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Defending the Nation: the Falklands

1. Introduction

Despite the growing institutionalization and internationalization of military operations, the classical unilateral military action must not be forgotten. The invasion of the Falklands/Malvinas islands by Argentina in 1982 led to a huge British military operation to recapture them. Despite being based on the inherent right of a sovereign state to defend itself from attack, the operation attracted considerable debate both domestically and internationally. This chapter explores the political and legal dynamics that fuelled that debate, and considers whether the Falklands did represent a post-Second World War highpoint of electoral and political support for a military operation, as is commonly assumed. Did parliament play any critical role, either in the decision to send the task force or in the conduct of the war? Was the fact that there was a clear international legal basis for the operation in the face of external aggression a factor in determining the level of electoral and political support?

2. The Modern Right of Self-Defence

One of the most sacred trusts placed in the government of any state is to defend that country from its enemies. The classical jurist Emmerich de Vattel declared in 1758 that ‘self-defence against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties’.¹ Even ultra-conservative proponents of a ‘minimal state’, in which governmental functions are severely limited, see the *raison d’être* of the government as one of protection of the citizens in the territory of the state.²

Something of the history of the concept of self-defence was recounted in chapter two, and it is not intended to repeat in full the evolution of what has become the main exception to the ban on force in the post-1945 world order.

However, it is necessary to put the development of the concept of self-defence in context. It was pointed out in chapter two that before there emerged a regulation of the use of force in international law with the League of Nations Covenant of 1919, the doctrine of self-defence was just one of many justifications put forward by states when using military force against another state. It cannot be said that the concept had any precise juridical content because it was contained within the much wider doctrines of self-preservation and self-help, which were recognized in the period leading up to the First World War.

While there can be no doubt that self-defence was a factual condition arising whenever a state was under attack by another state, it must be the case that the doctrine of self-defence only began to take shape as a legal concept after 1919 when the regulation of the use of force began in earnest. This casts some doubt on the relevance of state practice prior to that, such as the oft-quoted *Caroline* incident of 1837, considered in chapter two. Arguably the modern law of self-defence could be said to have finally emerged once there was a clear prohibition on the use of force, and that only occurred with the UN Charter in 1945. Given that the right of self-defence is a response to an unlawful attack against a person or state, in other words the attacker has breached their legal duty not to attack, self-defence as a precisely defined legal right will be dependent on there being a clear prohibition on using force unilaterally in the international legal order. As Yoram Dinstein, in his modern classic, makes clear: ‘the thesis of self-defence as a legitimate recourse to force by Utopia is inextricably linked to the antithesis of the unlawful use of force by Arcadia (its opponent)’.

The qualified prohibition on the use of force in the League’s Covenant of 1919 was improved if not perfected by the Pact of Paris of 1928, which outlawed war as an instrument of national policy. Self-defence was not mentioned in the text of the Pact. However, US Secretary of State Kellogg, one of the authors of the treaty, responded to French fears over not including the right of self-defence by making clear that:

There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in any sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.

This statement attempts a juridical definition of self-defence. It is important to note the use of the phrases ‘attack’ and ‘invasion’, signifying core elements of the right, which are not out of line with the post-1945 international legal order.

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Although such a statement should not be taken in isolation, it seemed to have been accepted in the pre-War period by Germany, Britain and Japan. However, the concept of self-defence remained unclear in this period, in particular the element of auto-interpretation, which was prominent in the statement by Kellogg. Japan, for instance, relied in part on this to justify its invasion of Manchuria in 1931 as an act of self-defence. What is clear is that for a right of self-defence to exist it must be capable of evaluation independently of any subjective interpretation of the situation by a particular state. If this was unclear before 1945, it has been clear since that date; while the state acting in self-defence exercises the right at its discretion it does so at its own risk since its actions will be examined by various international actors (states, organizations, possibly the International Court) to see if they comply with the conditions for the exercise of the right. The necessity of defensive action in the face of an attack signifies that although there must be some latitude given to the defending state, ‘the standard of action remains an objective not a subjective one’.

A certain amount of controversy surrounds the embodiment of the right of self-defence in the UN Charter, in particular, it is often stated that article 51 does not contain the customary right of self-defence which is, it is argued, much wider. Bearing in mind Kellogg’s restriction of the right to attack and invasion, article 51 does not seem to be reflecting any narrower right, at least in restricting the trigger mechanism to an ‘armed attack’. An attack must be a prelude to an invasion and includes bombardment (by artillery, missiles . . .) as well as incursion by troops and armour. All are covered by the concept of ‘armed attack’. Writers in favour of a wider right point to the reference in article 51 to the ‘inherent’ right of self-defence as somehow incorporating ‘wider’ customary law, but a more convincing interpretation is put forward by the International Court in the Nicaragua case to the effect that article 51 was intended to preserve the already existing right of self-defence.

The fact that article 51 was inserted at a late stage, and that there was no similar provision in the Dumbarton Oaks proposals of 1944 that were a precursor to the Charter, are inconclusive arguments for limiting the impact of article 51. The provision was inserted at a late stage in 1945 to preserve the freedom of action by regional organizations to act in collective self-defence. Article 51 was in part

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7 Rodin, *War and Self-Defense*, 42.
10 1986 ICJ Rep. 94.
intended to allow collective action in self-defence without prior approval of the Security Council,¹¹ but in deciding to allow this the delegates then had to incorporate the right of self-defence into the Charter. The words chosen to embody the right and subsequently objected to by some writers, particularly the phrase ‘if an armed attack occurs’, were not the subject of any particular challenge during the negotiations at San Francisco.¹² Overall, Ian Brownlie appears to be correct when he states that ‘the terms in which the right of self-defence is defined in article 51 are much closer to customary law as existed in 1945 than is commonly admitted’.¹³ Indeed, the development of the law since the UN Charter shows that article 51 embodies customary international law,¹⁴ although as the International Court pointed out in the *Nicaragua* case, article 51 does not contain all the elements of the right of self-defence, such as proportionality and necessity.¹⁵ It does, however, contain the key element, namely the act that entitles a state to act in self-defence, which must be an armed attack.

### 3. Defensive Action against Threats

It follows from this analysis that there is no right of self-defence in response to acts which though seemingly aggressive do not amount to armed attacks, such as threats of force, or minor border transgressions, or support for rebels by arming them for instance.¹⁶ In relation to the Cuban Missile Crisis of 1962 Myres McDougal tried to justify the American quarantine of the island by arguing that it was a legitimate defensive response to the threat of force represented by the Cuban acquisition of missiles from the Soviet Union.¹⁷ Although threats of force are prohibited by article 2(4) of the Charter, they do not give rise to the right of self-defence, as the right is restricted to ‘armed attacks’ in article 51. The debate then becomes one of whether a ‘wider’ customary right recognizes that self-defence can be exercised in response to a threat.

