frank drew one's attention to, in light of this conclusion, if we consider some facts, as with the location of the *Belgrano*, as having a stronger core of certainty than others, it would seem to go some way to mitigating against the first of Frank's strands, and it has the coincidental effect of aiding with the reduction in the magnitude of the second strand. For example, if there is a recognised higher probability of factual accuracy then there is a reduction in the scope for prejudicial interpretation to widely vary the facts that are presented within the utilised factual matrix. If we recall Hart's concept of the penumbra, it is when a legal norm has a large penumbra of uncertainty that politics has a more significant role to play in the interpretation of the legal norm; it is at the point of application, as Hart wrote, that an interpreter makes a choice afforded to them by the

language of the rule.[63] The same can be said for facts hen a fact is highly uncertain. Nevertheless, even following this approach Frank's second strand proves persistent: it is impossible to negate, in the totality, the intention of the individual undertaking the legal analysis, for as Derrida said, 'there is nothing outside the text'.[64] This is something that is accepted by this thesis, for it will prove impossible to remove the human from the legal analysis. The consequences of this analysis for the settlement of the Falklands (Malvinas) dispute are manifold.

2.6: History and Linguistic Indeterminacy

Intensifying the problems related to addressing a legal dispute steeped in history, is that, in addition to determining what the relevant factual matrix to a dispute was, linked to this, it can prove equally difficult to determine the legal framework that was historically relevant. For example, ascertaining what the legal significance of the Papal Bull of 1493[65] can prove illusive, as will soon be shown. Beyond this, there are added concerns for this thesis; even if we are able to determine what the applicable law was in 1493, this law would be then interpreted through the lens of the contemporary legal scholar's linguistic understanding. As time passes the shape, usage, and structure of a language changes. This thesis is not concerned with why, or how a language mutates, it is simply enough to note, as Croft rather eloquently put it, that language is a

[63] Hart, *supra,* note 53, p. 127.
[64] Derrida J. translated by Spivak G, *Of Grammatology* (John Hopkins University Press, London 1976), p.158.
[65] Pope Alexander VI, 'Bull *Inter Caetra*' (1493), English translation found at <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> last accessed 20/08/2015.

'fundamentally evolutionary phenomenon'.[66] Therefore, this change in language, temporally speaking, acts to create an added factor that escalates the uncertainty surrounding a legal norm,[67] thereby adding to the uncertainty of an already difficult legal analysis. This uncertainty, as noted in Chapter 1, thereby, provides additional scope for the subjective interpretation of the legal interpreter. This indeterminacy provides the lawyer with the scope to utilise, or at least argue for the utilisation of, a historical legal provision in a manner which best suits their expectations. This increasing level of uncertainty is, evidently, of significance if one is seeking to undertake an application of the law relating to discovery, the legal efficacy of a Papal Bull, or the doctrine of intertemporal law,[68] all of which the next chapter addresses.

This thesis is not alone in drawing attention to this linguistic issue. Alston – discussing the issue of human rights and history in a review of Martinez's text on the abolition of slavery movement, and its significance in the evolution of the human rights movement[69] – argued that it is clear that the use of language, such as human rights or an approximation of that, separated by centuries will inevitably incorporate divergent meanings.[70] However, Martinez, in the critiqued work, articulated that it is arguable that there is an undeniable evolution

[66] Croft W, *Explaining Language Change: an evolutionary approach* (Pearson Education, UK 2000), p.xiii; see also, Janda RD; & Joseph BD 'On Language, Change, and Language Change – or, of History, Linguistics, and Historical Linguistics', in Joseph BD; & Janda R (eds) Handbook of Historical Linguistics (Wiley-Blackwell, Oxford 2004).
[67] Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 606, p.607.
[68] Chapter 3.
[69] Martinez JS, The Slave Trade and the Origins of International Human Rights Law (OUP, GB 2012).
[70] Alston P, 'Book Review, Does the Past Matter? On the Origins of Human Rights' (2013) 126 Harvard Law Review 2043, p.2051.

of thought, and that an assessment of that history can aid in establishing the foundation of a particular thematic issue. Significantly, Martinez, in a rejoinder to Alston, articulated that '[t]he past gives us a vocabulary, and that vocabulary in turn shapes the very ways in which we think about problems'.[71] As a result, the documenting of history enables us to monitor the mutation of – importantly in this instance – legal terminology. Yet, as Cavaller warned, the scholar should be wary of drawing false continuities that ignore the 'complexity and pluralism of the discourse [of international law] from various (and often very divergent) centuries'.[72] In this regard, Martinez may be right in suggesting that the past was the source of today's vocabulary, but this answer fails to mitigate against the impact that the mutation over time may have had upon enabling us to understand the past, and, in particular, the core of a legal provision.

Ultimately, this again indicates the difficulties associated with undertaking a legal analysis that deeply rooted in history. It further signifies that caution should be taken by the legal analyst, and that bold statements of relating to the determinacy of a fact or law should be strictly considered. Critically, it adds further robustness to the argument that it is impossible to determine an objective factual, and legal matrix.

2.7: Conclusion

[71] Martinez JS, 'Human Rights and History' (2012) 126 Harvard Law Review Forum 221, p.237.
[72] Cavaller, 'Vitoria, Grotius, Pufendorf, Wolff and Vatell: accomplices of European colonialism and exploitation or true cosmopolitans?' (2008) 10 Journal of the History of International Law 181, p.209.

In disputes with an uncertain factual matrix, as is the case with the dispute over the Falklands (Malvinas), there should be a large degree of caution employed when addressing the dispute's history. Yet, clearly, even an uncertain history can be used to indicate the existence of a dispute, and to indicate that the disputing States have opposing positions. As Martinez, Cohen, and Orford argued, the dispute must be, initially, seen through the lens of history, as this can aid in our understanding of the origins and evolution of the problem, thus helping to shape the solutions that are presented today. Furthermore, as Beck revealed, 'it is difficult to look forward in an informed manner without knowing exactly where we are at the present time, how we got there, and the actual nature of the existing situation'.[73] History has a function of better enabling us to understand the present, and this aspect cannot be ignored.

Beyond establishing the context of a dispute the legal analyst, including international legal tribunals, should pay close attention to the certainty of a fact, whilst being willing to accept the subjectivity of an analysis of a factual matrix. It is beyond the remit of this thesis to suggest clear procedural guidelines for legal analysts, and legal tribunals, but a number of general points can be made. The analyst should be willing to admit when it would not prove 'prudent' for a fact to be determinative of the disputes outcome, which would be the case when a fact is highly uncertain. Indeed, this is an act which courts regularly undertake when they hold that evidence fails to fulfil evidential thresholds.[74] It is admitted

[73] Beck P.J. 'History and Policy-Makers in Argentina and Britain', in Hill C and Beshoff P (eds), Two Worlds of International Relations (Routledge, GB 1994), p.165.
[74] Lind EL; Thibaut J; & Walker L, 'Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings' (May 1973) 71 (6) Michigan Law Review 1129, p.1129.

that this requires a degree of introspective maturity that many legal scholars might be lacking. In this regard, it requires the use of the lawyer's 'critical faculties which we can bring to bear so that we can avoid, at the very least, wholesale errors in fact finding, and the worst influences of prejudice'[75] Critically, as Reisman and Skinner wrote, 'without accurate information about what has occurred, even those endowed with character, skill, and focused energy are unlikely to produce a sound decision'[76] However, it should not be forgotten that legal tribunals are often heavily dependent on the submissions, and rebuttals, of the disputing parties in order to determine the determinacy of evidence.[77]

Admittedly, this acceptance of subjectivity would be in stark contrast to the manner with which the International Court of Justice would approach a historical legal dispute. Was it to pronounce a judgment on the issue of sovereignty over the Falklands (Malvinas) it is most likely that it would declare a finding of an objective history, much as occurred within the *Minquiers v Ecrehos* case,[78] or as was held in the *Island of Palmas* arbitration,[79] from which it would apply the doctrine of intertemporal law, in combination with the determination of a critical date. It is not necessary to undertake a comprehensive study of the doctrine of intertemporal law here, it is merely enough to indicate its significance, with a

[75] Penner, *supra*, note 37, p. 62.
[76] Resiman WM; & Skinner C, *Fraudulent Evidence before Public International Tribunals: the dirty stories of International Law* (Cambridge University Press, GB 2015), p.1
[77] *Ibid*.
[78] *The Minquiers and Ecrehos Case (France/United Kingdom)*, Judgment, ICJ Reports 1953 47.
[79] *Island of Palmas (Netherlands, USA)*, Reports of International Arbitral Awards, 4th April 1928, volume II 829.

critical appraisal of the doctrine being found within Chapter 5. Yet, briefly, all jurisprudential evidence, as indicated by Fitzmaurice, pointing to the doctrine as being 'an established principle of international law that in such cases the situation in question must be appraised … in the light of the rules of international law as they existed at the time, and not as they exist today'.[80]

In summary, it is concluded that history does have a role to play within any legal inquiry, especially in regard to establishing context. Nevertheless, as indicated, there is no clear agreement as to how to utilise history within a legal analysis – despite the approach adopted by the ICJ – given the possibility of history providing widely divergent interpretations. Consequently, history adds an additional layer of indeterminacy to the legal analysis. As established, this discussion does find some concord with the Fact Sceptics, who argued that legal analysis becomes problematic upon the utilising of historical facts. One position of the Fact Sceptics is followed, that an objective truth is unobtainable, however, diverting from an extreme Fact Sceptic position, if this was to be followed unflinchingly then the resulting legal analysis would lose its context, and therefore become irrelevant. As a result, it is accepted that a factual matrix cannot be objectively attained, yet it is suggested that some facts are more determinate than others, much as with legal provisions. The consequence of this conclusion for this thesis is that facts should be dealt with cautiously, accepting that an objective analysis is unobtainable; however, the do still have utility. This is in stark contrast to the approach undertaken by the vast plethora of previous

[80] Fitzmaurice G, 'The Law and Procedure of the International Court of Justice, 1951-54: general principles and sources of law' (1953) 30 British Yeah Book of International Law 1, p.5.

legal examinations of the Falklands (Malvinas) dispute, which accept the utility of facts, irrespective of the uncertainty surrounding them, in order to support a legal position adopted. Nevertheless, it should be accepted that even uncertain facts can prove helpful in assisting with the constructing of an image of the context of a dispute, and those facts that have a greater degree of certainty can find application within a legal analysis. The next chapter takes what has been learned during this analysis to look at the factual matrix through a critical lens.

Chapter 3: The History of an Intractable Dispute

3.1: Introduction

This chapter follows on from the assessment of historico-legal methodologies undertaken in the previous chapter, where it was concluded that, initially, there should be an acceptance by the legal analyst that an objective understanding of a disputes history would be unobtainable. In this regard, it was acknowledged that some facts are more certain than others, and that in instances where the factual matrix was highly uncertain, this provides greater scope for the legal analyst to utilise their own personal bias to influence the outcome of the interpretation of those facts. Therefore, it is held that it is critical that the legal analyst should act cautiously, when it comes to addressing the factual matrix of a dispute.

Despite this acceptance of the required scrutiny that should be given to a factual matrix, the provision of a history over the contested Falklands (Malvinas) dispute has a number of benefits. The most obvious one being that it provides a contextual account from which the politics, and legal arguments, of the dispute originate. But, given the above warning, and that this thesis aims to move the dispute beyond the orthodox adversarial approach to dispute settlement, this history is not provided in order to determine which party has the strongest legal claim; therefore, a more critical approach to history is adopted than is typical.[1]

[1] Indicative of some of the antagonistic literature that has been produced are the publications by Pascoe and Pepper. Pascoe G & Pepper P, 'Getting it Right: the Real History of the Falklands/Malvinas: a reply to the Argentine seminar of 3 December 2007' (2008), and Pascoe

For example, this Chapter does not posit an argument that the Argentine account of the territory's history is superior to the UK's perspective, or vice-versa. In the alternative this chapter looks to develop a picture as to the highly nebulous nature of the factual matrix – and, indeed, it begins to show the uncertainty with regard to the legal framework in play – of the Falklands (Malvinas) dispute. In showing this uncertainty it acts to evidence the significance of the methodological theories posited in the previous chapter, and how it is, therefore, impossible to determine on an objective history of the dispute. This conclusion, ultimately, has significant consequences for the approaches to the pacific settlement of the dispute – either judicial or non-judicial – that might find application in bringing the dispute to a peaceful resolution.

3.2: A Note on Sources

The history that is provided in this thesis is founded upon a combination of primary, and secondary sources. With regard to the primary sources special recognition should be given to Dolzer for usefully compiling a large number of these within the annex to his text dedicated to the Falklands (Malvinas) dispute.[2] Obviously, care was taken to not merely restrict the research undertaken to the documents contained within this annex, given that the primary sources included would have been filtered through the bias and intention – perhaps unconscious

G & Pepper P, 'False Falklands History at the United Nations, How Argentina Misled the UN in 1964-and still does', <http://www.falklandshistory.org/false-falklands-historypdf> last accessed 19/09/2017. Written as a response to the 2008 piece by Pascoe and Pepper, Kohen M & Rodriguez F, *The Malvinas/Falklands Between History and Law: refutation of the British pamphlet 'Getting it Right: the real History of the Falklands/Malvinas* (CreateSpace Independent Publishing Platform 2017).

[2] Dolzer R, *The Territorial Status of the Falkland Islands (Malvinas): Past and Present* (Oceana Publications, USA 1993), pp.213–454.

predispositions – of Dolzer. In this regard, Dolzer, himself admits that 'there exists a much larger quantity of notes, declarations and documents relating to the Islands. The selection of documents reprinted here was made with primary regard to the importance of the document from the *point of view of international legal analysis'*.[3] The manner with which Dolzer writes is as if international law had a hand in objectively selecting these documents, whereas, it is submitted it would have been more appropriate for the author to have suggested that this was his own subjective interpretation of what documents are important, given his own understanding of the place of international law generally, and in the context of the Falklands (Malvinas) dispute.

In addition, supplementing these primary sources, a number of the most widely cited secondary sources are made use of. Beyond the levels of recognition, as suggested by the level of citation, when determining upon which secondary sources to utilise it was resolved to employ those from a wide spectrum of nationalities. This was done in order to try and mitigate against the shadow of bias that might be cast if texts from only one individual, or one nationality were utilised. For example, was this thesis to rely, on the mainstay, on Freedman's *Official History of the Falklands*,[4] with him being of British nationality, this would prove damaging for the investigation. This is not to say that Freedman's analysis was plagued with bias, but it would enable any bias possibly present to be strongly felt throughout this thesis.

[3] *Ibid.*, p.15, authors own emphasis added.
[4] Freedman L, *The Official History of the Falklands Campaign: volume one* (Routledge, GB 2005).

Often regarded as the closest to a comprehensive account of the history of the Islands until the early twenty century, is the work by Goebel, *The Struggle for the Falkland Islands*,[5] with Dolzer suggesting that the text should be considered the 'definitive treatment of the relevant facts and developments'.[6] Despite such a degree of accreditation care must be taken when utilising this document, given that Goebel undertakes a succession of legal analyses within the text, without being officially legally trained.[7] Within his 1928 book review of Goebel's text, Higgins highlighted this weakness, pointing out Goebel's lack of legal nuance, suggesting that '[h]e appears to be reading into the proceedings of the Powers in the sixteenth and seventeenth centuries the more settled views of law of the latter part of the nineteenth century'.[8] Nevertheless, if attention is taken to filter out the legal analysis it is possible to use the text as an invaluable secondary source of historical information. Supplementing this document other notable accounts include: the previously mentioned text by Dolzer, *The Territorial Status of the Falkland Islands (Malvinas)*;[9] and Gustafson's, a professor in political science, *The Sovereignty Dispute over the Falkland (Malvinas) Islands*,[10] to name but a few. Surprisingly, there have been but a few notable contributions from British authors. The most prominent of this sparse collection being the aforementioned work of Freedman, *The Official History of the Falklands Campaign: volume*

[5] Goebel J, *The Struggle for the Falkland Islands* (1982 reissue Yale University Press, GB 1982).
[6] Dolzer, *supra*, note 2, p.6.
[7] Goebl, *supra*, note 5.
[8] Higgins AP, 'Book review: The Struggle for the Falkland Islands' (1928) 44 Law Quarterly Review 388.
[9] Dolzer, *supra*, note 2.
[10] Gustafson L, *The Sovereignty Dispute over the Falkland (Malvinas) Islands* (Oxford University Press, GB 1988).

one, the origins of the Falklands War.[11] Still, it must be noted that this work is limited in scope and detail, with *volume one* being but a fraction of the size and scope of *volume two*,[12] which deals more specifically with the 1982 armed conflict over the Falklands (Malvinas) between the UK and Argentina. In addition to this, the 1927 Ph.D of Down[13] proved incredibly insightful, given Down's access to historical ministerial documents from which his thesis is constructed. For balance, the previously referred to Argentine text by Areco shall be employed, along with the more contemporary text by Gonzalez.[14] One would expect to be able to extract some semblance of a coherent historical interpretation of the facts from these texts. Whilst there are some, a large number of the facts pre-dating the Twentieth Century are highly nebulous and often contested.

3.3: The Falkland (Malvinas) Islands

Before going on to address the history of the dispute it proves enlightening to have a short recap of the territories current status. The Falklands (Malvinas) are a collection of approximately 750 islands, located, around, 650 kilometres from the Argentine mainland, and 8000 kilometres from the UK. The total landmass constitutes close to 12,000 square kilometres, with the capital, Stanley, being located on East Falkland, which, in combination with West Falkland, comprise

[11] Freedman, *supra*, note 4.
[12] Freedman L, *The Official History of the Falklands Campaign: volume two* (Routledge, GB 2005).
[13] Down W, *The Occupation of the Falkland Islands and the Question of Sovereignty* (Ph.D thesis, Cambridge University 1927).
[14] Gonzalez MA, *The Genesis of the Falklands (Malvinas) Conflict* (Palgrave Mcmallian, GB 2013).

the largest two islands of the archipelago.[15] The population is, as of the 2012 census 2,840.[16] However, this is substantially increased as a result of the, approximately, 1,450[17] military personnel based in the territory. To the British the Islands are one of fourteen overseas territorial units, known as a British overseas territory, in accordance with Schedule 6 of the British Nationality Act 1981.[18] To Argentina the Islands are referred to as the Malvinas, with it being a claim, as noted in the first paragraph of the Argentine Constitution, that the territory is an integral aspect the States national territory. Internationally, the Islands are classified as a non-self-governing territory, in accordance with Article 73 (e) of the UN Charter.[19] A list of factors that necessitates what must be taken into consideration when determining whether a territory should be given non-self-governing status is included within General Assembly Resolution 742.[20] Key amongst these criteria are that the territory is 'geographically separate;[21] and that the territory is in a position of subordination to the administering territory.[22] It is noteworthy that the Resolution stipulated that the obligation under Article 73(e) ceases only once a territory has progressed towards a 'full measure of self-government'.[23]

[15] Special Committee on the Situation with regard to the Implementation of the Declaration of Independence to Colonial Countries and Peoples: Falkland Islands (Malvinas), Working paper prepared by the Secretariat, UN Doc. A.AC.109/2012/12, p.3.
[16] Falkland Islands Census 2012: statistics and data tables (April 2013), p.5.
[17] HC Deb, 19 February 2007, c216W.
[18] British Nationality Act 1981.
[19] Charter of the United Nations (adopted 24 October 1945), Article 73 (e), Evans M, *International Law Documents* (10th Edn Oxford University Press, GB 2011), p.9. See also Transmission of Information under Article 73(e) of the Charter, GA Res. 66 (14 December 1946), UN Doc, A/64/Add.1 p.125.
[20] Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, GA Res. 742 (VIII) (27 November 1953), UN Doc. A/2630, p.21-22.
[21] *Ibid*., Principle IV.
[22] *Ibid*., Principle V.
[23] *Ibid*., Principle II.

3.4: Recalling the Subjectivity of History

This account of the history over the disputed territory of the Falklands (Malvinas) is not intended to be comprehensive. Yet, this is not to say that it is a brief glance either, for the analysis provides the contextual foundation for the legal analysis of the processes of dispute settlement later in this thesis. Markedly, further differentiating this historical analysis from earlier work, is that it is undertaken through a critical eye, as discussed above. By way of a quick recap, this approach highlights the nebulous nature of the dispute's history, particularly the territories early history, thereby indicating how an objective truth is unobtainable, and, in addition, it will signify how history can add an additional layer of uncertainty to the legal analysis.

As a result, the historical analysis undertaken is not a simple account of the history, but suggests, where appropriate, the difficulties of basing the legal dispute within this historical setting. This historical overview focuses on the key areas of legal interest that are contested by the States in relation to the territorial dispute; however, what the conducted analyses establishes is not an answer as to which legally contentious position is correct, but to enunciate for the reader how the arguments against being able to objectively determine the legal and factual matrices are embodied in reality; it establishes how the posited State arguments are often founded on a factual matrix of a questionable degree of certainty, and linked to this, how establishing the international legal framework applicable at the time can often be difficult to verify. Perhaps indicative of the

problems that confront the legal analyst are the positions taken by the respective representative of the UK and Argentina, in 1982. Parsons, speaking on behalf of the British government, when he stipulated that 'my Argentine colleague and I could debate endlessly the rights and wrongs of history, and I doubt whether we would agree'.[24] Ironically proving this point to be accurate, the Argentine Foreign Minister during the conflict, Mendez, responded by asserting that 'the facts of history are absolutely indisputable'.[25] This, immediately, highlights the subjectivity of historical interpretation, and signifies how States often take advantage of this in order to craft a history to further their goals.

3.5: A Papal Bull

The origins of the legal dispute over the Falklands (Malvinas) can be traced back to the early colonial period of the South American continent. It is during this period that both the UK and Argentina – through succession from Spain in 1816, with the 'Buenos Ayrean Government … claimed them as an appendage to their territory on the ground of right derived to them from the Crown of Spain'[26] – found the basis of their legal claim, principally, upon discovery. However, even prior to the territories discovery, the Argentine argument has suggested that Spain had obtained title to the territory through the proclamation of the Pope Alexander VI, via the Papal Bull, *Inter Caetera*,[27] whereupon he gifted upon the

[24] Parsons A, 'British representative, 1 April 1982', in *Britain and the Falklands Crisis: a documentary record* (HMSO, GB 1982), p.24.
[25] Mendez NC, 'Argentine Foreign Minister, 1982' in Perl R (ed), *The Falkland Islands Dispute in International Law and Politics: a documentary Sourcebook* (Oceana, New York 1983), p.438.
[26] Lord Dunglas, the Under Secretary for Foreign Affairs, writing to Herbert Jenner, the King's Advocate, July 9 1829, quoted in Down, *supra*, note 13, p.167
[27] Pope Alexander VI, 'Bull *Inter* Caetra' (1493), English translation found at <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> last accessed 20/08/2015.

Spanish State exclusivity of possession of all discovered – including those yet to be discovered – territories 100 leagues west of a longitudinal line, centred on the Cape Verde Islands, not already within the possession of a Christian monarch.[28] Upon Spain and Portugal signing the treaty of Tordesillas, June 1494,[29] this line was moved 270 leagues further west, with it stipulating that:

> [A]ll other lands, both islands and mainlands, found or to be found hereafter, discovered or to be discovered hereafter, which have been discovered or shall be discovered by the said King and Queen of Castile, Aragon … and by their vessels on the western side of the said bound, determined as above, after having passed the said bound toward the west, in either its north or south latitude, shall belong to, and remain in the possession of, and pertain forever to, the said Kind and Queen … and to their successors'.[30]

This treaty was later confirmed by Pope Julius II twelve years later with the promulgation of a further Papal Bull, *Ea Quae*.[31] The outcome of these Bulls was to, effectively, divide the world into two spheres of authority: one part being Portuguese, the other being Spanish.

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[28] Pope Alexander VI, 'Bull *Inter Caetra*' (1493), English translation found at <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> last accessed 20/08/2015.
For a succinct overview of the significance of the Papal Bull on control of maritime water, see, also, Subedi SP, 'An Innovative Solution to an Ambitious Project: dispute resolution in the 1982 Convention on the Law of the Sea', in Jalloh C & Elias O (eds), *Shielding Humanity: essays in international law in honour of Judge Abdul G Koroma* (Brill, The Netherlands 2015), pp.163-164.

[29] Treaty between Spain and Portugal concluded at Tordesillas, June 7, 1494, English translation at < http://avalon.law.yale.edu/15th_century/mod001.asp> last accessed 20/08/2015.

[30] *Ibid*., para.1.

[31] English Translation, Pope Julius II, The *Bull Ea Quae*, in Davenport FG (ed), *European Treaties bearing on the History of the United States and Its Dependencies* (The Law Book Exchange Ltd, USA 2012), p.110.

The posited legal effect of these Bulls was to effectively create legal possession based purely on discovery, without the requirement for actual occupation.[32] The general legal position is that there is little question as to whether the treaty and Bulls were binding between Spain and Portugal;[33] however, the Argentine legal argument extends this, maintaining that, in accordance with the international law prevailing at the time, these instruments were equally binding upon third party States, therefore resulting in the Bull, affirmed within the treaty, being the first document to reflect Spanish title to the Falklands (Malvinas).[34] Contrary to this, Waldock put forward a rather damning perspective of the utility of the Bull, where he presented the perspective that it acts as a 'hopeless root of title'.[35] He goes on to advocate that it would be most improbable for the International Court to find that the Papal Bull would grant sufficient title to territory against third party States, even if the ICJ was it to follow the doctrine of intertemporal law, and implement the law recognised within the fifteenth and sixteenth centuries.[36] However, Waldock failed to significantly develop this position, other than to stipulate that it would prove binding only between Spain and Portugal, for which the Bull determined their respective sphere of influences.[37]

[32] Pardo A, 'The Law of the Sea: its past and its future' (1984) 63 (1) Oregon Law Review 7, p.8.
[33] Waldock H, 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25 British Yearbook of International Law 311, p.322.
[34] Fernandez C. et al, *The Question of the Malvinas Islands: 50 years after the resolution 2065 (XX) of the United Nations* (Ministry of Foreign Affairs and Worship, 2008), section on historical background.
[35] Waldock, *supra*, note 33, p.321.
[36] *Ibid*.
[37] *Ibid.*, p.322.

Initially, in assessing both the Argentine claim and the argument of Waldock posited by the UK government,[38] it is felt that a degree of clarification is needed. It must be recalled that there were two legal regimes in play: initially there was the Papal Bull; and, secondly, supplementing the Bull, there was the treaty between Spain and Portugal affirming the Bull's content. The following analysis of the Papal Bull will indicate how the legal significance of the Bull is uncertain, that the facts surrounding the issue are nebulous, and, as a result, how the contemporary Argentine position of certainty is problematic, but, conversely, the analysis also highlights how a position asserting the alternative would also be questionable. Critically, can either States's contemporary assertions be consistently defended with regard to both the Bull and the treaty, or can questions be raised as to the validity of both claims as a result of the present-day legal analyst being in a position whereby their own subjective bias could prove dominant due to the high degree of uncertainty? In answering these questions care must be taken to not conflate the two regimes, and to address them independently; in this instance starting the analysis with the Bull. Initially, this analysis will first address the origins of the Papal Bull, exploring from where the Bull's authority emanates, asking the question as to whether it acted as an apology for the Spanish colonial enterprise. The discussion then progresses to assess whether the enforcement mechanisms of the Bull impair its legal efficacy, finally looking at how the Papal Bull regime is indicative of a primitive legal system, where morality and legality are conflated; here the just war theory is used as being reflective of this problem where morality and legality collide.

[38] *Ibid*.

The utilisation of a Papal Bull *Inter Caetera* to decouple the world into two hemispheric spheres of authority, between the two Iberian powers of Spain and Portugal, holds a place of prominence within history texts relating to the early stages of global conquest by European States.[39] Yet, this prominence makes a presumption as to the significance of the Bull and the universal legal efficacy of the Papacy. It is difficult to contest that the Pope has theological authority over the Catholic world, however can an emanation of a body with spiritual authority give rise to a provision – the Bull – that extends beyond the religious to the legal? In regard to the legal significance of the bull, Goebel, within his historical assessment of the Falklands (Malvinas) dispute, went to some pains to describe its origin, indicating how it was deemed a critical implement for the conversion of the world's populace to Christendom.[40] Goebel continued to state that the legal justification for the conversion of the natives,[41] with the propagation of Christianity being one of the Papacy's primary goals as the head of Christendom,[42] was linked to the doctrine of the infallibility of the Pope, acting as God's representative on Earth. This, in the opinion of Goebel, does add a degree of robustness to the legal authority of the Bull.[43] However, for Grotius the principal function of the Bull was to act as a dispute resolution tool to mitigate against the likelihood of a conflict arising between Spain and Portugal,[44] and the scope of the Bull should not be extended beyond this, for

[39] Scott WH, 'Demythologizing the Papal Bull "*Inter Caetera*", (1987) 35 Philippine Studies 348, p.348.
[40] Goebel, *supra*, note 5, p.79.
[41] *Ibid*., p.80.
[42] *Ibid*.
[43] *Ibid*.
[44] Grotius H translated by Magoffin RvD, *The Freedom of the Seas* (Oxford University Press, London 1916), p.15.

which the Pope was chosen to do by the respective States. Simply signifying that the Pope was working in his capacity as an arbitrator does not, *prima facie*, negate the legal efficacy of the Pope's proclamation, and Grotius recognised this. As a result, Grotius continued to stress how the power of the Pope was limited to the religious, with the Pope being nothing more than the Bishop of the Roman Catholic Church. In support of this, Grotius stressed the nature of the origin of the Pope's power, ascending to the transmitted authority of Jesus, focusing on a quote by 'our Lord Jesus Christ when he said "My kingdom is not of this world" thereby renounced all earthly power'.[45] In addition to this, Grotius draws attention to the fact that Jesus was but a man on earth, and, as a result, He certainly did not have dominion over the whole world'.[46]

Despite the words of Grotius proving insightful, it must be recalled that he was writing a century after the promulgation of the Bull, and we cannot ignore the articulations of those scholar's that question the feasibility of being able to disentangle personal bias from a historical analysis; Grotius was of Dutch birth during a period of the ascent of natural law and the Protestant Reformation, not to mention the rise of the Dutch State as an imperial power, and could not help but to have had his perspectives of legal history tainted by the prejudices associated with such.[47] Consequently, whilst exploring the initial position of the universal legal authority of the Pope it is helpful to move closer to the time of

[45] *Ibid*., p.16.
[46] *Ibid.*
[47] Haggenmacher P, 'Hugo Grotius', in Fassbender B & Peters A (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, GB 2012), pp.1098&1099. See also, <http://www.iep.utm.edu/grotius/> last accessed 10/09/2017/

origin of the Bull. In this regard, special mention must be made of the work of Vitoria, a sixteenth-century Spanish theologian, philosopher, and jurist.[48] For Scott, Vitoria's impact was significant, furnishing him with the accolade of having crafted the foundation of the law of nations, a *jus gentium*, 'which was to become the international law not merely of Christendom but of the world at large'.[49] Accordingly, the impact of Vitoria on the field on Public International Law cannot be ignored, with his two lectures, *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbados*,[50] proving to be a catalysts for the emergence of the discipline in its modern form.

Prior to assessing the legal significance of Vitoria's work, in particular with regard to the Papal Bull, it is necessary to create a picture of what *is perceived as being* the legal landscape that predated his writings. The Church claimed authority to determine legal relations universally as a result of the divine nature of the order.[51] This divine law was seen as being in the primacy of a triumvirate of legal regimes, the other two being human law and natural law.[52] The traditional approach for dealing with non-Christian peoples, such as the Saracens, was to characterise them as heathens, legitimising the conquest of these heathen cultures and lands as a consequence of the divine nature of the expansion of the Christian religion. It was through this activity that the

[48] Scott JB, *The Spanish Origin of International Law: Franciso de Vitoria and His Law of Nations* (Clarendon Press, Oxford 1934).
[49] *Ibid*., p.9.
[50] Both lectures are contained within: Vitoria F de, *Franciscus de Victoria De Indis et de ivre Belli Relectiones* (Carnegie Institute of Washington, USA 1917)
[51] Rubin AP, 'International Law in the Age of Columbus' (1992) 39(1) Netherlands International Law Review) 5, p.7.
[52] *Ibid*., p.10.

sovereigns of Europe made real the theoretical legal powers of the Papacy.[53] In turn it was through the sanctions of the Church, such as the Bull *Inter Caetera*, that seemingly legitimised the activities of the European sovereigns: creating a mutually benefiting regime of reciprocity. However, Vitoria was of the perspective that the Papacy's ability to delegate to a non-believer was limited, stating that the 'Pope has no temporal power over the Indian aborigines or over other unbelievers',[54] giving reference to Corinthians, '[f]or what have I [St. Paul] to do with judging outside the church'.[55] Further indicating a limitation of the scope of the Pope's authority Vitoria extrapolated this to suggest that the Pope even lacked spiritual authority over those non-believers.[56] Consequently, this resulted in Vitoria being confronted with the legal problem as to how to craft a universal legal order without relying upon the supposed universal authority of the Papacy as justification.

Vitoria's solution was to dispose of divine law, supplanting it with a notion of natural law as administered by a sovereign.[57] This supplanting of the authority of the Papacy significantly affected the answer as to the question as to whether the aborigines could be true owners of the territory.[58] Applying this rejection of Papal authority he concluded that '[u]nbelief does not destroy either natural law

[53] Williams R, *The American Indian in Western Legal Thought* (Oxford University Press, New York 1990). p.45.
[54] Vitoria, *supra*, note 50, p.137. English Translation from the Latin: '*Papa nullam potestatem temporalem habet in barbors istos, neque in alios infideles*'.
[55] The Holy Bible (New International Version Gideons International, Lutterworth 2005), Corinthians 5:12.
[56] Vitoria, *supra*, note 50, p.136.
[57] Anghie A, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5(3) Social and Legal Studies 321, p.323.
[58] Vitoria, *supra*, note 50, p.120.

or human law; but ownership and dominion are based on natural law or human law; therefore they are not destroyed by want of faith'.[59] It is this critical element that shifts the focus of international law from the spiritual authority of the Pope to laws that are administered by the sovereign. However, this created a problem for Vitoria as a rejection of the Pope's authority negated the validity of the sovereigns to undertake military activity against the 'heathens'. This separation of the Christian and non-Christian world was, ultimately for Vitoria, an issue of jurisdiction. Therefore, this was a jurisdictional problem which Vitoria overcame by suggesting that the Indians were in the possession of reason, as indicated by their ordered society. The significance of this, as Vitoria noted, is that reason was common amongst all nations, Spanish and Indian alike, labelling this a '*jus gentium*'.[60] It was this *jus gentium*, the content of which was based upon reason, that Vitoria supplanted the universal system of divine laws with.

This, *prima facia*, appears to be a system based upon a system of equality; however, Vitoria ultimately utilised this system to endorse Spanish colonialism by suggesting that despite the Indians being in the possession of the capacity to reason they often violated reason within their social and cultural practices, positioning Spanish practice as being the epitome of reason.[61] What is intriguing is that in his earlier reasoning, Vitoria denounced the significance of Christianity, but he later channelled it's authority through the Spanish State, when he suggested that Christianity was the epitome of the *jus gentium*. This

[59] *Ibid*., p.123.
[60] *Ibid*., p.151.
[61] *Ibid*., pp.151-159.

ultimately functioned to act as justification for the next strand of Vitoria's reasoning, where he suggested that the opposition to Spanish transgression onto their territory, and a resistance to converting to Christianity acted as justification for the waging of war by the Spanish sovereign:

> If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do the best to destroy the Spaniards, they can make war on the Indians, no longer as innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones …[62]

As Anghie identified this justification provided the Spanish sovereign with an almost unrestricted legal capacity to wage war, given the inevitability of the 'Indian's' resistance.[63] Vitoria went on to develop additional arguments supporting Spanish conquest, drawing the reader's attention to ambassadorial laws, focusing on the inviolable protections afforded to such persons. He continued to apply this to the Spanish as ambassadors of 'the Christian peoples. Therefore, the native Indians are bound to give them, at least, a friendly hearing and not repel them. This, then, is the first title which the Spaniards might have for seizing the provinces and sovereignty of the natives'.[64] Anghie, in his work on Vitoria, crafted a rather critical view on this legal formulation, focusing on Vitoria's preoccupation with colonialism. Other authors, such as Williams, have

[62] *Ibid*., p.155.
[63] Angie, *supra*, note 57, p.328.
[64] Vitoria, *supra*, note 50, p.156.

raised the opinion that Vitoria's contributions acted as little more than apologies for the Spanish colonial exercise, justifying the activity through 'secular' notions of humanity and liberality;[65] yet, Anghie extrapolated this concept further to suggest that the significance of Vitoria's writings should not be limited to the activities of the Spanish, but that 'Vitoria's real importance lies in his developing a set of concepts and constructing a set of arguments which have been continuously used by western powers in their suppression of the non-western world and which are still regularly employed in contemporary international relations in the supposedly post-imperial world'.[66] Both of these perspectives have merit, and it is understandable as to why Vitoria is seen particularly critically within Third World Approaches to International Law (TWAIL) literature. However, we must recall the reason for assessing Vitoria's writings in aiding our understanding as to whether the Papal Bull had universal legal efficacy, and not simply fixate upon a contemporary critique of the Vitoria's jurisprudential writings.

This investigation into Vitoria's work would seem to suggest that at the time he was writing the legal significance of the Pope was waning, placing emphasis upon the sovereign to enforce the *jus gentium*. However, why then did the sovereigns of Spain and Portugal feel the Papal Bull was required if the legal assessment of Vitoria was felt to be correct by the monarchs of the day? There is evidence that Ferdinand and Isabella of Spain did attach a great deal of value to the efficacy of the Bull, even if it was merely to function to repeal previous

[65] Williams, *supra*, note 53.
[66] Angie, *supra*, note 57 p.332.

Bulls that favoured the monarchs of Portugal. Direct authority of this perceived need can be found within the *vidimus* of August 4 1493 where the Spanish Monarch wrote to Columbus indicating how they 'have applied to Rome for a bull respecting the islands and land which you have discovered and which remained to be discovered. It has come to us today … so that all the world may know that no one can enter into these regions without authorisation from us'.[67] Evidently, there is a deal of confusion as to whether the Bull was truly required, and even if it was, the level of control exerted by the Spanish over the Papacy at the time resulted in the Bull being little more than an apology for Spanish colonial activity.

Finding further support for the lack of legally binding efficacy of the Bull, Goebel drew attention to the issue as to whether the English monarch would have been of the opinion that a vague assertion of possession emanating from the Pope would have created legally effective property rights over the Falklands (Malvinas) territory.[68] He points out that the emphasis within English law at the time in question was firmly on *de facto* possession. As a result, it is unlikely that the English king would be disposed to disregard 'vague assertions of proprietary rights that rested ultimately upon a sanction emanating from an authority pre-eminently spiritual'.[69] Furthermore, Westlake noted that it 'is superfluous to remark that as soon as Protestant States arose such papal grants could not be pleaded against them; even at the time when the grants were made Catholic

[67] Navarrete MF, *Coleccion de los Viages y Descubrimentos, Volume II* (en la Imprenta Nacional, Madrid 1859), p.90.
[68] Goebel, *supra*, note 5, p.86.
[69] *Ibid*.

powers were far from admitting as conclusive authority the power which they'[70] claimed to possess. In evidence of this Westlake brought the attention of the reader to a letter from Henry VII of England, where he granted his navigators the power to 'find, discover and search out all islands, countries, regions and provinces of gentiles and infidels, situate in any part of the world, which were unknown to all Christians before these times';[71] evidently the English monarch wrote with little regard for the Bull.

Critically, even prior to this the English monarch, King Edward, remarked how all subordination to the authority of the Catholic Church, in particular the Holy Roman Empire, was squarely denied, having been quoted as declaring 'Regnum Angliae ab omni subjection imperiali esse liberrimum',[72] proving indicative of the emergence of sovereign independence of the time is. Furthermore, writing in 1854 and therefore one of the more period relevant reviews of the law available, albeit still several hundred years removed from the inception of the Bull, Phillimore was of the opinion that 'these papal grants to, and arbitrations between, Spain and Portugal … were always utterly disregarded by Great Britain'.[73] Nevertheless, it cannot be ignored that Phillimore was an Englishman writing at a period of British colonial expansion, and barely two decades after British resettlement of the Falklands (Malvinas). Looking beyond the academic

[70] Westlake J, *International Law* (2nd Edn CUP, GB 1910), p.97.
[71] Henry VII of England, to John Cabot and his sons, May 5, 1496, reproduced in Williamson JA, *The Voyages of the Cabots and the Discovery of North America* (Argonaut Press, London 1929), p.25–27.,
[72] English translation, 'by order of The Kingdom of England should be free from Imperial subjection', introduction.
[73] Phillimore R, *International Law* (AG Benning, 1854 London), p.200.

perspective providing further support for the lack of legal value of the Bull it should be noted that the Netherlands, within the *Islands of Palmas* case, suggested that the colonisation of the territory now comprising the Unites States of America, by States other than Spain or Portugal, proves indicative of the lack of legal significance of the Papal bulls.[74]

Critically, drawing this analysis together, what these contesting perspectives indicate is that the Bull was promulgated at a tipping point within the international legal regime; an evolutionary moment characterised by the emergence of the modern State system, and the decline of the Papacy, and it's conferred universal authority. Due to this, the legal efficacy of the Bull is highly nebulous. Writing in 1916, Vander Linden noted how there are perhaps, 'in the whole history of diplomacy, no documents which have aroused more passionate discussions and given occasion to more divergent commentaries, than the Bulls of Alexander VI'.[75] He continued to note how multiple different interested parties have explored the efficacy of the Bull, and an assessment of the work of those parties does little other than to highlight how 'the opinions expressed regarding them have varied with the different epochs, quite as much as with the different mind of those expressing them'.[76] It is worthy of noting how closely this comment by Vander Linden resonates with the perspective that this thesis has expressed with regard to the interpretation of history.

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[74] The Netherlands Counter-memorandum to the USA, Islands of Palmas arbitration (National Printing Office, The Hague 1926), p.9, available at <http://www.peacepalacelibrary.nl/ebooks/files/356260089.pdf> last accessed 26/08/2015.
[75] Vander Linden H, 'Alexander VI. And the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-1494', (1916) 22(1) The American Historical Review 1, p.1.
[76] *Ibid*.

Following the above examination, is necessary to explore deeper into the functionality of the Bull in order to provide a comprehensive analysis. In regard to this it must be noted that the Bull, itself, relied upon the threat of excommunication from the Papacy in order to ensure compliance:[77] this being a threat of isolation from international society. Metford was of the opinion that the Bull's authority was only effective in so far as Spain was able to maintain such authority by the threat of use of force.[78] Looking at the context within which the Papal Bull was decreed it must be noted that Spain was the preeminent imperial power at the time.[79] This is not to say that Spain could set the rules of international law, but this power, as the historian Studnicki-Gizbert noted, enabled the generation of wealth that enabled the Spanish King to pursue his desires of further colonial expansion, and to extend the province of Catholicism further afield.[80] This posits the argument that the combination of imperial strength and the threat of excommunication resulted in a form of *de facto* compliance, if not *de jure* compliance with the Bull. The power to expel a member from a community is a provision that can still be found within the contemporary international legal order, with Article 6 of the UN Charter providing that 'a Member of the United Nations which has persistently violated the principles contained within the present Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security

[77] Goebel, supra, note 5, p.83; Papal Bull *Inter Caetra*, *supra*, note 27, full text.
[78] Metford JCJ 'Falklands or Malvinas? (1975) 44 International Affairs 463, p.469.
[79] Kamen H, *Spain's Road to Empire: the making of a world power, 1492-1763* (Penguin Books, London 2003).
[80] Studnicki-Gizbert D, N*ation Upon the Sea: Portugal's Atlantic Diaspora and the Crisis of the Spanish Empire, 1492 – 1640* (OUP, USA 2006), p.8.

Council'. However, despite the General Assembly calling for a review of the 'relationship between the United Nations and South Africa in light of the latter's constant violation of Human Rights'[81] and a draft resolution being put before the Security Council, which sought the immediate expulsion of South Africa in line with Article 6,[82] this provision has yet to be used.

Despite its contemporary existence, and probably reflective of its lack of present-day utilisation as a method to ensure legal compliance, expulsion from a society is deemed extreme, and often harmful to the cause that the expulsion is seeking to further. Writing in regard to contemporary international organisations, White noted that, '[i]f an organisation is set up to perform a function, or as a rudimentary form of world or regional government, or simply as a forum for States to discuss and attempt to solve their differences, expulsion of a State member for whatever reason appears to undermine all of these aims'.[83] Despite the transition of time, it is suggested that this position still held true at the time of the passing of the Bull, with it highlighting a level of impotence to control the member of that community, with Schermers and Blokker suggesting that, 'the more primitive a legal system, the more evident this lack of power will be'.[84] Following this logic, given excommunication being the primary method to ensure compliance it would seem to suggest that a system with expulsion being the basis of compliance is one that is, at best, primitive in nature.

[81] GA Res. 3207, 30 September 1974.
[82] UN Doc. S/11543 (1974).
[83] White ND, *The law of International Organisations* (2nd Edn Manchester University Press, GB 2005), p.119.
[84] Schermers HG; & Blokker NM, *International Institutional Law* (5th Edn Martinus Nijhoff Publishers, The Netherlands 2011), p.106.

However, it must be questioned as to whether the primitive nature of a legal system[85] negates its legal competence, or as to whether it would relegate the system to a pre-legal stage.

