The Falkland Islands and the UK v. Argentina Oil Dispute: Whither Legal Regime?

On How Global Energetic Concerns can Catalyze Non-Armed, Economic Conflicts

Alice Ruzza

Introduction

The Falklands' dispute involves Argentina and UK since 1833, when the two states initially claimed their sovereignty over the Islands. The controversy, however, recently re-emerged with regard to the access to the oil deposits located in the Falklands' seabed. Obviously, the entitlement to the sovereignty would entail huge profits for the eligible state and its corporations, which are even more valuable in a context of global energetic concern.

The pending sovereignty dispute poses a number of obstacles to the renewed attentiveness for the Falklands' economy. Various questions arise from the international law perspective, transforming this dated case into a piece of modern reality. This short contribution, would, therefore, bring up to date the controversy, by introducing its more recent developments and the legal issues that are touched upon.

The core of the dispute remains the title to territory: however, it will be considered in its interplay with the Principle of Permanent Sovereignty over Natural Resources (PSNR), being the access to the Falklands' oil deposit the fundamental interest of the parties.

The PSNR is generally enjoyed by the legitimate sovereign Power of the territory. Conversely, it is debatable the compatibility with international law of negotiating on the natural wealth's exploitation, while the sovereignty attribution is pending. Notably, Argentina and UK entered into such an agreement in 1995, concluding a Joint Declaration for Hydrocarbons. The document, set aside the sovereignty issue, and laid the foundations for a cooperative relationship in the access to oil within a Special Co-operation Area; it failed with the Argentine withdrawal in 2007, apparently due to the lack of exploitable resources[1].

The analysis of the legal nature of this Declaration may prove significant in evaluating the lawfulness of a separate treatment of title to territory and to PSNR, where the sovereignty is disputed. The issue could also affect third parties' rights, and thus the possibility for other state and non-state parties' legitimate claims will be considered.

Particularly, the ongoing activity of British Transnational Corporations (TNCs) in the disputed maritime area, raises several concerns with regard to both the PSNR and the accountability profile.

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[1] IBRU, *Claims and Potential Claims to Maritime Jurisdiction in the South Atlantic and Southern Oceans by Argentina and the UK*, available at http://www.dur.ac.uk/resources/ibru/south_atlantic_maritime_claims.pdf, (last visited 7 June 2010).

This results also from the GA Resolution 31/49[2], calling the Governments to refrain from unilateral actions that would modify the situation prior to the settlement of their dispute.

Therefore, the structure of this contribution will be the following: starting from a brief account of the historical and modern background of the controversy, attention will then focus on the applicable legal framework, considering in particular the PSNR, the UN Resolutions and practice on the Falkland Islands, the 1995 Joint Declaration and the UN Convention on the Law of the Sea. The paper will then conclude by considering the legal questions that the case of the Falklands poses to international law.

1. The Dispute: Historical and Modern "Warfare"

The ongoing dispute over the Falklands' sovereignty began in 1833, when the Islands came under the *de facto* British control. Argentina's claim is based on territorial rights inherited from Spain, which exclusively administered the Malvinas from 1774 to 1810[3]. It has to be noted that prior to the *Lexington* incident[4] involving Argentina and United States, the controversy was latent. The UK decision to re-open the contention and 'reassert' its sovereign title (1832-33)[5], indeed, resulted from the American recognition of the British sovereignty over the Malvinas, as a consequence of the incident. After a period of political pressure and fruitless negotiations, Argentina invaded the Falklands on April 2, 1982. As a consequence of the Argentine belligerent conduct, the 'modern' claims advanced by the UK concentrates on three issues: the right to self-determination of the islanders[6]; the illegitimacy of the use of force; and, the right to self-defense under art. 51 of the UN Charter[7].

While the Islands traditionally experienced armed conflicts, the current 'hostilities' are combated by using economic means. Most importantly, the dispute between UK and Argentina involves the maritime areas around the Falklands: the countries have overlapping claims in relation to the Exclusive Economic Zone (EEZ) and to the Continental Shelf, to which Argentina and the

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[2] UN General Assembly Resolution 31/49, par. 4, 1 December 1976, available at www.un.org/documents, (last visited 5 March 2010).

[3] L. Freedman, *The Official History of the Falklands Campaign*, *Vol. I,* 2005, London, Routledge, p. 6.

[4] Ivi, p. 7. In 1823 the Argentine Governon Vernet received a concession on East Falkland for fishing and grazing rights. Seeking to establish a settlement on the Islands, Vernet decided to enforce Argenitne fishing regulations by seizing three American ships. The USS warship *Lexington* was in the River Plate at that time: it sailed to the Islands, and after having destroyed all military installations, and put most inhabitants under arrest, the American Captain Duncan declared the Islands free of all government. As a result, relations between United States and Argentina were broken; moreover the United States denied Argentine jurisdiction over the Islands, apparently recognizing the British sovereignty.

[5] L. Freedman, *The Official History of the Falklands Campaign*,op. cit., p. 8.

[6] On the status of the Falkland Islands see, R. Dolzer, *The Territorial Status of the Falklands Islands (Malvinas): Past and Present*, Ocean Publications Inc, 1993, pp. 170 and following.

[7] L. Freedman, *The Official History of the Falklands Campaign*, op. cit., p.11.

Islands are respectively entitled[8]. The relevant legal instrument on this regard is the Convention on the Law of the Sea (UNCLOS): it invites the parties to effect a delimitation of the continental shelf 'by agreement on the basis of international law, [..] in order to achieve an equitable solution'[9].

Since gas and oil deposits have been discovered in the North Falklands Basin, located within the Islands' Exclusive Economic Zone (EEZ)[10] it is self-evident the importance of upholding the sovereign title over the Islands.

1.1 The Current Developments and the Status of the Parties' claims

The recent developments of the dispute result from the arrival in the Malvinas of an oil exploration rig, the Ocean Guardian. The rig was hired by the British company Desire Petroleum, aiming to drill up to ten wells in the North Falkland Basin[11]. The presence, and the possible activities, of the rig could clearly infringe upon the Argentine sovereign claim over the Islands, underlining the extent to which an unsettled question of sovereignty could impact upon the assertion of economic rights.

The Argentine Government reacted by imposing a shipping ban on all the vessels sailing between Argentina and the Falklands, (or to them through Argentine waters), in order to make drillings more complicated and expensive for foreign firms[12]. Moreover, Argentina accused Britain to have breached a UN resolution forbidding unilateral development in disputed waters[13], and protested to the UN Secretary General, who reiterated its availability for performing good offices, provided that both parties agree[14]. Arguably, in the absence of any UN Security Council Resolution, the margin for an intervention of the UN is limited and the role of the UK as permanent member of the Security Council, would additionally veto any such an act.

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[8] IBRU, *Claims and Potential Claims to Maritime Jurisdiction in the South Atlantic and Southern Oceans,* op. cit.

[9] UNCLOS, art. 83(1), 10 December 1982, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/part6.htm, (last visited: 7 September 2010).

[10] IBRU, *Claims and Potential Claims to Maritime Jurisdiction in the South Atlantic and Southern Oceans,* op. cit.

[11] BBC, *The Falklands Oil Row*, 17 February 2010, available at http://news.bbc.co.uk/2/hi/business/8520038.stm, (last visited: 8 June 2010); The Guardian, *UK Firm's Falklands Oil Sparks Mix of Hopes and Fears*, 6 May 2010, available at http://www.guardian.co.uk, (last visited: 7 June 2010). Furthermore, in contrast to the steady economic decline that Argentina is experiencing, in May the British company Rockhopper discovered an oil deposit at about 137 miles off the north coast of the Islands.

[12] BBC, *The Falklands Oil Row*, op. cit.

[13] The Argentine President is referring to UN GA Resolution 31/49, 1976.

[14] The Times, *Escalating Falklands Oil Dispute,* available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7038582.ece, (last visited: 9 June 2010).

As a counteraction to the Argentine ban, the UK reinforced its assertion of sovereignty over the Falklands, specifying that the application of law in and around the Islands is a matter for the islanders[15].

Hence, the gist of the states' positions could be summarized as follows.

The UK Representative Philip Parham described the relationship between Great Britain and its Overseas Territories (including the Falklands) during the second meeting of the Sixty-fourth General Assembly[16]. Such relationship is based on partnership, shared values, and the right of each territory to choose whether to remain linked to the UK or not. Moreover, to the extent that independence is an option, a constitutionally-expressed wish of the people concerned, he stated that UK will give any help and encouragement to the territory to attain it. The Representative underlined that 'no doubt there is concerning the British sovereignty over the Falklands and that there could be no negotiations on the matter until such time as the islanders so wished'[17]. The British argument, hence, relies on this understanding of the islanders' right to self-determination: looking at the Falklands' Constitution, the will to remain under the British administration is clearly expressed, so that the UK may easily wave the uncontroversial nature of its position, qualifying itself as the Administering Power[18].