The *Caroline* incident certainly suggests that defensive force can be used in response to an attack that is imminent though not yet fully materialized. Remember, the phrase used in the diplomatic exchange was that the state

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¹¹ Though article 51 states that the right of self-defence only exists until the Security Council has taken measures necessary to restore peace.
exercising the right of self-defence had to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’. There was no evidence of an imminent attack coming from Cuba against the United States in 1962, if anything Cuba could make a stronger case that it was in danger of being attacked by the United States, given the attempted CIA-backed Bay of Pigs invasion of the previous year. This usefully shows the flaw in the anticipatory self-defence scenario. When two states are facing each other, and are involved in a spiralling arms race (India and Pakistan would be a modern example), both are under threat from the other and both could make arguments that they are entitled to strike first if the law allowed a degree of anticipation.

The possession of nuclear weapons and other weapons of mass destruction, which can be launched from great distances, is often pointed to in support of the argument that states must be allowed to launch first-strikes in the face of imminent attacks, otherwise they would be easy targets. Such an argument would seem to be in contradiction with the strict wording of article 51, which requires that an ‘armed attack occurs’. Nevertheless, to interpret article 51 to mean that a state must wait for the missiles to cross its frontiers before it can respond would appear to be condemning the state, a victim of an aggression, to destruction in whole or in part.

The International Court of Justice, when asked about the legality of the use of nuclear weapons in 1996 by the UN General Assembly, was of the opinion that nuclear weapons were subject to the same rules as found in the UN Charter, which suggests that they could be used in self-defence against an armed attack, though their use would normally violate the rules of international humanitarian law because of their indiscriminate nature. The Court did not deal with the issue of an anticipatory strike against a state threatening to use nuclear weapons, though by sticking to the wording of the Charter, including article 51, the tenor of the opinion seems to be against this. The Court did confuse the matter saying, by dint of the casting vote of the President of the Court, that it was unclear whether the ‘threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake’. While very unsatisfactory, in the sense that it leaves a lacuna, the reality is that once a state is using nuclear weapons, or using force against nuclear weapons, the nuances of international law have probably ceased to be relevant. However, for a Court to endorse this seems to be an admission that international law has little relevance in influencing the decisions of governments to use such apocalyptic weapons.

Nevertheless, it would be an unfair law that restricted a victim state’s right of self-defence to waiting for the attack to hit its territory. But to strike first without being under attack would turn the state from being the victim to being the

18 See for example Waldock, ‘Use of Force’, 498.
19 Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ Rep. 226 at 266.
aggressor. In attempting to solve this paradox, the word ‘occurs’ in the phrase an ‘armed attack occurs’ can be interpreted to mean that an armed attack has been launched, either when the missiles leave their launch pads but have not yet crossed the frontiers of the victim state, or even earlier when the victim state has clearly detected that the firing sequence has been initiated—to put it more bluntly, when the button has been pressed. The danger with the latter is that the state preparing to attack could arguably be said to have a ‘locus poententiae’²⁰ (a brief period) in which it could cancel the firing sequence.

However, it can safely be said that the armed attack has occurred once the aggressor state has clearly committed itself to the attack, a commitment which is not shown by mere preparations for war, but is present in the launch of the missiles or perhaps earlier when the launching sequence has been irrevocably started. In January 1991, during the Gulf Crisis, Iraq launched many SCUD missiles against Israel, which was not a party to the more general conflict that was occurring. In the exercise of its right of self-defence Israel tried to shoot down the SCUD missiles using US-supplied Patriot missiles. The evidence is that these attempted interceptions took place over Israeli territory, but it would be difficult to deny Israel the right to shoot them down before they crossed the Israeli frontier if they were clearly on route to targets in Israel. Indeed, given that the missiles passed over a third state’s territory on the way to Israel, it could be argued strongly that Israel had the right, although it might not have had the technical ability, to knock the missiles out as they were being launched in Iraq.

This allows for what Dinstein calls an ‘interceptive’ right of self-defence. He gives the hypothetical example of the United States using force against the Japanese fleet on its way to Pearl Harbor in 1941, thus preventing a devastating attack from materializing. Having identified this, Dinstein then tends to interpret it too widely, stating that Israel was exercising such an interceptive right in 1967 to open the Six Day War against Egypt, Jordan and Syria by attacking military airfields in all three countries.²¹ After initially stating that Egypt had attacked first,²² Israel then argued that an attack was imminent, pointing to the Egyptian ejection of the UN peacekeeping force (UNEF I) that had been in place between Israel and Egypt since 1956, and the build up of Egyptian forces along the frontier. In fact the evidence of an imminent attack was not conclusive,²³ and although it can be argued that Israel should have been allowed to take military action first if it reasonably believed an attack had been launched, there was actually little evidence of the attack being launched or put in motion, only a collection of circumstantial evidence indicating that an attack might have been launched. Israel’s action, most obviously its strikes on Jordan and Syria, but also its attack

²² SC 1347th mtg, 5 June 1967.
on Egypt, were not interceptive but anticipatory, and there is limited evidence, at least until the events of 11 September 2001, that international law accepts the right of anticipatory self-defence. We will return to the issue of self-defence after 9/11 in the next chapter.

The argument, that to deny a state the right to take anticipatory action would leave it as an easy target seems to ignore the fact that, if there is a danger of an attack, a state can and should prepare for it and indeed it can invite its allies to assist in preparations. The despatch of American and British troops to Saudi Arabia in August 1990 was not undertaken on the basis that these troops would take pre-emptive action in the face of a potential attack by Iraq against Saudi Arabia, but on the basis that they would adopt a defensive posture in case the Iraqis decided to try to add Saudi Arabia to its conquest of Kuwait earlier in the month.²⁴

An earlier example of such a ‘precautionary’ deployment in the same region occurred in 1961 when 7,000 British troops were deployed to Kuwait, which shortly after its independence from Britain was faced with an apparent Iraqi troop build-up on the frontier, causing the threat of attack by Iraq to subside. Mark Curtis argues that the Iraqi threat may well have been fabricated or at least over-exaggerated by the British government so that ‘intervention was intended to secure both the Kuwaiti emir’s firm reliance on Britain for protection and favoured treatment for the huge economic stake in the country’.²⁵ Even post-Suez, the British government was intent on exercising some level of control over the Middle East, shown by its intervention in Kuwait in 1961 in the face of an alleged threat, and in Jordan three years earlier when 2,000 troops were deployed at the request of King Hussein in the face of an alleged attempted coup.²⁶ Still, despite the dubious grounds of intervention, the 1961 lesson in precautionary deployment should have been applied again in July 1990 in the face of imminent attack on Kuwait by Iraq.

