

EDITORIAL COMMENTS

DULCE ET DECORUM EST: THE STRATEGIC ROLE OF LEGAL PRINCIPLES IN THE FALKLANDS WAR

INTRODUCTION

Since 1945, Britain has relinquished 5,200,000 square miles of colonial possessions with some 800 million inhabitants. Many of these ex-colonies, such as Malaya, Zambia, and Jamaica, contain inestimable billions of dollars' worth of natural resources. Around the globe, from the Caribbean to Fiji, the thin, red line has by and large responded rather gracefully to the recession; hardly a shot has been fired in anger.

Then came the Argentine invasion of the Malvinas. To hold those barren, forlorn Falkland Islands, inhabited by a mere 1,800 agoraphiles, the British expended the lives of about 250 of their countrymen and killed nearly 1,000 Argentinians.¹ The cost of the operation to Britain has been put at \$2.6 billion, including the replacement cost of seven ships.²

What is to be made of all this by the international lawyer concerned with world order? Was it a selfless, necessary defense of principles that are the pillars of civilized conduct among states? Or was it a declining world power's sclerotic delusion of Thermopylae? Are we to derive from the Falklands war the moral that principles do matter? Or only, as Samuel Johnson said after the 1770 Falklands war, that an exaggerated sense of patriotism "is the last refuge of scoundrels"?³

These questions matter, because, on the one hand, small wars are becoming endemic in a world brittle as a tinderbox. On the other, the erosion of principled conduct by states is equally alarming, since a decent concern for principle is the cohesive force in building a society. Without it, social interaction is purely random and social evolution directionless. The meaning of the Falklands war thus affords an insight into the state of the international system.

Observing the unfolding of the Falklands crisis, in Britain and at the United Nations, the author became convinced that principles of international law directly affected strategic outcomes and had a dramatic mobilizing effect on public opinion, particularly in Britain and Western Europe. Principled legal thinking by governments also had significant consequences at the United Nations. Ignoring strategic, geographic, ethnic, social, and economic factors, nations reacted to the crisis by asking, "What precedential effect would an Argentine victory have on us?" In a rather dramatic fashion, political-strategic

¹ N.Y. Times, June 16, 1982, at A24.

² *Id.*, June 20, 1982, §4, at E1.

³ Professor Hugh Trevor-Roper's brief, illuminating note on Johnson's inquiry into the 1770-1771 Falklands crisis, including this quotation, is found in *id.*, May 29, 1982, at 23.

concerns were subordinated to considerations of principle; or, more precisely, principle became a dominant factor in the political-strategic equation.

The Falklands crisis thus provides a case study of the potential role of international legal principles in the conduct of world politics. It also illustrates the dangers that arise when principles are neglected or applied selectively.

THE ABILITY OF PRINCIPLE TO RALLY THE PUBLIC

Why Britain Fought

The bloody little conflict in the southwest Atlantic was patently a war of inconvenience for Britain, whose participation cannot be explained in conventional terms of self-interest. To study the rallying of Britons to the war is to confront the dynamic power of legal principles to mobilize the polity. This is no everyday phenomenon. War on behalf of abstract principle, common in the era of the Crusades, is nowadays quite rare. We in the West do not live in an era of "*dulce et decorum est, pro patria mori*."⁴ If asked to die for our country, we must be primed by credible reasons bigger than life itself. Yet the British marines did not believe—indeed, were not asked to believe—that the Falklands were the doorstep to Dover. Rumors of oil discoveries offshore were painstakingly denied. Prime Minister Margaret Thatcher's reason was, simply, that "Britain . . . has a duty to the whole world to show that aggression will not succeed and to uphold the cause of freedom."⁵ It was reason enough.

In a London pub of a May afternoon,⁶ to the tune of World War II Vera Lynn records,⁷ the talk was not of avenging a national insult or even of recapturing useful real estate, but of protecting the world from the contemporary moral equivalent of Neville Chamberlain's "peace in our time." Poor little Czechoslovakia had become poor little Falkland "kelpers." An *Economist* poll showed that 76 percent of the British public backed their Government's response to the Argentine aggression.⁸

The Western European Attitude

This response, in varying degrees of intensity, seemed to predominate throughout that part of the European community which had been invaded by Germany in the Second World War. Mlle. Edmonde Dever, the Belgian Ambassador to the United Nations, early captured that feeling:

If the use of force were to be rewarded, this would encourage any state with territorial ambitions to follow suit. Peace in the world would become even more precarious and many countries, no matter what group they

⁴ HORACE, ODES, III, ii, 13.

⁵ N.Y. Times, May 21, 1982, at A10.

⁶ The author was in Britain for the United Nations during part of the events herein described, although only occasionally in pubs.

⁷ Dame Vera Lynn, perhaps best known for her World War II rendition of "White Cliffs of Dover," had resurfaced for the occasion with a new recording called "I Love This Land," which became an instant hit in Britain.