As for Argentina, its Constitution establishes the sovereignty over the Malvinas, pivoted on a title inherited as a result of the state's declaration of independence from Spain[19]. Consequently, Argentina claims not only a right to territorial integrity from which emanates the British correlative duty to favor the reunion of the Islands with the Argentine mainland, but also it contests the attribution of the right to self-determination to the islanders[20]. Indeed, Argentina defines them as 'a

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[15] UK Government, *Bryant: No Doubts about Our Sovereignty over Falkland Islands*, 23 February 2010, available at http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=21801977, (last visited 4 March 2010); the UK had reaffirmed its sovereignty over the Falkland Islands during the GA Fourth Committee, *The Remaining 16-Non-Self-Governing Territories*, p. 12, 5 October 2009, available at www.un.org/documents, (last visited 5 March 2010); The Economist, *Oil and Troubled Waters-Drilling a Vein of Nationalism*, 18 February 2010, available at http://www.economist.com/world/americas/displaystory.cfm?story_id=15546482, (last visited: 7 June 2010): The Falklands' Government stated that supplies were coming from Aberdeen, not Argentina, and therefore the shipping ban will have no effect.

[16] UN GA, 64th , Fourth Committee, *Remaining 16 Non-Self Governing Territories on United Nations List are 'Too Many'*, 5 October 2009, GA/SPD/422, available at http://www.un.org/News/Press/docs/2009/gaspd422.doc.htm, (last visited: 7 September 2010).

[17] Ibidem.

[18] UK Government, *Bryant: No Doubts*, op. cit.; UN GA, 62nd, Fourth Committee, GA/SPD/371, 8 October 2007, available at http://www.un.org/News/Press/docs/2007/gaspd371.doc.htm, (last visited: 26 July 2010); GA, 64th, Fourth Committee, GA/SPD/422, 5 October 2009, op. cit.

[19] UN General Assembly, Special Committee of 24 on Decolonization, *Statement by Councilor Janet Robertson, Legislative Council of the Falkland Islands*, 12 June 2008, available at http://www.falklands.gov.fk/site/legco/un-speech-2008-robertson.pdf, (last visited 4 March 2010).

[20] The Guardian, *UK Firm's Falklands Oil*, op. cit.; M. G. Kohen, "Alternativas Para la Solucion del Conflicto por las Islas Malvinas", in *Revista de Estudios Internacionales*, Vol. 7, No. 4, 1986, pp. 1145-1163.

British population transplanted with the intention of setting up a colony', and thereby addresses the *mala fides* in the British conduct[21]. Most importantly, Argentina founds its claim on the paragraph 4 of the GA Resolution 31/49[22]. This position was reiterated at the UN Special Committee on Decolonization, where Argentina described the purported British sovereignty over the Malvinas as a 'colonial injustice'[23].

In the international community the position of Argentina finds support in the Latin American states, which backed Argentine 'legitimate rights in the sovereignty dispute with Great Britain', during the Rio Group Summit[24]. Interestingly, the United States seem not willing to side in favor of the UK[25], whose position finds however an indirect recognition in the inclusion of the Falkland Islands among the 'Association of Overseas Countries and Territories' regime, established in the newly entered into force Treaty of Lisbon[26].

The last participant to this controversy is the population of the Falklands. In the UN Resolutions[27] the islanders are treated as the object of a conflict arose between UK and Argentina, and not as an autonomous party, entitled to self-determination. Nonetheless, the right to self-determination is manifestly stated in the opening of the Falklands' Constitution, recalling the UN

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[21] UN General Assembly, Special Committee on Decolonization, 11th Meeting, *Statement of the Argentine Foreign Minister Jorge Taiana*, 15 June 2006, http://www.un.org/News/Press/docs/2006/gacol3140.doc.htm, (last visited 5 March 2010).

[22] UN GA Resolution n. 31/49, para. 4: the GA "calls upon the two parties to refrain from taking decisions that would imply introducing unilateral modifications in the situation while the islands are going through the negotiation process".

[23] UN GA, 64th, Fourth Committee, GA/SPD/422, op. cit.; Permanent Mission of Argentina to the UN, *Statement made by Argentina Minister of Foreign Affairs, International Trade and Worship at the United Nations*, 18 June 2009, available at http://www.un.int/argentina/english/statements/miscelaneous/taiana2009.htm, (last visited: 26 July 2010).

[24] The Times, *Escalating Falklands Oil Dispute,* op. cit. The Guardian, *Latin American Leaders back Argentina over Falklands Oil Drilling*, available at http://www.guardian.co.uk/uk/2010/feb/23/argentina-uk-falkland-row-oil, (last visited: 7 September 2010); UN GA, 64th , Fourth Committee, *Remaining 16 Non-Self Governing Territories on United Nations List are 'Too Many'*, op. cit.: More precisely, Uruguay maintains that the sovereignty dispute over the Falklands involves Argentina and UK as the sole parties. It considers that the principle of self-determination cannot be applied in this case, since in the Malvinas there is no colonized population, but rather a transplanted British community, which does not conform to the subjugated or dominated people criterion as set forth in the GA Resolutions on the point. Venezuela as well declares its support for the legitimate sovereign rights of Argentina. Furthermore, Uruguay, Venezuela and Mexico urges the Governments of Argentina and the United Kingdom to resume negotiations, to find a peaceful and just solution to their sovereignty dispute.

[25] The Times, *US Refuses to Endorse British Sovereignty in Falklands Oil Dispute*, 25 February 2010, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7040245.ece, (last visited: 5 March 2010).

[26] Treaty of Lisbon, Part 4, art. 198, 1 December 2009, available at http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-4-association-of-the-overseas-countries-and-territories.html, (last visited: 7 September 2010).

[27] GA Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19, 43/25 available at www.un.org/documents, (last visited 5 March 2010).

Charter and the Common Article 1 of the 1966 Covenants[28]. This *erga omnes* right[29] is perceived as shielding the islanders' legitimate title to choose their political condition: the Malvinas are constitutionally qualified as a British Overseas Territory, internally self-governed but under the British Administration[30], and as observed by the Legislative Councillor of the Malvinas, it is thanks to this mixed status that the political will of the Islands' people is fully implemented[31].

2. A Quick Insight on The Matter of the Dispute: the Falkland Islands' Oil

The sheer object of the controversy over the Malvinas is located in the North Falklands Basin, within the islands' EEZ, and corresponds to oil deposits to be drilled and transformed into vendable energy. Among the companies drilling in the area, one can enumerate Desire Petroleum, Rockhopper and BHP Billinton: all British firms.

According to Rockhopper, the company found a deposit of 'high quality reservoir interval, with very good porosity and permeability'[32]. Provided that the reservoir's quality is as estimated, the company declared to be looking 'at a discovery of maybe a couple of hundred million barrels'[33]. On the average amount of the reserves, the opinions are contrasting: a conservative estimate suggests a bare minimum viable recovery of 3.5 billion barrels of oil; the estimate of the British Geological Society[34] suggests around 60 billion barrels. What is certain, however, is that the payback for the UK in case of success is significant, particularly in terms of corporations' taxes and royalties[35]. By the next year, also the British Borders & Southern will be performing exploration

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[28] UN, International Covenant on Civil and Political Rights (ICCPR), 1966, available at http://www2.ohchr.org/english/law/ccpr.htm, (last visited: 7 September 2010); UN, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, available at http://www2.ohchr.org/english/law/cescr.htm, (last visited: 7 September 2010).

[29] ICJ, *East Timor case*, 1995, p. 102; See also, ICJ, *Barcelona Traction case*, 1970, both available at http://www.icj-cij.org/, (last visited: 7 September 2010).

[30] UN General Assembly, Special Committee of 24 on Decolonization, *Statement by Councilor Janet Robertson*, op. cit.; see also, Falkland Islands Government, Department of Mineral Resources, http://www.falklands-oil.com/.

[31] UN General Assembly, Special Committee of 24 on Decolonization, *Statement by Councilor Janet Robertson,* op. cit.

[32] The First Post, *Argentina lashes out at Britain's 'illegal actions' as large oil deposit discovered in Falkland Islands,* 10 May 2010, available at http://www.thefirstpost.co.uk/63121,news-comment,news-politics,high-quality-falklands-oil-find-raises-tensions-with-argentina-rockhopper, (last visited: 7 September 2010).

[33] For comparison, Saudi Arabia is estimated to have reserves totalling 264bn barrels. The First Post, *Argentina lashes out at Britain's 'illegal actions' as large oil deposit discovered in Falkland Islands,* op. cit.

[34] See, British Geological Survey, http://www.bgs.ac.uk/research/highlights/falklands_oil_exploration.html, (last visited: 8 September 2010).