Initially, it must be noted that a primitive legal system displays a wide range of attributes;[86] however, certain traits, albeit there are instances of exception, are typically prevalent within these systems: a lack of certainty and security; a limited range of legal norms; the relatively high significance of customs; retaliation; collective responsibility; religious connection; trial by battle and ordeals; legal fictions; formalism; and the liability of inanimate objects.[87] Kennedy, writing specifically in regard to the international legal order prior to 1648 – notable as the year of the adoption of the Treaty of Westphalia – highlighted the predilection of primitive legal scholars of that time to conflate legal and moral authority.[88] To the primitive legal scholar, Kennedy continued, all activities are undertaken within the same moral/legal plane.[89] This lack of distinction is often the source of objection, as a result of the subjectively determined source of morality. As way of providing an example of this objection attention is drawn to the theory of the just war.

[85] Malinowski B, *Crime and Custom in Savage Society* (Harcourt, Brace and Company, London 1926), please see generally for an examination of primitive legal systems.
[86] Dias RWM, *Jurisprudence* (5th Edn Butterworths, London 1985), p.390.
[87] Dinstein Y, 'International Law as a Primitive Legal System' (1986-1987) 19 New York Journal of International Law and Politics 1, p.2.
[88] Kennedy D. 'Primitive Legal Scholarship' (1986) 27(1) Harvard International Law Journal 1, p.7
[89] Kennedy, ibid., p.9.

According to Brownlie, early Christian tradition precluded military activity of any sort, with enlisting being forbidden.[90] This tradition endured until Christianity become intertwined with notions of secular power, with the Roman, St. Augustine, introducing the just war theory.[91] Augustine, moving the Church away from the profound pacifism enshrined within the Gospel teachings, influenced by the philosophical and legal traditions of the Greeks and Romans which taught that a just war could only be fought in order to achieve peace, saw synergies with the Christian understanding which positioned peace within a position of moral prominence. Consequently, Augustine concluded that limited war was permissible, should its goal to be to restore or preserve peace.[92] However, it is apparent that these goals are rather indeterminate, and open to expansive interpretation, as indicated by von Elbe, in his review of the just war doctrine, where he wrote that for Augustine, the justness of a war could be reduced down to the following factors: self-defence; restore stolen property; as a response to a wrongdoing; as a deterrence for a future wrong; and, critically, it could be utilised to further promote the Christian religion;[93] the final one of these being of particular relevance in relation to the Papal Bull.

Moving forward to a more contemporary understanding of the just war doctrine, Nussbaum, writing amidst the horrors of the Second World War, was critical of

[90] Brownlie I, *International Law and the Use of Force* (OUP, Oxford 1963), p.5.
[91] Neff SC, *War and the Law of Nations: a general history* (CUP, Cambridge 2005), p.3-5,10&11.
[92] Friedman L, *The Law of War: a documentary history* (Greenwood Publishing Group, Westport 1972), p.7.
[93] von Elbe J, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 American Journal of International Law, p.665.

the subject, expressing the doctrine as being 'essentially religious', continuing to argue that 'where its religious spirit evaporates, only a shallow and stale residue remains'.[94] There is a high degree of negativity within Nussbaum's words, and it must be noted that it was during this period that many commentators of international law were pushing back against an international legal regime that had been so manifestly transgressed, enabling such a cataclysm.[95] As a result, but being mindful of the catastrophic events of the Second World War, it is suggested that the reader of material emanating from this period should take care to assess the degree of weight that should be placed upon any criticisms of international law. Ultimately, it is not immediately clear what Nussbaum meant when he wrote the above statement, however at a later point he mentioned that 'the law of nations must not be left to the exclusive use of those forces which are bent on conquest, suppression, and enslavement'.[96] Therefore, it is suggested that this 'stale residue' that Nussbaum was referring to, in regard to the doctrine of just wars, was that the doctrine was nothing more than an apology for the powerful. What this analysis shows is how the merging of morality and legality opens up law to abuse by those determining the context of that morality. Recalling the writings of Vitoria and Augustine, it can be clearly seen that Christian morality can be manipulated by the requirements of the powerful. Given this merger of legality and morality, this results in those having control over morality having *de facto* control over the primitive legal system.

[94] Nussbaum A, 'Just war – A Legal Concept?' (1943-1944) 42 Michigan Law Review 453, p.478.
[95] Shelton D, 'Normative Hierarchy in International Law' (2006) 100 (2) American Journal of International Law 291, p.297.
[96] Nussbaum, supra, note 94, p.479

It is accepted that the embodiment of international law, within the sixteenth century, was primitive in nature; however, it is worth comparing this position with that of contemporary international law. Most notably, Hart was of the opinion that the modern incarnation of international law still retains is primitive nature, with it being replete with traits that make it resemble a primitive legal system.[97] As was Dinstein,[98] whereupon in his assessment of international law he highlighted the following categories as expressing this synergy between contemporary international law and a primitive legal system:[99] that the system poses a distinct lack of certainty; the ongoing importance of custom; legal prominence of self-defence; and the legal fiction that is the State.[100] Nevertheless, as Dinstein continued to suggest, being primitive does not negate against the legal nature of a system, with primitive law still being law 'because it introduces solutions, inadequate and unsatisfactory as they may be, to problems of social order'.[101] Furthermore, few today would argue that international law is lacking in legal effect. The key point to take from this comparative overview is that the legal system that emanated from the Papacy, despite its apparent primitive character, was possibly still that: a legal system. Consequently, it would be a legal fallacy to claim that the Bull had no legal efficacy based purely on the notion that compliance with the Bull was based on

[97] Hart HLA, *The Concept of Law* (2nd Edn Oxford University Press, GB 1994), p.227.
[98] Dinstein, *supra*, note 87, p.1.
[99] *Ibid*.
[100] Wolff M, 'On the Nature of Legal Persons' (1938) 54(4) Law Quarterly Review 494, p.496, explores the so-called legal fiction theory. Identifying that only human beings can be persons, with other subjects, corporations and States, of the law being treated as such as a result of a legal fiction.
[101] Dinstein, *supra*, note 87, p.3.

excommunication, adding further justification to the scepticism behind the audacious claim of Waldock.

By way of a summary, this analysis has identified that academics from either side of the legal efficacy of the Bull debate argue, with apparent authority, that they have determined upon the objective historical truth, and have identified the objective legal answer. Yet, what is clear is that there are far too many unknowable factors in play. Therefore, when Waldock made his overtly bold claim in relation to whether the Bull should apply, he was simply interpreting the Bull through his own subjective lens which resulted in him determining upon this answer. Equally, those claims that are supportive of the counter-position claimed by Argentina, are, equally guilty of this. The classical approach of the lawyer, to claim to be able to determine an objective history is, evidently, lacking in sufficient nuance.

Critically, the methodological approach suggested within Chapter 2, being distinct from that traditionally employed by the lawyer when addressing history, might not have answered whether the Papal Bull was of universal legal efficacy, or otherwise, but, given the uncertainty surrounding the factual matrix of the dispute, it is unlikely that the answer to this question will ever be known. Yes, it is conceded that an answer to this question could be given, but as mentioned the highly nebulous nature of this history would result in any answer to this question being reached as a result of the bias of the interpreter. Therefore, the fundamental outcome of this examination has not been to provide a *clear* legal

answer, but it has gone some way towards establishing that which was concluded in Chapter 2. Critically, the level of uncertainty, as to the facts surrounding the Papal Bull ultimately work to reduce its legal worth within contemporary pacific dispute settlement to that of context setting. Furthermore, was a judicial body to base a decision on this highly uncertain factual matrix, the indeterminacy of the facts would result in the bias of those comprising the judicial panel as having added significance in their interpretation. Therefore, this would result in the outcome being viewed with suspicion by the disputing States, and, therefore, of questionable worth in resolving the dispute.

3.6: The Treaty of Tordesillas

Waldock's statement regarding the rejection of legal efficacy was not limited to the Papal Bull, he also summarily excluded the application of the Treaty of Tordesillas beyond the two parties to the treaty. Yet, again this conclusion is questionable with other jurists having come to differing conclusions. For David Berry the Treaty acted as a concretising act, crystallising the contents of the Papal Bull.[102] The problem with this conclusion is that it fails to take into consideration what the preceding analysis as to the high level of factual and legal uncertainty that permeates the Bull; it seems problematic to state that a treaty makes concrete a mechanism of uncertain significance. Contrary to this position, it is submitted that the Treaty actually acts as an indicator as to the shift away from the universal authority of the Pope, for as Craven articulated, the Treaty

[102] Berry DS, 'The Caribbean' in Fassbender B; & Peters A (eds), *The Oxford Handbook of The History of International Law* (Oxford University Press, GB 2014), pp.580-582.

'heralded [the Pope's] decline as the ultimate author of claims to power and jurisdiction'.[103] This shift from the authority of the Pope towards a State centric international order was explored above, with it being emphasised that there is no clear line of demarcation between the two regimes. Craven further emphasised this point, identifying that the period is one of transition, not just legally, but also socially and religiously.[104] Irrespective of this lack of clarity, to precipitously reject the binding nature of the Treaty on third party States would be to fall into the same trap as Waldock; consequently, the binding nature of the treaty will be examined.

In broaching the binding nature of the treaty, and being mindful to not transpose the present-day legal regime onto the legal system of fifteenth century Europe, it could prove fruitful to examine the functioning of treaties within Public International Law, today. A treaty, according to Shaw, at its most simplest, is a formal method of international law creation,[105] being an 'agreement between parties on the international scene'.[106] In formulating an understanding of treaties, and in turn reflecting upon the historical mechanisms of treaty application, the general rule that a treaty will only bind those States parties to the treaty, and the relevance of State sovereignty in relation to the doctrine, shall be commented upon. The analysis then progresses to establish that this general position is not always accurate, drawing attention to the controversial concept of the objective regime, a treaty proving binding on a third party.

[103] Craven M, 'Colonialism and Domination' in Fassbender; & Peters, *ibid.*, p.866.
[104] *Ibid*., p.867.
[105] Shaw M, *International Law* (6th Edn CUP, GB 2012), p.902.
[106] *Ibid*., p.903.

As stated, the general rule when considering the binding nature of a treaty is that these international agreements are only binding upon those States that explicitly consent to be bound,[107] applying the following formula, *pacta tertiis nec nocent nec prosunt*, typically known as *res inter alios acta*. This doctrine found codification within Article 34 of the Vienna Convention on the Law of Treaties, where it is stated that, '[a] treaty does not create either obligations or rights for a third State without its consent',[108] a view that clearly seized the minds of the members of the International Law Commission during the preliminary deliberations that resulted in the Vienna Convention, where it was suggested that the doctrine acts as one of 'the bulwarks of the independence and equality of States'.[109] This general rule was central to the *North Sea Continental Shelf* case where it was held that West Germany was not party to the relevant convention having never ratified it, and, therefore it was not bound by the Convention's obligations.[110] This is the general position that Waldock seemingly takes, being a position that nestles neatly within the concept of equal and independent sovereign States, a legal construct that is the foundation stone upon which the contemporary international legal system is founded.[111]

[107] *Ibid*., p.928.
[108] Vienna Convention on the Law of Treaties, 23 May 1969, Art.34, (1969) 8 International Legal Materials 679.
[109] International Law Commission, 'Documents of the Second Part of the 17th session and of the 18th session including the reports of the Commission to the General Assembly', (1966) 2 Yearbook of the International Law Commission, p.227
[110] *North Sea Continental Shelf Cases*, Judgment, ICJ Reports 1969 3, p.25, para.26.
[111] UN Charter, *supra*, note 19, Art.2.

If one was to assume that an accurate date for the emergence of the sovereign State as a legal concept was with the Peace of Westphalia[112] in 1648, as is commonly accepted as being the case, this might cause significant inconsistencies with the direct imputation of the *res inter alios acta* doctrine into a historical analysis of the Treaty of Tordesillas; however, to stipulate that the State emerged at this point is a huge oversimplification, with authors, such as Lesaffer, suggesting that this assumption is a legal and historical fallacy.[113] In actuality, reference can be found to the concept of sovereignty in the years predating the Peace of Westphalia, as has been indicated with the earlier assessment of the work of Vitoria. Consequently, it is permissible that the notion of State equality was in existence at the time of drafting of the Treaty of Tordesillas. Nevertheless, the emphasis of this doctrine is on State equality, and it should be noted that the Treaty is, therefore, afflicted with the same issues as to the Papal Bull, in that it was ratified during a period of great upheaval within foreign relations, where there appears to be no clear crystallisation of the concept of sovereign equality, nor has the universal legal authority of the Pope been resolutely rejected. The consequence of this is that we cannot categorically limit the application of the Treaty, due to the doctrine of *res inter alios acta*; again, our understanding of the normative legal order at the time with which the Treaty was ratified proves to be a limiting factor.

[112] Usually perceived as starting with the Treaty of Westphalia, see < http://avalon.law.yale.edu/17th_century/westphal.asp> last accessed 10/01/2016.
[113] Lesaffer R, 'Peace treaties from Lodi to Westphalia' in Lesaffer R. (ed), *Peace Treaties and International Law in European History: from the late Middle Ages to World War One* (CUP, GB 2004), p.9.

Despite this, it is worth returning to the contemporary understanding of the operation of treaties within present-day international law, as their application is not so linear as to be strictly bound by the *res inter alios acta* doctrine, without exception. This assists us with moving away from the picture that Waldock paints, where there is an assumed clarity as to the binding nature of treaties on third parties, both in the past and in the present. In exploring these exceptions, the initial starting point is that there is an exception to the *res inter alios acta* doctrine where a provision of a treaty has entered into general customary international law, as indicated within the *North Sea Continental Shelf* case.[114] Shaw, provided as an example, highlighted how the Hague Conventions[115] of the early twentieth century are now deemed to be a key component of customary international law. Thus, echoing the position of the Nuremberg Tribunal, where it held that the rules 'laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war'.[116] Notable here, is that the treaty, itself, is not binding on third party States, it is the custom that emanates from the treaty, was it possible to indicate that the provision had attained that position.

There is further long standing international tribunal jurisprudence to suggest that this narrow notion of agreements between two States not binding upon third parties is not always strictly followed. The 1916 judgment of the Central

[114] Shaw, *supra*, note 105, p.43.
[115] Convention (iv) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.
[116] 'Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946', (1947) 41 American Journal of International Law 172, pp.248&249.

American Court of Justice, pertaining to the 1914 Bryan-Chamorro Treaty,[117] between the United States and Nicaragua, held that Article 2 of the Treaty, which gifted the United States with a section of territory on the Nicaraguan coast, on the Gulf of Fonseca, was invalid due to it being in a violation of a customary norm of international law, established within the Cafias-Jerez Treaty.[118] This customary norm asserted the third party rights of Salvador and Honduras to condominium in the gulf.[119] Writing in his commentary of the case, Wright was in agreement with the judgment of the tribunal, and went on to indicate how he perceived the decision as being an expression of the notion that treaties and custom may create *objective* rules of international law, that are universal and permanent in application;[120] however, Wright went on to clarify this statement articulating that this universality results from the 'general acceptance and acquiescence in their terms by all states … [t]hus to invoke such a treaty against or in behalf of a nonsignatory State, a tacit acceptance of the conditions would have to be shown'.[121] As indicated within the assessment of the Papal Bull, there is no evidence to indicate that there was general acceptance of the Papal Bull for which the Treaty of Tordesillas is often suggested as having codified; contrary to this, there appears to be a body of evidence to suggest otherwise. Yet, it may simply be that this evidence has been lost to time.

[117] Interoceanic Canal (Bryan-Chamorro Treaty), August 5, 1914, <https://www.loc.gov/law/help/us-treaties/bevans/b-ni-ust000010-0379.pdf> last accessed 10/06/2016.
[118] Cafias-Jerez Treaty, 1858.
[119] Costa Rica v. Nicaragua (Central American Court of Justice, 1916), translated and reprinted in (1917) 11 American Journal of International Law 181, p.229.
[120] Wright Q, 'Conflicts between International Law and Treaties', (1917) 11(3) American Journal of International Law 566, p.573.
[121] *Ibid*.

Beyond this there is an additional exception that any examination of the manner within which treaties can create legal effects binding on third party States would reveal: the notion of the objective regime. An objective regime is one that, it is argued, is of *erga omnes* effect.[122] *Erga omnes* meaning, as indicated in the *Barcelona Traction* case,[123] that they are rights that are the concern of all States.[124] According to McNair the International Law Commission was of the mind that objective regimes which established, for example, a demilitarised zone within a given territory by treaty did not have a place within international law, recalling back to Art 35 of the Vienna Convention.[125] However, McNair does seem to suggest that there is evidence of their existence, with their presence being noticeable in relation to rights of transit through waterways, such as via the Panama and Suez Canals.[126] However, taking a position counter to that of McNair, Brownlie was of a mind that there is insufficient evidence to equivocally establish the legal nature of objective regimes, in contemporary international law.[127] However, even if one was to accept their existence, the scope that they can bind a third party is unclear.

[122] Simma B, 'The Antarctic Treaty as a Treaty providing for an "Objective Regime"' (1986) 19 Cornell International Law Journal 189, p.189.
[123] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New application: 1962) (Belgium v Spain)*, Second Phase, Judgment, (1970) ICJ Reports 3.
[124] *Ibid*., p.32. See also, de Hoogh A, *Obligations Erga Omnes and International Crimes: a theoretical inquiry into the implementation and enforcement of the international responsibility of States* (Martinus Nijhoff Publishers, The Netherlands 1996).
[125] McNair, *Law of Treaties* (Clarendon Press, Oxford 1961).
[126] *Ibid*., pp.663&64.
[127] Brownlie, supra, note 50, p.662.

It is interesting to note that Waldock later wrote on the issue of objective regimes during his tenure as the Special Rapporteur on the law of treaties.[128] As part of this he undertook a thorough review of the concept of the objective regime, clearly establishing a position echoing his earlier writings on the Falklands (Malvinas); for Waldock 'where an intention to create an objective regime … is present, any State which expressly or impliedly assents to its creation or to its execution will be considered as having accepted the general provisions of the regime'.[129] It is apparent that this concept of objective regimes is predicated upon what are now the contents of Article 34, of the Vienna Convention, reflecting the Articles contents and nature, where it is states that a 'treaty does not create either obligations or rights for a third State without its consent'.[130]

However, it must, again, be noted that there is no jurisprudential evidence to indicate that there was a legal concept comparable to that of the objective regime at the time the Treaty of Tordesillas was ratified. Crucially, we must be careful to not transpose our contemporary understanding of the interpretation of treaties onto the past. Critically, as has been discussed, it is uncertain whether the notion of sovereign equality had yet to fully crystallise at the time the Treaty of Tordesillas was ratified, as it predates the emergence and rise to prominence of the State as a legal entity within international law, usually posited as being 1648, with the promulgation of the Peace of Westphalia. As a result, caution must be

[128] Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/167/1964, within the Yearbook of the International Law Commission 1964, volume 2, UN Doc. A/CN.4/SER.A/1964/ADD.1.
[129] Waldock, *supra*, note 33, p.33.
[130] Vienna Convention, *supra*, note 108, Art.34.

taken when interpreting treaties that were ratified many centuries ago. As Shaw reminded us, the general tenor of treaty law, today, is crafted upon the foundation of the 'basic principles relating to State sovereign equality and non-interference'.[131]

The result of this is that this analysis is interesting theoretically, but its practical benefit might not be immediately obvious. Nevertheless, it signifies how the *clear* functioning of treaties within the fifteenth and early sixteenth century may be hidden behind the passage of time. This is not to suggest that we have no way of knowing how historical treaties should be applied, but it is to advocate a position that care should be taken to examine them in order to ensure that contemporary understandings do not unduly influence their interpretation. Consequently, what this theoretical assessment achieves is to indicate that the initial legal landscape might not be as unambiguous as many authors, such as Waldock, would like their readers to believe. It is unlikely that in today's legal climate that the treaty would prove binding on third party States, but this presumption cannot be summarily applied to the past without explanation, something which Waldock and others fail to do. This is not to suggest that Waldock's conclusions were incorrect, but it is, again, indicative of the concerns of the Fact Sceptics and others: namely the past is seen through the prejudice of the individual undertaking the legal investigation.

[131] Shaw, *supra*, note 105, p.930.

To conclude this section on the Papal Bull and the Treaty of Tordesillas, it is first necessary to recall the reasons for the undertaking of this analysis. Firstly, this section has gone some way to build a picture of the foundation of the context of the Falklands (Malvinas) dispute. It has established that Spain was the preeminent power within this region, at the time within which the Bull was decreed, functioning with the support of the Papacy. However, and of equal significance, the purpose of this section was to clearly signify the difficulty of undertaking a legal analysis that is based in history. It never set out to provide an answer as to which State has the most persuasive legal argument; the aim was not to establish whether the Papal Bull sufficed to create an effective right of possession. Time and again this analysis has indicated how a historical investigation resonates with the methodological concerns that were raised within Chapter 2; indicating how a clear objective history is unobtainable. It has shown how eminent and highly regarded historians and lawyers have found themselves in polar positions, utilising history in a – for the most part – functional capacity, subjectifying it through the lens of their own prejudices. Supporting the argument that this inspection of history has made, David Berry suggested, in his examination of Papal Bulls, that many later scholars are guilty of imposing modern legal notions upon the legal doctrines of the past, where they suggest that the 'Pope's decrees merely granted 'inchoate' title to the lands, which would be perfected following occupation'.[132] Proving evidential of this assertion, von der Heydte wrote that the Bull only provided Spain and Portugal with *a jus ad occupationem*.[133] It must be reiterated that this criticism identified by Berry, and

[132] Berry DS, 'The Caribbean' in Fassbender; & Peters, *supra*, note 102, p.581.
[133] von der Heydte A, 'Discover, Symbolic Annexation and Virtual Effectiveness in International Law' (1931) 29 American Journal of International Law 499, p.450.

restated here, does not suggest that this legal understanding is incorrect; indeed, this might be the true legal position, and our modern-day understanding of these legal notions might have their origin in this period. Yet, what this section shows is that both State arguments make presumptions as to the legal order that was in existence within the fifteenth century, asserting that the international law of the time can be objectively interpreted, and understood, by the international lawyer of today; it is this what this section, fundamentally, contests.

3.7: Discovery and Colonisation

Moving on chronologically from the issue of the Papal Bull, the next significant context establishing stage of history that necessitates examination is that of the discovery of the territory, for which far greater attention is typically paid within the literature. This is as a result of, critically, it being the central founding concept for which Argentine and the UK base their respective claims upon. This section, initially, examines the contested nature of the Falklands (Malvinas), before moving on to, briefly, examine the legal consequences of discovery, concluding that, again, there is little academic concord as to the legal significance of mere discovery, alone.

Western discovery of the Islands is contested with it being the Argentine position that a Spanish expedition, under the command of Magellan, was responsible for first discovery of the Islands in 1519.[134] However there appears

[134] Groussac P, *Les iles Malouines* (Impr. Coni freres, Buenos Aires 1910), p.191. See, also, the PDF of an archival note of a member of that expedition, Andres de San Martin in his native

to be greater support to suggest that a later expedition undertaken by the Italian Americus Vespucci, whilst under the employment of the Spanish Crown, discovered the Islands in 1540. However, these, according to Goebel, cannot be ascertained with any degree of scientific certainty.[135] Despite stating this, he does go on to suggest that it is possible, via a process of inference from indirect evidence, that due to the 'peculiar climactic and oceanic conditions of this region, and by the details of the voyage in the log' to suggest that the expedition captained by Vespucci is the most likely time of first discovery.[136] Using this as an example, if this sort of factual matrix is considered following the Hartian approach, as suggested, it is arguable that the discovery by Vespucci would have a stronger core of certainty than that of Magellan, which would appear to be a highly uncertain fact. Given the uncertainty of this fact, it leaves its interpretation, as either being in support or otherwise of Argentine discovery, down to political bias; for example, an individual who favours Argentine territorial sovereignty is likely to interpret this fact as being supportive of this.

However, suggesting an alternative history, the British position is that the first recorded sighting of the Islands was in 1592, by the captain of the Desire, John Davis,[137] but, according to Johnson, writing in 1771, 'he left them as he found

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Spanish <http://gallica.bnf.fr/ark:/12148/btv1b9065835g/f44.image.r=Le%20Grand%20Insulaire%20et%20pilotage%20%20d%C2%B4Andr%C3%A9%20Thevet.langFR.> last accessed 20/09/2017.

[135] Goebel, *supra*, note 5, p.7.

[136] *Ibid*., p.23.

[137] Hendry I; & Dickson S, *British Overseas Territories Law* (Hart Publishing, GB 2011), p.316.

them, without a name'.[138] Johnson went on to record that two years later Sir Richard Hawkins made sight of the Islands, and named them Hawkin's Maiden Land; however, Johnson suggested that the journey failed to conjure up significant renown resulting in the name failing to be adopted.[139] Furthermore, this reported sighting has been questioned, with Goebel suggesting that Hawkins' reported sighting was simply appropriating Davis' earlier discover,[140] with Goebel later arguing that both Davis and Hawkins had borrowed from Spanish charts that were already in existence.[141] However, this is purely speculative on the part of Goebel, with there being no evidence that this had been the case.

Irrespective, the first reliable sighting of the territory, a factual account with a strong core of certainty, can be fixed as being in 1600, by the Dutch captain, Sebald de Weert, giving the islands his name: the Sebaldes.[142] Sebald de Weert was commanding the *Geloof*, one of five vessels that had sailed from Rotterdam in 1598. Whilst passing through Magellan's Strait the vessels had to separate due to the adverse weather conditions. The *Geloof* proceeded to return to the Netherlands, exiting the Strait, heading out into the Atlantic. On the 16 January 1600, the ship's surgeon recorded:

[138] Johnson S, 'Thoughts on the Late Transactions Respecting the Falkland's Islands' in Hawkins J (ed), *The Works of Samuel Johnson, LLD: together with his life and notes on his lives of the poets, Vol.10* (CUP, GB 2011), p.35.
[139] *Ibid*., p.35.
[140] Goebel, supra, note 5 p.39-40.
[141] *Ibid*., p.42.
[142] Falkland Islands Economic Study 1982 / Chairman the Rt. Hon. Lord Shackleton: presented to the Prime Minister by Command of Her Majesty, September 1982, Cmnd 8653, Command Papers in ten volumes 1981-82.

> Three little islands were sighted, hitherto neither noted nor drawn on any map. These were given the name *Sebaldes*. These islands are distant from the continent sixty leagues toward the east and southwest in 50° 40' latitude. In the same place they found an extraordinary number of penguins which, if they had not lost their skiff, they could with difficulty have passed by.[143]

According to Freedman, both parties to the dispute agree that it was here that the Islands were first named,[144] albeit it is notable that neither party suggests that this represents a concession as to when they were first discovered, and, given the plethora of reports of prior discovery it would be problematic to state with certainty that de Weert did first discover the Islands.

Critically, even from this cursory examination of the available resources, it is apparent that neither party to the dispute has a concrete claim to have discovered the Islands. Goebel appears to agree with this, where he stated that 'to this day there has been no careful examination of the records, no sifting of the proof, no trustworthy exposition of the relative merits of the conflicting claims' in regard to discovery.[145] Yet, reading this, it is apparent that Goebel was of the opinion that, someday, a clear picture as to discovery could one day be achieved. Whereas it is the submission, here, that the probability of this being accomplished is very low, finding concord with Metford, who wrote that a factually accurate answer as to who first discovered the Falklands (Malvinas) is

[143] De Bry, *Americae Nona Pars* (Frankfurt 1602), p.52, cited in Goebel, *supra*, note 5, p.45.
[144] Freedman, *supra*, note 12 p.4.
[145] Goebel, *supra*, note 5, p.2.

unlikely to become available.[146] For Freedman this is irrelevant, and he dismisses the effect of discovery in answering as to where sovereignty resides, but provides no legal reasoning for this declaration.[147] This is in stark contrast to the British position in 1829, where a memorandum addressed to Argentina proclaimed its territorial sovereignty to be 'founded upon the original discovery … of the said Islands'.[148]

The legal question in relation to the legal efficacy of discovery, as a mode for territorial acquisition, is infected with the same quandaries as ascertaining the legal value of the Papal Bull; that the passage of time has resulted in it being highly improbable that the analyst will be able to truly ascertain the legal and factual matrix with any degree of certainty. That the legal position is uncertain has resulted in the legal provision being indeterminate. This has, therefore, had the consequence of there being enough scope for the British understanding of the significance of the provision to mutate; with it having transitioned from discovery being essential to discovery being irrelevant. Proving further evidence of this shift, it is first worthy of noting the position of Vitoria. For Vitoria discovery was a permissible form of territorial acquisition, so long as that territory was *terra nullius.* However, critically, Vitoria seemed to conflate the notion of discovery with the notion of occupancy: that to behold an object that is unclaimed is to take it for oneself, and, ultimately, to possess.[149]

[146] Metford, *supra*, note 78, p.469.
[147] Freedman, *supra*, note 12, p.4.
[148] British Protest of November 19, 1829, against Argentina decree of June 10, 1828, British and Foreign State Papers, volume 20 (1832 -33), p.346, appended to Dolzer, *supra*, note 2, p. 263.
[149] Vitoria F de, 'On the American Indians' in Vitoria F de, *Political Writings* (Cambridge University Press, GB 1991), p.265.

Grotius, on the other hand, showed a great deal of scepticism towards equating discovery with possession. Dissenting from Vitoria's position Grotius suggested that discovery alone would fail to sustain a claim to title to territory, 'for to find [that is, possess] is not to see a thing with the eyes but to lay hold of it with the hands'.[150] However, it is suggested, as noted previously, that Grotius was interpreting the situation through his own prejudicial preferences, ultimately acting as an apologist for those States competing with Spain; however, Fitzmaurice noted that not every detractor of the right of possession was acting as an apologist for the colonial movement.[151] Nevertheless, in this instance, it is clear that Grotius established the distinction between discovery and occupation with the intention of limiting the imperial claims of the Spanish crown. For Grotius permitting a State to claim vast swathes of territory simply via discovery would restrict colonisation; the result being vast tracts of land not being exploited.[152] Pufendorf reaffirmed this position, articulating that 'the bare seeing a thing, or knowing where it is, is not judged a sufficient Title of Possession'.[153] Given the shift in the perceived legal requirements for the acquisition of territory, from Vitoria to Grotius, it is arguable that the applicable norms of international law simply mutated, with both perspectives being accurate. However, even were we inclined to attempt to apply the applicable legal approach at the time that the Islands were discovered, this approach would prove

[150] Grotius H, Hakluyt (trans.), *The Free Sea: with W Welwod's critique and Grotius's Reply* (Liberty Fund, Indianapolis 2004), pp.13-15.
[151] Fitzmaurice A, 'Discovery, Conquest, and Occupation of Territory' in Fassbender; & Peters, *supra*, note 102, p.843.
[152] Grotius, *supra*, note 150, pp.13-15.
[153] Pufendorf S; Oldfather CH; & Oldfather WA (trans), *De Jure Naturae et Gentium Libri Octo: volume 2* (Oxford University Press, Oxford 1934), p.391.

impossible, due to the uncertainties indicated as to when the Islands were first discovered. This, again, reinforces the theoretical arguments raised within Chapter 2.

At this point it is worth, briefly, examining the modes by which a State can acquire territory under contemporary international law, in order to provide an anchor of knowledge from which to attach the history of the Islands. Despite being first published in 1963 the seminal text by Jennings is an invaluable resource when addressing this subject.[154] According to Jennings, there are five different modes via which a territorial sovereignty can be acquired by a State: prescription; cession; accretion; conquest; and occupation. It is worth examining each of these in a little more detail. Prescription, according to Jennings, occurs when a State has acquired territory, and through the long-continued and undisturbed nature of the occupation acquires a validity of possession. In this instance the territory need not have been *res nullius*, but the previous holder of sovereignty must have not voiced an objection to this occupation.[155] Cession is a bilateral mode of territorial acquisition whereby there is a transference of territory from on State to another. Uniquely, amongst instances of territorial acquisition, it requires the co-operation of the two States concerned. In this regard, title is derivative, meaning that it emanates from the valid title of the ceding State.[156] Judge Huber in the *Island of Palmas* case signified how this

[154] Jennings RY, *The Acquisition of Territory in International Law* (Manchester University Press, GB 1963). Please note, that this text has recently been reissued, Jennings RY, The Acquisition of Territory in International Law: with a new introduction by Marcelo G Kohen (Manchester University Press, GB 2017).
[155] *Ibid*., pp.20-21.
[156] *Ibid*., p.16.

functions in practice, where he is quoted as stating that 'it is evident that Spain could not transfer more rights than she herself possessed'.[157] Accretion is quite simply the augmentation of a States territory by the process of nature, or via land reclamation techniques.[158] Penultimate on the list is conquest. Legally speaking, under contemporary international law there is a general prohibition on the acquisition on territory via the use of force. There is a coherent strand of legal implements from the Covenant of the League of Nations,[159] the Kellogg-Briand Pact,[160] the Stimson Doctrine,[161] the UN Charter,[162] the Vienna Convention on the Law of Treaties,[163] the Friendly Relations declaration,[164] and the general acceptance of the principles of self-determination[165] – albeit it is arguable that the fulfilment of self-determination, where the conquered populace indicated their wish to be under the sovereignty of the subjugating State, could be one of the few instances where the acquisition of territory via the use of force is legitimate. Irrespective of this general prohibition, instances of territorial acquisition via the use of force do still occur, as with Northern Cyprus; however, this does not speak to the legality of the act.[166] Finally, occupation is the appropriation of territory by a State that was until that time not subject to the

[157] *Island of Palmas*, supra, note 75, p. 842.
[158] Jennings, *supra*, note 154, p.19.
[159] The Covenant of the League of Nations, (1920) 14 (S1-S2) American Journal of International Law Supplement.
[160] Kellog-Briand Pact 1928, <http://avalon.law.yale.edu/20th_century/kbpact.asp> last accessed 20/09/207.
[161] McNair AD, 'The Stimson Doctrine of Non-Recognition: a note on its legal aspects' (1933) 14 British Year Book of International Law 65, see generally.
[162] UN Charter, *supra*, note 19.
[163] Vienna Convention, *supra*, note 108.
[164] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970.
[165] Korman S, *The Right of Conquest* (Clarendon Press, Oxford 1996), p.302.
[166] Letter dated 29 May 2001 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General, UN Doc. A/55/970-S/2001/541.

sovereignty of another State, it was *res nullius*. Jennings notes a number of concerns in relation to the implementation of the doctrine, namely the degree and kind of possession effective to create title, and how to 'define the area of territory to which such a possession might be said from time to time to apply'.[167] It is to the initial occupation of the Falklands (Malvinas) for which this section will now turn, and the concerns raised by Jennings, as will become apparent, are of relevance with regard to the territorial dispute over the Falklands (Malvinas).

With regard to occupation, relatively concrete evidence suggests that this did not initially occur until 31 January 1764,[168] being one of the last vestiges of the newly discovered American continent to be settled by Europeans.[169] Goebel perceived this as a natural consequence of the unpleasant climate of the islands, writing that 'only the love for one's country or one's God could persuade men to remain in the face of such an unfriendly nature'.[170] Perhaps it was that factor that had resulted in the Falklands (Malvinas) uniquely being one of the few uninhabited lands within the Americas.[171] Interestingly, the colonising power was neither Spain nor was it England, but France. Antoine Louis de Bougainville, a veteran of the French defeat at the hands of the British at Quebec, departed from St. Malo, France, on 15 September 1763.[172] Bougainville did this

[167] Korman, *supra*, note 165, p.20.
[168] Gustafson, *supra*, note 10, p.8.
[169] Lindsey, 'Conquest: a legal and historical analysis of the root of United Kingdom title in the Falkland Islands' (1983) 18 Texas International Law Journal 11, p.16.
[170] Goebel, *supra*, note 5, p.1.
[171] Lindsey, *supra*, note 169, p.16.
[172] Bougainville L, Forster JR (trans), *A Voyage Round the World Performed by Order of His Most Christian Majesty* (J. Nourse, London 1772), p.38.

at his 'own expense, assisted by Messrs. De Nerville and d'Arboulin'[173] departing on-board the 'Eagle of twenty guns, and the Sphinx of twelve, constructed and furnished with proper necessaries for such an expedition'.[174] The French expedition made land fall on the 17th March 1764,[175] and Bougainville 'solemnly took possession of the isles in the king's name' on the 5 April 1764.[176] Bougainville departed for France on the 8 April 1764,[177] with his return corresponding to the settlement of the Islands being declared publicly in Paris, on 3 August 1764.

Early in 1765 Bougainville returned to the Islands, with fresh supplies, departing from them again on the 27 April 1764. Within his journal he makes note of the 'colony consisting of twenty-four persons, including officers'.[178] Why this recollection is significant is that it can be contrasted with the writings of Gastafson, who claimed that the colony then consisted of 150 settlers.[179] The reason why the reader's attention is drawn to this factual discrepancy is that it clearly highlights how facts become confused and lost as time progresses; thereby, once again indicating the general scepticism that should be had with regard to those claiming to have produced an objective history.

[173] *Ibid*., p.37.
[174] *Ibid*., p.37-38.
[175] *Ibid*., p.40.
[176] *Ibid*., p.41.
[177] Text of the declaration is available in Dolzer, *supra*, note 2, p.240, annex 8.
[178] Bougainville, *supra*, note 172, p.41.
[179] Gustafson, *supra,* note 10, p.8.

Nine months after the initial taking of possession of the Falklands (Malvinas) by the French, Captain John Byron arrived at the western Island[180] and claimed *all* of the territory for England.[181] However, according to Bougainville, the British didn't settle the territory until 8 January 1766, when they 'sent a colony to settle in Port de la Croisade, which they had named Port Egmont'. The British discovered the French settlement 2 December 1766, commenced to order the French to leave and 'threatened to land by force', were they to not comply.[182] The French, unsurprisingly, failed to comply with this threat of the use of force.

This duality of occupation raises an important question as to the uniformity of the territory: namely, whether the territory should be considered to be one territorial unit or several. The factual situation seems to be that the French took possession of the eastern island, with the British settlement being established on the western island. Dolzer addressed the question as to whether the territory should be considered a single unit, and what the geographical extent was of the French acquisition, as a result of the settlement on the eastern isle. For Dolzer the Islands should be seen as one geographical unit, giving reference to the significance of the *Eastern Greenland* decision on determining whether the Falklands (Malvinas) should be deemed one continuous unit.[183] Usefully, Waldock examined the issue of territorial unity in great detail, in relation to the Falklands (Malvinas) dependencies, paying particular attention to the *East*

[180] Bougainville, *supra*, note 172, p.41.
[181] Goebel, *supra*, note 5, p.239.
[182] Bougainville, *supra*, note 172, p.43
[183] *Legal Status of Eastern Greenland*, Judgements Orders and Advisory Opinions, (1933) PCIJ Series A/B 53.

Greenland decision of the Permanent Court of International Justice,[184] and *The Island of Palmas* case.[185] With regard to the latter he drew the reader's attention to the following passage:

> It is, however, observed that international arbitral jurisprudence in disputes on territorial sovereignty (eg the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola) would seem to attribute greater weight to – even isolated – acts of displays of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries.[186]

Evidently, this position is in contradiction to the estimation elucidated upon by Dolzer; Dolzer seemed to emphasise the territorial bounds of a landmass as being the most critical component, yet it is apparent that the most likely approach that an international tribunal would follow would be to examine the unitary nature of the territory as being restricted by a State act that displays sovereignty. Most critically, Dolzer failed to address what constitutes a display of sovereignty or pay it any real regard. In his analysis, Dolzer did recognise that factors beyond the geographical form of the islands should be taken into consideration, making note that 'the population, the duration of the established legal order or the political organisation concerned will all be of relevance'. Nevertheless, despite highlighting this, Dolzer failed to then really assess these qualities. Conversely, he fixated upon the geographical form, raising the point that the Falklands (Malvinas) are considerably smaller than the territorial unit that comprises Greenland, therefore suggesting that if an island the size of Greenland could be

[184] *Ibid*.
[185] Island of Palmas, *supra*, note 75.
[186] *Ibid*., p.23.

deemed a territorial unit, then obviously a far smaller geographical from could be so. This is, arguably, an oversimplification; even ignoring the other qualities and fixating upon the geographical nature of the compared territories he seemingly ignored the fact that Greenland is a largely unbroken landmass, comprising one island, whereas the Falklands (Malvinas) are comprised of, primarily, two major geographical units.

Confusingly, Dolzer referred to the *Minquiers and Ecrehos* case as being authority for his findings, stating that the Court simply pointed out the unity of the Islands as being essential. However, reading the passage from where Dolzer gleamed this insight, it is apparent that the Court applied a two part test, looking at, firstly, geographical unity, and, secondly, this is assessed in combination with the 'exercise of State functions in respect of the group'.[187] It cannot be stated with any degree of certainty, but given the small scale of the colonial outposts, at the time in question, it is suggestable that both France and Britain would have only been able to exert a limited degree of control over the geographical unit. However, Dolzer seemed to contend that this lacks relevance, and the factor of most significance is that both France and Britain claim sovereignty over the whole archipelago,[188] echoing the decision of the ICJ within the *Land, Maritime and Frontier Dispute* case.[189]

[187] *The Minquiers and Ecrehos Case*, *supra*, note 74, p.67
[188] Dolzer, supra, note 2, p.34.
[189] *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, (1992) ICJ Reports 351, pp.351&570.

However, this presumption by Dolzer seemingly ignored that the competing State demands are founded, initially, upon occupation being distributed between two States; one settling the eastern island and the other the western. Dolzer seems to be oversimplifying the situation in his desire to find a manageable answer to the legal question, with this providing further insight into how the legal analyst can conflate and confuse history in order to fulfil their own functional demands; in this instance to provide a concrete and manageable answer, which the absence of has, arguably, been a central component of the of the dispute. Furthermore, consider this example: a governor, located within a fortified outpost claims all to which he can perceive, which is equivalent to what the French and British were claiming. To find in favour of this claim is to, in effect, argue in favour of discovery as being an effective mode with which to obtain territorial control.

Looking beyond these concerns, it again needs to be recalled that the international lawyer must be cautious to interpret a legal framework in contravention of the doctrine of non-retroactivity of law. Critically, even were we to follow this strictly and comply with the doctrine of intertemporal law the resulting legal analysis would still be plagued with problems, for the reasons cited above in relation to the interpretation of historical legal provision. To highlight the level of uncertainty, both in terms of legal scope and existence, pertaining to the doctrine of contiguity throughout history it is worth examining the judgment of Judge Huber in relation to the application of the doctrine to the Island of Palmas, where he held that:

> [T]here are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law … the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness.[191]

Accepting this, whilst undertaking a legal analysis we must therefore be conscious to not impute our understanding of legal concepts onto the past, in order to fill-over any weaknesses in our understanding of the historical legal order. Equally so, we must not allow our own prejudices to have an equiparable effect. The analysis of the concept of contiguity further reinforces the problems that have plagued successive examinations of the dispute pertaining to the Falklands (Malvinas), and public international law generally. It illuminates how the analyst's presumptions reflect their prejudice and functional determinants for undertaking the project. It further confirms how the analyst often imputes their own desires, and how the analyst can ignore established legal principles, in this instance the doctrine of intertemporal law, to further bolster their own legal argument. However, what the analysis undertaken here cannot do is to provide a legal answer as to whether the territory should be considered one single territorial unit; all we can do is to accept the *de facto* position. In spite of this, it is interesting to note that both the UK[192] and Argentina[193] have posited opinions questioning whether or not the Islands should be separated, in order to provide

[191] *Island of Palmas*, supra, note 75, p.22.
[192] Letter of the Secretary of the Admiralty and the Colonial Department, 4 August 1832, cited in Down, supra, note 13, p.148.
[193] For the Argentine suggestion, please see the Argentine note of 19 February 1842, in Azpiri M, *Historia Completa de las Malvinas, volume 1* (Oriente, Buenos Aires 1966), p.185.

an answer to the legal status of the territory; nonetheless, it appears that these arguments have consistently failed to gain much momentum.

As indicated, the rationale for the above historical examination was, again, as much to establish the omnipresent difficulties when undertaking a review of the law in the past, as it was to provide the reader with a context of the territorial dispute. From here, the majority of the remaining issues that are identified are done so in order to furnish the reader with a more comprehensive contextual understanding of the dispute. This is not to say that the methodological concerns with regard to historico-legal analysis do note find application, but it is to suggest that it would be superfluous to continue to execute repeated examinations of these concerns within each event of historical significance; it is hoped that by this point that these are well established.