⁸ The Economist, May 1, 1982, at 12.

belonged to, would feel threatened. The reaction of many small countries in the world to the Argentine invasion demonstrates, furthermore, that this danger has been understood.⁹

This perception ensured the early passage—over the opposition only of Panama—of Security Council Resolution 502 calling on Argentine troops to withdraw from the islands.¹⁰ It also facilitated severe Western European economic and military sanctions against Argentina.¹¹

The United States: Principle Skepticism

In the United States, however, the response to the unfurling of the banner of principle was much more mixed. As might be expected, the “Eastern Establishment” rallied to Britain. The *New York Times* columnist Flora Lewis had no doubt that “Britain has gone to war for no special national interest, neither conquest nor security, but in defense of a general principle against military seizure of land.”¹² New York Senator Daniel Patrick Moynihan, himself a former U.S. Ambassador to the United Nations, called for Argentine withdrawal and submission of the issue to a special chamber of the International Court.¹³ But many ordinary Americans seemed to agree with Ambassador to the United Nations Jeane Kirkpatrick, who had difficulty discerning the principle at issue. In the seizure by Argentina of land it believed to be rightfully its own, she thought, there could be no question of aggression. Kirkpatrick also believed that, even if there was a principle at stake, it ought to give way to practical considerations of U.S. self-interest in maintaining friendly relations with the major anti-Communist Government in Latin America. Asserting that “there aren’t very many people in our Government who take an interest in Latin America,”¹⁴ she held a flurry of meetings with Argentinian officials, such as Brigadier José Miret, the Secretary of State Planning, in an effort to keep the United States from tilting towards Britain. A small band of “Latin Americanists” in the State Department cheered her on, while leaking to the media horror stories of the costs to U.S. interests that would follow any overt tilt towards imperial England.¹⁵

These voices of geopolitical pragmatism were joined by intellectual adherents of the American “death of principle” school. With aggression everywhere richly rewarded, or at least condoned—China’s against Vietnam, Vietnam’s against Cambodia, India’s against East Pakistan, Russia’s against Afghanistan, Iraq’s against Iran, Israel’s against Iraq and Lebanon, Tanzania’s against Uganda, to mention but a few instances of mounting global unilateral “quick

⁹ Amb. Edmonde Dever, UN Doc. S/PV.2363, at 48–50 (1982).

¹⁰ UNSC Res. 502 (Apr. 3, 1982).

¹¹ The European Economic Community unanimously voted to impose economic and military sanctions on Argentina on Apr. 10, 1982. *N.Y. Times*, Apr. 11, 1982, §1, at 1, 12.

¹² *N.Y. Times*, May 23, 1982, §4, at E23.

¹³ 128 CONG. REC. S3366–68 (daily ed. Apr. 13, 1982).

¹⁴ *N.Y. Times*, May 31, 1982, at A5.

¹⁵ For coverage of the Haig-Kirkpatrick *contretemps*, see *id.*, May 31, 1982, at A5, and June 1, 1982, at A8.

fixes"—it was surely at best a churlish self-delusion to sacrifice one jot or tittle of coolly appraised self-interest for the chimera of "principle."

The man who was then Secretary of State, Alexander Haig, probably shared none of these views, but during April and most of May, he spearheaded the effort to remain pragmatically evenhanded. He could do little else, so long as the President still vacillated between the combatants. In April, after the invasion, Reagan used the occasion of Argentina's Independence Day to tell an astounded President Galtieri that it "has never been more important to reaffirm the common interests and values of Argentina and the United States."¹⁶ Not until his address to the British Parliament of June 8 did President Reagan publicly align the United States with the principle for which Britain was fighting, by noting "that armed aggression must not be allowed to succeed, and that people must participate in the decisions of government under the rule of law."¹⁷

Although Prime Minister Thatcher has confided that "in her heart of hearts" she believed that the United States "knew and always knew that there could never be any neutrality between the military junta and democracy,"¹⁸ this is more gracious than true. The United States was divided. As late as May 31, Ambassador Kirkpatrick was still making an end run to President Reagan to reverse the new policy of siding openly with London.¹⁹

Why was the United States so late in choosing sides?

Some, in the administration, saw neutrality as essential to playing the cherished game of shuttle diplomacy. Washington's incurable need to be the global mediator has the same origin as the urge to be a global policeman. In 1945, at the San Francisco founding of the United Nations, Secretary of State Edward Stettinius announced that, UN or no UN, we would continue not only to "protect our interests, which extend to the whole world," but equally, to "play the role of mediator between our major Allies whenever their interests conflict."²⁰ The Secretary was not thinking of General Galtieri and Mrs. Thatcher, of course, but of Joseph Stalin and Winston Churchill. Although neither then nor now were our mediations exactly a *succès fou*, the urge dies hard. And so long as it persists, we must at least seem neutral ("like a fire department neutral between house and fire," one British MP remarked dourly to the author).

Unfortunately, neutrality has costs to strategy as well as to principle. Arguably, our abstemiousness made a negotiated settlement more difficult. In April and early May, Argentina's obduracy fed on U.S. evenhandedness. Had Buenos Aires been certain that we were ready to provide all necessary military aid to the British forces, various proposed compromises might not have foundered. Then, too, neutrality eventually got us into more trouble with Argentina than necessary, because it was seen as a trick, a betrayal, when we at last sided

¹⁶ For this quote and the comment thereon by Carlos Fuentes, see Anthony Lewis, *id.*, May 31, 1982, at A13.

¹⁷ *Id.*, June 9, 1982, at A1.

¹⁸ *Id.*, June 3, 1982, at A14.

¹⁹ *Id.*, June 1, 1982, at A8.

²⁰ *Id.*, May 29, 1945, at 8. The text is slightly different in the official State Department version. 12 DEP'T STATE BULL. 1007, 1013 (1945).

with England. Such mixing and changing of signals, inducing cognitive dissonance in Argentina, was the natural consequence of Washington's need to mediate. It would have been more prudent to have left mediation to UN Secretary-General Javier Pérez de Cuéllar, who eventually landed the job, anyway. The new Secretary-General had just been chosen precisely for his ability to perform this sort of task. Also, as a new man in an underrated role, his prestige could not but have been enhanced by being invited to try, whether or not he succeeded.