[35] Energy Tribune, *A Falklands Gusher: UK Look for an Oil Rich Payback*, 16 June 2010, available at http://www.energytribune.com/articles.cfm/4341/A-Falklands-Gusher-UK-Looks-For-An-Oil-Rich-Payback, (last visited: 8 September 2010).Moreover, While Rockhopper's shares 'rocketed by 150%' thanks to its activity in the North Falkland Basin, the quest for oil in the Southern one proved a failure. See, The Guardian, *Falkland Oil and Gas shares plunge after its Toroa Well proves empty*, 12 July 2010, available at http://www.guardian.co.uk/business/2010/jul/12/falkland-oil-production-exploration, (last visited: 7 September 2010).

activities in the North Falklands; and, Argus Resources as well is planning to drill for oil off the Falkland Islands[36].

The British 'oil row' is therefore unbridled: Argentina, who is facing a severe economic crisis, does not seem to have the power to influence the UK's action, nor by the resort to force. Indeed, Rockhopper is continuing its activity and has announced this 7 September, to have commenced the flow test to probe commerciality of the Falklands' oil discovery in the 'Sea Lion well'[37]. It will take up to 30 days to know whether the 'oil activities still remain encouraging' in the Falklands[38].

3. The Legal Regime

The relevant international law norms and principles applicable to the case of the Falkland Islands are the following: the title to territory, the Permanent Sovereignty over Natural Resources (PSNR), the principle of self-determination, the UN Resolutions and the UN Convention on the Law of the Sea.

The question of the title to territory is the core of the Falklands' dispute. When we consider the term 'title', we can observe that it encompasses either a situation based on a juridical entitlement and on '*faits de possession*'[39]. Moreover, the additional and distinctive element on this regard, is effectivity[40]. Notably, the interplay between 'legal title' and 'possession' could be variously framed as to how the 'effectivity requirement' operates: on the one hand, the effective act of possession could integrate the title, reinforcing its validity; on the other, it could compete with the legal title, so that a choice between these two is necessary to attribute sovereignty; additionally, the effective possession could aim to operate a transfer of sovereignty, whatever the sources of the prior sovereignty attribution (e.g. acquisitive prescription)[41]. Claiming that 'effective possession'

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[36] MercoPress, *Fifth Company Argos Plans to Drill for Oil*, July 2010, http://en.mercopress.com/2010/07/09/fifth-company-argos-plans-to-drill-for-oil-off-the-falkland-islands-says-ft, (last visited: 7 September 2010).

[37]MercoPress, *Flow Tests Begin to Probe Commerciality of Falklands' Oil Discovery*, 7 September 2010, available at http://en.mercopress.com/2010/09/07/flow-tests-begin-to-probe-commerciality-of-falklands-oil-discovery, (last visited: 7 September 2010): "The top oil sand in the Sea Lion well was encountered at 2,374 meters subsea, and the base of the lowest oil sand ("oil down to") level was encountered at 2,591 meters subsea. The total vertical oil column is 217 meters (712 feet), with total net pay of 53 meters in seven identified pay zones, the thickest of which is approximately 30 meters".

[38] MercoPress, *Falkland Islands: Oil Activity Still Remain Encouraging*, 7 September 2010, available at http://en.mercopress.com/2010/09/03/falkland-islands-oil-activities-still-remain-encouraging, (last visited: 7 September 2010).

[39] M. G. Kohen, *Possession Contestèe et Souverainetè Territoriale,* Paris Presses Universitaires de France, 1997, p. 192.

[40] See, PCIJ, *Eastern Greenland case*, Ser. A./B., n. 53, 1933, available at http://www.icj-cij.org/pcij/serie_AB/AB_53/01_Groenland_Oriental_Arret.pdf, (last visited: 26 July 2010); *Island of Palmas case*, 1928, in *Reports of International Arbitral Awards*, Vol. II, pp. 829-871, available at http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf, (last visited: 26 July 2010).

[41] M. G. Kohen, *Possession Contestèe,* op. cit., p. 192. See also on acquisitive prescription P. K. Menon, "Title to Territory: Traditional Modes of Acquisition by States", in *Revue de Droit International et de Scieces Diplomatiques et Politiques*, n. 72, 1994, pp. 1-55.

outweighs legal titles, or that it could reverse the owner of the title to territory, similarly signals a case of 'contested possession'[42]. The previous or original status of the territory concerned, could also play a role: it is on this ground, for instance, that Kohen rejects the British vindication on the Falklands, supporting instead the Argentine claim. Maintaining that the possession acquired after the qualification of the territory as 'non self-governing', or the changes in the possession after a critical date, could not justify the acquisition of sovereignty, Kohen considers that the Administering Power itself cannot invoke the possession as it followed to the qualification of the territory as a non self-governing entity[43].

It is generally maintained that it is for the entity enjoying sovereign title to the territory, to exploit the natural wealth of the area (PSNR). A number of UN GA Resolutions exist on the issue[44], and they progressively clarify and extend the scope of 'the right of the peoples and nations to the permanent sovereignty over their natural wealth and resources'[45]. Their underlying rationale, however, tend to interpret the PSNR as a peculiar expression of the sovereign title to a territory from which it cannot be disentangled[46]. Even the emersion of the people's right to self-determination, increasing the number of possible holders of PSNR, seems to reinforce this contention. Indeed, as a result of the decolonization process, the number of obligations imposed on states raised: particularly, the states are compelled to exercise the permanent sovereignty in the national interest and for the well-being of the population[47].

The case of the Falklands, evidently, is problematic: the territorial title is contested so that the capacity of whatever actor to exploit the resources appears, at least, questionable. Under such circumstances, the activities in the area should be avoided: not only third parties' rights could possibly be infringed upon, but also the risk for impunity in case of misbehaviors of Transnational

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[42] M. G. Kohen, *Possession Contestèe*, op. cit., p. 193.

[43] Ivi, pp. 194-195.

[44] UN GA Resolutions n. 523(VI) of January 1952, n. 626(VII), of 221 December 1952, n. 1314(XIII) of 12 December 1958, n. 1803(XVII) of December 1962, n. 1831(XVII) of December 1962, n. 2398(XXIII) of December 1968, n. 2581 (XXIV) of December 1969, n. 2849(XXVI) of December 1971, n. 2994(XXVII) of December 1972, n. 2995(XXVII) of December 1972, n. 2996(XXVII) of December 1972, n. 2997(XXVII) of December 1972, n. 3129(XXVIII) of December 1973, n. 3281(XXIX) of December 1974, n. 34/89 of December 1979, n. 34/186 of December 1979, etc. available at http://www.un.org/documents/resga.htm, (last visited: 7 September 2010).

[45] UN, General Assembly Resolution 1803(XVII), of 14 December 1962; N. Schrijver, *Sovereignty Over Natural Resources - Balancing Rights and Duties*, Cambridge University Press, 1997, p. 11.

[46] Ivi, p. 7-9 and 68-69. During the drafting process of Resolution 1803, the very existence of the legal concept of 'permanent sovereignty over natural wealth and resources' was challenged. Several States, among which Japan and Afghanistan, clearly interpreted the right to dispose of the natural wealth as an attribution of the sovereign state. Moreover, during 1970s and 1980s only peoples whose territories were under foreign domination or occupation were identified as subjects of the right to self-determination. However, in the same time-span a tendency to consider the states as the sole subjects of the PSNR re-emerged, both in the UN GA CERDS of 1974 and in the ILA Seul Declaration of 1986.

[47] Article 1, common to the 1966 Covenants; Article 55 UN Charter.

Corporations (TNCs) could easily materialize. Additionally, the status of the Joint Declaration for Hydrocarbons[48] complicates the scheme. Apparently, it attempted to separating the treatment of the title to territory and to natural resources: it established a framework for a cooperative exploitation in the disputed area, while setting aside the sovereignty question and thereby the issue of possible third parties' claims. The following sections will examine the implications of these aspects.

3.1 The UN Resolutions and Practice

As noted, the UN Resolutions[49] do not consider the Falklands islanders as entitled of self-determination. Rather, the 'Question of the Falkland Islands' is portrayed as a 'special and particular colonial situation, which differs from others in light of the sovereignty dispute'[50]. Peaceful negotiations between the parties are called for, finding support in the whole international community. During its 9th Meeting (June 2010), the Special Committee on Decolonization recommended the General Assembly to reiterate the call for resumption of negotiations. The record of the meeting, moreover, is important for the purpose of this contribution because it summarizes the various arguments and positions of the (specially interested) states, underlining the nature of the practice over the Falklands' situation[51].

The majority of the Latin American states, together with the Group of 77, supports the Argentine argument. Particularly, Cuba refers to the territorial integrity of Argentina as well as to the interests of the islanders, which UK should respect also by reactivating substantial negotiations. Similarly, Uruguay, Mexico, Bolivia and Venezuela express their view in favor of Argentina's legitimate rights over the Malvinas, describing the British conduct as preserving an 'anachronistic colonial situation'[52]. The states seem to reveal the general opinion that Argentina and UK are the sole relevant parties to this controversy. Specifically, the position of the islanders and their right to self-determination do not clearly emerge as a possible counterclaim. The only exception in the 9th Meeting of the Decolonization Committee is Sierra Leone, whose statement reiterates the country's support for the islanders's basic human right to self-determination, considering that any solution

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[48] *Joint Declaration, Cooperation Over Offshore Activities in the South West Atlantic*, 1995, available at http://www.bgs.ac.uk/falklands-oil/download/joint.pdf, (last visited: 27 July 2010).