Shortly after the French had established their outpost on the Falklands (Malvinas), the Spanish Crown, in 1766, took possession of the French settlement[194] after Bougainville accepted 618,000 livres,[195] approximately £24,000,[196] roughly £4,000,000 today,[197] as collateral for the transfer. It is worthy of mention that the Spanish Crown protested at the existence of this French settlement prior to this transfer.[198] The formal act of territorial cession

[194] Declaration made by Bougainville, issues on the occasion of the transfer of the Islands to Spain available in, Dolzer, *supra*, note 2, p.241, annex 9.
[195] Gustafson, *supra*, note 10, p.8.
[196] UN Doc. A/5800/Rev.1 (1964-1965), p. 434.
[197] This is an estimate based on an average inflation rate of 2% per annum, <http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx> last accessed 22/09/2017.
[198] Lennox to Shelbourne, 17 September 1766, (Ro State Papers, France).

having occurred on 1 April 1767. Assuming France held title to the territory, the validity of the cession appears to be valid, and, as a result, Spain acquired the territorial rights of France, along with the associated problems. Consequently, this resulted in Spain and Britain having conflicting claims that, ultimately, resulted in a minor armed conflict in 1770.[199] It is at this point that Captain Hunt, the British Commander of Port Egmont, penned the first known legal analysis as to the legitimacy of British sovereignty over the Islands when he wrote to his Spanish counterpart, F. Ruiz Puente, that the territory 'belong to his Britannick Mayesty my Mater by right of discovery, as well as Selilement [sic]'[200]. The Spanish response was to depart for the territory with about 1,400 troops, aboard four frigates; a force far superior to the British garrison, with a single supporting frigate.[201] Consequently, with barely a shot fired, the British force surrendered, with the Spanish commander allowing the British force to leave, complete with stores and belongings; even going so far as to provide a receipt of the property that the British force was unable to take with them.[202]

Despite the civilised nature of the incident the expulsion of Britain from the Islands almost resulted in a major conflict between the two respective powers. However, to avoid the outbreak of war King Charles III of Spain proposed a peaceful settlement that would restore the pre-9 June 1770 status quo, to which the British agreed.[203] Notwithstanding avoiding an armed conflict, this

[199] Goebel, *supra*, note 5, p.271.
[200] Letter written by Captain Hunt (then British Commander of Port Egmont), addresses on December 10, 1769, to F. Ruiz Puente (then Spanish Governor on the Islands) (concerning British title to the Islands), in Dolzer, *supra*, note 2, annex 10, p.242.
[201] Gustafson, *supra*, note 10, p.12.
[202] Johnson, *supra*, note 138, p.415.
[203] Goebel, *supra*, note 5, p.294.

agreement was purely retrospective in action, serving no part in resolving the legal dispute over the Islands; if anything, the agreement served to reignite the legal debate, albeit to the detriment of Spain. Metford highlighted the main concern associated with Spain allowing Britain to return and how 'Spain's action in restoring the *status quo* has much embarrassed successive generations of proponents of the Argentine case'[204]

Having returned to the Islands in September 1771 the British force was evacuated on 20 May 1774. The British informed the Spanish of this removal, via a correspondence delivered by the British ambassador in Madrid, explaining the rationale for the departure as being one of economy.[205] However, the British contended that this evacuation did not equate to abandonment, with it being at this point whereupon the British left the infamous lead plate inscribed with the following words:

> Be it known to all Nations That Falkland's Islands, with this Fort … 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 colours left flying as a mark of possession by S.W. Clayton, Commanding officer of Falkland's Islands, A.D. 1774.[206]

[204] Metford, *supra*, note 78, p.470.
[205] Down, *supra*, note 13, p.74.
[206] Inscription on the Islands by Britain in 1774, on the occasion of the departure of British forces, in Dolzer, *supra*, note 2, annex 12, p.245.

According to Oppenheim, for withdrawal to equate to abandonment, the reversion of the territory to the status of *terra nullius*, the withdrawal must be combined with an intention to abandon, with O'Connell arguing that there is a 'presumption against reversion to the status of a *terra nullius*'.[207] Given that a State is unlikely to obtain anything from indicating its intention to abandon, as Hyde articulated, '[c]ircumstances indicating abandonment rarely occur'.[208] Critically, the British Government has 'always strenuously asserted and maintained'[209] its rights to the territory. Nevertheless, Goebel was of the opinion that the departure by the British did equate to an abandonment, as a 'definite presumption of law'.[210] This diversion from the typically accepted understanding of abandonment being, perhaps, indicative of his lack of legal training. Indeed, it would seem that abandonment is a relatively determinate legal concept and this interpretation seemingly falls outside of that articulated by a number of eminent international lawyers.

Yet, in order to strengthen this argument, Goebel drew the reader's attention to the text of the Nootka Sound Convention, between Spain and Britain, arguing that in signing the treaty the UK had recognised Spanish sovereignty over the Falklands (Malvinas), thereby, through implication, indicating that it must have

[207] O'Connell DP, *International Law* (Oceana Publications, London 1965), p.511.
[208] Hyde CC, *International Law: chiefly as interpreted by the United States* (Little, Brown, and Company, Boston 1922), p.197.
[209] Herbert Jenner, the Kings advocate writing to Lord Dunglas, the Under Secretary for Foreign Affairs, 28 July 1829, in Down, *supra*, note 13, p.166.
[210] Goebel, *supra*, note 5, p.466.

previously abandoned the territory. In this regard Goebel focused on the words of Article 6 of the Convention, where it reads:

> [A]greed 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 coast situated to the south of the parts of the same coast and of the islands adjacent already occupied by Spain…[211]

Critically, there is no statement concerning the status of the Falklands (Malvinas), including the presence of a reservation stipulating British sovereign right to the territory. It is Goebel's submission that this omission confirmed the British abandonment. He went on to suggest that it was at this moment that 'Spanish right to the Falklands became absolute'.[212] However, questions need to be asked with regard to Goebel's submission: principally, can an inference drawn from an omission equate to evidence of an intent to abandon? Secondly, the inference drawn could easily turn the other way with it being submitted that was Britain of the perspective that it was the rightful sovereign title bearer, then a comment regarding the Islands would be superfluous to the context of the convention. There remain questions as to the legal significance of the Nookta Sound Convention; Goebel's position, and the counter proposal clearly highlight this, however, it is submitted that drawing an inference from an omission is a precarious, if not desperate, analytical route to take, with it being plagued by a

[211] Nookta Sound Convention (1790), Article 6; see also, unknown author, *Comments on the Convention with Spain* (T. Axtell, GB 1790); unknown author, *The Errors of the British Minister in the Negotiation with the Court of Spain* (J Debrett, GB 1790).
[212] Goebel, *supra*, note 5, p.466.

high level of uncertainty, therefore strictly limiting any legally binding conclusions to be extrapolated from it.

Moving on chronologically, after the withdrawal of the British garrison Spain alone retained a small settlement on the Islands. In 1776 Buenos Aires was made a viceroyalty, with its administrative zone encompassing the Falklands (Malvinas) territory.[213] However, in 1811 the Spanish settlement was vacated, and as Goebel stated, the 'islands were once again abandoned to the elements'.[214] Despite Goebel utilising the term abandon, there appears to be no resulting legal analysis, and it is suggested that he was using the term as it is understood in regular parlance, and not as a statement relating to the legal implication of the Spanish retreat. Nevertheless, questions can be drawn as to why Goebel failed to consider the significance of this – albeit, it is recalled that Goebel's application of the law of abandonment is flawed, if one takes a position favouring the analysis of the prominent international lawyers stated above – Spanish retreat, such as he had done with regard to the British vacation of the territory. However, it soon becomes apparent that had Goebel contemplated this, then it would have had severely detrimental implications for the Argentine claim that the territory belongs to Argentina by virtue of the application of the doctrine of *uti possidetis*.[215]

[213] *Ibid*., p.423.
[214] *Ibid*., p.433.
[215] An analysis of the Argentine argument in favour of an application of uti possidetis is undertaken in Chapter 4.

Shortly after Spain vacated the Falklands (Malvinas), Buenos Aires initiated a revolt against Spanish rule in 1816.[216] Argentina was successful in obtaining independence, in what can be considered an early act of self-determination, with it claiming, due to the application of the doctrine of *uti possidetis*, that the administrative borders of the Spanish viceroyalties should now take effect as the external borders of the newly emerged Argentine State.[217] Today's understanding of the doctrine of *uti possidetis* is that it tends to find application upon the cession of a territorial unit from a colonial entity, and arguably on the fracturing of a State, with the resultant territorial units acquiring the external borders that previously comprised the administrative borders of the colonial unit.[218] This would appear to be consistent with the Argentine position. In the instance of the Falklands (Malvinas) dispute, the claim is that with the independence of Argentina from Spain, Argentina inherited the Islands due to their inclusion within the Spanish colonial administrative zone for which Argentina comprised. For the moment it is sufficient to note that the doctrine is comprises a significant element of the Argentine claim, with this thesis addressing the doctrine in far greater detail at a later point.

Notwithstanding the legitimacy of the Argentine claim of sovereignty over the Islands, due to the application of the doctrine of *uti possidetis* at the point of independence, the territory was without human habitation until 1820, when the

[216] Rock D, *Argentina, 1516-1987: from Spanish colonization to Alphonsin* (Uniiversity of California Press, USA 1987), p.79.
[217] Pfirter EA & Napolitano SG, 'Secession and International Law: Latin American practice', in Kohen M (ed), *Secession: international Law Perspectives* (CUP, UK 2006), p.380.
[218] *Ibid*.

Buenos Aires government sent Colonel Daniel Jewett, a North American, aboard the frigate *Heroina*, to establish a formal settlement on the islands.[219] Upon arriving the ship was met with, approximately, fifty ships of foreign registration, undertaking fishing activities within the seas surrounding the Islands.[220] Jewett gave orders prohibiting fishing and hunting on the Islands, whilst formally claiming the territory for Argentina, with 'the national standart [sic] hoisted at the fort, under a salute from his frigate, in the presence of several citizens of the United States and Great Britain'.[221] It is important to note that this was not followed by any act of occupation until 1826.[222] On 20 August 1829 Argentina installed Louis Vernet as governor of the Islands. Not long after taking up this position Vernet informed all vessels that it was his intention to strictly enforce Argentine fishing regulations, stipulating that any infringement would result in the transporting of the accused to Buenos Aires for trial.[223] This proclamation was to, later, have a considerable impact on the Argentine settlement.

In 1831 Vernet seized three American registered vessels: the *Superior*, the *Harriet*, and the *Breakwater*. The crew of the three vessels were charged with violating the proclaimed Argentine fishing regulations. The *Superior* was allowed to set sail for sealing waters outside of Argentine jurisdiction, whilst the *Breakwater* was able to make good its escape. However, the *Superior* was

[219] Goebel, *supra*, note 5, p.434.
[220] Dolzer, *supra*¸ note 2, p.59.
[221] Declaration by Argentina on the Occasion of the Taking of Possession of the Islands, November 9 1820, Colonel Jewett, printed in Dolzer, *ibid*., p.252.
[222] Goebel, *supra*, note5, p.435.
[223] *Ibid*., 438.

ordered to enter the port of Buenos Aires, for the crew to stand trial.[224] Critically, Vernet is quoted as having stated that 'he could not take English Vessels with the same propriety he could American'.[225] This reticence to detain English vessels added to the sentiment that England, and not Argentina had title to the Islands, with Slacum, United States Consul in Buenos Aires, stating that 'no English vessel has been captured or molested. And Why? They durst not do it. And at the moment of seizing upon our vessels, they knew they stood upon disputed territory, and for which they had not the title deeds'.[226]

Following the activities of the USA within the Falklands (Malvinas) area, Britain despatched a force, aboard the *Clio*, a British sloop, to resettle the territory. The factual details surrounding the British activities are recounted in a report by Captain Onslow, of the *Clio*,[227] and within a report of the Argentine government.[228] It is noteworthy that there appears a great deal of concord between the opposing State reports, perhaps proving indicative of a high probability of factual accuracy.

On 20 December 1832, the *Clio* reached its intended destination, Port Egmont, on the Western Island. After examining the area, finding no human habitation, it departed for Berkeley sound, arriving on January 2, 1833. It was here that the

[224] *Ibid*., pp.438&439.
[225] Letter from Slacum, United States Consul at Buenos Aires, to Livingston, Secretary of State, 9 December 1831, printed in Manning W, *Diplomatic Correspondence of the United States: Inter-American affairs* (Carnegie Endowment for International Peace, Washington 1932), p.76.
[226] Letter from Slacum to Livingston, Secretary of State, 20 February 1832, printed in Manning, *ibid*., p.91.
[227] Report of Onslow, 1832, reprinted in Down, *supra*, note 13, p.155.
[228] Azpiri M, *Historia Completa de las Malvinas, vol. 2* (Oriente, Argentina 1966) p.87.

Argentine settlement was located, numbering, approximately, 40 persons. Captain Onslow, of the *Clio*, approached the settlement, and met with the Argentine commander, Pinedo. It was during these discussions that Onslow asserted the rights of Britain to the territory:

> I … requested him to embark his force and haul down his flag on shore … At first he acquiesced … on the morning of the third instant at 5 a.m. he visited me, to request to allow the Buenos Ayrean flag to be kept flying on shore till Saturday the 5th, when we would finally set sail, taking with him the force and such of the settlers as expressed a desire to leave the Islands. I told him his request was inadmissible, and that he must consider he was in port belonging to Great Britain … [he] was reluctant to strike his flag, I immediately landed, hoisted the Union …[229]

It transpired that Captain Onslow landed with the crew of three boats and hoisted the Union flag. There are no records of any shots having been fired. This came as little surprise to Down, who, in his study of the dispute, noted the obvious disparity between the two forces, noting how Argentine resistance would have been futile.[230] Following the capture of the port by the British force, Onslow departed the Islands on the 10 January, after passing command of the colony on to an Irish settler, who had been a resident on the island since 1826.[231] Shortly after a second British ship arrived, the *Tyne*, followed by the now famous *Beagle* on 1 March. In the summer of 1833 a mutiny took place, resulting in the loss of several lives, with the Islands being, effectively, out of British control.[232]

[229] Report of Onslow, *supra*, note 226, p.156.
[230] Down, *supra*, note 13, p.157.
[231] Dolzer, *supra*, note 2, p.104.
[232] Down, *supra*, note 13, p.162.

However, on 7 January 1834, a representative of the British Crown was stationed on the Islands, with this position being filled, permanently, since.[233]

Recorded accounts indicate that the Argentine Government, in 1833, was taken by surprise by the British reassertion of sovereign rights over the Falklands (Malvinas), noting that the relationship between Britain and Argentina had been amicable,[234] with the Argentine Foreign Secretary writing to Philip Yorke Gore, the British charge d'affaires in Buenos Aires, that '[t]his unexpected event has sensibly affected the feelings of the Government of Buenos Ayres', continuing to demand a 'competent explanation'.[235] This inability to reconcile the British act with the relationship enjoyed between the two States was partly as a result of the original British despatch indicating that Britain was asserting its territorial claim to the Islands never reaching Buenos Aires. This proving indicative of the problems of communication over vast distances encountered in the early nineteenth century. It transpired that the British despatch was, in actuality, forwarded to Rio de Janeiro.[236] Irrespective, for the Argentines, 'what had taken place the Government of Buenos Ayres could not but see a gratuitous exercise of the right of the strongest to humiliate and repress a powerless and an infant people'.[237] The displeasure at the British activity resulted in the Argentine government, from a very early stage, waging a wider public relations style campaign against the British, avowing that every measure would be followed 'to

[233] *Ibid.*, p.164.
[234] *Ibid.*, p.171.
[235] Letter of Philip Yorke Gore, British charge d'affaires in Buenos Aires,16 January 1833, reprinted in Down, *supra*, note 13, p.168.
[236] Down, *supra*, note 13, p.169.
[237] Gore to Palmerston, 14 February 1833, reprinted in Down, *ibid*., p. 171.

adopt such measures as may be most conducive to obtaining a declaration of the opinion of the world upon the matter, to which a government like that of England, which wishes to be considered as ranking among the most free and enlightened of Europe, cannot be indifferent'.[238] It cannot help but be noted that this campaign still continues today.

Lindsay has suggested that the taking of the territory, via the use of force – whilst, as indicated, for the most part is an unlawful manner of obtaining territory under international law, today – was perfectly permissible as a form of territorial acquisition during the early nineteenth century.[239] This is in stark contrast to the assertions of Lauterpacht, where he held that the use of force in order to acquire territory was 'repulsive to the idea of law'[240]; however it should be noted that Lauterpacht was writing in relation to the 20th Century legal regime. However, Lindsay drew the attention of the reader to the work of Sir John Fischer Williams, where he wrote that '[t]o say that force cannot give a good legal title is to divorce international law from the actual practice of nations in all known periods of history'.[242] Then, applying the doctrine of inter-temporal law, Lindsay wrote how the British use of force should be assessed by the legal standards of that time. However, and rather strangely, Lindsay failed to quote legal historians of the period in question, instead, he quotes Oppenheim and

[238] Government statement to the House of Representatives of the Republic, 23 January 1833, reprinted in Down, *ibid*., p.172.
[239] Lindsey, *supra*, note 169, pp.29-32.
[240] Lauterpacht H, *Private Law Sources and Analogies of International Law* (The Law Book Exchange, 2002).
[242] Williams JF, 'Sovereignty, Seisin and the League', (1926) 7 British Yearbook of International Law 24, p.35.

Jennings, who both wrote that conquest was historically a valid mechanism via which to acquire title. However, Jennings' position differed from that of Oppenheim, as Oppenheim was of the perspective that conquest must take place during a time of war,[243] whereas Jennings advocated that 'there may presumably be a title by subjugation or conquest, even where there has been no war or even hostilities in the technical sense, where the territory has nevertheless been seized by a display of armed force'.[244] It should be noted that the Permanent Court of International Justice, in the *Legal Status of Eastern Greenland* case, held that '[c]onquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat on of them [sic] sovereignty over territory passes from the loser to the victorious State'.[245]

Despite this, Williams seemingly suggested a logical position when he submitted that it 'would be a strange law that would give to the author of a homicide advantages which it denies to a mere highway robber'.[246] Ultimately, what these positions highlight is, once again, how nebulous the ascertainment of a historical legal position can be. This is not to suggest that conquest was not a lawful mode of territorial acquisition in the nineteenth century, as it undoubtedly was, but it is to suggest that is debateable as to whether a clearly determinate picture exists. As a result of this uncertainty it is, ultimately, highly unlike that the UK would reject one uncertain legal position in favour of another uncertain legal position. Indeed, the UK has refrained from utilising an argument based on conquest. In

[243] Oppenheim L, *International Law: a treatise, volume I, peace* (2nd Edn Longmans, New York 1912), p.305.
[244] Jennings, *supra*, note 154, p.53.
[245] *Legal Status of Eastern Greenland*, *supra*, note 183, p.47
[246] Williams, *supra*, note 240, p.27.

addition, was the UK to advocate a position in line with Lindsay's suggestions, then it is arguable that this would bolster the Argentine position that the Falklands (Malvinas) should be decolonised.

3.8: British Hegemony

Irrespective as to whether the territory was conquered, or reclaimed, the *de facto* territorial status, since Britain reasserted control over the territory, would appear to be relatively stable. The British government proclaimed that it has remained in 'open, continuous, effective and peaceful possession, occupation and administration of the islands since 1833 (save for 10 weeks of forcible Argentine possession in 1982)'.[247] It is upon this that the British claim relies, as a result of its peaceful unbroken administration, stipulating that the doctrine of prescription should have application.[248] It must be noted that the following is not a legal analysis undertaken with the intention of showing whether the doctrine should apply, it is merely presented in order to facilitate the construction of the context of the dispute.

The nature of the doctrine of prescription is that it is analogous to that of usucaption in Roman Law,[249] where 'the acquisition of territory [is] through

[247] Fifth Report of the Foreign Affairs Committee of the House of Commons, 1983-1984, (HC) 268-I0.
[248] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 9th Session, GAOR, UN Doc A/5800/Rev.1 (1964 -1965), at Chapter XXIII, para.114.
[249] Menon PK, 'The Acquisition of Territory in International Law: a traditional perspective' (1994) 22 Korean Journal of Comparative Law 125, p.146.

long standing possession'.[250] The reason for the British reliance on the doctrine can be clearly seen when one assesses the words of Shaw, where he wrote that '[p]rescription is a mode of establishing title to territory which is not *terra nullius* and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated'.[251] Given the indicated evidential difficulties pertaining to the territorial status of the Islands, this would clearly seem to be the most appropriate recourse for the UK. The doctrine was recognised by the International Court in the *Botswana/Namibia* case,[252] whereupon it tacitly agreed with the position taken by both States that acquisition by prescription requires possession to be peaceful and uninterrupted, public and for a protracted period of time.[253] It is accepted that there are two forms of prescription: acquisitive and extinctive.[254] In relation to the Falklands (Malvinas) dispute, acquisitive prescription is the one of relevance.

Acquisitive prescription requires long-term peaceful possession of a territory upon which no other claimant State has voiced open protest, whilst asserting its own title to the territory.[255] A successful claim based upon acquisitive prescription provides the triumphant State with complete right to the territory,

[250] Blank A, 'Johannes von Felden on Usucaption, Justice, and the Society of States' (2013) 74(3) Journal of the History of Ideas 403, p.404.
[251] Shaw, *supra*, note 105, p.504.
[252] *Case Concerning Kasikili/Sedudu Island (Botswana/Namibie)*, Judgment, ICJ Reports 1999 1045.
[253] *Ibid*., pp.1101,1103,&1106.
[254] Gravelle JF, 'The Falkland (Malvinas Islands: an International Law analysis of the dispute between Argentina and Great Britain' (1985) 107 Millennium Law Review 5, p.29; Johnson DHN, 'Acquisitive Prescription in International Law' (1950) 27 British Yearbook of International Law 332, p.335.
[255] Hall WE, *A Treatise on International Law* (8th Edn Oxford University Press, GB 1924), p.353.

whilst any previous possessor States rights are quashed.[256] In regard to the relevance of the doctrine to the Falklands (Malvinas) dispute, the Argentine position is that the UK's claim of the applicability of the doctrine is groundless, due to the Argentine State presenting a 'continuous attitude of protest'.[257] However, it is suggestable that this assertion by Argentina proves indicative of the manner within which historical facts are manipulated in order to fulfil the prejudices of the one undertaking the legal analysis. In contrast to the Argentine position Freedman illustrated how there have been significantly protracted periods of time where Argentina was silent, notably, should Freedman's information prove accurate, Argentina failed to pursue its claim from 1849 until 1884: a period totalling thirty-five years.

During this period, from British resettlement to the First World War, the economic link between Britain and Argentina was of huge significance for both nations, with it being noted that the relationship was 'more important than Egypt or China, and, perhaps, even India as a source of foodstuffs and raw materials'[258] for Great Britain; with this saying nothing of the huge levels of capital investment that Britain had undertaken in the region, resulting in at least one author claiming that it is reasonable to consider the economic dominance over Argentina as constituting informal empire.[259] Given this, it is of little surprise

[256] Johnson, supra, at note 252, p.332.
[257] Hope AFJ, 'Sovereignty and Decolonization of the Malvinas (Falkland) Islands' (1983) 6 (2) Boston College International and comparative Law Review 391, p.442.
[258] Ferns HS, 'Britain's Informal Empire in Argentina, 1806-1914' (1953) 4 Past and Present 60, p.60.
[259] *Ibid*., see also Ferguson N, *Empire: how Britain made the modern world* (Penguin Press, GB 2003), p.143.

that authors such as Hope see the Argentine silence as of being little relevance. The disparity between the Argentine and British military, during the period, would explain any dearth of protest.[260] This raises the question as to whether a power disparity could act to negate a period of silence on behalf of a later protesting State.

The *Chamizal Arbitration between the United States and Mexico*,[261] of 1911, held that for the application of the doctrine one must look at the evidence to deduce the existence of a protest that would act to successfully estop the effectivity of prescription, with the Joint Commission determining that diplomatic protest would be effective.[262] If this determination was accepted, it is questionable as to whether a power disparity could act to vitiate a thirty-five year period without protest; a power disparity would not negate diplomatic relations in the instance of a territorial dispute, it would merely restrict the disputant State's ability to obtain the territory by the use of armed force. Whilst discussing this lack of Argentine protest, it is worth drawing the reader's attention to the Argentine proposal of 1838, where the Argentine State offered that it would accede to the British claim of title to the Islands, in return for the cancellation of a national loan held with Barings Bank.[263] However, the legal implications of this offer should not be overstated, as it was more likely indicative of a weakness in the Argentine economy during the period than it was

[260] Hope, *supra*, note 255, p.442.
[261] The Chamizal Arbitration between the United States and Mexico: Minutes of Meeting of the Joint Commission, 10 June 1911' (1911) 5 American Journal of International Law 782.
[262] *Ibid*., p.806.
[263] Freedman, *supra*, at note 12, p.11.

a statement of acceptance of British sovereignty. It is noteworthy that during the year of 1838 the Argentine currency, the *peso papel*, was devalued by thirty-four percent,[264] a devaluation which would have hugely inflated the cost of any externally owed foreign debt.

In relation to the length of the proclaimed period of silence, it needs to be considered that Article IV (a), of the Treaty of Arbitration between Venezuela and Great Britain held that '[a]dverse holding or prescription during a period of fifty years shall make a good title'.[265] Evidently, the proclaimed Argentine period of silence falls below this threshold; however, this Article should only be taken as being indicative of a permissible period as to what period should be required to give effect to acquisitive prescription, and there should not be an assumption that this is reflective of the general position in international law. However, what this Article does provide is further insight into how uncertain the British claim of title to the territory by acquisitive prescription is. Consequently, any claim based on this doctrine would be plagued with legal and evidential difficulties. Nevertheless, this analysis is all based upon an assumption that the factual account is accurate, and it cannot go without saying that the doctrine is, evidently, one that would seem to favour the powerful. After the 1884 protest the Argentines have continued to regularly proclaim against the legality of the

[264] Edwards S, 'Latin America's Decline: a long historical view', NBER Working Paper No. 15171, (July 2009), National Bureau of Economic Research, p.17.
[265] The Treaty of Arbitration between Venezuela and Great Britain, signed at Washington and dated 2nd February 1897, available at <http://archive.org/stream/treatyofarbitrat00venerish#page/2/mode/2up> last accessed 10/12/2015.

British occupation, in 1888, 1908, 1927, 1933, and on an almost undisrupted yearly basis since the formation of the UN.[266]

With the birth of the UN, and the process of decolonisation that the organisation precipitated, the debate concerning sovereignty over the territory was reinvigorated. As indicated previously, the Falklands (Malvinas) are classified as a non-self-governing territory, by the UN. The preamble to General Assembly Resolution 1514 recognised the role of the UN in relation to 'the movement for independence in … Non –Self-Governing Territories', with it further identifying that 'the peoples of the world ardently desire the end of colonialism in all its manifestations'.[267] Relating to this, on innumerable occasions the UN, in the guise of the General Assembly and the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples,[268] have urged Argentina and the UK to:

> [P]roceed without delay with the negotiations … with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution … bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly Resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas).[269]

[266] Gustafson, *supra*, note 10, p.34.
[267] Preamble, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), 14 December 1960, UN Doc. A/4684.
[268] For the latest declaration by the Special Committee, with regard to the Falklands/Malvinas see: Special Committee on Decolonisation 4th Meeting, 14 June 2012, UN Doc. GA/Col/3238;
[269] GA Res. 2065, 16 December 1965, UN Doc. A/6014, p.57; see also Special Committee Res. A/AC.109/2003/24.

The voting outcome for this was unequivocal, with ninety-four States to zero States voting in favour, and with fourteen abstaining. This position has regularly been further reiterated by the Special Committee on Decolonisation.[270] Therefore, it is clear that a negotiated settlement is the UN's preferred mechanism for resolving the dispute. However, it must be noted that this preference for negotiation should not preclude the UK and Argentina from seeking to resolve the dispute via alternative mechanisms indicated within the UN Charter.

Whilst addressing Resolution 2065 it should not be ignored that the terminology utilised within Resolution 2065 has arguably prohibited, rather than promoted, the positive progress of the negotiations pertaining to the question of sovereignty over the territory. Most prominently, the inclusion of the indeterminate term 'interests' has proven highly divisive; the question this inclusion raises relates to whether the use of the term includes or restricts the applicability of self-determination as a legal doctrine available to the Island residents. Nevertheless, despite the weaknesses within the linguistic structure of the Resolution the expressed summons to negotiate adds further weight to support the centrality of negotiation in this piece.

[270] The Special Committee was established in order to oversee the implementation of General Assembly Resolution 1514, see GA Res 1654, 1962, UN Doc. A/1500. See, for example, with regard to the Falklands/Malvinas, Special Committee on Decolonisation 4th Meeting, 14 June 2012, UN Doc. GA/Col/3238.

Recalling what was noted in Chapter 1, it is apparent that little substantive progress has been made in relation to the negotiations. This lack of advancement was, on at least one occasion, expressly utilised as justification for the Argentine invasion of the Falklands (Malvinas) in 1982, with one Argentine academic commentator, Pinto, stating that the 'intent of the Argentine Republic when it recovered the Islands … was to recommence the negotiation process'.[271] Without addressing the legality of the Argentine initiated armed conflict, it would appear that the use of military force would appear a controversial manner within which to reignite the process of negotiation. Critically, any resulting territorial change to emanate from any ensuing negotiations would be vitiated by this use of force, as indicated within the Charter of the United Nations,[272] and where the Vienna Convention on the Law of Treaties, at Article 52, proclaims that a 'treaty is void if its conclusion has been procured by the threat or use of force'.[273] Consequently, the legal efficacy of Pinto's position seems doubtful.

Despite the long-standing history of the dispute, negotiations have been undertaken with regard to the future of the territory; however, progress has been dogged by an apparent reluctance of both parties to compromise.[274] A more comprehensive analysis of negotiations takes place in Chapter 5, therefore, for the moment it is sufficient to provide simply a flavour of what has occurred. A

[271] Pinto M, 'Argentina's Right to the Falkland/Malvinas Islands' (1983) 18 (1) Texas International Law Journal 1, p.10.
[272] UN Charter, *supra*, note 19, Art.2(3)&2(4).
[273] Vienna Convention, *supra*, note 108, Art.52.
[274] Beck, 'Cooperative Confrontation in the Falkland Islands Dispute: the Anglo-Argentine search for a way forward, 1968-1981' '(1982) 24 (1) Journal of Interamerican Studies and World Affairs 37, p.37.

common theme within Argentine literature is that these negotiations were little more than a 'smokescreen of perpetuation', with the intention of continuing the status quo.[275] The title of Gamba's text, 'El Peon de la Reina',[276] the Queens pawn, proving indicative of the general Argentine perception of the British attitude towards the Islands. Gonzalez wrote of the southern-hemisphere's evaluation of Britain as one of abstinence, and a desire to continue the imperial state of affairs.[277] However, the concern here is that the literature emanates from a prejudicial perspective that presumes negation to mean the eventual handing-over of territorial sovereignty. Furthermore, it seems to ignore that the British position, perhaps, is not as staunch as the Argentines would profess. This is not to say that Britain was pushing for territorial change, as indicated by the 1965 the British Colonial Office acquiescence to an Argentine invitation to initiate negotiations, where it was stipulated that on the question of sovereignty there was 'no room for compromise'.[278] For the British, to negotiate on the issue of sovereignty would be tantamount to a violation of the Falklands (Malvinas) resident's right to self-determination. Furthermore, there are possible wider implications for the British, such as the impact that it might have on Gibraltar, the Falkland Island Dependencies, and the British Antarctic Territory.[279]

Evidently, it is apparent that the British reluctance to negotiate was founded on wider geo-political reasons than on a desire to maintain sovereignty over the

[275] Gonzalez, *supra*, note 14, p.10.
[276] Gamba V, *El Peon de la Reina* (Sudamericana, Buenos Aires 1984).
[277] Gonzalez, *supra*, note 14, p.10.
[278] CO 1024/434, Letter, Bennet to Slater, 12 October 1965.
[279] CO 1024/433, Letter, Rennie to Creswell, 30 December 1964.

Islands. However, despite this, it is striking to note that in the period prior to the 1982 conflict there was an apparent move to remove this stumbling-block to conducive Anglo-Argentine relations,[280] which are assessed in greater detail where this thesis addresses the issue of diplomatic negotiations, in Chapter 5. Yet, as history continues to show, the movements towards negotiating the status of the Falklands (Malvinas) during this period proved, ultimately, fruitless. And, critically, this was to have severe ramifications, and resulted in the unnecessary loss of a significant number of lives.

3.9: The Argentine use of Military Force in 1982

This brings us to 1982, and the invasion of the Falklands (Malvinas) by Argentina, and the British military expedition, operation CORPORATE[281] that was sent to repel the invading force and eventually recaptured the islands.[282] To the British the conflict is known as the Falklands War, whilst in the Spanish speaking world it goes by the name *Guerra de las Malvinas.* It is commonly perceived that the invasion came about as a diversionary tactic by the ruling military junta, in Buenos Aires, to deflect attention from a worsening economic and politic situation within the State. However, Aquilla and Rasmussen have suggested that this reasoning is probably an oversimplification, as the Argentine government was encouraged by a rapidly shrinking power deficit, between

[280] Beck, *supra*, note 272, p.38.
[281] Freedman L, *The Official History of the Falklands Campaign: vol II* (1st Edn Routledge, GB2006), p.3. See, also, Middlebrook M, *Task Force: the Falklands War, 1982* (revised Edn Penguin Books, GB 1987); Middlebrook M, *The Argentine Fight for the Falklands* (Pen and Sword Military Classics, GB 2003); Hastings M & Jenkins S, *The Battle for the Falklands* (New Introduction Edition Pan Books, GB 1997); Yokota M, *Bibliography on the 1982 Falklands War* (The Rand Paper Series, Santa Monica 1985).
[282] Freedman, *Ibid*.

Argentina and the UK, and an assumption that, 'faced with a *fait accompli*', Britain would accept the Argentine occupation.[283] This happened to be premature, with the result being that British forces were able to retake the islands. Albeit, the conflict came at the cost of 907 lives.[284]

A detailed factual account of this conflict is beyond the purview of this thesis, as is an assessment of the debates undertaken within the UN between States at the time of the conflict due to the particulars providing little insight as to the contemporary status of the Islands within international law. However, given the political nature of many approaches to the pacific settlement of disputes it does prove necessary to provide some details pertaining to what occurred.

From a territorial dispute perspective the primary issue of relevance to emanate from the conflict was whether the British military operation was undertaken under the auspices of the right to self-defence, as characterised within Article 51 of the Charter[285] and customary international law,[286] with this precluding the prohibition on the 'threat of use of force' contained within Article 2(4) of the UN Charter.[287] There can be no argument as to whether the use of State controlled military forces to obtain control of territory under the *de facto* control of another State would constituted an armed attack. However, questions do arise

[283] Arquilla J; & Rasmissen MM, 'The Origins of the South Atlantic War' (2001) 33(4) Journal of Latin American Studies 739.
[284] For a breakdown of British casualties see Freedman, *supra*, note 279, pp.772-777.
[285] UN Charter, *supra*, note 19, Art.51.
[286] Kunz JL, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations' (1947) 41 American Journal of International Law 872, pp.877&878.
[287] UN Charter, *supra*, note 19, Art.2(4)

as to whether this attack would initiate Article 51 of the UN Charter was the State undertaking the armed attack the owner of legal title to the territory. The ICJ, within the *Oil Platforms* case, clearly stated that it was of the mind that the State claiming to be the victim of an armed attack, insisting upon the right to self-defence must 'show that its actions were necessary and proportionate to the armed attack made on it'.[288] This raises the question as to what is necessary and proportionate.

For Rodin, a question of imminence is subsumed within the proportionality component, where he quoted the work of George Fletcher, '[a] pre-emptive strike against a feared aggressor is illegal use of force used too soon; and retaliation against a successful aggressor is illegal use of force used too late. Legitimate self-defence must be neither too soon or too late'.[289] The problem with this definition is that it is far too indeterminate and leaves wide scope for abuse by belligerent States. Proving indicative of this problem is the use of armed force by India within the territories of Goa, Damao, and Diu; at the time Portuguese colonial enclaves.[290] The Indian Government forwarded the argument that Portugal had invented the legal fiction that the enclaves were an integral part of the Portuguese State; whereas, the reality was that Portugal had illegally occupied Indian territory, vigorously asserting that Portugal should have given effect to the 'numerous resolutions of the General Assembly with

[288] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003 161, p.187.
[289] Fletcher G, *Basic Concepts of Criminal Law* (Oxford University Press, Oxford 1998), p.133; see, also, Rodin, War and Self-Defence, p.41.
[290] *Case Concerning Right of Passage over Indian Territory*, Merits, (1960) ICJ Reports 6, p.7.

regard to the freedom of independent peoples'.[291] The argument continued to suggest that as the territory was an integral aspect of India, there could have been, therefore, no assertion of aggression levied against it. A great deal of synergy can be found with this and the Argentine position in relation to the Falklands (Malvinas).[292] Irrespective of this, the general understanding of the use of force seems to be, as articulated by Wright that irrespective of the many arbitrary boundaries prevalent throughout the world, with territorial change being desirable under self-determination, [294] the UN Charter is quite unequivocal in its dictates that international disputes should be settled 'by peaceful means in such a manner that international peace and security, and justice, are not endangered'.[295] This would seem to preclude the argument posited by India. It is interesting to note that India, quite strikingly, condemned the use of force by both sides of the conflict.[296]

Significantly, synergy can be found between the India incident and that of that Falklands (Malvinas), with one Argentine academic quoting Jennings, 'if the legal right to territorial sovereignty is to have any real significance it must on occasion at least be capable of subsisting even when divorced from possession … *titulus est justa causa possidendi quod nostrum est*'.[297] In this regard, Rodin posited that 'Britain's war for the Falklands/Malvinas was undeniably a

[291] Complaint by Portugal (Goa), Chapter 8 Consideration under the Council's Responsibility for the Maintenance of International Peace and Security, Repertoire of the Practice of the Security Council Supplement 1959-1963 (3rd Supplement), UN Doc. ST/PSA/1/Add.3, p.197.
[292] Pinto, *supra*, note 269, p.10.
[294] Wright Q, 'The Goa Incident' (1962) 56 American Journal of International Law 617, p.619.
[295] UN Charter, *supra*, note 19 Article 2(3)
[296] UN doc S/PV.2366, para.89.
[297] Jennings, *supra*, note 154, p.5.

defensive one, but in a deeper sense we cannot but be troubled by the question of whether Britain had the right to be there in the first place'.[298] This seemingly stems from the Marxist and Third World argument that colonial domination should be perceived as instances of continuing aggression, thereby providing justification for any use of force implemented with the intention of ejecting the colonial power. The argument posited by India was that it had been under colonial domination, and not able to give effect to self-defence until this time.[299] However, was this taken as a legitimate legal argument, regarding the permissibility of self-defence, then the imminence component of the proportionate strand of the right to self-defence suggested by Rodin, would be negated; was a State not militarily capable of defending its territory it could, arguably, as White contended, wait centuries for a shift in the balance of power relationship[300] between the two States to then strike out under the guise of self-defence. This seems problematic, counterintuitive, and would most certainly seem to transgress Article 2(3) of the UN Charter. In this regard, Security Council Resolution 502 shows that the UN Security Council was quick, albeit after concerted pressure from the UK, to condemn the Argentine use of force;[301] something that it failed to do during the Indian use of force in Goa.[302] Furthermore, the Argentine position resides on the presumption that it has *de jure* territorial sovereignty over the Falklands (Malvinas), a fact that is far from without dispute. The use of armed force is strictly curtailed under international

[298] Rodin D, *War and Self-Defence* (Oxford University Press, GB 2002), p.190.
[299] Security Council 987th Meeting, 1961.
[300] White ND, *Democracy Goes to War* (Oxford University Press, GB 2009), p.170.
[301] Resolution 502 (1982), 3 April 1982.
[302] The Soviet Union vetoing the USA sponsored draft resolution, Complaint by Portugal (Goa), Chapter 8 Consideration under the Council's Responsibility for the Maintenance of International Peace and Security, Repertoire of the Practice of the Security Council Supplement 1959-1963 (3rd Supplement), UN Doc. ST/PSA/1?Add.3, p.197.

law, and basing this use of force on a factor that is disputable is questionable at best. Nevertheless, the factual situation that arose between India and Portugal is indicative of the nature of international disputes, and that it is not always easily discernible as to which party is the initial aggressor; a point equally applicable to the dispute between the UK and Argentina.

3.10: The Post-Conflict Situation

Following the conflict, there was a relative normalisation of the relationship between the two countries, with agreements relating to fishing rights[303] around the Islands, with a regular flight service departing from Argentina.[304] However, recently there has been a significant souring of the relationship, with one commentator noting that 'stormy water lie ahead'.[305] Resonating with this perspective, the Argentine permanent representative to the United Nations, in a letter to the organisation, stated that 'the dispute with the [UK] can be settled only by the restoration of the Islands to the national heritage of the Argentine Republic';[306] a position that is indicative of the Falklands (Malvinas) dispute being a deeply rooted 'political and cultural problem that intensely affects Argentina's external policy and much Argentinian thinking'.[307]

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[303] Joint Statement by the British and Argentine Delegation, Madrid 15 February 1990, UN Doc. A/45/136, para.7; Joint Statement on the Conservation of Fisheries, 28 November 1990, reprinted in Dolzer, *supra*, note 2, p.451.
[304] Joint British and Argentine Statement, Madrid 19 October 1989, reprinted in Dolzer, *supra*, note 2, p.427.
[305] Dodds K, 'Stormy Waters: Britain, the Falkland Islands and UK – Argentina Relations' (2012) 88 (4) International Affairs 683, p.700.
[306] Letter from the Permanent Representative of Argentina to the United Nations, 25 March 1975, reprinted in UN Doc. A/31/23 Rev.1.
[307] Palermo V, 'Falklands/Malvinas: in search of common grounds' (2012) 3 (1) Political Insight 18, p.18.

Evidently, the 1982 armed conflict failed to meaningfully resolve the dispute, and tension between the two States have ebbed and flowed since. There have been periods of agreement, whereby the relationship between the UK and Argentina has significantly developed. These periods would typically be characterised with events such as with the agreement of fourteenth July 1999,[308] the opening of access and air services, with the resumption of direct scheduled civil air services between 'Chile and the Falkland Islands',[309] and with enabling Argentine citizens the ability to 'visit the Falkland Islands, on their own passports'.[310] During these amicable periods confidence building has long been seen as key towards overcoming the dispute. For example, it was agreed that a memorial to members of the Argentine service personnel killed during the 1982 conflict should be raised in the Argentine cemetery on the Falklands (Malvinas),[311] and that Argentina should continue to work with the UK towards the removal of the remaining land mines that were still present on the territory following the 1982 armed conflict.[312]

Nevertheless, Argentina has continued to apply pressure within international forums, contesting the current territorial status of the territory, and recent years had seen a steady decline of the relationship between the two States. In 2010

[308] Agreement of 14th July 1999, <http://www.fiassociation.com/shopimages/pdfs/8.%201999%20Joint%20Statement.pdf> last accessed 20/09/2017.
[309] *Ibid*., Part II
[310] *Ibid*., Part II
[311] *Ibid*., Part IV.
[312] *Ibid*.

Argentina closed it ports to ships visiting the territory, unless prior authorisation had been attained from the Argentine authorities.[313] In addition to this, Argentina has persistently protested when it comes to the development of offshore oil extraction in the waters surrounding the territory. For example, in 2010 the Argentine government delivered a strong protest to the UN in relation to what it deemed the 'granting of so-called British licences to explore for oil and gas.[314] This position was restated by a letter from the Permanent Representative of Argentina to the UN Secretary-General, later that year.[315] However, the UK and Argentina have recently sought to reach an accord with regard to the extraction of hydrocarbons, particularly from the Sea Lion oil field, given that both States would gain to benefit from the exploitation of this resource.[316] It is still unclear as to whether this pendulum will stop swinging, and if it does on which side it might rest.

Linked to the issue of oil extraction, it has already been mentioned, in Chapter 1, that Argentina has been pressing the issue as to the scope of its territorial waters, even going so far as to claim that the Commission on the Limits of the Continental Shelf had suggested that it had title to the waters surrounding the Falklands (Malvinas).[317] This is despite the Commission clearly noting that it

[313] Watkins E, 'Argentina Closes Ports to Ships visiting Falklands' (17 February 2010), <http://www.ogj.com/articles/2010/02/argentina-closes-ports.html> last accessed 10/08/2017.
[314] Letter dated 3 February 2010 from the Permanent Representative of Argentina to the United Nations Addressed to the Secretary-General, 8 February 2010, UN Doc A/64/653.
[315] Letter dated 15 March 2010 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, 17 March 2010, UN Doc A/64/711.
[316] <http://www.ogj.com/articles/2016/09/argentina-uk-to-seek-falklands-oil-accord.html> last accessed 10/09/2017.
[317] Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Argentina on 21 April 2009, 11 March 2016, <http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/2016_03_11_COM_SUM

would not give a decision over the disputed region, given that it is precluded by Rule 46.2 of its rules of procedure from undertaking any action that might 'prejudice matters relating to the delimitation of boundaries between States'.[318]

Finally, it is worth paying note to the current military climate in the South Atlantic. In this regard, the Argentine military has sought to upgrade its air force with, for example, the lease of twelve long range bombers from Russia. Ultimately, this attempt proved unsuccessful, but had it proven so it would have amounted to the first upgrade that the Argentine air force had received since before the 1982 armed conflict. Unsurprisingly, this resulted in a strong reaction from the UK government, which deployed two Chinook helicopters, and additional anti-aircraft defences in the territory.[319] However, this should be seen in light of IHS Jane's analysis of the Argentine military capacity, where it was noted that the Argentine Air Force is drastically cutting staff working hours and decommissioning its last fighter aircraft amid continuing budget issues. This, combined with the conclusions drawn by the UK Defence Journal, where it declared that the Argentines are 'now getting rid of their only semi-capable

REC_ARG.pdf> last accessed 10/08/2017. See also, Commission on the Limits of the Continental Shelf, 43rd session, Progress of work in the Commission in the Limits of the Continental Shelf, 17 April 2017, CLCS/98, p.12.

[318] Rules of Procedure of the Commission on the Limits of the Continental Shelf, Rule 46.2, 17 April 2008, Article XI, UN Doc CLCS/40/Rev.1.