In April, however, it was still inconceivable to our Department of State that a quarrel between two of our "major allies" should be mediated by anyone but us, least of all by the Secretary-General of that dangerous organization. The State Department's neutral stance was thus tactical, rather than deeply felt. But, as we have already noted, it fitted nicely with the world view of two other groups of Americans: those who, like Ambassador Kirkpatrick, opposed a tilt towards Britain for reasons of geopolitical strategy, and those who simply exhibited the national penchant for skepticism when faced with any summons to defend higher principles.

The latter is almost a native American trait. We may fight to defend our ships against Barbary pirates and German U-boats. We will probably defend access to distant but essential oilfields. But we do not follow the flag to war for abstract concepts. For us, war is an instrument of pragmatic self-defense, not a way to teach first principles to the heathen. America's reluctance to ratify even the most basic international treaties, even one prohibiting genocide, reflects a national preference for keeping our pragmatic options free of normative entanglements.

In this respect, British and American recent history is illustrative of two somewhat disparate views of the role of norms and principles in world affairs. Britain, with France, entered the Second World War at enormous cost to honor a commitment to principle.²¹ The challenge to that principle happened to occur in Poland, a country with an unpalatable government that was neither strategically essential to the two Western European democracies nor defensible logistically. Yet the principle had to be upheld. The United States, by contrast, entered the war only after the Japanese had obligingly met the requirements of our strategic geopolitical pragmatism by mauling the Pacific fleet at Pearl Harbor.

The U.S. attitude changed briefly after the San Francisco Conference, where we sponsored a UN Charter that bound states to work collectively in defense of normative principles. Temporarily believing in this new order, we found ourselves fighting at Pusan to defend the principle of nonaggression, even though Secretary of State Dean Acheson, shortly before, had told us that South Korea was not within our strategic ambit.²² That war was not a

²¹ On March 31, 1939, British Prime Minister Neville Chamberlain, speaking for his country and for France, pledged help if Poland's independence was threatened by Germany. On Aug. 25, a British-Polish treaty of alliance was signed in London. Agreement of Mutual Assistance between the United Kingdom and Poland, 143 BRIT. & FOREIGN ST. PAPERS 301-03 (1939).

²² This may have been an inadvertence. See Acheson, *Crisis in Asia—An Examination of U.S. Policy*, 22 DEP'T STATE BULL. 111, 116 (1950).

great success, in part because other members of the United Nations provided little support. The next war, in Vietnam, was also fought on principles, some of which were disguised as the "domino theory." That venture proved a disaster, compounded by the dawn of a public suspicion that the principles being asserted were only rather tenuously coupled to the facts. After it was over, many of those who had convincingly used legal and moral principles to argue against U.S. intervention in Vietnam fell silent when the Pol Pot regime turned genocidally against its own population and when the victors in Hanoi invaded Kampuchea and established dominion over Laos. Principles, to many Americans, evidently served no—or purely operational—purposes.

The British thus have had a different recent experience than Americans with committing their national honor and future to causes that, seen as discrete events unconnected to "tides of history" or the social *willem*, are likely to appear quixotic to many Americans. Significantly, it was American liberals, not British Social Democrats, who whispered that the Falklands war was provoked to buttress Mrs. Thatcher's standing with the electorate.

The *Economist* poll does illustrate the continuing power of principle in mobilizing British society for action, even for costly and painful sacrifice. Britons demonstrated their belief in the importance of principles in general and of the particular principle at stake. They were willing to share their leaders' belief that the asserted principle was genuinely threatened. To state this to Americans risks making the British—perhaps with some Western Europeans—seem rather culturally exotic.

THE STRATEGIC POWER OF PRINCIPLE TO RALLY GOVERNMENTS: THE "THIRD WORLD"

The Falklands crisis is illustrative of the role of principles not only in mobilizing the British public but also in affecting the operation of the international system.

What happened at UN headquarters in May and June illustrates the residual power of principles to shape policies and behavior of members of the international community. In the corridors of the General Assembly building, the junta found itself almost without support, except from a few states with interests and ambitions similar to Argentina's. In speeches at the Security Council, there were pro forma invocations of colonialism's evils.²³ But in the delegates' lounge even most Latin Americans distanced themselves from the military "adventurists." Ambassador Muñoz Ledo of Mexico—a country with a better claim to Texas than Argentina's to the Falklands—stated publicly: "We reject the use of force to settle this or any other conflict."²⁴ His Foreign

²³ For example, Amb. Javier Chamorro Mora of Nicaragua was particularly strident in his denunciation of British colonialism and support for its "victim," Argentina, despite Nicaragua's well-known aversion to the "fascists" of Buenos Aires who were believed to be sending troops to act as U.S. proxies in Central America. UN Doc. S/PV.2363, at 16–25 (1982). See also N.Y. Times, May 23, 1982, §1, at 16.

²⁴ Amb. Muñoz Ledo, UN Doc. S/PV.2362, at 41, 46 (1982).

Ministry condemned the invasion outright.²⁵ The Bogotá delegation was nicknamed "British Colombians" for their perceived posture.