[49] GA Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19, 43/25 available at www.un.org/documents, (last visited 5 March 2010).

[50] Special Committee on Decolonization, 9th Meeting, 24 June 2010, GA/COL/3212, available at http://www.un.org/News/Press/docs/2010/gacol3212.doc.htm, (last visited: 7 September 2010): "after hearing the petitioners on the question of the Falkland Islands as well as a statement by the Foreign Minister of Argentina, the Special Committee on Decolonization recommended that the General Assembly reiterate its call for direct negotiations between Argentina and United Kingdom over that Non-Self-Governing Territory". The Committee stressed the content of its draft resolution approved by consensus on the issue (document A/AC.109/2010/L.15).

[51] Ibidem.

[52] Ibidem.

that fails to embrace their aspiration would be inconsistent with art. 1(2) and art. 73(b) of the UN Charter[53].

Hence, analyzing the case of the Falklands, it emerges a recessive understanding of the islanders' self-governing capacity, to be declined when major—external—interests are at stake. This acquiesced to-practice seems to validate the rejection of the islanders' peoplehood[54], as the UN Resolutions also seem to suggest. Indeed, the Resolutions confirm the dominant approach among the states. The GA Resolution n. 2065 (XX) of 16 December 1965[55], while calling the two Governments for peacefully settle a dispute 'covered by the process of decolonization of non-autonomous territories', also invites them to take into consideration the *interest*—not the *will*—of the Falklands' population[56]. The 'selfness' of the islanders seems hence rejected. GA Resolutions n. 3160 (1973) and n 31/49, (1976) follow and strengthen this line. Particularly, Resolution 31/49 is decisive. Paragraph 4 of the Resolution[57] requires the *two States* to refrain from taking decisions or actions that would unilaterally modify the Falklands' condition, before any agreement between them is reached. Apparently, by calling the 'two states' to refrain from the 'unilateral modification' of the circumstances, the Resolution is linking the event of the 'modification of the circumstances' to the sole conducts either of Argentina and the UK (two parties), possibly suggesting that no other sovereign and legitimate claim over the Falklands could effectively alter the Islands' situation. Argentina,on this basis, denounces the presence and activity of the British firms in the North Falklands Basin as a unilateral conduct unlawfully impairing the circumstances in the region.

The 'oil row' that is taking place in the Falklands' maritime areas accounts for the current urgency of natural resources issues. This concern is corroborated in the Security Council Resolutions on the matter, which although not directed to the Falklands' situation[58], stress the need

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[53] Special Committee on Decolonization, 9th Meeting, 24 June 2010, op. cit.

[54] S. K. N. Blay, "Self-determination Versus Territorial Integrity in Decolonization", in M. N. Shaw (edited by), *Title to Territory,* Ashgate, 2005, pp. 448-449: 'Falkland Islands may be described as 'plantations' of the colonial administration because they are predominantly populated by citizens or subjects of the colonial power who settled in the colonial territories. International law is unclear as to whether such residents are entitled to self-determination. [..] It is not clear from the text of art. 73 UN Charter whether the provision sets up a distinction between people and inhabitants. [..] The General Assembly's approach to the claims of self-determination for the territories of Gibraltar and the Falkland Islands suggests that these resident do not constitute a people and are not entitled to exercise the right to self-determination'. See also, UN GA, 64th , Fourth Committee, *Remaining 16 Non-Self Governing Territories on United Nations List are 'Too Many',* op. cit.

[55] UN, General Assembly, Resolution n. 2016 (XX), op. cit.

[56] G. Cataldi, "L'Assemblea Generale delle Nazioni Unite e la controversia sulle Falkland/Malvinas", in N. Ronzitti (a cura di), *La questione delle Falkland-Malvinas nel diritto internazionale*, Milano, Giuffrè, 1984, p. 79.

[57] UN, General Assembly Resolution 31/49, par. 4, op. cit.

[58] More precisely, they deal with Iraq, the Democratic Republic of the Congo and other conflict-zones, in which the flow of natural resources is considered a root-cause of the hostilities: See, UN SC Resolutions n. 687 (1991), par. 16, n. 1625 (2005), par. 6; n. 1653 (2006), par. 16-17; See, also n. 502 (1982) and n. 505 (1982), available at http://www.un.org/Docs/sc/unsc_resolutions.html, (last visited: 10 June 2010).

to regulate the access to natural resources. Moreover, they call for affirmative actions and normative steps also at the national level, to secure population's rights over the exploitation of their natural wealth.

The Principle of Permanent Sovereignty over Natural Resources (PSNR), is fundamental when natural wealth and economic rights are at stake. Despite its debated nature, depending upon the definition of its objects and subjects, the principle could pose a number of rights and duties upon states—and individuals—, and thereby have an impact on the regulation of the natural resources' (mis)use. Accordingly, the interplay between the PSNR and the exploitation of natural resources should be analyzed.

3.2 The Interplay between Sovereignty and Exploitation of Natural Resources

The Principle of Permanent Sovereignty over Natural Resources (PSNR) is disciplined in various GA Resolutions[59]. It evolved in the post-war era as a new principle of international economic law, particularly aiming to secure to developing countries and peoples living under colonial rule, the advantages stemming from the exploitation of natural resources within their territories. The principle, moreover, functioned as a legal tool to newly independent states, against breaches of their economic sovereignty[60].

Doctrinal controversies emerged on the principle's legal nature. Firstly, the development of the PSNR in GA Resolutions exposed it to questions concerning its binding character. Secondly, the matters it covered—such as expropriation of foreign property, compensation, standards of treatment of foreign investors—were delicate and controversial aspects of the interstate relations, and this endangered its acceptance. Additionally, the PSNR association with the struggles of colonial peoples for political and economic self-determination, as well as with the New Economic Order pursued by developing states, opened up the issue of a people's title to permanent sovereignty[61].

It is a well established practice, accepted as law, that the title over the natural resources is to follow that over the territory[62]: accordingly the sovereign subject enjoys the exclusive right to dispose of the natural wealth of the area. On this regard, one should note that the state does not have an arbitrary right to exploit natural resources, but it is required to do so in the interest and for the

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[59] UN GA Resolutions n. 523(VI) of January 1952, n. 626(VII), of 221 December 1952, n. 1314(XIII) of 12 December 1958, n. 1803(XVII) of December 1962, n. 1831(XVII) of December 1962, n. 2398(XXIII) of December 1968, n. 2581 (XXIV) of December 1969, n. 2849(XXVI) of December 1971, n. 2994(XXVII) of December 1972, n. 2995(XXVII) of December 1972, n. 2996(XXVII) of December 1972, n. 2997(XXVII) of December 1972, n. 3129(XXVIII) of December 1973, n. 3281(XXIX) of December 1974, n. 34/89 of December 1979, n. 34/186 of December 1979, etc, cit.

[60] N. Schrijver, *Sovereignty over Natural Resources*, op. cit., p. 3.

[61] Ivi, p. 4.

[62] Ivi, op. cit., p. 238: "territorial sovereignty plays the part of a presumption"; See also, Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Art. 3 of the Biodiversity Convention.

well-being of the population, including indigenous peoples[63]. Thus, the underlying rationale seems to be that the PSNR operates as a corollary of the sovereign title to a territory, belonging also to the population[64]. Apparently, the case of the Falkland Islands is an instance of a different approach. Argentina and UK signed in 1995 a Joint Declaration Agreement that, far from settling the sovereignty dispute, expressly regulates the exploitation of natural resources between the two entities, none of which holding an uncontested sovereign title over the territory. Manifold observations can be advanced on this aspect; however, the issue can be fully explored only in light of the origins, content, and legal value of the Declaration, which will be forthwith commented. However, before moving to it, one last consideration should be made. Notwithstanding the termination of the Agreement, TNCs have continued to exploit Falklands' natural resources: hence, one could raise questions concerning their accountability against the 'owners' of the PSNR, and the possible nature of the PSNR as *jus cogens* norm, aimed to strengthen the protection of the rights at stake.

3.3 The 1995 Joint Declaration for Hydrocarbons

The Origins and Content of the Joint Declaration

The document signed in 1995[65] provides to UK and Argentina an instrument for a cooperative relationship in the exploitation of non-renewable natural resources. Indeed, under the Joint Declaration for Hydorcarbons, the States committed themselves to jointly explore and exploit hydrocarbons in a Special Co-operation Area (up to six 3,500 square kilometer areas), operating under the control of a Joint Commission.