[319] 'Fearing Russia May be Arming Argentina, Britain Beefs up Falkland Island Defences', (25 March 2015) The Telegraph <http://nationalpost.com/news/world/fearing-russia-may-be-arming-argentina-britain-beefs-up-falkland-islands-defences> last accessed 23/09/2017.

fighter aircraft' would seem to indicate that this deployment by the UK government was probably a significant overreaction.[320]

Future relations between the two States have, recently, started to look a little more optimistic, with the coming into office of Mauricio Macri. Indeed, in coming into office President Macri noted that he was going to seek a 'new kind of relationship'.[321] This is not to say that Macri was suggesting that he would not continue to press the Argentine claim to the territory, but that he desired to 'sit down and start talking about the subject and in the meantime find in which ways we can cooperate'.[322] In this regard, in September 2016 a Joint Communique was released whereby both States identified new areas of collaboration,[323] which included: the fight against corruption and organised crimes; the development of ties in the science and technology industries; and that the States were eager to work in cooperation in ensuring compliance with the Treaty of Paris within the framework of the UN Convention on Climate Change.[324] It is notable that the communique was silent regarding the dispute over the Falklands (Malvinas).

[320] Allison G, 'Argentine Military Capability Almost all Gone', (20 August 2015) UK Defence Journal <https://ukdefencejournal.org.uk/argentine-military-capability-almost-all-gone/> last accessed 10/08/2017.
[321] Watts J, 'Argentina's President: 'I will try to start a new kind of relationship' with the UK', (Tuesday 19 January 2016) The Guardian, <https://www.theguardian.com/world/2016/jan/19/argentina-president-mauricio-macri-falklands-cameron> last accessed 10/09/2017.
[322] *Ibid*.
[323] UK and Argentina Joint Communique: 13 September 2016 <https://www.gov.uk/government/publications/communique-between-argentina-and-the-united-kingdom/uk-and-argentina-joint-communique> last accessed 10/05/2017.
[324] United Nations Framework Convention on Climate change (1992) UN Doc FCCC/INFORMAL/84

This positivity aside, it should still be noted that Argentina has increased its military spending by 33.4 percent this past year, its biggest rise in history, and that it has plans to continue to increase the military budget to ensure that it matches 1.5 percent of the States gross domestic product.[325] However, alternative sources suggest that sustaining this vastly increased military spending are unrealistic, given that the Argentine government is enforcing strict austerity measures on other governmental departments.[326] It should also be noted that 2016 saw the first rise in British defence spending in six years, with the intention being to increase spending by 0.5 percent year-on-year, in order to continue to spend two percent of gross domestic product on defence spending.[327] However, it should be remarked that this increase is as a result of an increasing belligerent Russia and not a reaction to the Argentine military budget increases. It should also be mentioned that this budgetary desire does not take into consideration the impact that Brexit might have on the UK economy, and the consequences that it might have on defence spending.[328]

[325] Dunlop T, 'No, Argentina is not Spending $2 Billion on Military Equipment' (21 September 2017) UK Defence Journal <https://ukdefencejournal.org.uk/no-argentina-not-spending-2-billion-military-equipment/> last accessed 22/09/2017. See also, Ostrove B, 'In a Sensible Move Argentina's Defence Minister Decides not to Purchase Supersonic Jets' (16 February 2017) Forecast International <https://www.globalsecurity.org/military/world/argentina/budget.htm> last accessed 20/09/2017.

[326] <https://blog.forecastinternational.com/wordpress/in-a-sensible-move-argentinas-defense-minister-decides-not-to-purchase-supersonic-jets/> last accessed 10/09/2017

[327] <https://www.gov.uk/government/news/defence-budget-increases-for-the-first-time-in-six-years> last accessed 05/05/2017.

[328] Black J; Hall A; Cox K; Kepe M; & Silfversten, *Defence and Security after Brexit: understanding the possible implications of the UK's decision to leave the EU Compendium report* (RAND Corporation, GB 2017), pp.118-119, and see generally.

The impact of Brexit and the change in the political leadership of Argentina are the two most prominent features of the disputes recent history. It is not yet entirely clear what the combined effect of these two political movements will be, but it is very likely that Argentina will continue to push for negotiations regarding to sovereignty over the territory. From the British perspective, the UK government has been pressing ahead with its desire to sign free-trade agreements with States outside of the EU;[329] critically, given the significance of Argentina within the Mercosur trading block, it is arguable that the UK would have to act to appease Argentina if it was hoping to build free-trade agreements with the South American continent. It is worthy of note that the EU is currently negotiation a trade agreement with the four founding members of the Mercosur, which includes Argentina.[330] This raises one significant question, the answer to which remains outstanding: to what degree, if any, will the UK be willing to shift its position on the Falklands (Malvinas) in light of the economic uncertainties that the post Brexit world will bring?

3.11: Conclusion

It is clear from this analysis that the contemporary position is one of uncertainty between the two States, with inter-State relations being relatively cold. It is notable that there might not appear to be the threat, presently, of an imminent

[329] Liam Fox's Speech on Free Trade and Bilateral Trade and Investment between the UK and Mexico at HSBC's Headquarters in Mexico City, 27 July 2017, <https://www.gov.uk/government/speeches/brexit-and-global-trade-the-uks-approach> last accessed 20/09/2017. See also, Yeomans J, 'After Brexit, can the UK Build its Trade with Latin America' (14 August 2016) The Telegraph, <http://www.telegraph.co.uk/business/2016/08/14/after-brexit-can-the-uk-build-its-trade-ties-with-latin-america/> last accessed 20/09/2017.

[330] <http://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/index_en.htm> last accessed 20/09/2017.

armed conflict, but taking this narrow view of peace would be to perpetuate a status quo that has already in the past resulted in several armed conflicts. An innumerable quantity of academics have attempted to draw together the pieces of this puzzle in order to try resolve the dispute; yet, none of these have managed to provide a clear and persuasive argument, and the question as to which State should hold title to the territory still remains: the dispute remains stubbornly intractable.

The examination of the history of the dispute has built on the analysis of historico-legal methodologies undertaken in Chapter 2, to provide evidence that supports the theory that in historical disputes, where the factual matrix is uncertain, the guiding hand of personal bias will prove decisive in determining how the factual matrix will be interpreted. As a result, this chapter has highlighted one of the key issue behind this intractability; the heightened role of political bias in the assessment of a nebulous legal and factual history to which the Falklands (Malvinas) dispute is deeply rooted in.

Building on this analysis, and on the picture that has been built with regard to the conflict, Chapter 4 of this thesis continues to take a critical look at the leading legal arguments of the disputing States. It shows how it is not just the elements of the dispute that are grounded in this history that are uncertain, but that the contemporary legal norms argued by the UK and Argentina are, equally, uncertain. The result of this is that it creates a picture showing how deeply perplexing the dispute is; it is this nebulous nature that rests at the core of why

the dispute has proven so stubborn to resolve. In this regard, it must be recalled that the nature of interpretation, particularly in instances where the factual and legal matrix are highly uncertain, results in political bias being hugely significant to the outcome of any analysis.

Chapter 4: The Contemporary Legal Dispute

4.1: Introduction

The examination in Chapter 1 established the general theoretical framework within which this thesis undertakes the analysis of the Falklands (Malvinas) dispute. It challenged the orthodox approach to legal dispute settlement, that legal scholars have had a preponderance to adopt when addressing the dispute over the contested islands, and other intractable international disputes. Therefore, as it identified, the key rational behind the undertaking of this thesis is to move the dispute beyond this, thereby taking the dispute away from the adversarial nature of previous legal analysis. Consequently, it was argued that was this thesis to simply undertake another positivist approach, positioning one legal norm against the other, this would do little to aid with the disputes resolution. Therefore, in its place it was argued that the legal analyst should take a step away from claiming to be able to objectively determine on the applicable legal framework, whilst then going on to position one party's legal argument against the other's. Chapter 2 developed this line of reasoning further by suggesting that the same is applicable to a dispute's factual matrix, and that the legal scholar should accept that personal bias has a *significant* role to play in interpreting *highly uncertain* facts. Consequently, it was advocated that uncertain facts should be dealt with cautiously, and that their value should be restricted to context setting; thereby limiting their utility to aiding with our understanding of the underlying politics and nature of a dispute. Stemming from this Chapter 3 progressed to illustrate this argumentative position, whilst providing the contextual background to the Falklands (Malvinas) dispute.

Now that a workable contextual foundation of the dispute has been provided that sets the scene of the basis of the legal claims by the disputing States, it is possible to progress on to scrutinise the legal arguments posited by Argentina and the UK. In this regard this Chapter deconstructs the competing leading legal norms. Given their centrality to the disputes resolution the primary focus of this chapter is on *uti possidetis* and self-determination. Attention is drawn to the high levels of indeterminacy that both *uti possidetis* and self-determination, as legal norms, are inflicted with. This indeterminacy is not limited to just the content of the legal norms, it, also, applies to the connected issue of their application. In showing that our understanding of these legal norms is firmly rooted in the penumbra of uncertainty, this chapter elucidates on the notion that this results in the bias of the interpreter being of heightened significance, as indicated within Chapter 1, when conducting their legal analysis. This has significant ramifications for the approaches to dispute settlement that might find application in resolving the Falklands (Malvinas) dispute, to which this thesis turns after this chapter.

It should be noted that title to territory is relative, in that the recognised existence of title relates to the nature of any competing claim that another State may have over it.[1] For instance, when an international tribunal is undertaking an assessment as to with which State territorial title should rest, as noted by the

[1] Jennings, *The Acquisition of Territory in International Law: with a new introduction by Marcelo G. Kohen* (Manchester University Press, GB 2017), p.19

Permanent Court of International Justice, in the *Eastern Greenland* case,[2] a tribunal must take into consideration what the extent is 'to which sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to sovereignty, and the tribunal has had to decide which of the two is the stronger'.[3] It is this non-absolute nature of territorial title that enables the existence of competing territorial claims, and for them to subsist in spite of a State not holding effective possession.[4] The relevance of this for this thesis is that it underlies how Argentina can have a territorial claim over the Falklands (Malvinas) despite it not having held effective control of the territory for over 180 years (the few months in 1982 aside). Given what has just been stated, having developed a notion as to the nature of territorial disputes, and how possession can be disputed, this thesis now turns to the contestations of the disputing States.

4.2: The Legal Arguments of Argentina and the UK

Prior to undertaking a critical analysis of the leading legal arguments advocated by Argentina and the UK it proves helpful to recall the general positions of the disputing powers. As noted in the preceding chapters, since Britain established a permanent presence on the territory in 1833, Argentina has, albeit at times only intermittently, regularly voiced protests with regard to its existence. Despite the sporadic nature of these objections in the nineteenth century, since the creation

[2] *Legal Status of Eastern Greenland*, Judgements Orders and Advisory Opinions, (1933) PCIJ Series A/B 53.
[3] *Ibid*., p.46.
[4] Jennings, *supra*, note 1, p.18.

of the UN there has been a renewed urgency and consistency to them. The apex of this was in 1964 where there was a resurgence of Argentine interest in the territory. It was during this year that the Argentine government brought the issue before the Special Committee on the Situation with regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples. Jose Maria Ruda, representing Argentina, argued before the Committee that the territory had been 'illegally occupied by Great Britain since 1833, following an act of force which deprived [Argentina] of the possession of the Archipelago'.[5] The resulting report of the Special Committee occasioned the promulgation of General Assembly Resolution 2065 which was passed on the 16 December 1965, where the governments of Argentina and the UK were invited to 'proceed without delay with negotiations recommended by the Special Committee … with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas)'.[6] The consequences of this resolution, and its call to negotiate, are examined in detail in Chapter 5; for now the focus is on providing a more detailed examination of the legal arguments posited by the disputing States, on which this latter chapter is crafted.

[5] Ruda JM, 9 September 1964, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, in 19 UN GAOR Annex 8 (Agenda Item 21, addendum item part 1), UN Doc. A/5800/Rev.1.

[6] Question of the Falkland Islands (Malvinas) General Assembly Resolution 2065 (XX), 138th plenary meeting, 16 December 1965.

For the Argentinians '[t]he Malvinas are a part of the territory of Argentina, illegally occupied by Great Britain since 1833 … [i]n the course of these 131 years, we have never consented – and will never consent – to have part of our national territory wrestled from us by an illegal and untenable act'.[7] In this regard, the Argentine government is of a mind that their claim is relatively speaking stronger than the British claim, which is based on unlawful foundations. This purported superior Argentinian territorial claim to the Falklands (Malvinas) stems from the right that the predecessor State, Spain, may have had over the territory. This was addressed in detail in Chapter 3; therefore, it will not prove necessary to repeat what was stated, however, it is worth restating some of the key points. As raised by the Minister for Foreign Affairs and Worship of Argentina, Hector Marcos Timerman. According to Timerman's account, on the 3 January 1833, a 'British naval force had expelled the legitimate Argentine authorities and population for the Islands and that the colonial dispute remained unresolved, compromising the territorial integrity of Argentina'.[8] In this sense, the argument posited by Argentina is that Spain had acquired a legitimate territorial right to the territory, to which Argentina inherited when it became an independent State in 1816 at the Congress of Tucuman,[9] and the UK has been in violation of this since 1833. Critical to the Argentine argument is that this Spanish claim, albeit based on a nebulous factual matrix, is superior to the territorial claim of the UK, which is equally based on this same uncertain

[7] Ruda, *supra*, note 5. Please note that the 131 years reflects the date at which the speech was given.
[8] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Counties and Peoples: Falkland Islands (Malvinas), working paper prepared by the Secretariat, 12 March 2014, UN Doc. A/AC.109/2014/15, para 48.
[9] Congress of Tucuman (9 July 1816).

history. Consequently, it is the Argentine submission that upon seceding from Spain title to the territory was effectively transferred from the predecessor State, Spain, to the successor State, Argentina,[10] through an application of *uti possidetis*; a Roman law mechanism adopted by the emerging Spanish American republics.[11]

There are countless jurists who argue in favour of this this claim,[12] as, equally, there has been considerable ink spilled protesting against the applicability of the *uti possidetis* doctrine.[13] For the most part the scholarship favouring the Argentine position doesn't undertake a detailed analysis of *uti possidetis*, and the purpose for its existence as a legal doctrine. Indeed, inverse to this, for as Hope wrote, the focus is not on whether the doctrine was applied, or whether it should have been, but on the notion that the UK must have implicitly accepted the doctrines application, given that the UK failed to protest, or register any reservations concerning the Argentine claim to the territory. Bolstering this,

[10] Yearbook of the United Nations (United Nations, USA 1965) p.577; Question of the Malvinas Islands (Falklands), Letter dated 18 October 1982 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, 20 October 1982, UN Doc. A/37/553, p.8

[11] Moore JB, *Costa Rica – Panama Arbitration: memorandum on uti possidetis* (The Commonwealth Co Printers, USA 1913), pp.32-35.

[12] See, for example, Goebel J, *The Struggle for the Falkland Islands* (Yale University Press, USA 1982), pp.466-467; Pinto M, 'Argentina's Rights to the Falkland/Malvinas Islands' (1983) 18 Texas International Law Journal 1; Schwed A, 'Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute' (1982) 6 Fordham International Law Journal 433; Hope AFJ, 'Sovereignty and Decolonization of the Malvinas (Falkland) Islands (1983) 6 Boston College International and Comparative Law Review 391; Rubin AP, 'Historical and Legal Background of the Falkland/Malvinas' in Coll AR & Arend AC (eds), *The Falklands War: lessons for strategy, diplomacy and international law* (HarperCollins Publishers Ltd, GB 1985) p.9; Bolgna AB, 'Argentinian Claims to the Malvinas under International Law' (1983) 12 (1) Millennium: Journal of International Studies 39.

[13] Weber H, *"Falkland-Island" order "Malvinas"?* (Metzner, USA 1977), p.61; Freedman L, *The Official History of the Falklands Campaign, volume 1: the origins of the Falklands War* (Taylor and Francis, GB 2005), p 8&9.

attention is drawn to the British recognition of Argentine independence, in 1822,[14] and the treaty of amity, commerce, and navigation of February 1825,[15] with it being argued that these indicate British acceptance of the emergence of the Argentine State, and its territorial scope.

Yet, jurists countering the Argentine argument have proven, equally, critically illiterate. Here, the legal scholar, as does the British State, focus their attention on the notion that the territory was first discovered by the UK, and later settled, thereby vitiating the Spanish claim to the territory.[16] It is interesting to note that, Sir John Thomson for the UK, in his representation before the UN General Assembly regarding the British claim to the territory, failed to make any mention of Britain discovering the territory, in his 1982 address to the General Assembly.[17] It is possible that this was an accidental omission, but it is probably more likely that the British representative was keenly aware of the weakness of basing the territorial claim to the territory as a result of discovery, given the historical uncertainty surrounding the period of discovery. Nevertheless, the argument that British settlement precludes the applicability of *uti* possidetis is a position supported utilising 'evidence' from the highly uncertain factual matrix of the dispute.

[14] 12 British and Foreign State Papers (1824-1825), at 29.
[15] The Consolidated Treaty Series (1823-1824), at 255; see also Question of the Falkland Islands (Malvinas), 2 November 1982, UN Doc. A/37/PV.51, para.19
[16] Yearbook of the United Nations, *supra*, note 10, p.577.
[17] Question of the Falkland Islands (Malvinas), *supra*, note 15, paras.93-97

Supporting the claim that Spain could not secede territory which she did not possess, literature endorsing the British claim frequently draws attention to events of 1829.[18] During this year Louis Vernet was appointed as the political and military Governor of the territory. Until this point Britain had remained silent with regard to the existence of an Argentine presence on the islands, albeit this might have been as a result of ignorance more than acquiescence given that there was no representative of the British State in Buenos Aires prior to this point. Returning to the occurrences of 1829, with the British State now having representation in the Argentine Republic, a formal note of protest was submitted to the government in Buenos Aires by the British Charge d'Affairs. The contents of the note stated that 'the Argentine Republic, in issuing this Decree, [has] assumed authority incompatible with His Britannick Majesty's rights of sovereignty over the Falkland Islands denoting that Argentina should respect the British claim to the territory'.[19] The protest of 19 November 1829 went on to firmly reject the notion that the 'withdrawal of His Majesty's Forces from these Islands, in the year 1774, cannot be considered as invalidating His Majesty's rights'.[20] This protest was repeated in 1832,[21] shortly before a British force arrived at the territory in order to – what the British government deemed – reassert and exercise its sovereign rights. The letter from Commander Onslow, leading the British force, where it was stated that he was soon 'to exercise the

[18] Freedman, *supra*, note 13, p.6.
[19] British protest of November 19. 1829, against Argentina decree of June 10, 1828, British and Foreign State Papers, vol. 20 (1832-33), p.346.
[20] *Ibid*.
[21] Question of the Falkland Islands (Malvinas), *supra*, note 15, para.94.

rights of Sovereignty over these Islands' is further indicative of the British perception that it held title to the territory.[22]

In addition to this, it is often argued that even if Spain had acquired title to the territory, the withdrawal of a permanent outpost from the territory, in 1811, amounted to abandonment.[23] However, the notion that this act resulted in Spain abandoning the territory is as weak as that which suggests that the British did in 1774,[24] for, critically, there was no express statement by the Spanish State of an intention to abandon the territory. Indeed, the inverse of this would appear to be in accurate for pretty concrete factual evidence supports the notion that the Spanish State clearly stipulated that it was their intention to reoccupy the territory when favourable conditions returned.[25] Yet, it is notable that the strength of this British claim to the territory is not without its detractors even within the British government. For instance, in 1829 the then British Prime Minister, the Duke of Wellington, after having perused the documents relating to the territory, wrote how it was 'not at all clear to me that we have ever possessed the sovereignty of all these Islands'.[26] However, it should be noted that the Duke, in utilising the term 'all' was not arguing that Britain had no territorial claim, but that the claim may be limited to the territory surrounding Port Egmont.

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[22] Request by Commander Onslow to the representative of Argentina, to withdraw from Islands, January 2, 1833, British and Foreign State Papers, vol. 20 (1832-33), p.1197.
[23] Metford JCJ, 'Falklands or Malvinas?' (July 1968) 44 (3) International Affairs 463, p.471; Question of the Falkland Islands (Malvinas), *supra*, note 15, para.93.
[24] Goebel, *supra*, note 12, p.466.
[25] Metford, *supra*, note 23, p.471.
[26] Letter written by the Duke of Wellington, then Prime Minister, to Sir George Murray, 25 July 1929, Despatches, Correspondence and Memoranda of Field Marshal the Duke of Wellington, vol. XI (1877), p.41.

Given the uncertainty surrounding the discovery, and later settlement of the territory, it is unsurprising that the British government has sought to bolster its claim. It has been argued that the simplest approach for the British government would have been for it to base its title to the territory on the law of conquest. Lindsey undertook an extensive analysis of this approach to territorial acquisition in relation to the Falklands (Malvinas), and ultimately concluded that Britain, under the international legal regime of 1833, would have been deemed to have conquered the territory.[27] Furthermore, as Lindsey concluded, acquisition of title to the Falklands (Malvinas) 'by conquest remains the simplest foundation for United Kingdom sovereignty, for it does not require any degree of Argentine acceptance'.[28] Yet, it would appear that the British government is of a mind that this argumentative approach is politically distasteful, and it has, therefore, determined to base its claim on a more palatable mode of acquisition: prescription.[29]

An in-depth analysis of prescription was undertaken in the previous chapter, but by a way of a reminder it is useful to recall that territory is acquired via prescription when the territory in question is held for an extensively protracted

[27] Lindsey JM, 'Conquest: a legal and historical analysis of the root of United Kingdom Title in the Falkland Islands' (1983) 18 Texas International Law Journal 11, pp.30-32. That conquest was a valid form of territorial acquisition in the early nineteenth century can find support in the work of Lindley MF, *The Acquisition and Government of Backward Territory in International Law: being a treatise on the law and practice relating to colonial expansion* (Longmans, GB 1926), pp.160-165.
[28] Lindsey, *ibid*., p.32.
[29] Fifth Report of the Foreign Affairs Committee of the House of Commons, 1983-1984, (HC) 268-I0;

period of undisturbed possession.[30] Beyond this general definition, it should also be recalled that there has yet to emerge any clearly defined procedural steps, thereby resulting in significant questions remaining with regard to the application of prescription, and decisions are made on a case-by-case basis.[31] It is in light of this that the British representative to the General Assembly, in 1982, drew the Hall's attention to the 'fact that a permanent settlement was first established in the Islands in 1833 and the fact that the settlement has continued ever since to the present day'.[32] In addition, the British representative went on the stress that there have been '149 years of continuous, peaceful settlement'.[33] However, as noted by Shaw, a reliance on prescription as a basis for British title is problematic given that the Argentine State has intermittently protested about the British presence on the territory.[34] The weakness of this argument would seem to have been recognised by the British State, for the focus of the British argument has turned to a reliance on self-determination.[35]

The British government asserts that it 'has no doubt about … the principle and the right of the Falkland Islanders to self-determination, as enshrined in the Carter of the United Nations and in article 1 of the two United Nations

[30] Jennings, *supra*, note 1, p.34.
[31] Gravelle JF, 'The Falklands (Malvinas) Islands: an international law analysis of the dispute between Argentina and Great Britain' (1985) 107 Military Law Review 5, p.24.
[32] Question of the Falkland Islands (Malvinas), *supra*, note 15, para.92.
[33] *Ibid*.
[34] Shaw M, *International Law* (6th Edn Cambridge University Press, GB 2012), p.532.
[35] Falkland Islands (Malvinas), working paper prepared by the Secretariat, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 28 March 2017, UN Doc. A/AC.109/2017/6 p.12; Falkland Islands (Malvinas), working paper prepared by the Secretariat, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 8 March 2012, UN Doc. A/AC.109/2012/12, p.10.

Covenants on human rights'.[36] However, the Argentine government is of a perspective that the UK has spuriously invoked the principle of self-determination in order to justify the continued presence of the British colony on the contested territory.[37] In this regard, the Argentine State has long argued that the 'principle could not be invoked to violate the territorial integrity of existing States' and that '[s]elf-determination therefore did not apply to the inhabitants of the Malvinas Islands, who were not recognised as a people able to exercise that right under the relevant United Nations resolutions'.[38] It is worth noting the utilisation of the term principle as opposed to expressing self-determination as being a right. That both the UK and Argentina are able to, as will be shown, argue these polar positions with some authority is indicative of the indeterminacy of the legal norm of self-determination. This indeterminacy is a focus of the analysis that is undertaken in this chapter.

Therefore, it can be seen that there are two key arguments at the heart of the contemporary legal dispute: that of the application of *uti possidetis* and self-determination. That the legal arguments are addressed is not in order to generate an orthodox picture of international legal dispute settlement, as noted in Chapter 1. For, as stated, the purpose of the legal analysis within this thesis is to draw a critical picture of these legal provisions. In this regard attention is paid to the

[36] Falkland Islands (Malvinas), working paper prepared by the Secretariat, 28 March 2017, ibid, p.12.
[37] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Counties and Peoples: Falkland Islands (Malvinas), working paper prepared by the Secretariat, 12 March 2014, UN Doc. A/AC.109/2014/15, para.48.
[38] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Summary record of the 9th meeting, 23 June 2016, UN Doc. A/AC.109/2016/SR.9, para.40.

normative weaknesses within the two legal frameworks, with a focus being on the indeterminacy of the legal norms and how this provides scope for individual bias as being key when it comes to determining how the norm would be interpreted. The following section first undertakes an examination of *uti possidetis* questioning its applicability to the dispute. It then progresses to assess the UK's claim that the territory's residents should be free to express their desire to maintain links with the British mainland through the use of the right to self-determination.

4.3: A Critical Legal Analysis

4.3.1: Uti Possidetis

4.3.1.A: The Origins of a Doctrine

Given the centrality of *uti possidetis* to the Argentine argument the focus here will be on the nature of the doctrine, with it being deconstructed in order to provide the thesis with a contemporary understanding of its nature. In this regard, in order to develop a clearer understanding of the role and place of *uti possidetis* in contemporary international law, and therefore its place in the resolution of the Falklands (Malvinas) dispute, a significant degree of the analysis undertaken in this section is on the deconstruction of the contemporary manner within which *uti possidetis* is interpreted by international tribunals. In doing this a light is focused on the factors that have been at the core of the doctrines application by these tribunals. The aim behind the deconstruction is to crack open the concept in order to determine what resides at the core of this legal norm. But first, in order to establish how the current interpretation of *uti*

possidetis has emerged, it is essential that a picture is crafted as to where the doctrine originally emanated.

The concept of *uti possidetis* can be traced to a Roman Law interdict of the Praetor. The Roman law concept was commonly abbreviated to: *uti possidetis, ita possideatis*: 'as you possess, so may you possess'.[39] However, despite there being a general acceptance of this as a legal concept by Roman law scholars, there would appear to be no clear account as to the purpose behind the doctrine's birth, with the rationale behind its creation often going contested.[40] However, this is unsurprising given the time that has passed since its Roman law usage. In this regard, it is unclear as to whether its precise purpose was to ensure the protection of a better right, or to prevent a breach of the peace. This being said, further adding to the abbreviated understanding of *uti possidetis*, there does appear to be a significant degree of consensus as to the substantive content of the doctrine, beyond the initial questions over its inception. It is generally agreed that the interdict was employed to ensure that there was no alteration of an existing state of possession of property, between two individuals, whereupon one was contesting the validity of the current holder's ownership. Critically, the possessor of the land must not have obtained it through the use of force (*vi*), or via the employment of a clandestine method (*clam*), or some other revocable method (*precario*). As a result, irrespective of our lack of normative understanding behind the creation of the doctrine, it is apparent that its central

[39] Moore JB, *Costa Rica – Panama Arbitration: Memorandum on Uti Possidetis* (The Commonwealth Co Printers, USA 1913), pp.5–8.
[40] *Ibid*, 5.

function was to invalidate the use of force, or other prohibited modes, in acquiring title to the land.[41] It is also worth noting that juristic consensus points to the burden of proof being firmly on the side of the party contesting the current holder's title, the plaintiff, requiring this party to show that the property was acquired via a prohibited means in order to vitiate the holder's title.[42]

According to Muirhead, the doctrine was primarily utilised as a protective tool for those in possession of public land, with who the property was not legally entitled. Muirhead continued by stating that this occupancy was not only recognised, it was actually sanctioned by the state, and, as a result, it was in the public interest that this occupation should be protected against any disturbance from an adversary to the possession. In effect, the interdict's primary purpose was to ensure the maintenance of the *status quo*. Subsequent to this maintenance an inquiry would determine which of the disputants was in actual possession, and thereby, which of the disputants was in violation of the interdict by contesting the possession.[43] Therefore, in summary, the Roman law manifestation of *uti possidetis* had application purely to private disputes, and was merely temporary in nature, granting provisional possession to the holder of real property during the litigation process.[44]

[41] Buckland WW, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, Cambridge 1921), p.728.
[42] *Ibid*, p.728.
[43] Muirhead J, *Historical Introduction to the Private Law of Rome* (2nd Edn Adam and Charles Black, London 1899), p.206.
[44] Buckland, *supra*, note 41, p.734.

In its contemporary manifestation *uti possidetis* finds little synergy with its Roman law counterpart, with the general understanding of the doctrine being that it provides that 'new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power'.[45] The American jurist Hyde usefully articulated the application of the principle as follows:

> When the common sovereign power was withdrawn, it became indispensably necessary to agree on a principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was a colonial uti possidetis; that is, the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State.[46]

Turning upon this, Oppenheim provided the definition that upon independence the territorial limits of a State will be dependent upon the same borders that were so defined whilst they still constituted an administrative unit of the previous colonial power.[47] Fundamentally the doctrine in its existing international form differs in a number of significant ways to the ancient Roman interdict: first, as Bluntschli argued, the doctrine's application under international law is in relation to territorial sovereignty, and not the private property rights of individuals; second, as Bluntschli continued to suggest, the recognition of the territorial right, as a result of the doctrine's application, is of a definitive and

[45] Shaw, *supra*, note 34, p.97.
[46] Hyde CC, *International Law, Chiefly as Interpreted by the United States: volume 2* (2nd Edn Little Brown, Boston 1947), p.499. The definition of Hyde, albeit proving suitable in this instance, is a substantially abridged explanation of the doctrine. For a more comprehensive account of the classic understanding of uti possidetis see Moore, supra, note 39.
[47] Oppenheim LFL, *International Law: Volume 1* (9th Edn Longman, London 1992), p.670.

permanent status, as opposed to the temporary nature as envisaged within the Roman law scheme.[48] However, Bluntschli failed to address what Moore considered the most fundamental distinction: where the Roman law interdict proved fatal to the acquisition of land by the use of force, the doctrine, as implemented within the international legal order, makes no such distinction, with the manner that the territory was initially acquired proving irrelevant.[49] It would seem that the international legal translation of the doctrine is at odds with its Roman law form, other than where it fixates on the abbreviated Roman law expression *uti possidetis*, *uti possideatis*. Ultimately, this transformation of the doctrine is inextricably linked to the consequences of European colonialism and its eventual demise.

4.3.1.A: South American *Uti Possidetis*

The current international formulation of *uti possidetis* can trace its origin to the dissolution of the Spanish and Portuguese empires. In this regard, *uti possidetis*, in this form, was initially adopted – 1810 within South America, and 1822 for those states within Central America – and developed by the emerging South American states[50] upon obtaining independence from the Iberian mother countries, in the early nineteenth century.[51] The newly emergent South American states regarded their territorial stability as being of central concern, and in order to ensure the protection of this stability these states adopted a policy

[48] Bluntschli JK, *Le Droit International Codifié* (Guillaumin et cie, Paris 1895), pp. 401&402.
[49] Moore, *supra*, note 39, pp.8–9.
[50] *Ibid*., pp.32–35, raises questions as to when this adoption was truly manifested.
[51] Alvarez A, 'Latin America and International Law' (1909) 3 The American Journal of International Law 269, p.342.

of *uti possidetis*. The commonly accepted primary rationale for this was that it prevented any renewal of European colonisation by ensuring that no aspects of the continent could be deemed *terra nullius* (territory belonging to no state),[52] irrespective of whether or not the territory itself was effectively occupied by the emergent entity. A clear indication of this application was given in the *Colombia – Venezuela* Arbitral Award, where it was stated by the Federal Council of Switzerland that *uti possidetis*:

> [O]ffered the advantage of establishing an absolute rule that there was not in law in the old Spanish American any territory without a master; while there might exist many regions which had never been occupied by the Spaniards and many unexplored or inhabited by non-civilized aborigines, these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish Province to which these territories were attached by virtue of the old Royal Ordinances of the Spanish Mother Country.[53]

Further stressing this, the *Beagle Channel* arbitration case held that '*uti possidetis* was a convenient method of establishing the boundaries of the young Spanish-American States on the same basis as those of the old Spanish administrative divisions'.[54] The ICJ, within the *El Salvador/Honduras* case, is of no doubt about the importance of the doctrine, finding that its application resulted in 'certain and stable frontiers throughout most of Central and Southern America'.[55]

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[52] Brownlie I, *Principles of Public International Law* (7th Edn Oxford University Press, Oxford 2008), pp.127–28; Shaw, *supra*, note 34, p.98.
[53] *Colombia – Venezuela Arbitral Award*, 24 March 1922, Federal Council of Switzerland 228; see also Scott JB, 'The Swiss Decision in the Boundary Dispute between Colombia and Venezuela' (July 1922) 16 American Journal of International Law 428.
[54] *Case Concerning a Dispute between Argentina and Chile concerning the Beagle Channel*, 19 February 1977, Reports of International Arbitral Awards, vol.XXI, 53, p.82.
[55] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)*, Judgement, (1992) ICJ Reports 351, p.386.

Despite these assertions, it is possible to contrast these findings with the work of Lalonde, who suggested that the impact of *uti possidetis*, within Latin America, has often been overstated, and that the doctrine only became of relevance once the newly emerged entities had already been identified, and with their independence confirmed.[56] For example, it was only in 1847, at the signing of the Treaty of Confederation, that the majority of South American States agreed upon the utilisation of *uti possidetis*, giving it retroactive effect, crystallising the 1810 administrative boundaries.[57] Additionally, attention needs to be further drawn to how uncertain the doctrine of *uti possidetis* was. For instances, there were two competing approaches that bordering States might advocate as being the manner within which the doctrine should be applied. For example, one State would argue that the boundary should be taken as the administrative boundary that legally existed at the exact moment of independence, while the other party was of a mind that the doctrine of *uti possidetis* required the new international boundary to be drawn along the boundary that was effectively occupied.[58] The first approach is called the *uti possidetis juris* line, whilst the second is known as *uti possidetis de facto*, with this form of legal conflict being played out in the dispute between Bolivia and Chile, over the Atacama Desert region.[59]

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[56] Lalonde S, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's University Press, Canada 2002), p.56.

[57] Treaty of Confederation between the Republics of Peru, Bolivia, Chile, Ecuador and New Granada, 8 February 1848 (Treaty of Lima), <www.oas.org/sap/peacefund/VirtualLibrary/CongressofLima1847/Treaty/TratadoConfederacionPeruBoliviaChileEcuadorNuevaGranada.pdf> last accessed 20/6/2017.

[58] Woolsey, 'Boundary Disputes in Latin-America', (1931) 25 American Journal of International Law 324, see generally.

[59] St John RB, 'Boundary and Territory Briefing', (1994) 1 (6) Boundary and Territory Briefing 1, pp.2,7,&25.

Perhaps as a result of this lack of clarity, as Lalonde argued, despite South American States stipulating their observance to the doctrine, boundary treaties and negotiations were, for the most part, undertaken with reference to effective occupation,[60] as opposed to what the legally determined boundaries were, as indicated within the *Clipperton Island* case, between France and Mexico, where the arbitrator deemed the *manifestation* of sovereignty as being essential.[61] Linked to the problems of stipulating what the legally determined administrative boundaries were, evidence suggests that determining where the pre-decolonisation boundaries resided had often proved problematic,[62] with the language utilised by the Spanish Crown, when undertaking changes to the administrative units that comprised is South American colonies, typically being unclear and imprecise.[63] Therefore, to argue that a well-defined picture of what the doctrine of *uti possidetis* constituted, and its legal significance at the time of Spanish decolonisation, would be to interpret an indeterminate doctrine in a manner which would best fit the subjective bias of the legal analyst. Fisher, writing with regard to this uncertainty in relation to the Guatemalan-Honduran boundary dispute,[64] argued that the conflict between the status of the legal administrative boundaries and effective control caused the core of the doctrine of *uti possidetis* to be highly uncertain at the time of the dissolution of the

[60] Lalonde, *supra*, note 56, p.57.
[61] 'Judicial Decision Involving Questions of International Law: France – Mexico: Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Islands' (1932) 26 American Journal of International Law 390, p.393.
[62] Lalonde, *supra*, note 56, pp.30–31.
[63] St John RB, 'The Boundary Dispute Between Peru and Ecuador', (1977) 71 (1) American Journal of International Law 322, pp.323-324.
[64] *Honduras border (Guatemala, Honduras)*, Report of International Arbitral Awards, 23 January 1933, volume II 1307.

Spanish Empire in the early nineteenth century.[65] With the consequence of this being that disputing parties supported their territorial claims with a reliance on the invocation of an 'indefinite and illusory concept of *uti possidetis*',[66] with this having resulted in the high number of territorial disputes that have plagued the South American continent since.

Looking at the Falklands (Malvinas) dispute, in light of this analysis it can be seen that Argentina, in claiming that it was the successor to the Spanish vice-royalty of the River Plate, has argued that any territories within the vice-royalty's legal remit of control, and not of that which Spain, through the vice-royalty of the River Plate, had effective control, given that Spain had vacated the territory in 1811 several years before Argentina obtained independence. Of significance, this governed region did, at least from an internal administrative perspective, include the disputed Falklands (Malvinas) territory, but it also included territory that later became Uruguay, Paraguay, Bolivia, and Chile.[67] It is also worth recalling that when the doctrine of *uti possidetis* was formally adopted, at the Congress of Lima, in 1848; some thirty-seven years after Argentina obtained independence.[68] Additionally, it should be noted that an Argentine representative was not present at the meeting. However, the legal significance of this is of questionable value, as the treaty could have been merely

[65] *Ibid*.
[66] Fisher FC, 'The Arbitration of the Guatemalan-Honduran Boundary Dispute' (1933) 27 American Journal of International Law 403, p.415.
[67] Freedman, *supra*, note 13, p.10.
[68] Goebel J, *The Struggle for the Falkland Islands* (2nd Edn Yale University Press, GB 1982), p.XIX.

confirming the regional international customary law that was already in existence.

In drawing together this analysis of the emergence of *uti possidetis* as a doctrine of international law has indicated how diminutive the core of certainty of the legal rule was during its emergence as an international legal norm in the early period of the nineteenth century. Therefore, the understanding of the *uti possidetis* doctrine that is argued by the Argentine State, and those jurists favouring the Argentine position, is not as clear as might first be apparent. Critically, given that the mainstay of our understanding of *uti possidetis* resides within the penumbra of uncertainty, this provides significant scope for politics and personal bias to influence how the doctrine is interpreted. In determining what factors might influence the manner with which the doctrine would be interpreted, it proves beneficial to continue to examine how the doctrine has evolved since its inception.

In spite of this lack of certainty, over a century later *uti possidetis* was adopted by the newly emergent independent African States[69] in their search for a solution as to how to best bestow their newly obtained territorial framework with legitimacy. The Organisation of African Unity (OAU) itself emphasised the significance of *uti possidetis*, when they covenanted to 'respect the borders existing on their achievement of national independence'. The OAU justified the

[69] OAU Resolution, Border Disputes Among African States, AHG/Res 17 (1), July 1964.

rationale behind this agreement when it stated, within the same resolution, that 'border problems constitute a grave and permanent factor of dissension'.[70] This resolution is evidential of a desire amongst the emerging African entities to avoid territorial conflicts, thereby mirroring that of the perceived needs of the nascent South American states, with *uti possidetis* being seen as the most pragmatic mechanism whereby to quickly furnish the new African international order with stability. Castellino and Allen succinctly articulated this concern as one where it was feared that the newly emergent African states 'remained vulnerable to vested interests who it was feared might try to seize power on the departure of the colonial ruler'.[71] The significance of *uti possidetis*, in relation to decolonisation in Africa, finds support within numerous ICJ determinations; most notably the seminal *Case Concerning the Frontier Dispute*,[72] where it held that *uti possidetis* is 'a firmly established principle of international law, where decolonization is concerned'.[73] However, the Court did go on to warn, within the same decision, that the application of *uti possidetis* will often provide borders that prove unsatisfactory, but that this is of no legal significance, as these frontiers, 'possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law'.[74] Such a determination is seemingly problematic, with the Court positioning the maintenance of stability,

[70] *Ibid*. It must be noted that the term '*uti possidetis*' is not directly utilised, yet it is generally accepted that the document is referring to such; see Radan P, 'Post-Secession International Borders: a critical analysis of the opinion of the Badinter Arbitration Commission' (2000) 24 Melbourne University Law Review 50, p.59.
[71] Castellino J; & Allen S, *Title to Territory in International Law: A Temporal Analysis* (Dartmouth Publishing Company, GB 2003), p.12.
[72] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, Judgment, (1986) ICJ Report 554.
[73] *Ibid*, p.565.
[74] *Ibid*, p.633.

order, and peace at the fore, relegating considerations of human free will to being a secondary factor.

4.3.1.C: *Uti Possidetis* as a Contemporary Doctrine of International Law

Despite the often-unacceptable territorial arrangements to have resulted from the application of *uti possidetis*, the doctrine's use has not proven limited to the colonial context. For example, upon the dissolution of the former USSR, Article 5 of the Minsk Agreement provided that the seceding entities respect the existing borders 'within the Commonwealth'.[75] Of even greater significance, with regard to the crystallisation of *uti possidetis* as an international legal norm, the dissolution of Yugoslavia, with the Badinter Arbitration Commission, the European Community's – as it then was – Conference for Peace in Yugoslavia,[76] in *Opinion No 3*, stipulating that:

> *[U]ti possidetis, though initially applied in settling decolonisation issues in America and Africa, is today recognised as a general principle … the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles.*[77]

[75] Minsk Agreement Establishing the Commonwealth of Independent States 1992, (1992) 31 International Legal Materials 143, p144.

[76] For an account of the work of the Badinter Commission see, inter alia: Pomerance M, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998–1999) 20 Michigan Journal of International Law 31–58; Weller M, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 American Journal of International Law 569–607; Introductory Note by Szasz PC, 'Documents Regarding the Conflict in Yugoslavia' (1992) 31 International Legal Materials 1421–26.

[77] 'Conference on Yugoslavia: Arbitration Committee, Opinion No. 3' (1992) 31 International Legal Materials 1499, p.1500, author's own emphasis added.

It is this logic that this section now goes on to deconstruct.

Further instances exemplifying the application of the doctrine include: Quebec;[78] Scotland;[79] and Crimea.[80] Had Quebec and Scotland obtained independence, evidence points towards the likely use of *uti possidetis*, crystallising their present administrative borders as inter-state borders. The same was true for Crimea, upon it obtaining independence from Ukraine; however it must be noted that the inclusion of this example does not speak to the nature of the transfer of the territory that comprises Crimea.[81] The use of *uti possidetis*, in this instance, adds very little to the debate surrounding the doctrine's construction, but the independence, and arguable de-facto annexation of the territory by the Russian Federation, is, perhaps, indicative of how the tools of international law can be abused; it proves telling of the structural weaknesses embedded within the international legal system, particularly so with regard to the restriction on the use of force by members of the UN Security Council. In this regard, Krisch emphasised how the example brought into focus the fact that '[w]hen it comes to the use of force, some [S]tates have always been more equal

[78] Pellet A, et al, 'Report by Alain Pellet: Legal Opinion on Certain Questions of International Law Raised by the Reference' in Bayefsky A (ed), *Self-Determination in International Law: Quebec and Lessons Learned* (Kluwer Law International, The Hague 2000) pp.85–123.
[79] *Scotland's Future: Your Guide to an Independent Scotland* (Scottish Government, GB 2013) p.557.
[80] Bjarnason M, 'NATO, Changing International Borders in Ukraine: Crimea – Russia's Bold Move', <www.nato.int/docu/review/2014/Russia-Ukraine-Nato-crisis-2/Borders-Ukraine-Crimea-Russia/EN/index.htm> last accessed 21/06/2017.
[81] Ozsu U, 'Ukraine, International Law, and the Political Economy of Self-Determination' 16 (2015) German Law Journal 434, p.440; Yue H, 'Crimea's Independence from Ukraine and Incorporation into Russia: the unlawfulness of Russia's use of force' 7 (2016) Beijing Law Review 181, p.181. For an insight into the history of the Crimean region, see Geiss R, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind' (2015) 91 International Law Studies 425.

than others'.[82] Irrespective of this characteristic of international law, it is noteworthy that Russia sought to justify its activity through the use of legal terminology, seeking to present it as being legally permissible.

Returning to the question of the logic behind the implementation of the doctrine of *uti possidetis*, evidently, as Shaw illustrated, the doctrine 'provides the new State with territorial legitimacy',[83] but the question remains as to what does this legitimacy reside upon? In this regard, Oppenheim emphasised the link between *uti possidetis* to that of the stability of boundaries.[84] However, this particular approach to statehood reduces the transmission of sovereignty – and legitimacy – down to spatial and territorial conditions, at the expense of the human. More problematically, there is evidently a clear and undeniable distinction between an international boundary, and one created purely for internal administrative purposes.[85] This reflects the ICJ's pronouncement in the *El Salvador/Honduras* case, where it held that:

> *it has to be remembered that no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries, uti possidetis is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.*[86]

[82] Krisch N, 'Crimea and the Limits of International Law', EJIL: Talk!, <www.ejiltalk.org/crimea-and-the-limits-of-international-law> last accessed 21/06/2017.
[83] Shaw, *supra*, note 34, p.97.
[84] Oppenheim, *supra*, note 47, p.670.
[85] Shaw, *supra*, note 34, p.116.
[86] *Land, Island and Maritime Frontier Dispute*, *supra*, note 55, p.388; such an application is equally appropriate to the African colonial situation.