After the Security Council ordered Argentina to leave the Malvinas, over the lonely opposition of Panama, Flora Lewis wrote approvingly in the *New York Times*, "The United Nations has never been able to prevent or reverse these challenges to principle. But it has broadened a sense of the value of asserting it in a world where so many are weak and so few are mighty."²⁶ This reassertion in the Security Council could not have happened had there been a conventional split between Third World "victims" and First World "exploiters." But there was no such knee-jerk reaction. Clearly, among many Third Worlders, even Latin Americans, principle took precedent over hemispheric solidarity. Rio de Janeiro's leading newspaper, *Jornal do Brasil*, echoing the sentiments of its Government, asked, "why must Argentina's neighbors adopt a continental position as a bloc when the Government of Argentina has demonstrated such little appreciation for what peace on this continent means to them?"²⁷ Lamenting the demise of the inter-American system for preserving the power of law over force, São Paulo's leading newspaper, *O Estado*, concluded: "It was one of its own members, and an influential one at that, that hastened its demise."²⁸

This new deviation from Third World solidarity could not be explained solely in terms of the Argentine junta's global unpopularity, although this did play a part. There were many things the Group of 77 could have done, beginning with convening the General Assembly, that were omitted because Argentina just could not collect the necessary votes. Aside from the action of Venezuelan dockworkers in refusing to unload Scotch whiskey,²⁹ the junta got very little tangible help, only some watered-down resolutions of the OAS and the Havana meeting of the nonaligned. Even these did not condone the use of force.³⁰

THE PRINCIPLES AT STAKE

The principles that moved so many nations during the Falkland crisis are both clear and basic to the system established by the UN Charter. Article 2(3) obliges members to "settle their international disputes by peaceful means," while 2(4) prohibits "the threat or use of force" against a state. These concepts are further embroidered in the landmark Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the General Assembly in 1970.³¹ It "solemnly proclaims" that

²⁵ *N.Y. Times*, May 23, 1982, §1, at 16.

²⁶ *Id.*, §4, at E23.

²⁷ *Id.*, §1, at 14.

²⁸ *Ibid.*

²⁹ *Id.*, June 3, 1982, at A14.

³⁰ Draft Final Communiqué, Political Section, Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Countries, May 31–June 5, 1982, Doc. NOAL/CONF.6/BUR.3/DOC.1/REV.2, at 40–42. The nonaligned, while aligned with Argentina in respect of its claim of sovereignty over the Malvinas, reiterated the call for "peaceful settlement of disputes between states and non-use of force in international relations." *Id.* at 40.

³¹ GA Res. 2625 (XXV), 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

every state "has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes."³² Argentina, of course, joined in supporting that declaration, which also requires states to settle disputes by "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements or other peaceful means of their choice," but never by resort to military force.³³

Another, more controversial, set of principles evoked by the Falklands crisis has to do with the disposition of the islands, which are a British colony. Under Article 73 of the UN Charter, the colonial power is obliged to recognize that "the interests of the inhabitants of these territories are paramount" and to promote, within the UN system, "the well-being of the inhabitants" including the right "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions." The Declaration on Friendly Relations also purports to give the people of each colony the right freely to choose the "establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people."³⁴ This is important because it makes clear that the decolonization of a territory need not lead to independence or merger with a neighboring state, but that self-determination can take the form of free association with the "mother country," the direction preferred by the Falkland inhabitants.

Not every nation at the United Nations thought these principles were worth defending in this specific instance. Each did its own cost-benefit analysis. Ambassador Noel Dorr of Ireland said that "though the principles at stake are none the less important, the area in dispute is small and geographically isolated [and] the population of the islands is tiny."³⁵ He called, unsuccessfully, for a cease-fire that would have left the Argentinian forces in control.³⁶

Diplomatic action at the United Nations in May and June showed that Dorr was in the minority. To most, preponderant weight was given to the principle factor. Principles matter in two related senses. First, principles like Article 2(4) are perceived to lay down the basic rules of the game. Most states, if they are not themselves parties to the dispute, tend to "vote for the rules" because they perceive themselves to have a greater national interest in protecting them from erosion than in supporting either side. Of course, in many instances, it is difficult to tell who violated the rules: which state "started" the crisis. But when that is clear, as it was in the Falklands invasion, then states tend to lean on the violator, as did Mexico, Colombia, Brazil, and Chile, even while occasionally genuflecting to the cherished icons of hemispheric solidarity.

³² *Ibid.* The provisions of the declarations are not numbered.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Amb. Noel Dorr, UN Doc. S/PV.2360, at 56 (1982).

³⁶ Ireland: draft resolution, UN Doc. S/15106 (1982). The resolution called on both parties to suspend hostilities for 72 hours, while the Secretary-General renewed his good offices efforts. The resolution was not adopted.