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[63] N. Schrijver, *Sovereignty over Natural Resources*, op. cit., p. 232, 241; See also, UN Declaration on Permanent Sovereignty, paragraph 1; Art. 1 of the Human Rights Covenants; The *Texaco Award*, Texaco v. Libyan Arab Republic, in *International Law Reports (ILR)*, 1977, vol. 53 , p. 484-493; S. J. Anaya, *Indigenous People in International Law*, Oxford University Press, 1996, pp. 104-106; See also, S. J. Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resources Extraction: the More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources", in *Arizona Journal of International and Comparative Law*, vol. 22, n.1, 2005; E. Duruigbo, "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law", in *The George Washington international law review*, vol. 38, issue 1, 2006.

[64] N. Schrijver, *Sovereignty Over Natural Resources,* op. cit., pp. 7-9 and pp. 68-69. During the drafting process of Resolution 1803, the very existence of the legal concept of 'permanent sovereignty over natural wealth and resources' was challenged. Several States, among which Japan and Afghanistan, clearly interpreted the right to dispose of the natural wealth as an attribution of the sovereign state. Moreover, during 1970s and 1980s only peoples whose territories were under foreign domination or occupation were identified as subjects of the right to self-determination. However, in the same time-span a tendency to consider the states as the sole subjects of the PSNR re-emerged, both in the UN GA CERDS of 1974 and in the ILA Seul Declaration of 1986.

[65] *Joint Declaration, Cooperation Over Offshore Activities in the South West Atlantic*, op. cit.

The Declaration follows the Joint Statement issued in Madrid in 1989, establishing the so-called 'Formula for Sovereignty'[66]. The Formula aimed to lead the parties to a progressive normalization of their relationship, and indeed resulted in cooperative arrangements on either fisheries (1990) and hydrocarbons (1995)[67]. As noted, the latter arrangement was unilaterally terminated by Argentina in 2007[68]; however, its content should be analyzed in order to evaluate the approach of the parties.

A safeguard clause opens the declaration: accordingly, nothing in the document shall be interpreted as changing, or recognizing, the UK or the Argentina's claims over 'sovereignty or territorial and maritime jurisdiction over the Falkland Islands'. Similarly no third party's activity carried out as a result of the agreement should constitute a basis for supporting, affirming, or denying such claims. Art. 2 continues stating that the two Governments 'agreed to cooperate and to encourage offshore activities in the South West Atlantic', specifying that 'activities' stands for 'exploration and exploitation' of hydrocarbons. The document warrants the establishment of a Joint Commission, composed of delegates of both States, in charge of supervising the business activities, submitting recommendations and proposing standards for the protection of the environment, by coordinating the actions in the 'Areas for Special Cooperation'. Particularly, those areas shall be controlled by a sub-committee, which will, among the other, 'encourage commercial activities in each tranche' and 'promote the exploration for and the exploitation of hydrocarbons in maritime areas of the South West Atlantic subject to a controversy on sovereignty and jurisdiction'. The Declaration concludes by affirming that 'the parties will create the conditions for substantial participation in the activities by companies from the two sides', that they will share information concerning exploratory and exploitative actions, refraining from any conduct possibly frustrating the carrying out of hydrocarbon developments. Finally, the declaration is portrayed as 'an interdependent whole', for the implementation of which the Governments shall cooperate 'throughout the different stages of offshore activities undertaken by commercial operators'.

Evidently, the Declaration regulates the organizational aspects for the two states' cooperation in the access to Malvinas' hydrocarbons. However, its enforceability seems weak: no procedural provisions concerning implementation, termination or suspension, or the rights-duties of the parties,

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[66] The 'Madrid Formula' was agreed by Argentina and the UK on 19 October 1989. Accordingly, the countries pursue cooperation while accepting that the position of either side on sovereignty over the Falklands remain reserved. See, K. Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia*, 2004, Martinus Nijhoff Publishers, p. 152.

[67] R. R. Churchill, "Falkland Islands: Maritime Jurisdiction and Co-operative Arrangements with Argentina", in *The International and Comparative Law Quarterly*, Vol. 46, No. 2, 1997, pp.463-477.

[68] Apparently, the Argentine decision to terminate the Agreement depends upon the fact that the Special Area created through the Declaration were found devoid of exploitable resources. Presently, as mentioned, the resource-rich zone is located in the North Falklands Basin.

are envisaged in the document. Only short reference is made to legislative measures to be adopted by UK, to take into account the innovations established through the Agreement. This aspect is linked the legal value of the Declaration, which, as we will see, remains equivocal.

The Legal Value of the Joint Declaration

The question of the nature of the Joint Declaration, particularly with regard to its binding character, gives rise to a number of considerations.

The Vienna Convention on the Law of Treaties (VCLT)[69], generally interpreted as reflecting customary law[70], does not derive the binding character of a document from the nomenclature used to title it. In light of Article 2 VCLT definition of 'treaty'[71], no specific requirements of form seem necessary in international law; what is essential, is that the parties intend to create legal obligations among them[72]. Moreover, in case of a dispute concerning the status of a document, an objective test would apply, assessing the 'actual terms' and the particular circumstances in which it had been drawn up[73]. As the Rapporteur of the International Law Commission stated, the 'intention to create legal obligations' is implied in the formula 'governed by international law'[74], constituting therefore the core element to produce a binding instrument.

The choice for the term Declaration[75], thus, is not *per se* excluding binding effects: the states could have well committed themselves to the respect of the provisions established in the document. Particularly, in the Annexed Declaration of the British Government[76], it is declared that 'appropriate

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[69] Vienna Convention on the Law of Treaties, 1969, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf, (last visited: 7 September 2010).

[70] See, ICJ, *Namibia case*, 1971, pp. 16, 47; the *Fisheries Jurisdiction case*, 1973, pp. 3, 18, available at http://www.icj-cij.org/, (last visited: 7 September 2010).

[71] Art. 2 VCLT: "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[72] M. N. Shaw, *International Law*, 6th Edition, Cambridge University Press, 2008, p. 906; M. Fitzmaurice, 'The Practical Working of the Law of the Treaties', in M. D. Evans (edited by), *International Law*, Oxford University Press, 2nd Edition, 2006, p. 188.

[73] ICJ, *Qatar v. Bahrein case*, 1994, p. 112, para 27, available at http://www.icj-cij.org/, (last visited: 7 September 2010).

[74] Art. 2 VCLT. M. Fitzmaurice, 'The Practical Working of the Law of the Treaties', in M. D. Evans (edited by), *International Law*, Oxford University Press, 2nd Edition, 2006, p. 188.

[75] M. N. Shaw, *International Law*, op. cit., p. 119: The US State Department examining non-binding international agreements, underlined that 'governments may agree on joint statement of policy or intention that do not establish legal obligations. [..] this has become a common means of announcing the results of diplomatic exchanges, stating common positions on policy issues, recording their intended course of action on matters of mutual concern, or making political commitments to one another. [..] these documents are sometimes referred to as non-binding agreements, gentlemen's agreements, *joint* statements or declarations'.

[76] *Declaration of the British Government with Regard to the Joint Declaration signed by the British and Argentine Foreign Ministers on Cooperation over Offshore Activities in the South West Atlantic*, available at http://www.bgs.ac.uk/falklands-oil/download/joint.pdf, (last visited: 7 September 2010).

legislation will be introduced in order to take account of the Joint Declaration', thereby conveying the idea of the normative, and binding value of the instrument concerned, capable of prompting an adaptation process in the national law[77].

However, reading the opening passage of the Annexed Declaration one could note that the 1995 Agreement is referred to as an '*understanding*' reached with Argentina on 'cooperation over offshore activities'. The term may suggest the soft-law, and possibly political, nature of the document, being thereby at odds with any binding inference stemming from the legislative measures envisaged by UK. Thus, one can also conclude that the legislative arrangements mentioned in the Annexed Declaration, are a *motu proprio* initiative of UK, neither aimed to implement the Declaration, nor emanating by the parties' intention to create legal obligations upon themselves. Evidently, hence, a clear-cut answer on the nature of the Joint Declaration is problematic.

One can also refer to the subsequent conduct of the parties. It shows a lenient or recommendatory interpretation of the Declaration's provisions: indeed, facing the Argentina withdrawal in 2007, the UK reacted with a mere statement of regret[78]. Assuming that the Joint Declaration amounts to a 'treaty' for the purpose of the VCLT, the rules to be applied should be the following.

Firstly, a treaty under the Convention[79] may be terminated in accordance with a specific provision, or otherwise at any time by consent of all the parties after consultation. In the cases in which a treaty contains no provisions regarding termination and does not provide for denunciation or withdrawal specifically, a state may only withdraw or denounce it, where the parties intended to admit such a possibility or where the right may be implied by the nature of the treaty[80].

Secondly, a treaty may be terminated when its purpose and objects have been fulfilled or, if it appears from its provision that it is limited in time and the requisite period has expired[81].

Thirdly, where fundamental changes in the circumstances have occurred, a party to the agreement may withdraw or terminate it. This principle, known as *doctrine of rebus sic stantibus,* is generally acknowledged as customary international law[82]. Its scope, however, is restricted, since it could easily frustrate the binding force of the obligations undertaken by states, providing an

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[77] On the UK Constitutional Rules see E. Denza, 'The Relationship between International and National Law', in M. D. Evans (edited by), *International Law*, Oxford University Press, 2nd Edition, 2006, pp. 433-435.