Ratner's writings addressing *uti possidetis* are an essential starting point, whilst assessing the contemporary distinction between international boundaries and internal administrative lines.[87] As he showed, the primary function of an international boundary, today, is to delimit the scope of the States' territorial jurisdiction, echoing the position of the ICJ within the *Aegean Sea Continental Shelf* judgment.[88] Furthermore, he continued to note how these international borders enable a State to exercise some degree of control as to the movement of tangibles – and in some instances intangibles – into, and out of its territory.[89] However, it must be noted that some international borders are of a more porous nature than others; this may be as a result of a lack of effective border control, or as an intended consequence of reductions in the restrictions, as within the European Union, and those states party to the Schengen Agreement.[90]

The, for the most part, restrictive nature of an international border is in contrast to the openly permeable nature of an internal administrative zone; this will often result in families and communities being spread throughout differing administrative areas. Should this administering border crystallise, upon secession, into an interstate border, these communities could find themselves split.[91] Instrumental in this is that the internal administrative border is not drafted

[87] Ratner S, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90 The American Journal of International Law 590.
[88] *Aegean Sea Continental Shelf Case (Greece v Turkey)*, Judgment, (1978) ICJ Reports 3, p.35.
[89] Ratner, supra, note 87, p.602.
[90] 'Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement' (1991) 30 International Legal Materials 68.
[91] Ratner, *supra*, note 87, p.606.

paying heed to the future possibility of secession.[92] In regard to this, for the one wielding the power to demarcate where an administrative border should rest, little attention is likely to have been paid to the demographic patterns of those resident to the region, the focus is likely to have been on pragmatic factors relating to the efficacy of administration, to ensure the unity and effective function of the parent state.[93] Stemming from this, it is highly unlikely that those resident within the State had any impact upon the decision as to where to position the internal boundary; consequently, a border established by the ruling government is unlikely to be reflective of the wishes of those resident,[94] as with the arbitrary creation of Nigeria, comprising of three major ethnic groups, in order to fulfil the strategic and economic requirements of the British State.[95] A further advocated problem with the transformation of administrative boundaries is that a strict application of the crystallisation of the internal border will often result in pockets of minorities being contained within the territory of the newly emergent state, thereby propagating the likelihood of future antagonisms, as occurred with the dissolution of Yugoslavia.[96] With these criticisms in mind, in the African context, Judge Ajibola highlighted as to how:

> *The colonial penchant for geometric lines … has left Africa with a high concentration of States whose frontiers are drawn with little or no consideration for those factors of geography, ethnicity, economic convenience or reasonable means of communication that have played a part in boundary determinations elsewhere.*[97]

[92] Owen D, *Balkan Odyssey* (Indigo, London 1996) pp.34&35.
[93] Ratner, *supra*, note 87, p.602.
[94] Radan, *supra*, note 70, p.71.
[95] Kaladharan Nayar, 'Self-Determination Beyond the Colonial Context: Biafra in Retrospect' (1975) 10 Texas International Law Journal 321–45, p.322.
[96] Ratner, *supra*, note 87, p.617.
[97] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, (1994) ICJ Reports 6, Separate Opinion of Judge Ajibola, pp.52&53.

Ajibola went on to conclude, as a result, that the Court should bear in mind that the vast majority of African State borders are purely artificial in nature, established by the former colonial masters.[98] In spite of Judge Ajibola's warning, history has indicated a predilection for the utilisation of the doctrine; the consequence being that this adherence has resulted in conflicts between the doctrine, and other emergent norms within international law. This conflict should be kept in mind, for it is returned to later in this chapter when it addresses the application of self-determination to the Falklands (Malvinas dispute).

Consequently, given that *uti possidetis* has found application throughout the world, it comes as little surprise that the ICJ, within the *Case Concerning the Frontier Dispute*, held that *uti possidetis* is a 'general principle' and a rule of 'general scope'.[99] However, it then continued to add the caveat that this is only true in instances of decolonisation.[100] Despite the restriction noted by the ICJ within the *Case Concerning the Frontier Dispute*, the Badinter Commission, as indicated, extended the scope of the concept to all instances of secession, emphasising that this is as a result of *uti possidetis* being recognised as a general principle of international law. Evidently, the justification behind this extension is questionable. In this regard, academic opinion would seem to suggest that the approach taken by the Badinter Commission was arguably a misapplication of the ICJ's determination within the *Case Concerning the Frontier Dispute*, with

[98] *Ibid*, pp.53&54.
[99] *Case Concerning the Frontier Dispute*, *supra*, note 72, p.565.
[100] *Ibid*., p.565.

Vidmar suggesting that the Badinter Commission artificially stretched the judgment of the ICJ in 'an attempt at peace activism'.[101] Echoing Vidmar's position, Ratner was also of an opinion that the concept of *uti possidetis* had been artificially extended, arguing that the Commission had misrepresented *uti possidetis* as defined in the *Case Concerning the Frontier Dispute*,[102] recalling that the ICJ restricted the application of *uti possidetis* to instances of decolonisation. To add clarity as to why Vidmar and Ratner were of this opinion, it is worth examining the relevant section of the *Frontier Dispute* case, where it was held by the Court that *uti possidetis* is a 'principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers … therefore [as] a principle of a general kind which is logically connected with this form of decolonisation wherever it occurs'.[103] It is apparent that the ICJ was very careful to include terms limiting the scope of its judgment. However, as Ratner noted, the Badinter Commission's brief made no reference to these limiting qualifiers stipulated by the ICJ.[104] Indeed, it would appear that the Badinter Commission chose to ignore them. Nevertheless, at no point within the case, or others, did the ICJ stipulate that *uti possidetis* was strictly limited to instances of decolonisation, and given that the case related to a question of decolonisation it is of little surprise that the question of the application of *uti possidetis* to the dissolution of states was not addressed. Therefore, it would seem that there is a degree of certainty in relation to the core of the doctrine in relation to decolonisation, but beyond its application to instances of decolonisation, and the conclusions reached by the Badinter

[101] Vidmar J, *Democratic Statehood in International Law* (Oxford, Hart Publishing, 2013) 207.
[102] Ratner, *supra*, note 87, p.614.
[103] *Case Concerning the Frontier Dispute*, *supra*, note 72, p.566.
[104] Ratner, *supra*, note 87, p.614.

Commission, the scope of application of the doctrine remained uncertain. Therefore, recalling the opinion of Vidmar, that the Badinter Commission had extended the scope of *uti possidetis* through an act of peace activism, it can be seen how the indeterminacy of the doctrine, outside of the decolonisation process, enabled the Commission to interpret it in a manner that best suited the Commission's political objectives. Further indicating the significance of the objectives of the Commission in interpreting the scope of the doctrine, beyond the Badinter Commission report there is little evidence to indicate that *uti possidetis* should find application outside the decolonisation process. However, despite his criticism of the Commission's broadening of the doctrine's scope, even Ratner concedes that the extension undertaken by the Badinter Commission would seem to be a logical one.[105]

Coupled to the question of the scope of the doctrine, is the question of the legal status of *uti possidetis*. The jurisprudence of the ICJ provides satisfactory evidence to indicate that there is little doubt that the doctrine is a legal norm, with Ratner pointing to the increasing body of evidence from Asia,[106] Africa,[107] and South America[108] that all indicate an acceptance of *uti possidetis* as a 'customary norm, requiring States to presume the inheritance of their colonial borders'.[109]

[105] *Ibid*., p.591.
[106] C*ase Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, (1962) ICJ Reports 6; *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan)*, 19 February 1968, Reports of International Arbitral Awards, vol. XVII, p.1.
[107] *Case Concerning the Territorial Dispute*, *supra*, note 97, Separate Opinion of Judge Ajibola, pp.83–92; *Case Concerning the Frontier Dispute (Benin/Niger),* Judgment, (2005) ICJ Reports 90.
[108] *Land, Island and Maritime Frontier Dispute*, supra, note 55.
[109] Ratner, *supra*, note 87, p.598.

There can be little doubt over its status as a legal norm, but it the next necessary step is to ascertain whether the doctrine has attained the status of a *jus cogens* norm. As shown in the International Law Commission's study into the fragmentation of international law, there is 'no single authoritative list of *jus cogens* norms',[110] with it further noting how there is no general consensus as to what such a list would be constitutive of.[111] However, this does not mean that jurists have not attempted to craft a test to enable the identification of these norms. For example, with regard to the identification of a *jus cogens* norm, Akehurst drafted a two-part test, constructed upon the formulation of Article 53 of the Vienna Convention,[112] determining that for a putative norm to be regarded as having attained *jus cogens* status it would have to fulfil both of the requirements: initially, it must be a legal rule that is 'accepted by all States in the world'; and secondly, it is necessary that an 'overwhelming majority of States must regard it as *jus cogens*'.[113] The second stage of this test seems to mirror the work of the International Law Commission, where it held in trying to determine the content of *jus cogens* 'the full content of this rule [is] to be worked out in State practice'.[114] In this regard, Linderfalk was of the perspective that '[i]t has to be regarded as peremptory by the international community of [S]tates

[110] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 18 July 2006, A/CN.4/L.682, p.189.
[111] *Ibid*, p.190.
[112] Vienna Convention on the Law of Treaties, 23 May 1969, Art.53, (1969) 8 International Legal Materials 679.
[113] Akehurst M, 'The Hierarchy of the Sources of International Law' (1974–75) 47 British Yearbook of International Law 273.
[114] Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the Work of Its Eighteenth Session, UN Doc A/6309/Rev.1 (4 May–19 July 1966) 248.

as a whole'.[115] Looking at *uti possidetis*, in light of this test, there appears to be no discernible evidence to suggest that the doctrine has been accepted as a *jus cogens* norm by the international community. Contrary to this, it would appear that State activity is suggestive of an understanding that *uti possidetis* is not a *jus cogens* norm.[116] For example, as Brownlie showed, the application of *uti possidetis* in post-colonial situations is merely a rebuttable presumption, its application being far from compulsory, with emerging states being free to agree to adopt alternative borders to those administrative borders that they had as a colonial entity.[117]

However, as Saul indicated, a word of caution should be taken when providing such a positivist analysis as to what constitutes as being of a *jus cogens* status. In this regard, it is possible to discern a range of approaches to assist with identifying such a norm.[118] For example, within the natural law school, *jus cogens* norms are reflective of norms the violation of which would be morally repugnant, and 'contrary to the ethics of the world'.[119] Given, as the International Law Commission advocated, that there is a distinctive natural law flavour at the heart of the concept of *jus cogens*,[120] it would be remiss to not pay heed to the natural law perspective. However, simply accepting that a natural lawyer might

[115] Linderfalk U, 'The Effects of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2008) 18 The European Journal of International Law 853, p.862.
[116] Akehurst, *supra*, note 113, p.284&285.
[117] Brownlie, *supra*, note 52, p.130.
[118] Saul M 'Identifying *jus Cogens* Norms: the interaction of scholars and international judges' (2014) Asian Journal of International Law 1, p.8; Saul M, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 Human Rights Law Review 609, p.634–35.
[119] Verdross A, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 American Journal of International Law 55, p.56.
[120] Fragmentation of International Law, *supra*, note 110, p.190.

construct a list that is distinct from a positivist counterpart is not to suggest that *uti possidetis* would be considered a peremptory norm by the natural lawyer; indeed, it is highly unlikely that the norm would fulfil the above stated natural law criteria. Nevertheless, what the example does highlight is as to how, and why, there is often a degree of disunity of recognition of *jus cogen* norms, more generally. Indicative of an analysis for another time, this raises an interesting question about the determinacy of norms that claim to be *jus cogen* norms, given that the very notion of a *jus cogens* norm remains firmly rooted in the penumbra of uncertainty.

What can be concluded from this analysis is that there would appear to be a degree of certainty about the scope of the *uti possidetis* doctrine, with the orthodox position today being, as indicated by notable scholars such as Cassese, that *uti possidetis* constitutes a general rule of international law; albeit not a *jus cogens* norm. Yet, despite the doctrine not being of a *jus cogens* nature, the ICJ has placed significant emphasis upon the doctrine. Perhaps the answer behind this, as alluded to above, is as a result of the ICJ having determined that an application of the doctrine is the most practicable and pragmatic manner through which to provide an outcome that is of benefit for the global society. In this sense, the ICJ has often emphasised the social importance of law, stipulating that 'law exists … to serve a social need'.[121] However, the ICJ went on to clarify that for a social interest 'to generate legal rights and obligations, it must be given

[121] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, second phase, Judgement, (1966) ICJ Reports 6, p.34.

juridical expression and be clothed in legal form'.[122] The Court reaffirmed this within the *Fisheries Jurisdiction* case, where it held that 'as a court of law, [it] cannot render judgment *sub legis ferendae*, or anticipate the law before the legislator has laid it down'.[123] Given, as has been shown, that *uti possidetis* does have legal character, the Court's utilisation of the doctrine is in compliance with its own jurisprudence, and Statute;[124] therefore, it cannot be argued that it is inappropriate for the Court to utilise the doctrine.

4.3.1.D: *Uti Possidetis* and the Stability of the International System

Given that the doctrine of *uti possidetis* is perceived as a legal norm by the ICJ, the above conclusion comes as little surprise. Yet, accepting this does not answer the question as to why the doctrine has been given preferential status by the Court. Certainly, as argued by this author elsewhere, the doctrine of *uti possidetis* has been treated so favourably by the ICJ that even in instances where it is in conflict with a *jus cogens* norm, such as self-determination, it has been given priority.[125] What is striking is that in instances of conflict between *uti possidetis* and self-determination the ICJ has preferred a resolution favouring the former, citing reasons relating to stability;[126] this has even been deemed the case in decisions relating to decolonisation, where the *jus cogens* status of self-determination would seem to be more concrete, and generally accepted. This

[122] *Ibid*.
[123] *Fisheries Jurisdiction (United Kingdom v Iceland)*, (1974) ICJ Reports 3, p.24.
[124] Statute of the International Court of Justice (1945), Art.38, Evans M, *International Law Documents* (10th Edn OUP, GB 2011), p.30.
[125] Shucksmith-Wesley M, '*Uti Possidetis*: The Procrustean Bed of International Law?' 24 (2013-2014) Finnish Yearbook of International Law 227.
[126] *Case Concerning the Frontier Dispute*, *supra*, note 72, p.567.

approach was particularly evident in the *Burkina Faso v Republic of Mali* case, where the ICJ held that *uti possidetis* was regarded by the African States as an 'essential requirement of stability in order to survive, to develop … [thus resulting in] the respecting of colonial borders, and to take account of it in the interpretation of the principle of self-determination of peoples'.[127] Echoing the argument of this thesis, Shaw was of the opinion that the ICJ had positioned *uti possidetis* in a position of superiority, with it seemingly taking precedence in instances where the two are in conflict.[128] That the Court can interpret the doctrine in a manner that provides it with enough legal force to modify and restrict the application of, what the Court, itself, has labelled as being a *jus cogens* norm is particularly striking. Equally, this issue is perhaps expressive of the indeterminate nature of self-determination as a legal norm, an issue with which this chapter later addresses in detail. Despite the problems with regard to the indeterminacy of self-determination, given that the definition of self-determination as a *jus cogens* norm is relatively concrete in instances of decolonisation, it would seem that this hierarchical positioning is in clear violation of the legal rule recognised in Article 53 of the 1969 Vienna Convention on the Law of Treaties. Here it is stated that where a norm is accepted as being of a *jus cogens* character, 'no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[129] Judge Lauterpacht has even determined that the Security Council cannot act in contravention of a *jus cogens* norm, stating, unequivocally, that a *jus cogens* norm is 'superior to both customary

[127] *Ibid*., p.567.
[128] Shaw, *supra*, note 34, p.124.
[129] Vienna Convention on the Law of Treaties, *supra*, note 112, Article 53.

international law and treaty'.[130] Consequently, given that *uti possidetis* is devoid of *jus cogens* character, this brings this thesis to a critical question in relation to this deconstruction of the *uti possidetis* doctrine: why has *uti possidetis* been interpreted in a manner that enables it to have the legal force to displace a *jus cogens* norm.

The answer to this question would seem to reside in the notion that the Court has come to the creation of this predilection for *uti possidetis* due to, as Shaw articulated, *uti possidetis* draws 'sustenance from the precept of the stability of boundaries as reflecting policy consideration with regard to stability of the international system as a whole'.[131] Therefore, critically, it would appear that the doctrine of *uti possidetis* has attained this position due to its power to ensure international stability. This conclusion is hardly surprising, when recalling back to the rationale as to why the doctrine was initially adopted by the South American States; to ensure peaceful transition into independent sovereign entities.

Looking at the significance of stability, Shaw was also of a perspective that the system of stable boundaries was of huge significance to the general stability of the international system. In relation to this, Shaw argued that a system that is founded upon 'the sovereign equality of all its Members'[132] will inexorably be

[130] *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993, (1993) ICJ Reports 3, Separate Opinion of Judge ad hoc Lauterpacht, p.440.
[131] Shaw, *supra*, note 34, p.147.
[132] Charter of the United Nations (adopted 24 October 1945), Art.2, Evans M, *International Law Documents* (10th Edn Oxford University Press, GB 2011), p.9.

orientated towards ensuring the harmonious maintenance of that system. The result of this is that the international legal system will not only be supported by states, but it will also be supportive of states, 'preserving and promoting the system as a whole'.[133] The state and its territory are inextricably linked, as indicated within Article 1 of the Montevideo Convention of Rights and Duties of States.[134] The significance of the stability of this territory has been affirmed by the ICJ, where it held within the *Temple* case that:

> *when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called into question.*[135]

Reflective of this, the Court of Arbitration, in the *Dubai/Sharjah* case determined that 'the re-opening of the legal status of the boundaries of a State may give rise to very grave consequences, which may endanger the life of the State itself'.[136] Consequently, it is unsurprising that Shaw was of the perspective that territorial stability is one of the fundamental principles of the international system, and that he continued to aruge that the notion of stability will retain this position of centrality for as long as the international legal system is founded upon the sovereign state.[137]

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[133] Charney JI, 'Universal International Law' (1993) 87 American Journal of International Law 529, p.532.
[134] Montevideo Convention on the Rights and Duties of States, Montevideo, 26 December 1933, Article 1, <www.oas.org/juridico/english/treaties/a-40.html> last accessed 21/06/2017.
[135] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Judgment, (1962) ICJ Reports 6, p.34.
[136] *Dubair/Sharjah Border (Award)*, Court of Arbitration (1981), 91 International Law Reports (1993) 545, p.578.
[137] Shaw, *supra*, note 34, p.84.

Accepting this centrality, it would seem obvious that international law would act to further propagate the system of stable sovereign states, with this self-maintenance being, as Bull argued, one of societies key values.[138] In regard to this, Charney submitted that all societal hierarchies act to self-propagate, with predictability and stability being critical to interactions to maintain the status quo.[139] Therefore, it should not come as a surprise that the international system has a developed a rule system that enables its member to interact whilst maintaining stability. Building on this, Castellino and Allen identified four vital components that are necessary for the continuation of an ordered international society: the system's preservation; the maintenance of the sovereign equality of States; peace; and – arguably linked to peace – the need to mitigate against the use of violence.[140] Looking more closely at these general rules, Castellino went on to suggest that *uti possidetis* is an ideal tool for the furtherance of these goals, especially so, given that at the moment of secession the newly emergent State is at its most vulnerable. This follows from Castellino's earlier work, where he illustrated that the newly demarcated State boundary is, from the moment of crystallisation, 'declared sacrosanct and given international legitimacy'.[141] This resonates with the submission of Shaw, where he argued that the use of the doctrine ensures the continuation of the system of sovereign States, by acting as a legitimising tool. Furthermore, Castellino suggested that this powerful

[138] Bull H, *The Anarchical Society: A Study of Order in World Politics* (2nd Edn Columbia University Press, New York 1995), p.4.
[139] Charney, *supra*, note 132, p.532.
[140] Castellino; & Allen, *supra*, note 71, p.9.
[141] Castellino, *International Law and Self-Determination: the interplay of politics of territorial possession with formulations of post-colonial national identity* (Martinus Nijhoff, The Hague 2000), p.110.

affirmation of the borders of the State acts to restrict the threat of violence from neighbouring States, that might have otherwise attempted to take advantage of the situation, were the borders of the new State less defined.[142] Clearly a central concern of the newly independent South American States. It is this fixation on stability that has resulted in the continued adherence to mechanisms that protect territorial borders, with this leading Jenkins to come to the conclusion that 'in a properly ordered society, territorial boundaries will be among the most stable of institutions'.[143] It is for this reason that, it is submitted, the ICJ has concluded that – in order to contribute towards the maintenance of global society – *uti possidetis* should be given legal force, and applied in instances it would fulfil this goal.

Recalling the Argentine position, it is advocated by the Argentine State that it inherited the Falklands (Malvinas) from Spain, at the moment it obtained independence through an application of the *uti possidetis* doctrine. There is a large degree of legal and factual uncertainty as to whether this could have occurred, but this thesis seeks to move beyond this uncertainty, as identified in the previous chapter. Given the high level of uncertainty, was this thesis to draw a conclusion based on this it would be a representation of the subjective bias of the author, rather than an objectively determined deduction. Therefore, this thesis simply accepts that this is the Argentine argument, without determining whether it is a valid argument to make. What has emerged from this

[142] Castellino; & Allen, *supra*, note 71, p.11.
[143] Jennings RY, *The Acquisition of Territory in International Law* (Manchester University Press, Manchester 1963), p.70.

deconstruction of the doctrine is distinct from the typical legal analysis addressing the Falklands (Malvinas) dispute. It has avoided the adversarial approach, by actively seeking to not argue in favour of the doctrine's application, or otherwise, but to produce an understanding of the doctrine drawing attention to the key factors that reside at the heart of the doctrine. Critically, this analysis has concluded that the focus of the *uti possidetis* doctrine is on the maintenance of stability, and on ensuring the peaceful transition of an administrative unit into an independent State. This is not simply restricted to the current understanding of the doctrine, but, despite the uncertainty of the doctrine's birth in South America, it would appear to have been the purpose behind the doctrines adoption there, too.

This raises a critical point for the Argentine position, that has before now gone unasked, and therefore, unanswered in the legal literature addressing the dispute. Given that Argentina has been an independent State for over 200 years, that it has not held effective control over the territory for the majority of this time, and that *uti possidetis* is primarily a doctrine concerned with the maintenance of stability, how applicable is the doctrine to the territorial dispute over the Falklands (Malvinas)?

Here the analysis runs into a cloud of uncertainty. On the one hand, *uti possidetis* provides a mechanism through which a nascent State obtains its territory. Yet, at the same time, it is central to the doctrine's application that it is applied in order to ensure stability during this transition phase, from administrative region

to State. The problem that the Falklands (Malvinas) scenario raises, in relation to our understanding of *uti possidetis*, is: what happens in instances where a State has had little effective control of the claimed territory since the moment that it obtained independence, and that a protracted period of time has elapsed, with the result of the doctrine's application being to cause significant territorial instability? There would appear to be no clear answer to this, with there being a great deal of uncertainty about the doctrines application in this instance. Recalling that discussed in Chapter 1, the uncertainty, in relation to the temporal restrictions of the doctrine, provides the legal analyst with the scope to interpret the doctrine in a manner which best suits their own subjective aim. Looking at jurisprudence of the ICJ, indeed, there have been instances where the ICJ has held that the *uti possidetis* line should be followed, despite significant time having passed since the disputing States obtained independence and when the case was heard before the Court, as in the *Burkina Faso/Mali* case.[144] But it should be mentioned that in this instance it is notable that both States had only obtained independence twenty-six years prior to the judgment of the Court being given. Returning to the Falklands (Malvinas) dispute, over 180 years have passed since Britain established its continuously administered settlement on the territory, and the question must be asked with regard to whether the Court would follow an application of the doctrine in this unique factual situation. In this regard, it should be recalled, that the core of understanding of the doctrine shows us that it is not a *jus cogens* norm, and, as Brownlie mentioned, it is perfectly permissible to determine the boundaries of a State through alternative mechanisms. Therefore, given that the answer, as to whether the Court would

[144] *Case Concerning the Frontier Dispute*, *supra*, note 72.

determine that the territorial limit of Argentina should be resolved via an application of *uti possidetis* resides within this penumbra of uncertainty; it is permissible that the doctrine would find application, but, critically, the political bias of the legal interpreter would prove significant in interpreting the doctrine in this manner. Equally, was it held that the doctrine was not applicable, this outcome would be similarly determined by the bias of the legal interpreter. Looking at this considering the: jurisprudence; the conservatism; and how the doctrine has been applied previously by the ICJ, it is perhaps more likely that was the ICJ to determine on this issue, it would be guided by its political desire to maintain stability within the international legal system, with the disruption of a territorial status that has existed for almost 200 years appearing to be averse to that.

This hypothesis cannot be said with any certainty, but the robustness of the analysis would seem to indicate that Argentina cannot be entirely sure that an international tribunal would follow their reasoning. Therefore, this analysis of *uti possidetis* might not have provided a traditional legal answer, in that the conclusion drawn does not favour the doctrines application, or otherwise, but in highlighting the significance of the penumbra of uncertainty surrounding the doctrine, and its application to the Falklands (Malvinas) dispute, it has taken a significant step in guiding this thesis towards an international legal dispute settlement mechanism that might find application. This conclusion is significant, for it provides insight as to how the claimant State would approach the disputes resolution. Tellingly, given this, it is unsurprising that Argentina has not pressed for the dispute to be heard before a competent international legal tribunal.

Having assessed the central argument of the Argentine State, this chapter now turns to undertake the same process to the primary UK argument, that the Falklands (Malvinas) residents should be able to express their right to self-determination.

4.3.2 Self-Determination

4.3.2.A: Introduction

As mentioned in the introductory element to this chapter, where the primary arguments of the disputing States were discussed, the UK is of a mind that the population resident on the Falklands (Malvinas) should benefit from the enjoyment of the right to self-determination. It is often recognised that self-determination can be divided along two dimensions: internal self-determination, affirming self-direction of the State by the 'people … without distinction as to race, creed or colour';[145] and, in the alternative, external self-determination, a process via which a select population within a territory is free to declare its independence – or dependence – of a State, thereby directly affecting the territorial composition of the State, and of any seceding entity.[146] It is the latter of these two that is of particular relevance within this discussion on the status of the Falklands (Malvinas).

[145] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970; it is noteworthy that the focus of Western States and authors, with regard to internal self-determination, is on its links to civil and political rights, at the detriment of economic and social rights, White N, *The Cuban Embargo under International Law: el bloqueo* (Routledge, GB 2015), pp.66&67.

[146] McCorquodale R, 'Self-Determination: A Human Rights Approach' (1994) 43 International and Comparative Law Quarterly 857, p.863.

It is unsurprising that the UK has pinned its ambition to retain sovereignty to the territory on the right of self-determination, given that the norm would appear to be politically palatable. In addition the heritage of the Falklands (Malvinas) territory, at the last census, indicated that 81.4 percent of the population identify as being of a Falkland or British national identity.[147] Furthermore, 47 percent of the population were born in the Falklands (Malvinas), and 28 percent were born in the UK.[148] It, therefore, should come as little surprise to the observer, as shown in the previous chapter, that a recent referendum has shown that 99.9 percent of the population favour the maintaining of its continued constitutional link with the UK,[149] as a British Overseas Territory. The British government's perspective is that this vote was reflective of the residents' right to self-determination, as granted within 'Article 1 (2) of the Charter of the United Nations, Article 1 of the International Covenant on Civil and Political Rights and General Assembly resolution 2625 (XXV)'.[150] However, understandably, the Argentines contest this interpretation, arguing that it is a 'serious distortion of the spirit of self-determination'.[151] Further to this, it is the position of the government in Buenos Aires that the Argentine territorial claim is not impaired by the *principle* of self-determination.[152] Emphasis was drawn here to the Argentine use of the word 'principle', due to the government in Buenos Aires remaining steadfast in its use of the phrase 'principle', as opposed to 'right'. The

[147] Census 2012: full results and analysis, 24 April 2013, p.12 <http://www.falklands.gov.fk/assets/79-13P.pdf> last accessed 10/10/2017.
[148] *Ibid*., p.13.
[149] <http://www.falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/> last accessed 14/01/2014.
[150] Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Falkland Islands (Malvinas), working paper prepared by the Secretariat, 12 March 2014, UN Doc. A/AC.109/2014/15, para.5.
[151] *Ibid*., para.6.
[152] *Ibid*., para. 48.

rationale for this is not explicitly stated within Argentine governmental material, but it can be surmised that it would hamper the State's objectives was the legal norm to be clothed in the garb of a legal right. The implication of this is examined in greater detail within this section, for now it is enough to indicate it as being of significance.

4.3.2.B: The Origins of Self-Determination

This cursory glance at the norm of self-determination would seem to suggest that it is a norm troubled with being highly indeterminate; to what degree, and what the consequences of this are for the dispute between Argentina and the UK are to where this chapter now turns. Therefore, in order to achieve this, this section begins by looking at the origins of the norm, with it then progressing to engage in an examination of the norm as it has developed over the last century, through into this one. Where relevant, this discussion remains rooted within the context of the Falklands (Malvinas) dispute, with the ultimate outcome of this section, as with *uti possidetis* before, feeding into how the analysis of dispute settlement mechanisms are tackled in the latter part of this thesis. As with the analysis that was undertaken with regard to *uti possidetis*, the focus of this section is on deconstructing the legal norm, in order to ascertain whether there are cues that can aid with our understanding.

In order to ascertain if there is any certainty to the concept, it proves helpful to initiate the analysis at the point in time when the norm was given birth. The modern concept, as an international legal norm, can trace its heritage to the

aftermath of World War I, in the guise of the Wilsonian moment, where it was argued for the 'self-determining nation State [to be] the only legitimate political form throughout the globe'.[153] Indeed, President Wilson, the central character of the 'moment', argued that '[s]elf-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril'.[154] Yet, despite this bold claim, this clarion-call against oppression,[155] self-determination failed to obtain any real substantive momentum, with it failing to gain legal expression as an aspect of the Covenant of the League of Nations.[156] Reflecting this, the International Committee of Jurists, in their findings within the *Aaland Islands* dispute, made no reference to self-determination as a legal concept;[157] conversely, the Jurists commented that this distinct lack of any express provision providing for the legal status of the principle of self-determination proved fatal to a legal claim based on it.[158] Further to this, the Committee took a highly State-centric view, being conscious of the damage that a legal right to self-determination could do the international community, the stability of the international system:[159]

[153] Manela E, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press, Oxford 2007), p.5.
[154] President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances, at para.5, <http://www.lib.byu.edu/index.php/President_Wilson's_Address_to_Congress,_Analyzing_German_and_Austrian_Peace_Utterances> last accessed 20/09/2017.
[155] Manela, *supra*, note 152, p.19
[156] Cobban A, *The Nation-State and National Self-Determination* (HarperCollins, GB 1969); Pomerance M, 'The United States and Self-Determination: perspectives on the Wilsonian Conception; (1976) 70 American Journal of International Law 1, p.23.
[157] *Of the International Committee of Jurists entrusted by the council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Island Question*, (1920) 3 League of Nations Official Journal Supplement 3.
[158] *Ibid*., p.5.
[159] *Ibid*.

> To concede to minorities [the right of self-determination] … would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.[160]

The Jurists, therefore, came to the conclusion that self-determination should take a back-seat to the concept of the maintenance of territorial integrity in order to ensure the maintenance of peace.[161] This conflict between self-determination and territorial integrity is one which remains today, and is discussed in relation to the Falklands (Malvinas) dispute later within this section.

Consequently, self-determination had to wait until the cessation of the Second World War, for the international community to find renewed in developing the concept. In this regard, it finds mention within the UN Charter, at Article 1 (2), with the *principle* of self-determination now being seen as a key component in the development of friendly relations amongst nations,[162] as opposed to the challenge suggested by the International Committee of Jurists. This is then restated, in relation to international economic and social cooperation, in Article 55,[163] with Article 56 indicating that all members should 'take joint and separate action … for the achievement of the purposes set forth in Article 55'.[164] However, the concept, as espoused by the Charter, remained highly indeterminate, with there being no indication as to the scope or content of the

[160] Report Presented to the Council of the League of Nations by the Commission of Rapporteurs (1921), League of Nations Council Doc. B.7.21/68/106, p.318.
[161] *Aaland Island Advisory Opinion*, *supra*, note 156, p.7.
[162] UN Charter, *supra*, note 131, Article 1 (2).
[163] *Ibid*., Article 55.
[164] *Ibid*., Article 56.

principle. It is, also, of significance that self-determination was still referred to as a principle, and not a right, at this time.

Looking at the significance of the labelling of self-determination as a principle, it is unclear whether the UN was referring to self-determination as a fundamental principle of international law, or, in the alternative, if it was suggesting that it was a general principle of law, or something less entirely, as it was deemed in the *Aarland Island* case. It would seem to be distinct from what the Jurists held in the *Aarland Island* dispute, for the key rationale behind the Jurists determining that self-determination was devoid of legal character was its lack of reference in an international legal treaty; evidently the UN Charter fulfils this. The significance of Article 56 in relation to self-determination can, also, not be ignored, recalling that it was noted that the Members pledge to 'take joint and separate action … for the achievement of the purposes set forth in Article 55'. Judge Tanaka, in his dissenting opinion within the *South West Africa Cases*, drew attention to this, suggesting that Articles 55 and 56 acted together to create legally binding obligations on the member States.[165]

Therefore, it needs to be assessed as to what self-determination's legal character was, as a result of the creation of the UN Charter. Initially, a general principle, as distinct from a fundamental one, is a basic rule of international law with an abstract content that should be seen to be upheld, and that tends to act to fill legal

[165] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, second phase, Judgement, (1966) ICJ Reports 6, Dissenting Opinion of Judge Tanaka, p.289.

voids.[166] Given the uncertainty surrounding the norm, it is suggestable that this was the intended outcome, as it would be difficult to clothe such an uncertain norm with the garb of a fundamental principle. This is not to say that self-determination, as a general principle, was devoid of legal force. For instance, looking at the Statute of the ICJ, Article 38 (1) (c) confirmed that the Court, in its decision making, shall apply 'the general principles of law recognised by civilised nations'.[167] Yet, the Statute did not go on to indicate what a general principle was. Sadly, a proposal forwarded by Mr Georges Scelle in 1950, supported by some members of the International Law Commission, to formulate an understanding of what these general principles constituted was rejected.[168] Had this been undertaken it might have provided this analysis with a clearer understanding as to what the position was, with regard to self-determination, at the time of the drafting of the UN Charter. Nevertheless, despite this lack of clarity, what is clear is that self-determination, at the birth of the UN, was highly indeterminate, and, notwithstanding Article 38, it was, therefore, of questionable legal worth.

Almost two decades then passed before the norm found renewed purpose as a central component of the decolonisation process, undertaken during the latter half of the twentieth century. It was during this period that self-determination crystallised sufficiently to be regarded as a legal norm, with three General

[166] Kohen M & Schramm B, 'General Principles', 2013, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml> last accessed 10/10/2017.
[167] Statute of the International Court of Justice, Art.38(1)(c), *supra*, note 124.
[168] UN Doc. A/CN.4/SR.29; 'Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, with commentaries' (1950) 2 Yearbook of the International Law Commission, p.374.

Assembly resolutions playing a critical role in developing the concept as a legal right: General Assembly Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples enunciated that *all peoples* have the right to self-determination, and that all Member States of the UN should bring to a 'speedy and unconditional end [to] colonialism in all its forms and manifestations';[169] therefore, far from improving the degree of certainty of the legal norm of self-determination, this expression of self-determination introduced the inclusion of the term 'people', another uncertain concept into the composition of the legal norm. General Assembly Resolution 1541 (XV),[170] which supplemented Resolution 1514, illustrated how this right to self-determination should be given effect. What is critical is that the wording of both Resolution 1514 and Resolution 1541 very clearly limited to the application of self-determination to instances of decolonisation, and to non-self-governing territories. Confirming this, the International Court, within the *South West Africa* case held that the right of non-self-governing territories to self-determination was a component of customary international law,[171] and is 'applicable to all of them'.[172] The consequences of this is that it resulted in the norm being more determinate than it was previously, and, therefore, being less susceptible to wide degrees of interpretation, at least in relation to decolonisation; or, so it seemed.

[169] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) 14 December 1960.
[170] Principles which should guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for Under Article 73 e of the Charter, GA Res 1541 (XV), 15 December 1960.
[171] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory opinion, (1971) ICJ Reports 16, para.52-53
[172] *Ibid*., para.52.

The final of the triad of General Assembly resolution critical to the development of self-determination is General Assembly Resolution 2625,[173] which seemingly proved to be another significant step in the development of self-determination, with it, apparently, providing an answer to the legal concerns relating to the restrictive application of self-determination. Within the Resolution, it was stated that 'all peoples have the right freely to determine without external interference, their political status and to pursue their economic social and cultural development'.[174] In stating this, Resolution 2625 – purportedly – broadened the scope of self-determination, extending its application beyond the colonial context. Yet, it should be noted, it failed to further clarify the notion of what constitutes a 'people'.

4.3.2.C: The Interpretation of Self-Determination

The drafting of this triumvirate of General Assembly resolutions did go some way towards crystallising to the core of self-determination, with it now being apparent that self-determination can be regarded as a legal right, and that it is not limited to instances of decolonisation. Nevertheless, little guidance as to the normative content of the right of self-determination was provided, beyond this, and, consequently, it can be seen that the right remained highly indeterminate, with only nominal levels of clarity having been provided. Therefore, despite there being some movement towards a more concrete understanding, the norm still remains highly uncertain, and, accordingly, open to wide levels of

[173] Friendly Relations Declaration, *supra*, note 144.
[174] *Ibid*.

interpretation. This part progresses to indicate the significance of this indeterminacy, in the context of the Falklands (Malvinas) dispute, and how it has enabled widely divergent interpretive positions to have been adopted by Argentina and the UK.

Prior to examining the interpretive understandings of the disputing States, it proves invaluable to examine the manner within which self-determination has been interpreted, more broadly. Therefore, the analysis initially returns to the widening of the understanding of self-determination at the time of the drafting of Resolution 2625. Initially, it should be noted that Resolutions 1514 and 1541 did not expressly preclude for the application of self-determination, as a legal norm, beyond the colonial context. It simply remained undefined as to whether self-determination was applicable beyond the decolonisation process. Therefore, whether it was applicable, or not, was firmly hidden in the penumbra of uncertainty. Resolution 2625 altered that, by bringing a degree of clarity to the situation. For many, it seemed a logical expansion of the interpretation of self-determination for it to be applicable beyond the narrow confines of the decolonisation process.

Bringing this understanding out from the pendumbra, and into the core is a process of interpretation which would be heavily influenced by the personal bias of the legal interpreter. By way of an example, Koskenniemi approached the situation from his own unique perspective, utilising his understanding of legal history. He argued that the narrow interpretation, as indicated within Resolutions

1514 and 1541, was arbitrary in character. In support of this position, he made reference to self-determination having originally emanated from the philosophies of the Enlightenment in the late eighteenth and early nineteenth centuries, and how it was intended, as originally conceived, that the right should be available for universal application.[175] Considering the interpretation of self-determination from a different, albeit connected, perspective, Franck suggested that restricting the concept in such an ad-hoc manner was to the doctrine's detriment. Accordingly, if the concept was to be seen as having legal force it should be implemented uniformly.[176] Considering this, was the right only accessible by certain select elements, this would seem to be pretty fatal to the concept of self-determination as a legal norm, with it not being applied equally, 'without distinction as to race, sex, language or religion'.[177]

Furthermore, with regard to the fulfilment of the right to self-determination, Declaration 2625, also, acted to concretise this, to some degree, with it noting that in implementing the right of self-determination, a people may undertake this by establishing themselves as a 'sovereign and independent State, [through] the free association or integration with an independent State or the emergence into any other political status freely determined' on.[178] The British argument is that the outcome of the recent referendum, held in the Falklands (Malvinas), proved indicative of the residents expressing their desire to freely associate or integrate

[175] Koskenniemi M, 'National Self-determination Today: Problems of Legal Theory and Practice' (April 1994) 43 International and Comparative Law Quarterly 241, p.242.
[176] Franck TM, *The Power of Legitimacy among Nations* (Oxford, Oxford University Press, 1990), pp.153–174.
[177] UN Charter, *supra*, note 131, Articles 13(1)(b)&55(c).
[178] Friendly Relations Declaration, *supra*, note 144.

with an independent State. Indeed, was the argument accepted that the residents are in a position to express their right to self-determination this would be a valid outcome, given the certainty provided for by the Friendly Relations Declaration. Yet, despite this clarification in relation to the fulfilment of the right, and the statement as to the universal application of self-determination, questions remain about the scope of self-determination, as identified above. In this regard, the statements of the General Assembly have only gone some-way towards enunciate the substantive content of the legal norm.

Looking at this further, given that the Falklands (Malvinas) are one of the remaining seventeen non-self-governing territories, it would, initially, appear that the General Assembly, through the promulgation of Resolutions 1514 and 1541, has granted the residents the right to self-determination. Yet, merely being residents of a non-self-governing territory would seem to be not enough, for, as insinuated within the *Western Sahara* advisory opinion,[179] there will be instances where the Court, or the General Assembly, might find that being residents of a non-self-governing territory was, alone, insufficient:

> The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed wills of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.[180]

[179] *Western Sahara*, Advisory Opinion, ICJ Reports 1975 12.
[180] *Ibid*., p.33 para.59.

The *South West Africa* advisory opinion, and the *Western Sahara* case were heard less than five years apart, yet this limitation of the right would seem to not be one that the Court had considered as of relevance in the earlier case. In coming to this divergence in interpretation it is, perhaps, of significance that the composition of the Court had changed considerably during this period. In instances where a legal norm was highly determinate, the significance of a change in the judicial members of the Court, in relation to legal interpretation, would prove limited. However, in this instance, the relatively high level of indeterminacy of self-determination enabled the bias of the judicial panel to play a more prominent role in legal interpretation.

Critically, within the *Western Sahara* case the ICJ merely defined self-determination as the 'need to pay regard to the freely expressed will of peoples',[181] with the notion of what constitutes a 'people' remaining undefined by the Court. That this term had been adopted by the General Assembly, and utilised by the International Court, would seem to be based on an assumption that humanity can be neatly dissected into convenient groups.[182] Yet, as Chadwick noted, to 'speak of a "people's" desire to achieve rights of self-determination is first to beg the question as to what precisely is meant by the

[181] *Western Sahara*, *supra*, note 178, p.72.
[182] Franck TM, 'Tribe, Nation, World: self-identification in the evolving international system' (1997) 11 (1) Ethics and International Affairs 151, pp.151-153.

term "people"'.[183] The answer to this question is not found within international law, as there is no determinate understanding as to what constitutes a people within it.[184] In this regard, the *Commentary on the Additional Protocols of 8 June 1977*, despite its age, remains accurate, when it noted that there is no 'objective or infallible criterion which makes it possible to recognise a group as a people'.[185] Incidentally, in attempting to define a 'people', a number of alternatives are available. For example, a people could be defined via ethnic,[186] or minority differentiations.[187] Perhaps a people could be defined as a group that has a desire to reside together,[188] or maybe it should be defined as those that are indigenous to an area, or culturally distinct from an administering power; it is, also, conceivable to define a people as a result of the existence of lands that may act as a unifying factor for a group, as with Native American tribes,[189] or with the Palestinians.[190]

In failing to clarify as to what constitutes a 'people', the international community, and the International Court, has left a critical component of self-

[183] Chadwick E, 'Post-World War 2 Exercises of Self-Determination: "peaceful", "friendly", and "other", in Simmers J (ed), *Kosovo: a precedent?* (Martinus Nijhoff Publishers, The Netherlands 2011), p.227.
[184] Sandoz Y; Swinarski C; & Zimmerman B, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva 1987), p.52.
[185] *Ibid*.
[186] United Nations Declaration on the Rights of Indigenous People, 61/295, 13 September 2007, UN Doc. A/Res/61/295.
[187] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution 47/135, 18 December 1992, UN Doc A/RES/47/135; 'Minority Rights: international standards and guidance for implementation', 2010, UN Doc. HR/PUB/10/3, p.4.
[188] Commentary on the Additional Protocols, supra, note 183, p.52.
[189] Wilson J, *The Original Americans: US Indians* (Minority Rights Group, London 1986)
[190] Yost CW; & Bassiouni MC, '"Self-Determination" and the Palestinians' (1971) 65 (4) American Journal of International Law 31, p.34.

determination undefined, and therefore open to interpretation based on the subjective whim of the legal interpreter. Unsurprisingly, both disputing States have utilised this indeterminacy to their advantage. The Argentine State's position is that the present population cannot be considered a people which would be granted the right,[191] as they are not the territory's original inhabitants, and are not culturally distinct from the administering power.[192] In this instance, the lack of determinacy, as to what constitutes a people, has provided the scope for Argentina to interpret the term narrowly, noting that the population of the Islands are not distinct ethnically or culturally from the administering power, the UK. This interpretation is unsurprising, as this suits the subjective desires of the Argentine State, with it resulting in self-determination not being applicable to the current residents of the Falklands (Malvinas).