There is a second sense in which principles matter. They are, after all, the fragile strands of extrapolative logic that link one situation with others. Many at the United Nations with no direct stake in the disposition of the Falklands chose up sides because a key issue—may historic titles be used to force changes in established national boundaries?—reminded them of another situation in which they did have a strong interest. Of course, this works both ways. Venezuela supported Argentina,³⁷ while Guyana strongly supported Britain,³⁸ because Venezuela has a claim based on historic title against Guyana. Guatemala and Belize saw the issue as similar to their own boundary dispute.³⁹ Kenya, a large part of its territory still claimed by Somalia on the basis of historic title, was outspoken in Britain's cause. Ambassador Maina made it clear that

whether or not the [Argentine] claims are valid . . . they should not be settled at the expense of people who now live on the Falkland Islands. They are paramount, and in our view their interests are paramount. Whatever claims Argentina may have against the British, based on history and the imperialism of the past, may be settled without treating the people of the Falkland Islands like chattels in real estate. . . . If we bend the principle of decolonization of peoples to look like the redistribution of territories, this Organization is in real trouble. One has only to look at any map of one's choice to see why. . . . [A]ny attempt to redraw the map of the world would lead this planet to endless war and destruction.⁴⁰

Maina addressed Argentina as "a violent member of the United Nations committing naked aggression against its neighbours."⁴¹

The lack of African support for Argentina is also understandable in another sense which illustrates the role of reciprocal principles in a slightly different fashion. As Ambassador Maina pointed out, as recently as September 1981, at the meeting of nonaligned foreign ministers, Argentina had dissociated itself from a resolution calling for support to southern African liberation movements insofar as that implied aid to armed struggle. The stated ground was that "resorting to force is incompatible with the Charter of the United Nations." Wryly, Maina asked: "what happened between September 1981 and April 1982 . . . to transform Argentina . . . ?"⁴²

The direct connection made by governments between the events in the South Atlantic and matters close to their own national interest was apparent to anyone following the proceedings in the Security Council. Of the 15 current

³⁷ Amb. Zambrano Velasco, UN Doc. S/PV.2362, at 21–35 (1982).

³⁸ Informally, as in the Havana meeting of the nonaligned. See note 30 *supra*.

³⁹ Amb. Delpree-Crespo of Guatemala told the Security Council:

It is inconceivable that the colonialist system, which is fortunately in its death throes throughout the world, including our continent, should have sprung to life, allowing a colonialist empire to impose its interests upon our America to the detriment of a Latin American country, whose right to sovereignty over the full extent of its territory has been internationally recognized.

UN Doc. S/PV.2362, at 97, 98–100 (1982). He clearly indicated that Guatemala, in respect of Belize, had suffered "similar treatment" in "similar circumstances." *Ibid.*

⁴⁰ Amb. C. G. Maina, UN Doc. S/PV.2364, at 21, 23–26 (1982).

⁴¹ *Id.* at 26.

⁴² *Ibid.*

members of the Council, 11 are states on one side or another of problems very similar to that of the Falklands. France has a network of little bits and pieces of empire, many in the category of "*départements d'outre mer*" that wish to remain French. In May, the deputy representing one of these overseas departments, St. Pierre et Miquelon in the Gulf of St. Lawrence, made a panicky prediction of an imminent Canadian invasion of his homeland. Guyana, equally nervous about an oil-rich neighbor that claims two-thirds of its territory, on May 11 notified the United Nations that it had been the subject of a "threatening" incursion by Venezuelan soldiers.⁴⁵ Both jeremiads proved, at the least, premature. But they reflected the understandable fear that one thing leads to another, an operational view of principle. Even the United States has ties with Puerto Rico, and expects soon to establish links with the distant Northern Marianas, comparable to those of Britain with the Falklands. "Historic title" forms the basis of claims by Ireland to Northern Ireland, Japan to the Southern Kurile Islands currently in Russia's keep, Togo to British Togoland which was annexed to Ghana, Spain to Gibraltar, and China to those parts of the British Hong Kong colony ceded by China in 1842 and 1860.⁴⁴ As Panamanian Foreign Minister Jorge Illueca told the Security Council, the Gibraltar case is indistinguishable from the Falklands issue: "these colonial enclaves," he said, "have no justification; they are inadmissible, reprehensible, and stand condemned by the world conscience."⁴⁵

The Panamanian position, too, illustrated the role of a sort of principled thinking. As the voice of this world conscience, Panama—the only Hispanic Latin American country then on the Security Council—provided most of the ardent, if eccentric, support for Argentina. Delegates were startled by the temper of Illueca's outbursts, which attributed Prime Minister Thatcher's intractability to "the glandular system of women" and called on the United Nations to deprive the British Ambassador, Sir Anthony Parsons, of the use of his knighthood since, in the world organization, "we do not have any monarchical system."⁴⁶ The Panamanians privately admitted that what occasioned all this verbal excess was not the Malvinas so much as thoughts of the Panama Canal. Here, again, the power of principles—extrapolative thinking—was at work. Illueca surprised delegates with the theory that the Falkland Islanders deserved no right of self-determination because, he contended (wrongly), they are all "employees of a colonial company who are of the same nationality as the oppressor nation."⁴⁷ The bigger game he was really stalking, however, was the Panama Canal company and its resident U.S. "zonians."

This author asked one Panamanian representative whether he had considered that, if Argentina had succeeded in asserting its historic title, the Gov-

⁴⁵ Letter dated May 11, 1982, from the Permanent Representative of Guyana to the United Nations addressed to the President of the Security Council, UN Doc. S/15072 (1982).

⁴⁴ Treaty between Great Britain and China, signed at Nanking, Aug. 29, 1842, 30 BRIT. & FOREIGN ST. PAPERS 389-92 (1842); Convention of Friendship between Great Britain and China, signed at Peking (*sic*), Oct. 24, 1860, 50 *id.* at 10-12 (1860).

⁴⁵ Foreign Minister Jorge Illueca, UN Doc. S/PV.2362, at 63, 81 (1982).

⁴⁶ Illueca, UN Doc. S/PV.2363, at 76, 92 (1982).