If the right of anticipatory self-defence became established then, because of its inherent subjectivity and flexibility, it allows states to justify acts that are clearly self-help as acts of self-defence. Israel, perhaps perceiving that its arguments of anticipatory self-defence in 1967 were not overwhelmingly condemned, sought to rely on the same doctrine in 1981 when it bombed a nuclear reactor in Iraq. Israel alleged that the reactor was designed to produce material for nuclear weapons eventually to be used against Israel, and that although the reactor would not be able to produce the material for the weapons in the near future, the Israelis had decided to knock it out before it became ‘hot’ so that its destruction would not cause widespread damage.²⁷

²⁶ Ibid.
²⁷ SC 2288th mtg, 19 June 1981.
The Israeli argument appears to be flawed even within the doctrine of anticipatory self-defence itself, in that there was no imminent armed attack from Iraq. It was only after the Gulf War of 1991 that the Security Council ruled that Iraq should give up its nuclear programme, at least as far as it was intended to produce nuclear weapons. The fact that the Israeli strike against Iraq in 1981 was not justified in self-defence and was a breach of article 2(4) itself, was clearly stated when even its staunchest supporter on the Security Council (the United States) voted for a Security Council resolution, which ‘strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.

Similar arguments were put forward by Israel after it had bombed the PLO headquarters in Tunisia on 1 October 1985. The Security Council, with the United States abstaining, vigorously condemned ‘the act of armed aggression perpetrated by Israel against Tunisian territory’ in violation of international law. On this occasion Israel did extend its argument, relying not only on the prediction that future terrorist operations were likely to be planned at the headquarters, but also arguing that the fact that many past attacks had been planned there should be taken into account. This argument is based on the theory developed by Israel that when a state is subject to many relatively small attacks it is entitled to defend itself by launching large-scale operations to wipe out the sources of these attacks and should not be restricted to merely responding to each attack individually.

Israel invaded Lebanon in 1978, 1982 and 2006, and undertook several more limited military actions against armed bands in southern Lebanon on this basis, for example in April 1996, in order to destroy Palestinian bases and more recently Hezbollah bases, and to establish a security zone in southern Lebanon to protect Israel from rocket attacks and terrorist strikes. In justifying its actions, Israel stated that it is under constant attack from terrorists and therefore can exercise its right to self-defence even if it is not in direct response to an individual armed attack.

The International Court of Justice took the opportunity to comment on this cumulative approach to self-defence in 2003 in a case brought by Iran against the United States for armed actions against Iranian oil platforms in the Gulf during the tanker war of the 1980s (a by-product of the Iran-Iraq war of that period). The Court rejected the US arguments that it struck at the oil platforms in self-defence as they were the source of attacks against US flagged tankers, and in so doing it did not accept the American use of an ‘accumulation of events’ argument—that a series of small attacks against it could be justifiably reacted to by one major response. Interestingly the Court thought that ‘even taken cumulatively… these

incidents do not seem to the Court to constitute an armed attack on the United States, of the kind... qualified as a “most grave” form of the use of force’, thus dismissing the argument not on the basis that a cumulative approach would always fail, but that in the case before it the series of incidents did not amount to a sufficiently serious use of force as to equate to an armed attack.³³ Whether this is the position of states after 9/11 is considered in the next chapter, especially in the light of the reaction to Israel’s most recent invasion of Lebanon in 2006, which was provoked by the capture of two Israeli soldiers by Hezbollah.

4. Limitations on the Right of Self-Defence

The basic core of the right of individual self-defence is that the response to an armed attack must be necessary and proportionate. A third requirement, that of immediacy, was more prominent before the attacks of 11 September 2001, but since then the dominant requirements seem to have shifted to those of necessity and proportionality, reflected in the International Court’s judgment in the Oil Platforms case of 2003, when, in rejecting the US argument of self-defence, the Court took the opportunity to clarify the elements of the right:

Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks have been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51... and as understood in customary law on the use of force... The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.³⁴

Christine Gray groups the requirements together and states that ‘necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack’.³⁵ Dinstein still identifies ‘immediacy’ as a separate requirement to ‘necessity’ and ‘proportionality’, with the proviso that ‘a State under attack cannot be expected to shift gear from peace to war instantaneously’.³⁶ David Rodin approaches the matter somewhat differently. He identifies ‘three intrinsic limitations to the right’ of self-defence—‘necessity, imminence, and proportionality’—with imminence being a ‘component and corollary of the requirement of necessity’. While necessity ‘refers to indispensability

³⁴ Ibid., 186–7.
³⁶ Dinstein, War, Aggression and Self-Defence, 212.
and unavoidability rather than inevitability’.³⁷ ‘Imminence’ means (in the words of George Fletcher):

A pre-emptive strike against a feared aggressor is illegal use of force used too soon; and retaliation against a successful aggressor is illegal use of force used too late. Legitimate self-defence must be neither too soon or too late.³⁸

Rodin goes on to say that ‘if necessity and imminence require a particular relationship between the defensive act (the content of the right) and the aggressive or attacking act, proportionality requires us to balance the harmful effects of the defensive action against the good to be balanced’. He makes the point that proportionality does not require that the means of force deployed in self-defence must somehow balance the aggressive force used—so for instance an attack by missile strikes against military targets requires a response by counter-strike using similar weapons; rather ‘the proportionality that is required is between the harm inflicted and the good to be preserved’, so that if all the defending state has available in response to a missile attack is bombardment from naval vessels against military targets then the use of force is proportionate.³⁹

Rodin though is sceptical about whether the moral basis underpinning the right of personal self-defence is to be found at the international level. On the individual level the innocent victim is faced by a wrongful aggressor, while at the international level, the victim is often far from innocent since there is likely to be a whole history of bad relations between the two states in question. In this regard he makes a challenging point in relation to the Falklands War of 1982, to which we will return in this chapter:

Britain’s war for the Falklands/Malvinas was undeniably a defensive one, but in a deeper sense we cannot but be troubled by the question of whether Britain had the right to be there in the first place.⁴⁰

A similar difficulty exists over the Arab-Israeli wars where the history of hostility since the creation of the state of Israel in 1948 makes deeper judgements as to who is the aggressor and who the defender difficult. To take an example, on 6 October 1973 Egypt and Syria launched a co-ordinated surprise attack against Israel. In the ensuing Yom Kippur War the Arab armies were eventually repulsed by Israel, but it is the justifications given for the initial attack that are of the greatest interest. The Syrian argument that Israeli had initiated the immediate hostilities was clearly spurious.⁴¹ The more challenging argument was put forward by Egypt, whose UN representative stated, ‘Egypt and Syria are defending

³⁷ Rodin, War and Self-Defense, 40–1.
³⁹ Rodin, War and Self-Defense, 41–2.
⁴⁰ Ibid., 190.
themselves... The Arab people have been the victim of aggression since 1967, not the aggressors.⁴²