It is worth examining one possible consequences of the narrow Argentine interpretation of 'people'; consider what would occur if the Argentine position was accepted, that the Falklands (Malvinas) residents are not a people, as a result of not being distinct culturally from the administering power, and that there was a transference of sovereignty from the UK to Argentina. Was this interpretation accurate, and this transfer to happen, this would, arguably, result in the creation of a legal paradox. For example, an international tribunal, in choosing to base its decision on this narrow interpretation, would act to concretise this legal concept of a 'people' in self-determination. Delving deeper, this now determinate narrow

[191] UN Doc. A/37/553, supra, note 10, p.3
[192] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 9th Session, GAOR, UN Doc A/5800/Rev.1 (1964 -1965), para.36.

interpretation of self-determination may be available to the current residents, as a result of the Islanders now being distinct culturally from the new administering power, Argentina. Based on the result of the 2013 referendum, it is eminently likely that the Falklands (Malvinas) population would chose to associate themselves, once again, with the UK. Was there to be a transference of territory from Argentina to the UK, following an application of the self-determination, the population would, again, not be distinct from the administering State, and the process would repeat. It should be noted that this is a purely hypothetical scenario, and it is very unlikely that such a cycle of territorial transfer would occur, but, the consequences of this hypothesis should not be ignored. Indeed, it should be recognised that this scenario would still be dependent on whether the Islanders recognise themselves as being a unique people, or an aspect of the wider British community.

Returning to how the disputing States currently interpret self-determination, it should come as little surprise that the UK displays an understanding of self-determination that is highly divergent from that of Argentina. In this regard, the UK government is of a mind that the residents do constitute a people; albeit it should be noted that the UK government in London does not indicate in what manner it believes that the population do constitute such. This is an intriguing omission, but it is unclear whether this omission was done intentionally, or otherwise. However, given the examples provided above, the indeterminacy of the norm would, again, provide the State with the interpretive scope within which to do this. For instance, as shown in the last census the majority of

residents perceive themselves as being of a distinct group from the rest of Great Britain, bound by their common heritage and attachment to the territory.

Drawing this together, it is clear that there has been some crystallisation of the scope and content, particularly in the context of decolonisation;[193] yet, the level of crystallisation should not be overstated, and despite the time, and regardless of the vast quantity of work that has been produced on it, a determinate understanding has remained largely elusive.[194] Consequently, the concept of self-determination remains, as Drew explained, one that is 'plagued by an excess of indeterminacy both in terms of scope and content'.[195] This, perhaps, for as Saul articulated, is as a result of the 'controversial nature' of the norm, suggesting that States could be fearful of providing the norm with a more defined understanding for fear that to do so could, one day, furnish the norm with sufficient legal force to be used against them.[196]

In this regard, Saul was referring to the capacity of self-determination to dismember a State, thereby challenging its territorial integrity. It is on this basis that Buchanan advocated that the institutionalisation of self-determination is unlikely to be adopted by the 'makers of international law because [self-

[193] Simma B; & Paulus A, 'The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View' (1999) 93 American Journal of International Law 302, p.307.
[194] Drew C, 'The East Timor Story: International Law on Trial' (2001) 12 European Journal of International Law 651, p.658; Kirgis F, 'Editorial Comment: The Degrees of Self-Determination in the United Nations Era' (1994) 88 American Journal of International Law 304, p.305.
[195] Drew, *ibid.*, p.658
[196] Saul, *supra*, note 118, p.611.

determination] authorises the dismemberment of [S]tates even when those [S]tates are perfectly performing what are generally recognised as the legitimate functions of [S]tates'.[197] It is on this basis that Argentina adds a further challenge to the right of the Islands residents to self-determination, with it maintaining that the right of peoples to self-determination must be seen in light of the principle of territorial integrity.[198] Here, it is Argentina's argument that the promotion of the right of self-determination would amount to a violation of Argentina's territorial integrity.[199] Indeed, it is arguable that territorial integrity is one of the most significant principles – if not the cardinal principle – of international law. Article 2 (1) of the UN Charter stipulates that the organisation is founded on the principle of the sovereign equality of all its Members,[200] with General Assembly 2625 indicating that one of the key components of sovereign equality is the inviolability of the territorial integrity and political independence of States.[201] The ICJ has reaffirmed the significance of territorial integrity on many occasions; for instance, in the *Corfu Channel Case* it held that 'between independent States, respect for territorial integrity is an essential foundation of international relations'.[202]

This conflict between self-determination and territorial integrity finds expression in the construction of the Helsinki Final Act of the Conference on

[197] Buchanan A, 'Theories of Secession' (2006) 26 Philosophy and Public Affairs 31, p.45.
[198] Ruda, *supra*, note 5.
[199] Special Committee on Decolonization Approves Text Reiterating Need for Talks as Only Way to Resolve Falkland Islands (Malvinas) Question, 2014 Session, 7th & 8th meetings, 26 June 2014, UN Doc. GA/COL/3271.
[200] UN Charter, *supra*, note 131, Article 2 (1).
[201] Friendly Relations Declaration, *supra*, note 144, para.2.
[202] *Corfu Channel Case*, Judgement, (1949) ICJ Reports 4, p.35.

Security and Cooperation, whereby it was recognised that self-determination should be broadly applied, yet this was veiled by the Final Act's strongly articulated focus on territorial integrity.[203] Within the Act, it was stated that the 'participating States will respect the equal rights of people and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations … including those relating to territorial integrity of States'.[204] In addition, the Friendly Relations Declaration emphasised that nothing in the document should be seen as 'authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. but, the paragraph continued, restricting this protection to instances where the host states were 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples'.[205] Evidently, there is a significant degree of confusion and contradiction within the construction of these documents.

Looking at this contradiction, it is certainly arguable that the UN has, in instances where self-determination and territorial integrity are in conflict, at times supported the maintenance of territorial integrity, as with Cyprus,[206] and the Congo.[207] Yet, there is nothing indicated with these aforementioned documents that specifically shows for the hierarchical dominance of territorial

[203] Conference on Security and Co-operation in Europe Final Act, Helsinki 1975, Principle VIII.
[204] *Ibid*., Principle VIII.
[205] Friendly Relations Declaration, *supra*, note 144.
[206] General Assembly Resolution 1600 (XV), UN Doc. A/RES/1600 (XV).
[207] General Assembly Resolution 3212, UN Doc. A/RES/3212.

integrity over self-determination. However, the Supreme Court of Canada held that self-determination is subservient to territorial integrity, as a result of 'self-determination having evolved within a framework of respect of territorial integrity of existing States'.[208] Furthermore, authors, such as Eide,[209] Blay,[210] and Radan,[211] are firm supporters of territorial integrity taking pre-eminence. Eide, for examples, echoed the *Corfu Channel Case*, basing his perspective on the notion that the overriding concern for the international community is its continued stability.[212]

Nevertheless, despite this, Coleman has argued that this automatic presumption, of territorial integrity as being in a position of superiority to self-determinisation, is an oversimplification. In this regard, he identified that there will be instances where fulfilling the right of self-determination will be more conducive towards maintaining stability, than it would be to insist on the pre-eminence of territorial integrity.[213] For instance, in relation to the maintenance of stability, the level of disruption and violence that would be created was self-determination denied, should be considered.[214] This seems to echo the understanding of self-determination at its birth, within the Wilsonian movement. Furthermore, it must be recalled that self-determination is a concept that the ICJ, itself, has endowed

[208] *Reference re Secession of Quebec* [1998] 2 SCR 217, p.287.
[209] Eide A, 'In Search of Constructive Alternatives to Secession', in Tomuschat C, *Modern Law of Self-Determination* (Kluwer Academic Publishers, The Hague 1993).
[210] Blay SKN, 'Self-Determination *Versus* Territorial Integrity in Decolonization' (1985-86) 18 New York Journal of International Law and Policy 441, p.472.
[211] Radan P, *The Break-up of Yugoslavia* (Routledge, New York 2002), p.36&37.
[212] Eide, *supra*, note 208, p.147.
[213] Coleman AK, *Resolving Claims to Self-Determination: is there a role for the International Court of Justice?* (Routledge, GB 2013) p.68.
[214] *Ibid.*

with considerable value, being an 'imperative right of peoples',[215] notwithstanding this conflict, and the indeterminacy of the normative framework of self-determination,[216] and one that:

> could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary.[217]

Judge Dillard, in his separate opinion within the *Western Sahara* case, warned of taking a restrictive approach to self-determination, and continued by reminding the court that it is for 'the people to determine the destiny of the territory and not the territory the destiny of the people'.[218] In this regard, it is particularly intriguing that the external concept of self-determination, despite the lack of determinacy with regard to the right, has been held, by both academics

[215] *Legal Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 16, Separate Opinion of Vice-President Ammoun, p.75; *See also, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra, note 207, pp.115&162.
[216] See Weller M, *Escaping the Self-Determination Trap* (Cambridge, Cambridge University Press, 2008); Saul, *supra*, note 118; Summers J, 'The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance' (2004) 14 Finnish Yearbook of International Law 271. It is also arguable that this normative framework has been intentionally undermined, as a result of the norm conflicting with the stability of the Westphalian State system.
[217] *Western Sahara*, *supra*, note 178, Separate Opinion of Judge Nagendra Singh, p.81.
[218] *Ibid*., Separate Opinion of Judge Dillard, p.122.

and by the international courts, as having the status of an *erga omnes* right,[219] and a *jus cogens* norm.[220]

Simply put, being deemed an *erga omnes* right means that it is a legal obligation which all states have a legal interest in protecting.[221] Despite this articulation, unsurprisingly, it has proven difficult to determine the substantive content[222] and procedural consequences of this status, with the Badinter Commission noting that 'international law as it currently stands does not spell out all the implications for the right to self-determination'.[223] Echoing this regard, Drew suggested that the law on self-determination 'remains resolutely impoverished'.[224] Saul, reiterating this perspective, claimed that the legal obligations that have arisen as a result of self-determination having attained this status are rather nominal, highlighting how the major international instruments, pertaining to self-determination,[225] have restricted the legal consequences of this status, obligating States to, merely, promote and respect the right; in other words, States must not

[219] *Case Concerning East Timor (Portugal v Australia)*, Judgment, (1995) ICJ Reports 90, para.29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra, note 207, paras.88&156; *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment, (2005) ICJ Reports 90;
Case Concerning the Barcelona Traction, Light and Power Company, Limited (New application: 1962) (Belgium v Spain), Second Phase, Judgment, (1970) ICJ Reports 3, p.32.
[220] Barcelona Traction, Light and Power Company, *ibid.*, Separate Opinion of Judge Ammoun, p.304; For an examination of *jus cogens*, see Orakhelashvili A, *Peremptory Norms in International Law* (Oxford University Press, Oxford 2006).
[221] Report of the International Law Commission on the Work of Its Twenty-Eighth Session, UN Doc A/CN.4/SER.4/1976/Add.1 (Part 2) p.99.
[222] Koskenniemi M, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 European Journal of International Law 113, p.122.
[223] Conference on Yugoslavia: Arbitration Committee, Opinion No. 2 (1992) 31 *International Legal Materials* 1497-99, 1498.
[224] Drew, *supra*, note 192, p.668.
[225] Human Rights Committee, General Comment No 12: The Right to Self-Determination of People (Article 1), 13 April 1984. HRI/GEN/1/Rev.1 (1994), para 6; Friendly Relations Declaration, *supra*, note 144, para.6.

undertake activity in contravention of the right, and that they are under no obligation to fulfil the right.[226]

In relation to self-determination being a *just cogens* norm, it should be noted that the *Barcelona Traction* case seemingly only recognised the norm as having *jus cogens* status in instances of decolonisation, and not in more general terms. Mirroring this, McCorquodale was of the perspective that self-determination has attained the status of a peremptory norm, but only in relation to non-self-governing territories.[227] On the other hand, other authors have interpreted the right in a manner recognising its status as a *jus cogens* norm as extending to all aspects of self-determination, with Orakhelashvili asserting that '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance'.[228] However, Orakhelashvili's perspective seems to be a suggestion as to how to interpret self-determination based on his own perceived importance of the norm, more than it is an indication as to what the norms core has already been determined as being. Conversely, others, such as Weisburd writing in the late twentieth century, have taken a widely divergent approach, arguing that self-determination, in any form, is devoid of *jus cogens* character.[229] Drawing this analysis together, it is evident that there is little agreement within the discourse on self-determination. However, the intention of

[226] Saul, *supra*, note 118, p.632.
[227] McCorquodale R, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66 British Yearbook of International Law 283, p.326.
[228] Orakhelashvili, *supra*, note 208, p.51; see also, Castellino, *supra*, note 140, p.110.
[229] Weisburd AM, 'The Emptiness of the Concept of *Jus Cogens* as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan Journal of International Law 1, pp.23–24; Whiteman M, '*Jus Cogens* in International Law, with a Projected List' (1977) 7 Georgia Journal of International and Comparative Law 609, pp.625&26; Pomerance M, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff Publishers, London 1982), p.71.

this study is not to make its own interpretative claim about the right, and where it should reside within the international legal hierarchy; what this analysis has sought to do is to establish that self-determination is a highly indeterminate norm, and, therefore, open to widely deviating interpretations.

Indeterminacy of this sort is not uncommon in international law and it is unsurprising that this legal uncertainty has resulted in competing interpretations, and legal inconsistencies. Undeniably, Public International Law is replete with instances of legal contradiction and doctrinal tension, with the struggle between territorial stability and self-determination being a prime example. Accepting this position as being expected, Koskenniemi argued that any social reality will consists of an inherent tension between opposing components,[230] with 'such structural dichotomies reflecting the contradictory ways in which modern society sees itself'.[231] In this sense, that there is a conflict between territorial integrity and self-determination is expected given that the international community, on the one hand, is comprised of, largely, sovereign independent States, which would want to maintain their unchallenged existence; whilst on the other, there has been a move over the last century to further the protection and fulfilment of human rights, which are a challenge to the State. In instances of conflict, there will be occasions where one sits at the apex, and there will be other moments when the reverse is true.

[230] Koskenniemi M, 'What Should Lawyers Learn from Marx' in Marks S (ed), *International Law on the Left* (CUP, Cambridge 2008), p.39
[231] *Ibid*, 41.

This analysis has shown that it is unclear as to how an international body or tribunal would interpret the concept of self-determination. Evidently, the indeterminacy of self-determination, with our understanding of much of it still being firmly planted within the penumbra of uncertainty, enables the personal bias of the lawyer to play a significant role in the interpretation of it. For instance, the uncertainty of the norm would enable an interpreter favouring the position of the Argentine State with the capacity to hold that self-determination should be restricted in light of the concept of territorial integrity. Furthermore, it should not be forgotten that the historical matrix is, also, uncertain, with this, equally, providing the scope for the interpreter of the facts to determine in favour of Argentina. Equally, the alternative is feasible, should the interpreter favour a different outcome.

It is this lack of certainty that has resulted in both the UK and Argentina as being able to develop arguments that reside at polar extremes, whilst both remain, for the most part, legitimate legal arguments that cannot be easily dismissed. For Argentina and the UK, the furtherance of their territorial claim to the Falklands (Malvinas) proves the critical lens through which these States perceive the normative content of self-determination. Looking at this interpretation more generally, States, and international organisations will likely have different agendas that prove critical in how they interpret self-determination. On the one hand, the Special Committee on Decolonisation, established in 1961 by General Assembly Resolution 1514[232] has followed a mode of interpretation that more

[232] GA Res 1514, *supra*, note 168.

closely echoes that of Argentina,[233] but it needs to be recognised that the Committee is heavily dominated by States that were once colonies, and that are now, themselves, fearful of self-determination being utilised as a tool to threaten their own territorial integrity.[234] On the other hand, the ICJ, for instance, seemingly favours the maintenance of stability, and, as indicated, there will be instances where this maintenance will result in the Court interpreting self-determination as being inferior to territorial integrity, and on other occasions, the fulfilment of the right will be the option which best serves stability.

Critically, this observation is not a suggestion as to the approach that the Court will take when interpreting self-determination, as there may be other pertinent factors which are not currently apparent. However, what this does indicate is that neither the UK, nor Argentina can be sure of the outcome was the Court to hear the case. Therefore, it is unsurprising that academics, such as Vidmar, are calling for a reopening of the question as to the scope of democratic expression in international law, particularly so when it is seemingly in conflict with international stability.[235]

Ultimately, it is apparent that self-determination is a highly problematic legal norm. The scope of the rule has yet to attain any real certainty, as a result of the challenge that the norm might present to States, with this resulting in it being

[233] <http://www.un.org/en/decolonization/members.shtml> last accessed 20/10/2017.
[234] Special Committee on Decolonization Approves Draft Resolution Calling for Argentina, United Kingdom to Resume Talks over Falkland Islands (Malvinas) Dispute, GA/COL/3314.
[235] Vidmar V, 'The Annexation of Crimea and the Boundaries of the Will of People' (2015) 16 German Law Review 365.

highly indeterminate. Furthermore, in its indeterminate State, self-determination can be seen as both a challenge to, and as a supporting tool, of international stability. However, this high degree of uncertainty means that the disputing States are unlikely to be able to rely, with any certainty, on a tribunal agreeing with their interpretation of the right. Therefore, this adds further support to the notion that international adjudication would prove an unlikely route through which to resolve the dispute.

4.4: Conclusion

Having conducted this analysis of the two competing legal arguments of Argentina and the UK, it has become evident that the terminology utilised in their constriction is highly expansive, indeterminate, and therefore open to wide interpretation. In showing that our understanding of these legal norms is firmly rooted in the penumbra of uncertainty this chapter has elucidated on the notion that this has resulted in the bias of the interpreter being of heightened significance, as indicated within Chapter 1, when conducting their legal analysis. The indeterminacy of *uti possidetis* and self-determination has provided those interpreting international law with the scope to interpret the legal rules in a manner which enables them to interpret the law in a manner which best fits their own subjective agenda; whether that interpreter is one of the disputing States, a judge of the International Court, or anyone else.

This has significant ramifications for the approaches to dispute settlement that might find application in resolving the Falklands (Malvinas) dispute, to which

this thesis now turns. For instance, was the dispute to find itself on the docket of the ICJ, the subjective agenda of the Court would have significant implications for the manner with which these indeterminate norms would be interpreted. In this regard, this analysis has indicated that this outcome would tend to be the one which would most likely result in the continued stability of the international system. Critically, in regard to the Falklands (Malvinas) dispute, the most stable outcome would, probably, be the maintenance of the status quo. However, the maintenance of this would do little to resolve the dispute; it would, merely, continue the existence of a negative peace, thereby perpetuating the underlying problems that have negatively impacted on inter-State relations between the UK and Argentina.

In light of this, the next chapter examines the different international dispute settlement mechanisms available to the disputing parties, in order to ascertain which mechanism would be the most effective approach through which to normalise relations and resolve the dispute over the Falklands (Malvinas) between Argentina and the UK.

Chapter 5: Dispute Settlement between Argentina and the UK in International Law

5.1: Introduction

The two previous chapters developed a picture of the dispute over the Falklands (Malvinas). They illustrated that both the factual and legal matrix of the dispute are highly indeterminate, with this, therefore, providing the disputing States with the interpretive latitude within which they can argue their divergent positions. It is this feature that has resulted, in part, with the dispute being of an intractable quality. In coming to this point, this thesis has demonstrated how the orthodox approach to legal analysis, through the proclaimed ability to be able to determine an objective factual and legal matrix, has yet to result in a resolution to the dispute, and that it is the contention of this thesis that it will continue to not do so.

This chapter undertakes an analysis of the dispute settlement mechanisms available under international law, assessing their value in relation to the Falklands (Malvinas) dispute. In order to undertake this, it is broken down into four substantive sections: the first takes a look at dispute settlement in international law generally, with it acting as a bridge to the next two sections which address the key modes of pacific settlement of international disputes. In this regard, the significance of this first substantive section cannot be understated, for it links together the deconstructed components of Chapters 3 and 4 with the positive utilisation of these fragments when it is assessed which

mode of dispute settlement would best aid with a resolution of the Falklands (Malvinas) dispute. Therefore, the function of the first substantive section is to establish the role of dispute settlement in international law. In doing so it provides an introduction into its aims, purposes, and key mechanisms. The next aspect this chapter looks at the legally binding modes of dispute settlement, paying particular attention to the jurisdiction of the ICJ, whether the dispute over the Falklands (Malvinas) might find itself on the Court's docket, and on the techniques of interpretation that a adjudicatory body might utilise whilst assessing the dispute. Following this, the chapter analyses the non-legally binding modes of dispute settlement, again assessing how these might aid in resolving this highly intractable dispute, with a nebulous legal and historical matrix, to resolution.

Throughout this chapter, that which has been discussed before, the subjective nature of indeterminate international legal norms and the uncertain factual matrix of the history of the dispute, finds distinct application, with this culminating in the chapter concluding by taking a more theoretical appraisal of the role of law in international dispute settlement.

5.2: International Disputes, and Dispute Settlement Mechanisms

It is uncontroversial to state that international disputes should be settled peacefully with international law providing a range of approaches through which the pacific settlement of a dispute might be reached. This section undertakes a survey of dispute settlement in international law, first by looking at the nature

of disputes in international law, and then progressing on to provide an overview of the key mechanisms that have emerged in order to assist with the settlement of these disputes. In doing so, it provides a foundation on which the following sections build, by taking a more focused look at these mechanisms.

International law provides a number of different techniques and institutions that could see application in resolving the dispute over the contested territory in the South Atlantic. Yet, to affix upon the most relevant approach towards achieving progressive peace it is first necessary to establish that the nature of disputes in international law, and to identify that the Falklands (Malvinas) dispute is one that international law would recognise. To assist in verifying this it is first worthwhile turning to the jurisprudence of the Permanent Court of International Justice. Within *The Mavrommatis Palestine Concessions* case, it was held that a dispute is a 'disagreement on a point of law or fact, a conflict of legal views or interests'.[1] Echoing this, Merrills defined a dispute as being where there is a 'specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another'.[2] For Merrills the existence of international disputes is simply symptomatic of international relations,[3] with the source of this tension being that, like individuals, States often want one thing in a situation where there is not enough of it to go around;[4] with this being the core reason as to why

[1] *The Mavrommatis Palestine Concessions (Greece/UK),* Jurisdiction, PCIJ, Series A, No 2, (August 30, 1924), 6; Merrills JG, *International Dispute Settlement* (5th Edn CUP, GB 2012), p.11.
[2] *Ibid* p.1.
[3] *Ibid.*
[4] *Ibid.*

territorial disputes were traditionally the primary cause of armed conflict.[5] The dispute between the UK and Argentina is symptomatic of this, being over the territory that comprises the Falklands (Malvinas).

Yet, simply noting that States' desire to hold territory fails to address as to why States crave to obtain it. Indicating the significance that States place upon holding territory is Article 1 of the Montevideo Convention on Rights and Duties of State, where it is denoted that territory is essential for recognition as a State.[6] Yet, this is a tautology, and merely restates the importance of territory to a State and fails to answer as to *why* it is important. Assisting in answering this it is worth examining the words of de Visscher where he expressed that '[t]he firm configuration of [a State's] territory furnishes the State with the recognised setting for the exercise of its sovereign powers'.[7] Crawford spoke of territorial title as denoting 'the legal competence which a State enjoys in respect of its territory'.[8] This echoes the words of Judge Huber, within the *Island of Palmas* case, where he held that territorial sovereignty gives rise to the State having exclusive competence within a spatial area.[9] Further reinforcing this position, it is worth examining the words of Jennings, and how he was of a mind that States have exclusive authority to express this legal competence within the territory to

[5] Forsberg T, 'Explaining Territorial Disputes: from Power Politics to Normative Reasons' (1996) 33 (4) Journal of Peace Research 433, p.433.
[6] Montevideo Convention on Rights and Duties of States, Art.1.
[7] de Visscher C, *Theory and Reality in Public International Law, translated by Corbett PE* (Princeton University Press, USA 1957), p. 197.
[8] Crawford J, *Brownlie's Principles of Public International Law* (8th Edn Oxford University Press, GB 2012), p.210.
[9] *Island of Palmas (Unites States of America v Netherlands)* (1928) Reports of International Arbitral Awards Vol II 829, per Judge Huber, p.838.

which they have title.[10] Indeed, Shaw was of an opinion that the exclusive expression of sovereign power is one of the fundamental axioms of international law.[11] It is this exclusive authority to control the territory, and its attached resources, that makes holding sovereignty over territory such a powerful motivation for States. However, it must not be forgotten that this exclusive competence has been curtailed, somewhat, over the past century with the ongoing development of the international legal regime, human rights, the Responsibility to Protect, the powers of the UN Security Council, intergovernmental bodies, and regional governmental organisations, to name but a few.

Nevertheless, it would seem that, unless agreed between the States (perhaps as a result of an international treaty),[12] title to territory is exclusive;[13] a State either possesses it, or it does not. Therefore, disputes over territory, as is the nature of the dispute over the Falklands (Malvinas), are understood as zero-sum games in that there would be no scope for a middle ground. Consequently, with the perceived outcomes being so binary it is easy to see as to why the dispute has evolved into being one that is intractable in character. This is to say that there would appear to be no clear legal or political answer to the dispute that would – critically – be accepted by both parties, and result in the pacific settlement of the dispute. Critical for this analysis the very nature of judicial settlement would

[10] Jennings RY, *The Acquisition of Territory in International Law* (Manchester University Press, Manchester 1963), p.2
[11] Shaw M, *International Law* (6th Edn CUP, GB 2012), pp.487&488.
[12] Bantz VP, 'The International Legal Status of Condominium' (1998-2000) 12 Florida Journal of International Law 79, see generally.
[13] Jennings, *supra* note 10, pp.2&3.

result in a winner and a loser; one State would lose its territorial claim, whilst the other's claim would be upheld. Yet, it can be argued that the zero-sum nature of the territorial dispute has been overstated, with a number of authors suggesting that a shared sovereignty option, condominium, could be a workable solution.[14] However, despite there being historic movements in this direction[15] there seems to be little contemporary support for this. The UK's position in particularly would seem to be rather intransient,[16] being dictated by the objections of the local residents of the Falklands (Malvinas).[17]

Given this analysis it is, therefore, unsurprising that the UN has recognised the existence of a dispute over the Falklands (Malvinas), as indicated in General Assembly Resolution 2065.[18] The intractable, yet *prima facie* stable, nature of the territorial dispute over the Falklands (Malvinas) should not result in its resolution being ignored. However, it should be clearly acknowledged that this makes the resolution of the dispute difficult. Nevertheless, the recognition of the dispute as being of this nature does not result in resolution being impossible, or, indeed, should it negate from the desirability of attempting to overcome the features that have resulted in the dispute having attainted this intractable status.

[14] Dent M, *Shared Sovereignty: A solution for the Falklands/Malvinas Dispute* (South Atlantic Occasional Papers, London 1989); Herter M, Smith WS, 'Possible Solutions', in Smith W (ed), *Toward Resolution? The Falklands/Malvinas Dispute* (Lynne Rienner Publishers, UK 1991), pp.127-129.
[15] FO 371/185137, letter, Hohler to Creswell (21/7/1966).
[16] The British position was most recently restated by the British Prime Minister, May T, in her 2016 Christmas Message to the Falkland Islander, <https://www.gov.uk/government/news/prime-ministers-2016-christmas-message-to-the-falkland-islands> last accessed 20/01/2016.
[17] See, for example, the result of the 2013 referendum on the Political Status of the Falkland Islands, <http://www.falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/> last accessed 10/01/2017.
[18] General Assembly Resolution 2065 (XX), 16 December 1965.

Inversely, the difficulties imbedded within the dispute provide an added impetus – both from a practical and an academic level – to attempt to refine our understanding of the dispute resolution process, and how it might find application.

The peaceful settlement of international disputes is considered one of the fundamental purposes of international law,[19] sitting at the heart of the UN Charter,[20] and the contemporary international legal system. In resolving disagreements States have a duty to 'settle their disputes in accordance with international law',[21] with international law prescribing that States 'shall settle their international disputes by peaceful means'.[22] Therefore, this would preclude the use of military force in resolving disputes, obviously raising legal questions as to the legality of the use of armed force by Argentina in 1982. This aside, looking further at the provision of the UN Charter, Chapter VI provides a list of arrangements specifically for the settling of international disputes, with Articles 34 – 38 focusing on the role of the UN Security Council in relation to dispute settlement, and with Article 33 (1)[23] applying more generally to States. Focusing on Article 33, it denotes that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by: negotiation, enquiry, mediation, conciliation,

[19] Collier J; & Lowe V, *The Settlement of Disputes in International Law* (Oxford University Press, GB 1999).
[20] Charter of the United Nations (adopted 24 October 1945), Chapters I, V, VI, VII, & XIV, Evans M, *International Law Documents* (10th Edn Oxford University Press, GB 2011), p.9.
[21] Lauterpacht H, 'The Judicial Settlement of Disputes' in Lauterpacht E (ed), *International Law: being the collected papers of Hersch Lauterpacht, vol.5* (CUP, GB 2004), p.72.
[22] UN Charter, *supra*, note 20, Art.2.3.
[23] *Ibid*., Art.33.

arbitration, judicial settlement, and so on.[24] This list was restated and reemphasised by the UN General Assembly in resolution 2625,[25] the Friendly Relations Declaration. These dispute mechanisms can be broken down into two distinct categories: diplomatic means of dispute settlement, and adjudication, or legally binding modes of dispute settlement. However, as identified at the time of the drafting of the UN Charter, by Leland Goodrich, the Secretary of Committee II/2 on the Pacific Settlement of Disputes, '[t]he provisions of the Charter relating to the pacific settlement of disputes no doubt leave something to be desired';[26] principally, the Charter is empty of effective definitions, providing no guidance as to how the stipulated dispute settlement mechanisms function in practice, and that the International Court lacks compulsory universal jurisdiction.[27] Consequently, when assessing the applicability of the different dispute resolution mechanisms to the Falklands (Malvinas) dispute, it has been necessary to look outside of the Charter framework in order to find guidance as to how they function.

The procedural deficiencies aside, the Charter compensates for this by offering a flexible framework for dispute settlement, placing primary responsibility upon the disputing States;[28] in other words, despite the Charter requesting States to

[24] *Ibid*.
[25] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970.
[26] Goodrich L, 'Pacific Settlement of Disputes' (1945) 39 (5) The American Political Science Review 956, p.968.
[27] Statute of the International Court of Justice (1945), Art.36 (1), Evans M, *International Law Documents* (10th Edn OUP, GB 2011), p.30; see also Charney J, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 (4) American Journal of International Law 855.
[28] Goodrich, *supra,* note 26, p.968.

seek a resolution to disputes that are likely to endanger international peace and security, the disputing States are, with the exception of binding Security Council resolutions,[29] free to determine which approach to take. In a legal field that is still dominated by the concept of State sovereignty it is of little surprise that this flexibility was retained at the time of the Charters drafting. Yet, this freedom to determine the manner within which the dispute should be resolved sits at the heart of why the dispute over the Falklands (Malvinas) has yet to be resolved, and unless the nature of the dispute was to escalate, and draw the attention of the Security Council, it is perfectly permissible for the dispute to continue indefinitely.

This raises the question as to whether a dispute settlement system that is reliant upon the disputing States to implement it can effectively aid in the resolution of the Falklands (Malvinas) dispute. Therefore, as noted in the introduction, this Chapter now progresses to develop an understanding of the modes of dispute settlement. In doing so, it first identifies how legally binding modes of dispute settlement would prove an unlikely source of resolution. Therefore, it progresses to indicate how diplomatic means of settlement have a central role to play in aiding Argentina and the UK in resolving the dispute, whilst remaining conscious of the significance of politics.

[29] See UN Charter, *supra*, note 20, Chapter VII.

5.3: Legally Binding modes of Dispute Settlement

5.3.1: Introduction

As noted, it is possible to, very generally, dissect the processes of international dispute settlement into two categories. There are those that are held to be legally binding, or, as Merrills put it, these are known as 'legal means of settlement'.[30] The residual dispute settlement mechanisms are classed as lacking in this legally binding quality, and are addressed at a later point within this chapter; these are termed diplomatic means of dispute settlement. The focus of this section is on assessing the legally binding modes of dispute settlement, with the seeds having been sown, throughout this thesis, that indicate that international tribunals would prove an approach through which the disputing States could seek to have the Falklands (Malvinas) dispute resolved.

The prime candidate for a judicial body which might hear the dispute would seem to be the International Court of Justice, however it cannot be immediately disregarded that an alternative form of arbitration, perhaps an ad-hoc tribunal, might be established in order to hear the dispute,[31] as was seen in the *Island of Palmas* case[32] which consisted of a one single arbitrator, and the *Alabama Claims* case[33] which concerned the actions of the UK as a neutral third party during the American Civil War with the arbitral panel being comprised of five members. The arbitral panel of the *Alabama* case functioned much like a judicial

[30] Merrills JG, *International Dispute Settlement* (6th Edn CUP, UK 2017), p.88.
[31] *Ibid.*, p.89.
[32] *Island of Palmas*, *supra*, note 9.
[33] *Alabama claims of the United States of America against Great Britain*, (1872) Reports of International Arbitral Awards Vol XXXIX 125.

panel, a significant development on previous tribunals which had a blending of judicial and diplomatic characteristics and has been much emulated since.[34]

This chapter will focus on the ICJ as a result of it being the legal tribunal most likely to hear the dispute over the Falklands (Malvinas). The ICJ was born in 1945, as the successor to the PCIJ (established in 1919), and is the principal judicial organ of the UN.[35] In addition, other than the procedural requirements peculiar to the ICJ, the legal issues particular to the dispute being heard at the ICJ would be, equally, applicable to arbitration at an ad-hoc tribunal.

The focus of this section is on the capacity of the ICJ as a dispute settlement mechanism in its contentious sense, and, therefore, its competence when it comes to resolving the Falklands (Malvinas) dispute. In order to achieve this, this section first looks at whether the Court has the jurisdiction to hear the case, whilst being mindful of the discretion of the disputing parties in determining this. It then goes on to address whether the Court, itself, would hear a case based on the dispute, looking at whether it would deem the dispute to be admissible before the Court. Following this, this section goes on to analyse how the Court has broached similar territorial disputes that are steeped in history, focusing on the legal doctrines of inter temporal law and the critical date. Ultimately, this analysis provides a clear picture as to why the dispute has yet to have found itself

[34] See, for example, *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, (1998), Reports of International Arbitral Awards 209; *Iron Rhine Railway Arbitration (Belgium/Netherlands)* (2005), Reports of International Arbitral Awards, vol.XXXVII 35.
[35] UN Charter, *supra*, note 20, Art.92.

on the docket of the International Court, albeit it being perfectly permissible for the ICJ to hear the dispute, whilst establishing why the Court would prove an unlikely forum for resolution in the future

5.3.2: Territorial Dispute Settlement at the International Court of Justice

5.3.2.A: Jurisdiction of the International Court of Justice

The adjudicatory function of the International Court, since its birth in the early twentieth century, has sought to emulate the effective legal enforcement mechanisms of domestic legal systems, with their capacity to settle disputes.[36] This is unsurprising, given that it is typically understood that the enforcement of international law, as Hersh Lauterpacht put it, is the 'primary purpose of the International Court', and that it exists as an 'instruments for securing peace in so far as this aim can be achieved through law'.[37] This section undertakes an examination of this function of the Court, and in doing so it assesses the value of the Court in relation to the resolution of the Falklands (Malvinas) dispute. The Court has the capacity to hear three forms of case: contentious; incidental jurisdiction; and advisory.[38] The main focus of this analysis is on the Court's capacity to hear contentious cases, as a result of their outcome being legally binding on the disputing States. However, very briefly, before addressing the Court's contentious jurisdiction, incidental and advisory opinions are assessed.

[36] Llamzon AP, 'Jurisdiction and Compliance in Recent Decision of the International Court of Justice' (2007) 18 European Journal of International Law 815, pp.815-816.
[37] Lauterpacht H, *The Development of International Law by the International Court* (Stevens & Sons Limited, GB 1958), p.3.
[38] Merrills, *supra*, note 1, p.132

The Court's incidental jurisdiction is governed by Article 41 of the Court's Statute.[39] Orders under Article 41 are also known as interim measures of protection, and are linked with the rights of parties that are currently subject to litigation.[40] As a result, the Court's incidental jurisdiction is beyond the remit of this thesis, other than it being worth suggesting that was the dispute over the Falklands (Malvinas) to come before the Court, and was one of the disputing States to undertake activity that might disrupt the situation, the Court would have the legal capacity to protect the legal rights of the other disputing State. For instance, in the *Frontier Dispute* case the Court was asked to resolve a boundary dispute between the two disputing States. Yet, prior to the Court giving its findings an armed conflict occurred between the disputing parties, with the Court, therefore, providing interim measures that necessitated both States from not undertaking any activity that might destroy any pertinent evidence, and to not undertake actions that might aggravate the situation further.[41]

The Court's advisory capacity, on the other-hand, was created in order for the Court to have the power to give legal opinions at the request of international organisations, with the power for this being provided for by Articles 65-68 of the Court's Statute.[42] The jurisdiction of the Court does not seem to be limited to answering questions that are only legal in nature, with the Court appearing to be perfectly content to respond to advisory calls in relation to largely political

[39] Statue of the ICJ, *supra*, note 27, Art.41.
[40] Goldsworthy PJ, 'Interim Measures of Protection in the International Court of Justice' (1974), see generally. See, also, *Anglo-Iranian Oil Co. Case, Order of July 5th 1951*, (1951) ICJ Reports 89.
[41] *Frontier Dispute,* Provisional Measures, Order of 10th January 1986, (1986) ICJ Reports 3.
[42] Statute of the ICJ, *supra*, note 27, Arts.65-68.

matters, as shown in the *WHO Regional Headquarters* case.[43] Therefore, it would seem likely that the ICJ would deem itself competent to provide an advisory opinion on the Falklands (Malvinas) dispute, was an international organisation to bring this before the Court.

Further supporting this, the Court in the *Construction of the Wall* case[44] affirmed the relationship between advisory opinions and dispute settlement, with it asserting its capability to hear the case, despite the significant political foundations of the case, and the contestations of Israel that the matter related to a contentious issue, and therefore the Court should be precluded from hearing the case as a result of Israel not having consented.[45] In addition, being of particular note in relation to the resolution of the Falklands (Malvinas) dispute, the Court emphasised to the General Assembly that it should encourage the fulfilment of a negotiated settlement that would result in the establishment of the Palestinian State, in order to engender peace within the region.[46] In relation to the Falklands (Malvinas) dispute, it has to be noted that no international body has indicated a push towards requesting the Court for an advisory opinion; this is despite the Court being likely to be willing to provide one. Nevertheless, it should be recalled that was an opinion to be given it would be nothing more than that; an opinion, and not legally binding on the parties. However, it would likely

[43] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, (1980) ICJ Reports 73.
[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Reports 136.
[45] *Ibid*., p.157.
[46] *Ibid*., p.201.

have political ramifications, and the findings of the Court would be difficult to ignore in diplomatic forums.

Moving on to the legally binding jurisdiction of the Court, the power of the Court to make binding decisions via its contentious jurisdiction is defined within the Court's Statute. The Court heard its first contentious case involving a territorial dispute in 1953, when it passed its judgment in the *Minquiers and Ecrehos* case.[47] However, significant hurdles arguably preclude the Falklands (Malvinas) dispute from being found on the docket of the Court. Initially there is the issue as to the Court's limited jurisdiction when it comes to contentious cases. For the Court to have jurisdiction both parties to a dispute are required to have accepted the Courts jurisdiction. This can be done on either on an ad hoc basis, or the parties may have accepted to Courts compulsory jurisdiction. Article 36 (1)[48] gives the Court the jurisdiction in all cases referred to it by parties. Critically, as noted, the jurisdiction of the Court, in relation to contentious cases, is founded on the consent of States, as indicated in the *Armed Activities* case,[49] where the Court noted that 'jurisdiction is based on the consent of the parties and is confined to the extent accepted by them', with the Court going on to note that 'consent is a question of jurisdiction and not admissibility'.[50] Indeed, in certain circumstances the Court has inferred consent from conduct. For instance, in the

[47] *The Minquires and Ecrehos case (France v United Kingdom),* Judgment, (1953) ICJ Reports 47.
[48] Statute of the ICJ, *supra*, note 27, Art.36(1).
[49] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) Jurisdiction and Admissibility*, Judgment, (2006) ICJ Reports 6.
[50] *Ibid.*, p.39, see also p.32.

Corfu Channel case[51] the Court inferred this from the application of the claimant State and letters indicating acceptance of jurisdiction from the other disputing party, Albania, to the plaintiff.[52]

In addition, Article 36 (2) provides a mechanism through which a State can accept the jurisdiction of the Court, with it stating that:

> The States parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a) The interpretation of a treaty;
> b) Any question of international law;
> c) The existence of any fact which, if established, would constitute a breach of an international obligation;
> d) The nature or extent of the reparation to be made for the breach of an international obligation.[53]

This clause provides that should a State accept the jurisdiction of the Court, under this Article, then the Court can hear any dispute over which it has jurisdiction, limited by the requirement that the other party to the dispute must have, also, accepted this authority. The UK has accepted the jurisdiction of the Court,[54] however, at this venture it must be noted that Argentina as yet to sign up to the optional clause, therefore this would preclude the clauses application, unless Argentina was to accept the Court's jurisdiction.

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[51] *Corfu Channel Case (Preliminary Objection)*, Judgment, (1948) ICJ Reports 3.
[52] *Ibid*., p.3.
[53] Statute of the ICJ, *supra*, note 27, Art.36(2).
[54] <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en> last accessed 10/11/2017.

It is worth examining this further, as it needs to be considered whether the Court would have the temporal jurisdiction to decide on the Falklands (Malvinas) dispute was Argentina to accept the compulsory jurisdiction of the Court at a point in the future. Returning to the wording of the clause, evidently, the Article mentions nothing of a clause limiting the temporal scope, the *ratione temporis,* of the Court. Therefore, it is suggestable that the temporal jurisdiction of the Court is exceptionally wide, if not unlimited. Indeed, the Court within the *Anglo-Iranian Oil Co.* judgment,[55] and its predecessor the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case,[56] interpreted this provision in this manner. The result of this is that the legal provision that resulted in the creation of the Court's authority has retroactive effect, resulting in the Court being able to hear cases where the factual event arose prior to this authorisation. Therefore, it is arguable that the Court has the temporal jurisdiction to hear the Falklands (Malvinas) dispute, despite the Court, and the possible declaration of the acceptance of Article 36 (2) being created long after the dispute arose. Therefore, was Argentina to accept the Court's jurisdiction under Article 36 (2), the Court would, *prima facie,* be able to decide on the dispute.

[55] *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment, (1952) ICJ Reports 93, p.106.
[56] *The Mavrommatis Palestine Concessions (Greece/UK),* Jurisdiction, PCIJ, Series A, No 2, (August 30, 1924), p.35.

The unlimited temporal scope of the Court's jurisdiction has resulted in States being apprehensive to accept to this clause in its totality;[57] therefore, in order to mitigate against this, States have tendered reservations whilst accepting the compulsory jurisdiction of the Court. For example, in 1925, Belgium was the first State to introduce a limiting condition upon its acceptance of the universal jurisdiction of the PCIJ (in relation to a provision synonymous with the provision contained with the Statute of the ICJ), denoting that the Court had jurisdiction to hear cases, but limited to instances that arose 'after ratification in regard to situations or facts subsequent to such ratification'.[58] Similarly, the UK has deposited a reservation in relation to its declaration accepting the compulsory jurisdiction of the Court. Very recently the UK submitted an amended reservation in the wake of the *Marshall Islands* case.[59] This was undertaken in order to protect the UK from future claims based on the UK's nuclear test programme, amongst other things.[60] The UK and Belgium are far from alone when it comes to having deposited reservations, with numerous other States having documented similar restrictions on the scope of Article 36 (2).[61] What these examples signify, above all else, is that States are conscious of the significance of temporality in relation to legal questions, that States are uneasy

[57] Hudson M, 'Compulsory Jurisdiction of the International Court of Justice' (1946) 40 Proceedings of the American Society of International Law at its Annual Meeting 12; Giustini A, 'Compulsory Adjudication in International Law: the past, the present, and prospects for the future' (1985) 9 (2) Fordham International Law Journal 213, p.214; Owen HJ, 'Compulsory Jurisdiction of the International Court of Justice: a study of its acceptance by nations' (1968-1969) 3 Georgia Law Review 704, p.704.

[58] Second Annual Report of the Permanent Court of International Justice, June 15th 1925 – June 15th 1926, Series E – No. 2, A. W. Sijthoffs Publishing Company, Leyden, p.77.

[59] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Judgment, (2016) ICJ Report.

[60] Amendments to the UK's Optional Clause Declaration to the International Court of Justice: written statement, 23 February 2017, HCWS489.

[61] Waldock H, 'The Decline of the Optional Clause' (1957) 32 British Yearbook of International Law 244; Merrills JG, 'The Optional Clause Today' (1979) 50 British Yearbook of International Law 87.

with the uncertainty and instability that could ensue was the Court furnished with an unreserved universal jurisdiction, and that temporal concerns go beyond substantive rules, being equally applicable to procedural and interpretative rules of international law.

Despite this unease the UN General Assembly has been one of the primary exponents of extending the Courts jurisdiction through acceptance of the optional clause,[62] yet, as Merrills argued, the predilection that States have shown in restricting Article 36 (2) has had the effect emasculating the optional clause, making it all but ineffectual.[63] Indeed, this was reflected in the words of former UN Secretary-General Boutros-Ghali, when he encouraged all States to accede to the Courts jurisdiction under Article 36, without reservation, 'before the end of the United Nations Decade of International Law in the year 2000'.[64] Evidently this didn't occur, and there has to be significant doubt whether this ever would, for a movement in this direction would prove to be a seismic shift of huge proportions in the politico-legal structure of international law. Indeed, as evidenced by the recent British declaration in relation to Article 36 (2), it would appear that States are increasingly likely to want to protect themselves from finding themselves as an unwanted party at the ICJ. This is, obviously, of concern in relation to the Falklands (Malvinas) dispute, with the reservation submitted by the UK ensuring that the universal jurisdiction of the Court would

[62] UN General Assembly Resolution 3232, UN Doc. A/RES/3232 (XXIX), para.1.
[63] Merrills JG, 'Does the Optional Clause Still Matter?' in Kaikobad KH & Bohlander M (eds), *International Law and Power: perspectives on legal order and justice* (Martinus Nijhoff, Leiden 2009), p.431.
[64] Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277, para.38.

fail to apply to the territorial dispute. Therefore, it is apparent that the powers granted to the Court under Article 36 (2) would not extend the Court's jurisdiction to hearing the Falklands (Malvinas) dispute.