⁴⁷ Illueca, UN Doc. S/PV.2362, at 71 (1982).

ernment of Colombia might have revived its old claim to its isthmus province. "Oh, but they wouldn't," the Panamanian replied, somewhat uncertainly. But how could he be sure? Panama, after all, had been "stolen" from Colombia by the same two colonial powers, Britain and the United States, that 70 years earlier had relieved Buenos Aires of the Malvinas.

For most countries, not being the subject of claims based on historic title, the principles at stake in the Falklands were not quite so specifically relevant. Yet they were perceived as no less important. As British historian Hugh Trevor-Roper wrote to the *New York Times*, "if Argentina had kept its spoil today, the rule of law would have been replaced by that of force, and no undefended island would have been secure."⁴⁸ Ambassador Jacobs of Antigua and Barbuda said, "as a small island State whose only defence against the aggression of those larger and more powerful than ourselves is the Charter of the United Nations and the resolutions of this Security Council, we must deplore Argentina's illegal use of force."⁴⁹ In a world where 62 states have populations of fewer than a million, and 32 have fewer than 200,000, Jacobs spoke for a significant constituency. Most of these vulnerable nations agreed with Shridath Ramphal, the Secretary General of the Commonwealth, who said bluntly: "in making a firm and unambiguous response to Argentina's aggression, Britain is rendering a service to the international community as a whole. . . . Commonwealth countries, including in particular Commonwealth countries in Latin America, have stood full square behind Britain in this matter."⁵⁰

This was far from public posturing. Nations and territories felt themselves threatened by the ripple effect an Argentine victory would have had. Worried senior officials of the Netherlands Antilles rushed to New York in May to request UN technical assistance in constructing a status that would permit their constitutional link with the Netherlands to continue in peace. "We do not wish to follow Suriname's disastrous experience with premature independence," their representative said. On the other hand, the Antilles did not want the link with Holland to provide an excuse for "liberation" from "colonialism" by a powerful Latin American neighbor. (When it was suggested that the islands might escape the "colonial" label by constructing a relationship with the Netherlands that either could terminate on notice, one of the visitors replied, "Oh no. We cannot give the Netherlands the power to rid themselves of us so easily.")⁵¹

WHEN PRINCIPLES ARE NOT PRINCIPLES

But what does all this activity prove about the utility of principles in the international system? Perhaps only that nations, like the citizenry of Britain, may still be moved—or manipulated—by appeals to principle. Reflecting Americans' traditional reserve towards such appeals, Ronald Steel pointed out

⁴⁸ N.Y. Times, May 29, 1982, at 23.

⁴⁹ Amb. Lloydston Jacobs, UN Doc. S/PV.2360, at 83 (1982).

⁵⁰ S. S. Ramphal, "International Collective Security: Precondition for Peace and Security," Statement to Parliamentary Mass Lobby, Central Hall, Westminster (Apr. 27, 1982).

⁵¹ The author participated in these unrecorded discussions.

in an op-ed piece for the *New York Times*⁵² that what the Argentine junta tried to do in the Falklands follows quite logically from similar acts the international community has tolerated with a mere wink. The geopolitically pragmatic practice, he argued, long ago obliterated the principles. India's seizure of the Portuguese colony of Goa, in 1961, was benevolently overlooked by the UN system. Although the Portuguese fascist dictatorship made it impossible to demonstrate the political preference of the Goans, it is probable that the inhabitants of the enclave had no desire, after 450 years as part of Portugal, to be "liberated" by India. When the Goan invasion came to the notice of the Security Council, Ambassador Adlai Stevenson charged that India had violated the Charter principles.⁵³ But nothing was done, except that U.S. Ambassadors to New Delhi are still instructed not to visit the area in order to avoid legitimizing its annexation.

In a similar case, the United States and the United Nations actually helped take the western half of the vast island of Papua New Guinea (West Irian) away from Holland and, without the consent of the inhabitants, handed it to Indonesia.⁵⁴ During the transfer, the UN flag flew over the territory for 8 months. In 1963, after assuming control, Indonesia conducted a rigged "consultation" which a shamefaced international community accepted as a *fait accompli*.⁵⁵

More recent examples are the Indonesian seizure of Portuguese East Timor and the Moroccan taking of the Spanish (Western) Sahara, both in 1975. In each instance, the preferences of the local inhabitants for independence were clearly evidenced and blatantly ignored. In Timor, there was bitter resistance to the invaders, which was brutally suppressed. The General Assembly passed a toothless resolution.⁵⁶ In the Western Sahara, a visiting UN fact-finding mission reported the overwhelming desire of the indigenous population for independence,⁵⁷ and the International Court of Justice in its advisory opinion on the legal status of that territory reiterated its assertion that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them." The "right of self-determination requires a free and genuine expression of the will of the peoples concerned."⁵⁸

⁵² Steel, *Self-Interest*, N.Y. Times, May 28, 1982, at A27.

⁵³ 16 UN SCOR (987th mtg.) at 15-18, UN Doc. S/PV.987 (1961).

⁵⁴ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 18 UN GAOR Annex 1 (Agenda Item 20), UN Doc. A/5578 (1963).

⁵⁵ GA Res. 2504 (XXIV), 24 UN GAOR Supp. (No. 30) at 3, UN Doc. A/7630 (1969).

⁵⁶ GA Res. 3485 (XXX), 30 UN GAOR Supp. (No. 34) at 118, UN Doc. A/10034 (1975).