[78] IBRU, *Claims and Potential Claims to Maritime Jurisdiction*, op. cit., p. 1.

[79] Art. 54 and 57 VCLT.

[80] Art. 56 VCLT.

[81] M. N. Shaw, *International Law*, op. cit., p. 946.

[82] Ivi, p. 950.

accessible ground for justifying withdrawals[83]. Article 62 VCLT disciplines the impact of fundamental change of circumstances on a treaty, specifying that the change should not be foreseeable by the parties.

Provided that the Joint Declaration falls within the scope of the VCLT, the conduct of Argentina seems scarcely in compliance with the Convention's provisions. No rule concerning the termination or the suspension of the Agreement is identifiable in the Declaration; nor it is arguable that the Argentine withdrawal has been performed with the consent of the counterpart. Moreover, it is dubious any reconstruction concerning the intention of the parties to admit such a possibility. The purpose of the Declaration, furthermore, is the cooperation over offshore activities in order 'to encourage the exploration and exploitation in the sovereignty contested areas'. It is arguable that by discovering that no exploitable resources were present in the Special Area, the goal set in the Declaration was exhausted. However, being this the case, the Hydrocarbon Agreement should have been terminated by all the parties, and not unilaterally by Argentina. In addition, no time limit is envisaged, so that the temporal argument cannot operate. The *rebus sic stantibus* doctrine, as well, appears as not viable: as the VCLT specifies, the fundamental change in the circumstances has to be not foreseeable by the parties; conversely, the risk not to find any exploitable natural resource is part of the *alea,* in contracts on seabed explorations and drillings.

From a different point of view, the conduct of Argentina could also be examined as a material breach[84] of the Declaration, consisting in an unlawful repudiation of the agreement. Conceivably, the British non-reaction to the Argentine withdrawal may amount to acquiescence to its misbehavior as well as to renunciation to enforce the rights it would be entitled with, as an injured State[85]. However, this reasoning is based upon a binding nature of the Agreement which, on the contrary, does not seem to plainly emerge from either the intention and the behavior of the parties. Notably, Argentina as well did not resort to any justification or excuse in order to substantiate its withdrawal and thereby excluding its responsibility, so that any assessment of the parties' 'intention to be bound' seems undermined.

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[83] ICJ, *Fisheries Jurisdiction case*, 1973, pp. 3, 20; *Gabčíkovo-Nagymaros Project case*, 1997, p. 65, available at http://www.icj-cij.org/, (last visited: 7 September 2010).

[84] Art. 60 of the VCLT.

[85] The relationship between the material breach of a treaty and the law of State Responsibility is problematic. In the intention of the ILC, however, the regimes of the VCLT and of the State Responsibility should coexist. Crawford explains that 'the law of treaties is concerned essentially with the content of primary rules and the validity of attempts to alter them; the law of State Responsibility takes as given the existence of primary rules (whether based on treaty or otherwise), and is concerned with the question whether the conduct inconsistent with those rules can be excused, and if not, what consequences of such conduct are'. See, Third Report on State Responsibility, A/CN.4507/Add.3, available at http://www.lcil.cam.ac.uk/projects/state_responsibility_document_collection.php#6, (last visited: 7 September 2010), and M. Fitzmaurice, 'The Practical Working of the Law of the Treaties',, op. cit., p. 210.

Conclusive Remarks

Through the Joint Declaration, Argentina and UK disciplined the operational aspects of their cooperative relationship on the exploration and exploitation of the Falklands' hydrocarbons. The Declaration serves as a basic text on which also the licenses with third, commercial parties could rely. Noteworthy, it does not include neither rules of procedure nor concerning the rights and duties of the parties about the Agreement's implementation, and therefore its enforceability is affected. Hence, the legal nature of the document remains ambiguous and therefore the possible side-effects of the exploratory and exploitative activities in the Malvinas, remain outside any binding legal regime.

The dilemma posed by the Declaration concerns the plausibility that a document on the exploitation of natural resources triumphs over the unsettlement of a sovereignty and jurisdiction dispute. While a sovereign State may well dispose of its properties and of the rights it maintains over them, in the Falklands' case, the exploitation of the resources is performed by two parties which are not the formal bearers of rights and duties.

The interplay between the title to territory and the PSNR seems to suggest that the former is the basis for the enjoyment of the latter, and this is entirely consistent with the principle of non-interference and the concept of domestic jurisdiction[86], as well as the sovereign equality of states[87]. Apparently, the Declaration allocates the right to dispose of the wealth of a territory, while the sovereignty dispute over it is still pending, possibly endangering third parties' rights. However, the Declaration could also be interpreted as dividing the PSNR between the two sole parties upon which sovereignty could reside. This understanding of the Declaration, which is in line with the well-established practice on the relationship between title to territory and PSNR, could be persuasive insofar as third parties' rights are excluded. As para. 4 of the Resolution 31/49 may suggest, the dispute over the Falklands does not seem to involve any other (state)party[88]. The Resolution urged the states to avoid any 'unilateral modification' of the circumstances in the Islands, indirectly conveying the idea that a modificative, but bilateral, agreement may respect the GA recommendation, not affecting any other legitimate claim. To complete this analysis the position of possible non-state parties to the dispute deserve attention: both the Falklands' islanders and the Argentine population, may uphold a right to self-determination over the Malvinas;

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[86] Art. 2(7) of the UN Charter.

[87] Art. 2(1) of the UN Charter.

[88] Considering the State Actors, as noted it does not seem that any other member of the international community could validly advance any sovereign claim over the Falklands. Either considering the national statements at the Decolonization Committee and the traditional approach to the issue in the UN Resolutions, it appears rather uncontroversial that the dispute is involving only Argentine and UK. See, UN GA, 64th , Fourth Committee, *Remaining 16 Non-Self Governing Territories on United Nations List are 'Too Many'*, op. cit.

moreover, the TNCs involved in the drillings could also be acknowledge as a possible third parties. Moreover, the Joint Declaration will be analyzed also in light of the UNCLOS provisions.

On the whole, despite a theoretical admissibility of this Agreement, its failing outcome is not encouraging. Starting from the assumption that the dispute could not be settled by exclusively imputing the sovereign status to one party, the Joint Declaration regulated the most fundamental corollary of the dispute, the access to natural resources. Along the same line, in a more politically challenging alternative, the whole bunch of rights and the duties associated to the Falklands' sovereignty could have been divided upon the states[89].

3.4 The Role of Third Parties

The Falkland islanders and the Argentina's population could be considered as possible third parties, entitled to enforce their right to self-determination[90].

The islanders position could smoothly be analyzed by referring to the UN general practice[91]: the right of self-determination, as noted, is not attributed to the islanders[92], but rather their condition is described as a 'special and particular colonial situation'[93], which should be settled by means of negotiations between the relevant state-parties. Moreover, the wording of the Resolution 31/49 at its para 4 itself seems to validate this view.

With regard to the right of Argentina's people, the issue could be framed as follows: the people's right would include the Falklands' region as portion of the territory as it was defined by its former colonial boundaries[94]. As Higgings[95] suggests, one of the possible interpretation of the term 'people' to identify the subject of a right to self-determination, equates it with the whole population of the country, namely with the 'nation'. This definition of the 'Argentine self' would constitute the ground for the people's right to self-determination over the Falklands[96]. The argument seems

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[89] On the concept of 'shared sovereignty', see S. D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law", in *Michigan Journal of International Law*, vol. 25, 2004.

[90] UN GA Resolutions n. 1514(XV) of 14 December 1960, 1541(XV) of 15 December 1960, 2625(XXV), of 24 October 1970, available at http://www.un.org/documents/resga.htm, (last visited: 7 September 2010).

[91] GA Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19, 43/25, op. cit.

[92] S. K. N. Blay, "Self-determination Versus Territorial Integrity in Decolonization", op. cit.

[93] Special Committee on Decolonization, 9th Meeting, 18 June 2009, GA/COL/3196, available at http://www.un.org/News/Press/docs/2009/gacol3196.doc.htm, (last visited: 7 September 2010).

[94] L. S. Gustafson, *The Sovereignty Dispute over the Falklands (Malvinas) Islands*, Oxford University Press, 1988, p. 55.

[95] R. Higgings, *International Law and the Avoidance, Containment and Resolution of Disputes,* Recueil des cours (1991), vol. 230 , issue V, pp. 164-165.