Nevertheless, there are other methods through which the Falklands (Malvinas) dispute might find itself on the docket of the Court. Supplementing the Court's jurisdiction under Article 36 (2) it should also be noted that the Court may hear contentious cases brought before it on the basis of special agreements, as occurred in the *Minquiers and Ecrehos* case.[65] Article I of the agreements between the UK and France, the disputing States in the case, requested the Court to determine 'whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic.[66] That this occurred between the UK and France provides scope that the same might occur between the UK and Argentina; however, given that this has yet to have occurred, despite the length of time that has transpired since the origin of the dispute, makes it questionable whether it is likely to happen without there first being a considerable shift of the political stance of either party.

One final mechanism for accepting the jurisdiction of the Court is provided for in Article 37,[67] where it is noted that treaties may provide for the referral of a case before the Court. As it stands, there is no such treaty between the UK and

[65] *The Minquires and Ecrehos* case, *supra*, note 47.
[66] *Ibid*., p.49.
[67] Statute of the ICJ, *supra*, note 27, Art.37.

Argentina that might provide for the Court to have jurisdiction to hear a contentious case in relation to the question of territorial sovereignty over the Falklands (Malvinas). However, should the two disputing States come to some form of agreement over the territory, such as with the creation of a condominium, a clause may be included within the agreement that would provide the Court with the jurisdiction to resolve any disputes that might arise in relation to its interpretation and application.

Further to the jurisdictional hurdle, the next test that the Falklands (Malvinas) dispute would need to cross is that of admissibility. Admissibility, as indicated in the *Serbia and Montenegro v UK* case,[68] refers to factors that preclude the Court from hearing a case. Of significance in relation to the Falklands (Malvinas) dispute is that the Court, as a legal institution, normally has no right to decide political questions. Therefore, the ICJ has sought to implement a two-stage test in order to assess whether it should be precluded from hearing a case based on the political nature of a dispute. The first aspect is that if the question cannot be resolved by legal criteria, then unless the Courts competence has been extended by agreement it must decline to adjudicate. The second is linked to the first, in stipulating that if a case raises a question of international law then to fulfil its function the Court must give a decision irrespective of the political context. For example, within the *Aegean Sea Continental shelf* case[69] the Court held that a dispute involving two States in respect of their continental shelf can

[68] *Case Concerning Legality of Use of Force (Serbia and Montenegro v United Kingdom) Preliminary Objections*, Judgment, (2004) ICJ Report 1307, p.1340.
[69] *Aegean Sea Continental Shelf*, Judgment, (1978) ICJ Reports 3.

hardly fail but to have some political element.[70] Nevertheless, the Court continued to note that it was clear from the arguments of the States that the dispute between them involved a conflict as to their respective rights. Therefore, it was determined that legal rights resided at the root of the dispute. A similar point was raised by the Court in the *United States diplomatic and Consular Staff in Tehran* judgment.[71] Therefore, it is safe to say that the Falklands (Malvinas) dispute, with its roots firmly in the legal issue as to where territorial title should reside, would be heard by the Court.

To this point this section has concerned itself with an analysis of the procedures of the Court in relation to whether the Falklands (Malvinas) dispute would find itself on the docket of the Court. It has concluded that it is unlikely that the disputing States would consent to the Court's jurisdiction, but was this to happen there would seem to be no reason to preclude the Court from hearing it based on questions of admissibility. Given this, the next aspect of this section addresses how the Court has dealt with previous historical territorial disputes. In developing an understanding as to how the Court addresses territorial disputes, it adds further clarity as to the likely dispute settlement mechanism that Argentina and the UK would utilise, whilst indicating why the disputing States have yet to bring the dispute before the Court.

[70] *Ibid*., p.13.
[71] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, (1980) ICJ Reports 3, p.18.

5.3.2.B The Interpretation of Law and History at the International Court of Justice

As noted, it is very possible for the Court to hear a contentious case based on the merits of the Falklands (Malvinas) dispute, with there being no obvious reason as to why the Court should be precluded from hearing the case for reasons of inadmissibility. Indeed, the Court has had a history of hearing cases in relation to territorial disputes. For instance, as mentioned, the first territorial dispute that the Court heard was that of the *Minquiers and Ecrehos* case.[72] Since then it has heard many more, from the *Frontier Land* case,[73] to the *Land, Island and Maritime Frontier* case,[74] the *Kasikili/Sedudu Island* case,[75] and most recently the *Frontier Dispute (Burkina Faso/Niger)* case.[76]

Initially, looking at the doctrine of intertemporal law, of the territorial dispute cases that the Court has heard, many concerned long-standing disputes with highly complex legal and factual matrices.[77] In each case, the Court has had to determine the pertinent legal regime that should be utilised in resolving the dispute. In most disputes, the answer might seem self-explanatory, as a dispute may have been brought before the legal forum at a time close to when the triggering facts arose. But, in other instances, as with the Falklands (Malvinas), there is a large degree of disconnectedness between the point that the dispute

[72] *Minqueirs and Ecrehos* case, *supra*, note 47.
[73] *Sovereignty over Certain Frontier Land (Belgium v Netherlands)*, Judgement, (1960) ICJ Reports 192.
[74] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)*, Judgement, (1992) ICJ Reports 351.
[75] *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, (1999) ICJ Reports 1045.
[76] *Frontier Dispute (Burkina Faso/Niger)*, Judgment, (2013) ICJ Reports 44.
[77] Merrills, JG, 'The International Court of Justice and the Adjudication of Territorial and Boundary Disputes' (2000) 13 Leiden Journal of International Law 873, p.875.

was brought before a forum, and the time that the dispute originated. By way of an example, a State may have acquired territorial title under the sixteenth-century legal order, via conquest; yet, the question remains as to whether this title is still valid as a result of the progression of law, with the contemporary legal position being that it is illegal to acquire territory via the use of force.

A perusal of the jurisprudence of the ICJ indicates that the Court has developed a number of tools that assist it when it comes to interpreting historical territorial disputes. As indicated within the *Minquiers and Ecrehos* case, the two that would prove significant in relation to the Falklands (Malvinas) dispute are the doctrine of intertemporal law,[78] and the critical date theory.[79] Given that the Court's perceived utility of these mechanisms, in relation to historical territorial disputes, it proves necessary to undertake an analysis of them in order to indicate what the implications of their use would be for the resolution of the Falklands (Malvinas) dispute. Consequently, this section now turns to undertake an analysis of the intertemporal law doctrine, whilst then progressing on to look at the critical date.

In any dispute the time-period from which the law is determined would prove pivotal in forming the outcome of a legal dispute. Jennings noted that the manner within which we, as international lawyers, determine the relevant law applicable to a legally significant act is of utmost importance.[80] The significance of this

[78] *Minquiers and Ecrehos case*, *supra*, note 47, please see generally.
[79] *Ibid*., p.51
[80] Jennings, *supra*, note 10, p.28.

determination by Jennings should not be understated, for it highlighted how the process through which the law of the past is determined is a process of interpretation. The methodology that international lawyers, typically, employ is the doctrine of inter-temporal law.

The doctrine of intertemporal law, as Elias remarked, has acquired a wide array of titles, such as: international intertemporal law; intertemporal theory; and the principle of intertemporal law. Despite the lack of consistent nomenclature, the doctrine of intertemporal law, as this section refers to it, has seemingly been accepted as a general rule of international law.[81] Indeed, such is the ubiquitous nature of the doctrine that Higgins wrote that '[e]very student of international law is familiar, of course, with the inter-temporal rule'.[82] Early cases referring to the doctrine are the *Grisbadarna* case[83] and the *North Atlantic Coast Fisheries* arbitration,[84] yet, for Fitzmaurice, the crystallisation of the doctrine of intertemporal law is said to have occurred as a result of the enunciations delivered by Huber, sitting as sole judge in the *Island of Palmas* arbitration,[85] with Jennings noting how the award is the most frequently quoted authority in relation to the doctrine.[86] Extracting a working definition from the words of Huber, Fitzmaurice found the doctrines substantive composition to be that 'the

[81] Fitzmaurice G, 'The Law and Procedure of the International Court of Justice 1951-54: general principles and sources of Law' (1953) British Yearbook of International Law 1, p.5.
[82] Higgins R, 'Time and the Law: international perspectives on an old problem' (1997) 46(3) International and Comparative Law Quarterly 501, p.501.
[83] *The Grisbadarna Case* (Norway v Sweden), Award of the Tribunal, Permanent Court of Arbitration 1909, Hague Court Reports, (1910) 4 (1) American Journal of International Law 226.
[84] *The North Atlantic Coast Fisheries Case* (Great Britain, United States), Reports of International Arbitral Awards 1910, Vol XI 167.
[85] Fitzmaurice, *supra*, note 81, p.5.
[86] Jennings, *supra*, note 10.

situation in question must be appraised … in the light of the rules of international law as they existed at the time, and not as they exist today'.[87]

The position of Shaw echoes that of Fitzmaurice, who suggested that it would appear that the intertemporal law doctrine has been accepted as 'an established principle of international law'.[88] Yet, as will be shown, the chosen formulation of the doctrine by Huber, is, arguably, not as clear as Fitzmaurice suggested; in this regard, Jennings, rather damningly noted that Judge Huber put a 'by no means entirely clear gloss on the basic rule'.[89] This 'gloss' has resulted in the doctrine being relatively indeterminate. Therefore, rather than being a legal doctrine with a strong core of certainty, thereby being applied consistently, there would appear to be, broadly speaking, two distinct interpretations of the doctrine with each holding polar perspectives as to how the doctrine of intertemporal law should be given form. For the sake of clarity these camps are classified as the: non-retroactivists; and with the alternative camp seeing law as being evolutionary and dynamic.

Having identified that the *Island of Palmas* case is perceived as being central to the doctrine of intertemporal law, and of the doctrinal split mentioned, in order to address this it is now necessary to assess the terminology utilised by Judge Huber; it is notable that he gave reference to the doctrine on several occasions.

[87] Fitzmaurice, *supra*, note 81, p.5.
[88] Shaw, *supra*, note 11, p.508.
[89] Jennings, p.28; it should be noted that Jennings was of the opinion that the basic rule is one ensuring the non-retroactivity of law.

Initially, he noted that a 'juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled'.[90] This understanding of the doctrine suggests that the essential criterion to underpin the doctrine of intertemporal law is that of the non-retroactivity of law, the position which Fitzmaurice has since taken. However, later within the award Judge Huber gave a further account as to how he perceived the doctrine of intertemporal law should be constructed:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[91]

This extended definition, as Judge Huber stated, makes a clear distinction between the origins of a legal title, and the continued existence of that title. It is worth examining the words of Judge Huber, further, before going on to assess the significance of this aspect of the doctrine of intertemporal law, as constructed:

> It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognised by existing law, even if such a title ever conferred

[90] *Island of Palmas* (Unites States of America v Netherlands) (1928) Reports of International Arbitral Awards Vol II 829, as per Judge Huber p.845.
[91] *Ibid.*, p.845.

> territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty over the Island of Palmas, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.[92]

The result of this is that this doctrinal construction is, far from providing for a legal regime that gives effect to the law progressively as time passes, that all legal provisions predating the contemporary period are negated. This results in the contemporary legal position having retroactive effect. Taking a highly critical stance of this construction, it would seem that the second aspect of the intertemporal law doctrine acts to negate the first, in the entirety. Whatever the rationale for this, it is these two distinct, polarising components of the doctrine that have been at the root of the doctrines problems, with this being manifest within the doctrinal debate surrounding it.

As noted it is permissible to separate the debate into two, generally speaking, camps. By way of a recap it must be recalled that the first subsect seems to favour the first strand of Judge Huber's judgment, thereby rejecting the applicability of the second strand, with it being generally held that the two branches are mutually exclusive. Progressing on to the alternative camp, advocates of this position favour a utilisation of Judge Huber's extended definition of intertemporal law, which perceives international law as being a

[92] *Ibid.*, p.883

living entity,[93] focusing upon the creation of a legal right, and the maintenance of that right over a period of time.[94] Now that the opposing doctrinal positions have been identified, it is now necessary to assess each of these in more detail.

The first camp is led, in spirit if not directly, by Jessup, who was of a mind that Judge Huber's determination and application of the second strand, stipulating the requirement for the continued manifestation of a right, in effect, functions to negates the first strand of the doctrine.[95] Jessup provided an example in order to clarify this position, which is worth examining:

> Assume that State A in a certain year acquires Island X from State B by a treaty of peace after a war in which A is the victor. Assume Island X is a barren rocky place, uninhabited and desired by A only for strategic reasons to prevent its fortification by another Power. Assume that A holds Island X, but without making direct use of it, for two hundred years. At the end of that time suppose that the development of international morality has so far progressed as to change the previous rule of international law and that the new rule is that no territory may be acquired by a victor from a vanquished at the close of a war. Under the theory of 'intertemporal law' as expounded, it would appear that A would no longer have good title to Island X but must secure a new title upon some other basis in accordance with the new rule.

Taking a strict reading of the words of Judge Huber, this would seem to be the logical result. The consequences of this retroactive effect of law, as Jessup continued to suggest, would be 'highly disturbing. Every State would constantly

[93] Linderfalk U, 'The Application of International Legal Norms over Time: the second branch of intertemporal law' (2011) 58 Netherlands International Law Review 147, p.150.
[94] Elias TO, 'The Doctrine of Intertemporal Law' (1980) 74 American Journal of International Law 285, p.286.
[95] Jessup PC, 'The Palmas Island Arbitration' (1928) 22 American Journal of International Law 735, p. 740.

be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition'.[96] In this regard, Raz, was of a mind that all laws 'should be prospective, open and clear',[97] with Fuller considering retroactive laws to be an aberration,[98] and that the improper use of retroactive law- making negates the legal efficacy of a legal rule.[99] Evidently, was this to be the case the result of this would be a highly chaotic international legal order, with highly unstable territorial regimes. Harris echoed this, suggesting that the second strand results in a heightened level of instability within the international legal order.[100] Elias noted that this fear is justified, but that other aspects of international law, such as the rule against nonretroactivity of treaty provision, acquiescence, prescription, and desuetude act to mitigate against any injustices that the second strand might give rise to.[101]

This camp would seem to be following an interpretative course rejecting the second strand identified, preferring a legal interpretation favouring the maintenance of the stability of the Westphalian State system.[102] The primary argument of Jessup, and others, is that to apply the second strand would be to create an international system founded on chaos. For example, as Jessup noted, a State would have to show that it complied with international law at all points

[96] *Ibid*., p.740.
[97] Raz J., 'The Rule of Law and Its Virtue' (1977) 93 Law Quarterly Review 195, p.198.
[98] Fuller L, *Anatomy of the Law* (Greenwood Press, USA 1976), p.61.
[99] Fuller L, *The Morality of Law* (Yale University Press, USA 1964), p.39.
[100] Harris D.J. *Cases and Materials on International Law* (6th Edn Sweet and Maxwell, GB 2004), p.197.
[101] Elias pp.286-287.
[102] Cameroon v. Nigeria ICJ Reports 2002 303, p.405 (para 205).

throughout history to show it retained sovereignty over a territory. Similarly, Castellino and Allen suggested that to question the validity of the principle of intertemporal law is to favour revisionist desires, and that to comply with these would be to retrospectively 'project a more progressive notion of law and its underpinning morality onto the actions of the past in a bid to seek culpability'.[103] Further supportive is that the State is, as suggested by Jennings, at the core of the international legal system,[104] with Crawford stating that the existence of the international legal system is a corollary of the need to maintain stability and predictability in the international system of States.[105]

Notwithstanding this focus by jurists and academics on the restrictions on the retroactive effect of law, the second strand of the doctrine cannot be ignored. The second camp suggests that the strands are not incompatible, but, also, that the second strand's existence is necessary in order to ensure that the law advances and keeps pace with societal evolution.[106] Recently, the second strand has found a proponent in Linderfalk, who argued that if 'the existence of a sovereign title to territory is dependent on the application of a specific law governing the acquisition of territory, then this law does not necessarily remain the same for as long as title to the territory is claimed'.[107] In this regard, as

[103] Castellino J; Allen S, *Title to Territory in International Law: a temporal analysis* (Ashgate, GB 2003), p.234.
[104] Jennings, *supra*, note 10, p.2.
[105] Crawford J, Brownlie, p.218.
[106] Shaw, *supra*, note 11, p.508.
[107] Linderfalk *supra*, note 93. p.150.

Koskenniemi put it, the second strand enables the doctrine to enable international law to adapt and evolve to shifting societal requirements.[108]

There are numerous instances whereby the International Court echoed this perspective. For instances, in the *Minquiers and Ecrehos* case the Court held that it is necessary to 'show that you not only had title, but that you exercised – and are exercising it now'.[109] Within the Aegean Sea Continental Shelf case the ICJ followed a very expansive interpretation of the second strand of Huber's decision, suggesting that the words of a treaty should be taken to evolve, and incorporate contemporary understandings. Furthermore, it should be noted that there is no general legal prohibition on the retrospective application of law, with ICJ Judge ad hoc Tom Franck, in the *Indonesia/Malaysia* case,[110] holding this. It was Franck's findings, in his separate opinion, that historic claims of title, no matter how persuasively argued, should never be an effective claim of sovereignty when the alternative is based on the right to self-determination, a contemporary legal provision.[111]

What this analysis has shown is that there is a clear doctrinal divide, with there being effectively argued perspectives on either side of the debate. Yet, given the

[108] Koskenniemi M, *From Apology to Utopia: the structure of international legal argument, reissue with new epilogue* (CUP, GB 2007), p.456.
[109] *ICJ Pleadings Minquiers and Ecrehos (France v United Kingdom) (1953)*, Oral Proceedings 10, pp.33-34.
[110] *Case Concerning the Barcelona Traction and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene*, Judgment, (2001) ICJ Reports 575.
[111] *Ibid*, separate opinion of Judge Franck, p.652.

significance of the doctrine within international law, as a natural corollary of the life-span of the State being – generally speaking – significantly longer than that of the average human,[112] one would be forgiven for thinking that an established formulation for this mechanism would have crystallised. However, as indicated, despite it being of no surprise that a mechanism has arisen to assist with the determination as to what legal provision should apply at a given temporal point, in instances where the relevant legal regime has changed, questions remain as to the form of this doctrine. It is striking that a mechanism that is seen as being fundamentally necessary has a framework that is not entirely fully formed and clear.

This level of uncertainty is significant when it comes to considering whether the UK or Argentina would be likely to submit to the jurisdiction of the International Court. Both States would be conscious of this issue, and of the uncertainty as to which strand of the doctrine would be followed. Recalling what was discussed in Chapter 2, in instances where a legal rule is uncertain the subjective perspective of the legal interpreter comes to the fore. Critically, as the interpreter does not come 'as a blank slate … [that t]hey begin with a viewpoint or pre-understanding'[113] in relation to the interpretation of law, they, therefore, interpret the doctrine of intertemporal law through their own subjective perspective. Therefore, the interpretation of the doctrine, deciding which strand will be followed, will be determined by the judge that is sitting, and their own subjective perspective.

[112] Jennings, *supra*, note 10, p.28.
[113] Greenawalt K., *Legal Interpretation* (OUP, GB 2010), p.151.

An analysis of the case law of the ICJ provides no clear correlation between the sitting judicial panel, and which strand of the intertemporal law doctrine was chosen. However, looking at the outcome of each case, it is suggestable that the Court determined on which strand to utilise based on the one which would best result in international stability. Given the analysis undertaken in regard to self-determination and *uti possidetis*, this should hardly come as a surprise, for the ICJ has held the promotion of stability between States as being one of the central aspects of international law.[114] Furthermore, in one instance, Judge Rangeva held that the 'main purpose of the rules of intertemporal law is to strengthen legal security in international relations'.[115] Consequently, it could be cynically argued that the doctrine has been intentionally left indeterminate in order for the Court to be able to utilise the strand which best suits the maintenance of stability. For instance, was it to restrict itself to the first strand, it would tie itself to making decisions based on the non-retroactive effect of law, and there might be instances where this would result in the creation of international instability.

Adding further to the uncertainty and unease that the disputing States would feel, with regard to the Falklands (Malvinas) dispute being heard before the International Court, is the second interpretive tool that the Court typically utilises when addressing historical disputes: the doctrine of the critical date; a doctrine which is often utilised in conjunction with the doctrine of intertemporal

[114] Barcelona Traction (Belgium v Spain) p.50; Norweigian Fisheries (UK v Norway) p.130.
[115] *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, (2002) ICJ Reports 303Separate Opinion of Judge Rangeva, para.3.

law, as occurred in the *Minquiers and Ecrehos* case. The general definition of the concept, as noted by Goldie, is that the critical date is the point at which the rights of the parties have crystallised, with events that follow not affect the rights of the disputing parties.[116] Therefore, in instances of territorial disputes, as Fitzmaurice indicated, the 'critical date tends to assume special prominence'.[117] Again, the origin of the term can be traced back to the *Island of Palmas* case where Judge Huber developed the notion of the 'critical moment',[118] and went on to say that 'the question arises whether sovereignty …existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris'.[119]

Therefore, the critical date might be deemed to be at the point of the creation of a treaty, as in the *Island of Palmas* arbitration, or the date that a territory was occupied, as seen in the *Eastern Greenland* case.[120] Fitzmaurice identified six distinct ways in which a dispute can be said to have crystallised:

> (i) the date of the commencement of the dispute;
>
> (ii) the date (not necessarily the same as in (i)) when the challenging or plaintiff State first makes a definite claim to the territory;
>
> (iii) the date, which again may or may not coincide with one of the foregoing, when the dispute 'crystallized' into a definite issue between the parties as to territorial sovereignty;
>
> iv) the date when one of the parties proposes and, so far as lies within its power, takes active steps to initiate a procedure for the settlement of the

[116] Goldie LFE, 'The Critical Date' (1963) 12 The International and Comparative Law Quarterly 1251, p.1251.
[117] Fitzmaurice G, 'The Law and Procedure of the International Court of Justice, 1951-4: points of substantive law. Part II' (1955-56) 32 British Yearbook of International Law 20, p.20
[118] *Island of Palmas, supra,* note 90, pp.843&866.
[119] *Ibid.*, p.84.
[120] *Eastern Greenland case*, PCIJ, Series A/B No.53, p.45.

> dispute, such as negotiations, conciliation, mediation, reference to, or use of, the machinery of an international organization, or other means falling short of arbitration or judicial settlement;
>
> (v) the date on which any of these procedures is actually resorted to and employed;
>
> (vi) the date on which, all else failing, the matter is proposed to be or is referred to arbitration or judicial settlement.[121]

Fitzmaurice continued to undertake a far more robust analysis of the doctrine than is needed for this analysis. But what this list indicates is that the doctrine is highly flexible, and, as a result, is one that is plagued by a lack of procedural concreteness. In other words, there is a large degree of discretion available to the legal interpreter as to when to determine the critical date.

Looking at the Falklands (Malvinas) dispute any number of critical dates can be picked. For instance, it could be argued that the date the British forces left the territory was the critical date, in 1774. In the alternative, the critical date may be the point that the French settled the territory in 1764, or when the British initially settled in 1765. Perhaps the signing of the Nootka Convention, by Britain in 1790, yielding all British claims against Spanish territories in the Americas could be seen as being a critical date. Another alternative might have been the date that Argentina obtained independence, in 1816, or when Britain regained effective control over the territory in 1833. Other dates could, equally, be seen as being critical. Some of these would favour the British position, and others would seem to favour the Argentine position. In combination with the uncertainty of the factual matrix, which is discussed in Chapters 2 and 3, the

[121] Fitzmaurice, *supra*, note 117, pp.23-24.

uncertainty as to how the critical date doctrine functions provides the interpreter of the factual matrix with a wide degree of latitude when it comes to interpreting how it should be applied. Therefore, once again, the subjective bias of the interpreter proves highly significant (as does the persuasiveness of the litigant's legal representation). Consequently, the doctrine of the critical date functions as another factor that would act to dissuade the disputing States from bringing the dispute before the International Court: the outcome of adjudication at the Court would be highly uncertain.

Concluding this analysis of the manner within which the International Court would analyse the legal and factual matrix of the Falklands (Malvinas) dispute, it is apparent both disputing States would be fearful of the doctrinal uncertainty that permeates this aspect of international law. This, therefore, goes someway to indicating why neither State has been willing to submit to the jurisdiction of the International Court, and as to why it is unlikely that they would be willing in the future.

5.3.3: Is there a Role for the Court in Resolving the Falklands (Malvinas) Dispute?

Given this analysis of the contentious jurisdiction of the International Court, it would seem unlikely that the Court would have a role to play in resolving the territorial dispute over the Falklands (Malvinas). This built of that discussed in Chapters 2, 3 and 4 of this thesis, where it was highlighted how significant the personal bias of the interpreter of facts would be in coming to conclusions based on the legal and factual matrix of the Falklands (Malvinas) dispute, given the

high level of uncertainty that permeates both. The uncertainty of the outcome of a judicial hearing, as a result of the high significance of subjectivity in interpreting the uncertain legal and factual matrix, would result in the disputing States being unlikely to consent to the Court's jurisdiction. However, even if they did consent, or were to somehow find themselves on the Court's docket unwillingly, there remains the question of compliance. Therefore, it needs to be assessed whether the disputing States would comply with the judgment of the Court, was it to decide on the question of sovereignty over the Falklands (Malvinas).

In this regard, as Jennings wrote, the 'judgments of the Court are binding in law, but do they, in fact, resolve the matter'?[122] In relation to the enforcement of a decision of the Court, a judgment of the Court, as noted under Article 60, is final and without appeal. Critically, as indicated in the *Nuclear Tests* case,[123] the Court is not concerned with whether the decision is complied with, 'once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it'.[124] However, this is not to say that there is a dearth of enforcement mechanisms. For instance, Article 94 of the UN Charter stipulates that the Member State should comply with the decisions of the Court in a case to which it was a party, and that was a party to a case not to comply with the 'obligations incumbent upon it under a judgment rendered by the Court, the other party may have

[122] Jennings R, 'Presentation', in Peck C Lee RS (eds), *Increasing the Effectiveness of the International Court of Justice: proceedings of the ICJ/UNITAR colloquium on the 50th anniversary of the Court* (Springer, The Netherlands 1997), p.78.
[123] *Nuclear Tests (Australia v France)*, Judgment, (1974) ICJ Reports 253.
[124] *Ibid.*, p.477.

recourse to the Security Council'. Article 94 continues to note that the Security Council may, if it deems necessary, make 'recommendations or decide upon measures to be taken to give effect to the judgment'. However, given the prominence of the UK as a Permanent Member of the Security Council, it is questionable as to how effective this mechanism would prove to be, was the decision to go against it.

Yet, returning to the words of Jennings, 'it is not always easy to find out what happened afterwards',[125] once the Court has handed down its ruling. Nevertheless, Charney conducted an empirical study of State compliance with final decision, albeit concluded in 1987. Nonetheless, the findings of that study still prove informative. The general findings of that study were that contentious judgments were largely complied with. In instances where States had willingly consented to the jurisdiction of the Court, such as with the submission of special agreements, compliance tended to be higher. However, inverse to this, in proceedings where a party was unwilling, compliance, unsurprisingly, tended to be lower.[126] That compliance issues might arise reflects the difficulty of resolving disputes that are deeply imbedded within politics through legally binding mechanisms[127].

[125] Jennings, *supra*, note 10, p.81.
[126] Charney JI, 'Disputes Implicating the Institutional Credibility of the Court: problems of non-appearance, non-participation, and non-performance' in Damrosch LF (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers, USA 1987), p.288.
[127] P.460.

However, the political costs of non-compliance cannot be ignored, and this is something that both the UK and Argentina must consider.[128]Nonetheless , as Merrills noted, cases involving territorial disputes tend to have long and complex histories that result in adverse decisions being difficult to accept.[129] Therefore, the political cost of non-compliance would be a one based on a balance between the negative costs of non-compliance combined with the negative political costs of complying with the decision. Therefore, internal domestic politics may have as significant a role in ensuring compliance as external international politics.

Nevertheless, it is arguable that were both parties to voluntarily accept the jurisdiction of the Court it is unlikely that they would then decide to disregard the judgment of the Court. However, there is no guarantee of this occurring; indeed, it should be recalled that it is the conclusion of this section that there is little chance of the States' consenting to the Court's jurisdiction. Consequently, the biggest hurdle for the settlement of the Falklands (Malvinas) dispute, via adjudication, is not ensuring compliance, but it is in getting the disputing States to willingly bring the case before the Court. In this regard, the requirement of State consent for the Court to have jurisdiction, coupled with the high degree of uncertainty as to the outcome, would result in the UK and Argentina having no clear understanding as to which way the Court would decide. Given that the Court would decide in favour of one State, or another, this high degree of

[128] Paulson C, 'Compliance with the Final Judgments of the International Court of Justice Since 1987', (2004) 98 American Journal of International Law 434, p.
[129] Merrills, *supra*, note 77, p.898.

uncertainty would act, and has acted, to dissuade the States from seeking judicial settlement. This leads to one conclusion, that the contentious jurisdictional role of Court is unlikely to have a role to play in pacifically resolving the Falklands (Malvinas) dispute. Therefore, this Chapter now turns to look at the non-legally binding modes of international dispute settlement, in order to ascertain if they may have a role to play.

5.4: Diplomatic Means of Dispute Settlement

5.4.1: Introduction

5.4.2: Negotiation

The analysis of the dispute has brought us to this point, whereby the focus now needs to be on the issue of negotiation as a dispute settlement mechanism. Initially, it is necessary to provide an understanding as to the place of negotiation within international dispute settlement. Once this picture has been crafted the instrumental worth of the machinery of negotiation will be analysed through the contextual framework of the Falklands (Malvinas) dispute.

As noted, not only has the UN General Assembly 'invited' the parties to the Falklands (Malvinas) dispute to enter into negotiations, with regard to the implementation of General Assembly Resolution 1514, negotiation also holds a position of primacy in both the UN Charter and the Friendly relations Declaration. Despite negotiation coming first amongst the list of recognised modes of dispute settlement, the text of these two documents are devoid of any indication as to the hierarchically normative significance as to this ordering.

Therefore, the question remains as to whether this ordering is purely random, or whether some unwritten significance underlies this arrangement. The PCIJ in the *Case of the Free Zones of Upper Savoy and the District of Gex*, which admittedly predates the inception of both the UN Charter and the Friendly Relations Declaration, shows that the Court perceived there as being no normative hierarchy when it came to dispute settlement mechanisms, and that 'the judicial settlement of international disputes … is simply an alternative to the direct and friendly settlement of such disputes between the [p]arties'.[130] Therefore, if there is no hierarchy it could simply be that negotiation was included first as it is the most commonly utilised form of dispute settlement.[131] As the Permanent Court observed within the *Mavrommatis Palestine Concession* case negotiation is the chief method through which States seek to settle their disputes.[132] In fact, as noted by Merrills, negotiation is so commonly employed that its use eclipses all of the other forms of dispute settlement combined.[133] Merrills went on to suggest that this is not as a result of negotiation being the most effective dispute settlement mechanism, but that the freedom it delivers to States results in the mechanism being *perceived* as desirable by those States. Consequently, looking a little deeper, this preference is unsurprising given that negotiation would seem to best maintain the status quo situation of the sovereign equality of States. It provides States with the widest degree of

[130] *Case of the Free Zones of Upper Savoy and the District of Gex* (France v Switzerland), 1932 PCIJ (ser.A/B) no. 46 (June 7), p. 13.
[131] CMH Waldock, *International Disputes: the legal aspects* (David Davies, London 1972), Chapter 2, p.77.
[132] *The Mavrommatis Palestine Concessions (Greece/UK)*, Jurisdiction, PCIJ, Series A, No 2, (August 30 1924), 6, pp. 11-15.
[133] Merrills JG, 'The Principle of Peaceful Settlement of Disputes' in Warbrick C; and Lowe V (eds), *The United Nations and the Principles of International Law* (Routledge, GB 1994), p. 55; Cassese A, International Law (Oxford University Press, Oxford 2001), p. 213.

freedom when it comes to conducting their international dealings, with the least interference from external influences. As Pan wrote, it provides the disputant States with the maximum control over the dispute settlement process, and the outcome that is reached.[134] In addition to this, the process of negotiation presents a dual purpose, not only as an effective means of dispute resolution in of itself, but also, as Satow indicated, the process of negotiation is often used in conjunction with other dispute mechanisms, either as a precursor, or in mutual support.[135] For example, a process of negotiation might be followed prior to the establishment of an international tribunal addressing the issue in question, with negotiations ongoing whilst adjudication takes place.[136]

Looking more closely at the process of negotiation it is normally undertaken through what are considered to be 'normal diplomatic channels'.[137] *Inter alia*, this includes the use of diplomats, foreign office representatives, and foreign office ministers. On the other hand, it might be appropriate for the negotiations to be undertaken by a 'competent authority',[138] whereby representatives of a specific ministry may be involved within the negotiation process if it is felt that their expertise would be of an advantage. For example, the 1996 Argentina-UK Double Taxation Convention, at Article 3, stipulated for the use of competent authorities, with those being, in the case of the United Kingdom, the

[134] Pan J, *Towards a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff, The Netherlands 2009), p. 53.
[135] Satow EM, *Satow's Guide to Diplomatic Practice edited by Lord Gore-Booth* (5th Edn Longman, London 1979), p. 349.
[136] Merrills JG, 'The Mosaic of International Dispute Settlement Procedures: complementary or contradictory? 54 (2) (2007) Netherlands International Law Review 361, see generally.
[137] Merrills, *supra*, note 1, p. 8.
[138] *Ibid.*

Commissioner for the Inland Revenue, and for Argentina, the Ministry of Economy, Works and Public Services, Secretary of Public Revenue.[139]

Negotiations may be undertaken on an ad hoc basis, or with the establishment of a commission. A commission is usually deployed in instances where there might be a recurrent or a protracted problem. For example, in 2009, Turkey and Armenia established an intergovernmental bilateral commission with the aim of improving diplomatic relations. The commission was constituted of several sub-commissions aimed at addressing: politics; transport and energy infrastructure; legal questions; the environment; with the final sub-commission having a remit to assess the historical issues that plague the relationships between the two States.[140] This final issue focusing on the alleged Armenian genocide, allegedly committed by the Turkish State.[141] Given the contentious nature of the dispute between Armenia and Turkey it is perfectly permissible to suggest that it would be feasible for the UK and Argentina to deploy a similar approach; however, this cannot be taken as a given. Consequently, accepting that the question over sovereignty of the Falklands (Malvinas) is seen as being so contentious by the disputant States, it might act as an inhibiting factor towards the establishment of a commission. Therefore, it is suggested that was a commission established, it

[139] Convention Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Article 3. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/498342/argentina-dtc_-_in_force.pdf> last accessed 10/01/2017.

[140] <http://peacemaker.un.org/sites/peacemaker.un.org/files/AM-TR_091010_Protocol%20on%20the%20establishment%20of%20diplomatic%20relations.pdf> last accessed 10/10/2017.

[141] Darian VN, 'Genocide as a Problem of National and International Law: The World War 1 Armenian Case and Its Contemporary Legal Ramifications', (1989) 14 Yale Journal of International Law 221.

would not be compelled to, at least in the immediate term, address the issue of sovereignty; in the alternative, it could assess other issues of concern, such as: fishing; hydrocarbon extraction; the environment; the development of cultural links; trade; the oversight of military training activities; and alleged war crimes committed during the 1982 conflict.[142] This would mirror and build upon the Joint Statement on Relations produced in 1989, where it was agreed that the developing of Anglo-Argentine relations should take priority, whilst noting that cooperation between the disputant States should not be interpreted as changing the position of either State, with regard to its territorial claim.[143]

Evidently, as with any form of negotiation, its work would be purely advisory. Yet, as Cohen noted whilst writing about the Canadian United States International Joint Commission,[144] the utility of a commission is not limited to its outputs, as it can act as a stabilising element between the disputing States.[145] Therefore, the commission might act as a foundation from which to normalise relations in times when relations between the two States are frayed. Nevertheless, even though there might be significant advantages to emanate from the creation of a commission, it cannot be ignored that both States would need to perceive its birth as being in their own mutual interest, and relations between the UK and Argentina need to have already normalised to such a degree

[142] Levie H, 'The Falklands Crisis and The Laws of War' (1997) 70 International Law Studies 203, see generally.
[143] Joint Statement issues at Madrid on 19 October 1989 by the delegations of the Republic of Argentina and the United Kingdom of Great Britain and Northern Ireland, 29 (6) International Legal Materials 1291, p. 1293.
[144] Established by the Boundary Waters Treaty, 1909, Article 7, <http://www.ijc.org/en_/BWT> last accessed 03/05/2017.
[145] M Cohen, 'Canada and the United States: dispute settlement and the International Joint Commission – can this experience be applied to law of the sea issues?' (1976) 8 Case Western Reserve Journal of International Law 69, p. 78.

that would allow for the drafting of a founding treaty. Perhaps the changing political climate within both the UK and Argentina might function as the catalyst for this – critically, the significance of 'Brexit' cannot be ignored, and it will be returned to at a later point.

In the alternative, should the above mechanisms prove unsuccessful, it might be advantageous for the two disputant States to have summit type discussions, whereby heads of State or high ranking foreign office ministers meet in order to attempt to break the deadlock, perhaps resulting in the creation of a commission. Often summit meetings are the culmination of lower level negotiations, thereby being the result of several other meetings.[146] The utility of a summit forum stems from the public nature of the mechanism, with this combining with the personal prestige attached to overcoming the dispute at the centre of the meeting. However, the effectiveness of these summit forums should not be overstated, and, indeed, the increased public nature of the mechanism is as much of a negative factor as it is positive one. The attention, that such a high-profile event might give rise to, could act to reignite the political aspects of the dispute. The very public nature of this form of negotiation would add weight to the perspectives of the public in the UK, the Falklands (Malvinas), and in Argentina. Given the, relatively, intransient perspectives of these groups this can be seen as a significant hurdle to the effectiveness of a summit meeting in resolving the dispute. It is unlikely that a minister would want to be seen to be doing what is politically detestable within their home State. Consequently, given the desire for

[146] Merrills, *supra*, note 1, p. 9.

a summit meeting to not result in failure, both as a result of public scrutiny, and the elaborate degree of preparation that such meetings require, this will likely constrict the matters to be discussed at the meeting.[147] In regard to the Falklands (Malvinas) dispute, this might involve the forum only addressing the lightly politicised aspects of the dispute, similar to how the remit of a commission might be limited. In this regard, a summit was held in London between Sir Alan Duncan, Minister for Europe and the Americas, and Deputy Minister Pedro Villagra. At the centre of the summit's agenda was the agreement to enable the International Committee of the Red Cross to carry out identification of Argentine soldiers who had been buried in the Darwin cemetery, following the Falklands (Malvinas) conflict.[148]

Clearly, negotiation would seem to be the UN's preferred mode of resolving the dispute. However, what does the invitation to negotiate within General Assembly Resolution 2065 encapsulate; does this call contain any legal obligations, and if so what are they: does it presuppose an obligation to reach an agreement, or is the substantive content of this call to negotiate something less? In order to answer these questions it is worth examining instances where there is an obligation to negotiate, such as would arise as a result of signing a treaty – for example, Article 283 (1) of the Convention on the Law of the Sea, 1982, provides that 'the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation'.[149] It must be noted

[147] Leguey-Feilleux JR, *The Dynamics of Diplomacy* (Lynne Rienner Publshing, 2009) pg. 6.
[148] <https://www.gov.uk/government/news/minister-for-the-americas-holds-uk-argentina-summit> last accessed 01/02/2017.
[149] Convention on the Law of the Sea, 1982, Article 283 (1).

that taking a literal interpretative stance, one would assume that an obligation to negotiate would be stricter than the invitation to negotiate contained within Resolution 2065. This being said, in the *Railway Traffic between Lithuania and Poland* case, the PCIJ seemed to perceive the two as being analogous, and even used the term 'invitation' and 'obligation' interchangeably.[150] Should the ICJ – or any other legal analyst – follow this approach in the future, that the two concepts are interchangeable and contain the same substantive requirements (at least once the invitation to negotiate has been accepted), the analysis of instances where there is an obligation to negotiate will prove enlightening as to the substantive requirements contained within Resolution 2065. In this regard, the ICJ has held that where:

> [T]he parties are under an obligation to enter into negotiations with a view at arriving at an agreement … they are under an obligation so to conduct themselves so that the negotiations are meaningful, which will not be the case when either [party] insists upon its own position without contemplating any modification of it.[151]

However, the Court makes no mention of there being a requirement for the States to reach an agreement, with this echoing the *German External Debts Agreement* case where the court, in that award, held that in undertaking negotiations there was no obligation to reach an agreement, yet 'serious effort should be made towards that end'.[152] Linked to this, again using the *Railways Traffic* case, the

[150] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarow-Kaisiadorys)*, PCIJ 22nd session 1931 108, 116.
[151] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, (1969) ICJ Reports 3, p. 47.
[152] German External Debts Agreement, 47 (1974) International Law Reports 418, 454.

requirement to negotiate does not imply that the inviting entity believed settlement should be made to favour one party, or the other; an invitation makes no normative statement as to the preferred outcome, other than indicating a desire for an agreement to be reached.[153] Returning to the assessment of the Court's statement in the *North Sea Continental Shelf* case, it is mentioned that the negotiations should be undertaken in a meaningful way, but the Court left open the question as to what it meant by this. Again, looking at additional ICJ jurisprudence it can be deduced that this requires the negotiations to be conducted in good faith.[154]

The notion of good faith is a commonly utilised concept within international law forming 'part of the foundation of the whole international legal structure'.[155] It is recognised, *inter alia*, within Article 2 (2)[156] of the UN Charter, Articles 26 and 31 (1) of the Vienna Convention on the Law of Treaties,[157] and the Friendly Relations Declaration. Further to this, the concept of good faith was held by the ICJ, in the *Nuclear Tests* case, to be one of the 'basic principles governing the creation and performance of legal obligations, whatever their source'.[158] Yet, the Court in the *Nuclear Tests* case failed to go further and elaborate on what it meant by invoking this requirement, other than to state that its existence is

[153] *Railway Traffic between Lithuania and Poland*, *supra*, note 150, pp. 116-117.
[154] *Cameroon v Nigeria*, (2002) ICJ Reports 303, p.424; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Reports 226, p. 264.
[155] Virally M, 'Review Essay: Good Faith in Public International Law' 77(1) American Journal of International Law 130, p. 134.
[156] UN Charter, *supra*, note 20, Art.2 (2).
[157] Vienna Convention on the Law of Treaties, May 22 1969, Art.26 & 31 (1), 8 (4) (1969) International Legal Materials 679.
[158] *Nuclear Tests*, *supra*, note 123, p. 473.

essential for the creation of trust, confidence, and cooperation between States.[159] However, providing some clarity as to what the substantive content of good faith includes, in regard to negotiations, the *Lake Lanoux* arbitration highlighted that it requires the disputant States to act genuinely, and for the negotiations to not be mere formalities.[160] The arbitral award went further to comment that a State would be infringing the principle of good faith was it to: behave so that there were unusual delays; was it to give blanket refusals to consider proposals; and if a State was unable to justify breaks in communication.[161] In other words, the State should not act dishonestly, nor operate in a manner which is not conducive of compromise.

Looking at this requirement to act in good faith in relation to the negotiations that have been undertaken with regard to the status of the Falklands (Malvinas), there is a common theme within Argentine literature that the negotiations that have been conducted were little more than a 'smokescreen of perpetuation' with the intention of continuing the status quo;[162] the status quo favouring the UK. Gonzalez wrote of the southern-hemisphere's evaluation of the UK's attitude towards the Falklands (Malvinas) as one of abstinence, showing a desire to continue the imperial state of affairs.[163] However, the terminology utilised by Gonzalez is very emotive, and seemingly emanates from a prejudicial perspective that presumes negotiation to mean the eventual handing-over of

[159] *Ibid*., p. 473.
[160] Lake Lanoux Arbitration (France v Spain) (1957) Arbitral Tribunal, 24 ILR 101, p. 119.
[161] *Ibid*., p. 128.
[162] Gonzalez MA, *The Genesis of the Falklands (Malvinas) Conflict* (Palgrave Macmillan, GB 2013), p. 10.
[163] *Ibid*., p. 13.

territorial sovereignty to Argentina. However, as noted, the invitation to negotiate is empty when it comes to what the ultimate outcome should be, and it is to the work's detriment that Gonzalez chose to follow this approach. This aside, it would seem that the British perspective is, generally speaking, one of intransience, as indicated by the 1965 British Colonial Office acquiescence to an Argentine invitation to initiate negotiations, where it was stipulated that on the question of sovereignty there was 'no room for compromise'.[164] Further to this, the UK has indicated that it is consistently aware of the wider geopolitical implications that a softening on the sovereignty question might have. For example, it was argued by the UK government that to:

> [W]eaken our position in the Falkland Islands Dependencies and the British Antarctic Territory, would inevitably lead to an increase of pressure against British Honduras and British Guina, and to a stiffening of the Spanish attitude towards Gibraltar. It could also be embarrassing to us further afield, e.g in Aden. Indeed, it is impossible to say where the chain reaction would stop.[165]

Were the contents of this letter accurate, the British reluctance to negotiate can be seen to be founded on more than merely a desire to maintain sovereignty over the Islands; the dispute is one of many that the UK is concerned with, given the global nature of its territorial interests, even in a post-colonial world. Consequently, the title of Gamba's text, *El Peon de la Reina*,[166] the Queens pawn, is, arguably, correctly indicative of the British attitude towards the Islands. However, despite this, it is striking to note that in the period prior to the

[164] CO 1024/434, Letter, Bennet to Slater, 12 October 1965.
[165] CO 1024/433, Letter, Rennie to Creswell, 30 December 1964.
[166] Gamba V, *El Peon de la Reina* (Sudamericana, Buenos Aires 1984).