⁵⁷ The mission was authorized by GA Res. 3292 (XXIX), 29 UN GAOR Supp. (No. 31) at 103, UN Doc. A/9631 (1974). See Report of the United Nations Visiting Mission to Spanish Sahara, in the Report of the Special Committee, UN Doc. A/10023/Add.5, Annex, at 26-27 (1975).

⁵⁸ Advisory Opinion on Western Sahara, 1975 ICJ REP. 12, 31-32 (in part quoting with approval its Advisory Opinion on The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 *id.* at 16, 31).

When all this was ignored by the invading Moroccan army, the General Assembly passed two contradictory resolutions, one recognizing the right of the Saharawis to independence and the other ratifying the *fait accompli*.⁵⁹

Both times, the United Nations ineffectually criticized the usurping government but did nothing more concrete. The British Government certainly did not identify with the Timorese, some 50,000 of whom died defending the same right Britain now claims for the Falkland kelpers. As for the United States, it has tut-tutted, made a short shadow play of restricting military sales to Morocco and Indonesia, but staunchly supported and supplied both aggressor regimes.⁶⁰

These are dramatic instances of national policy based not on principle but on pragmatic geopolitical strategy. In East Timor and the Western Sahara, the West supported its surrogates, the legions of General Suharto and King Hassan, without much thought for cost to the credibility and deterrent power of the principles at stake. Who could blame Galtieri's anger and confusion at being treated so differently from Suharto and Hassan?

The junta's confusion was further compounded by the unprincipled way that the Third World had previously dealt with the Falklands issue in the General Assembly and in the councils of the nonaligned. In both settings, the Argentine claim has essentially been recognized since 1965 by resolutions that called for negotiations between Argentina and Britain to terminate the "colonial" presence.⁶¹ In 1973 the Assembly explicitly determined that "the way to put an end to this colonial situation is the peaceful solution of the conflict of sovereignty."⁶² This was tantamount to a call for Britain to negotiate the islands' transfer to Argentina, while somehow "bearing in mind" the interests of the inhabitants.

That line of resolutions on the Falklands, paralleling others on Gibraltar,⁶³ while not sanctioning Argentina's use of force, did implicitly reject the inhabitants' claim to self-determination. It is the most egregious instance of abandonment by the Third World of the very principle to which its member states owe their existence. True, the population of Gibraltar (about 30,000) is small, and of the Falklands, even smaller. However, the UN debates show absolutely no attempt to make the distinction on that basis, if only because there are other Third World countries with comparably minute populations. Such a line would have been impossible to draw without intense internal squabbling within the Third World bloc. The dirty little truth of the matter is that the Falklanders and the people of Gibraltar were not thought worthy

⁵⁹ GA Res. 3458A (XXX) and GA Res. 3458B (XXX), 30 UN GAOR Supp. (No. 34) at 116-17, UN Doc. A/10034 (1975).

⁶⁰ See *The Question of Self-Determination in Western Sahara: Hearing Before the Subcomms. on International Organizations and on Africa of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977); *Human Rights in East Timor: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977).

⁶¹ GA Res. 2065 (XX), 20 UN GAOR Supp. (No. 14) at 57, UN Doc. A/6014 (1965).

⁶² GA Res. 3160 (XXVIII), 28 UN GAOR Supp. (No. 30) at 108-09, UN Doc. A/9030 (1973).

⁶³ See, e.g., GA Res. 2429 (XXIII), 23 UN GAOR Supp. (No. 18) at 64, UN Doc. A/7218 (1968), which asks Britain "to terminate the colonial situation in Gibraltar."

of the right to self-determination because they are not about to self-determine themselves *into* the Third World, but wish to remain linked with the “mother country,” an example of the unsurprising fact that the Third World, too, sometimes sacrifices principles for geopolitical pragmatism.

A senior Indian diplomat explained it a little differently:

Before the non-aligned meet, various special interest resolutions are drafted within the regional sub-group concerned. The rest of us rarely get a look at the texts until a week or so before the vote. Anyway, we really don't care, since it's all cut and dried and doesn't affect us much. Among the Third World, each region goes along with every other region's agenda. That's how we manage to stay a group.⁶⁴

This attitude may change, however, when a First World country feels really strongly about one of the items and applies bilateral pressure—the way the United States has done when resolutions about Puerto Rico were under consideration. But, the Indian representative indicated, the British “never really lobbied us about the Falklands or Gibraltar resolutions. They seemed to feel that those resolutions were just a lot of hot air. And we rather felt the same.”⁶⁵ Unfortunately, the Argentines took them at face value, as a hunting license.

CARING FOR PRINCIPLES

From all this, one might conclude that the principles for which Britain purported to fight in the South Atlantic are bunk, to be trotted out when convenient, then forgotten when not. Every law student knows that, for every principle, there is a countervailing one. International law is an illusion created by lawyers to gull the naive into serving somebody else's self-interest. Always, in international affairs, ahead of principle comes praxis, which is highly selective, pragmatic, strategic, and indifferent to rules.

Well, as T. S. Eliot would say, that is a way of putting it.⁶⁶ But let us try another. The Falklands crisis points to a social phenomenon: principles evidently can rally both people and nations, even overcome countervailing perceptions of self-interest. This rallying has strategic consequences. There is no doubt that Argentina's diplomatic isolation sapped its will to fight and its ability to secure weapons, replacement parts, and credits as well. Principles, in the Falklands war, were effective *because they were credible* to those asked to defend them.