[96] It has to be noted, on this regard, that after the adoption of the 1962 Declaration on Permanent Sovereignty over Natural Resources, the term 'nation' was only once included in a permanent sovereignty resolution, namely UN GA Resolution 2692(XXV). This could suggest the conclusion that the term nation has lost its relevance as a subject of the right to permanent sovereignty. N. Schrijver, *Sovereignty Over Natural Resources,* op.cit., p. 10.

founded on an anti-colonial approach, which avails itself of the legal instruments of territorial integrity and uti possidetis, conceiving self-determination as meaning the end of colonialism[97]. Noteworthy, Argentina's interpretation of self-determination as merging with uti possidetis, was not entirely successful: GA Resolution 2065(XX) declared that 'Resolution 1514(XV) of 14 December 1960 was prompted by the cherished aim of bringing to an end everywhere colonialism in all its forms, one of which covers the case of the Falkland Islands (Malvinas)', recognizing thereby Argentina's claim; but it continued by inviting the Governments to proceed with negotiations, bearing in mind the interest of the Falklands' population[98].

Moreover, the Argentina's forceful invasion of the Islands in 1982 diminishes the value of its claim and brings about two observations. On the one hand, Resolution 1514(XV) does not seem to authorize the use of force for its implementation, or at least, it could permit the resort to force against a metropolitan state, in a context of colonization. However, Argentina invaded the Malvinas in 1982, more than 20 years after the adoption of the Resolution and, in all likelihood, beyond the historical period of colonization[99]. On the other hand, an evolutionary interpretation of the principle of self-determination[100] would as well consider debatable the use of force as means to gain independence and reassert the right to self-determination. The qualified secession doctrine, indeed, is open to debate in international law[101], and furthermore it presupposes an indiscriminate violence against the people, as well as the absence of mechanisms alternative to secession to realize self-determination, in order to apply: two arguments that are not effortlessly tenable in the Falklands' case[102].

Transnational Corporations (TNCs) as well deserve to be mentioned among the 'third parties', although their position is linked more to the responsibility-duty side of the coin, rather than to the

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[97] UN GA Resolution 1514(XV), op. cit.

[98] UN GA Resolution 2065(XX), op. cit.

[99] L. S. Gustafson, *The Sovereignty Dispute over the Falklands*, op. cit., pp. 78-80: "It seems that the Argentine claim to the Malvinas was anti-colonial enough to warrant negotiations but not to justify the use of force".

[100] See, *Island of Palmas Arbitration*, op. cit., pp. 829-871.

[101] EC Arbitration Commission Opinion n. 2, 1992, in A. Pellet, "The Opinion of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of People", in *European Journal of International Law,* Vol. 3, 1992, pp. 178-185; ICJ, *Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, available at http://www.icj-cij.org/, (last visited: 7 September 2010); J. Dugard, D. Raic, "The Role of Recognition in the Law and Practice of Secession", in M. Kohen, *Secession – International Law Perspectives*, Cambridge University Press, Cambridge, 2006, pp. 94-137; C. Tomuschat, "Secession and Self-Determination", in M. Kohen, *Secession – International Law Perspectives*, Cambridge University Press, Cambridge, 2006, pp. 23-45.

[102] The Malvinas' geographical proximity to Argentina has also be advanced as an argument, however, it was mainly intended to provide additional evidence about the imperialist nature of any British claim over the Islands. See, Special Committee on Decolonization, 9th Meeting, 24 June 2010, op. cit.

right-related one. The status of TNCs[103] poses delicate questions, since in international law the issues concerning their subjectivity and accountability are still under scrutiny. In a context of disputed sovereignty, it goes without saying that the problems are exacerbated. Basically, it could be assumed that the misbehavior and the ensuing damage caused by a TNC may trigger the responsibility of the home state of the corporation; yet, the difficulty remains, as for identifying the affected State entitled to claim reparation for damages occurred in an area not entirely under its sovereign control. Under these circumstances, the effectiveness of the international law instrument is unequivocally undermined.

3.5 The Convention on the Law of the Sea

As mentioned, the UN Convention on the Law of the Sea (1982)[104] is a relevant tool with regard to the dispute over the maritime areas around the Islands. Both UK and Argentina are parties to the Convention, which establishes that islands are entitled to the same maritime zones as other land territories[105]. Furthermore, the Convention explains that an island has sovereignty over its territorial sea and holds sovereign rights for the purpose of exploring it and exploiting its natural resources; this, in relation both to any EEZ and to the Continental Shelf, each of which extends up to 200NM from the baseline from which the territorial sea is measured[106]. The Convention, moreover, requires the parties involved in a dispute to settle it by agreement, to achieve an equitable solution[107].

Two assumptions could be proposed. Either the UK-Argentina Joint Declaration regulating the access to natural resources is favored by the UNCLOS; or, the Declaration fails to meet the its requirements. The answer depends upon how we interpret the aim of the Convention, namely as calling for a negotiation effectively capable to resolve the subject-matter of the dispute (sovereign

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[103] See, A. Clapham, "The Complexity of International Criminal Law: Looking beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States", in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, 2004; A. Clapham, "The Complexity of International Criminal Law: Looking beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States", in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, 2004; A. Clapham, *Human Rights Obligation of Non-State Actors*, Oxford University Press, 2006; A. Alkoby, "Non-State Actors and the Legitimacy of International Environmental Law", in *Non-state actors and international law*, vol. 3, n. 1, 2003; R. Brown, "The Relationship between the State and the Multinational Corporation in the Exploitation of Resources", in *The International and Comparative Law Quarterly*, vol. 33, n. 1, 1984; O. De Schutter, *Transnational Corporations and Human Rights*, Oxford, Hart Publishing, 2006.

[104] UN Convention on The Law of The Sea (UNCLOS), 1982, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm, (last visited 7 September 2010).

[105] Article 121 UNCLOS.

[106] See articles 55-57, 74 and 76-77, 83 UNCLOS.

[107] See articles 74 and 83 UNCLOS.

title), or deeming it sufficient to cope with one of its corollaries (access to natural resources), provided that an agreement is reached[108].

On interstate disputes, art. 33 of the UN Charter could be referred to. This provision is as well exposed to a twofold (and opposing) interpretation: this broad principle requires states to peacefully settle their disputes, and has been interpreted by the ICJ as posing a direct obligation on the states to resort to negotiations as preferable means for solving controversies[109]. The object of the 'negotiations' however, could be construed as implying on the one hand, that the parties should be available to compromise in relation to the starting point of their conflict—which, in the Falklands' case, would mean the question of sovereignty; on the other, as allowing for any agreement between the parties, provided that it entails the re-establishment of their peaceful relations[110]. Remarkably, the former assumption would suggest that both Argentina and UK may bear a quantum of responsibility by concluding an agreement on the sole matter of natural resources: it would result from their failure to comply with a duty flowing directly from the UN Charter, and abided by when the parties manifestly contemplate a modification of their original position[111]. The latter, conversely, will welcome the Joint Declaration as an attempt to settle the dispute and stabilize peaceful interstate relations, despite its limited content. Since peaceful relations and the maintenance of peace and security are fundamental goals in international law[112], it would be plausible to argue that consent should be reached by the parties, regardless of the scope of the formal document in which it is enshrined.

Yet, this speculation on the legal regime applicable to the Falklands' controversy, and the conclusions that could be inferred about the nature of the 1995 Declaration, should not be divorced

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[108] On this regard, one should note that the UN Special Rapporteur on Shared Natural Resources recently suggested at the 62nd ILC Session not to pursue any further the topic of oil and gas, being the matter bilateral in nature, as relying on the *agreement* of the parties. The 62nd ILC Session is to be held in Geneva, (3 May-4June, and 5 July-6 August, 2010). At the time of writing it is not possible to assess the consequences stemming from the position opted for in the Session. However, the recommendation of the UN Rapporteur that "the Working Group decide that the topic of oil and gas will not be pursued any further", is noteworthy. According to Murase, this outcome expresses a general trend in the international community, which is either against a universal international rule and in favor of interstate, bilateral, cooperative agreement mechanisms, as for the management of oil and gas reserves (point C). The UNCLOS is interpreted in this light. ILC, *Shared Natural Resources: Feasibility of Future Work on Oil and Gas*, A/CN.4/621, 9 March 2010, available at http://untreaty.un.org/ilc/guide/8_6.htm, (last visited: 7 June 2010).

[109] ICJ, *North Sea Continental Shelf Cases*, 20 February 1969, para. 85 a), 86, available at http://www.icj-cij.org/docket/files/51/5535.pdf, (last visited: 28 July 2010).

[110] Such interpretation could also be supported by reference to the effet utile doctrine. See, ICJ, *Fisheries Jurisdiction case*, 1998, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=ac&case=96&code=ec&p3=4, (last visited: 28 July 2010), establishing that the principle of effectiveness 'has an important role in the law of treaties', pp. 432, 455.

[111] ICJ, *North Sea Continental Shelf Cases*, para. 85 a), 86, op. cit. Para. 85 a): "the parties [..] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".

[112] Art. 1(1-2), 2(3) of the UN Charter.

from the fact that the Declaration has been terminated. Thus, the main lesson to drawn, concerns the volatility of similar agreements and the ensuing unstable interstate relationships that they could create. Indeed, the Argentina *versus* UK dispute has been harshening during the last months, and the lack of any international legal remedy effectively capable to keep the 'hostilities' under control, would possibly aggravate this tension.