Given that Israel had launched their attack in 1967 arguably unlawfully then the Arab states, the victims of that aggression, were prima facie entitled to the right of self-defence. Their actions appeared proportionate in that they were primarily aimed at recovering the territories occupied by Israel, the only problem was that of immediacy or imminence—a problem that appears to render the Arab surprise attack of 1973 unlawful, although one could view the use of force by the Arab states as a legitimate use of force to rid their countries of an occupying aggressor, whose use of force did not end in 1967 but continued as long as the occupation continued. This argument seemed to persuade some members of the Security Council at the time.⁴³

However, to permit such a development may lead to the acceptance of a state’s right to try to recover territory lost hundreds of years ago. In 1961 India invaded the Portuguese enclave of Goa stating that this was a response to a conquest that had occurred 450 years ago. India added that it had only just responded because for 430 years it had itself been the subject of colonial domination.⁴⁴ This argument is difficult to sustain in the face of the commonly cited doctrine of inter-temporal law, as stated by arbitrator Max Huber in the *Island of Palmas Case*,⁴⁵ concerning a territorial dispute between the United States and the Netherlands. This case established, at least for the purposes of international law, that title to territory has to be judged by the law governing relations between states at the time. Thus the Portuguese seizure of Goa at a time when title to territory by conquest was lawful signified that it did have title in 1961, so that India was unjustified in using force on the grounds of self-defence. This approach would suggest that the British did have title to the Falklands in 1982 at the time of the Argentinian invasion. However, though the doctrine of inter-temporal law appears to be a central component of the international legal order and it does provide some degree of certainty in international relations, it seems to be a doctrine shaped by former colonial powers for their benefit. Interestingly, though, the Goan situation can be distinguished from the Yom Kippur War of 1973, in that Israel had illegally occupied the Arab territories in 1967 after the right to acquire territory by conquest had been lost—in other words Israel lacked and continues to lack a title to the territories.

The moral basis of the personal right of self-defence is not easily transferable to the international plane where there are numerous actors involved in a government’s decisions to go to war, and in this sense Rodin’s thesis constitutes a serious challenge to the legitimacy of self-defence in international law. Rodin does admit though that his sceptical thesis is more difficult to sustain when faced with

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⁴⁵ (1928) 2 RIAA 829.
aggressive regimes ‘as repugnant as Nazi Germany or Stalinist Russia’. He states further that ‘by locating the conditions which could potentially justify military action, we can identify those forms of military action which are, if not perfectly justified, then closer to being just than others’.⁴⁶

Despite his doubts about the legitimacy of the right of self-defence by a state, Rodin’s analysis of the limitations upon the right at a conceptual level do, for this author at least, amount to a clear conception of when the right is being exercised justly, whether at the level of individual self-defence or national defence. The requirements of necessity and imminence signify that a state is only entitled to legitimately rely on the right in the face of an armed attack. In such a situation it has no choice but to act, as the attack is about to hit or has just hit the territory or fleets of the defending state. If the state strikes too early in response to what appears to be a threat, or if it strikes too late in response to an attack that has already past, then it is not legitimately exercising its right of self-defence (despite what it might claim), but is claiming some form of preventive right or retaliatory right, both of which lack a moral basis though they have been practised by states. The Bush administration’s claim to be able to take preventive action in the face of terrorist threats after 9/11 will be considered in the next chapter.

5. Modern Reprisals

In chapter two the doctrine of retaliatory or punitive reprisals was considered. Though it was accepted as lawful subject to certain limitations prior to 1945, the post-War consensus was that reprisals were no longer acceptable. This was made clear in a consensus resolution, the Declaration on Friendly Relations, adopted by the General Assembly in 1970, which stated that ‘States have a duty to refrain from acts of reprisal involving the use of force’.⁴⁷ Only self-defence was a right reserved for states.

The doctrine of reprisals is distinguished from self-defence in that the latter is limited to a response to an attack, a response that is aimed solely at countering that particular attack. The doctrine of reprisals allows a state to respond at its leisure, delaying while a target is chosen, a target which need only be related to the original attack in a general way. Reprisals are punitive in nature, an aspect which carries with it an element of deterrence. Fine distinctions are sometimes drawn between deterrence and punishment in order to make a case for legitimizing reprisals, by arguing that if they are intended to deter rather than punish then they are more acceptable as defensive rather than punitive reprisals.⁴⁸ However, although states may put emphasis on the deterrent or overall defensive value of

reprisals, their inherently punitive nature is inescapable. Indeed, when states claim that their acts which clearly are reprisals are defensive, they are not trying to justify reprisals as such, instead they are attempting to legitimize their acts as self-defence. It is worth noting that if we accept the argument of deterrence put forward by states and writers, it becomes difficult to distinguish reprisals from acts of anticipatory self-defence, another doctrine that departs from the essence of self-defence. All this illustrates the fact that any movement away from a well-defined and legitimate doctrine of self-defence, will mean a move towards a rejuvenated doctrine of self-help.

A recent example of what appeared to be a reprisal, involving the use of American airbases in Britain, was the US air strikes on targets in the Libyan cities of Tripoli and Benghazi on 15 April 1986. The targets were a compound that included the Libyan leader’s home, military installations and alleged training sites for terrorists. Over one hundred civilians were killed in the raids. Ten days earlier a bomb explosion in a Berlin discotheque had killed a US soldier and injured about 200 civilians. The United States alleged that Libya was involved. President Reagan referred to this bombing in his speech in which he tried to justify the US bombings. If he had stopped there he would have been propounding a pure doctrine of reprisals. However, his argument then moved towards a very wide doctrine of anticipatory self-defence when he stated that the mission was justified under article 51 of the UN Charter, adding that ‘this pre-emptive action…will not only diminish Colonel Kadhafi’s capacity to export terror, it will provide him with reasons and incentives to change his criminal behaviour’.⁴⁹ In the Security Council, the US ambassador stated that ‘in the exercise of self-defence…United States military forces executed a series of carefully planned airstrikes against terrorist related targets in Libya…This necessary and proportionate action was designed to disrupt Libya’s ability to carry out terrorist acts and to deter future terrorist acts by Libya’.⁵⁰

Using the language of self-defence does not convert an unlawful act of punishment into a lawful act of self-defence. There was no element of imminence driving the American action—it was not an action aimed at repelling an attack. However, the United States did receive a degree of support due in large part to the distaste for the Libyan regime to be found in many states. In the Security Council a draft resolution condemning the ‘armed attack’ by the United States was defeated by nine votes in favour to five against, with one abstention.⁵¹ However, two of the votes against can be explained by the lack of balance in the resolution in that there was no condemnation of the acts of terrorism that provoked the US action.⁵² In its annual session the General Assembly adopted a resolution similar

⁴⁹ *Keesing’s Record of World Events*, 1986, 34457.
⁵⁰ SC 2674th mtg, 1986.
⁵¹ UN Doc. S/18016/Rev.1 (1986). Those voting against were the US, UK, France, Denmark, and Australia.
⁵² SC 2682nd mtg, 1986 (Denmark and Australia).
in content to the defeated draft, but it was only adopted by seventy-nine votes in favour to twenty-eight against with thirty-three abstentions. The majority of states found no justification for the US raid and so the incident cannot be said to have changed the law in any way. Indeed, it is possible that if the resolution had been a balanced one condemning both the acts that led to the reprisal, as well as the reprisal itself, then the resolution would have been more widely supported.