1982 conflict there was an apparent move by the British to engage with the negotiation process, and remove the stumbling-block to conducive Anglo-Argentine relations that is the Falklands (Malvinas) dispute.[167]

In one Foreign Office letter it was suggested that the UK government should consider calculating 'how much it would cost to 'bribe' all 3,000 Falkland Islanders to emigrate to New Zeeland (or to accept Argentine sovereignty on the basis of special local guarantees and privileges)';[168] the final point having a degree of synergy with the transfer of sovereignty from the UK to China of Hong Kong.[169] The note continued by stipulating that the cost of this should be weighed against the levels of expenditure that would be required should the dispute take a turn for the worse, and result in an armed conflict. This statement proved indicative of a notable shift towards the British revaluation of the cost of objecting to negotiations relating to the sovereignty of the Islands; that 'strong political, economic and strategic policy' combined to persuade the British Foreign Office that negotiations over sovereignty were essential.[170] However, Gonzalez concluded that, ultimately, the negotiations were plagued by the above mentioned wider geo-political concerns. Gonzalez continued to argue that the true tragedy of the Falklands (Malvinas) resided 'in their lack of importance: as

[167] Beck PJ, Cooperative Confrontation in the Falkland Islands Dispute: the Anglo-Argentine search for a way forward, 1968-1981' 24 (1) February 1982 Journal of Interamerican Studies and World Affairs, p. 38.
[168] CO 1032/406, FO Memorandum, 6 July 1965, p. 23.
[169] Dagati PA, 'Hong Kong's Lost Right to Self-determination: a denial of due process in the United Nations' 1992) New York Law School Journal of International and Comparative Law 153- 179; RM McGee, D Kin-Kong Lam, 'Hong Kong's Option to Secede, (1992) 33 Harvard International Law Journal, 427, p. 429.
[170] Gonzalez, *supra*, note 162, p. 210.

a colony, they were too insignificant to be defended and developed, and as a dispute, they were not weighty enough to be disentangled from others of its kind'.[171] If this historical assessment is accurate, it is arguable that British apathy resulted in the stagnation of negotiations, and the resultant armed conflict. However, it is suggested that the situation would have been no different had Britain given the territory a high degree of priority; with this, too, having resulted in the dispute being of an intractable nature.

To be sure, it is apparent that little substantive progress has been made in relation to the negotiations. This lack of advancement was, at one time, expressly utilised as justification for the Argentine invasion of the Falklands (Malvinas) in 1982, with one Argentine academic, Pinto, stating that the 'intent of the Argentine Republic when it recovered the Islands … was to recommence the negotiation process'.[172] The use of military force would appear a controversial manner within which to reignite the process of negotiation, and, critically, any resulting territorial change to emanate from any ensuing negotiations would be vitiated by this use of force, as indicated within the Charter of the United Nations.[173] Furthermore, the Vienna Convention on the Law of Treaties, at Article 52, proclaims that a 'treaty is void if its conclusion has been procured by the threat or use of force'.[174] Consequently, had the UK and Argentina come to an

[171] *Ibid.*, p. 212.
[172] Pinto M, 'Argentina's Rights to the Falkland/Malvina Islands' 18 (1983) Texas International Law Journal 1, p. 10.
[173] UN Charter, *supra*, note 20, Articles 2(3) &2(4).
[174] Vienna Convention, *supra*, note 157, Article 52.

agreement, the use of armed force by Argentina would have void its legal efficacy. Therefore, Pinto's position can be readily rejected.

Returning to the question as to whether the UK has been acting in good faith, this is made increasingly complex once the issue of self-determination is brought into play. As has been indicated, the British government has long been concerned with not undermining the Falklands (Malvinas) residents' right to self-determination. In this regard, the UK has stipulated that it is unwilling to negotiate on the territorial status of the territory, pending the territories residents' indication of a desire for there to be a change in the status of the territory;[175] however, it should not be forgotten that this is a position that is not empty of irony, given the UK's actions with regard to a number of its other overseas interests, such as Hong Kong,[176] and the British Indian Ocean Territory.[177] If it is accepted that the right of self-determination is applicable to the Falklands (Malvinas) residents, it is arguable that this results in the UK's justification to not negotiate being genuine, and, therefore, not in contravention of the identified substantive requirements of negotiation being in good faith.

Further on the subject as to whether the UK has previously acted in good faith during the negotiation process, it is notable that there is no discernible evidence

[175] Falkland Islands Referendum, as per The Minister for Europe Mr David Lidington, 13 June 2012, HoC Hansard vol. 542, col. 328; Prime Minister David Cameron, Statement on the Falkland Islands, 2 April 2012, <https://www.gov.uk/government/news/statement-on-the-falkland-islands> last accessed 15/04/2017.
[176] Amberg EM, 'Self-Determination in Hong Kong: a new challenge to an old doctrine' 22 (1985) Sand Diego Law Review 839.
[177] Allen S, 'International Law and the Resettlement of the (Outer) Chagos Islands' 8 (4) (2008) Human Rights Law Review 683, p. 690.

to suggest that Argentina has been willing to compromise, or that it has been any more compliant with the requirements for negotiating in good faith than the UK has. The official Argentine position is that it remains fixed on its intentions to 'recover' the islands, and to assert 'the full exercise of sovereignty over the Islands'.[178] This claim has been restated on an annual basis at the UN, both at the General Assembly,[179] and before the Special Committee on Decolonisation.[180] This refusal to consider alternatives proves indicative of an unwillingness to compromise.

Recent attempts at engaging in negotiation have shown that an impasse has been reached, whereby both States claim to be willing to negotiate, but neither party is willing to do so on the terms offered by the other State. For example, in response to the UK offering to open dialogue, but insisting that Falkland's residents be present, Argentina firmly refused to engage. The former Minister of Foreign Affairs, Timerman, stated that negotiations should only be conducted between the recognised foreign ministers of both States,[181] and that third parties should not be present. He went on to suggested that this term that the UK was insisting upon was akin to him insisting that his wife be present at the

[178] Ministry of Foreign Affair and Worship, 'The Question of the Malvinas Islands: 50 years after the resolution 2065 (XX) of the United Nations'; see also <http://www.mrecic.gov.ar/es/question-malvinas-islands-0> last accessed 14/06/2017; The Ushuaia Declaration, <http://en.mercopress.com/2012/02/26/argentine-all-party-lawmakers-group-ratify-malvinas-sovereignty-claim-in-ushuaia> last accessed 10/05/2017.
[179] General Assembly Resolution 3160 (XXVIII), 14 December 1973; Letter dated 3 January 2017 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, UN Doc. A/71/743.
[180] Special Committee on Decolonization Approves Draft Resolution Calling for Argentina, United Kingdom to Resume Talks over Falkland Islands (Malvinas) Dispute, GA/COL/3314.
[181] Hector Timerman, Minister of Foreign Affairs of Argentina, on the Issue of the Falklands/Malvinas, at 18:40 < http://www.unmultimedia.org/avlibrary/asset/T137/T1371765106/> last accessed 11/05/2017.

negotiations.[182] Looking at this, it could be suggested that the UK is intentionally halting the negotiations by insisting upon a requirement that it knows Argentina would find unacceptable – this act, itself, not being in good faith. However, there is no objective evidence to suggest this, and the UK would simply counter the argument by stating that the inclusion of Falklands (Malvinas) representatives is an integral aspect of giving effect to the islanders right to self-determination. The validity of the current British negotiating position aside, both States have, arguably, failed to comply effectively with the invitation to enter into negotiations; progress has been dogged by an apparent reluctance by both parties to compromise,[183] which is unsurprising given the perceived zero-sum nature of the territorial dispute. Consequently, the invitation to negotiate contained within General Assembly Resolution 2065 has yet to produce the peaceful resolution to the dispute that is desired by so many, and the intractable nature of the dispute is still very much alive. Therefore, the question needs to be asked as to whether the process of negotiation is, itself, at fault; in other words, should the disputant States, and the global community be pressing for the implementation of alternative dispute settlement mechanisms?

Before being too critical of the negotiation process, the basic elements of the mechanism must be recalled: negotiation provides the disputant States with the greatest degree of autonomy and flexibility of all the dispute resolution mechanisms. It is the lack of rigidity that makes negotiation popular – and therefore often effective – as a dispute resolution mechanism. It gives States the

[182] *Ibid*., at 11:20.
[183] Beck, *supra*, note 167, p. 37.

widest discretion to come to an agreement, and to interpret the applicable legal regimes in a manner that is conducive of creating peaceful international relations. However, this flexibility is what, at the same time, can enable disputing States to come to polar-opposite positions. The process of negotiation, especially when an applicable legal norm is highly indeterminate – as with self-determination, results in there being the scope for the disputing parties to produce widely 'divergent legal arguments'.[184] Consequently, it is the flexibility of negotiation that can also result in this approach to dispute settlement proving ineffective. Therefore, it is apparent that the strength of negotiation as a dispute resolution mechanism is also its weakness.

As a result, it is arguable that it is not the properties of bilateral negotiations that have resulted in the mechanism having yet to provide a pathway towards the disputes resolution, but the prevailing conditions within which the process has been applied. Following this reasoning, the success of the negotiation process will be principally dictated to by the prevailing political conditions that are affecting the disputing States. Therefore, for negotiations to prove successful there needs to be a political shift that results in it being in the UK's, and in Argentina's interests for positive negotiations to take place. The significance and impact that the changing political climate can have on the success of negotiations will be examined later in this chapter, when it turns to look at the relationship between law and politics, and the role of law in the political settlement of disputes. This being said, it should be acknowledged here that there

[184] Wheatly S, *The Democratic Legitimacy of International Law* (Hart, GB 2010), p.149.

can be no guarantee that the political conditions will arise which would facilitate for the settlement of the dispute via bilateral negotiation. And, furthermore, even were these circumstances arise, the international community would need to be prepared to exploit them. Therefore, it is necessary to consider approaches to dispute settlement that act to supplement the negotiation process, through which an avenue to the resolution to the Falklands (Malvinas) dispute might be initiated.

Prior to looking at these alternatives, it must be recalled, as noted above and echoed by Darwin, that the process of negotiation is not a mutually exclusive tool; it is often a precursor to an alternative dispute resolution mechanism, and it can be used in conjunction with others.[185] In this regard, bilateral negotiations between the UK and Argentina might be complemented by the utilisation of third party mediators, or perhaps an inquiry. These adjuncts to the core negotiation process might prove the appropriate catalyst through which to facilitate the disputes resolution. However, even if we accept this, it is still necessary to assess what role law might play in these negotiations, and whether the law can act to facilitate dispute settlement. It is to this role that this chapter turns completing the analysis of the dispute settlement mechanisms.

[185] Darwin HG, *International Disputes: The Legal Aspects, report of a study group of the David Davies Memorial Institute of International Studies, chairman Sir Humphrey Waldock* (Europa Publications, London 1972).

Retuning to these ancillary mechanisms, there will arise instances where third parties might deem it advantageous to aid the disputing States. This will often occur in order to assist with the resolution of a particularly stubborn dispute, such as that between the UK and Argentina.[186] Amongst these approaches we have mediation, and good offices. The third party might be: a State; a group of States; a specialised agency; an international organisation; an individual; and even a coordinated approach from any number of the above. Both approaches can be initiated at the request of the disputants, or suggested to those States party to the dispute, with the result of the negotiations undertaken being devoid of legally binding character,[187] with the process aiming to persuade the parties to come to an agreement.[188] As a result, negotiations undertaken with the assistance of good offices and mediation, retain the characteristic of bilateral negotiations that enables the disputant States a wide degree of leverage within which to act.

5.4.3: Good offices

Looking first at good offices, this is where a friendly State, or third party, acts as an intermediary conduit through which communication between the disputants can occur.[189] It must first be mentioned that it is not specifically mentioned within Article 33 (1) of the UN Charter. Given this, it is therefore

[186] Grieg J M, 'Stepping into the Fray: when do mediators mediate?' (2005) 49 American Journal of Political Science 249, p. Merrills, *supra*, note 1, p. 26.
[187] 1907 Convention for the Pacific Settlement of International Disputes, Article 6. <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> last visited 02/05/2017.
[188] Shaw, *supra*, note 11, p. 1018.
[189] Alheritiere D, 'Settlement of Public International Disputes on Shared Resources: elements of a comparative study of international instruments' (July 1985) 25 (3) Transboundary Resources Law 701-711.

necessary to look elsewhere for authority as to good offices place in the dispute resolution process. With this in mind, good offices is represented on an equal footing with other dispute settlement mechanisms in the Manilla Declaration on Peaceful Settlement of International Disputes.[190] Further authority recognising it as mode of dispute settlement can be found, *inter alia*, within Article 33 (2) of the 1997 Convention on Watercourses,[191] whilst also finding mention in the 1988 Declaration on the Prevention and Removal of Disputes which Threaten International Peace and Security and on the Role of the United Nations in this Field.[192] At paragraph twelve it is noted that 'the Security Council should consider sending at an early stage fact finding missions or good offices … as a means of preventing the further deterioration of the dispute'.[193] It should be recognised, given the UK's prominent position as a permanent member of the Security Council, it is unlikely that the approach envisioned within this Declaration will find application.

With regard to the Falklands (Malvinas) dispute, in 1982 the General Assembly requested the Secretary-General of the United Nations to undertake a mission 'of good offices in order to assist the parties in complying with' finding a peaceful solution to the dispute.[194] This has been further restated on numerous

[190] Manilla Declaration on Peaceful Settlement of International Disputes, General Assembly Resolution 43/51, UN Doc A/Res/37/10.
[191] Convention on the Law of the Non-Navigational Uses of International Watercourses 1997, UN General Assembly Resolution 51/229 Annex, UN Doc A/RES/51/229.
[192] Declaration on the Prevention and Removal of Disputes which Threaten International Peace and Security and on the Role of the United Nations in this Field, General Assembly Resolution 43/51, UN Doc GA/Res/43/51.
[193] *Ibid*., para. 12.
[194] UN General Assembly Resolution 37/9, UN Doc A/Res/37/9.

occasions, through General Assembly Resolutions 38/12,[195] 39/6,[196] 40/21,[197] 41/40,[198] 42/19,[199] and 43/25.[200] The Secretary-General described the role of good offices as being one that 'can significantly help encourage member States to bring their disputes to the negotiating table'.[201] However, the resulting reports compiled by the Secretary-General indicate a common theme, that 'despite the adherence expressed by both sides to the principle of peaceful settlement of international disputes and their desire to engage in meaningful dialogue, it has not been possible to develop a formula that would enable the two parties to engage'.[202] Despite this lack of progress, there are continued calls for the Secretary-General to use his good offices to get *all* parties to sit down and talk, most recently voiced by the representative of Sierra Leone to the Special Committee on Decolonisation, 2015,[203] and by the representative of Ecuador in 2016.[204] In spite of this, there is little indication that this mechanism has proven successful. This is despite, as Franck wrote, the Secretary-General, and their subalterns, having a wide range of practices that can draw the disputants to the negotiating table.[205] Therefore, in light of the failure of the Secretary General,

[195] Un General Assembly Resolution 38/12, UN Doc A/Res/38/12.
[196] Un General Assembly Resolution 39/6, UN Doc A/Res/39/6.
[197] Un General Assembly Resolution 40/21, UN Doc A/Res/40/21.
[198] Un General Assembly Resolution 41/40, UN Doc A/Res/41/40.
[199] Un General Assembly Resolution 42/19, UN Doc A/Res/42/19
[200] Un General Assembly Resolution 43/25, UN Doc A/Res/43/25.
[201] UN Doc SG/SM/3525.
[202] Report of the Secretary-General, Question of the Falkland Islands (Malvinas), UN Doc A/40/891. See also, Report of the Secretary-General, Question of the Falkland Islands (Malvinas), UN Doc A/41/824;
[203] Special Committee on Decolonisation, 2015 Session, 6th and 7th Meetings, UN Doc. GA/Col/3283.
[204] Special Committee on Decolonisation, 2016 Session, 9th and 10th Meetings, UN Doc. GA/COL/3298.
[205] Franck T, 'The Good Offices Function of the UN Secretary-General' in Roberts A & Kingsbury B (eds), *United Nations, Divided World: the UN's Role in International Relations* (2nd Edn OUP, GB 1996), p. 182.

evidence would suggest that in seeking to find a catalyst to resolve the dispute, a more engaging mechanism is required to break through the deadlock.

5.4.4: Mediation

With this in mind, mediation is a development of the good offices mechanism, whereby the third party takes a more engaged role in the dispute resolution process. Historically good offices and mediation where often seen as synonymous. For example, in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, the text at Article 2 – 8, used the terms interchangeably.[206] However, contemporary understanding, as indicated within the UN Handbook on the pacific settlement on disputes, is that the two are distinct, with mediation having significant practical differences to that of good offices.[207] The primary difference is that where in good offices the third party would limit itself to acting as conduit through which to initiate negotiation, in mediation the third party takes a much more active role in the process.[208] For instance, the mediator might go so far as to attempt to persuade the disputant States to accept proposals aimed at resolving the dispute; these proposals often being suggested by the third party mediator.[209] Poignantly, there is no obligation to accept the suggestions of the mediator; with this thereby ensuring that the

[206] Hague Conventions for the Pacific Settlement of International Disputes, 1899, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> last accessed 14/05/2017; Hague Conventions for the Pacific Settlement of International Disputes, 1907, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> last accessed 14/05/2017.
[207] UN Handbook on the Peaceful Settlement of Disputes, p.33, UN Doc. OLA/COD/2394.
[208] Merrills, *supra* note 1, p. 26.
[209] Shaw, *supra*, note 11, p. 1018.

disputing parties remain in control.[210] Given the deep rooted historical animosity, and how significant the territory is perceived by the disputing States, the retention of control will likely prove an essential criterion for the acceptance of the mediation.[211]

Not only is mediation acknowledged in the UN Charter, it has also found wide recognition and use in other international instruments. See, for example: the Inter-American Treaty on Good Offices and Mediation of 1936;[212] the Pact of the League of Arab States;[213] the 1959 Antarctic Treaty;[214] the Friendly Relations Declaration;[215] and the Final Act of the Conference on Security and Cooperation in Europe, 1975.[216] Looking at the role of the mediator, Article 4 of the Hague Conventions notes that the 'part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance',[217] with this characteristic being further shown in Article XX of the Organisation of African Unity Protocol of Mediation, Conciliation, and Arbitration of 1964.[218]

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[210] Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th Edn Routledge, GB 1997), p. 275.
[211] Merrills, *supra* note 1, p. 27.
[212] Inter-American Treaty on Good Offices and Mediation, 1936', 31 (2) (1937) American Journal of International Law 64.
[213] Egypt – Iraq – Lebanon – Saudi Arabia – Syria – Transjordan – Yemen: Text of the Pact of the Arab League, March 22nd 1945, Articles 5 & 6, 39 (4) (1945) The American Journal of International Law, Supplement: official documents 266.
[214] Antarctic Treaty, 1959, Article XI, 54 (2) (1960) American Journal of International Law 477.
[215] Friendly Relations Declaration, *supra*, note 25.
[216] Conference on Security and Co-operation in Europe, Final Act, 1975, < http://www.osce.org/helsinki-final-act?download=true> last accessed 24/05/2017.
[217] Hague Convention, 1907, Article 4.
[218] Organisation of African Unity: Protocol of the Commission of Mediation, Conciliation and Arbitration 1964, Article XX, 3 (6) International Legal Materials 116.

Again, much like with good offices, Merrills perceived of mediation as being an adjunct to the basic negotiation process; however, it is interesting to note that this is not a perspective that is universally shared, with the UN Handbook on the Peaceful Settlement of Disputes between States seeing it as more than that, due to the mechanism having its own distinct procedural methods.[219] An illustration of this can be found in Part II of the 1899 and 1907 Hague Convention for the Pacific Settlement of International Disputes – however, it should not be forgotten that the Hague Convention did not treat mediation as being distinct from good offices. A more effective example can be found in the provisions of the 1936 Inter-American Treaty, which provided clear guidance for mediation as a stand-alone mechanism.[220] Yet, it should be noted that the procedural requirements stated within the Treaty are not universally common features of mediation, with Article IV of the Treaty stating that should the parties have not come to an agreement within a predetermined period of time, not exceeding six months, then the dispute will be submitted to the procedure of conciliation, as provided for by the inter-American agreements.[221] The significance as to whether Merrills is correct, or the UN Handbook, is unclear. However, whichever is accurate, it seems unlikely that mediation could occur without negotiation having done so first. As a result, Merrills' perspective would seem to be the most accurate reflection of the reality of mediation. This question aside, irrespective of whether the mechanism is an adjunct of negotiation, or a

[219] UN Handbook, *supra*, note 207, p.41.
[220] Inter-American Treaty on Good Offices and Mediation, 1936', 31 (2) (1937) American Journal of International Law 64.
[221] *Ibid*., Article IV.

standalone mechanism, when considering whether international mediation might prove helpful in resolving the dispute there are two hurdles towards mediation being utilised that must be examined: the first is that the parties to the dispute must consent towards a mediator being appointed; and the second is that a third party must want to take up the role.

Addressing the first of these, it needs to be clearly noted that the process of mediation cannot be imposed upon the disputing parties. Therefore, if the States to the dispute have yet to appoint a mediator, this might be indicative of a general desire by them to find the process unacceptable. As Merrills argued, if either of the States' feel that its position is sufficiently stable, and that compromise is unnecessary, it is unlikely that room will be found for negotiation, therefore it is, generally, difficult to find an entry point for international mediation.[222] Mirroring Merrills, Wallensteen was of the perspective that hope of victory is likely to have faded before both parties are willing to accept the intervention of a mediator.[223] Consequently, as Zartman argued, the timing of the mediatory effort is as important to the success of settling a dispute as is the substance of the proposal; when the political conditions change, the parties to the dispute might be more willing to 'grab on to proposals that usually have been in the air for a long time and that only now appear attractive'.[224] Scholars of international diplomacy have labelled this moment as the point ripeness, and is considered as

[222] Merrills, *supra* note 1, p. 28.
[223] Wallensteen P, 'Dag Hammerskjold's Diplomacy: lessons learned', in Stahn C; Melber H (eds), *Peace Diplomacy, Global Justice and International Agency: rethinking human security and ethics in the spirit of Dag Hammarskjold* (CUP, GB 2014), p. 366.
[224] Zartman W, 'The Timing of Peace Initiatives: hurting stalemates and ripe moments' 1 (1) (2001) The Global Review of Ethnopolitics 8, p. 8.

being ‘one of the absolute essences of diplomacy’.[225] Despite being from different schools of thought, it is clear that there is a correlation between this and that argued by Koskenniemi and White, that for the dispute settlement process to be guided progressively by international law there ‘must be a significant break in the prevailing political context’.[226] It is this ‘break’ that Zartman and Campbell would label as the point where the dispute has become ripe for resolution. Merrills too was conscious of this, despite using different phraseology, noted that mediation is likely to be ‘particularly relevant when a dispute has progressed to a state which compels the parties to rethink their policies’.[227] It is important to note that whilst dispute resolution scholarship focuses on this concept in relation to mediation, it will be applicable to the other forms of dispute settlement.

As stated, the second hurdle that needs to be traversed is that a willing mediator needs to be located. There needs to be some form of incentive for the mediator to involve themselves in the dispute. Youngs suggested that a prospective mediator would undertake a cost benefits calculation in order to assess whether the efforts required to mediate the dispute would be, on balance, worthwhile.[228] Consequently, it is typical that the third party looking to act as a mediator will often have a vested interest in the dispute being resolved, which can have adverse effects on the success of mediation, recalling back to the issue of bias.

[225] Campbell J, *Successful Negotiation: Trieste* (Princeton University Press, USA 1976), p. 73.
[226] White ND, *The Cuban Embargo under International Law* (Routledge, GB 2015), p. 161.
[227] Merrills, *supra* note 1, p. 31.
[228] Young OR, *Intermediaries: third parties in international crises* (Princeton University Press, Princeton 1967), p. 55.

When looking at the Falklands (Malvinas) dispute, it must initially be noted that there would seem to be little in the way of motivation for a third party to get involved in what is perceived as being an intractable dispute, where the disputant States have adopted diametrically opposed positions. Secondly, and perhaps as significant, it must be noted that the dispute is relatively stable. Therefore, there is little incentive for a prospective mediator to expend resources and political capital on the dispute – even if that stability is the continued presence of an intractable dispute. Therefore, for a third party to volunteer its services it might prove necessary for there to be an escalation of the dispute over the territory; or, at the very least, a movement away from the current relative stability of the disagreement. This might act as a catalyst to push third parties towards offering their services. Consequently, it would appear that political change is required for both the recipient States and the third-party mediator to want to engage in the process. Therefore, dispute ripeness is a relevant factor affecting the willingness of the third party to mediate, as well as being of significance to the disputant States.

Considering this notion of the point of ripeness, the Falklands (Malvinas) dispute provides an interesting example. In 1982, the highpoint of intensity of the dispute, both the UK and the Argentine governments were in politically insecure positions. Consequently, both States sought to garner support from allies through the projection of an ‘image of political reasonableness’. It was at this moment that both States appeared receptive to mediation. This political

weakness resulted in the appearance of the dispute being ripe. Most prominent amongst these were the efforts by the US Secretary of State Alexander Haig,[229] followed by the UN Secretary-General Javier Perez de Cuellar offer of good-offices; ultimately, both of these attempts proved unsuccessful.

It is possible to interpret the failure of mediation in this instance as being indicative that the receptiveness of the Argentina and the UK to the process was merely a façade, and not a true reflection of the political situation; in other words, despite appearances the dispute was not yet ripe for settlement. Looking at the timing of these mediatory attempts it must be noted that they occurred prior to the battle between the Argentine Air Force and the Royal Navy in the South Atlantic; therefore, both parties were still in a position where they believed that they could enforce their own preferred outcome through the utilisation of military hardware. In addition, the failure of the process could be attributed to the lack of effectiveness of the third-party mediator. For instance, there is a strong degree of academic support behind the notion that impartiality is a critical attribute for the mediator to be vested with.[230] In this regard, Merrills noted that mediation is unlikely to be successful if one of the disputing governments believed that a mediator was influenced by bias, or if there was a perception that it was more concerned with fulfilling its own agenda.[231] However, others such as Jabbri, argued that the ability of the mediator to

[229] Please see Freedman L & Gamba-Stonehouse V, *Signals of War: the Falklands Conflict of 1982* (Princeton University Press, GB 1990), chapters 12-18.
[230] Young, *supra*, note 228, p. 81; Carnevale PJ & Arad S, 'Bias and Impartiality in International Mediation' , in Bercovitch J (ed), *Resolving International Conflicts: the theory and practice of mediation* (Lynne Rienner Publishers, USA 1996) p.39.
[231] Merrills, *supra*, note 1, p. 31.

engender trust is of greater significance.[232] It is probable that both positions are accurate with an unbiased nature being an essential component of trust. Indeed, Moore, a specialist in mediation as a general dispute settlement mechanism, argued that the ideal mediator should be 'autonomous … [and] not have specific aims that they want met by an agreement'.[233] Moore continued to argue that the mediator must commonly be unbiased, and be able to perceive the dispute, looking at the needs of the interested parties, in an impartial manner.[234] With regard to the Falklands (Malvinas) conflict, it is very feasible that, in combination with the dispute not being ripe for resolution, the thin veneer of neutrality that the US had[235] acted as a factor detrimental to its influence as a mediator. However, when looking at whether a third party is likely to want to present itself as a mediator there needs to be some degree of incentive. In this regard, Carnevale and Arad were of a mind that a degree of bias might be an essential quality for the mediator to possess, as it 'adds to the mediator's motivation and desire to influence the outcome'.[236] Consequently, the mediator has a difficult balancing act to perform between remaining unbiased and having an incentive to undertake the role.

Caution must be taken before suggesting that mediation might be the chamber through which the golden bullet to resolve the dispute might be fired. It must be noted that studies from the school of International Relations, into the

[232] Jabbri V, *Mediating Conflict: decision making and Western intervention in Namibia* (Manchester University Press, USA 1990) p. 8.
[233] Moore CW, *The Mediation Process: practical strategies for resolving conflict* (4th Edn Jussey-Bass, USA 2014) p. 6
[234] Ibid.
[235] Merrills, *supra* note 1, p. 39
[236] *Ibid* ., p. 41.

effectiveness of the mediation process in post-conflict situations, have shown that the process often has had mixed results. For example, Fortna wrote that there is evidence that peace has a tendency to last longer with the intervention of mediators, as opposed to instances where the disputants are left to come to their own agreements.[237] However, this can be contrasted with the writings of Smith and Stam, who were of a mind that '[t]hird party mediation and peacekeeping efforts more generally have been a notable failure'.[238] Smith and Stam believed that piece brought about by the disputing parties was more likely to be long-lasting. However, this would seem to be most relevant where the disputing State have very recently been engaged in an active conflict, and would not seem to a dispute such as the Falklands (Malvinas). Consequently, it would seem that the more optimistic view of mediation would be applicable to the Falklands (Malvinas) dispute.

Building further on this optimism, the intervention of a third party could act as a major 'face saving' route, for the UK and Argentina. In other words, the third party could act as a lightning rod through which any negativity felt by the populations within the States to the disputes could be channelled. Therefore, Argentina and the UK might be able to channel the negative consequences of an agreement towards the mediator, as a result of the confidentiality of the process of mediation. This will thereby result in the mechanism as having as good a chance as any at reinvigorating the negotiation process. However, this will raise

[237] Fortna VP, 'Inside and Out: peacekeeping and the duration of peace after civil and interstate wars' (2003) 5 (4) International Studies Review 97, p.111.
[238] Smith A, Stam A, 'Mediation and Peacekeeping in a Random Walk Model of Civil and Interstate War' (2003) 5 (4) International Studies Review 115, p.115.

the costs associated with acting as the mediator. Consequently, it is foreseeable, should the dispute become ripe, that mediation might prove an effective way through which to overcome the hurdles that bar the resolution of the Falklands (Malvinas) conflict.

5.4: The Role of Law in International Dispute Settlement

What is apparent from the above analysis of dispute settlement mechanisms is that their success relies, quite heavily, on the prevailing political conditions. Therefore, it needs to be asked whether international law has a role to play in resolving the highly political and intractable Falklands (Malvinas) dispute. In this regard, when looking at the relationship between law and politics, it is apparent that law, at any level, is the product of politics.[239] However, it is expected that law should, also, create a framework within which politics is exercised. As shown with the scholarship of Lauterpacht[240] and Kelsen,[241] this desire for an overarching legal structure emerged, rather forcefully, out of the ashes of the First World War, where there was an emphasis on the autonomy of legal rules from the authority which created them.[242] In this sense, we expect law to not be a slave to politics. However, given the above analysis of international dispute-settlement mechanisms, it proves difficult to argue that an international

[239] Schacter O, *International Law in Theory and Practice: volume 13 of developments in international law* (Martinus Nijhoff, The Netherlands 1991) p.24; White ND, *The Cuban Embargo under International Law: el bloqueo* (Routledge, GB 2015), p.156.
[240] See, H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, GB 1933).
[241] Kelsen H, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (Mohr, Tubingen 1920).
[242] Nussbaum A, *A Concise History of the Law of Nations* (Macmillan, USA 1954), pp.251-290. Shaw, *supra*, note 11, p.30.

rule of law truly exists. This is notwithstanding the UN expending considerable effort, as shown in 1989 where the UN General Assembly agreed by consensus, within the Declaration on the 'Decade for International Law', that it was '[c]onvinced of the need to strengthen the rule of law',[243] and in General Assembly Resolution 68/116 where the Assembly reaffirmed the 'imperative of upholding and promoting the rule of law at the international level'.[244]

However, it should be noted that these expressions were normatively empty, with Koskenniemi highlighting the weakness of these claims, when he wrote in 1990 that:

> [O]ur inherited ideal of a World Order Based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested – political – principles to justify outcomes to international disputes.[245]

The internal problem that Koskenniemi referred to is the manner within which international law is created. As Klabbers noted, international law is predominantly made by States, with there being no authority above the State.[246] Consequently, 'international law is often said to be a consent-based (or

[243] UN General Assembly Declaration, United Nations Decade of International Law, 17 November 1989 A/RES/44/23.
[244] UNGA 'The rule of law at the national and international levels' UNGA RES 68/116 (20130) para. 4.
[245] Koskenniemi M, 'The Politics of International Law' (1990) 1 European Journal of International Law 4, p.7.
[246] Klabbers J, *International Law* (2nd Edn CUP, GB 2017), p.24.

consensual) system'.[247] Customary international law, in particular, being generated by State practice, is representative of this.

It is for this reason that much of international law is, as Koskenniemi argued, an apology for State behaviour,[248] in that it lacks distance from State conduct, being a 'mere sociological description'.[249] The alternative position, whereby international law is created in order to curtail State behaviour, is deemed utopian, in that these legal norms are lacking in relevance and have a negligible impact on State activity.[250] Therefore, in order to get States to come to agreement, legal provisions, such as treaties, are often drafted utilising indeterminate phraseology. In doing this it provides States with a wide latitude within which to interpret the terminology of the treaty; therefore, on the one hand, the legal provision can be argued to provide a restriction on State activity, whilst on the other, the indeterminacy of the provision provides the State with the scope to interpret it so that it does not constrain its activity. This can be seen very clearly in the legal framework surrounding self-determination; on the one hand, as States support self-determination, they appear to be in furthering human rights protections, whilst on the other, States have failed to provide the norm with the necessary certainty that would enable it to be applied readily beyond the decolonisation process, given the destabilising effect that its extended application might have.

[247] *Ibid*., p.24.
[248] Koskenniemi, *supra*, note 245, p.17.
[249] *Ibid.*, p.17.
[250] *Ibid*., p.20.

Therefore, to adopt Hart's phraseology, it can be determined that one aspect of the core of self-determination is its application in the post-colonial context. However, this doesn't explicitly preclude self-determination from finding application in alternative scenarios. Indeed, there is no express statement restricting self-determination's application beyond the decolonisation process, but whether the norm does extend beyond this point is still hidden within the norms penumbra of uncertainty. Therefore, given the relative indeterminacy of self-determination, it is unsurprising that both the UK and Argentina have been able to settle upon definitions that favour the furtherance of their own argument.

As a result of this indeterminacy international law does not act as the sole factor in guiding States actions, with other non-legal factors being highly significant. Yet, despite this indeterminacy, even Koskenniemi, as a radical indeterminist, conceded that international law still has a role to play. For Koskenniemi, in situations where the political situation is stable, law plays a pragmatic role. For instance, White pictured international laws as being 'legal vessels (treaties, resolutions, soft laws)', in which politics is in effect poured.[251] In other words, international politics acts to mould international law. On the other hand, when the underlying political situation becomes unstable this role is reversed, with law now taking on the role of sculptor. In these instances, White argued that 'law acts as a constraint on discretion … international law performs the function of being a container within which politics are confined. This signifies that within a

[251] White, *supra*, note 239, p.158.

new political context international law provides the parameters for political action'.[252]

Therefore, when there is significant political change, the new political context can result in a shift in understanding of the legal framework, with it being reassessed, and reinterpreted in light of the newly emerged political situation. This is where negotiations between the disputing States can play a role, for this moment of political change is what has been referred to as the critical point at when negotiation can prove effective in resolving the dispute.

In this sense, was there to be a significant shift in the prevailing political conditions between the UK and Argentina, international law would be reinterpreted to apply more effectively within this new political situation. In the instance of the Falklands (Malvinas) it is feasible that a move away from political stability might necessitate a re-evaluation as to how the disputing States define the key legal concepts at the heart of the dispute. Significantly, given the indeterminate nature of self-determination and of *uti possidetis,* it is theoretically possible for the States to shift their understanding of these concepts. To facilitate this, it is suggested that there is the guiding hand of a mediator present that the disputing States could attribute the blame for moving away from their earlier understanding of the concept.

[252] *Ibid.*, p.158.

Consequently, it would seem that for international law to take a role in resolving the dispute between the UK and Argentina, the prevailing political status quo must be broken. However, as identified within this thesis, the international legal regime generally acts to maintain stability within the international system of States. Therefore, it is arguable that the international legal system, far from assisting in resolving the conflict, has functioned in a manner which adds to the perpetuation of the dispute. The issue that this gives rise to is that the Falklands (Malvinas) dispute is one that appears to be relatively stable, given the lack of an armed conflict, yet, this stability is one of a considerable negative peace, with it having a detrimental impact on diplomatic and economic relations between the UK and Argentina. The indeterminacy of these norms, and the widely divergent interpretation of them, is likely to remain a constant within the dispute whilst ever the dispute remains stable.

Proving rather timely is that both the UK and Argentina have recently experienced significant political change. It remains to be seen what the impact might be of these in the long-term, especially in relation to Brexit, but the September Joint statement from the UK and Argentina is, arguably, indicative of this theory in practice. There might not have been negotiations in relation to sovereignty, but perhaps this agreement is representative of an alternative pathway to the peaceful settlement of the dispute; one that is centred on cooperation, and trade, as opposed to one that focuses on the zero-sum-game of territorial sovereignty.

5.6: Conclusion

This chapter has built on that conducted within Chapter 3 and Chapter 4. It has drawn together the fragments of the deconstruction of the legal norms at the centre of the dispute with the uncertain factual matrix. In doing this it has indicated as to which international legal dispute mechanism would prove the most fruitful in pacifically resolving the Falklands (Malvinas) dispute.

In doing this, the chapter began by looking at dispute settlement in international law generally, with this acting as a bridge to the next two sections which addressed the key modes of pacific settlement of international disputes. In addressing the different modes of international dispute settlement three factors proved critical: the significance of politics; the requirement for States to consent to the mechanisms; and the uncertainty of the legal and factual matrix, thereby heightening the significance of the subjective bias of the interpreter. Consequently, based on this, it was concluded that the UK and Argentina would be unwilling to consent to legally binding modes of dispute settlement, and that, therefore, diplomatic means would prove the most likely approach through which to resolve the dispute.

It was determined that the flexibility of the diplomatic process would prove critical in enabling the parties to come to agreement. Yet, it should not be forgotten that diplomatic relations have yet to achieve this; we have had several decades of diplomatic interactions between the UK and Argentina, with little forward movement towards the disputes resolution. Therefore, for negotiations

to prove successful the prevailing political conditions must prove conducive. In order to provide the required political conditions, additional diplomatic dispute settlement mechanisms, such as good offices and mediation, could act as a catalyst. It was hypothesised that was this to occur at the point of ripeness, where there has been significant political change, the disputing States would latch on to proposals that they would usually have rejected, due to these now appearing to be of heightened attractiveness. It is in instances such as this that international law can prove to be the guiding hand that assists with normalising relations between the Argentina and the UK, with the indeterminacy of international law, which has so far proven to be at the heart of the intractability of the dispute, now proving the be the means through which Argentina and the UK can come to agreement.

Chapter 6: Concluding Remarks and Towards Resolution

The Falklands (Malvinas) dispute has proven highly intractable, having persisted for over two-hundred years. To date there has been much ink spilled attempting in order to attempt to resolve the dispute, yet none of these have managed to provide a roadmap to positive peace, and the dispute has remained stubbornly intractable; indeed, much of the literature has added fuel to the fire, further antagonising the dispute.

To the outsider it may appear that the dispute over the Falklands (Malvinas) is over, but this is far from the case. It is clear from the analysis undertaken in this thesis that the contemporary status of the dispute is one of a negative peace, with relations between the States being relative frosty. Presently, there might not appear to be the threat of an imminent armed conflict, but an acceptance of this narrow view of a threat to international peace and security would be to perpetuate a status quo that has already resulted in a significant loss of life. It is unlikely that a military conflict would once again erupt between the UK and Argentina; however, it remains a possibility whilst ever this thorn in the diplomatic relations between Argentina and the UK exists.

Consequently, this thesis set out with the aim to ascertain whether international law has the potential to assist in the pacific resolution of this dispute. These concluding remarks act to draw together the strands of this thesis that have been

woven, and to show that the dispute over the Falklands (Malvinas) does have the potential to be resolved, and that, critically, international law does have a role to play.

The first half of this thesis draws a critical picture of the nature of the Falklands (Malvinas) dispute. In crafting this, it highlighted the factual and legal uncertainties that reside at the core of the Falklands (Malvinas) dispute, signifying how these have contributed to a dispute that is intractable in nature. It was concluded that history does have a role to play within any legal inquiry, especially with regard to establishing context, but it was noted that caution should be taken when viewing the factual matrix of the Falklands (Malvinas) dispute, as a result of the high degree of uncertainty that permeates throughout. The thesis then progressed to take a closer look at the factual matrix of the Falklands (Malvinas) dispute, through this cautious lens. The examination of the history of the dispute built on the analysis of historico-legal methodologies undertaken in Chapter 2, to provide evidence that supports the theory that in historical disputes, where the factual matrix in uncertain, the guiding hand of personal bias will prove decisive in determining how the factual matrix will be interpreted. As a result, this chapter highlighted one of the key issues behind this intractability; the heightened role of political bias in the assessment of a nebulous legal and factual history to which the Falklands (Malvinas) dispute is deeply rooted in.

Building on this Chapter 4 of this thesis continued by looking at the leading legal arguments of the disputing States, showing how it is not just the factual elements of the dispute that are grounded in this history that are uncertain, but that the contemporary legal norms argued by the UK and Argentina are, equally, uncertain. In this regard, it was recalled how significant bias proves in the interpretation of legal rules when those legal rules are highly indeterminate. Consequently, it was concluded that the indeterminacy of *uti possidetis* and self-determination has provided those interpreting the international legal rules relevant to the Falklands (Malvinas) dispute with the scope to interpret them in a manner which best fits their own subjective agenda; whether that interpreter is one of the disputing States, a judge of the International Court, or anyone else. Consequently, the combination of an uncertain history with an indeterminate legal regime, has contributed to the dispute proving so stubborn to resolve.

The latter half of this thesis then progressed to utilise the conclusions drawn in the former, layering on top of this an analysis of international dispute settlement mechanisms, and the value of international law, to the processes of settling the Falklands (Malvinas) dispute. Critically, the role of personal bias in the interpretation of the law and facts of the Falklands (Malvinas) dispute was recalled, with this influencing the analysis of the different approaches to dispute settlement that might find application in resolving the Falklands (Malvinas) dispute. It was concluded that the disputing States, being conscious of the uncertainty of the legal and factual matrix, would be unwilling to accept the jurisdiction of legally binding modes of dispute settlement, such as would be the case was the dispute to find itself on the docket of the ICJ.

Therefore, the supposition was drawn that of the differing dispute settlement mechanisms available to the disputing parties, the one that would most likely find success is that of negotiation, due to the flexibility inherent within the process. Yet, it must be recalled that negotiation, including recent attempts at engaging in negotiation, have shown that an impasse has been reached, whereby both States claim to be willing to negotiate, but neither party is willing to do so on the terms offered by the other State. Therefore, for negotiations to prove successful the prevailing political conditions must prove conducive. In order to provide the required political conditions, additional dispute settlement mechanisms, such as good offices and mediation, could act as a catalyst. It was postulated that it is at this point of ripeness, where there has been political change, that the disputing States would latch on to proposals that they would usually have rejected, due to these now appearing to be of heightened attractiveness. In this regard, there would appear to be a synergy of thinking between scholars of international diplomacy and international legal theorists, who have suggested that when the political conditions radically change, law can then function as a constraint on political actions, with the new political context possibly resulting in there being a need to come to a new interpretation the relevant legal norms, such as self-determination and *uti possidetis*. This thesis concluded by suggesting that in moments of political change, international law can prove to be the guiding hand that assists with normalising relations between the Argentina and the UK, with the indeterminacy of international law, which has so far proven to be at the heart of the intractability of the dispute, now

proving the be the means through which Argentina and the UK can come to agreement.

In this regard, recently both the UK and Argentina have undergone significant political change. It has yet to be seen whether the UK exiting the European Union could act as the political radical change required for there to be a reinterpretation of the facts and legal norms at the heart of the dispute. The September Joint statement, of 2017, from the UK and Argentina is, arguably, indicative of this theory in practice. There might not have been negotiations in relation to sovereignty, but this agreement may be representative of a pathway to the peaceful settlement of the dispute; one that is centred on cooperation, and trade, as opposed to one that focuses on the zero-sum-game of territorial sovereignty.

What is notable about this thesis is that it has not sought to make political suggestions as to how the dispute should be resolved. For instance, at no point has there been a proposal as to with which State it is felt sovereignty should reside. This was a conscious decision based on the expertise of the international lawyer being in the analysis of international law, and not on the making of political decisions. This analysis has built a foundation for a road to peace, on which others can build. In this regard, the writing of Herter and Smith still proves insightful, despite being written over twenty years ago, where they noted that the dispute is not one which will be resolved at an international court, but that 'it is one that will be resolved as the result of political settlement that takes into

account the concerns and satisfied the bottom-line needs of all sides, the islanders included'.[1] It can only be hoped that the analysis undertaken within this thesis can provide those engaged in the dispute settlement process some of the insight required to direct the disputing parties towards resolution.

[1] Herter C & Smith WS, 'Possible Solutions', in Smith WS (ed), *Towards Resolution? The Falklands/Malvinas Dispute* (Lynne Rienner Publishers Inc, USA 1991), p.123.

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