But, besides their capacity to rally, principles have another strategic capability. They can deter. Principles that are regularly implemented over a long period tend to make certain conduct “unthinkable.” The idea that something “just isn't done” is both descriptive and proscriptive. However, once a principle is violated with impunity—the previously unthinkable seizure of

⁶⁴ Interview conducted by author, New York, June 2, 1982.

⁶⁵ *Ibid.*

⁶⁶ “That was a way of putting it—not very satisfactory,” T. S. Eliot, “East Coker,” from *Four Quartets*, in *THE COMPLETE POEMS AND PLAYS* 123, 125 (1952).

an embassy in Tehran, for example—it loses part of its credibility and thus its capacity to deter. It is no longer unthinkable. Restoring its unthinkability is rather like putting toothpaste back in a tube.

A government that sees others successfully ignore principles will not give them much weight when calculating its own strategic self-interest. After Goa, West Irian, East Timor, the Western Sahara, Afghanistan, Cambodia, the Iran-Iraq and Mideast wars, it is hardly surprising that Buenos Aires believed it could invade the Falklands without stirring up a hornet's nest.⁶⁷ The principles for which Britain fought in the Falklands had lost their capacity to deter violators, even if they still retained a lingering ability to rally defenders.

Unfortunately, a principle with just enough life to rally defenders but not enough to deter violators is not just another compromise. It is a particular danger to world stability, leading to unpredictability and potentially lethal miscalculations.

The sad truth is that the international community has not very ardently tended even its most basic principles. Yet social scientists tell us that rule building is a universal social imperative, that a sense of shared, generally obeyed principles gives definition to a society and distinguishes it from a random rabble.⁶⁸ The international system does, indeed, maintain many of the trappings of a society: a fixed population (of states), repetitious patterns of interactions, an agreed system of communications, and elaborate, if politically rudimentary, institutions. Yet, when it comes to principles, the states in the system remain careless about going consistently to their defense.

Tending principles only once in a while is probably worse than abandoning them altogether. Yet that is precisely what happened in the Falklands. The British military action in the Falkland Islands—costly, prolonged, perhaps quixotic—was senseless in cost-benefit terms if it was fought merely to reclaim real estate. It is equally indefensible in Benthamite terms, for the relative happiness of the 1,800 islanders would have been purchased by the greater unhappiness of an equal or larger number of battle casualties.

The campaign can be justified only as a reinforcement of basic principles crucial to peace. These are surely worth fighting for, if states are thereby persuaded to adhere to them. But a principle asserted occasionally may not be worth defending if only because it is already incapacitated, having lost its power to deter.

In his June address to the British Parliament, President Reagan emphasized that armed aggression must not be allowed to succeed and that people must

⁶⁷ Carlos Fuentes made a somewhat different connection:

If Mrs. Kirkpatrick was sent down to Buenos Aires to say, "What wonderful people you are, you are not totalitarians, you are simply authoritarians, we love you," and Mr. Enders went down there, and Secretary Haig, when asked what the United States had in common with the Argentine military regime, said, "We both believe in God"—naturally the junta felt they had the green light from the United States to go forward with this adventure.

Quoted by Anthony Lewis, *N.Y. Times*, May 31, 1982, at A13.

⁶⁸ See, e.g., S. Hoffmann, *International Systems and International Law*, 14 *WORLD POL.* 205, 207 (1961).

participate in the decisions of government under the rule of law. "If there had been firmer support for that principle some 45 years ago," he added, "perhaps our generation wouldn't have suffered the bloodletting of World War II."⁶⁹ But so, too, the Argentine invasion of the Falklands and resultant bloodshed would probably have been unthinkable if the international community had defended those principles more vigorously in inconvenient settings like the Middle East, Afghanistan, East Timor, and the Western Sahara.

One must assume, perhaps naively, that Britain and all those who supported it at the United Nations have made a bond in blood that commits them, not to the kelpers, but to uphold in future—regardless of pragmatic strategic and geopolitical considerations—the important rules of civilized conduct for which the Falkland war was fought.

THOMAS M. FRANCK

BROADENING THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

The adoption of the Manila Declaration on the Peaceful Settlement of International Disputes by the General Assembly on November 15, 1982, has focused attention again on the need to improve means for the settlement of international disputes. Among existing means that might be improved is use of the International Court of Justice. While states have shown great reluctance to increase the jurisdiction of the International Court of Justice to render binding decisions, it might be possible to broaden the Court's advisory jurisdiction, if it can be done without revising the Charter of the United Nations or the Statute of the Court.

Under the Charter of the United Nations, the General Assembly and the Security Council were granted broad power to request that the Court give an advisory opinion on "any legal question."¹ The General Assembly was also empowered to authorize other organs of the United Nations and specialized agencies to request advisory opinions of the Court, but only with respect to "legal questions arising within the scope of their activities."² The General Assembly gave such authorization to several organs of the United Nations and to more than a dozen of the specialized agencies.³ By 1982, 15 requests for advisory opinions had been made by United Nations organs, and 3 by specialized agencies.⁴

Proposals for broadening the advisory jurisdiction of the Court have envisaged in particular the following possibilities:

⁶⁹ N.Y. Times, June 9, 1982, at A16.

¹ UN CHARTER art. 96(1).

² *Id.* art. 96(2).

³ For a list, see the latest Y.B. ICJ, ch. III, sec. II.

⁴ 1981 *id.* at 46 nn.2-4, and 47 nn.1-3.