6. The Falklands War

The issue of whether the war to recover the Falklands in 1982 was a paradigmatic case of self-defence has already been raised. This was not an attack on mainland UK along the lines of the aerial bombardment and threatened German invasion of 1940. These are islands in the South Atlantic 300 miles from the coast of Argentina that Britain has occupied since 1833. Spain, the former colonial power, had withdrawn in 1811, and although the newly independent Argentina had undertaken acts of administration over the islands in the 1820s up to 1833, the British position was that these islands were lawfully acquired in 1833 and effectively occupied thereafter. This position was stated by the government after the War in a statement made before the Foreign Affairs Select Committee:

Britain’s title is derived from early settlement, reinforced by formal claims in the name of the Crown and completed by open, continuous, effective and peaceful possession, occupation and administration of the islands since 1833 (save for 10 weeks of forcible Argentine occupation in 1982). The exercise of sovereignty by the United Kingdom over the Falklands Islands has, furthermore, consistently been shown to accord with the wishes of the islanders through their democratically elected representatives.

However, the British case is not as strong in law as it is in fact. In essence the government’s case is an international version of the old adage that ‘possession is nine-tenths of the law’. While the UK has enjoyed largely uninterrupted possession since 1833, to acquire title lawfully the islands must either have been terra nullius (land belonging to no-one) in 1833, or their occupation must have been acquiesced to by the state having title to territory before 1833, or finally it must be established that the UK took the islands by dint of conquest in 1833. The problem for the British government is that it cannot clearly rely on any one of these, so the result is that it falls back on an argument of effective occupation in combination with the wishes of the islanders. It cannot prove that the islands were truly terra nullius in 1833, or that Argentina had acquiesced since Argentina irregularly protested against British occupation from 1833 onwards. Nor can Britain prove it had the necessary intention or indeed used force to conquer the territory.

53 GA Res. 41/38, 20 Nov. 1986.
in 1833. On the other hand it is difficult for Argentina to establish that it clearly succeeded to the Spanish title, and that it effectively objected to British occupation. In the words of the Foreign Affairs Select Committee overall ‘the historical and legal evidence demonstrates such areas of uncertainty that we are unable to reach a categorical conclusion on the legal validity of the historical claims of either country’.⁵⁵

In the modern era the British government consistently refers to the wishes of the 2,000 or so inhabitants as the determining factor in justifying its continued possession of the Islands. In 1986, ninety-four per cent of the inhabitants of the Falklands voted to retain their association with the UK. Politically this is clearly something that cannot easily be ignored, but it is not absolutely clear that legally speaking the islanders have a right of self-determination. Self-determination emerged in the 1960s as a limited rule of international law ‘by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of its inhabitants, within the limits of the principle of *uti possidetis*’.⁵⁶ The latter principle is the restrictive element and confines expressions of self-determination to territorial boundaries on decolonization of the territory. From the Argentine perspective, on Spanish decolonization the islands were within the boundaries of the newly emerging state of Argentina, and although it was not able to fully exercise sovereignty over them, self-determination cannot subsequently be applied to a small part of the population within those boundaries. On the other hand Britain could claim that it had colonized the islands from 1833 and that the Falklanders have this right, but in so doing they are admitting that the Falklands is a colonial or similar territory that still exists in a post-colonial age. Furthermore, the UN Special Committee on Decolonization has taken the view that the wishes of the population should not be paramount in the case of the Falklands (and it adopts the same approach as regards Gibraltar) because it is an imported colonial population. The Committee and the General Assembly have invited the UK and Argentina to negotiate the future of the islands ‘taking due account of the interests’ of the population.⁵⁷

Certainly before the war in 1982, as Walter Little points out, British governments had been keen to seek a negotiated solution ‘in which the Argentine claims for sovereignty would be met and the desire for the islanders to retain a British way of life safeguarded’. Both sides were considering ‘a formal transfer of sovereignty with a lease-back of the territory to Britain for a long period’. The main blocks to this were parliamentary opposition to such a deal and the growing pressure in

⁵⁵ Ibid., para 22.
Argentina for a military solution.⁵⁸ Little accurately summarizes the political and legal context that existed at the outset of the conflict:

It was clear that neither nation's basic survival was at stake and, though each government enjoyed a momentary boost in its public standing, neither was particularly popular at the time and neither wished to have to confess to its citizens its miscalculation about the other's intentions. Furthermore, though each side made great play about the inflexibility of the other, neither wanted to be branded an aggressor in the eyes of third parties. Thus Argentina stressed not only its legal claims but also the ‘peaceful’ nature of the islands’ seizure and the ‘disproportionate’ nature of the British response. Britain, on rather more solid legal grounds, cited the self-defence provision of Article 51 of the UN Charter.⁵⁹

Furthermore, because both sides accepted that the issue was not about survival, the means deployed should be limited and proportionate so that fighting was confined to the islands and the surrounding area. In this context, the sinking of the Argentinian ship the General Belgrano, outside the British imposed exclusion zone, became a major issue ‘precisely because it seemed to breach’ the principle of proportionality and, with it, ‘Mrs Thatcher’s moral armour’.⁶⁰

Popular perception that Britain was caught completely by surprise by the Argentinian invasion on 2 April 1982 is too simplistic. Although the Franks Report, published after the conflict in January 1983, exonerated the triumphant government of Margaret Thatcher, stating that ‘the invasion of the Falklands on 2 April could not have been foreseen’;⁶¹ in fact the British government saw that Argentina was moving towards conflict, but its intelligence let it down as to the timing of the invasion. In early 1982 ‘British intelligence was clearly indicating