Conclusion

The case of the Falkland Islands appears as an unresolvable sovereignty dispute. The gist of the contention is the title to territory, from which a number of other problems do arise, especially involving the access to natural resources. The competing claims, as noted, cover the maritime areas around the Falklands, and more precisely extend to the EEZ and the Continental Shelf, to which Argentina and the Islands are respectively entitled. Oil and gas deposits were recently discovered in the North Falkland Basin, so that the 'fight' for the sovereign title has become even more valuable.

The legal arguments founding Argentina and UK titles, find a divided support in the international community. Argentina asserts its possessory title as inherited from Spain, and claims thereby a right to territorial integrity, contesting hence the islanders' right to self-determination; the UK focuses mainly on the right to self-determination of the Falklands' population, complemented by the illegitimacy of the Argentina's use of force in 1982. Admittedly, however, the British claim may count on an additional ground: the exercise of effective control is a parameter generally taken into account when defining statehood. Hence, while the British legal title could be questionable, its *de facto* capacity to exert control and thereby possess the Malvinas, is self-evident. Moreover, it is consistent with the constitutionally expressed will of the islanders, and may as well fulfill the principles of the stability and finality of borders. However, this possibility should be evaluated in light of both Argentina's ongoing protests[113], which may impede the effective formation of such a 'title' over the Falklands, and third parties' plausible rights.

Either the GA Resolutions and the states' practice show a tendency to consider UK and Argentina as the sole owners of a valid claim over the Islands, repeatedly urging them to resume negotiations. Resolution 31/49, particularly, calls upon the states to refrain from unilateral actions that could alter the situation in the Falklands, insofar as the dispute is pending; its Paragraph 4

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[113] D. H. N Johnson, "Acquisitive Prescription in International Law", in M. N. Shaw (edited by), *Title to Territory*, Ashgate, 2005, pp. 294-295: acquisitive prescription has been defined as 'the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states have acquiesced in this exercise of authority'; 'such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate organization or international tribunal or have failed to manifest they opposition in a sufficiently positive manner [..]'.

explicitly mention only *unilateral* behaviors, conveying the idea that agreed-upon conducts of the States cannot impair the circumstances in the Malvinas (or affect third parties' rights). The Joint Declaration, hence, seems in line with Resolution 31/49; furthermore, it may fulfill its expectations by dividing the PSNR between the two sole parties, upon which sovereignty could reside. Through this document, notably, the states committed themselves 'to create the conditions for a substantial participation by companies of the two sides', conforming thereby to a common and proportional enjoyment of the PSNR: the operationalization of the principle replaced the unsettled contention over sovereignty. As noted, the Declaration terminated in 2007, and given the British firms' drillings in the disputed maritime area, it seems plausible to argue that Argentina's entitlement to PSNR may be affected. To what extent, remain to be weighed in the future: however, being hydrocarbons a non-renewable resource, also an exhaustion of Argentina's right cannot be excluded.

The case of the Malvinas could therefore offer material for the evolution of international law. One issue to be investigated more in depth may be the nature of the PSNR as a *jus cogens*[114] norm. The qualification of the principle as *jus cogens* is debated in international law[115]. Undoubtedly, the energy demand, supply and the control of limited energy sources, are global issues which extend

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[114] On the meaning and formation of *jus cogens* see: Art. 53 of the Vienna Convention on the Law of Treaties; see also Art. 64, 71 of the Vienna Convention on the Law of Treaties; on the consequences arising out of the violation of a *jus cogens* norm see the Art. 41(2) of the Draft Articles on State Responsibility; on the relationship between *jus cogens* norms and the UN Charter see Art. 103 of the UN Charter and ICJ, *Bosnia case*, Judge Lautherpacht Separate Opinion, 1993, p. 325, 440. With regard to the ICJ jurisprudence one could note that the Court used to refer to 'intransgressible principles of international law' or to 'peremptory norms': See, ICJ, *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996, and *Legal Consequences of the Construction of a Wall*, 2004. Its endorsement of the '*jus cogens*' denomination is very recent and can be found in both the *Bosnia Genocide case* (2007) and the *Kosovo Advisory Opinion* (2010). All the cases are available at http://www.icj-cij.org/, (last visited: 7 September 2010).

[115] G. M. Danilenko, "International Jus Cogens: Issues of Law-Making", in European Journal of International Law, Vol. 2, 1991, pp. 42-65: A concerted effort aimed at elevating a particular norm to the rank of *jus cogens* is provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. One of the most controversial issues at the Conference was the legal nature of the principle of the permanent sovereignty over natural resources proclaimed in a number of the UN General Assembly resolutions. Art. 15(4) requires agreements between a predecessor state and a newly independent state concerning succession to state property not to "infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". Relying on the ILC commentary, which observed that some of the members of the Commission were of the opinion that the infringement of the principle of permanent sovereignty in an agreement between the predecessor state and the newly independent state would invalidate such an agreement, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of *jus cogens*. However, lacking the support of the Western states, which maintained that these efforts were 'an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly', is not possible to ultimately argue in favor of a *jus cogens* nature of the permanent sovereignty; N. Schrijver, *Sovereignty over Natural Resources*, op. cit., p. 374-377: arguments to support the *jus cogens* nature of the PSNR are to be found in the frequent identification of permanent sovereignty as 'inalienable' or 'full', or in the articles 25 and 47 of the two International Covenants on Human Rights. However, in light of the art. 53 of the VCLT, which establishes the mechanism for the formation of a *jus cogens* norm, the PSNR is yet to be accorded a *jus cogens* nature, failing to be supported by many states 'principally concerned'. Additionally, also its non-derogable character is questionable. See also UN, *Vienna Convention on Succession of States in respect of State Property, Archives and Debts,* 1983 (not yet in force), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf, (last visited: 8 September 2010).

beyond the interests and jurisdiction of a single state[116], and that could therefore contribute to the progressive acceptance of the PSNR as a peremptory norm. Moreover, the implication of Transnational Corporations (TNCs) would probably call for an enhancement of the protection of the PSNR: this could result from imposing the burden of corporations' unlawful behaviors on home states, whose responsibility will be more easily ascertained if a peremptory norm has been breached[117]. The obstacles caused by the involvement of TNCs in the access to natural resources are linked either to the subjectivity and to the accountability of Non-State Actors in international law, and are further confused by the absence of a sovereign authority. This thorny issue is likely to pose fundamental problems in the future, and is hence a second field deserving closer attention by legal scholars.

Separating the title to territory from the title to natural resources appears not *per se* unlawful[118]. The approach in the UNCLOS seems to support this reasoning, and notably, the Joint Declaration concluded between UK and Argentina seems to add further evidence on this regard. However, the Declaration did not produce stability and order in the relationship between the two states: its ambiguous legal nature together with the lack of any procedural rule did not clarify the legal framework governing the parties' interaction. The states have currently put aside the agreement as a solution: from the dispute settlement perspective, their relationship shifted from a cooperative arrangement to a stalemate. On the contrary, from the point of view of the hydrocarbons exploitation, each country is autonomously leading its battle: the UK by carrying out its commercial activities, and Argentina by striving for hindering them.

It is for the will of the states to resume negotiations and reach, eventually, a settlement of the dispute. Yet, this voluntary element seems absent and there is no effective international law norm to force its emersion[119]: arguing that the states are under an obligation to negotiate is still not plausible, since the formally non-binding nature of the GA Resolutions prevents this conclusion.

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[116] L. E. Cuervo, "The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea", in *Tulane Environmental Law Journal*, Vol. 19, 2006, pp. 158.

[117] As noted a *jus cogens* norm enshrines an interest of the international community as a whole, and bound a subject irrespectively of its consent. Art. 41 of Draft Articles on State Responsibility plainly establishes that the states shall cooperate to bring to an and any serious breach of a peremptory norm and that no state shall recognize as lawful a situation created by a serious breach of a peremptory norm. On this regard the question of a possible 'complicity' of the (home, but also host) state may arise. See, I. Tófalo, "Overt and Hidden Accompliances: Transnational Corporations' Range of Complicity for Human Rights Violations", in Olivier de Schutter (edited by), *Transnational Corporations and Human Rights*, 2006, pp. 335-358. In addition, on the emersion of the problem concerning the jurisdiction over Non-State Actors see, United States Military Tribunals, *I.G. Farben Trial,* Nuremberg, July 1948, available at Internet http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf, (last visited: 7 September 2010).

[118] Evidently, no third parties should be affected.

[119] None of the parties will presumably decide to bring the case before an international Court or Arbitration, as none would run the risk of ultimately loosing the possibility to assert its rights over the Islands' resources.

Too many economic interests are intertwined with the historical claims of the states, for them to peacefully negotiate upon a ri-allocation of rights and duties.

The issue of the Falklands poses various legal questions that urge consideration: indeed, the repercussion of inaction would possibly be paid not only by the state and non-state parties practically involved, but also by the whole international community, in environmental and energetic terms.