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⁵⁸ W. Little, 'Anglo-Argentine Relations and the Management of the Falklands Question', in P. Byrd (ed), British Foreign Policy under Thatcher (Oxford: Philip Allan, 1988) 137. See the contrasting answers by the newly elected Conservative government in the House of Commons in 1979 Hansard HC vol 967, col 296w, 25 May 1979 (Sir Ian Gilmour stating that the Argentine government was ‘left . . . in no doubt’ as to British sovereignty over the Falklands), while in June 1979 in vol 969, col 153w, 26 June 1979 (Nicholas Ridley stating that sovereignty was one of the issues to be discussed with the Argentine government). See further Nicholas Ridley’s report to the House on negotiations with Argentina held in New York in 1980: vol 984, cols 1476–8, 14 May 1980; and also his discussions with the Falklanders where he raised the lease-back option: vol 995, cols 128–34, 2 Dec. 1980. A full debate on the future of the Falklands was held later in the month when a number of members expressed concern about the lease-back proposal: vol 996, cols 647–52, 18 Dec. 1980, at col 649 when John Farr made it clear that the idea had ‘upset’ many members and was ‘totally unacceptable’. It was later reported to the House that the Falklanders did not like the idea either: vol 997, col 248–9, 21 Jan. 1981 (Gilmour). On talks held at the UN in February 1982 see vol 19, col 263, 3 March 1982 (Luce), where the Minister took a stronger line with Argentina. Aggressive statements in the Argentine press were pointed to by one member who asked ‘will he assure us that all necessary steps are in hand to ensure the protection of the islands against unexpected attack?’ (col 264, Avery).

⁵⁹ Little, 'Anglo-Argentine Relations', 138.

⁶⁰ Ibid.

⁶¹ Franks Report: 'Falkland Islands Review' Report of a Committee of Privy Counsellors, 18 Jan. 1983, Cmd 8787, paras 266 and 339. The Committee of Privy Counsellors chaired by Lord Franks was established by the government to ‘review the way in which the responsibilities of Government in relation to the Falklands Islands . . . were discharged in the period leading up to the Argentine invasion . . .’: Hansard HC vol 27, col 51w, 6 July 1982 (Thatcher).
a breathing space of months, if not a year’. However, the arrival of Argentinian scrap metal merchants on South Georgia in March 1982 (lampooned in the British press as a ‘comic opera’), and protests in Buenos Aires against the military junta of General Galtieri (fulfilling the prediction in the Argentine press that ‘the only thing that can save this government is war’), led to escalation with the British government ordering three submarines to the islands in late March.

In the period immediately before the invasion there is evidence that the Royal Navy was preparing for a task force to be despatched, something agreed to by the Prime Minister and her senior ministers meeting in something like a pre-war informal cabinet. Though questions were raised in the House of Commons there was no ministerial admission that submarines had been dispatched or of any other planned military deployment. While this might be defended on the basis that secrecy was essential so as not to escalate the crisis, it could be argued that a clear statement of Britain’s intent to fight for the islands might have deterred Argentina from invading. Hastings and Jenkins comment that ‘it is perhaps no more than a constitutional curiosity that at this stage an expedition had been approved by neither the British cabinet nor the British Parliament. Nor indeed had the Argentinians yet invaded the Falklands’. Given that the vast majority of MPs were averse to negotiating the future of the Falklands, many in fact speaking about the need to prepare for the defence of the islands, the decision to send a task force was unlikely to be undone by a rebellious House of Commons. Nevertheless, for a decision that sent the forces of a democratic country to war to escape scrutiny or approval by political decision-making bodies shows serious weaknesses in the democratic process when it comes to military deployment.

Overcoming limited military resistance by the small British force present on the Falklands, the Argentinian occupation of the islands started on 2 April. Bizarrely, problems in communications meant that the government minister spoke in the House on 2 April of a ‘real expectation that an Argentine attack against the Falklands will take place very soon’. This provided an opportunity for the other parties to express their support for the defence of the Islands if this should prove necessary, but they also took the opportunity to criticize the government for its misjudgment of the situation. Criticism increased in the afternoon of the 2 April as government ministers were still unable to confirm the invasion had taken place. Although ‘the full British cabinet played a minor role in the Falklands war’ it did meet on 2 April to agree on the dispatch of the task force, though ‘no cabinet minister believed for a minute that the outcome of their decision would be

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63 Ibid., 65.
64 Ibid., 65–9.
65 Ibid., 64.
66 Ibid., 71.
67 *Hansard* HC vol 21, col 571, 2 April 1982 (Atkins).
68 *Hansard* HC vol 21, col 571–2 (Silkin and Owen).
69 *Hansard* HC vol 21, col 619, 2 April 1982 (Pym).
open war. The time it would take the task force to get to the Falklands was widely seen as the period in which diplomacy would produce a solution. So the cabinet agreed to the force but not to war; furthermore it agreed because ‘the government could not face Parliament the following day without a task force’.

A full debate in the House of Commons occurred on 3 April after the decision to dispatch the task force had been made, but it represented an opportunity for MPs to rally round the flag. Prime Minister Margaret Thatcher called on the House to condemn ‘this totally unprovoked aggression by the Government of Argentina against British territory’, which ‘has not a shred of justification and not a scrap of legality’. She further declared that it was the ‘Government’s objective to see that the islands are freed from occupation and are returned to British administration at the earliest possible moment’. Mrs Thatcher announced the government’s decision to send a ‘large task force’, but stressed that ‘I cannot foretell what orders the task force will receive as it proceeds’, expressing hope that diplomatic efforts would meet with success. The Leader of the Opposition, Michael Foot, expressed his support for the Falklanders and declared that Argentine aggression should not be allowed to succeed. He also accused the government of betraying the islanders, and though this was vigorously denied by the Conservatives, several ministerial resignations (most particularly Lord Carrington, the Foreign Secretary) followed. His successor, Francis Pym re-opened the debate on 7 April informing the House that the task force was on its way and that it constituted a ‘formidable demonstration of our strength and strength of will’.

The international legal basis of the British response was clearly stated to be self-defence under the UN Charter. The Foreign Secretary asked the House to declare its full support ‘for those who are now embarked in defence of British territory and to protect the rights which we and the Falkland islanders hold equally dear’. No vote was taken though the lengthy debate showed the House’s resolve to recover the islands. Political control though was in the hands of a War Cabinet (technically a sub-committee of the Cabinet’s Overseas Development Committee), initially consisting of a core of the Prime Minister, the Home Secretary (William Whitelaw), the Foreign Secretary (Francis Pym) and John Nott who had been persuaded not to resign as Defence Secretary at the time of the invasion, as well as senior civil servants and the Chief of the Defence Staff. Cecil Parkinson, the Chairman of the Conservative Party, soon joined this group, which often consulted the Attorney General (Sir Michael Havers) and the Foreign Office Legal Adviser, Sir Ian Sinclair, on matters of international law.

71 Hastings and Jenkins, *Battle for the Falklands*, 77.
72 *Hansard* HC vol 21, cols 633–8, 3 April 1982 (Thatcher).
73 Ibid., col 640 (Foot).
74 The task force was dispatched on 6 April and eventually consisted of two aircraft carriers, sixteen frigates and destroyers, plus support ships: Hastings and Jenkins, *Battle for the Falklands*, 95.
75 *Hansard* HC vol 21, col 960–2, 7 April 1982 (Pym).
With the task force at least seven weeks away from the Falklands, diplomacy dominated, led first by the American Secretary of State Alexander Haig and then the UN Secretary General Javier Perez de Cuellar, who both tried to broker a deal that would involve military withdrawal by both sides, followed by an interim administration and then some form of long term-settlement. However, the path towards war was becoming clearer, with Britain securing by dint of massive diplomatic persuasion Security Council Resolution 502 demanding Argentinian withdrawal after determining that there had been a breach of the peace in the region of the Falkland Islands, as well as persuading her European partners to impose non-military measures against Argentina by means of a binding regulation. Sir Anthony Parsons, the UK representative on the Security Council expressed British ‘condemnation of this wanton act of armed force—it is a blatant violation of the United Nations Charter and of international law’. EC Foreign Ministers condemned Argentina’s ‘armed intervention’ and appealed to it to withdraw.

The British Cabinet announced a 200 mile exclusion zone around the Falklands, and the War Cabinet’s response to Haig’s overtures ‘left no room for doubt. The nation would return to the negotiating table when Argentina honoured Resolution 502’. The War Cabinet also gave the navy broad rules of engagement when meeting enemy ships. Although Mrs Thatcher told the Commons in mid-April that ‘our strategy has been based on a combination of diplomatic, military and economic pressures’, a military solution was looking the most likely, and most MPs seemed to support the strategy that the task force represented a real threat of force unless Argentina withdrew.

The Argentine position was made clear by Admiral Anaya whose view was that ‘the British had no stomach for a fight; that democracies could not sustain casualties; and that the task force would simply break down in the South Atlantic winter’. It looked like the threat of force by Britain would have to be carried out, but since it was based on the sovereign right of self-defence, parliament was clear that it had right on its side. The government made it clear that Resolution 502 did not affect Britain’s right of self-defence, a view generally supported by parliament and the wider international community. The Attorney General had also advised the War Cabinet that action taken in self-defence should be restricted to

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77 Ibid., 107.
78 SC Res. 502, 3 April 1982 by 10 votes to 1 (Panama) and 4 abstentions (China, Poland, Spain, USSR).
79 EC Regulation 877/82, OJ L102/1.
80 SC 2346th mtg, 2 April 1982.
82 Hastings and Jenkins, Battle for the Falklands, 107.
83 Ibid., 137.
84 Hansard HC vol 21, col 1146, 14 April 1982 (Thatcher).
85 Hastings and Jenkins, Battle for the Falklands, 111.
86 Hansard HC vol 22, col 982, 29 April 1982 (Thatcher).
the islands, since any attack on mainland Argentina would be disproportionate.⁸⁷ When the Prime Minister announced to the House on 26 April that British forces had retaken South Georgia,⁸⁸ the scene was set for the real battle for the Falklands.

The move towards full armed conflict was put beyond any shadow of doubt by the War Cabinet’s authorization for one of the submarines, Conqueror, to sink the Argentinian cruiser the General Belgrano, 35 miles outside the exclusion zone on 2 May,⁸⁹ with the loss of over 350 lives. The Prime Minister defended this action in the Commons by stating that the Belgrano ‘posed a very obvious threat to the men in our task force’.⁹⁰ While this showed Britain’s intent, and represented a serious blow to Argentina’s naval capability, it was seen as a significant escalation that led to further bloody clashes between the two opposing forces, most immediately the loss of the British destroyer HMS Sheffield hit by an Exocet missile on 4 May, with the loss of over thirty lives.⁹¹ The success of Argentinian air attacks on the task force meant that it was very difficult for the British to mount a successful amphibious landing. Despite this the War Cabinet decided on 8 May to send the landing force from Ascension island.⁹² The plan for the landing, codenamed ‘Operation Sutton’, was outlined by the chiefs of staff to the War Cabinet and then the Cabinet on 18 May. The government received support from the House of Commons for increased military pressure,⁹³ by overwhelmingly rejecting a motion put forward by one of the war’s biggest critics, Tam Dalyell, by 296 votes to 33. After six Commons debates the country was ready for war. The government position was clearly expressed by the Foreign Secretary, Francis Pym, who told the House of Commons that ‘the world knows that the international rule of law would be dangerously undermined if Argentine aggression were allowed to stand’.⁹⁴

From the point of landing at San Carlos Water on 21 May, the battle to recover the Falklands was not an easy one. The British forces did not have air superiority, or superior equipment, and although the Royal Navy controlled the seas around the Falklands it was severely hampered by attacks from the Argentinian airforce. Indeed, in the fierce battles that took place after the landings (21–25 May), three British naval ships were lost—the Ardent, the Antelope (both frigates), the destroyer Coventry, as well as the merchant navy ship the Atlantic Conveyor, and a number of other ships were damaged, with significant loss of life and injury. The House of Commons was kept informed on military progress and losses by the Defence Secretary, John Nott.⁹⁵ On the Falklands, the British landing forces

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⁸⁷ Hastings and Jenkins, *Battle for the Falklands*, 162.
⁸⁸ *Hansard* HC vol 22, col 395, 26 April 1982 (Thatcher).
⁹⁰ *Hansard* HC vol 23, col 16, 4 May 1982 (Thatcher).
⁹¹ See statement by Defence Secretary ibid., col 120 (Nott).
initially were bystanders as the crews of the ships fought for survival as well as trying to protect the beachhead.⁹⁶

The land campaign started with the capture of the Argentinian base at Goose Green on 29 May, driven out of a desire to secure a ‘tangible victory’ after the naval losses. The War Cabinet was shocked by the loss of so many ships,⁹⁷ and despite assurances to the House that the commanders on the ground must be left to decide when to move,⁹⁸ the decision came from London.⁹⁹ Of little strategic value, Goose Green was a ‘politicians’ battle’, and a hard won one, with seventeen paratroopers killed and thirty-five wounded.¹⁰⁰ ‘The Argentinians had been given a devastating demonstration of Britain’s absolute will to achieve victory at whatever cost in blood and treasure’.¹⁰¹ ‘Parliament departed for the Whitsun recess temporarily sated with success’.¹⁰² However, the War Cabinet had realized that further quick victories were unlikely, and left planning and timing for the assault on Port Stanley to the military. Political and public opinion had moved away from any negotiated settlement, the press quoting one British soldier: ‘if they’re worth fighting for, they must be worth keeping’.¹⁰³

The British had to fight their way to Port Stanley, the capital, and suffered a major loss when the landing ship Sir Galahad was sunk on 8 June with the death of fifty-one Welsh Guards;¹⁰⁴ but within three days of the tragedy, the British had embarked on the final battle for the Falklands, taking the mountains surrounding the capital one by one in fierce fighting. With Argentine soldiers (mainly conscripts) finally fleeing back to the capital, their commander General Menendez decided not to put up further resistance, and on 14 June he surrendered to the British military commander, Major General Moore. The surrender was announced to the House of Commons on the 14 June when Prime Minister Thatcher reported that the Argentines were ‘flying white flags over Port Stanley’.¹⁰⁵ The victory was welcomed by the Leader of the Opposition, Michael Foot.¹⁰⁶ On 15 June the Prime Minister declared that ‘our purpose is that the Falkland Islands should never again be the victim of unprovoked aggression’.¹⁰⁷

⁹⁷ Ibid., 254.
⁹⁹ See also the debates in the UN around SC Res. 505, 26 May 1982 that called upon the parties to co-operate to end the hostilities. The government simply saw this as reiterating Resolution 502: *Hansard* HC vol 24, col 1049, 27 May 1982 (Thatcher). A draft resolution calling for a cease-fire on 4 June was vetoed by the UK.
¹⁰¹ Ibid., 253.
¹⁰² Ibid., 256.
¹⁰³ Ibid., 260–1.
¹⁰⁴ See statement of Defence Secretary: *Hansard* HC vol 25, col 399, 10 June 1982 (Nott).
¹⁰⁵ *Hansard* HC vol 25, col 700, 14 June 1982 (Thatcher).
¹⁰⁶ Ibid.
¹⁰⁷ *Hansard* HC vol 25, col 730, 15 June 1982 (Thatcher).
The conflict had cost the lives of 255 British and 655 Argentinian personnel. The British lost six ships with a further ten badly damaged; nine aircraft were also lost. The cost to the British taxpayer for the loss of ships and planes was put at £900 million and the campaign at £700 million.\(^8\) Billions of pounds have since been spent on making sure that the Falklands are properly defended, despite international opinion swinging away from Britain very quickly after the conflict had ended. On 4 November 1982 the UN General Assembly adopted a resolution which expressed an awareness ‘that the maintenance of colonial situations is incompatible with the United Nations ideal of universal peace’, and requested the governments of Argentina and Britain ‘to resume negotiations in order to find as soon as possible a peaceful solution to the sovereignty dispute relating to the question of the Falkland Islands (Malvinas)’.\(^9\) With international community support ebbing away, ‘the Falklands had become a costly fortress’.\(^10\)

The abovementioned Franks Committee exonerated the government from any blame for the invasion itself. The Prime Minister welcomed this in the House in January 1983,\(^11\) and although there was some discussion of the campaign itself, Mrs Thatcher summarized this as representing ‘total agreement that the campaign was brilliantly conducted and bravely fought’.\(^12\) Earlier the Defence Secretary announced a white paper assessing defence lessons from the conflict.\(^13\) This was debated in the House of Commons on 14 December 1982, and concerned military lessons learned, having regard to what the Defence Secretary called the ‘unique’ nature of the campaign to recover the Islands.\(^14\) There was also an updated report on the economy of the Falkland Islands produced by Lord Shackleton discussed by the House of Commons in December 1982.\(^15\) But apart from the lingering doubts over the decision to sink the Belgrano,\(^16\) there was limited criticism of the campaign, and little questioning of its necessity or legality.\(^17\)

Though the Prime Minister dismissed Tam Dalyell’s suggestion that a full inquiry into the Falklands conflict was necessary ‘taking into account the precedent of the inquiry into the Crimean war’,\(^18\) the sinking of the Belgrano was

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\(^9\) GA Res. 37/9, 4 Nov. 1982 by 90 votes to 12 with 52 abstentions.

\(^10\) Hastings and Jenkins, *Battle for the Falklands*, 327.


\(^12\) *Hansard* HC vol 35, col 984, 26 Jan. 1982 (Thatcher).


\(^16\) See for example *Hansard* HC vol 49, col 897, 30 Nov. 1983 (Dalyell).


\(^18\) *Hansard* HC vol 42, col 110w, 5 May 1983 (Dalyell).
discussed by the Foreign Affairs Committee in 1984. The Ministry of Defence gave evidence that naval rules of engagement had been changed to allow the attack on the Belgrano when it was outside the exclusion zone, but also stating that the UK was acting in self-defence under article 51 of the Charter which gave it the right to deal with any threat to British forces. However, the issue refused to go away and it was not until February 1985 that the government finally drew a line under the incident by securing a vote by 351 votes to 0, which resolved that 'the sinking of the General Belgrano was a necessary and legitimate action in the Falklands Campaign; and agrees that the protection of our Armed Forces must be the prime consideration in determining how far matters involving national security and the conduct of military operations information can be disclosed'. An opposition amendment that would have found that Ministers had 'betrayed their responsibility to Parliament' by seeking to conceal information on the incident from the House of Commons was defeated by 350 votes to 202. Despite difficulties over the sinking of the Belgrano, the right of self-defence (and the self-determination of the islanders) provided a rock-solid justification for the government, parliament and the electorate, which remained consistently behind the deployment and operation, even when losses were considerable.

7. Conclusion

The battle for the Falklands showed that legally and politically little had changed since 1945 in terms of decisions to go to war. Dominated by the Prime Minister, the War Cabinet and military chiefs, parliament was simply there to be kept informed and to be relied upon to give the enemy a clear indication of the British resolve to re-capture the islands. Though title to the islands was not as clear as the government made out, the right of self-defence and the protection of the Falklanders provided a strong legal case to convince parliament, the public and the wider international community. While arguably the requirements of necessity and imminence had passed once the Islands had been occupied by Argentina, and further the British government could either have rescued the islanders or more realistically successfully negotiated with Argentina for their repatriation to Britain, there was never any real doubt about the legality of Britain’s action. Though the British response took several weeks to reach the Islands, it could not


120 Hansard HC vol 73, cols 732–836, 18 Feb. 1985. Much of the debate concerned the leak of information in 1984 to Tam Dalyell MP by Clive Ponting, a senior civil servant at the Ministry of Defence. Ponting was acquitted in 1985 after being prosecuted for breaching the Official Secrets Act of 1911.
be classified as retaliatory given that the nexus between the attack by Argentina and the British response was not broken. Such delays show the inherent weakness in the right of self-defence at the international level, where instead of instinctive action to ensure self-preservation that characterizes the right at the level of individual self-defence, we have a slow and cumbersome response as thousands of troops and vast amounts of equipment are deployed.

Nevertheless, even with a less than certain legal title, international law in the UN-era provides that territorial disputes must be settled by peaceful means, so that Argentina’s capture of the Islands did indeed give rise to the right of self-defence. But with the Islands back in British hands, the issue of sovereignty was once again back on the international community’s agenda, though regrettably not something countenanced by parliament. Though willing to fight to uphold the principles of international law, Britain is unwilling to discuss the issue of sovereignty as part of its international obligation to settle disputes by peaceful means.